



## THE CONTEMPORARY DEVELOPMENT OF GLOBAL CONSTITUTIONALISM

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### ABSTRACT

In the current globalized scenario, in view of the existence of phenomena and dynamics that go beyond state territories, of the integration of States in supranational and globally considered political systems, it is possible to perceive the emergence of new forms of political-legal organization in the international community that raise constitutional conceptions beyond the classical perspective of the State-centered Constitution Theory. Thus, in view of the manifestation of a quantitative and qualitative growth of international law based on the identification of constitutional elements, an issue that has been gaining importance in debates and in the internationalist agenda, the problem to be developed asks: how is the development of Global Constitutionalism composed? considering the common challenges of the globalized world that transcend state borders, the confusion between external and internal limits, as well as the transformations of law in the international order, it is necessary to analyze the present content due to the need to point out directions by where you can tread the reflection in relation to the development of Global Constitutionalism. In this sense, the present study intends to find theoretical trends that compose the identification of the development process of the Global Constitutionalism paradigm. To answer the exposed problem, some objectives need to be achieved. Initially, an overview of the perspective of classical constitutional theory will be carried out. Then, we move on to the observation of the manifestation of Constitutionalism beyond the State. Finally, trends and aspects of the development of Global Constitutionalism will be examined.

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## **Introduction**

In the current globalized scenario, in view of the existence of phenomena and dynamics that go beyond state territories, of the integration of States in supranational and globally considered political systems, it is possible to perceive the emergence of new forms of political-legal organization in the international community that raise constitutional conceptions beyond the classical perspective of the State-centered Constitution Theory.

Thus, in view of the manifestation of a quantitative and qualitative growth of international law based on the identification of constitutional elements, an issue that has been gaining importance in debates and in the internationalist agenda, the problem to be developed asks: how is the development of Global Constitutionalism composed?

To answer the above problem, some objectives need to be achieved. Initially, an overview of the perspective of classical constitutional theory will be carried out. Then, we move on to the observation of the manifestation of Constitutionalism beyond the State. Finally, trends and aspects of the development of Global Constitutionalism will be examined.

For that, the work made use of the deductive approach, studying the theme based on documentary research and specialized bibliography on the subject, taking into account the range of theoretical conceptions and doctrinal currents that seek to understand the theme, once it develops in a heterogeneous and complex plan of approaches.

That said, considering the common challenges of the globalized world that transcend state borders, the confusion between external and internal limits, as well as the transformations of law in the international order, it is necessary to analyze the present content due to the need to point out directions by where you can tread the reflection in relation to the development of Global Constitutionalism. In this sense, the present study intends to find theoretical trends that compose the identification of the development process of the Global Constitutionalism paradigm.

### **1. Horizon of classic constitutional theory**

The Constitutional Theory is integrated into a long process, evolving the complex idea of “constitution” in different contexts throughout history. The notion can be traced back to antiq-



uity in the concepts of the Greek *politeia* and the Roman *constitutio* and *status republicae*. In medieval times, the notion of constitution overlapped with others, such as the *institutio*, the *lex fundamentalis* and the *Verfassung*<sup>1</sup>.

In the Middle Ages, from the institutionalization of Canon Law, the idea of Constitution gains a legal aspect, determining an order to the different political powers of the Church, kings and nobility, delimiting the spheres of action of each through rules, pacts and contracts, as a means of maintaining the balance of relationships. Later, with the institution of modern States, norms emerged that sought the stability of power, conceiving the idea of sovereignty, disciplined to a fundamental state nucleus<sup>2</sup>.

Despite the existence of embryonic concepts of constitution since ancient times, its systematization and classical conception emerged from the revolutionary contexts in the United States of America and France at the end of the 18<sup>th</sup> century. Despite important differences between the two phenomena, the concepts of constitution that emerged, in the wake of the Enlightenment, converged in the consecration of ideas such as the separation of powers, in the establishment of checks and balances and in the protection of the fundamental rights of the citizen as fundamental pillars to be protected by the established legal order<sup>3</sup>.

Yet, as important as the American and French phenomena, the English experience of the common law observes a historical constitutional order, based primarily on customary law, which was able to safeguard legal certainty and guarantee rights to the English, without the existence of a written constitution as in other countries<sup>4</sup>. In this sense, it is possible to observe that the constitutionalist movement does not merely depend on the written existence of a state constitution, as it exists independently of the Constitution<sup>5</sup>.

Widespread the phenomenon of constitutionalism in the following centuries, it was from the end of the Second World War and its sequels that the place of the Constitution and the influence of constitutional law on contemporary institutions were cemented. During the second half of the 20<sup>th</sup> century, one of the major paradigm shifts was the attribution to the constitutional norm of the status of a legal norm, overcoming the model that prevailed in Europe in which the Constitution was seen essentially as a political document, inviting the action of the Public Powers, consolidating the notion of supremacy of the Constitution. Such a constitutional wave produced a new form of political organization, primarily known as the Constitutional Rule of Law<sup>6</sup>.

In this way, the rule of law has become the predominant model for structuring the constitutional order of the state in the era of globalization, with some essential elements, such as the protection of fundamental rights and their promotion, including social rights, the separation of powers and

1. Fassebender Bardo, 'International Constitutional Law: Written or Unwritten?', (2016), v. 15, n. 3, Chinese Journal of International Law, 494-495.

2. Trindade Otávio Cançado, 'A constitucionalização do direito internacional: Mito ou realidade?' (2008), v. 78, n. 45, Revista de Informação Legislativa, Brasília, 274.

3. Saunders Cheryl, 'Constitution Transformation. Global Constitutionalism', (2021), v. 10, n. 2. Cambridge University Press, 241-242.

