Transconstitutionalism or Cosmopolitanism: perspectives for a dialogical semantics in the contemporary constitutionalism.

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Abstract: By considering the variety of elements that surrounds the fragmentation of law reproduction, beyond the precarious legitimacy of the national State and non-state entities to confront common constitutional problems of the world society, this paper discusses two theoretical proposals directed to the question: transconstitucionalism and constitutional cosmopolitanism. To draw a parallel between the two perspectives, it is intended to demonstrate the limits and possibilities of both, with special attention to the American constitutionalism. Focusing on the resistance of the Supreme Court to consider foreign precedents as reference to their decisions, the paper evaluates how the posture of closing the dialogue affects the construction of the notion of shared constitutionalism.

1. Introduction.

Let´s suppose that the Shakespearian passage, in Hamlet, which states "our time is disoriented"[1], could be taken as the great provocation of the philosophical thought of modernity in the relation between law and politics, and from this provocation, the following question had risen: Who decides what sense law and politics must have on the individuals´ lives?

In a generality level like this, maybe no other answer could be as precise as the figure of the sovereign. But what sovereignty should one talk about when the sovereign is not defined as the power or norm? Therefore, the dilemma is presented between two alternatives: either law establishes the norms of operation of power or power creates law freely.

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1 Cf. SHAKESPEARE, 2007, p. 69. In the original, published in 1601: "*The time is out of the joint*". There is yet a Spanish translation which states: "*La naturaleza está en desorden"* SHAKESPEARE, William. *Hamlet*. trad. Inarco Celestino. Madrid: Oficina de Villalpando, 1798, p. 45. The extract is in the end of Act I, scene 5, in which Hamlet conversing with Horacius and Marcellus, just after receiving from his father´s spectrum the news that the reason of the death had been poisoning by henbane while sleeping in the garden, by option of Hamlet´s uncle, Claudius, who had become The King of Denmark and married Gertrudes, the widow queen.

In the context of the construction of the modern State, this historical antinomy between power and law has sought solution in the constitutionalism. It regards a linguistic innovation articulated with the liberal revolutions, whose intention was to build a social semantics[2] which would be able to supply a concept of sovereignty founded in Constitution Primacy. The promise of a mechanism which, at once, would promote the differentiation between the juridical and the political systems, enabling their legitimation by mutual references through the structural coupling between those two spheres, which would avoid the infinite regress to the issue on the foundation of power and law.

Constitucionalism was then consecrated as a sovereignty notion that, according to Luigi Ferrajoli[3], resided under three grounds: the first, the philosophical matrix, which attributed to the jusnaturalistic conception (sovereignty) the juspositive foundation of the State, and of the modern international public law; the second, of historical nature, is responsible for the division between internal sovereignty (absolute *potestas*), consistent in the progressive formation of constitutional states and external sovereignty (*superiorem non recognoscens*), historically made as absolutization of the right to declare war and to celebrate peace; and, finally, the paradox inserted in the theory of Law, regarding the legitimation of the legal system in the internal plan, whose self determination demands that law regulates itself, suffering an irreducible antinomy of obliging the observance of peace and human rights in the international plan.

Today, this last paradox seems to have been radicalized. The formula of the self proclamation of sovereignty combined with procedure rules and the validity of substantial norms based on fundamental rights, in the internal plan; and exerting the prerogative of autonomously binding to pacts of international law, as a means of incorporating to the national juridical norms, provisions of supranational interests, in the external plan; no more correspond to the complex relations of production of meaning of law in the multicentric global society[4].

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[2] Cf. LUHMANN, 1996, p. 4 ss.

[3] Cf. FERRAJOLI, 1997, p. 8 ss.

[4] For Luhmann, the term does not diminish the inequalities amongst the globe regions, which could result in a " global system of regional societies", yet, part of the consideration that the explanation of these differences" should not take them for granted, i.e., as independent variables, but should begin with the assumption of a worldly society and, then, investigate, how and why this society tends to keep or even expand the regional inequalities. " Cf. LUHMANN, 1997, p.72

The terrorist threat to life and people´s integrity, the destructive power of the nuclear weapons, the offenses to the environment and the global warming[5], the ethnic-religious conflicts with extraterritorial effects, the harshening of disputes for energy sources, besides the intensification of misery and inequalities, responsible for the expansion of the migratory phenomenon, are instances of factors that highlight the world scale problems in which the reduced political and technical capacity of the States needs to deal with. All that, in a context of institutional legitimacy worsening[6], responsible for the maintenance of peace and international relations balance.

On the other hand, the attempt of building consensual solutions in a global sphere based on legitimation criteria, which presuppose the observance of democratic conditions by their participants, face serious difficulties. Here, the paradox reveals itself intending to formulate common procedure rules in an environment marked by radical diversities amongst peoples and cultures[7], whose conflict is characteristic of the globalization, added to the expansion effects of the free trade logics.

It´s under this Shakespearian disorientation, that the Constitutionalism dilemmas are reproposed as movements able to articulate fundamentally the limitation of power and the assurance of rights, responsible for the success of the Constitution concept in the modern sense, yet, separating them from the figure of the State[8].

Given the amount of variants, the theoretical efforts, focused on the rehabilitation of the Constitutionalism as a universal normative discourse of the idea of freedom[9], need to deal mainly with two phenomena. The first one regards the complexity raise of the relations between the actors involved in the process of

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5 From the consensus of the scientific community that global warming and the present climatic crisis are due to human action, Dipesh Chakrabarty observes as the contemporary feelings of anxiety and worry regarding the ending of humanity challenging even a shift in the self understanding of historical thinking. For the author, the perception of the dimension of the crisis and the possibility of extinction of the human species would provoke a sense of present which separates the future from the past putting such future beyond reach of the historical sensibility. Cf. CHAKRABARTY, 2009, p. 197.

6 The unilateral and hegemonic position of the EUA was symptomatic of that crisis when decided to intervene in Iraq, against the decision of the Unites Nations Security Council, and the intervention of Kosovo, even with the vetoes of Russia and China. Cf. MORRIS & WHEELER, 2007, p. 220 ss.

7 Some of these conflicts may be seen not only in the relations among private individuals facing the technology expansion and the market, i.e. the selling of beef in some places in India, where the animal is considered sacred, or the commercialization of frozen chicken in Iran, without respecting the slaughter ritual demanded by Muslims; but also in the relations of private individuals or groups with states, as in the decision of the Court in Cologne (Germany), which considered crime, subject to imprisonment, the ancient religious Jewish and Muslim practice of new born circumcision, considering this practice incompatible with the physical integrity of the children, prevailing over the religious freedom of their country.

