

## TRANSNATIONAL NORMS AND CONSTITUENT POWER: BIOPOWER CONNECTIONS\*

### *NORMAS TRANSNACIONAIS E PODER CONSTITUINTE: CONEXÕES DE BIOPODER*

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**Abstract:** The article examines important paradigms to constitutional law and for discussions between law and politics, as contractualism, constitutionalism, constituent power and

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transjuridicity through connections (element that makes the difference between knowledge processes to develop new views - thoughts - on those processes). Therefore, a bibliographical research and a qualitative approach were used, to clarify the constitutional phenomenon from its association with biopower. The first section is dedicated to investigate connections between contractualism and modern constitutionalism, to demonstrate the use of various power paradigms in the relationship between sovereignty and power. The second part is focused on the connections between the construction of transnational rules and the transformation of the constituent power and its approach to global constitutionalism, with the modification of the political system. Third, constituent power is presented as fixed values of a society that functions to internally legitimize the political system, using biopower as an instrument to organize the relations between law and politics in a society of control based on constitutionalism. Thus, the elements that support the relationship between transjuridicity and constituent power through biopower connections are described.

**Keywords:** Global Constitutionalism; Transjuridicity; Biopower.

**Resumo:** *O artigo estuda paradigmas importantes para o direito constitucional e para as discussões entre direito e política, como contratualismo, constitucionalismo, poder constituinte e transjuridicidade através de conexões (elemento que estabelece a diferença entre processos de conhecimento para elaborar novos pontos de vista - pensamentos - sobre aqueles processos). Para tanto, utilizou-se de pesquisa bibliográfica e abordagem qualitativa, para esclarecer o fenômeno constitucional a partir da sua associação com o biopoder. A primeira seção se dedica a investigar as conexões entre contratualismo e constitucionalismo moderno, para demonstrar a utilização de paradigmas de poder diversos na relação entre soberania e poder. A segunda parte é focada nas conexões entre a construção de normas transnacionais e a transformação do poder constituinte e sua aproximação com o constitucionalismo global, com a modificação do sistema político. Em terceiro lugar, o poder constituinte é apresentado enquanto valor fixo de uma sociedade que funciona para legitimar internamente o sistema político, utilizando o biopoder como instrumento para organizar as relações entre direito e política na sociedade de controle baseada no constitucionalismo. Dessa maneira descrevem-se os elementos que sustentam a relação entre transjuridicidade e poder constituinte através de conexões de biopoder.*

**Palavras-chave:** *Constitucionalismo Global; Transjuridicidade; Biopoder.*

**SUMMARY:** 1. Introduction. 2. Connections between paradigms: contractualism and modern constitutionalism. 3. Global constitutionalism: hito constituyente of political system? 4. Transnational norms and constituent power: biopower connections. Conclusion. References.

## 1 INTRODUCTION

Observing the transformations that occur in society represents the defense of a critical and constructive perspective in relation to the realities that are placed, that is, it is intended with the discussion on constitutionalism and biopower to extend the relation of self-observation that is necessary to a researcher in any scientific work, focused on the critical construction of new reflections.

That's the context the connection is proposed as an element of self-observation to highlight the position of paradigms in society, thus describing the

importance of new concepts through the theoretical approach of interdisciplinary and critical character.

Therefore, this research intends to analyze the relationship between the process of construction of transnational norms and the constituent power in the scenario of global constitutionalism, in order to demonstrate that this process integrates a biopower strategy.

Legal paradigms, such as sovereignty, contractualism, constituent power and constitution, for example, were strongly built over time, all of them having one thing in common: the element *power*. They are perceptions (or paradigms) of power that sustain these conceptions not only in the theoretical plane, but in the everyday life, in which the transformations of its mechanisms place new relations with people in conjunction with new legal-political arrangements.

This research puts modern and contemporary constitutionalism side by side to question the extent to which they can be represented by global constitutionalism. Because of this, the constituent power can be studied by several perspectives, among them by its association with the process of construction of transnational norms in two aspects. The first presents the points of intersection between law and politics to describe forms of rupture and integration in the contractualism and modern constitutionalism, the second shows the central aspects of proximity among biopower and global constitutionalism in the construction of transnational norms.

## **2 CONNECTIONS BETWEEN PARADIGMS: CONTRATUALISM AND MODERN CONSTITUTIONALISM**

Establishing the connection between paradigms is the first step to show the biopower connections that are established between transnational norms and constituent power; a task that would become impossible without examining categories fundamental to this proposal, such as contractualism and constitutionalism, which reveal connections between paradigms of power.