4. Fassebender, Bardo. International Constitutional Law: Written or Unwritten?', (2016), v. 15, n. 3, Chinese Journal of International Law, 497-500.

5. Luz Eduardo Silvaand Sapio Gabriele, 'Relativização da Soberania Estatal em da Possibilidade de um Constitucionalismo Global', (2018), v. 1, n. 28, Actio Revista de Estudos Jurídicos, 159.

6. Barroso Luís Roberto, 'Neoconstitucionalismo e constitucionalização do Direito (O triunfo tardio do direito constitucional no Brasil)', (2005), 240 Revista de Direito Administrativo, 3.



the principle of legality, and, despite variations, the rule of law is composed of recognized values in accordance with common foundations and determinations of international society<sup>1</sup>.

In this way, considering the multiplicity of conceptual understandings that the Theory of the Constitution entails, it is necessary to clarify key terms such as "constitution", "constitutionalism" and "constitutionalization", due to the "evaluative-descriptive" quality that these have when used in the context of the discussion of a global constitutionalism.

“Constitution”, being a historical process that composes institutional forms to accommodate the plurality of interests, assumes the notion of basic legal norms that comprehensively regulate the social life and power dynamics of a political community<sup>2</sup>. In this sense, for a body of law to be recognized as a constitution, certain functions and content are identified and must be present, such as the organization and institution of the political entity as a legal entity, the separation of powers, establishing the general lines of policy, of morality, justice and government, as well as the presence of fundamental rights, and, more recently, the guarantee of minimum social security<sup>3</sup>.

“Constitutionalism”, in turn, is more than the term “constitution” loaded with material content, or simply having a constitution. It is essentially a cognitive framework on how to act in a political world in a constitutive process<sup>4</sup>. It thus sustains a complex of political conceptions, legal procedures and moral value, elaborated in the conditions of the course of a history, with the objective of imposing limits, controls and rules to the exercise of political power<sup>5</sup>.

“Constitutionalization”, namely, implies both for the emergence of constitutional law within a given legal order, and for the spread of constitutionalism as a mindset<sup>6</sup>. In this framework, the idea of constitutionalization examined is associated with an expansive effect of constitutional conceptions, whose material and axiological content radiates throughout the legal system<sup>7</sup>.

From this panorama, from the perspective of classical Constitutional Theory, it follows a preliminary analysis of the forms and processes of manifestation of Constitutionalism beyond the State, as a means from the Global Constitutionalism paradigm.

## 2. Manifestation of constitutionalism beyond the state

In view of the above, it is necessary to examine the manifestation of constitutionalism beyond the national State, through the operation of a process of constitutionalization of international law, the development of the protection of human rights in the international community, the introduction of international norms oriented to the common good and reporting to the constitutional character of the United Nations Charter.

1. Liziero Leonam Baesso da Silva, ‘A Constitucionalização do Direito Internacional como Efeito da Globalização’, (2018), Vol. 8, n. 24, Revista Húmus. São Luís, MA, 97.

2. Peters Anne ‘Compensatory Constitutionalism: The Function and Potential of Fundamental Norms and Structures’, (2006), n. 19, Leiden Journal of International Law, 581.

3. Carvalho Leonardo Arquimino, ‘de. Constitucionalização do Direito Internacional: uma (re)introdução ao tema’, (2012), Revista Via Iuris, São Paulo, dez, 89.

4. Peters Anne and Armingeon Klaus, ‘Introduction: Global Constitutionalism from an Interdisciplinary Perspective’, (2009), v. 16, n. 2, Indiana Journal of Global Legal Studies, 388-389.

5. Almeida Lilian Barros de Oliveira, ‘Globalização, constitucionalismo e os Poderes do Estado brasileiro’, (2018), v. 55, n. 219, Revista de Informação Legislativa: RIL, 241-242.

6. Peters Anne and Armingeon Klaus, ‘Introduction: Global Constitutionalism from an Interdisciplinary Perspective’, (2009), v. 16, n. 2, Indiana Journal of Global Legal Studies, 389-390.

7. Barroso Luís Roberto, ‘Neoconstitucionalismo e constitucionalização do Direito (O triunfo tardio do direito constitucional no Brasil)’, (2005), 240 Revista de Direito Administrativo, 12-13



## 2.1. the constitutionalization of international law

Despite the commonplace judgment that the constitutional phenomenon is connected to a nation-state frame, this fact does not mean exclusively and necessarily that Constitutionalism and the elements of the notion of Constitution cannot transcend state borders to deal with other possibilities of political-legal organization, namely in the international community<sup>1</sup>.

In this circumstance, theories about the constitutionalization of international law are asserted, which aim to describe the quantitative and qualitative growth of international law based on the identification of constitutional elements, which can be verified in its norms, interpreted in communion with the constitutional law of the States, as well as in the practice of courts and other international institutions<sup>2</sup>.

Faced with the common problems of the globalized world that transcend state borders, the study of a constitutionalized international order is based on the search for understanding the problem of sovereignty and the role of States in the contemporary world, the growth in the number of actors in the international public sphere, the proliferation of normative sources and international decision-making bodies, erga omnes and jus cogens norms, the need for transnational cooperation, the challenges of global issues and even in the face of the fragmentation of international law<sup>3</sup>. It is the purpose of international law to address these concerns through the fair participation of relevant stakeholders, and it is the duty of States to support and sustain the development of an international law that is capable of fulfilling this function<sup>4</sup>.

The legal community inevitably finds itself questioned by world transformations, and, in this context, the impact of globalization affects the concept of constitution and is reflected in comparable questions about the impact on the institution of the State. As globalization is a multifaceted and polycentric phenomenon, it also has the peculiarity of limiting the sovereignty of States and re-signifying their functions<sup>5</sup>.

