

Cooperative Constitutional State: the effectiveness of fundamental rights in a globalized world.

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Summary: Introduction. 1. The Constitutional State of Cooperative Law. 1.1. A new view of the sovereign nation-state. 1.2. The Cooperative Constitutional State – conceptual vision of Peter Häberle. 2. The objective of the Cooperative Constitutional State of Law. 3. Conclusions. 4. Bibliography.

Abstract: In the present essay we seek to demonstrate, in light of Peter Häberle's theory, how a state with a cooperative and open attitude towards the world can ensue more effective fundamental rights.

A Cooperative state aims to give greater effectiveness to the accepted norms which guarantee rights and provide a higher degree of protection for the global community, since we live in a dynamic world, where it is necessary to be open to new visions on fundamental rights.

Keywords: Peter Häberle's theory. Constitutional Cooperative State. Democracy. Open, pluralistic and democratic countries. Globalization.

Introduction

In the present paper, we intend to analyze the theoretical-philosophical basis of a possible "Cooperative Constitutional State", therefore, the following question is posed: could this state be possible in a world that is constituted on a basis of such an heterogeneous nature? Because of this, could a state of a cooperative nature really be a reality or is it just a mirage? To try to answer these questions, we will start from Peter Häberle's theory as a theoretical basis to refine what will become the "Cooperative Constitutional State" and what will be its objectives.

In the first topic, we will outline the theory of the "Cooperative Constitutional State", beginning with the problems that involve the current Sovereign State. This has developed from the "era of globalization" and its effects that in the end contest the authority of a state defined in the framework of classical theory and consequently its placement in the present world dynamics.

In the second topic, we start from the generic vision of a Cooperative Constitutional State and the difficulties in elaborating the possibility of a system that shelters and attracts the global society towards a more cooperative posture, which approaches the conceptual vision of that term postulated by Professor Peter Häberle.

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In conclusion, this paper considers some aspects of the effectiveness of "Cooperative" or "open" norms, and whether they could be effective, in an increasingly turbulent scenario in which cooperation appears to be an imperative order.

1. Problems posed by globalisation

The new world presents itself in a dynamic way. Relations between peoples and cultures intertwine in such a way that legal dialogue between the most diverse cultures becomes necessary. What was previously slow to evolve, is now happening almost in real time, due to the "new age" brought about by the "information society" that now characterizes the continuous activity of modern Man.²

The globalized world's data traffic and information imposes new perspectives and outlooks for the world beyond the National State.³ Cultural, economic and technological exchange, by themselves, have already effectively imposed new frontiers on constitutional law, which was already complicated in terms of global cooperation,⁴ and we now face new challenges imposed on multilateral institutions and governments.

The network economy, such as the case of securities sold in electronic transactions linked to international market fluctuations,⁵ the "de-nationalization" of legal entities and the arrival of increasingly virtualized companies, technological and informational development, raises questions about individual nation's ability to ensure their citizens' rights,⁶ which, in reality, are no longer national, but worldwide, as the network economy is carried on in a socially and culturally plural society,⁷ a process that arises from the emergence of new economies, or centers of power, across all continents, that is, the post-war polarized world, has now become a multipolar world, leading to many "disagreements"⁸ on which point should be common to authorities.

Protecting the environment as a global source of sustainability and man's survival,⁹ fauna, flora, aquatic life, life in cities and fields in various parts of the world are affected by activities of countries located in different parts of the globe. From this observation, it can be seen that the environmental problem cannot be considered nationally, "patrimonialized", as inadequate uses of natural resources affect countries on a global scale,¹⁰ a notable fact is the case of emissions of greenhouse gases which have consequently been causing global warming¹¹ with unpredictable consequences for all living things.

² CASTELLS, M.; HIMANEN, P. "A Sociedade da informação e o Estado-Providência". *O Modelo finlandês*, (trad. "The Information Society and Welfare State – The Finnish Model, 2002), Lisboa: Fundação Calouste Gulbenkian, 2007, p.1.

³ Seen in these terms, GIDDENS, A. *O Mundo na era da Globalização* (trad. Runaway World), 6ª. edição. Lisboa: Editorial Presença, 2006, p. 19.

⁴ HALE, T.; HELD, D.; YOUNG, K. *Gridlock: Why Global Cooperation Is Failing When We Need It Most*. Cambridge: Polity Press, 2013, p. 16.

⁵ GIDDENS, A. *Ibidem*, p. 22; see also, HALE, T.; HELD, D; YOUNG, K. *Gridlock...*, *ibidem*, p. 33.

⁶ FISCHER-LESCANO, A.; MÖLLER, K. (EDS.). *Transnacionation of social rights*, Cambridge – Antwerp – Portland, 2016, p. 15.

⁷ CASTELLS, M., HIMANEN, P. *Ibidem*, p. 3.

⁸ HALE, T.; HELD, D.; YOUNG, K. *Gridlock...*, p. 35.

⁹ See, BECK, U. *A sociedade de risco: em busca da segurança perdida*. (trad. *Weltrisikogesellschaft. Auf der Suche nach der verlorenen Sicherheit*).- Lisboa: Edições 70, 2015; *Idem, A metamorfose do mundo*. (Trad. *The Metamorphosis of the World*). Lisboa: Edições 70, 2017.

¹⁰ GIDDENS, A. *Este turbulento e poderoso continente: que futuro para a Europa?* Lisboa: Fundação Calouste Gulbenkian, 2014, p. 169.

¹¹E. STIGLITZ, J. *Globalização: como dar certo* (trad. Making globalization work), São Paulo: Companhia das Letras, 2007, p. 17-18.

Concern over the increasing emissions of these types of gases, such as Methane [CH₄], Carbon dioxide [CO₂], Nitrous oxide [N₂O], Chlorofluorocarbons [CFCs], Hydrofluorocarbons [HFCs], Perfluorocarbons [PFCs], Sulfur hexafluoride [SF₆]) was the subject of discussion at an intergovernmental meeting that culminated in the Kyoto Protocol of 1997 and entered into force on February 16, 2005, after ratification by Russia in November 2004. This international treaty defines emission reduction of these types of gases, had not been welcomed by some industrialized and developing countries.

Still in the environmental field, there has been growing concern about the pollution of the seas with product discharges without a zone of great depths, the contamination of river beds caused by activities of multinationals, mainly by mining activity, the predatory exploitation of forests and natural resources of Developing countries, the creation of "new living species, developed to serve certain human purposes"¹² puts the environmental problem in the jurisdictional web, not at the national but global level. Due to these consequences, Constitutional Law's effectiveness in unentangling these relationships is being questioned.¹³

Other issues arising from globalization, such as security,¹⁴ labor,¹⁵ cooperative justice,¹⁶ the protection of immigrant citizens¹⁷ and the dangers from other countries or continents, such as epidemics, terrorism and drug trafficking in modern societies are also key considerations.

Information is increasingly fluid and broader in scope and brings to the fore the discussion on the delimitation of human conduct in the national context [in the constitutional sphere], in view of the challenge from transnational organized crime and terrorist groups.