First of all, it is necessary to understand the meaning of the word paradigm. It is conceived as the model accepted and recognized by a particular scientific community, which provides initial certainties that unite this group around questions about the same phenomenon, by rules that guide the search for solutions to problems in order to become the basis for theories (KUHN, 1970).

In this sense, it is contractualism that, when examined as an example, can be connected to this notion, in such a way that its influences up to the present moment become more explicit.

Admitting the formation of the State as a result of the establishment of a pact between free persons, by which they transfer certain individual rights to the sovereign in order to maintain the right to life of the community in light of a pre-existing situation characterized by the absence of legal norms, is the basis on which contractualism was built.

Formation of the State, maintenance of the social order and establishment of the law are the initial certainties that underlie this paradigm. The advancement of the studies led to questions of several orders, such as those on which would be the basis of the power responsible for making the transition between social models, on what are the objectives of this consensus among people and on what would be the position of each subject after the association intended by the contract.

At the political level, the main repercussion is the Westphalian State, which permits us to advance in the understanding and perception of statehood, by allowing the entry of new state actors in the international political scene, through the recognition of legal parity between states and the formal affirmation of sovereignty state-owned. Because of these facts it is possible to declare that that moment means the birth of the modern state and the international political system (FRANCA FILHO, 2006).

This is the aspect on which the analysis must be detailed, that is, the relationship between sovereignty and power in the contractualist paradigm, in order to identify the appearance of new problems in this tradition of scientific research.

First, there is the legal-discursive representation of power, which may be called the juridical conception of power or simply power-sovereignty. This derives primarily from the contract and, therefore, exists only with the State and the sovereign, either to meet the demands that arise with the establishment of the State, sometimes to limit it, or to ensure its monopoly. Through this representation, it is impossible to dissociate power from the figure of the sovereign or the State: they are born bound and remain in mutual probate, in relation to necessity.

Here, as power relations are identified as legal relations and sobriety occupies the central role in the definition of the State, power is represented by ownership, that is, characterizes itself as a right that one can have as a property. Consequently, it would be possible to transfer it through contracts, as a founding act of law (FOUCAULT, 2005).

In this case, the sovereign is characterized as the holder of the right to life and death over his people and, due to such fact, his people, originally, were in a neutral position, that is, the condition of living or dead, depended on the will of

the sovereign. Consubstantiated through the idea of appropriation of all elements of the person's life and through the idea that such a right was only effective at the time that the sovereign could kill, therefore, the right to let die or let live was a characteristic of this paradigm. Thus, as a mechanism of confiscation, this power materialized in the apprehension of properties and wealth to reach time, bodies and lives in order to suppress them (FOUCAULT, 2011).

The theory of sovereignty was the truth discourse produced by contractualism, orienting the search for methods of social and political organization, basing absolutist and administrative monarchies until parliamentary democracies emerged, so that there was some adjustment between the forms of power movement and the use of theory.

However, it is clear the change in this paradigm, because the new reality that was presented could not be explained by the contractualist model, leading to new interpretations and possibly to some misunderstanding (according to innumerable interpretations) in unstructured events (KUHN, 1970).

After the presentation of this first theoretical framework, with a view to the transformation of paradigms, a connection between processes (law and power) is proposed in order to make it clear that the substitution of contractualism by modern constitutionalism corresponds to the adjustment between power-sovereignty and disciplinary power.

The connection is possible while another paradigm of power is presented. From this it is possible to emphasize that the observation of this element shifts from its identification with the political apparatus or with the one that controls it to the daily life, that is, in the margins of the society perceives where the relations of power are produced from the everyday events that during the continuance of these paradigms were not historically or scientifically perceived.

This is the initial certainty that makes it possible to maintain that power does not belong to something or someone, it is not a superstructure, its formation also does not derive from the opposition between dominators and dominated, which means that power and resistance can be seen in different spaces.

Therefore, power must be seen as something that circulates, that is not located here or there, because it works and is exercised in a network, that is, by its meshes people not only circulate, but are always in a position to exercise this power and suffer their action, so instead of inert targets they are embodied in transmission centers (FOUCAULT, 2003).

The new view on this phenomenon allows the emergence of other questions. After all, to study the relationship between law and politics present in

constitutionalism from a paradigm of power based on social practices is to try to articulate it within the strategy of power of which it is part.

Modern constitutionalism is considered as a juridical-political movement consolidated after the revolutionary events of the eighteenth century destined to organize law and governmental organs in relation to the power of the State. For this reason, mechanisms of power limitation, the defense of fundamental rights and the creation of common values that encompass subjectivities within the same totality (collective feeling), provoke the rise of individualism with the adoption of the liberal model of State.