As a central element in the State system, sovereignty takes place in the internal conception, as an expression of the ultimate authority legitimized to superimpose itself over the population of a given territory, in order to configure itself as the expression of domain governance<sup>6</sup>. However, there can be no autonomous national constitutional legitimacy since the practice of self-government within the framework of the sovereign state raises the issue of negative externalities relevant to justice, such as the expansion of communications, terrorism and related measures of their containment, international trade and finance, migratory flow, drug trafficking and environmental concerns. Given the possibility of reasonable disagreement among States on how these externalities should be taken into account, any claim by a State to resolve these issues authoritatively and unilaterally amounts to a form of domination<sup>7</sup>.

1. Viviani Maury Roberto, *Constitucionalismo Global: crítica em face da realidade das relações internacionais no cenário de uma nova ordem mundial*, (Rio de Janeiro: Lumen Juris 2014), 169.

2. Rocha Isly Queiroz Maia, 'Limites da Constitucionalização do Direito Internacional no Sistema Interamericano: uma Análise dos Modelos Teóricos do Pluralismo Constitucional e do Constitucionalismo Multinível', (2021), Vol. 8, N. 01, *Revista Vertentes do Direito*, 133.

3. Viviani Maury Roberto, 'A Amplitude Constitucional da Carta Das Nações Unidas: Controvérsias de uma Proposta de Constituição para a Comunidade Internacional', (2016), Vol. 2, N. 2, *Conpedi Law Review*. Oñati, Espanha, 3.

4. Kumm Mattias, 'Constitutionalism and the Cosmopolitan State', (2013), Vol. 20, N. 2, *Indiana Journal of Global Legal Studies*, 9-10.

5. Saunders Cheryl, 'Constitution Transformation. Global Constitutionalism', (2021), v. 10, n. 2, Cambridge University Press, 244-245.

6. Viviani Maury Roberto, *Constitucionalismo Global: crítica em face da realidade das relações internacionais no cenário de uma nova ordem mundial*, (Rio de Janeiro: Lumen Juris 2014), 98.

7. Kumm Mattias, 'Constitutionalism and the Cosmopolitan State', (2013), Vol. 20, N. 2, *Indiana Journal of Global Legal Studies*, 9-10.



Thus, the State is in a relative crisis of legitimacy in relation to its sovereignty and autonomy in its internal policies. Although the State Constitutions continue to regulate the public power, it no longer holds the primacy of this task, as competition with other actors external to the State's order is greatly expanding. Currently, this manifestation of sovereign power can already be observed in other non-state sources, which seek to ensure the security of collective action through norms arising from new political scales, more capable of dealing with these new globalizing processes<sup>1</sup>.

The State then starts to act in a more fragmented field of political decision-making, permeated by transnational networks. The strict link between territory and political power that existed in a restricted way is broken. New international and transnational institutions link sovereign states and transform, in part, sovereignty into a shared exercise of power<sup>2</sup>.

In this way, the Constitutional State appears today correlated with the so-called "International Constitutional Law", observing a supranationalization or internationalization of the Constitutions of States, implying that States are incorporated in supranational political communities or in international political systems globally considered<sup>3</sup>.

Based on this, it should be noted that the relationship between domestic law and international law is not one of derivation or autonomy, but of mutual dependence. The constitutional legitimacy of national law depends, in part, on its being properly integrated into the international legal system, while the legitimacy of the international legal system depends, in part, on States having an adequate constitutional framework. National and international law, in this sense, are mutually co-constitutive<sup>4</sup>. This perspective implies the idea of complementation and intertwining between the two, which can be observed both in the principles and instruments at the domestic level of the States that pass to the international sphere, as well as in the opposite direction, when international provisions influence domestic constitutional law<sup>5</sup>.

Indeed, it should be noted that globalization, the various forms of integration between States and the increasing intersection between Constitutional Law and International Law have led to the emergence of multiple doctrinal conceptions about forms of constitutionalism beyond the State, such as for example multilevel constitutionalism<sup>6</sup>, transconstitutionalism<sup>7</sup>, network constitutionalism<sup>8</sup>, societal constitutionalism<sup>9</sup>, interconstitutionalism<sup>10</sup> and constitutional pluralism<sup>11</sup>.

1. Azevedo Neto Álvaro de Oliveira and Vandresen Thaís, 'Desafios de um Constitucionalismo Global: A Sobreposição de Espaços Normativos e o Estado Constitucional Cooperativo', (2016), v. 2, n. 2, *Conpedi Law Review*, Oñati, 180-182.

2. Stelzer, Joana, O fenômeno da transnacionalização da dimensão jurídica, in: Stelzer, Joana; Cruz, Paulo Márcio, *Direito e Transnacionalidade*, (Curitiba: Juruá 2009), 39.

3. Canotilho Gomes, Brancos e interconstitucionalidade: itinerários dos discursos sobre a historicidade constitucional, (Coimbra: Almedina 2012), 284-285.

4. Kumm Mattias, 'Constitutionalism and the Cosmopolitan State', (2013), Vol. 20, N. 2, *Indiana Journal of Global Legal Studies*, 8-9.

5. Viviani Maury Roberto, *Constitucionalismo Global: crítica em face da realidade das relações internacionais no cenário de uma nova ordem mundial*, (Rio de Janeiro: Lumen Juris 2014), 181.

6. See Pernice Ingolf, *La dimensión global del Constitucionalismo Multinivel: Una respuesta global a los desafíos de la globalización*, (Ceo Ediciones, Madrid 2012).

7. See Neves Marcelo, *Transconstitucionalismo*, (Martins Fontes, São Paulo 2013).

8. See Slaughter Anne-Marie, *A New World Order*. Princeton University Press, (Princeton and Oxford 2004).

9. See Teubner Gunther, *Societal Constitutionalism: Alternatives to State Centred Constitutional Theory*, (Storrs Lectures, Yale Law School 2003).