Today, one can speak of drug cartels that act in an organized way at a global level and that have a network of distributors in every part of the planet. Although, at the national level, every State has been attempting to undermine the power of criminal organizations, but from time to time these efforts collide, in certain countries, with the Fundamental Law, a fact that requires urgent review, and which subordinate fundamental rights to a degree of "inter-constitutionality" with different types of states as a way of achieving a certain minimum standard of protection of fundamental rights.¹⁸

Security is a constant concern common to all countries, especially after September 11, 2001 with the attack on the Twin Towers of the World Trade Center in the United States. The issue of terrorism has brought to the surface complex situations involving the fundamental rights of man, since [terrorism] nowadays is sometimes equated to a particular religion [Islamic], it requires more attention when rights that may be restricted by virtue of the growing fear or prejudice towards the people of this religious persuasion, especially, the various questions raised by the

¹²CARVALHO ROCHA, J. C. *Direito Ambiental e transgênicos: princípios fundamentais da biossegurança*. Belo Horizonte: Del Rey, 2008, em particular capítulo I, p. 8.

¹³ JOAQUIM CANOTILHO, J. In _____, LEITE, J. R. M. (Organizadores); *Direito Constitucional Ambiental Brasileiro*, 2. ed. rev. – São Paulo: Saraiva, 2008, p. 1-11.

¹⁴ HALE, T.; HELD, D.; YOUNG, K. *Gridlock...*, p. 65.

¹⁵ E. STIGLITZ, J. *Globalização: como dar certo...*, p. 91.

¹⁶ See, Ac. TJUE, C-477/16 PPU; Ac. TJUE, C-399/11.

¹⁷ See, C. ANTÓNIO, J. H.; POLICARPO, V. (Coords.). *Os Imigrantes e a Imigração aos Olhos dos Portugueses*. Lisboa: Universidade Católica Portuguesa / Fundação Calouste Gulbenkian, 2011, especialmente, Capítulo IV, Imigração e Governos Constitucionais em Portugal, p. 94-132.

¹⁸ In these terms, it's the judicial *dialogue* proposal, see, TAVARES DA SILVA, S. *Direitos Fundamentais na Arena Global*. Coimbra: Imprensa da Universidade de Coimbra, 2011, p. 32; about the challenges faced by domestic and external legal systems in safeguarding human rights., see, ALBUQUERQUE MELLO, C. D. *Direito Constitucional Internacional: uma introdução: constituição de 1998 (sic)* revista em 1994. 2ª. edição – revista. Rio de Janeiro: Renovar, 2000.

European Court of Human Rights [ECHR] and the Court of Justice of the European Union [CJEU].¹⁹

The war on terror raises the question of national security in the wake of global discussion, since terrorism is a constant danger, without a face, without a country, based on a radical faith / policy that puts the citizens of the whole world in danger. These events have been reported in the United States (2001), France (2016), Germany (2016), Turkey (2016), England (2017), Egypt (2017), Spain August 2017, in Syria, Iraq, Afghanistan and Pakistan, these latter countries are the scene of constant [religious political] conflicts that cost the lives of hundreds of citizens, placing the discussion on fundamental human rights in the global arena,²⁰ Cooperation among States is a way to combat such violation of human dignity.

Humanitarian issues are raised at a local level [national], from blocs like: the European Union, MERCOSUR, APEC, ASEAN, CEA, among others, as the world is constantly erupting²¹ and the common effort in principle, is the most effective way to address the issue.

The crisis of refugees in Europe, which led to the opening of a procedure for non-compliance with treaty provisions against three European Union countries [Hungary, Poland and the Czech Republic], the crisis of those affected by catastrophes in Haiti, the crisis of lack of food in Venezuela, which comes from a totalitarian²² system that lasts for decades and ends up affecting the countries of MERCOSUR and South America as a whole, immigration and recrudescence of the anti-Latin speech of the American President Donald Trump, directed to Mexico, wars and disputes over power in African territories.

These are just a few examples of the panoply of problems that hit modern society and come to confront the traditional concepts of sovereignty and "constitutional independence"²³ of states. At the European level, many questions arise about the application of law within the Community and the Council of Europe, since this is the bloc of countries with greater integration at world level.

Questions such as those raised above are leading to questioning and ever more searching for a solution to local problems, which due to the process of more dynamic exchanges in the world today, have repercussions beyond these States almost immediately.²⁴ In this vein, the purpose of this paper is to verify whether the cooperation in the form advocated by Peter Häberle is the most effective way of conceiving a constitutional State able to deal with these human rights issues in the

¹⁹ See in these terms, acórdãos do TJUE n. C-188 e C-157/15 de 14 de março de 2017, available on: <http://curia.europa.eu>; e do TEDH *Affaire Ahmet Arslan e outros c. Turquia*, proc. n.º 41135/98; *Dahlab v. Suíça*, proc. n. 42393/98, Ac. de 15 de fevereiro de 2017, available on: <http://hudoc.echr.coe.int>, accessed on 09 de ago de 2017.

²⁰ See, TAVARES DA SILVA, S. *Direitos Fundamentais na Arena Global...*, p. 9.

²¹ CANÇADO TRINDADE, A. A. *Tratado de Direito Internacional dos Direitos Humanos*, Volume I, Porto Alegre: Sergio Antônio Fabris Editor, 1997, p. 212-213.

²² This is an example, among many, in which the state equips the public machine to achieve its objectives. In this sense, MIRANDA, J. *Democracia e Constituição para lá do Estado*, in da Revista da Faculdade de Direito da Universidade de Lisboa, vol. LI – n.º. 1 e 2, Coimbra: Coimbra Editora, 2010, p. 34, To the author, "the Absolute State did not intervene in the private life of the people, did not intend to absorb civil society (nor had the means to do so); while the totalitarian state assumes all power in society and identifies human freedom with the pursuit of its ends. "

²³ QUEIROZ, C. *Direito Constitucional Internacional*, Lisboa: Petrony Editora, 2016, p. 16. In the author's opinion, "The legal core of sovereignty - the highest political authority and constitutional independence - remains, but its content necessarily changes considerably."

²⁴ In this sense we can mention: the crisis of pathologies that spread through human contact; of contaminated foods that are produced by countries where they will not be consumed. More recent case is the crisis of the Eggs in the European Union that affected several countries within the economic block, and outside of it, Switzerland and Hong Kong. This was the case of the "blocking" of farms in four countries, where "illegal use of this product was confirmed": Belgium and the Netherlands, origin of the crisis, as well as Germany and France (August 2017).

global sphere,²⁵ or if, at the present moment and / or in the near future, the "Cooperative Constitutional State" will be possible?

1. The Constitutional State of Cooperative Law

The current state is influenced by multiple factors, because it is embedded in a global reality which suffers the impulse and inflows of unusual realities to its frontier boundaries. Although the Cooperative Constitutional State presents numerous difficulties in implementation and needs further study. Nevertheless, the issues that are faced should not divert the search for a more integrated (cooperative) society, because these problems are the keys that must impel the development of new perspectives and propose new objectives to be incorporated by the State of Law that extends to the outside world.

The global reality is imperative, both internally and externally in developing fundamental standards as a way of covering and protecting as many rights as possible, a good example of this type of open constitution is that of the United Kingdom.²⁶ Therefore, "The solution for the guarantee of fundamental rights will not be found in the cross-cultural consensus on them, but in the cooperation procedures and dependence of this cooperation."²⁷ In this sense, Constitutional Law cannot be considered as a right attached to the productive sphere of the local (national) parliament, since it can, and should be, influenced by normative and assecuratorial productions of rights derived from other normative orders, be they regional, such as the Fundamental Letters of Law (with areas of continental coverage) or worldwide as in the Universal Declaration of Human Rights (UDHR), UNESCO, FAO, International Human Rights Treaties,²⁸ International Organizations²⁹ and many other normative documents.