This constitutionalism promoted the formation of a new collectivity by creating a symbolic scope of membership in order to promote social integration, since it deconstructed the conceptions of society and its members as mere objects of sovereign intervention, transforming the foundation and grounding of legitimate authority and this integration into social tasks whose realization does not depend on any transcendent instances (FRANKENBERG, 2007).

And why does it happen? For what reasons were certain possibilities for the emergence of action explored or abandoned? Finally, we recognize that in a field of possible options modern constitutionalism was inserted within a strategy of power at the same time as the disciplinary society appeared, for which it was the only possible form of accommodation between law and politics.

Relationships are no longer purely top-down (governors-governed, employer-employees, parent-child) and become multiple. Since the effects of power cross all people (mutual supervision), the pyramid is replaced by the network.

The creation of common values reflects the normalization of social relations, normal becomes an instrument of coercion to create categories that are affiliated to a social body (not social) in which the individualization serves as a measure to recognize who it strays (FOUCAULT, 2007).

The limitation of power occurs through the law, which creates new institutions that become parallel centers of power, such as prisons, hospitals, asylums and schools, in regard to the normalization of knowledge applied.

Individualism as a political concept as well as individual rights standardized at that time not only reflects the struggle against absolutism and the consolidation of the bourgeoisie as the ruling class, but also reflects the pretension to keep the individual in his own way, with his own aptitudes and abilities on looks of permanent knowledge that makes it an object that can be described and analyzed.

Limitation of power, common values, social integration, individual rights and individualism are reflexes of the substitution of the transcendent instance for a power that is anonymous, multiple and automatic, which starts to make the gears of society, including politics and work. These are aspects that demonstrate the substitution of contractualism for modern constitutionalism as a way of adapting the strategy of power that replaced sovereignty by discipline.

### **3 GLOBAL CONSTITUTIONALISM: HITO CONSTITUYENTE OF THE POLITICAL SYSTEM?**

The second connection presented in this research occurs between transnational norms and constituent power. Considering the associations between sovereignty and power, it is necessary to specify the dialogue, so that the constituent power is scattered and so that the observation turns to the social facts of the present and, because of this, to contemporary constitutionalism, since the paradigm in focus only allows for detailing from of the theoretical effort that results in the study of both frames.

Contemporary constitutionalism is the stage currently experienced by society, as a requirement of the democratic political regime, along with pluralism and multiculturalism as social expressions. Given this, there is also a growing judicialization of politics along with the transfer of power from political institutions to judiciary ones, with decisions that involve the most serious controversies of politics in democracy. Internationally, the transformations are even more profound when compared to the past, jurisprudence is shared between foreign superior courts, reflecting the use of principles that find growing international uniformity as the international courts are consolidated and contemporary constitutionalism turns to the transnational processes of construction norms.

This new scientific tradition reveals the failure of modern constitutionalism in presenting answers to a society that exposes hypermodern where time and space are relativized. The new circumstances raised new questions, since individual, sovereignty, power, state and law were transformed. That said, it is necessary to emphasize nomenclatures more adapted to the contemporary constitutionalism as, for example, global constitutionalism<sup>1</sup>.

The main aspect of this conjuncture is linked to the process of construction of constitutional norms and, of course, to the constituent power. That is, the

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<sup>1</sup> Other well-known denominations are “international constitutionalism” and “transnational constitutionalism”; however, it follows Schwöbel’s (2010) argument by stating that the former refers to the discussion of matters between States, while the second deals with issues that are beyond the States.

influence of external factors and decentralization in the constitutional process allows the perception of the displacement of the relationship between law and politics based on internal formal procedures with legal sources previous the legal order for a network in which the construction of norms cannot be dissociated of values, institutions and procedures that do not belong only to one State. This transjuridicity will justify the emergence of global constitutionalism by embracing contemporary constitutionalism.

It is possible to associate global constitutionalism with a normative theory that seeks solutions to the relationships among legal systems (at all levels) in order to provide active capacity to regulate the forms of global governance in legal-political terms. In this sense, it supports the creative power of public law and with it from the courts and judges to organize a global order, so it can be considered a paradigm focused on legal practice. In addition, to achieve it, the existence of the international community with regard to common rules, procedures and values with the purpose of protecting the collective interests of humanity is indispensable. The objectives of global constitutionalism are to increase institutional efficiency, accountability, transparency and representation (VOLK, 2012).