8 A criticism to the attempt of the Constitutional theory of transferring recklessly to the global plan the paradigms of constitutionalization of the State-Nation was done by Günther Teubner. Cf. TEUBNER, 2004, pp. 7 ss.

9 Cf. BRUNKHORST, 2011, pp. 16.

globalization (private agents, supranational entities, States and individuals). The second one regards the tendency of the destructive expansion of the partial systems in a global level, specially the economic system[10], with consequences on the protection of human rights, when the juridical system breaks progressively into orders of multiple levels[11], jeopardizing two of the most important kelsenian[12] tenets, the scaled structure of the juridical order and the international law monism.

This Copernican self understanding revolution of the Constitutionalism in a global level does not cease to produce its reflexes in the internal plan of the states, with effects on the application and the interpretation of the law by national juridical bodies, which, on one hand, start to face the dogmatic lack of the "constitutional supremacy" and, on the other, need to face the tension of dealing with the need to found their decisions under the Constitution and the observance of the universality of the principles of international law, preceding from the international courts or decisions from transnational bodies, without being able to base them on inherited standards[13] of the liberal revolutions.

It is under the effects of the update of meaning[14] of the constitutionalism, that a reappropriation of the internal/external dichotomy in the juridical system is demanded, beyond an interpretative posture of the courts responsible for the constitutional answers common to the worldly society that this work focus its attention.

Considering the possibilities of permanence of the focused interpretations of the prevalence of the "last world"[15], two dialogical construction perspectives will be compared in the current stage of the constitutionalism: the transconstitutionalism amongst juridical orders of Marcelo Neves; and the constitutional cosmopolitism, of

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10 Describing the autonomous form of the juridical discourse of Modernity, Max Weber had observed that the formal right had contradictions when facing the commercial relations dynamics, being forced to take an anti formal route. Cf. WEBER, 2009, p. 153.

11 Habermas affirms that the constitutionalization of a cosmopolitan citizenship goes through three levels or arenas: the supranational (international community), the transnational (regional regimes) and the state (national states) HABERMAS, 2007, pp. 359 ss, defending a world internal politics decentralized of the State, but reformulated by the UN, according to a predicted structure of a constitution for the world society. Neves, nevertheless, describes the possibility of simultaneous interweaves amongst the state, supranational, international, transnational and local orders. Cf. NEVES, pp. 238 ss.

12 Cf. KELSEN, 1998, 155 ss. e 234 ss.

13 Cf. GRIMM, 2004, p. 15.

14 Cf. LUHMANN, 2006, pp. 33 ss e LUHMANN, 2002, p. 32.

15 A discussion about the lack of theories of 'last world ' or 'last authority' representing the conflict between the constitutional parliaments and courts in the intern domain of the law and politics reproduction is done by Conrado Hübner Mendes, who seeks to articulate the "temporariness of the decisions with the politics continuity" through a permanent dialogue. Cf. MENDES, 2008, pp. 168 ss.

Cass Sunstein, seeking to describe the limits and possibilities of both theories as alternatives to addressing the beyond-borders questions.

One of the main challenges for the behavioral change in the shared construction of the constitutional semantics, as a normative expectation rearticulated by distinct orders, is in the confrontation of the asymmetries[16] existent in the structural plan of the social relations in the world level. Considering the restrictions to the adoption of a common language in the plan level of conflict solution, this work proposes an analysis of both transconstitutionalism and constitutional cosmopolitism, under the specific perspective of the treatment of the differences, searching to look how the selfunderstanding of each theory can imply openness to the *other*[17] or only the strategic appropriation of the constitutional discourse in order to affirm the own identity and repeat the same.

2. Structural coupling, transversal reasoning and the transconstitutionalism.

One alternative theory built to deal with the increasing fragmentation of the law and the relationship difficulties amongst the juridical orders of the world society is the proposed *transconstitutionalism* of Marcelo Neves, who describes the possibility of dialogues based on structural coupling[18] and *transitional bridges,* as an approach properly complex to deal with the common constitutional problems, avoiding not only the perceptions focused on full state autonomy, but also the bet on the internationalism as a last ratio. In addition to avoiding the metaphorical use of the concept of the constitution, which can mean the expansion of an *imperial constitutionalism*[19] for the transnational order.

The presuppositions used by Neves to build the idea of the transconstitutionalism relate with the interweaving of the political and juridical discourses in the theory of the systems[20] and the formation of partial rationalities of

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16 For Koselleck the characteristic of the *antithetic asymmetric* concepts is that "*they determine a position according to such criteria that the opponent position, resulting from them, can only be refused*" Cf. KOSELLECK, 2006, p. 195. This opposition keeps the fundament of both, the internal constitution and the external politics, as it dislocates the experiment of the expectations horizon and permits the denial of the other as a part of a unique humanity. Cf. KOSELLECK, 2006, pp. 191 ss.

17 The reference here is to the "otherness thought", developed by Emanuel Levinas, who seeks to open the way to the relation with the *Self* with the absolutely *Other*, under an ethics for beyond the category of the conceptual totality in which would have been closed the modern philosophical tradition, demonstrating the subjectivity as an otherness relation. Cf. LEVINAS, 2011, pp. 66; and MILOVIC, 2004, pp. 88.

18 Cf. NEVES, pp. 34 ss e 235 ss; e LUHMANN, 1996, p. 22; 2002, pp. 315 ss e 2007, pp. 66 ss.

19 This purpose is clear from the beginning of the text. Cf. NEVES, pp. XX, 6, 51.

20 Cf. NEVES, 2009, pp. 34-38; NEVES, 2011, pp. 64-67 e LUHMANN, 1996.

Wolfgang Welsh[21], that seeks within his concerns, the rehabilitation of the concept of reasoning after the attacks of the post modernist and poststructuralist criticism.

Initially, the concept of the constitution is historically contextualized from the revolutionary movements in France and in the United States, when the responsibility for the terminological interpretation between politics and law in the social semantics were attributed to these liberal revolutions, so "*politics and law appear as a system and the law as a way of reacting to inconvenient politicians, including the danger of going back to the state of nature"*[22], hence, the constitution, in a modern sense, would be a reaction to the functional differentiation between politics and right, given the necessity of reconnecting these systems.

Under the perspective of the theory of the systems, this reconnection would be the parameter of the validity of the law, considering it operatively closed, self referring, circular and conceived under the description of two essential operational types: or positive, under the constructive tautology of its own internal elements; or negative, under the paradox of the insertion of the environment element, reproducing the distinctions which characterize it as a juridical system in the concrete plan of the social communication.