10. See Canotilho Gomes, Brancos e interconstitucionalidade: itinerários dos discursos sobre a historicidade constitucional, (Coimbra: Almedina 2012).

11. See McCormick Neil, 'Beyond the Sovereign State', (1993), Vol. 56, N. 1, *The Modern Law Review*.



Among the main theories that emerged, these can be grouped in different ways, depending on the perspective adopted to characterize the process of constitutionalization. One can think of a classification in terms of its extension, that is, as a global constitutionalism, in a functional, regional, multilevel constitutionalism that is structured around one or more of these nuances. One can also group constitutional ideas according to their scope in normative terms, that is, according to whether the intention is to form a single constitutional text, or to recognize the constitutional nature of several dispersed norms, or to assume a plurality of constitutional systems. In the same way, one could speak of an organic constitutionalism, a procedural constitutionalism or a foundational constitutionalism, depending on whether the objective is to form a constitutional structure, or to constitutionalize certain procedures, or whether constitutionalism intends to function as a legitimate source of international law<sup>1</sup>.

The constitutionalization of international law appears, at the same time, as a phenomenon and a process. It is a phenomenon since in the way it is described it exists in the real world and it is a process since it represents a way of acting, a method that aims at certain ends. And, contrary to what can be deduced, despite the constitutionalization of law being used to build a higher integrative norm, there is no equation that determines that the existence of a constitution is associated with a group of States or with a “Global State”<sup>2</sup>.

In this perspective, the process of constitutionalization of International Law is, therefore, a political and intellectual movement that intends to endow international law with constitutional characteristics, that is, it seeks to make International Law a system that justifies, organizes and limits the exercise of power and that respects the principles of legality, separation of powers, rule of law and human rights<sup>3</sup>.

In this way, constitutionalization can be evidenced by the emergence of instruments and structures of a constitutional nature in the international order and the consecration of constitutional values and principles in the international legal scenario in which limitations to the unrestricted power of the State are established, and seeks to establish the notions of State of Law, checks and balances and protection of Human Rights, as a way of establishing minimum parameters of coherence and efficiency to the interests of the international community<sup>4</sup>.

## 2.2. The Consolidation Of Human Rights In The Process Of Constitutionalization Of International Law

In this process of constitutionalization of international law, it is evident that human rights play an integral role, as they concern both constitutional and international law, which makes them function as a link between legal systems<sup>5</sup>. In this context, the recognition of the emergence and existence of a common interest of the global community in the protection of Human

1. Acosta Alvarado and Paola Andrea, ‘Del diálogo interjudicial a la constitucionalización del derecho internacional: la red judicial latinoamericana como prueba y motor del constitucionalismo multinivel’, Tese (PhD in International Law and International Relations – Complutense University of Madrid 2013), Ortega y Gasset University Research Institute, Madrid, 189.

2. Carvalho Leonardo Arquimino, ‘de. Constitucionalização do Direito Internacional: uma (re)introdução ao tema’, (2012), Revista Via Iuris, São Paulo, dez, 87-88.

3. Peters Anne ‘Compensatory Constitutionalism: The Function and Potential of Fundamental Norms and Structures’, (2006), n. 19, Leiden Journal of International Law, 579-610.

4. Calixto Angela Jank and Carvalho Luciani Coimbra de, ‘The Role of Human Rights In The Process of Constitutionalization of International Law’, (2020), v. 25, n. 1, Revista Novos Estudos Jurídicos – Eletrônica, 240-241.

5. Moreira Thiago Oliveira, A Possível Formação de um Direito Constitucional Comum na América Latina e os Direitos Humanos Sociais. In.: Moreira, Thiago Oliveira; Oliveira, Diogo Pignataro De; Xavier, Yanko. Direito internacional na contemporaneidade, (Brasília: CFOAB 2018), 152.



Rights, whether individual, civil, political, social, economic or cultural, is a key factor in the process of constitutionalization of International Law, Through this recognition, the international community begins to develop norms and introduce mechanisms to ensure the implementation of these fundamental rights and values<sup>1</sup>.

Since the second half of the 20<sup>th</sup> century, the need for concrete measures on the part of the international community has increased in order to strengthen the protection of human rights and prevent new atrocities, such as those committed during the Second World War. Due to this need to protect human rights at the international level, to prevent further abuses by States against individuals, the global legal landscape has undergone a process of permanent and accelerated change<sup>2</sup>.

This process originated with the creation of the United Nations and its main bodies, as well as the signing of the United Nations Charter<sup>3</sup>. Later, in 1948, the Universal Declaration of Human Rights (UDHR)<sup>4</sup> was promulgated. Developed with the aim of defining the role of Human Rights in the United Nations Charter, the UDHR became a code and common platform for States to act and introduced the contemporary concept of Human Rights into the international order, with such rights being perceived as a unit interdependent and indivisible<sup>5</sup>.

The proliferation of international and regional documents has, therefore, contributed to the development of the idea that the protection of Human Rights must go beyond borders, limiting the absolute sovereignty of States. Furthermore, the promulgation of international norms for the protection of Human Rights and the creation of international bodies to guarantee accountability allowed the protection of Human Rights in all parts of the globe to be supervised and monitored, cumulating in the recognition of the individual not only as an object of paramount importance, but also to be recognized as legitimate holders of rights emanating from the international legal system<sup>6</sup>.

