

A constitutionalism “of” the Global South? Epistemological reflections on emerging constitutional trends

Um constitucionalismo “do” Sul Global? Reflexões epistemológicas sobre tendências constitucionais emergentes

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Abstract

Taking into consideration the recent studies on the “constitutionalism of the global south”, the aim of this article is to critically analyze the applicability of the mentioned concept, highlighting the potentialities and inadequacies of its theoretical construction. The hypothesis states that notwithstanding the relative frailties on the concept of “global south”, it is possible to conceive the emergency of a “constitutionalism of the global south”, grounded on singular innovative experiences of several “southern” countries, which are relevant contributions for the common heritage of democratic constitutionalism. The article, an outcome of researches carried out between Brazil and Italy, with the use of hypothetical-deductive method, is methodologically grounded in the field of constitutional theory, with some elements of comparative constitutional law, and is divided in three topics: I. Defining constitutionalism: concept and evolutions; II. Constitutionalism, the global north and the south; III. Constitutionalism of the global south: a critical analysis. As results, the hypothesis has been partially confirmed, as it has been evidenced the inadequacy of the concept “constitutionalism of the

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global south”, for its vagueness and ambiguous delimitation. Therefore, it would be more appropriate to comprehend the constitutionalism of the global south as a “constitutionalism *from* the global south”, as an attempt to emphasize the diversity on global south constitutionalisms and, through this, increase the analytical perspective of contemporary constitutionalism complexity. Thus, in a “multicentered approach”, constitutional theory fits a more adequate position to analyze constitutional innovations, considering that center and periphery are conditional concepts, especially when referring to contemporary constitutionalism.

Keywords: Constitutionalism, Global south, Constitutionalism of the global south.

Resumo

Considerando os estudos recentes sobre o “constitucionalismo do sul global”, o objetivo deste artigo é analisar criticamente a aplicabilidade deste conceito, destacando as potencialidades e inadequações da sua construção teórica. A hipótese afirma que apesar das fragilidades relativas ao conceito de “sul global”, é possível conceber a emergência de um “constitucionalismo do sul global”, alicerçado em experiências inovadoras singulares de vários países do “sul”, que são contribuições relevantes para o patrimônio comum do constitucionalismo democrático. O artigo, resultado de pesquisas realizadas entre o Brasil e a Itália, com o uso do método hipotético dedutivo, fundamenta-se metodologicamente no campo da teoria constitucional, com elementos do direito constitucional comparado e está dividido em três tópicos: I. Definindo o constitucionalismo: conceito e evoluções; II. Os constitucionalismos, o norte e o sul global; III. Constitucionalismo do sul global: uma análise crítica. Como resultado, há a confirmação parcial da hipótese, observada a vulnerabilidade do “constitucionalismo do sul global” como categoria de análise, por sua imprecisão e ambígua determinação. Mais apropriado, portanto, compreender o constitucionalismo “do” sul global como constitucionalismo “desde o” sul global”, com o intuito de evidenciar as diversidades nos constitucionalismos do sul global e a partir do sul global aumentar a perspectiva para compreender a complexidade do constitucionalismo no mundo hodierno. Assim, em uma “abordagem multicêntrica”, a teoria constitucional se coloca em uma posição mais adequada para analisar as inovações constitucionais aportadas, considerando que centro e periferia são conceitos condicionados, especialmente quando se referem ao constitucionalismo contemporâneo.

Palavras-chave: Constitucionalismo, Sul global, Constitucionalismo do sul global.

Introduction

Taken into consideration the modern comprehension of the Constitution as a Charter of rights based on power rationalization, it's reasonable to affirm that, historically, modern constitutionalism has emerged in United States and France at the end of the 18th century.

Following the heels of the insurgent modern liberal thought, constitutionalism stood as an instrument for limiting state government, by separating branches of powers and guaranteeing citizens’ rights by a formal written document, the Constitution. Since its birth, constitutional texts and constitutionalism have spread Worldwide, especially in the Western world. In like manner, new rights have gradually integrated the range of rights that in one first step was essentially “liberal”, opening up towards new dimensions and new perspectives – as it is the case of “social constitutionalism”. After the Second World War, the “internationalization” of modern constitutionalism rationale and values has taken place, turning it difficult to conceive a contemporary nation-state without any reference to a constitutional text.

It is evident, therefore, that modern constitutionalism emerged in a specific global area – *Anglo-Saxon America* and *Western Europe* –, which were the economically, politically and symbolically dominant during the 19th and 20th centuries – and have also concentrated a several part of academic legal production – categorized since the fall of the Berlin wall as “*Global North*”³. Therefore, other parts of the world – namely Latin America, Africa and Asia –, called as “*Global South*”, have been designated as periphery or semi-periphery of modern constitutional normative production and constitutional thought, even though some of these areas have also had a tradition in modern constitutionalism since the 19th century – which is particularly the case of Latin America.

This geopolitical context has been recently questioned, with the expansion and diffusion of the flows of constitutional theories and the circulation of constitutional models, triggered by economic and political globalization, which stimulated the dialogue between different constitutional cultures, not only in a north-south direction, but also in a south-north and south-south ones. The most recent innovations in the scope of constitutional norms (Ecuador, Bolivia, Nicaragua, Tunisia, Bhutan, just to cite some examples) and constitutional justice (Brazil, South Africa, Colombia, India, among others), point towards the possibility of constructing a “*constitutionalism of the Global South*”. This is the thesis of Colombian constitutionalist Daniel Bonilla Maldonado, discussed in his homonymous book, in which he has opened the academic discussion on this topic.