The Cooperative Constitutional State of Law, despite calling for an "openness to the outside," nonetheless, the political, juridical and social criteria of a given state unit are not neglected. At that point, the assessment of reality, to which the State is linked, is permeated by the political appreciation of a given society. In this sense it "opens inwards."

This is due to the fact that the modern state, as Jorge Miranda teaches, "Today, it tends to also be situated in different ways in different instances - those of the increasingly institutionalized international community, through the United Nations and organizations and integration training, so-called above or transnational."³⁰ In fact, the State of Cooperative Constitutional Law does not appear very distant from the early developments that formed the idea of adopting national constitutions, because the reality that demands a global society is the definition of the scope of the duties and rights of the citizens and protection to those rights and duties by the state in relation to the international community.

This statement is in line with the vision of a Cooperative Constitutional State, because although there are internationally recognized human rights, it is within the internal sphere of the State that it is held, because as it is settled, the origin of the regulatory monopoly of fundamental rights, is based on constitutions, because "it is

²⁵ See, SOUSA SANTOS, B. *Os processos da globalização*. In: A Globalização e as ciências sociais. Boaventura de Sousa Santos (org.). 2ª. ed. – São Paulo: Cortez, 2002, p. 32 - 35.

²⁶ In this sense the UK Constitution is an example of constitution open to the world. In these sense, LEYLALAND, P. *The constitution of the United Kingdom: a contextual analysis*. Third edition, Portland, Oregon: Hart Publishing, 2016, p. 25, affirms that: "Despite the fact there is no fundamental law relating to the constitution, it is possible to approach a description of the constitution by reference to a number of key constitutional sources."

²⁷ BECK, U. *O que é globalização?...*, p. 168-169.

²⁸ See, CANÇADO TRINDADE, A. A. *Tratado de Direito Internacional dos Direitos Humanos, ... passim*.

²⁹ MIRANDA, J. *Democracia e constituição para lá do Estado...*, loc. cit.

³⁰ MIRANDA, J. *Curso de Direito Constitucional. Estado e Constitucionalismo. Constituição. Direitos Fundamentais*. Vol. 1. Lisboa: Universidade Católica Editora, 2016, p. 11.

the Constitution that deals with rights, in fact, it is thanks to the Constitution that [fundamental] human rights become rights in the legal sense."³¹

1.1. A new view of the sovereign nation-state

Global movements for the search for peace in the post-war period (1st and 2nd)³², brought to light the problems created by globalization and the diffusion of electronic information media, give local problems global reach. The very configuration of the present world that presents itself in an increasingly economic³³ and culturally transnational way³⁴, entails many problems or difficulties experienced by some countries or continent, which are generated by exogenous factors³⁵.

These movements, in search of integration around objectives common to the global community, strongly challenge the configuration of a "nation-state" in the classic way³⁶, that State "established" on the basis of "territorial" and "sovereign"³⁷, Since cloistering, within its own borders, no longer serves the interests of citizens of the State itself³⁸, nor of citizens of other countries, since international relations must be guided by the principle of respect for fundamental rights, that is to say, the realization of the Cooperative Constitutional State is achieved in the respect for

³¹D´ATENA, A. "Jedermannsrechte", "bürgerrechte" ed imigrazione: Note minime. In: O constitucionalismo do séc. XXI na sua dimensão estadual, supranacional e global: Congresso em Honra de Peter Häberle (por ocasião do seu 80º. aniversário). Vasco Pereira da Silva e Francisco Balaguer Callejón (Coord.). Lisboa: ICJP, 2015. E-book. ISBN 978-989-8722-06-5. Available on: www.icjp.pt, p. 23 – 30.

³²HALE, T.; HELD, D.; YOUNG, K. *Gridlock...*, p. 4; also see, MOTA DE CAMPOS, J. *Direito Comunitário: O Direito Institucional: Vol. I*, 2ª. edição. Fundação Calouste Gulbenkian. Lisboa, 1998, p. 40.

³³BECK, U. *O que é globalização? Equívocos do globalismo: resposta à globalização* (trad. Was ist globalisierung?: Irrtümer des globalism: Antworten auf globalisierung); São Paulo: Paz e Terra, 1999, according to the author, the globalization of the economy ends with the beacons of the "State and the national economy", p. 15.

³⁴BECK, U. *O que é globalização?...*, p. 123-127.

³⁵GIDDENS, A. *Este turbulento e poderoso continente...*, p. 19. in these sense see, D´ATENA, A. "Jedermannsrechte", "bürgerrechte" ed immigrazione..., p. 29 – 30.

³⁶KAFFT KOSTA, E. *A Local Globalização da Soberania*, In FERNANDO ALVES CORREIA; JÓNATAS E. M. MACHADO, E JOÃO CARLOS LOUREIRO (orgs.), *Estudos em homenagem ao Prof. Doutor José Joaquim Gomes Canotilho, Volume II, Constituição e Estado: entre Teoria e Dogmática*, Coimbra: Coimbra Editora, 2012, p. 347, In this sense, the author refers to the need for a "re-evaluation of the *topos* of state sovereignty and its revaluation, while free of absolutisms and self-enclosures."

³⁷VAN CAENEGEM, R. C. *Uma introdução histórica ao Direito Constitucional Ocidental* (trad. An Historical Introduction to Western Constitutional Law), Lisboa: Fundação Calouste Gulbenkian, 2009, p. 32, in this sense, the author states that the sovereign nation-state was "(...) Those did not consider themselves limited by supranational laws or subject to supranational institutions, and freely decided on their international policies, including war and peace . They were superior, that is, sovereign, higher than any other authority. The superiors of these states concerned not only other States, but also had an internal dimension, since citizens were completely and solely subject to a national legislator, a national government and a national judiciary without recourse to any external authority."

³⁸Here, we highlight countries such as North Korea, Venezuela and some countries in the Middle East. They are countries that close to the world and as a consequence impose on their citizens, organizations and companies a regime of suffering and deprivation of their fundamental freedoms and guarantees; also see, RUELA RIBEIRO, J. *Luxemburgo sugere expulsar Hungria da União Europeia: A política anti-imigração do governo de Budapeste põe em causa "a coesão dos valores" europeus, disse o ministro dos Negócios Estrangeiros luxemburguês*, Diário de Notícias, Lisboa, 13 de setembro de 2016, available on: <https://www.publico.pt/2016/09/13/mundo/noticia/luxemburgo-sugere-expulsar-hungria-da-ue-1743963>, accessed on 25 de jan de 2017.

fundamental rights³⁹, even for the citizens of other States⁴⁰, since these rights are "inherent in the very notion of person" and form "the legal basis of human life at its present level of dignity, as the philosophical, political, social and economic bases and circumstances of each time and place."⁴¹

The modern "nation-state" is reconfigured in malleability and "permeability" that allows external influences, especially, on matters that concern the international community, but which must be carried out internally in this aspect and at this stage of our Transnational organizations, so gaining great importance⁴².