Between law and politics is the constitutionalism that sometimes constitutes the element that involves the relationship, or, in the luhmanian vocabulary, the structural coupling between these two social subsystems. Unlike a merger, that happens by the stable coordination of the specific operations of each subsystem, what stands out in such relationship and what matters to the research is power.

The first point of view on this element is part of a scientific tradition that studies a constitution as a document that externalizes a structural coupling. Because of this, the relationship that describes power and sovereignty will result in constituent power. The second perception is aimed at a final part of this study and concerns a change in social facts from the power paradigm exposed as a presentation to the discipline to analyze how biopower connections between transnational norms and constituent power take place.

Both are aspects of the same observation and are interspersed throughout the research. In this sense, it is worth emphasizing the transition that underwent the paradigm of constituent power in the transformations described above. In the first place, it configures itself with the sovereignty of *summa potestas* and, consequently, of contractualism as an absolute and total element. On the other hand, modern constitutionalism presents it as a source of production of constitutional norms that aim at the organization of the State through the establishment of a new legal order (NEGRI, 2002).

For this reason, it is possible to speak of an external and pre-legal source that establishes the legitimacy of the modern state, since it authorizes the enactment of laws through the constitution, with the creation of political institutions to reconcile the expectations of shared autonomy and collective freedom (THORNHILL, 2012).

At this point, breaks also occur, so it is appropriate to investigate the approximation between constituent power and global constitutionalism. The authorized existence of a pluralistic legal order, which shifts powers from the holders of the constituent power to the transnational institutions; the conformation of constitutional norms of domestic law by international law to reinforce the fundamental values of the international community; the performance of external actors in the process of elaborating constitutional norms; the production of transnational norms unrelated to constituent power, presented by modern constitutionalism; the constitutional qualification for transnational norms together represent new interpretations of the constitutional phenomenon that provokes questions about the proximity mentioned above.

The scenario of consolidation of global constitutionalism conceives the transition from an eminently national political system to a transnational one. This trajectory takes the first glance to the defense of the substitution of the paradigm of the constituent power, mainly by the nucleus that characterizes this displacement, which is the process of construction of the transnational norms.

However, this is the appropriate *locus* for dealing with rupture or integration. Thus, the concepts of constituent moment and *hito constituyente* were sought as the theoretical framework necessary to clarify the debate, due to the fact that the answer what represents the global constitutionalism for the political system and, consequently, the paradigm situation of the constituent power.

Constituent moment represents constitutional creation that breaks with the political continuity by the adoption of new principles inspiring social and political organization, internalizing new and specific constitutional culture to provide new legitimacy to the system, that is, to conceive it as a political phenomenon that represents the express manifestation of the will of constituent power. Otherwise, *hito constituyente* is the set of negotiations and renegotiations in which there is general collaboration among the actors aiming at a reconstitution process that establishes strategic constitutional reflection to accommodate, for example, the requirements of multiculturalism and pluralism (GISBERT, 2005).

The factor that determines the choice for rupture or integration, by constituent moment or *hito constituyente*, is the observation of social facts

from a new paradigm of constituent power that does not oppose the process of construction of transnational norms, but integrates it.

This integration happens through the substitution of the source of the legitimacy of the constituent power, of sovereignty for values, taking it from the sphere of subordination to that of adaptation of the political system in a strategic constitutional reflection that sees it as an internal source of legitimacy, in such a way that these values guide the action of actors and institutions and conform the production of norms. Thus, the hito constituyente of the political system is represented by global constitutionalism because of the production of transnational norms that integrate the constituent power as a balise of values.

#### **4 TRANSNATIONAL NORMS AND CONSTITUENT POWER: BIOPOWER CONNECTIONS**

The biopower connections between transnational norms and constituent power are described by the elements that establish the dialogue with the other paradigms of power presented throughout the text. In other words, it is only possible to understand them when power-sovereignty and contractualism, disciplinary power and modern constitutionalism are integrated into the paradigm of biopower.

Biopower does not exclude discipline. Among them there is relationship characterized by integration, in which the effects of the second are enhanced by the first. People are no longer seen by their peculiarities as an individual body and are seen by the body-species, that is, by the processes of the whole, by the process in which all people are united in the same category, that is, the population. Similarly, the rules aim to discipline and regulate to achieve the greatest possible space. Therefore, the right to die or to let live is replaced by the right that makes live and lets die. The object of the paradigm of power is shifted to life in order to control the accidents and unforeseen events that are observed through the economic and political effects at the level of mass, so the biological begins to integrate a strategy of power (FOUCAULT, 2005).