Taking the binary code licit/illicit capacity in guiding the congruent formation of the normative expectations with generalizing pretensions[23], its own validity cannot be questioned. Hence, it is necessary that the law sanctions itself as a system, hiding the paradox of its differentiation, without this, its positivity would be jeopardized. In other words, it would be impossible to decide[24].

In this context, the constitution works as a "deparadoxalization" project, presenting itself as a validity fundament which becomes asymmetric with the law regarding itself. A 'super-regulatory' instance is created through the articulation between law and politics, which operationally closes the juridical system at the same time in which represents its foundation[25].

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[21] Cf. WELSCH, 1998, pp. 17-31 e WELSCH, 2000, pp. 79-91.
[22] Cf. LUHMANN, 1996, pp. 3-4
[23] Cf. LUHMANN, 1985, p. 42.
[24] In this point, it is highlighted the observation on the paradox of the juridical order in the construction of the "certainty" of the answers in the law on Luhmann, pointing as undecidability about the meaning of right and wrong, due to the absence of a true or false prior position, only an alternative in the application of the binary code (licit/illicit) to the own right would be found. Cf. LUHMANN, 1988, p. 154.
[25] As Luhmann puts *"the licit/illicit code generates the Constitution so that the Constitution may generate the licit/illicit code. The radicalized difference establishes the text that, in turn, establishes the difference – nevertheless under the condition that all self logical maneuver becomes invisible"* Cf. LUHMANN, 1996, p. 12.

The conception of the constitution as a structural coupling, and of the structural coupling as an evolutionary acquisition[26], offers consequences for the law interpretation process, as it admits the possibility of systemic irritation of the other spheres (economy, education, religion, etc.) in the communication of the juridical system, likewise the others, is subject to the increase of complexity and to the operational dynamics of the variation elements, selection and reestabilization of the system/environment relation.

Hence, the constitutional interpretation is not closed in the texts but inserted in the contingent context formed by historical elements modifiers of values subjacent to the constitutional text elaboration, altering its own sense. This contingence does not affect the intention of separation and operational closure of the law and political systems, which are the presupposition of the existence of the constitution, but do not impede an evolutionary trend that is common to both systems.

Luhmann points out that the interpretation of the Constitution assumes a distinct character of the interpretation of law in general, noting in it the transferring of the understanding of the sovereignty of the constituent to the interpreter, so it's up to the interpreter the construction of the meaning of Constitution in making “a description of descriptions”[27] whose operation irritates the systems of law and politics at the same time.

This structural coupling, although capable of obtaining "concentrated and lasting interrelationships between the social systems [28] and enabling the offering of heterogeneities of different intrasystemic communications to the common environment of society, lacks the function of coordination between the various complexities made available to other potential systems receptors of sense. Thus, the luhmannian structure of couplings demonstrates the existence of countless disordered or elusive complexities as constitutive of normative sense for all partial systems involved, not preventing the destructive expansion of one over the other.

To categorize in such manner the modern concept of the constitution would be insufficient to account for the increase in the degree of complexity required by the displacement of politics that, resenting the parameter of sovereignty, would require new functional criteria for the solution of the common constitutional problems.

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[26] Cf. LUHMANN, 1996, p. 29.
[27] Cf. LUHMANN, 1996, p. 36.
[28] Cf. NEVES, 2009, p. 37.

At this point, Neves rescues Wolfgang Welsch´s idea of cross-ratio, whose proposal does not deny the possibility of a rational metanarrative[29] that serves as a parameter for partial rationalities, but sees in reasoning the role of building transitional bridges between the discursive heterogeneity, that do not confound with a communicative-oriented consensus sequence[30] as a means of reaching justice, but as an instrument of articulation between the various disagreements.

Welsch exposes a double-sidedness proper of the reason, whereby the background in which it develops all reasoning involves, necessarily, the other side, hidden, which does not allow to be seen by the reason directed to a certain object. This reasoning would force the very reason to be opened to other phenomena that are transcendent, i.e., reason itself would be inconclusive, which does not mean to avoid it or disregard it as a philosophical task, rather to detach its analysis to the consistency focus[31].

Welsch´s proposal raises the need of adopting the starting point of adverse as a means to critically reconstruct the objections of the reference frame itself. The idea would be to reorganize the convergent and divergent points, from a "step backward" in terms of the disagreement of a certain theme, i.e., shifting the issue to a parameter of language common to both sides in an attempt to achieve a compelling basic assumption[32] of acceptance as a presupposition of the most diverse discourses.

Such a position would offer alternatives to the critical reconstruction of reason, allowing to transcend their own rationalities, or at least not to consider them so comprehensively[33], which would provide the reason of a more impartial view about their own position, and provoke what Welsch calls "reciprocal interpretation"[34].

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[29] This option does not refer to a metaorder or an Archimedean point able to establish in itself a privileged observation position of the world society, but to recognize the inevitable paradigm of plurality. See Welsch, 1998, p. 25

[29] A "orientation between the different disorders" See Welsch, 1998, p. 27 and NEVES, 2009, p. 40. On the possibilities of intermediation of the dissent content through a minimum procedural consensus that promotes the autonomy of the spheres of society v. hypercomplex. NEVES, 2008, p. 136-156.

[30] Welsch moves away from the idea of intersubjectivity pointed to by Habermas as a condition of communication, emphasizing the primacy of theoretical reason as the assumptions of self-reflection and self-understanding. See WELSCH, 2000, p. 82.

[31] Cf. WELSCH, 2000, p. 81.

[32] Cf. WELSCH, 1998, p. 28.

[33] Three factors would be determinant to describe the new structure of rationality, stresses Welsch: plurality or differentiation, the interweave of autonomous paradigms and the disorder provoked by variety of elements. Cf. WELSCH, 1998, p. 17 ss.

[34] Cf. WELSCH, 2000, p. 83.

This “mutual interpretation”, equipped with various features, would be able to promote the departure of the reason from its positional or parochial isolation[35] to couple different points of view[36], subjecting them to criticism in a sequential way, adjusting points of agreement and disagreement in accordance with processes of reflective reasoning.

The ability to evaluate positions from the standpoint of reason built in processes of reciprocal interpretation would avoid the imposition of statements emptied of self-reflection and would subject the rational discourse the same logical and procedural operations of rationality, such as the opposition between identity and difference; uniqueness and multiplicity; cause and effect; compliance and contradiction, perfecting reason as a logical ability.