An example, well marked by respect for fundamental rights and the need for States to safeguard them is delimited by the European Union, as teaching Maria Luisa DUARTE,

"Fundamental rights are on the path of the European Union as they have been - and are - in the long run of the constitutional state, in the sense that they are a structuring requirement of a model of legitimation and exercise of political power based on the nuclear idea of respect for dignity of the human person, with its multiple legal, ethical, economic and social implications."⁴³

From this point of view, it can be seen that the opening up of the Rule of Law is a requirement of the internal legal order⁴⁴, here Constitutional Law plays an essential role, since it proposes, through democratically⁴⁵ elected representatives, the "Opening up to the world". It is through the manifestation of the parliament that the constitutional law relaxes the internal order, in order to allow the dialogue with other rights assured in the international order.⁴⁶

In this light, the national State opens itself to "cooperation" with other States. This is due to the implementation of western constitutionalism, which is now shaped by representative and pluralist democracy⁴⁷ and the rule of law in its modern sense, based on solidarity and interdependence in the sharing of values and common problems, that "facilitates the acceptance of limits to the respective prerogatives of sovereignty."⁴⁸

³⁹ MIRANDA, J. *Valores permanentes da Constituição Portuguesa*. In IV Seminário Luso-Brasileiro de Direito Constitucional: Constituição e Crise: A Constituição no contexto das crises políticas e económica. Carlos Blanco de Moraes e Gilmar Ferreira Mendes (org.). Brasília: IDP, 2017, pp. 39 -56.

⁴⁰ In these terms, cf. LUÍSA DUARTE, M. *União Europeia e Direitos Fundamentais – no espaço da internormatividade* – Reimpressão. Lisboa: aafdl, 2006, pp. 21 e ss.

⁴¹ MIRANDA, J. *Direitos Fundamentais: Introdução Geral*. Lisboa: Sem Editora. 1999, p. 14.

⁴² VAN CAENEGEM, R. C.. *op. cit.*, p. 31.

⁴³ LUÍSA DUARTE, M. *União Europeia e Direitos Fundamentais...*, p. 21.

⁴⁴ VAN CAENEGEM, R. C. *op. cit.*, p. 321-322, in which case it was apparent that the opening inwards eventually led to a break with the one-party system, and the contestation within the Soviet Union, as issues of nationalities began to emerge within block, and with the defeats of the Communist Party (the only party), and consequently, after the 1991 revolution, the Soviet Union disappeared from the global scenario..

⁴⁵ HESSE, K. *A força normativa da Constituição (trad. Die normative Kraft der Verfassung)*, Porto Alegre: Sergio Antonio Fabris Editor, 1991, p. 21

⁴⁶ BROWNLIE, I. *Princípios de Direito Internacional Público (trad. Principles of Public International Law, 4th edition, 1990)*, Lisboa: Fundação Calouste Gulbenkian, 1997, p. 62-63

⁴⁷ GOMES CANOTILHO, J. J. *Direito constitucional*, 6ª. edição revista, Coimbra: Livraria Almedina, 1993, p. 406-407; MIRANDA, J. *Curso de Direito Constitucional...*, p. 70.

⁴⁸ LUÍSA DUARTE, M. *União Europeia e Direitos Fundamentais...*, p. 23.

1.2. *The Cooperative Constitutional State - conceptual vision of Peter Häberle.*

The term "Co-operative Constitutional State" was coined by Professor Peter Häberle. This developed from discussions about the need to open constitutional law, since the Constitution set to the national order ends up 'enclosing citizens' rights and excluding new rights produced in the global context.⁴⁹

With the importance of an open discussion in the context of the States, Peter Häberle, based on a new vision on the Constitutional State of the 19th Century, the so-called "Cooperative Constitutional State"⁵⁰ is the new compass that should guide constitutional law. As Gilmar Mendes points out, "Through his constitutional theory, aimed at the defense of tolerance and acceptance of the other and the protection of fundamental rights in the complex reality of the world today, Peter Häberle contributes enormously to the strengthening of the Constitutional State, above all in countries with democratic transition"⁵¹. This is crucial for the development of new horizons in law as a whole, as we live in a time when the need for international cooperation has been greatly demanded⁵², mainly because domestic challenges end up affecting other countries and what happens in other countries also ends up affecting companies outside their scope of action.

In the teaching of Professor Peter Häberle, the Modern Democratic State cannot be considered "immutable" and as a consequence of its transformation, a new phase arises within the "Constitutional State of International Law" due to the pressing needs of the State's adaptation to new paradigms⁵³, he proposes the concept of a "Cooperative Constitutional State"⁵⁴.

According to the author, the "Cooperative Constitutional State" is one that "finds its identity also in international law, in the intertwining of international, supranational relations, in the perception of international cooperation and responsibility, as well as in the field of solidarity. It corresponds, therefore, to the international need for peace policies."⁵⁵

Even more, for him "(...). The Cooperative Constitutional State is not only a possible (future) form of development of the type of "Constitutional State"; it has already taken shape today, clearly, in reality and is, a necessary form of legitimate statehood of tomorrow."⁵⁶

In the "Cooperative Constitutional State," state power is limited by material and formal constitutional principles: such as "Fundamental Rights, Social State of Law, division of powers, independence of the courts, - in which it is controlled in a pluralistic and legitimate manner democratically⁵⁷", principles that give consistency

⁴⁹ *Ibidem...*, p. 22.

⁵⁰ See, HÄBERLE, P. *Estado Constitucional Cooperativo* (trad. Der Kooperative Vervassungsstaat). Rio de Janeiro: Renovar, 2007.

⁵¹ MENDES, G. *Homenagem a Peter Häberle e sua influência no Brasil*, available on: http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfAgenda_pt_br/anexo/Homenagem_a_Peter_Haberle_Pronunciamento_3_1.pdf, accessed on 26 de jan de 2017.

⁵² See, HALE, T.; HELD, D.; YOUNG, K. *Gridlock...*, p. 34.

⁵³ In this sense, see, QUEIROZ, C. *Direito Constitucional Internacional...*, p. 22, for the author the "modern state of territorial basis, that is, the "classical" Vestifalian model. They no longer express the need of the international community.

⁵⁴ HÄBERLE, P. *Estado Constitucional Cooperativo...*, p. 2.

⁵⁵ HÄBERLE, P. *Estado Constitucional Cooperativo...*, p. 4.

⁵⁶ *Ibidem*, p. 5.

⁵⁷ HÄBERLE, P. *ibidem*, p. 6; see in this sense what the author has in his essay on constitutional hermeneutics, HÄBERLE, P. *Hermenêutica Constitucional: A sociedade aberta dos intérpretes da constituição: contribuição para a interpretação pluralista e "procedimental" da Constituição*

to what is articulated more essential in a Constitution and that emanate for the entire legal order⁵⁸ of a particular State.

The "Cooperative Constitutional State" is "open" to itself and "to the world," "juridically and politically," and "corresponds" to the development of "International Co-operative Law⁵⁹". In this sense, the "Cooperative Constitutional" is achieved through trust, "walking together", for the defense of human rights. This type of state "lives from cooperation with other states, the community of states and international organizations. (...) It takes for itself the international structures of community law in losing or letting it completely empty its own contours."⁶⁰

The Cooperative Constitutional State does not cling to its territorial universe, but is "open" to external influences, it works in the global interest and contests those who are shielded under an impermeable mantle. "The Constitutional State is the internal response of the free and democratic Western Constitutional State to the change in International Law and to its challenge that led to forms of cooperation. "At this point, International Law and Constitutional Law are self-influencing and" transforming together " and further" Crossroads and reciprocal actions are too intensive to give this external form of complementarity an exact idea. The result is the "common law of cooperation."⁶¹

1.3. Norms of Constitutional Law that guide cooperation.

The Constitutional State of Cooperative Law puts side by side the great themes of the present day and its affects on Man as being belonging to a "transnational / relational" environment, what Ulrich Beck calls "globalization of biographies"⁶² and Anthony Giddens draws attention to more clearly, because according to him "Globalization is not just another thing that goes "around", remote and detached from the individual. It is also an "inner" phenomenon that influences the intimate and personal aspects of our lives."⁶³ These aspects are intrinsically linked to fundamental rights, such as: to establish families with people from other countries, housing rights, children's rights and those for the elderly, as well as access to basic health services to people from other parts of the globe, but which demand local action.