It was in this scenario, with the urgent need to protect Human Rights, that the specialized branch of International Human Rights Law (IHRL) emerged and consolidated, with the primary objective of guaranteeing the protection of the individual and giving full effectiveness to Human Rights through the establishment of international norms that protect human dignity, freedom and equality, as well as through the provision of legal and political instruments for the implementation of such rights. With this expansion, an international system for the protection of human rights was created, through which the international community could monitor and enforce the observance of these rights by all States<sup>7</sup>.

Given that this process involves protection by the external order of matters that were previously the exclusive domain of domestic jurisdictions, the proliferation of international legal norms designed to regulate post-war tensions led to a juridification of international relations

1. Calixto Angela Jank and Carvalho Luciani Coimbra de, 'The Role of Human Rights In The Process of Constitutionalization of International Law', (2020), v. 25, n. 1, Revista Novos Estudos Jurídicos – Eletrônica, 246.

2. Ibid, 236.

3. Carta das Nações Unidas, (1945), Disponível em: <http://www.onu.org.br/conheca-a-onu/documentos/> – Acesso em 17 fev. 2022.

4. Declaração Universal dos Direitos Humanos. 1948. Disponível em:

<https://www.unicef.org/brazil/declaracao-universal-dos-direitos-humanos>. Acesso em: 9 maio 2021.

5. Calixto Angela Jank and Carvalho Luciani Coimbra de, op. cit., 243-244.

6. Calixto Angela Jank and Carvalho Luciani Coimbra de, 'The Role Of Human Rights In The Process Of Constitutionalization Of International Law', (2020), v. 25, n. 1, Revista Novos Estudos Jurídicos – Eletrônica, 246-247.

7. Taiar Rogério, Direito Internacional dos Direitos Humanos: uma discussão acerca da relativização da soberania face à efetivação da proteção internacional dos Direitos Humanos, Tese (Direitos Humanos – Universidade de São Paulo 2009), São Paulo, 232.



and a quantitative and qualitative expansion of international law. The quantitative expansion resulted from the intensive production of international norms in the most diverse fields of social conduct, while the qualitative expansion resulted from the strengthening of international procedures to interpret and enforce International Law with the creation of international organizations and quasi-judicial bodies, thus overcoming the decentralization and fragility in the implementation of international standards<sup>1</sup>.

Furthermore, with the establishment of a complex international corpus juris for the protection of Human Rights and the assumption of characteristics inherent to Constitutional Law, there is a redefinition of what was previously the exclusive competence of States. By focusing on the protection of people's rights, the IHRL began to address issues that were traditionally seen as constitutional in nature, as rights intended to protect the person against abuse were considered to be an exclusively domestic competence. The direct consequence of this understanding is the formation of the idea that, due to this process, International Law can be conceived as a binding legal system for all States, precisely because it is seen as an autonomous constitutional system<sup>2</sup>.

### 2.3. The Rules Of International Law Oriented To The Common Good

When considering the norms of international law currently framed in different categories, common contents are discovered, correspondences of protected goods, which allow for a material determination of "common goods of the international community". In particular, these are, first, the so-called "imperative international law" (jus cogens), second, the obligations of a State towards all other States ("obligations erga omnes"), and third, the crimes of the State defined by international law ("international crimes of States")<sup>3</sup>.

The first of these categories of norms specifically oriented towards the common good is that of "binding international law". Jus cogens norms were introduced into positive international law through a provision of the Vienna Convention on the Law of Treaties of 1969, which maintains, "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"<sup>4</sup>.

The Vienna Convention on the Law of Treaties does not define the content of jus cogens, in a way that the internationalist doctrine traces the circle of the norms that compose it with a sometimes shorter, sometimes longer radius. But there is consensus on the following rules: the prohibition of the use of force in the Charter of the United Nations, fundamental human rights (especially the right to life and protection from torture and degrading treatment) and the rules of international humanitarian law that prohibit reprisals against protected persons<sup>5</sup>.

1. Carvalho Ramos André de, 'A relação entre o Direito Internacional e o Direito interno no contexto da pluralidade de ordens jurídicas', (2012), v. 1, n. 12, BRANDT, Leonardo Nemer Caldeira (Org.). Brazilian Yearbook of International Law. Belo Horizonte: CEDIN, 103-104.

2. Taiar Rogério, Direito Internacional dos Direitos Humanos: uma discussão acerca da relativização da soberania face à efetivação da proteção internacional dos Direitos Humanos, Tese (Direitos Humanos – Universidade de São Paulo 2009), São Paulo, 196.

3. Fassbender Bardo, La protección de los derechos humanos como contenido central del bien común internacional, In: Aznar Mariano J; Gutierrez Ignacio; Peters Anne, La Constitucionalización de la Comunidad Internacional, (Valencia: Tirant lo Blanch 2010), 153.

4. Artigo 53. Convenção de Viena sobre o Direito dos Tratados. 1969. Disponível em: < [http://www.planalto.gov.br/ccivil\\_03/ato2007-2010/2009/decreto/d7030.htm](http://www.planalto.gov.br/ccivil_03/ato2007-2010/2009/decreto/d7030.htm) > Acesso em 09 fev. 2022.

5. Fassbender Bardo, La protección de los derechos humanos como contenido central del bien común internacional, In: Aznar Mariano J; Gutierrez Ignacio; Peters Anne, La Constitucionalización de la Comunidad Internacional, (Valencia: Tirant lo Blanch 2010), 138.



The normative category of the so-called *erga omnes* obligations of States dates back to the formulation of the International Court of Justice in the judgment of the "Barcelona Traction" case of 1970<sup>1</sup>. The obligations towards all States would result, says the International Court of Justice, for example, from the prohibition the war of aggression, the prohibition of genocide and the principles and rules that affect the most fundamental rights of the human person, including protection against slavery and racial discrimination. Subsequently, the Court also considered the right of people to self-determination to be a norm *erga omnes*<sup>2</sup>.