The connections between processes (law and biopower) are verified when the constituent power is identified with the values and as internal source of legitimation of the political system, because this is the exploration of a choice to emerge an action, that is, the change in the foundation and grounds of legitimate authority from external and transcendent source to internal and adaptive source promotes the integration of constituent power through the process of elaboration of transnational norms in the political system.

This biopower strategy reflects global constitutionalism as the only form of accommodation between law and politics in the society of control organized by biopower. So, what are the elements that demonstrate this relationship between transnational norms and constituent power, thus configuring biopower connections?

As for transjuridicity and global governance, there is a tendency to monitor, register and recognize people through law and politics, putting all the details of life in the strategy of power, representing, consequently, intervention schemes in global phenomena. In this way, it will be possible to predict and estimate the *modus operandi* of actors and institutions to achieve global states of balance and regularity in favor of common values that originate an international community that is the population.

In relation to the states and multilateral bodies, the presence of control and biopower society is observed through more democratic mechanisms of command, immanent to the social body, with the expansion of institutions in flexible and floating networks, at the same time as the meritocracy is progressively more valued.

Pluralism, multiculturalism and the standardization of principles reflect the tendency of coexistence of high levels of plurality and singularization, a basic example is that of social networks in the information society, where plurality of opinions is alongside the singularity of login.

Therefore, the main biopower connection established between transnational norms and constituent power is the realization of a diagram where all are interconnected, including law and politics. Biopower does not represent an overcoming of the paradigm of constituent power, but through the elements of the transnational political system it operates its mechanisms, integrating them into a strategy of power.

## CONCLUSION

The first words are of reaffirmation of interdisciplinary and critical positions in relation to realities and social facts. Therefore, the study of the association between transnational norms and constituent power cannot distance itself from the phenomenon of power that is in all people and in all places, because observing these connections requires a willingness to reflect on the law through new perspectives.

This is the approach in which it was proposed to discuss the relationship between the process of construction of transnational norms and the constituent power in the scenario of global constitutionalism, to demonstrate that this process integrates a biopower strategy.

The connections between the processes are the presuppositions that try to demonstrate the existence of the other connections within the constitutional phenomenon, emphasizing that its transformations are essentially social changes. This is the reason for presenting the constituent power interconnected to values and integrated in the construction of transnational norms.

Observations, explanations and interpretations must put aside dichotomies that belong to the common theoretical sense, in the attempt to understand that in the relationship between law and politics, the relations of power provide varied amalgams.

## REFERENCES

FOUCAULT, Michel. *Em defesa da sociedade*. Tradução por Maria Ermantina Galvão. São Paulo: Martins Fontes, 2005.

\_\_\_\_\_. *História da sexualidade: a vontade de saber*. Tradução por Maria Thereza Costa e J. A. Guilhon. Rio de Janeiro: Graal, 2011.

\_\_\_\_\_. *A microfísica do poder*. Tradução por Roberto Machado. Rio de Janeiro: Graal, 2003.

\_\_\_\_\_. *Vigiar e punir*. Tradução por Raquel Ramallete. Petrópolis: Vozes, 2007.

FRANCA FILHO, Márcio Toscano. História e razão do paradigma vestefaliano. *Anuario de Derecho Constitucional Latinoamericano*. Mexico D.F., p. 1445-1465, 2006.

FRANKENBERG, Günther. *A gramática da constituição e do direito*. Tradução por Elisete Antonluk. Belo Horizonte: Del Rey, 2007.

GISBERT, Rafael Bustos. *La conctitución red: un studio sobre supraestatalidad y constitución*. Instituto Vasco de Administración Pública: Oñati, 2005.

KUHN, Thomas. *The structure of scientific revolutions*. Chicago: University of Chicago Press, 1970.

NEGRI, Antonio. *Opoder constituinte: ensaio sobre as alternativas da modernidade*. Tradução por Adriano Pilatti. Rio de Janeiro: DP&A, 2002.

SCHWÖBEL, Christine E. J. Situating the debate on global constitutionalism. *International Journal of Constitutional Law (I-CON)*. Oxford, v. 8, n. 3, p. 611-635, 2010.

THORNHILL, Chris. Contemporary constitutionalism and the dialectic of constituent power. *Global Constitutionalism*. Cambridge, v.1, n. 3, p. 369-404, 2012.

VOLK, Christian. Why Global Constitutionalism does not live up to its promises. *Goettingen Journal of International Law*. Göttingen, v. 4, n.2, p. 551-573, 2012.