In this state, the "openness" to the outside, widens the horizon of analysis of the right (by virtue of a wide juridical framework at disposal), thus questioning the limits established in the national field that only the domestic legislation is given as " good and sufficient, "because there are norms and rights outside domestic law that assist and portray the best interest of man before the international community. This is due to the fact that many decisions within the State internal framework depend on global and supranational policies⁶⁴, an idea that is expressed, especially within the European Union, which is increasingly aware that what happens in the delimited

(trad. *Die offene Gesellschaft der Verfassungsinterpreten. Ein Beitrag zur pluralistischen und "prozessualen" Verfassungstheorie*). Porto Alegre: Sergio Antonio Fabris Editor, 2002, principalmente o cap. III, item 4, p. 36 – 40.

⁵⁸ MIRANDA, J. *Valores permanentes da Constituição Portuguesa...*, p. 39.

⁵⁹ HÄBERLE, P. *Estado Constitucional Cooperativo...*, p. 6-7.

⁶⁰ *Ibidem*, p. 8-9.

⁶¹ *Ibidem*, p. 10-12.

⁶² BECK, U. *O que é globalização...*, p. 138.

⁶³ GIDDENS, A. *O Mundo na era da Globalização...*, p. 23

⁶⁴ BALAGUER CALLEJÓN, F. *El final de una época dorada. Una reflexión sobre la crisis económica y el declive del derecho constitucional nacional*, In FERNANDO ALVES CORREIA; JÓNATAS E. M. MACHADO, E JOÃO CARLOS LOUREIRO (orgs.). *Estudos em homenagem ao Prof. Doutor José Joaquim Gomes Canotilho*, Volume II, *Constituição e Estado: entre Teoria e Dogmática*, Coimbra: Coimbra Editora, 2012, p. 101.

territory of another Member State, affects the rights of the local citizen⁶⁵. In this sense, the "supranationality" of [fundamental] rights is halfway to the obligations of international obligations [Treaties, Agreements and Conventions]⁶⁶, which is more easily adapted to the evolutionary modern states need, being able to allow constitutional evolution⁶⁷ by the fact that "conventions are capable of being easily modified to accommodate changing circumstances."⁶⁸

A fact that proves this situation, in which the sense of cooperation must prevail is the fact that crises originated in other states end up affecting directly neighboring countries, as is the case of the crisis triggered by political persecution in Venezuela, that affected neighboring countries. The problems caused by the crisis in this country are notorious, fundamental rights such as food, freedom of expression or education are victimized or, due to the current situation, cannot be implemented at national level, causing the exodus of the nationals of that country to neighboring countries [Brazil, Colombia and Guyana] and, consequently, have a devastating effect on their local institutions.

This fact, more evident, in the city of Pacaraima, on the border of Brazil with Venezuela, where the number of inhabitants has doubled and still grows, Venezuela is the country that has the highest number of refugees in Brazil⁶⁹, due to this reality, fundamental rights, not only of Brazilians, but also of Venezuelans are disrespected because of the lack of a structural conditions of the Brazilian government, and the principle of non-reversibility of fundamental rights is plainly unfeasible⁷⁰.

Based on the reality observed in the global context, the search for legal support must be done in a joint way, since "(...) it becomes increasingly predictable - and analytically comprehensible - that internal legal systems cannot live in isolation, and can no longer cope by themselves. They can no longer be analyzed and interpreted without considering their relation as an external system."⁷¹ In this sense, cooperation (openness) has the function of extending and assisting the national State in its mission of effecting, integrating and interpreting fundamental rights. At this point, "Cooperation will be, for the Constitutional State, a part of its identity that it, in the interest of" constitutional transparency", should not only practice but also document in its legal texts, especially in constitutional documents.⁷² Such norms, as an objective to be achieved, should come in the form of programmatic norms of "reception/integration"⁷³, because the open texture of the current ["human"] rights that one wishes to protect need such tools⁷⁴.

⁶⁵ BECK, U. *A Europa alemã: de Maquiavel a "Merkiavel": estratégias de poder na crise do euro* (das deutsche Europa. Neue Machtlandschaften in Zeiten der Krise). Lisboa: Edições 70, 2014, p. 19.

⁶⁶ See, MOTA DE CAMPOS, J. *Direito Comunitário...*, p. 509.

⁶⁷ In this sense, for a description from another point of view, tending to demonstrate a process of adaptation in a globalized and complex order of fundamental rights, denominated by the author as "bridges of transitions", see, NEVES, M. *Transconstitucionalismo*. São Paulo: Editora WMF Martins- Fontes, 2009, p. 110.

⁶⁸ LEYLAND, P. *The constitution of the United Kingdom...*, p. 26.

⁶⁹ BRASIL. *Refúgio em números*. Available on: http://justica.gov.br/noticias/brasil-tem-aumento-de-12-no-numero-de-refugiados-em-2016/20062017_refugio-em-numeros-2010-2016.pdf/view, accessed on 15 de ago de 2017.

⁷⁰ QUEIROZ, C. *O Princípio da não Reversibilidade dos Direitos Fundamentais Sociais: Princípios Dogmáticos e Prática Jurisprudencial*. Coimbra: Coimbra Editora, 2006, p. 25 e ss.

⁷¹ QUEIROZ, C. *Direito Constitucional Internacional...*, p. 104.

⁷² HÄBERLE, P. *Estado Constitucional Cooperativo...*, p. 3, *et. seq.*

⁷³ QUEIROZ, C. *Ibidem*, p. 20.

⁷⁴ It is necessary to mention that these standards really have a minimum of effectiveness, because as highlights NEVES, M. *A Constitucionalização simbólica*, 3ª. ed. – São Paulo: Editora

These norms would be the way to approximate the human rights established or recognized in the international sphere of [fundamental] state law, because in this way the State could verify its pertinence and necessity in the national order. At this point, these norms would approximate those advocated by Peter Häberle as the triad of "reality-possibility-needs"⁷⁵. In this sense, critical democracy develops⁷⁶, since it ends up rejecting the uncritical acceptance of the precepts [treaties, agreements or conventions] imposed by economically stronger states. The orientation by the triad defined by Peter Häberle is due to the fact that the countries that are oriented by the factor "reality-possibility-necessity" have the condition to go beyond⁷⁷ the internal constitution dictated, but within an appreciation of their needs.

Therefore, collaboration is done, under the pallium of reflection, thus replacing the arrogance of thought that what is internal is better, and in contrast, analyzes what is good and feasible in the national sphere of internationally established precepts and thus constitutionalizes rules that appear in accordance with the internal Constitution. In this way, the implementation of international norms in the national constitution of each country must pass through the scrutiny of critical democratic analysis, since "Critical democracy is, in contrast, a restless, circumspect regime that distrusts itself, always willing to recognize its own mistakes, to return to discussion, to start again from the beginning."⁷⁸ From this regime [critical democracy], one can see that the Constitution opens to the world.