The category of *erga omnes* obligations was developed to make the breach of certain fundamental international legal duties a matter for everyone, not just the sphere of the States immediately affected<sup>3</sup>.

The third normative category that covers the creation of State crimes defined by international law dates back to the period immediately after the Second World War, driven to sanction crimes committed by States against the peace and security of humanity<sup>4</sup>. The design of a criminal court of universal vocation, at this juncture, is part of the context of the creation of a new international legal system, translated, in the criminal field, in the conviction that certain crimes, due to their gravity, affect not only a certain State, but they are of interest to all international society because they affect fundamental principles of humanity<sup>5</sup>.

In this context, the work of the International Law Commission led to a Conference of States in Rome and the agreement on the "Rome Statute of the International Criminal Court", which sought to regulate the creation of the Court, the facts submitted to its jurisdiction, the general principles of criminal law that must be respected, as well as its composition and domestic legal system. Article 5.1 of the Statute limits the Court's jurisdiction "to the most serious crimes (...) that affect the international community as a whole", specifically the crimes of genocide, crimes against humanity, war crimes and the crime of aggression"<sup>6</sup>.

## 2.4. The Constitutional Scope Of The United Nations Charter

As a result of the need to achieve world peace and security in the face of successive war tragedies caused by the First and Second World Wars, the United Nations (UN) was created on October 24, 1945 in the city of San Francisco (USA) and the United Nations Charter was signed, leading to a redefinition of the fundamental values of the international community.

This process marked the beginning of a new international order, in which legal and institutional frameworks were established to limit the power of the State, characterizing a systemic integration of International Law with the internal rights of States. Important principles were established, such as respect for State sovereignty and territorial integrity, peaceful settlement of international disputes,

1. Barcelona Traction, Light and Power Company, Limited. Arrêt, CIJ, Recueil 1970. Julgamento de 5.02.1970. Disponível em: <https://www.icj-cij.org/public/files/case-related/50/050-19700205-JUD-01-00-EN.pdf>

2. Fassbender Bardo, La protección de los derechos humanos como contenido central del bien común internacional, In: Aznar Mariano J; Gutierrez Ignacio; Peters Anne, La Constitucionalización de la Comunidad Internacional, (Valencia: Tirant lo Blanch 2010), 140.

3. Ibid, 141.

4. Ibid, 149.

5. Lopez Filho; Francisco Camargo Alves; Moreira, Thiago Oliveira, Limites Du Paradigme Hiérarchique Dans L'incorporation Du Statut De Rome Dans Les Expériences Française Et Brésilienne, MENEZES, Wagner (Ed.), Direito Internacional em Expansão, Vol. XIX. (Belo Horizonte: Arraes Editores 2020), 38.

6. Artigo 5.1. Estatuto de Roma do Tribunal Internacional. 1998. Disponível em: < [http://www.planalto.gov.br/ccivil\\_03/decreto/2002/d4388.htm](http://www.planalto.gov.br/ccivil_03/decreto/2002/d4388.htm)> Acesso em 09 fev. 2022.



self-determination of peoples and non-interference in the internal affairs of other countries, for example, which form the basis of contemporary international law and international relations<sup>1</sup>.

One of the main approaches to the scope of the constitutional character of the United Nations Charter most evident today seeks to identify several characteristics that make it similar to a Constitution. Among these characteristics, one can present, among others, the denomination as a “Charter”, contrary to the usual term “treaty” or “agreement”; the expression “We the People of the United Nations”, implying a reference to a constituent power; the functioning and structuring of the Organization, with its own governance devices similar to the Constitutions of the States, in which the identification of bodies, the separation of powers and the organization of the competence of the institutions are observed; the normative hierarchy addressed to the international community, especially in view of the provisions of art. 103 of the Charter of the United Nations, which establishes primacy over any other treaty or agreement; the character of universality, circumscribing not only the member states; and the constitutional history of the international community, which since 1945 has orbited around the UN, which serves as a privileged locus for global issues and a facilitator for the achievement of common values that contain the essence of human dignity<sup>2</sup>.

However, there are numerous counterweights to qualify the Charter as a Constitution of the international community, such as the fragility of the Security Council's legitimacy, given that it lacks representativeness, generating a deficit of democratic legitimacy, in addition to not having judicial review bodies, causing a violation of the balance of powers, typical in a set of constitutional norms. In this sense, it still seems premature to attribute the role of a World Constitution to the United Nations Charter<sup>3</sup>.

Nevertheless, the constitutional approach of the UN Charter does not necessarily lead to equating the Charter with a state constitution. The constitutional notion in international law must be understood as an autonomous concept and not as an extrapolation of national constitutional law<sup>4</sup>. Therefore, the United Nations Charter is inevitably referred to as a starting point for global constitutionalism, since it presents a greater range of constitutional aspects than any previous multilateral international treaties, denoting an aspect of historical construction, typical of constitutionalism. The Charter is therefore the main contribution to the constitutional history of the world<sup>5</sup>.

### 3. The Development of A Global Constitutionalism

In the current emerging global order, marked by several regional subsystems and at the same time globalized, diversified and localized, characterized by the intersection and overlapping of different forms of domestic governance and organizational practices, the pursuit of

1. Fassebender Bardo, ‘International Constitutional Law: Written or Unwritten?’, (2016), v. 15, n. 3, Chinese Journal of International Law, 512.

2. Fassebender Bardo, *The United Nations Charter as the Constitution of the International Community*, (Leiden (Netherlands): Martinus Nijhoff 2009), 86-115.

3. Viviani Maury Roberto, ‘A Amplitude Constitucional Da Carta Das Nações Unidas: Controvérsias De Uma Proposta De Constituição Para A Comunidade Internacional’, (2016), v. 2, n. 2, *Conpedi Law Review*, Oñati, abr, 5.