However, it remains a series of epistemological questions related to the possibility of conceiving a true “constitutionalism of the global south”, especially due to the intrinsic diversity that characterize the affirmation and consolidation of modern constitutionalism both in global north and south. Even so, the recent contributions to constitutional theory and practice that come from the global south have the potential to reshape modern constitutional experience and enrich constitutional thought and theory, triggering dialogue among different constitutional cultures and epistemologies, as well as enrich constitutional debate and the formulation of new theoretical perspectives and methodologies.

Taken into account this premises, the aim of this article is to critically analyze the emergence of the concept of “constitutionalism of the global south”, highlighting the potentialities and inadequacies of its theoretical construction. The hypothesis states that notwithstanding the relative frailties related to the concept of “global south”, it is possible to

³ For an in-depth analysis, see: Santos, 2010; Amirante, 2020; Amirante, 2015.

conceive its emergency, grounded on singular innovative experiences of several “southern” countries, which are relevant contributions for the common heritage of democratic constitutionalism. The article is methodologically grounded in the field of constitutional theory, with some elements of comparative constitutional law, and is divided into three parts: I – Defining constitutionalism: concept and evolutions; II – Constitutionalisms, the global north and the south; III – Constitutionalism of the global south: a critical analysis.

Defining constitutionalism: concept and evolutions

Constitutionalism, as a modern ideal, is an outcome of the liberal revolutions of 18th century. It is, in its very origin, one of the concrete consequences of French and American revolutions, both being understood as processes of affirmation of liberal principles and values, which have been projected into political and legal fields. In this regard, constitutionalism is grounded on the necessity to: 1) guarantee both formally and concretely the rights of citizens, and 2) impose limits to the power of state and governments, 3) by the means of a written text (Canotilho, 2011). Dieter Grimm points out that the modern concept of “constitution” was established in a “normative” sense, highlighting that “the constitution represents a specific type of legalization of political rule that is linked to historical conditions” (Grimm, 2016, p. 1). Thus, it is possible to conceive that constitutionalism is a political, social, cultural and legal “*movement*” that aims to affirm the normative basis of social cohabitation and reaffirm the ideals enacted in constitutional texts by legal and political institutions.

In a theoretical-philosophical perspective, it can be stated that constitutionalism was born with a humanistic root and with a universalist vocation⁴, two characteristics that stem, at least in a formalistic point of view, from the intrinsic relation between “rights of man” and fundamental freedoms. In this regard, since the 18th century declarations of rights and liberal constitutions, there has been an emancipatory bias, by the positivation of a set of inalienable rights, congregating freedom and liberties with equality – at least in a formal dimension – and fraternity⁵. Hence, in the historical route of modern constitutionalism, the enactment of a new text in different countries witnesses the evolutions⁶ that contribute to updating it, be it in what relates to the protection of the rights of man (Bobbio, 1992), or even in what it comes to the separation of powers – but not overcoming its original fundamentals.

Grounded on liberal ideals, “liberal constitutionalism” is characterized by the recognition of liberty rights, that is, liberties for individuals against the State. Following the “natural law”

⁴ For an in-depth analysis, see: Onida, 2008.

⁵ Both the *Virginia Declaration of Rights* (1776) and the *Declaration of the Rights of Man and of the Citizen* (1789) bring up an incipient conception of freedom, equality and fraternity as an affirmation of the value of human dignity and the rights arising from it. Therefore, it was marked by an emancipatory and revolutionary idea, even if it has not reached its potential in practice and even if this affirmation may seem restrictive or precarious today, considering the contemporary contours of the political demands for emancipation in different spaces of social interactions. Thus, it can be inferred that these declarations already brought in the early beginning the openness towards the recognition of rights and subjects of rights as opposed to the arbitrary exercise of power, an open perspective that in the historical course of social movements’ struggles have incorporated new guidelines towards the resignification of equality and fraternity or solidarity. In this sense, the analysis proposed by Etienne Balibar in “The frontiers of democracy” is profoundly insightful: Balibar, 1993.

⁶ “Evolutions” is here understood in the sense of *movements*, advances and backtracking, not necessarily an evolutive linear and irreversible process towards progress and human development.

thought – from authors such as John Locke (1980), as an example – the “natural rights”, such as life, property and freedom, were formally granted in Constitutions. Viktor Vanberg highlights that the history of liberal constitutionalism, beyond its theoretical tension with democratic ideal⁷ also insurgent at that time, can be read as “*a liberal constitutionalism*”, which is related to the need to provide institutional guarantees for the liberties of individuals, and as “*a constitutional liberalism*”, which is related to the need to protect the liberty of individuals to choose the constitutional arrangement in which they want and wish to live” (Vanberg, 2011, p. 3). Those two dimensions and elements of liberal constitutionalism scores its development both in Europe and in the Americas. However, the contradictions related to the praxis of classic liberalism (Losurdo, 2005), associated with the demands for social justice and material equality, triggered the birth of “social constitutionalism”.