2. The objective of the Cooperative Constitutional State of Law.

In a closer analysis, one can start from the idea that the Democratic State of Constitutional Law is born and is strengthened, starting from the powers granted to it by its holders, the people. In this mission, the State of Cooperative Constitutional Law has as its goal the exercise of power, these are "fundamental rights", because in order for democracy to exist, it is necessary first of all to safeguard the fundamental rights of citizens, regardless of what instruments are listed⁷⁹. As Jorge Miranda states, fundamental rights are "all those who are enshrined in any norms of the formal Constitution, which covers both the instrumental constitution and the Universal Declaration: the place does not violate the nature of rights, [...]"⁸⁰.

It should be borne in mind that fundamental rights are not exhausted in the latter, since they are "not only those that formally constitutional norms enunciate;

WMF Martins Fontes, 2011. there is a tendency of distortion of the programmatic norms, which in the author's words are "pseudoprogrammatic" with the sense of advertising abroad, but which are disregarded by the domestic legislator, a fact that lacks greater control at the state level, since "can not propose or implement another program, or even act against the constitutional program. Hence why non-compliance with programmatic norms can raise the problem of controlling the constitutionality of the respective action (or omission) of state organs."

⁷⁵ HÄBERLE, P. *Pluralismo Y Constitución. Estudios de Teoría Constitucional de La Sociedad Abierta* (trad. *Die Verfassung des Pluralismus. Studien Zur Verfassungstheorie der offenen Gesellschaft, Athenäum TB-Rechtswissenschaft, Könstein/TS, 1980*), Madrid: Editorial Tecnos (Grupo Anaya, S.A.), 2013, p. 78.

⁷⁶ See, ZAGREBELSKY, G. *A Crucificação e a Democracia* (trad. II "Crucifige!" e la Democrazia). Coimbra: Edições Tenacitas, 2004. p. 102 e ss.

⁷⁷ ZAGREBELSKY, G. *A Crucificação e a Democracia...*, p. 103.

⁷⁸ *Ibidem*, p. 114.

⁷⁹ In these terms, see. GOMES CANOTILHO, J. J. *Incomensurabilidade dos discursos ou hierarquias entrelaçadas nos sistemas jurídicos multinível*. In: *Católica Law Review*, Volume I / n.º 1 / jan. 2017. According to the author, "In multilevel systems where inter-convergence, inter-consistency, inter-constitutionality, interjurisdictionality, and interjurisdictionality converge, it is found that the hierarchy of sources of law no longer has a pyramidal logic.", p. 37.

⁸⁰ MIRANDA, J. *Curso de direito constitucional. Estado e Constitucionalismo. Constituição. Direitos Fundamentais...*, p. 260; see also, in these sense, BROWNLIE, I. *Princípios de Direito Internacional Público* (trad. *Principles of Public; international Law, 4th edition, 1990*) ..., p. 39-40.

are or may also be rights from other sources, from the broader perspective of the material Constitution⁸¹. "Therefore," openness "to the outside and to" inside⁸² aims to safeguard the fundamental rights⁸³ that will arise in the future. As José Afonso da Silva points out, "The recognition of fundamental human rights, in explicit statements in the declarations of rights, is recent, and its possibilities are far from exhausted, since every step in the evolutionary stage of humanity matters conquest of new rights"⁸⁴. These new rights are emerging from the demands of the populations of various parts of the world, causing an effect, previously not imagined by the States, the so-called "*bottom-up*"⁸⁵ movement is one of the realities born just of the open society of the interpreters of the constitution⁸⁶, also claim constitutional rights that many times closed states can not see.

This opening has a double basis, as Peter Häberle asserts, because fundamental rights are "supreme values themselves", and enable Man to discover and actualize values, while at the same time guaranteeing him the libertarian status. The fundamental rights are, on the one hand, an expression of an order of liberty already achieved and, at the same time, are presupposed for this order to be constituted again, again and again through the action in freedom of all, ⁸⁷ " being thus" elements constitute the "guiding principles of the Constitutional Constitutional Law.

From the above, it is stated that the Cooperative Constitutional State, because of the many mishaps and problems that involve the globalized world, is one of the possibilities that are in line with the need to safeguard fundamental rights in the

⁸¹ MIRANDA, J. *A Abertura Constitucional a Novos Direitos Fundamentais*, in Estudos em Homenagem ao Professor Doutor Manuel Gomes da Silva, Edição da Faculdade de Direito da Universidade de Lisboa, Coimbra: Coimbra Editora, 2001, p. 560, (p. 560-572)

⁸² In this sense, we can highlight the role of the *Amicus Curiae* (friends of the Court). It provides the democratic and dialogical interaction between the Courts and natural or juridical persons, organs or specialized entities, in which it has the cognitive potential to present different points of view, interests, aspects and elements not always perceived, seen or heard by the Courts directly from the controversy between the parties that make up the controversy, thus allowing for more accurate and also more legitimate decisions from the point of view of the Democratic State of Law, provided that they fulfill criteria for admission, namely the relevance of the matter, the specificity of the topic or the social repercussion of the controversy, as well as the adequate representation of the suitors. In that sense, the San Francisco Court of Appeal in the United States has allowed 97 large companies to act as *Amicus Curiae* in a lawsuit in which the suspension of the entry ban of seven Muslim countries in the United States will be considered, made in September 2016, available on: <http://newsroom.courts.ca.gov/news/supreme-court-issues-order-inviting-amicus-curiae-submissions-following-receipt-of-state-bars-interim-special-regulatory-assessment-request>, accessed on 09 de fev de 2017.

⁸³MIRANDA, J. *Constituição e Cidadania 2003-2015*, Coimbra: Almedina, 2016, p. 13.

⁸⁴ AFONSO DA SILVA, J. *Curso de Direito Constitucional Positivo...*, p. 149.

⁸⁵ About this form of activism, see the work of HALE, T.; HELD, D.; YOUNG, K. *Gridlock...*, p. 300.

⁸⁶ In these terms, see. HÄBERLE, P. *Hermenêutica Constitucional. A sociedade aberta dos intérpretes da constituição...*, *passim*.

⁸⁷ HÄBERLE, P. *La garantía del contenido esencial de los derechos fundamentales em la ley fundamental de Bonn. Una contibuición a la concepción institucional de los derechos fundamentales y a la teoría de la reserva de la ley* (trad. *Die Wesensgehaltgarantie des art. 19 abs. 2 Grundgesetz. Zugleich ein Beitrag zum institutionellen Verständnis der Grundrechte und zur Lehre vom Gesetzesvorbehalt*, Freiburger rechts -und staatswissenschaftliche Abhandlungen (hrsg. von d. Rechts – und Staatswissenschaftlichen Fakultät der Uiversität Freiburg, Breisgau, Band 21), Karlsruhe, 1ª. ed., 1962), Madrid: Editorial Dykinson, 2004, p. 8.

world order⁸⁸. Such an open and cooperative state is in line with the "critical democracy" that seals itself from the great and terrible works of truth and force. Even though supporters of vigorous politics may seem to be devoid of fiber, that renunciation nevertheless achieves freedom from necessity and openness to liberty⁸⁹. "This state is what Peter Häberle calls the" Cooperative Constitutional State⁹⁰", an ideal to be built within a regime that allows democracy to flourish.