It's about this effort that Welsch[37] suggests his concept of transversal reason placing reason in the processes of transition from one point of reasoning to another, in establishing relations between reason and rationality. For him, reason operates between the various forms of rationality; and the transition activities of rationality (comparison, contrast, mutual interpretation, consequential analysis) are the effect of logical operations built according to their own assessment instruments, acting as intermediary between "the hell of atomization and the depths of aggregation.”[38]

As the aspirations of autonomy and self-description of the various systems present an expansive trend of their own rationalities, a comprehensive metadiscourse from all different areas of communication would be unviable, which, however, may develop mechanisms for mutual learning.

The transconstitutionalism option by the dialogue between by transverse partial rationalities adjusts to the systemic corruption prevention model in the communications plan of a hypercomplex society, which, upon reaching the structural level of their relationships prevents the consistency of their self-production and operational closure

[35] With another approach, but also focused on the idea of building an “objective impartiality” able to redeem comparative analysis of rational argumentation about justice, Amartya Sen uses the term "parish reasoning" to criticize the excess of both approaches focused on institutional reforms and on measures focused exclusively on behavioral change, reinforcing the need for “mutual dependence” between them. Cf. SEN, 2011, p. 142.
[36] On the plurality of paradigms of rationality and involvement between them WELSCH, 1998, p. 21.
[37] Cf. WELSCH, 2000, p. 88.
[38] Cf. WELSCH, 1998, p. 27.

characterizing, in turn, the expectation stabilization in the sense of the non-operation of the own code, and consequently the functional dedifferentiation[39] between the systems.

The idea is to build "bridges of transition" between the various partial rationalities, which could provide, in the language of law of the world society, an alternative to avoid two inconvenient phenomena to its widespread reproduction: the "atomization"[40] caused by atavistic isolation of the state orders around its own sovereignty and the "imperialist expansion"[41] of a global constitutionalism little reflective about local and regional differences or unperceptive of its own limits.

Yet, in its limit, the transconstitutionalism proposal needs to deal with two problems: the first is the question of whether there is any competent body for the appraisal of issues involving the entanglement of the legal systems of multiple levels, and the second is the challenge of finding a legitimate way to the internal reading of decisions taken with reference to external elements, when the constitutional theory and legal doctrine remain asserting the national sovereignty[42].

For the first problem, Neves abandons the traditional institutionalist formula of creating a new body whenever new kinds of conflict are identified. The purpose of opening each one of the juridical orders involved for mutual learning and dialogue without last word implies, at institutional level, in the of emptying the need of a court holding the "competence of competence"[43] delegating the confronting of common constitutional problems to the sphere of negotiation by shared constitutional sovereignties as a way to provide greater decision legitimacy.

Regarding the second difficulty, the argument is seen from a perspective of legitimacy arising from the interdependence between the partial systems of law and

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[39] Cf. NEVES, 2009, p. 44. About the meaning of functional differentiation in luhmannian theory: Luhmann, 2006, pp. 471; NEVES, 2008, pp. 59-67; PHILIPPOPOULOS-Mihalopoulos, 2010, pp. 37-40. I dealt with specifically with the concept of functional differentiation in the evolutionary process of modernity and selectivity criteria involved in the relationship between politics and religion in CARVALHO, 2013, pp. 125-128.

[40] Cf. NEVES, 2009, p. 45.

[41] Cf. NEVES, 2009, p. 47.

[42] This phenomenon is called constitutional tradition of self sufficiency Cfc. NEVES, 2009, p. 144, which preserves an organization linked to a resistance model and emphasizes the need to enforce the sovereignty of the constitution against external normative referents which have not been validated internally or may be incompatible Cf NEVES, 2009, p. 258.

[43] Similar perspective is mentioned by Miguel Poiares Maduro proposing a "contrapunctual law" to the community of European states, accommodating the constitutional pluralism with Community law, so that each domain contributes to the important role of the other, deeming the reciprocity as fundamental the soundness of both legal systems, ensuring at the same time, the plurality of participation and the legitimacy of Community law. Cf. MADURO, 2003, p. 501-37.

politics with self fundament[44] capacity in world society. I.e., from assumptions of differentiation between various orders that see themselves as integrated parts of a single global system, its communications would be governed by coordination and not on the basis of sovereign autonomy.

Such coordination, in turn, prescind the definite primacy of one of the orders by setting as a legitimizing condition the fact that no such orders, including the public international law itself, may be presented as the last ratio discursive.

In contrast to the perception of Dieter Grimm[45], the work of Neves arises as a sharp criticism to the tendency manifested by the National States of remaining very close to maintaining a semantics of sovereignty less opened to a transconstitutional dialogue and more related to a strategic argumentation or rhetorical reference to other orders. This attitude is characterized by the absence of commitment to establish an appropriate complexly transversal rationality to deal with the phenomena of inclusion and exclusion on a global scale.

3. Many minds argument and the constitutional cosmopolitanism.

The effects of fragmentation on the law was also felt in the theoretical and practical setting of North American constitutional debate, which traditionally focused on the interpretation and application of its own precedents, demonstrated an astonishing indifference[46] of constitutionalists regarding the overall impact of the rise of the constitutionalism and hindered the strengthening of compared perspectives.

The U.S. Constitution does not define the position of international treaties and conventions in the hierarchy of the legal system. Experience with the breach of treaties between the Confederate States, one of the main reasons that drove the convention[47], was seen during the debates that led to the constitutional text as a limitation of competence to regulate on the issue in a broad way[48], including by the resistance of states, which viewed with suspicion the ability to remain bound by obligations derived from agreements that they had not participated directly.

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[44] Neves refers to a "plurality of cores of self reasoning, facing the same constitutional problems." Cf. NEVES, 2009, p. 125.
[45] Cf. GRIMM, 2004, p. 1-23.
[46] ACKERMAN, 1997, p. 773.
[47] In this sense it is the federalist paper n. 15, written by Hamilton while criticizing the Confederate system as insufficient for the maintenance of the Union, argued that the effectiveness of normative predictions always depended on local administrative authorities. See Hamilton et al, 1989, p. 89.
[48] HENKIN, Louis, 1996, p. 175.

Although the subject of treaties has not been regulated in detail in the Constitution[49], the Federalist Papers highlighted the importance of agreements with foreign nations, especially those related to war, peace and trade[50], as well as its value as source of law, like the other laws passed by the Congress, integrating adjudicating norms approved by all judges of the nation, but subjected to the standardization by a Superior Court[51].

The initial resistance of the American constitutional practice to the adjustments from the international relations reflected on the low number of treaties celebrated in the first ten years of the Constitution[52]. Some particularities of the configuration of the institutional model adopted are indicated by Louis Henkin[53] to explain the restrictions on treaties: the adoption of the federal form of government, the derived limits of the separation of powers and the assertion of the doctrine that on "domestic issues" there should not be any external influence.