4. Fassebender Bardo, ‘International Constitutional Law: Written or Unwritten?’, (2016), v. 15, n. 3, Chinese Journal of International Law, 510.

5. Viviani Maury Roberto, ‘A Amplitude Constitucional Da Carta Das Nações Unidas: Controvérsias De Uma Proposta De Constituição Para A Comunidade Internacional’, (2016), v. 2, n. 2, *Conpedi Law Review*, Oñati, abr., 18.



national interest and material capabilities point to the ordering of a political balance of powers that qualifies a multipolar system<sup>1</sup>.

In a historical and cultural approach, it is understood that countries have the right to independently constitute models of rule of law that are appropriate to their national conditions, that recognize social and economic development trajectories, the importance of culturally specific identities and the legitimacy of different views on the nature of sovereignty, the rules of international trade and the relationship between State and society<sup>2</sup>. Nevertheless, it is also understood that countries of different systems and in different stages of development are intertwined in mutual dependence and interconnected in a community of common destiny<sup>3</sup>.

In this context, the lack of a centralized authority in international society and the dispute of several centers of power for the legitimacy of central issues of global repercussions indicate the need for international regulations that evoke the attribution of responsibility and authority beyond the States in relation to global governance<sup>4</sup>.

Thus, in the face of the challenging transformations that are taking place in the contemporary world, the perception of a global society without a legality that corresponds to the effective stage of interdependence of the present legal pluralism highlights new trends in constitutional theory and the theoretical outlines that are currently being developed towards constitutionalism at a global level<sup>5</sup>.

In different magnitudes, the current general architecture of evolving constitutionalism indicates the coexistence of diverse paradigms, both at the national, transnational and global levels. Taking into account the need for coherence for the structural balance of the general scheme of constitutionalism, the comprehensive position to address and reach the issues and concerns of the globalized world enables global constitutionalism to act as an overarching paradigm of unity in the diversity of manifestations of that scheme<sup>6</sup>.

Following the hermeneutic premise that there is no meaning of a text independent of the reader, the constitutionalist reading of current international law is not a distortion of norms that are objectively something else, but a legitimate form of interpretation. It is not a mere deduction from positive thinking, but an intellectual construction induced by multiple general developments in international law<sup>7</sup>.

Still, gauging the sense that law and politics should not be seen as distinct domains, but as structurally coupled subsystems, it can be said that law is at the same time a product of political activity as well as organizer and limiter of political action. Consequently, the evolutionary dynamics of constitutionalism lead not only to the legalization of politics, but also to a stronger

1. Flockhart Trine, 'The coming multi-order world', (2016), v. 37, n. 1, CONTEMPORARY SECURITY POLICY, 6-11.

2. Ibid, 9.

3. Ahl Björn, Chinese Positions on Global Constitutionalism, Community of Common Destiny for Mankind, and the Future of International Law, (The Chinese Journal of Comparative Law 2021), 17.

4. Afonso Henrique Weil and Castro Thales Cavalcanti, 'Constitucionalismo Além Do Estado: Perspectivas Históricas E Demandas Emancipatórias', (2015), V. 10, n. 2, Revista Eletrônica do Curso de Direito da UFSM, 520.

5. Ferreira Francisco Gilney Bezerra de Carvalho and Lima Renata Albuquerque, 'Teoria constitucional em mutação: perspectivas do constitucionalismo contemporâneo frente aos desafios da globalização e transnacionalidade', (2017), v. 13, n. 3, Revista Brasileira de Direito, Passo Fundo, dez, 124.

6. Chen Wen Cheng and Chu Shirley Chi, Taking Global Constitutionalism Seriously: A framework for Discourse', (2016), v. 11, n. 2, National Taiwan University Law Review, 402-404.

7. Peters Anne 'Compensatory Constitutionalism: The Function and Potential of Fundamental Norms and Structures', (2006), n. 19, Leiden Journal of International Law, 605.



politicization of law, and the introduction of legal and even constitutional principles contributes to the stability of expectations, legal certainty and equal treatment of relevant actors<sup>1</sup>. In this sense, the Constitution, in the modern sense, is a factor and product of the structural coupling between politics and law<sup>2</sup>.

From this perspective, Global Constitutionalism has descriptive and prescriptive elements. It is not only intended to describe some features of the status quo of international relations, but also seeks to provide arguments for its further development in a specific direction<sup>3</sup>. The evolution of constitutional values to the international domain allows for a path to shape global governance through constitutional thinking in order to facilitate coordination between national legal systems and international law<sup>4</sup>.

In this way, Global Constitutionalism consists of a constitutive process of emergence and deliberate creation of constitutional elements in the international legal system, gradually, although not linearly, by political and legal actors, supported by an academic discourse in which these elements are identified and developed<sup>5</sup>.

The perception of Global Constitutionalism is developed in a plan of approaches that seek to understand the adequate responses to face the complex dynamics of world society in the face of globalization and the transformations that take place in the international community<sup>6</sup>. In this way, doctrinal approaches can at the same time be characterized as heterogeneous and interdisciplinary, since they structure their theses on different and contrasting assumptions, and insofar as they do not limit their analyses to only legalistic parameters<sup>7</sup>.

In view of this, it is possible to encompass three trends proposed to address the ambience of Global Constitutionalism, which are functionalist, normative and pluralist<sup>8</sup>. The functionalist element responds to the analysis of the constitutionalization processes that are revealed through bargains and negotiations in the institutional environments that structurally regulate international relations, identifying institutions capable of performing typically constitutional functions such as control and division of power at a global level, jurisdictional control of acts regulations and protection of fundamental human rights<sup>9</sup>. The normative factor foresees a movement towards the progressive political and legal development of practices beyond the sphere of influence of the States, determining in a compensatory way- the normative contents that have been weakened at the state level as a result of the forces of globalization and global governance, advocating a commitment to constitutional

1. Carvalho Leonardo Arquimino, 'de. Constitucionalização do Direito Internacional: uma (re)introdução ao tema', (2012), *Revista Via Iuris*, São Paulo, dez, 89.