4. Are the means of cooperation really effective?

The above question is related to the moment when the world has great uncertainty about the future of the peoples around the globe⁹¹, thus contesting the idea that the State of Cooperative Constitutional Law⁹² "would be the State of the future"⁹³. Such doubts are raised by the need to seek alternatives to the events that now appear in Europe, with an ever greater restriction of fundamental rights, of certain groups, especially of Muslims (in France); persecution of the Right of Worship and extinction of the activities of Jehovah's Witnesses (in Russia); the authoritarian and undemocratic reforms made by the Polish legislature, dominated by the conservative nationalists of the Law and Justice Party who call into question the exemption from justice; the crisis of refugees, which affect more forcefully, Spain, Greece, Italy among other countries of the European continent.

These facts provoke a critical questioning of the "Cooperative Constitutional State", since, as it seems to draw in the sphere of the European Union and in the global arena, it is a great split in the consensus on the issue of fundamental Rights, which puts it on a collision course with the "idea" of a "Cooperative Constitutional State", this fact is due to the differences between the philosophical thought and the reality that is verified in the practice⁹⁴.

These facts end up provoking a strong questioning of a "Cooperative Constitutional State", since it seems to draw in the sphere of the European Union and in the global arena, it is a significant split in the consensus on the matter of fundamental Rights, which puts in collision route to the "idea" of a "Cooperative Constitutional State", this fact is due to the differences between the philosophical thought and the reality that is verified in the practice.

In the United States, the issue of the Constitutional State of Cooperative Law is also posed, as the US president has signaled that the United States is in the process of closing in and out. It closes in, when the president attacks established institutions, trying to demoralize them as he has done by attacking the judiciary and parliament. Outwardly, when it manifests its intention to close relations with other States, because relations previously considered strategic for the region [Canada and Mexico], it is placed in the wake of the doubt, such facts can be verified from the Decrees of

⁸⁸ TAVARES DA SILVA, S. *Direitos Fundamentais na Arena Global...*, p. 17.

⁸⁹ ZAGREBELSKY, G. *A crucificação e a Democracia...*, p. 114.

⁹⁰ HÄBERLE, P. *O Estado Constitucional Cooperativo...*, *passim*.

⁹¹ See, DIDI-HUBERMAN, G. *Coisa pública, Coisa dos povos, Coisa plural*, in Rodrigo Silva e Leonor Nazare, (Orgs.), *A República por vir. Arte, Política e Pensamento para o século XXI*, 2ª. ed. Conferências no âmbito da exposição *Res Publica, 1910 e 2010 Face a Face*, Lisboa: Fundação Calouste Gulbenkian, 2015, p. 41-70.

⁹² See, GIDDENS, A. *Este turbulento e poderoso continente: ...*, "As far as the larger countries are concerned, the EU's human rights record is much less impressive. It was pointed out that, in the case of China, the policies implemented have been 'the most embarrassing signs of an abyss between European rhetoric and reality' p. 228.

⁹³ See, HÄBERLE, P. *Estado Constitucional Cooperativo...*, p. 11.

⁹⁴ In these sense, LACROIX, J. *Crise da democracia, crise da civilização* (trad. *Crise de la Démocratie, Crise de la Civilization: Chronique Sociale de France, 1965*), p. 128, "[...]. The philosopher is the one who thinks the end of the struggle and the oppositions, the reconciliation of man with man. But this thought does no change the reality and if everything is reconciled in the mind of the philosopher nothing is in the daily life of men."

President Donald Trump. The president-elect's Promise of Closing the Border with Mexico, through the construction of a wall, calls into question the North American Free Trade Agreement, NAFTA, even against precepts established by the Charter of the United Nations (art. 55), which establishes "cooperation" in the economic sphere as essential for the search and maintenance of peace.

In addition to the decree ordering the construction of the border wall with Mexico, other decrees strongly affect citizens of other countries, such as anti-immigrant, anti-Islamic decrees, including discriminating against countries and their citizens because they belong to a what that the president has labelled as an enemy, such an attitude is demonstrated in countries like Iran, Iraq, Libya, Syria, Somalia, Sudan and Yemen.

Also in the international sphere, the decrees of the president end up affecting fundamental rights of American citizens, of different origins, because, there are American people who have origins of several countries of which the president, by means of Decree, has prevented them living in their homes in the USA, thus establishing noncompliance with the constitutional precepts of freedom and many others affirmed in International Treaties and by the American Constitution itself⁹⁵.

There is also disregard for the Charter of the United Nations, which, in its preamble, states that countries must respect their obligations under the international order and promote better living conditions "within a broad freedom". Countries need to practice "tolerance and live in peace with one another as good neighbors." In Article 1, paragraph 3, the UN Charter affirms that "international cooperation is the way to solve international problems of an economic, social, cultural or humanitarian nature, and to promote and encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion; ⁹⁶"

The Inter-American Charter of Human Rights reaffirms that the American States must respect the "essential human rights"; that this right is not due to the human being "being or not" national of a particular country, but of the attributes of the human person, "reason why an international protection, of a conventional nature, supporting or complementary to that offered by domestic law of the American States; ⁹⁷" On the basis of these two normative instruments, we have learned that the US president's attitudes do not conform to the international commandments, but also severely defends human rights.

In Europe, speaking on a continent with a more developed supranational integration, due to the proportions, there is a greater stage of cooperation than in other parts of the world, and due to this configuration, the possibility of a European constitution⁹⁸, although this debate which had developed for several years, had been rejected by the referendum of the French and then of the Dutch in 2005. Although these two countries had "endorsed" such an instrument, there would still be difficulty in joining it because, as Ingolf Pernice asserts, the kind of constitutionalism that

⁹⁵ EUA. Constituição Americana. Art. VI, n.º 2. available on: https://usconstitution.net/xconst_A6.html, accessed on 28 de ago de 2017; também cf. DE ALBUQUERQUE MELLO, C. D. *Direito Constitucional Internacional...*, p. 102; 104.

⁹⁶ See, also in these sense, the art. 55 (a), (b) and (c) of the Charter of the United Nations.

⁹⁷ OAS. Convenção Americana sobre direitos humanos. Assinada na Conferência Especializada Interamericana sobre Direitos Humanos, San José, Costa Rica, em 22 de novembro de 1969, available on: http://cidh.oas.org/Basicos/Portugues/c.Convencao_Americana.htm, accessed on 09, fev, 2017.

⁹⁸ See, GUERRA MARTINS, A. M. *O projeto de constituição europeia*, Coimbra: Almedina, 2004, p. 31.

prevails in Britain has as "the key to Parliament's supremacy"⁹⁹, this kind of sovereignty has survived for centuries and therefore there is no need for a written constitution¹⁰⁰.

Following the abortion of a "Constitution" for Europe, another blow to the countries and integration into the old continent, came with the departure of the United Kingdom, the so-called "Brexit", which had been finalized on June 23, 2016. In addition to Britain's departure, the European continent is experiencing a crisis due to its openness to the outside, the growth of xenophobic nationalism is leading other countries to ventilate the possibility of also leaving the European Union.

In France, there is already a great movement, mainly dominated by the far-right National Front party (FN), which demonstrates the appeal for nationalist and anti-immigration ideas in terms of the promise of a political campaign that led to US President Donald Trump to power in 2016. In her address in the city of Lion, Marine Le Pen, a French right-wing candidate, attacked the fact that European countries opened too much to the world, causing a "large-scale immigration" effect, attacked globalization and the risk of "Islamic fundamentalism".