The first “social” constitution can be identified in Mexico in 1917, as the first constitution that has recognized “social rights” – being it an outcome of the Mexican Revolution. The constitution states the right to mandatory and free education as an obligation of the State to provide (art. 3) and also recognizes worker’s rights (art. 123). This constitution served as an inspiration, as the Russian (1918) and the Weimar Constitution (1919) ones, given a universal resonance to social constitutionalism (Laguardia, 1993, p. 63). In this constitutional profile, the affirmation of the principles related to liberty rights and liberal democracy with a social dimension that projected itself as an institutional recognition of popular revindications⁸. Indeed, social constitutionalism has reshaped the sense of modern democracy, laying on new attributions for the State, that had to get engaged in positive actions (Bonavides, 2007). However, not all constitutions worldwide have formally recognized social rights, remaining in a classic liberal model⁹.

Another important timeline for modern constitutionalism was the end of the Second World War, which boosted the enactment of new constitutions in Europe and other parts of the globe. The constitutions of Italy (1948) and Western Germany (Fundamental Law of Bonn, 1949) opened a new constitutional chapter, towards the protection of human dignity in its social dimensions as a fundamental principle of the constitutional state. Inspired by the creation of United Nations (1945) and the *Universal Declaration of Human Rights* (1948)¹⁰, the new constitutions recognized principles that went beyond the established molds of liberal and social constitutionalism. Three essential characteristics of this new constitutional chapter: 1) the expansion of the fundamental rights; 2) the enforcement and empowerment of constitutional justice by constitutional courts as guardians of the Constitution, increasing the constitutional “formants”; 3) the explicitly acknowledgement of “die normative kraft der

⁷ For further information on this topic, see: Habermas, 1992.

⁸ “La Constitución mexicana fué el modelo en muchos casos y el documento precursor, en este vasto movimiento del constitucionalismo social. En la dinámica del proceso revolucionario anterior a la aprobación de la Constitución, se fueron planteando las características que lo definirían: la reafirmación por los principios de democracia liberal junto al ingrediente social que pugnaria por el reconocimiento institucional de las reivindicaciones populares”, Laguardia, 1993, p. 67; Our translation from: “The Mexican Constitution was the model in many cases and the forerunner document in this vast movement of social constitutionalism. In the dynamics of the revolutionary process prior to the approval of the Constitution, the characteristics that would define it were raised: the reaffirmation of the principles of liberal democracy together with the social element that would project the institutional recognition of popular demands”.

⁹ The Constitution of the United States is a clear example.

¹⁰ See: Tushnet, 2009; Ackerman, 1997.

Verfassung”, as stated by Konrad Hesse (1959).

Since then, the new constitutions enacted worldwide have incorporated “new rights” and “new subjects of rights”, adapting the constitutional design to the specific national and regional forms of organization and social composition (Tully, 1995). Collective rights merged the set of fundamental rights, as is the case of environmental rights, cultural rights, minority’s rights, among others. Therefore, it is also noticeable that there was a transformation in “constitutional engineering”, as an improvement of patterns for the decentralization and subdivision of the powers and main functions of state government, being it through the “redesign of classical federalism” – by recognizing regional and local dynamics of autonomy, even inside unitary states, or by the establishment of “new branches of power”¹¹. Indeed, it can be affirmed that these processes constitute “new constitutional movements”, that reinterpret the carved fundamentals of classic constitutionalism.

More recently, globalization processes, transnational relations, expansion and specializations of international law have provoked direct transformations in constitutional law and democratic constitutionalism. Hence, constitutional dynamics also have been “globalized”, especially due to the actions of International Organizations, International non-Governmental Organizations, International Tribunals, processes of international integration and also by the International Human Rights Protection System. In this regard, new concepts have been added in order to reinterpret the new outlines of constitutionalism’s global governance (Teubner, 2012; Neves, 2013; Neves, 2015). Referring to the notion of “global constitutionalism”, Ana Peters points out that it means “that the respective principles, institutions, and mechanisms can and should be used as parameters to inspire strategies for the improvement of the legitimacy of an international legal order and institutions without asking for a world state” (Peters, 2015). The recent discussions on the possibility or not to enact a *constitution of European Union* clearly exemplifies the current theoretical discussions of modern constitutionalism on the field of the new rearticulations as supranational constitutionalism, interconstitutionalism and transconstitutionalism.

However, as an acquisitive evolution of the contemporary constitutionalism, constitutional texts should be currently positioned at the centrality of legal systems – or at their “top” if the Kelsenian perspective is adopted –, having a vital role in constructing legal, political and cultural identity and ways of living in several Nation-States – especially those in Western tradition – but also in several other countries that do not belong to this tradition and that have undergone recent processes of deep political change. Constitutional justice also plays a relevant role in this scenario. Undeniably, Constitutional Courts assumed a central role in contemporary constitutional democracies, as a “maximum interpreter” of the Constitution their presence on the political decision making became recurrent¹² – far from the prudence and self-constraint characteristics of the classical model.

¹¹ As examples, there are the cases of Venezuela (1999), Ecuador (2008) and Bolivia (2009) constitutions, that have created new parallel control institutions grounded on citizen participation, respectively the “*Poder Ciudadano*”, “*Control Social*” and “*Quinto Poder*”.

¹² Increasing the debate about the judicial activism, “judicialization of politics” and legitimacy of *judicial review*. For a deep analysis, see: Hirschl, 2004; Tate and Vallinder, 1995; Omaggio, 2011.