In spite of the absence of the registration of the declaration of unconstitutionality of a legislative provision of international treaties and conventions, after more than two hundred years of the institutional history of the Supreme Court[54], the understanding that the rules laid down in those instruments undergo the formal provisions and the Bill of Rights of the Constitution was early consolidated in the American jurisprudence.[55]

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[49] There are only four references to treaties in the Constitution. The first (Article I, section 10) prohibits that states stablish treaties; the second (Article II, section2) establishes the competence of the President to make treaties, under the advice and consent of the Senate by two-thirds of its members; the third (ArticleIII, section2) lists the treaties as a source of law subject to examination by the judiciary; and the fourth (Article VI, clause 2) places the treaties sided with the Constitution and laws, as the supreme law to which all institutions and judges of the country are bound .

[50] John Jay, in the federalist article n. 64. Cf. HAMILTON *et al*, 1989, p. 432.

[51] In Madison´s words, in the paper n. 22: "*The treaties of the United States to have any force at all, must be considered as part of the law of the land. Their true import as far as respects individuals, must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted in the last resort, to one Supreme Tribunal."*Cf. HAMILTON *et al*, 1989, p. 143.

[52] Only fourteen treaties with foreign nations were concluded during the first ten years after independence (1776-1786), among them three with England to declare the suspension of War and set the terms of peace; and the other to establish diplomatic and trade relations, two of them with the Netherlands six with France, with Sweden, with Prussia and with Morocco. And only six other after ten years of the Constitution (1787-1797) Cf. Miller, 1931, p. 55-56. Not accounted treaties signed to define boundaries of the areas belonging to indigenous tribes.

[53] HENKIN, Louis, 1996, p. 185 ss.

[54] Cf. HENKIN, 1996, p. 185.

[55] This reading was evident in the trial of the case v. Geoffrey. Riggs 133 U.S. 258 (1890), when they prevailed over the interpretation of Clause 2 of Article VI, that treaties could have regulatory equivalence with the Constitution. Especially the votes of justices John Field and Calhoum, it was emphasized that treaties cannot authorize what the Constitution forbids. In the same sense, the dictum of justice Holmes, in case Missouri v. Holland U.S. 252 416 (1920): "The language of the Constitution as to the supremacy of treaties being general, the question before us is narrowed to an inquiry into the ground upon which the present supposed exception is placed. It is said that a treaty cannot be valid if it infringes the Constitution,

The reception of international law as a source of law for the United States, but also from the United States by far ends of the complexity of its application by judges and courts. In a country divided into 50 federal units, each one with appellate courts and state supreme courts, jurisdiction to consider matters involving international law was reserved to the federal courts, as defined in the case law Chisholm v. Georgia[56], yet in 1793.

Larry Backer[57] raises three peculiarities of the prevailing constitutional thought in the United States as restrictive factors to the use of non-derived sources of national law, all related to the preservation of power: the centrality of the discussion about the legitimacy of the methods of interpretation as a means of avoiding 'judicial despotism[58], the assertion of national law as a strategy in the dispute for space in international relations and, finally, the concern about the usurpation of the congressional power to legislate.

These specificities contributed to the construction of interpretative originalism as an expression of attachment to the foundation of the Constitution as well as skepticism[59] about the possibilities of transnational regulatory sources serving as basis for decisions of the Supreme Court.

More recently, the negative reactions to the use of aliens precedents have provoked even the actions of Congress, which proposed the enactment of laws

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that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do".

[56] The case discussed the payment of a debt still in the war of independence for the state of Georgia to the estate of Robert Farquhar, whose administrator was Alexander Chisholm, who decided to sue that state Supreme Court. The vote of the chief justice John Jay registered the following passage: "*United States were responsible to foreign nations for the conduct of each state, relative to the laws of nations, and the performance of treaties"*. The case was taken as a reference to the enactment of Amendment 11, enacted in 1794, which prohibits the federal courts jurisdiction over matters: "*The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.*" The understanding that it is solely up to federal courts the jurisdiction of cases involving the application of an international treaty or convention was further reaffirmed in the cases Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) and Zschernig v. Miller, 389 U.S. 429 (1968), dealing with international law, for internal adjudication as equivalent to federal law. See HENKIN, 1996. 238 and 241.

[57] Cf. BACKER, 2009, pp. 149 ss.

[58] At this particular point it is worth noting the doctrine of *stare decisis* and the application system of precedents developed in the common American law, which significantly restrict the starting points, as argumentative arsenal, from which the parties and judges benefit. See DUXBURY, 2008, p. 113.

[59] This was the position of Mark Tushnet, highlighting the legacy of Hamilton for whom "the ability to establish a good government was reserved to the people of the United States", so the content of the Constitution would be primarily determined by political considerations and not locally by councils or external recommendations. See Tushnet, 2008, pp. 1473 ss. The author admits, however, the globalization of domestic constitutional law, a shift caused by two phenomena: negotiations between transnational non-governmental organizations such as the European Court of Human Rights and Amnesty International (top-down processes); and the role of lawyers in disputes in the international market scenario (bottom-up processes). See TUSHNET, 2009, pp. 985.

prohibiting references to foreign rulings in judicial decisions in the United States. In this sense the proposals were “Reaffirmation of American Independence Act” (HRRes. 97, 109th Cong. 2005) and then the project called "Constitution Restoration Act" (S.520, 109th Cong. 2005 and HR 1070, 109th Cong. 2005), the latter providing for impeachment in the event of breach.

However, this tradition has been confronted with the pretension to universality of main principles of human rights, as well as the very idea of permanence of American representativeness as the protagonist in the promotion of human rights globally. Such factors would cause pressures not only on domestic politics and their bodies directly elected, but reach an understanding of the system of checks and balances in the judicial activity.

It is noticed then that the restrictions and safeguards laid down externally began to exert an influence also on the internal reproduction of the law, requiring the agencies involved the ability to deal with the increasing complexity of a multicenter legal system[60].

Dedicated to addressing the problems of constitutional hermeneutics in the North American context, the work of Cass Sunstein exposes the need that different points of view of the democratic society are taken into account by the methods of interpretation of the Constitution which, he says, is not restricted to the Judiciary.

To build the sense of many minds argument, Sunstein uses the known divergence between James Madison and Thomas Jefferson about the best form to amend the Constitutional text. The first argued that the changes should be reserved for extraordinary big occasions, through a formal rigorous process; while the second pointed to the difficulty of linking the future generations to the thinking of the founders of the Constitution, which should be reconsidered as the values of each generation, always remaining open to reforms.