2. Peters Anne, 'The Merits of Global Constitutionalism', (2009), v. 16, n. 2, *Indiana Journal of Global Legal Studies*, 407.

3. Peters Anne and Armingeon Klaus, 'Introduction: Global Constitutionalism from an Interdisciplinary Perspective', (2009), v. 16, n. 2, *Indiana Journal of Global Legal Studies*, 388-389.

4. Ahl Björn, Chinese Positions on Global Constitutionalism, Community of Common Destiny for Mankind, and the Future of International Law, (*The Chinese Journal of Comparative Law* 2021), 16.

5. Peters Anne, 'The Merits of Global Constitutionalism', (2009), v. 16, n. 2, *Indiana Journal of Global Legal Studies*, 397-398.

6. Viviani Maury Roberto, 'A Amplitude Constitucional da Carta Das Nações Unidas: Controvérsias de uma Proposta de Constituição para a Comunidade Internacional', (2016), Vol. 2, N. 2, *Conpedi Law Review. Oñati, Espanha*, 5-6.

7. Afonso Henrique Weil and Castro Thales Cavalcanti, 'Constitucionalismo Além Do Estado: Perspectivas Históricas E Demandas Emancipatórias', (2015), V. 10, n. 2, *Revista Eletrônica do Curso de Direito da UFSM*, 525.

8. Wiener Antje and Lang Anthony; Tully James; Maduro Miguel Póaires; Kumm Mattias, 'Global Constitutionalism: Human rights, democracy and the rule of law', (2012), vol. 1, no.1, *Global Constitutionalism*, 1-15.

9. Afonso Henrique Weil and Castro Thales Cavalcanti, 'Constitucionalismo Além Do Estado: Perspectivas Históricas E Demandas Emancipatórias', (2015), V. 10, n. 2, *Revista Eletrônica do Curso de Direito da UFSM*, 526.



standards<sup>1</sup>. And the pluralist component, comprising Global Constitutionalism not in a singular perspective, but through differentiated systems and their interactions beyond the limits of the State, aims to mutually recognize different standards, in different regimes, respecting a minimum standard that confers organicity and systematization to enable its implementation by the States<sup>2</sup>.

In this regard, three characteristic points are listed that underpin the treatment of Global Constitutionalism: the foundation of a legal-political system in relation between States and people marked by the foundation of the United Nations Charter; the emergence, through international declarations and documents, of a set of norms oriented to the common good of the international community, recognized in *jus cogens* norms, imperative international law, in the *erga omnes* obligations of States, and in the normalization of an international criminal law; and in the consolidation of human rights and the protection of human dignity as a presupposition of all constitutionalisms<sup>3</sup>.

By accepting the conception that Global Constitutionalism consists not only of an idea and/or perspective, but of an academic and political agenda that aims to apply constitutional matrices, such as the rule of law, checks and balances and the protection of human rights in the international legal sphere, in fact, it is observed that, in a broad sense, the existence of a Constitution in the international sphere is admissible, as elements of structuring, organization and institutionalization can be found in that sphere<sup>4</sup>.

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1 . Peters Anne 'Compensatory Constitutionalism: The Function and Potential of Fundamental Norms and Structures', (2006), n. 19, *Leiden Journal of International Law*, 579-610.

2. Dantas Iana Melo Solano and Moreira Vaninne Arnaud de Medeiros, 'Análise Da Fragmentação Do Direito Internacional À Luz Do Constitucionalismo Global Orgânico', (2016), v. 2, n. 1, *Revista Brasileira de Direito Internacional*. Brasília, 156.

3. Canotilho José Joaquim Gomes, *Direito Constitucionale Teoria da Constituição*, (7th Ed. Coimbra: Almedina 2008), 1370-1371.

4. Viviani Maury Roberto, *Constitucionalismo Global: crítica em face da realidade das relações internacionais no cenário de uma nova ordem mundial*, (Rio de Janeiro: Lumen Juris 2014), 173-176.



## Conclusion

As demonstrated in the present study, it can be seen that while the development of a constitutional theory conceived throughout history in a way that is intrinsically centered on the national state, the intensification of globalization and the emergence of common problems that transcend state borders provides that Constitutionalism and elements of the notion of Constitution transcend to the international order.

Indeed, noting a relationship of mutual dependence and increasing intersection between domestic constitutional law and international law, the process of constitutionalization of international law is evidenced through the emergence of values, principles, instruments and structures of a constitutional nature in the international legal scenario, seeking to establish notions of checks and balances, limitation to the exercise of power and protection of human rights in the international order.

Such understanding took place through the consolidation of the protection of human rights, previously seen as an exclusive internal competence, as a link between the various legal systems in the international order; the creation of norms of international law oriented to the common good, particularly the norms of *jus cogens*, the *erga omnes* obligations, and the definition of international crimes of the States; and finally, the constitutional contribution of the United Nations Charter to redefining the fundamental values of the international community.

Finally, it is concluded that such construction verifies the development of a Global Constitutionalism through the emergence and deliberate creation of constitutional elements in the international legal system, which is developed in a plan of approaches that seek to understand the appropriate responses to face the complex dynamics of world society. In the face of globalization and the transformations that are taking place in the international community, gradually, though not linearly, by political and legal actors, supported by an academic discourse in which these elements are identified and developed.



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