These transformations have reshaped the constitutionalism in theory and *praxis*, taking of new influxes on the constitutional and social reciprocal conditioning dynamics. Nevertheless, considering the historical and theoretical evolutions, in order to keep alive its humanistic roots, modern constitutionalism may be conceived as a *continuous changing and incomplete revolutionary process*. Since it feeds itself of normative, jurisprudential and theoretical innovations that follow the evolutions and demands of society, politics and culture. In this sense, constitutionalism carries out and prospects an intrinsic utopian dimension¹³, directly related to human emancipation and the safeguard of life in its different dimensions, insofar as the legal and political system and civil society – through democratic participation by constitutional and political procedures – get involved in the dynamic of turning effective fundamental rights, and thus, taking substantial measures to guarantee the quality of life in social interactions.

In this context, these transformations were marked by the consolidation of *Democratic State of Law*, and by the plural reconfiguration of *democratic constitutional culture*, processes of high relevance for analysis conducted in the field of comparative constitutional law. These processes triggered the development of constitutional dialogues inside Constitutional Courts, Parliaments and also International Organizations, Non-Governmental Organizations and transnational public opinion. Pushing, thus, the rapprochement among different traditions of law in analyzing common constitutional problems. Likewise, highlighting the different (multi)levels of legal protection that are related to transconstitutional problems. Therefore, the “complexification” of modern constitutionalism, which takes shape in its current multifaceted configuration, instead of producing “standardization” of constitutional texts, expands the possibilities for circulation of different constitutional models and diffusion of constitutional policies, and boosts a constructive dialogue between different constitutional cultures across the globe.

Constitutionalism, the global north and the south

Taking into consideration the recent developments of contemporary constitutionalism at the global level and the intrinsic “complexification” of constitutional law systems, the Colombian constitutionalist Daniel Bonilla Maldonado, grounded in an epistemological analysis of modern constitutionalism, states that central concepts and definitions of constitutional law continue to be localized in few numbers of “authoritative interpreters”¹⁴. The United States of America’s *Supreme Court*, the German *Federal Constitutional Court (Bundesverfassungsgericht)*, and the *European Court of Human Rights* are, as states Maldonado, considered authoritative in contemporary constitutionalism, so their decisions are strongly accepted, often uncritically, by legal scholars and jurists worldwide, standing as paradigmatic,

¹³ A classical analysis on this perspective: Rousseau, 2016. Focalizing the prospective dimension of human rights and fundamental rights, pillars of contemporary constitutionalism, see: Melo and Burckhart, 2016.

¹⁴ “Yet the number of authoritative interpreters of this grammar is relatively small. Only a few institutions – such as the Supreme Court of the United States, the European Court of Human Rights, and the German Constitutional Court – are considered paradigmatic operators and enforcers of modern constitutionalism’s basic rules and principles” (Maldonado, 2013, p. 2-3).

overestimated and indisputable constitutional verdicts. In this sense,

They are the ones responsible for defining and solving key contemporary political and legal problems by giving specific content to modern constitutionalism’s rules and principles. The answers that these institutions give to questions like “What are the limits of judicial review?” “What is the meaning of the principle of separation of powers?” “Are social and economic rights mere political aspirations?” “How should cultural minorities be recognized and accommodated?” “Can security trump individual rights?” and “What are the rights of immigrants?” are considered by most legal communities to fundamentally enable the connection of modern constitutionalism to the realities of contemporary polities (Maldonado, 2013, p. 3).

Consequently, this uncritical perception impacts the theoretic field. That’s why, according to Maldonado’s analysis, authors as John Rawls, Robert Nozick, Charles Taylor, are considered “authoritative” “for comprehending, transforming and updating the basic components of modern constitutionalism” (Maldonado, 2013, p. 4). These scholars are known in most parts of the global legal academia and are constantly cited in constitutional law and constitutional philosophy papers and researches, as authentic interpreters of constitutional questions. Referred authors, however, come from the cultural context of northern legal academia, from western Europe and Anglo-Saxon America. In making this observation, Maldonado aims to emphasize that “the politics of constitutional legal and political knowledge has an unwritten but firmly entrenched hierarchy” (Maldonado, 2013, p. 4). This “unwritten hierarchy” is established by reproducing global inequalities, especially the inequities regarding economic development, between global north and south. Thus, “in this hierarchy, the scholarship and legal products created by the Global South occupy a particularly low level” (Maldonado, 2013, p. 5) inside constitutional theory. It is hardly evidenced by the low incidence of citations from global south scholars in global north legal literature in discussing basic concepts related to constitutionalism¹⁵.

Maldonado (2013, p. 5-11) points out that there are at least five reasons for this conjuncture that are inscribed in the way in which scholars from the global north “conceives” the Global South.

The first one affirms that laws and legal systems from the south are considered second components of the world’s major legal families. In this sense, Latin America would be only a weak member of civil law family, Africa would be a young and naïve participant in the Anglo-American common law tradition, Eastern Europe would only realize a mix between remaining and obsolete socialist legal family and civil law family, and Asia would reproduce, each country in its way, the former colonial legal systems. So, these global south’s normativities live together with some aspects of autochthonous normativities, but the latter remain subordinate to State “official law”, that reproduces global north models. Thus, it would not be a thought-

¹⁵ It is extraordinary to hear the name of a scholar or a legal institution from the Global South in this dialogue. The jurisprudence of a Global South court is very seldom mentioned by the specialized literature when discussing the meaning of key concepts of modern constitutionalism. It is very rare to see a course on comparative constitutional law in a North American or Western European university that includes a section about the constitutional law of a country in the Global South (Maldonado, 2013, p. 5).

provoking activity to study or research global south law and constitutionalism, because it is only the reproduction of westernized legal concepts adapted to other social and political realities, says the standardized global north rationale.