The apparent victory of Madison´s position, reflected in the small number of formal changes of the constitution, is challenged by Sunstein in terms of what he called “Jefferson´s revenge”. The argument is that despite the few textual changes[61], the

[60] The achievement of Congress' Constitutional Relevance of Foreign Court Decisions, "with a debate between the justices Antonin Scalia, restrictive regarding foreign references, and Stephen Brayer, who is favorable, under some conditions (event held by Washington College of Law in (http://www.wcl.american.edu/secle/founders/2005/050113.cfm in 2005), and the growing number of works on dialogues between courts and transnational litigation, such as SLAUGHTER 2003 and JACKSON 2005; exemplify the increasing attention of American jurists to external judicial practices.

[61] The author cites as the only significant reforms the inclusion of the Bill of Rights in 1789; the amendments that abolished slavery, granted the right to vote to African Americans and women; expanded

changes have been the result of more dynamic processes of constitutional understanding over time, whether by the changing of social behavior or judgments of the Supreme Court which provide to it a new meaning.

The author argues that judges and courts in interpreting the Constitution do not act in a vacuum of sense, rather, they seek to base their decisions on a broad social support, following the logics of *the Condorcet jury theorem.* This theorem proposes that the probability of the correctness of the response to a matter - whose alternative, whether false or true - increases proportionally with the growth of the group of individuals who can answer it, since the majority rule is used and when it seems more likely that each person is mistaken.

For Sunstein, the Supreme Court of the United States hardly judge in disagreement with the constitutional interpretation rooted in the society´s opinion, which is due to two main reasons: a consequentialist and an epistemic one.

Concerning the consequentialism, it highlights that prudence is an inherent element of judicial activity whose goal is the promotion of social peace. If a decision has relevance capable of causing serious repercussions for the social order, these factors must be considered. To this end, Sunstein uses the metaphor: judges should decide what they feel appropriate, even if the sky might fall; however, if the possibility of the sky falling were real, judges should not adopt the solution conceived as correct.

The second argument is epistemic in the sense that it is not possible to believe that the judge is a perfect and infallible being. Considering the human fallibility, the judges are unable to provide the correct answer for all kinds of subjects subject to their exam. In doubtful cases, public manifestations can help the magistrate as an important clue about the correctness of his understanding.

The exercise of this epistemic aspect of the magistrates demands an understanding that the author names *judicial humility*[62], and gains significance whenever issues daily faced by the population are at stake, whether related to morality or to daily life issues. That's because facing cases, primarily technical or outside the knowledge of the largest share of the citizens, the tendency would be to give less importance to the public opinion.

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the power of the national government over the states; established the direct election to the Senate. SUNSTEIN, p. 2.

[62] Cf. SUNSTEIN, 2009, p. 165.

Furthermore, Sunstein notes that it would be relevant to consider whether the people's belief derives from a legitimate and adequately informed aspiration, or if it is just the result of a systematic influence of biased media or the interests of power. Moreover, we must not forget that many communicative agents, who participate of the public, opinion may just be following the current majority[63], without regarding the ideologies that move the positions at stake.

The assumption in which individuals that have doubts about a subject tend to follow the majority opinion is presented. Such reasoning, in his view, could be applied to constitutional interpretation in a comparative perspective, i.e. it would be more reliable to delegate decisions on dubious moral and political issues to large groups of people than to leave them to be solved by a small college of judges[64]. Then, Sunstein examines the adequacy of this argument in three interpretive trends: traditionalism, populism and cosmopolitanism.

When dealing with the cosmopolitan viewpoint, the author highlights the increasing attention that foreign precedents have received of the Supreme Court[65], placing the debate about the quotation of external references around the division of the court between conservatives and liberals, to affirm the strong resistance of the former before a relative acceptance of the latter group, especially in human rights issues[66], such as equality and discrimination based on sexual factors, freedom of speech and religion.

An example of the division between the justices on the feasibility of the use of foreign precedents are in the antagonistic positions of Atonin Scalia and Stephen Brayer. The first opposes[67] comparatist stances in defense of unilateralism, as representative of the nationalist jurisprudence, stating that the comparison would be relevant only during the writing of the Constitutional text and not in its interpretation.

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[63] Cf. SUNSTEIN, 2009, p. 52.
[64] SUNSTEIN, 2009, p. 10. A similar argument is raised by Jeremy Waldron as "doctrine of wisdom of the crowd", rescuing the idea of sovereignty in the political philosophy from Aristotle. Cf WALDRON, 2003, pp. 113 ss and WALDRON, 1999, pp. 88-89 and 160-164.
[65] *Lawrence v. Texas* (2003); *Roper v. Simons* (2005); *Grutter v. Bollinger* (2003); *Printz v. United States* (1997); *Planned Parenthood of Southeastern Pa v. Casey* (1992); *Foster v. Florida* (2002); *Elledge v. Florida* (1998); *Washington v. Glucksberg* (1997); *Atkins v. Virginia* (2002) and *Raines v. Byrd* (1997) are cited. Cf. SUNSTEIN, 2009, p. 187.
[66] Cf. SUNSTEIN, 2009, p. 188.
[67] In this direction was his manifestation in the trial of the case *Printz v. United States*521 US 898, (1997) and in *Roper v. Simons*73 US 4.153 (2005).

Yet, Brayer[68] is an explicit advocate of the use of external references, registering an increase of the range of options for the solution of common constitutional issues, when expanded the spectrum of comparison.

Also sustaining the need for this approach in the context of the Supreme Court Justice Stevens in the trial MacDonald v. Chicago, on the protection of the Second Amendment on the right to own and carry a fire arm registered that despising those references would be a silly demonstration of arrogance to "think that we have nothing to learn about the freedom of billions of people beyond our borders"[69].

Sunstein also points out that the Supreme Courts of other nations (South Africa, Ireland, Israel, Germany, Switzerland, Austria, Canada, UK, Italy and France) regularly consult foreign precedents, to a greater or lesser degree, in like manner, the Europe Justice Court and the European Court of Human Rights. The proposal means to analyze how the observation of different realities can improve the decision making process, serving as an example of application of the *theorem of the jury* and the defense of the constitutional cosmopolitanism.

The many minds argument cited by the author as a constitutional form of learning for young democracies, whose expansion of information contained in the judgments of the oldest nations can contribute to the consolidation of its own constitutional jurisprudence.