The second reason affirms that law’s effectivity in the global south is very low compared to the global north, and because of that, the south does have a weak legal production in terms of law theory. Thus, the rationale of the north is to not take in consideration the studies produced by global south scholars, because they tend to be considered “useless”, and it would only be interesting and relevant to study and research southern law and constitutionalism as a source of legal sociology – with an emphasis in law’s ineffectiveness –, but not approaching law theory.

The third reason is related to the characteristic of legal formalism in the global south, by which the northern rationale arguments that, in the south, law tends to remain closed and function in a mechanical dynamic. It inevitably deepens the distance between text and context, linking the form of thinking and practicing law in the south to the classic legal models of civil and common law families, historically overcome. In this rationale, it would not be interesting to study and research the constitutions of global south, because they are not concerned with the central theoretical debates of contemporary constitutionalism.

The fourth reason, says Maldonado, affirms that legal north academy is more robust than the southern ones. The number of scientific production and specialized reviews is greater in the north than in the south, likewise institutional quality control and academic research in the field of law, in general, are elements that only recently begun to be discussed and developed in the global south.

The fifth and last reason stated by Maldonado refers to the parochial character of legal north academy towards the south. Indeed, global south scholars are rarely invited to academic events taken in the north, where knowledge exchange among different researchers may happen. According to Maldonado, it discourages a fruitful scientific dialogue between scholars and legal institutions from the global north with the global south. It can be defined as a sort of epistemic closure, in which dialogue might not occur.

Those five reasons pointed by Maldonado are projected in three *assumptions* that implicitly govern the relations between legal academy of global north and south. The first one is “the argument of the production well”, in which “states that the only context for the production of the knowledge is the legal academia in the North” (Maldonado, 2013, p. 12), whereas the intellectual production from the south “is considered weak reproduction of the knowledge generated in the north, a form of diffusion or a mere local application of the same” (Maldonado, 2013, p. 12). It generates the second assumption, called by Maldonado as “protected geographical indication”. It indicates that the mere origin of knowledge – at the global north – automatically puts it as relevant, in order to negatively mark academic products from the global south only because of its origin, being it only considered “legitimate” when approved by scholars from the global north. The third and last assumption pointed by Maldonado is called “effective operator”, and states that scholars and institutions from the north are “much better trained to make effective and legitimate use of legal knowledge” than the ones from the south.

However, even though Maldonado assumes to be true that formalism is predominant in many parts of the global south legal academy, and legal north academy is self-centered, not being interested in what happens outside its borders, these arguments are questionable both from a descriptive than from a normative point of view. These arguments “ignore the heterogeneity of legal academic communities” (Maldonado, 2013, p. 14), both in north and south. In fact, both realities are marked by intrinsic diversity, so it is noticeable internal weakness in academic production both in north and south, and high-quality academic research also inside both geographical contexts. Likewise, not only formalism has been the unique legal concept of different legal communities from the south, but there are various examples of normative and theoretical innovations that comes from the global south academy and law¹⁶.

Indeed, Maldonado brings up innumerable recent innovations that come from global south legal academy and institutions. Those are direct contributions for the dialogue on constitutionalism, for the reinterpretation and contextualization of central categories of legal-constitutional debate that are an outcome of Constitutional Justice – a “*formant*”¹⁷ that Maldonado focalizes more precisely in his analysis – as in new normative and theoretical approaches. Taking in consideration these legal-constitutional innovations, that are shaped by the internationalization of contemporary democratic constitutionalism and by the dialogue between and among jurisdictions of global south countries, Maldonado questions if is it possible to conceive the emergency of an authentic *constitutionalism of the global south*?

(a) The creative courts of the global south

In his book, Maldonado analyzes three constitutional courts experiences that in the last years have produced significative jurisprudential innovations, triggering the consolidation of democracies: these are the cases of Colombia, South Africa and India. The constitutional courts of these countries can be considered “creative courts” of the global south, because of its “activist” performance, especially on fundamental rights effectiveness, that have contributed to the transformation of the referred countries’ public and private spheres (Maldonado, 2013, p. 15). In this manner, although some furnished interpretations made by these courts merely reaffirm the basic concepts and categories of modern constitutionalism, they are rearticulated in new paths and senses – and, because of that, contribute significantly for the current state of epistemological debate on democratic constitutionalism.

Despite the difficulty in comparing three very different constitutional realities, with specific cultural, legal and political peculiarities, their constitutional performance are of great importance to comprehend hodiern constitutionalism. These countries belong to different legal families: Colombia belongs to the civil law family, while India is described as common law, and South Africa as a mixed system between civil and common law. These countries face

¹⁶ In the history of constitutionalism, the birth of “social constitutionalism” in Mexico, as already referred, can be seen as one of these examples.

¹⁷ As stated by Rodolfo Sacco, the concept of “formant” relates to what concretely constitute modern law: written law, jurisprudence and legal doctrine. For a further analysis, see: Sacco, 1980; Sacco, 1991.

a recent process of liberal democracies’ consolidation: they have high levels of social inequality and discrimination against ethnic and cultural minorities; a history marked by political violence and a remarkable cultural and biological diversity. On the other hand, they also have similarities in the aspect of Constitutional Jurisdiction, as they have Creative Courts. The Colombian Court recently produced interesting methods of interpreting the principle of separation of powers through, among others, its thesis of the “*Estado de Cosas Inconstitucionales*” (Campos, 2016); the Indian Court has produced an extensive jurisprudence in which it creates powerful strategies to ensure access to justice for low-income citizens; the Court of South Africa has produced a rich jurisprudence in terms of socioeconomic rights¹⁸, being it a reference worldwide.

Although Maldonado only focuses three experiences of constitutional justice in global south countries, references can be made to several other successful cases in terms of jurisprudential innovation stemming from the global south¹⁹. In this same sense, also from a “*constitution making*” and “*constitution revision*” point of view, several examples can also be listed. Remarkably regarding Latin America environmental constitutionalism, the “new Latin American constitutionalism”, characterized by the recognition of the “southern epistemologies”, as Boaventura de Sousa Santos (2010) points out, projected especially in the Constitutions of Ecuador (2008) and Bolivia (2009) the recognition of new rights and new subjects of law, as is the case of *nature* itself²⁰. In fact, Latin American Constitutions have produced incredible innovations in recent years, as for the most part, they have embraced in new constitutional texts the *protection of biocultural diversity*, the *recognition of the identity of minority groups*, and *new forms of organization of political power* (Melo, 2013). In Africa, the countries that went through the Arab Spring have produced new constitutional texts in which have drowned up new institutional arrangements and have recognized new fundamental rights – especially Morocco and Tunisia. In Asia, the innovations brought by the Constitutions of Bhutan and Nepal also follow the same line, significantly deepening the issues related to the environment and protection of culture (Viola, 2020).

Insofar as the complexification of social and political life imposes new challenges for different political and legal realities, contemporary constitutionalism is constantly called to elaborate innovative constitutional responses, in all its legal formants: normative, jurisprudential and doctrinal. Therefore, “constitutional identity”²¹ assumes an important dimension on contemporary constitutionalism, as its symbolic proportions have been hypertrophied. It is still more evident nowadays when *constitutional questions* assume each day a more incisive role inside public sphere, providing new elements for legal and political discourse and debate²².

Therefore, *the globalization of constitutionalism* opened the way for diversifying constitutionalism across the globe, as new countries have come across with new

¹⁸ The singularities of each reality are analyzed in the chapters of the book, which includes the participation of legal scholars from these three countries, Maldonado, 2013.

¹⁹ For a deepen analysis, see: Iturralde, 2013, pp. 361-402.

²⁰ For an in-depth analysis, see: Acosta and Martinez, 2011; Acosta, 2016; Gallegos-Anda, 2011; Gudynas, 2009; Gudynas, 2019.

²¹ For further analysis, see: Jacobsohn, 2010.

²² For a deepen analysis, see: Pino, 2017.

constitutional texts, establishing new rights, widening the modern limits of constitutional thought and practice. This complex process – which is grounded on a dialogical dialogue on the modern and contemporary elements of constitutionalism itself – has led up to significant innovations that may be understood as important contributions to contemporary democratic constitutionalism. These contributions come from countries symbolically localized in the global north and south, opening up the space of constitutional thought articulation around the globe. However, it is evident that there is a *gap* between the contents recognized by the north and the south in the field of constitutional law and comparative constitutional law, which can be understood as a “rationality” that reproduces the dynamics of political-economic power relations²³.

In this perspective, Maldonado will affirm that these recent developments of constitutional theory and practice headed by global south countries are constructing a “constitutionalism of the global south”, which can be framed both in a *descriptive* dimension, as a description of the recent transformations inside constitutional law in the south, and in a *prescriptive* one, as a theoretical proposal in the field of constitutional law and comparative constitutional law theory.

Constitutionalism of the Global South: a critical analysis

Taking into consideration the recent history of modern constitutionalism, the global asymmetries that determine the production of knowledge between north and south and the processes of normative, theoretical and jurisprudential innovation in the field of constitutional law by “global south” countries, several questions arise within of this theoretical debate: are those innovations creating a *constitutionalism of the global south*, as it is stated by Maldonado? Is it possible to conceive a constitutionalism both of the global south and north? What are the differences and similarities between the emerging constitutionalism of the global south and the mainstream one of the global north?

In his book, Maldonado highlights a general definition of the term “global south”, pointing out in a footnote that: “I use the words ‘Global South’ and ‘Global North’ as less pejorative synonyms of the words ‘developing countries’ and ‘developed countries’ respectively” (Maldonado, 2013, p. 5); so, as a synonymous of the major concept of development. As noted throughout the text, it is noticeable that the author refers to Anglo-Saxon America and Western Europe as parts of the north, excluding Eastern part of Europe, Latin America, Africa and Asia. Thus, approaches some classifications carried out by experts on economic development, who conceive the idea of development essentially grounded in economic aspects (Sachs, 2010).

However, when performing a brief genealogy of “global south” category, it can be noted that a correlation between “the global south” and the contemporary notion of “development” is not so clear. Apparently, the term *global south* was first used in an essay by the political scientist Carl Oglesby (1969), entitled “*Vietnamism has failed... The revolution can only be*

²³ As a “transconstitutionalism”, as proposes by Marcelo Neves: Neves, 2013.

mauled, not defeated”, published in the Review Commonweal. Referring to the Vietnam War, Oglesby uses the term *global south* in a *geopolitical perspective*, conceiving that global north was continuing to exert a form of “domination” historically present over the global south, perpetuating the dynamics of political and economic colonialism that has marked Vietnam modern history. At that time, however, the category did not reach any prominence.