On the other hand, within a posture of inconsistent closure with the proposal of a dialogical constitutionalism, he believes that the constitutional cosmopolitanism would be less valuable to nations with a long democratic tradition. As his analysis strictly focuses on the United States and the large number of precedents established by the Supreme Court, Sunstein[70] notes that the consultation to foreign decisions only make the decision making process more complex by including external elements. There isn´t, however, an assessment of potential gains in terms of interpretation of the Constitution, especially in cases involving the application of fundamental rights, subject in which the

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[68] One example is his vote in the case *Printz v. U.S.,* when comparatively analyzed the system of national control of firearms in the American federalism with the example of the integration to the Swiss and German in the Treaty number 101 of the Council of Europe on the subject. Highlighting the rejection of the founding fathers to some characteristics of European federalism, but demonstrating that "their experience may, nonetheless, shed an empirical light over the consequences of different solutions to a common legal problem - in this case, the problem of reconciling the central authority with the need to preserve the freedom in increasing the autonomy of a smaller government entity".

[69] The judgment discussed the constitutionality of the reach of the Second Amendment to the states *MacDonald v. Chicago* 561 US 3025 (2010).

[70] Cf. SUNSEIN, 2009, p. 197.

American jurisprudence has problems, being adopted by other courts, even as counter example-or anti-model[71].

One of the problematic points of this approach is that this attitude reveals the asymmetry in the openness to other legal orders, considering that "*cuts of stronger countries in the international constellation tend not to suffer censoring of the American courts, while the underdeveloped or developing countries' are not taken seriously"*.[72] The selectivity concerning the desire to dialogue in the American judiciary is evidenced by the rejection of Chilean, Iranian and Romanian decisions, for various reasons, in contrast to the embracement of the analysis of the Israeli, French and British precedents.

Sunstein's argument loses in complexity and consistency when confronted, for example, with the productive work of the South African Court[73] regarding matters of fundamental rights[74], field that has shown significant advances in the global scenario.

It is clear that the evaluation of the meeting of some conditions, such as the observance of due process of law and the composition of the courts of the countries, to which reference is intended, marks an important feature in the design of a transconstitutional model. However, a load of selectivity strictly guided by geopolitical or economic interests in the choice of the origin and the sources of the dialogue between the courts may prove especially harmful to the multilateralism of these relations and also to the pluralism of the perspectives to be taken.

The risk here is the maintenance of "blind spots" when other experiences could serve as a mirror. Or worse, the resource of jurisprudential precedents as a tool to

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[71] This is the case of the categories of "establishment" and "free exercise", applied by the U.S. Supreme Court to interpret the right to religious freedom and the rule of closing the businesses on Sundays, and rejected by the Supreme Court of Canada. See KLUG, 2000, p. 609. In this sense also: SCHEPPELE, 2003, p. 296-324.

[72] Cf. NEVES, 2009, p. 185

[73] The art. 39, I, of the South African Constitution of 1996 expressly authorizes the use of international and foreign law in interpreting the clauses of his Bill of Rights. The development of reasoning by the Court based on this openness to foreign law has been called a hermeneutic technique of "extra-systemic inference". Cf. LOLLINI, 2012, p. 55.

[74] Are noteworthy: *State v. Makwanyane*, 1995 (3) SA 391 (CC), which abolished the death penalty, and has been considered as a model for discussion of the issue in the U.S. Supreme Court (cf. KENDE 2006, pp. 241-250) in cases involving defendants with mental retardation - *Atkins v. Virginia, 536 U.S.* 304 (2002) or minors - the aforementioned *Roper v. Simmons (2005);* also the case *Minister of Home Affairs v. Fourie, 2005 (3) SA 429 (SCA),* applied the constitutional principles of equality and non-discrimination to sustain the constitutionality of marriage between persons of the same sex, whose grounds of decision were cited extensively in the *Portuguese TC Judgment* 359/2009, which also recognized the homoaffective marriage; as well as the important precedent on the right to religious freedom and diversity right in *Juleiga Daniels v Campbelln. Robin Grieve 2004 CCT 40/03*, about the effects of inheritance of monogamous and polygamous Muslim marriage.

confused and uncritical importation[75] with the constitutional reality and complexity of the discussion involved, besides the possibility of a purely rhetorical exploitation of references, just to reinforce a position already taken or to liberally show a sort of scholarship, in the detriment of the reciprocity of assumptions that this kind of experience intends to provide, reducing it to its symbolic dimension.

Out of the strictly legal field, Sunstein claims that government agents, legislators or members of the public administration, may not ignore how other countries have ruled on issues such as national security, climatic changes, labor laws, amongst other issues involving extraterritorial implications.

Although it would be still possible to register the resistance in the U.S. constitutional debate to expand the reception of foreign precedents, as in the example of Cass Sunstein position, some authors[76] have been devoted to show how the observation of the decisions of other countries' courts can contribute to the formation of a shared dimension of constitutionalism[77]. Besides, that perspective does not mean the abdication of institutes in the domestic law, but the willingness for the understanding of constitutional experiences as an external correction mechanism of the distortions caused by the application of the own national law.

4. Final Considerations

A balance between the two propositions shows an important point of convergence: the fight against traditional formalism of the constitutional theory in considering the constitutions as true statutes that contain within itself the adjustment

[75] It should be noted here that the risk aversion of "colonialism" (NEVES, 2009, p. 182) between the U.S. courts can lead to also undesirable problem of parochial isolation of the debate, and its consequent infantilization in the context of growing complexity of global legal discussions.

[76] This is the case, among others, of the PERJU (2010, pp. 326-353) proposing a reformulation of the domestic constitutionalism under different normative dimensions attentive to the asymmetry between the levels of freedom and equality, but guided by a responsive self-correction against the formalism that hides to those asymmetries and waterproof them through rhetorical strategies as, on several occasions, happens with the arguments of the pondering of the principles and proportionality. Also: ACKERMAN (1994, pp. 516-535 and 1997, pp. 771-797); SLAUGHTER (2003, p. 191-219) and JACKSON (2005, p. 109-128).

[77] Expression used by James Tully (TULLY, 2008, p. 336), in an analysis on the weakening of the semantics of "constituent power" in western nations due to the empowerment of financial and military groups, and the comparison with the practices of legal organization in Eastern countries. Tully points the dialogue as an alternative to building a "non imperial" model of coexistence amongst constitutional democracies. Also in the propositional sense of the dialogue as a source of convergence, without excluding the adversity, Aida Torres (TORRES, 2009, p. 109-130) shows several positive points of this perspective for resolution of interpretive conflicts involving disputes of fundamental rights between the European courts, which, ultimately, help to enhance the legitimacy of the European Court of Justice, preserving the constitutional pluralism of the continental dimension of the European Union.

between the power and the law as a result of sovereign choice, with the ability to link various normative expectations in a given (spatial and temporal) space. Idea that has lost strength as an explanatory category because of the growing complexity of the political and legal relationships, whether at local, regional and global levels.