Even so, *global north and south* has only gained relevance and space inside political and academic lexicon with the fall of the Berlin Wall and the end of the Soviet Union in 1991, being it used as a substitute of the concepts of “first”, “second” and “third” world, once developed by Alfred Sauvy (1961). In this context, the term “global south” came to be used to describe and categorize a large part of the globe – around 80% of the world’s territory – marked, in its majority, by a history of colonization – in which the south has been, with some rare exceptions, colonies of the north, both officially and metaphorically –, by economic “underdevelopment” and by the deep internal contradictions of modernization. In its main use, in the heart of political and academic discourse, the notion of global south is related to, and is associated with, the concepts of developing and developed countries, making reference particularly to the economic aspects and elements that govern the relations between these two categories of countries.

But, to deeply understand the concept of global south, it is necessary to first comprehend that it does not have a correlation with geographical boundaries. If we try to determine geographically the limits of the south, it would inevitably remain some “red areas” or even “red countries” that would be very difficult to categorize, especially when taking in consideration only ordinary economic elements. Some examples would be: China, Russia, Eastern Europe, Mediterranean Europe and the southern states of United States, and others. Second, the notion of global south might not be considered as a synonymous to “development”. Nevertheless, both terms have important connections, the notion of global south is more “symbolic” than “economic”. It is used to describe one part of the globe that, for innumerable reasons, has been historically marginalized or completely erased from political, economic and constitutional debate. Thus, it is a concept with a strong symbolic load – often much more symbolic than effectively “real” – but with visible political implications (Grovoqui, 2011), in view of its incorporation into international political debate.

Currently, “global north” and “global south” are important categories of Political Science, International Relations and International Economics literature – for example, when referring, among other issues, to South-South Cooperation (Modi, 2011) – and is also projecting itself an important concept for legal and constitutional theory. However, there are some critics to these categories, whether for its “vagueness” (Eriksen, 2015) or even because of the capacity to homogenize the entire world in two different colors. Likewise, as William Twining points out, the concepts that create big generalizations related to the global phenomena might also be “superficial, ethnocentric, misleading, meaningless, speculative, exaggerated, false or a combination of these” (Twining, 2009, p. 24).

These critiques cannot be disregarded when analyzing the concept of global south. To this extent, it is necessary to have a critical perspective when applying the concept “constitutionalism of global south”, having in mind the potentialities and frailties that it

represents and also the possible innate contradictions that it can invoke. It is necessary to have in mind that the big concepts of global analysis – which is the case of global south and global north – tend to homogenize or reduce completely different realities – sometimes not only among but also inside specific countries, insofar as there is some north inside the south and some south inside the northern realities, demonstrating that these asymmetries are even more complex.

Thus, it is defensible that the notion of “global south” may only be understood in its “symbolic” dimension, as a concept that has several symbolic-political effects in international relations and political science, but not as a descriptive category of some particular reality which relates to more than 80% of the global territory, because the global south is also strongly characterized by assimilates, differences and diversity. The fact that the concept refers to such a large territory, marked by different nations, languages, epistemologies, political and constitutional systems, does not allow to make a generalization even in constitutional theory terms either. The innovations described by Maldonado as experiences that could lead to the category of a “constitutionalism of the global south” – analyzed in the previous topic – are essentially “localized” in specific southern contexts, making it difficult to conceive that all constitutional systems in this specific area share the same goals and protect fundamental rights as the referred countries. As the sociocultural context of the southern nations is vastly diverse, this same diversity – not only cultural, but also epistemological – is also projected into each legal and constitutional systems.

As an inevitable conclusion, it is difficult and precarious to conceive a “constitutionalism of the global south”, as the referred south is marked by a large diversity of constitutional systems and experiences, and recent innovations in this field are particularly localized. The same rationale can be also applied to the constitutionalism of the global north. Indeed, in terms of structural elements, there is no clear difference between the constitutionalism of the global north and south. In terms of its substantial content, there will be regular differences in each constitutional system, related to the protection of fundamental rights, new constitutional arrangements and procedures. So, it is difficult and precarious to affirm that some singular characteristic or element would define what constitutes a constitutionalism of the global north and the southern one.

However, taking into consideration the relevant innovations that have recently taken place in the constitutional area of global south countries, it can be said that these countries are producing not a constitutionalism *of* the global south, but a constitutionalism *from* the global south – or “*constitutionalisms from the global south*”, in plural. The change of the term “*of*” to “*from*” aims to avoid the essentialization of the meaning related to global south both geopolitically and constitutionally, seeking to highlight the inexistence of a “specific” constitutionalism that come from the global south.

It does not imply on the mischaracterization of the elements that constitute Maldonado’s thesis – given that the problems raised by the author into the theoretical debate over the epistemology of contemporary constitutional thought are of an important relevance for understanding the exclusion processes of contemporary constitutional theory – but in the adequacy of his chosen analytical category. Indeed, the notion of “constitutionalism *from* the

global south” must be understood as a “symbolic concept” that projects itself as an epistemological critique of the predominance of global north’s rationale, and its theoretical matrices, to explain the distinct constitutional realities and constitutional systems from the south, and the parochiality of this rationale in conceiving constitutional law theory as the reproduction of northern constitutional models and “authoritative” northern scholars ideas.