The way the proposals describe the characteristics of this movement of the hierarchical fragmentation of the formal semantics of the constitution reveals , however, the essential distinction that marks the division of the involvement of both discourses.

While Neves' idea of the transconstitutionalism seeks to articulate the building of "bridges of transition", drawing on structural coupling and partial rationalities between different legal systems, which are opened to mutual learning without borders, taking into account the double contingency [78] of these relationships; Sunstein´s constitutional cosmopolitanism bets on the hermeneutical variants directed to the text of the constitution as mechanisms of raising the consistency as more perspectives come to interpret it (many minds argument), including the contribution of external (foreign precedents)[79]. However, Sunstein's focus on the functioning of the U.S. judicial system makes him move away from the usefulness of the application of other nations' decisions by the Supreme Court.

The difficulties of dealing with the two views also derive from the normative claims that the authors fail to reveal. Methodologically, the formation of a spectrum conducive to the development of the "transconstitutional dialogue" becomes hostage to the spontaneous opening to various orders (state, international, supranational and transnational), without which the re-articulation of common constitutional issues would not be achieved taking into account the position of the *other*, i.e., of the self justification based on the willingness to the otherness, when missing one superior order available or an institution with unilateral coercive power. While the posture of "cosmopolitanism" of which Sunstein speaks, follows exactly in reverse: take an *a priori* constituent element of its own internal operations (the system of binding precedent and quantitative variation of these elements) to deny the usefulness to the reception of the constitutional experiences built on other jurisdictions.

This argument, as well as the resistance of the political institutions of the United States, and even part of the Supreme Court, shows limitations to the assumption of the frankly opened posture the U.S. courts to the other courts around the globe, indicating

[78] Cf. NEVES, 2009, p. 270.
[79] Cf. SUNSTEIN, 2009, p. 188.

on the other hand, that the selectivity around the interests of the most powerful orders reinforces the asymmetry of treatment in the relations between that country and others, with reflections in the work of international and transnational organizations.

Therefore, several examples[80] show the strategic performance of the foreign policy of the United States, which concentrate power and preserve interests in detriment of the resolution of international courts or the provision of treaties, when not directly reaching the sphere of sovereignty of other countries[81].

The maintenance of a continued resistance model against the reciprocity of these relationships, in turn, hinders the construction of a different order of communication[82] that becomes feasible in the structural level of the world society, capable of enabling two landmark constitutional premises of the constitutional semantics: the reduction of particularisms of ethnic-religious nature that impede the exercise of freedom and the promotion of less unequal levels of distribution and access to essential goods, creating space for a more complex equality regime .

If the structural coupling between the politics and the legal systems was the way that constitutionalism managed to establish its legitimacy, albeit narrowly, in the context of building the modern states, I understand that the hyper complex context, in which the interwoven relations into the current world society, launches a significantly riskier challenge to the autonomy of law and its function to promote a consistent generalization of normative expectations.

The Lack of a language able to justify that their juridical system operations are no longer guided by a hierarchical model, but, paradoxically, there are no structural and

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[80] Here the refusal to sign the Kyoto Protocol may be cited, which sets targets for reducing the emission of gases that cause the greenhouse effect; rejecting the jurisdiction of the International Criminal Court, established by the Rome Statute on the 17 July 1998, with jurisdiction over genocide, war crimes and crimes against humanity; refusal, similarly only to Somalia in ratifying the Convention on the Rights of the Child adopted by the UN Assembly in 1989; repeated noncompliance of the decisions of the International Court of Justice (The Hague) based on Art. 36, the Vienna Convention 1963 of which the U.S. is a signatory, on consular assistance to foreign detainees in foreign territory - Running the death penalty against injunctions that suspended the death penalty until the trial (Avena and José Ernesto Mendellín case).

[81] It can be registered here the recent denounces of the formation of business and politics espionage network involving the use of internet, as disclosed by ex-CIA agent, Edward Snowden; and the revelation by Wikileaks of data on the performance of the U.S. State Department in managing resources for military training in order to promote the coup in Paraguay, which overthrew President Fernando Lugo in 2012; the ban on the presidential plane from Bolivia, which was returning from Russia to fly the French, Spanish, Italian and Portuguese territories, and then the high jacking of the aircraft at the airport in Vienna (Austria), during fourteen hours by the suspicion that the flight housed Edward Snowden; besides the recent cases of deposition of Hosni Mubarak, and Muhammed Morsi by a military joint in Egypt and Barak Obama's decision to invade Syria.

[82] The guarantee of the communication possibilities is for Luhmann the main feature of the fundamental rights whose potential function as a modern institution would be to react against the indifferentiation of social order. Cf. Luhmann 2010, p. 98-99.

semantic conditions suitable to its heterarchical functioning, reoriented by horizontal intertwines, hence, the exposure of constitutional values (freedom and equality) is exposed, in a larger way, to the destructive effects of the thoughtless expansion of the economy. This is a growing problem that derives from the political consequences of the concentration of power, which is not subjected to procedures established by legitimacy criteria, whether internal or external to the States, setting what might be called disorganized complexity.

To compare similarities and distinctions, as I have tried in this text regarding the two theoretical perspectives approached, is intended to be an alternative to the atavistic isolation in which the constitutional theory traditionally has sought refuge, almost always to crystallize concepts like "sovereignty" and "constituent power". It seems to me that the dilemma needs to be reappropriated from two standpoints, whose choice reveals the understanding of the very issue.

The first would be crediting to the spontaneous opening of the legal orders distinct to the dialogue, the development of a common constitutional grammar for common questions, which would depend, in some cases, on the relationship between center and periphery, and on an almost moral attitude of the difference, without which the very contingency of the situation, and the range of possibilities would remain invisibilized. The second would be in the creation of conditions so that the increasing complexity of these relationships can be converted into conflicts, whose agendas reach certain degrees of generalization capable of causing sufficient pressure to force the change of postures so closed to dialogue.

Finally, the choice between the theoretical categories of the *transconstitutionalism* or the *constitutional cosmopolitism* cannot bring answers or a methodological roadmap to reduce the risks involved in the decision making, facing the growing complexity of the elements at stake in the global political-legal society board, rather they meet the function of keeping alert an assumption that could very well be summarized in the phrase of Levinas: "my freedom is not the last word, I'm not alone."[83]

[83] LEVINAS, 2011, p. 92.

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