In this framework, it is also opportune to link the notion of “constitutionalism *from* the global south” with a “multicentric perspective of global governance”. This perspective is based on the re-reading of Immanuel Wallerstein’s theory on World Systems (2004), pointing out that the current condition of global power is marked by a process of decentralization, by the birth of several poles – such as the BRICS, Brazil, Russia, India, China, and South Africa, among others – that, in recent years and decades came to be considered important players in the global governance of politics and economy. In this context, thinking about a “constitutionalism *from* the global south grounded in a multicentered approach” allows us to understand that centers evolving southern countries move constantly, so that what was defined as “center” yesterday may no longer be today and, in the same way, the center of tomorrow may not be the current one. This allows us to indicate that depending on the “topic” or “subject”, the center of constitutional innovations may be a certain country or region of the global south – or north –, while another country or region may be the center in other constitutional issues.

This approach allows us to understand the dynamics of diversity within the “constitutionalism of the global south”, without reproducing a notion of constitutional and cultural homogeneity among the southern nations. It also makes it possible to highlight the asymmetries that exist within the south in terms of constitutional protection of rights, whether in the sphere of constitutional theory, “normativity”, or even in terms of “constitutional justice”. Indeed, if it is possible to elect a common characteristic for the legal and constitutional systems of the south, it would be “diversity”. It is, therefore, only in terms of a broad conception of diversity – social, cultural, political, legal, constitutional – that global south can be understood, analyzed and criticized, given its symbolic condition.

So, understanding the *constitutionalisms from the global south grounded on a “multicentric perspective of global governance”* triggers the comprehension of contemporary constitutionalism beyond the dichotomies of modern constitutional thought. It, therefore, reshapes the functional dynamics of contemporary constitutional theory and grant new theoretical elements to replace each singular constitutional experience inside global constitutional theory, particularly pointing towards the potentialities of global south constitutional experiences.

Final remarks

The process of internationalization of constitutional law and the global spread of democratic constitutionalism evidences the detachment of the geographical concentration knowledge production in Europe and Anglo-Saxon America, increasing the complexity of current theoretical constitutional debate, triggering constitutional dialogues among different

constitutional cultures and the study of constitutional law itself. In this vein, the opening of debates inside constitutional law and theory implies the challenge of constructing dialogues between constitutionalisms, both in theoretical and practical perspectives, towards reciprocal understandings and exchange of constitutional experiences. Comparative constitutional law and the methodological perspective of studying law as constitutional policies assume a special relevance in this background, with the use of methods that go further the mere analysis of constitutional texts and jurisdiction, looking for a mutual understanding of the constitutional dynamics in different contexts to potentialize intercultural dialogues between diversified systems in the global constitutionalism.

However, as Maldonado has evidenced, the constitutional theoretical debate still remains largely linked with global north’s theoretical productions. While southern countries remain, for the most part, on the margins of this debate. Notwithstanding the recent good practices in normative, jurisprudential and theoretical terms, it is evident that political and economic asymmetries “tend” to be also reproduced inside academic and political institutions.

In this context, to conceive a “constitutionalism from the global south grounded in a multicentered approach” may be an “epistemological critique” of the predominant theories and practices that come from the northern countries and the non-contextualized application of “alien” theories in the legal and constitutional systems of the south. It also may: 1) advocate for the inclusion of marginalized constitutional experiences on the global debate around constitutional theory; 2) overcome the assumptions listed by Maldonado, that govern the relation between global north and south in terms of constitutional theory and practice; and, 3) democratize constitutional knowledge, through an epistemological openness, in order to consider relevant also what is produced in the global south.

In this manner, dialoguing between and among different constitutional cultures can not only lead to the circulation of different constitutional models, but to the mutual comprehension of different constitutional cultures and epistemologies. If understanding constitutional law, and particularly comparative constitutional law, is essentially linked to cultural studies and intercultural relations inside and among states, as points out Peter Haberle, then studying the constitutional system of global south societies may encourage the scholars to the comprehension of each cultural system, being it an impulse to international cooperation in the most diverse possible areas.

Thus, the hypothesis formulated in the introduction of this reflection, is partially confirmed. Since the research has indicated the inadequacy of the concept “constitutionalism of the global south” due to its vagueness and ambiguous delineation. By shifting from “of” to “from” – *a constitutionalism from the global south* – it seeks to characterize the diversity within and between southern countries and constitutional experiences. This approach tends to highlight the difference inside difference and, based on it, build a constructive dialogue between the most diverse constitutional experiences.

In this perspective, seems more appropriate to propose a multicentered approach, as a capable instrument to analyze the constitutional acquisitive evolutions, retractions and improvements in different parts of the world, with special regard to the innovations *from* global south.

Therefore, it would be more suitable to comprehend the constitutionalism of the global south as a “constitutionalism *from* the global south”, as an attempt to emphasize the diversity on global south constitutionalisms and, through this, increase the analytical perspective of contemporary constitutionalism complexity. Thus, in a “multicentered approach”, constitutional theory fits a more adequate position to analyze constitutional innovations, considering that center and periphery are conditional concepts, especially when referring to contemporary constitutionalism.

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