The persecution of [fundamental] human rights seems to break the frontiers of countries "not very civilized" or in the language of Peter Häberle, "indomitable States"¹⁰¹ or "savages"¹⁰² and anchor in so-called "civilized" countries, we see this fact in Myanmar, which continues with the ethnic cleansing of the Muslim community, which was denounced by the first Bangladeshi Minister in a UN General Assembly statement, with the ban in France on behalf of the secular State prohibiting the exercise of a fundamental right to the use of religious symbols, cruel death by the regime of the Philippine government¹⁰³, torture and mass murder by Bashar Al-Assad's regime in Syria, denounced by Amnesty International (AI) in its report¹⁰⁴. Decriminalization of crimes against family members in Russia, violation of fundamental rights in Turkey, discussion of the ban on the use of the Islamic veil and signing of an integration contract for Islamic immigrants from Austria, the inadmissibility of persons from Islamic countries and Latin countries in the United States of America, carrying out the promises made by the current American president.

In Mercosur, at the transnational level, there is still much to go through in the process of integration for the conquest of the Cooperative Constitutional State, mainly by the many political regimes established in the region from democracies in the process of sedimentation to totalitarianism. The internal solidification of protection of human rights remains to be achieved, because is evident, States, with few exceptions, do not yet have a strong apparatus to protect their own citizens.

⁹⁹ PERNICE, I. "Multilevel Constitutionism in the European Union", *Walter Hellstein-Institut, Für Europäisches Verfassungsrecht, Humboldt-Universität zu Berlin*, WHI – Paper 5/2, 2001, p. 3, available on: www.whi-berlin.de/pernice-constitutionalism.htm, accessed on 10 de fev de 2017.

¹⁰⁰ *Idem*.

¹⁰¹ HÄBERLE, P. *Estado Constitucional Cooperativo...*, p. 8.

¹⁰² *Ibidem*, p. 20.

¹⁰³ ANISTIA INTERNACIONAL (AI), *Filipinas: a guerra assassina da polícia contra os pobres*, available on: <https://anistia.org.br/noticias/filipinas-guerra-assassina-da-policia-contra-os-pobres/>, accessed on 09 de fev de 2017.

¹⁰⁴ ANISTIA INTERNACIONAL (AI). *Síria: Matadouro humano: enforcamentos em massa e extermínio na prisão de Saydnaya*, available on: <https://anistia.org.br/direitos-humanos/publicacoes/siria-matadouro-humano-enforcamentos-em-massa-e-extermio-na-prisao-de-saydnaya/>, accessed on 09 de fev de 2017.

This can be seen from a slow and inefficient judiciary, leading countries to be condemned internationally (Brazil) for not respecting labor rights. It can still be understood that, although the Brazilian Constitution is a constitution open to cooperation, the principles that guide this [cooperation] are not observed by the Brazilian government, because issues such as environment, which is of total importance for the whole world, and especially for Latin American countries, such as issues related to the preservation of the Amazon, have not deserved adequate treatment, let us say of collaborative bias, evidence that can be noticed from the Decree of the presidency of Brazil [Dec. 9,142 dated August 22, 2017], which extinguished the copper mineral reserve on the border of the State of Pará and Amapá¹⁰⁵, thus causing an impact not yet measured, since the extinction of the reserve did not go through the debate with the communities, which the exploitation of this ex-reserve will impact.

There is still a destabilization brought about by pseudodemocratic countries that only cooperate with their peers, it is understood, that they profess the same regime (Bolivia, Ecuador and Venezuela), in the latter, because they do not open themselves to "cooperation" they end up taking their citizens through the hardship of not having their basic fundamental rights respected.

The democratic State of Law has not yet been fully present. This was manifested in Venezuela's withdrawal¹⁰⁶ from the MERCOSUR pro-tempore rotating presidency, since it did not comply with the "constitutional" precepts of free elections, and the effectiveness of the rights to freedom of expression and politics, including condemning parties and opposition supporters to prison for disagreement at several crucial points regarding the administration of the current President [Nicolas Maduro], there is still disregard for the Constitution itself, regarding the convocation of elections, even after a positive referendum in favor of them.

Can the Cooperative Constitutional State prevail in a scenario of major eruptions and turbulences at the international level and with effects closely linked to the internal order of the countries? How to protect in the national order proposals that basically try to demonize movements from globalization? In this scenario, of promises that require the people to awaken from a dangerous cycle that seems to have no end, how can societies be "open" to the world if the promises of development and banishment of danger, especially from external phenomena such as immigration, terrorism, little economic development exist? Does the promise of placing order in a place of utter confusion seem to be the most productive path, even if there is no effective proposal for it?

In this sense, it seems that the Cooperative Constitutional State of Law, is blurred by the difficulties brought about by globalization itself, causing a real impasse¹⁰⁷

¹⁰⁵BRASIL. Decreto n.º 9.142 de 22 de agosto de 2017. *Extingue a Reserva Nacional de Cobre e seus associados*, constituída pelo Decreto nº 89.404, de 24 de fevereiro de 1984, localizada nos Estados do Pará e do Amapá. available on: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/decreto/D9142.htm, accessed on 28, ago, 2017.

¹⁰⁶ ESTADO DE MINAS (EM). *Venezuela anuncia transferência da presidência do Mercosul para Argentina*. Available on: http://www.em.com.br/app/noticia/internacional/2016/12/30/interna_internacional,836138/venezuela-anuncia-transferencia-da-presidencia-do-Mercosul-para-argent.shtml, accessed on 10, fev, 2017. In this sense, the newspaper reports: "Venezuela was suspended from the bloc on December 2nd, after the three-month deadline given to Nicolás Maduro's government to comply with Mercosur's trade and political provisions, including respect for human rights."

¹⁰⁷ In this sense, cf. HALE, T.; HELD, D.; YOUNG, K. *Gridlock...*, *passim*.

in its actual realization, however, assessing in what terms to "cooperate or not cooperate" is a discretionary activity of each State, which ultimately leads to the act of cooperating in a "more than desirable" aspect rather than a true cooperative spirit, that is, cooperation is more a value to be quantified in financial terms than to pursue the protection of fundamental rights of Men.

However, it should be borne in mind that the basis of a Constitutional State of Law lies in the legitimacy that its people bestows on its rulers in the internal sphere to negotiate their rights in the international order, therefore, it is necessary to strengthen of internal cooperation (open inwards) so that not only the nationals of a particular State, but those who come to establish themselves therein have their rights ensured, since fundamental rights are and should be the basis of democracy in a State of law,¹⁰⁸ regardless of how it is performed. However, although there is a great deal of difficulty, in implementing a cooperative Constitutional State, it is worth noting that the current scenario requires a joint and institutionalized¹⁰⁹ activity, or will, to continue to see the fundamental rights of people being disrespected throughout the world.

Conclusions

The new perspectives launched on the modern state leads to the questioning of their self-sustaining governance within its borders, without the participation in the global political reality. This questioning seems obvious, but it is not, since the modern state is increasingly confronted with new realities brought on in the winds of globalization, moreover, with the intensification of this caused by the growth of the information society the intra and extraterritorial movements become intensive and require new tools, or at least a solid guarantee, within the territory of each State that the Fundamental Rights will be safeguarded, because at least a minimum of cooperation is guaranteed to protect the rights guaranteed in the global sphere.

The State as a closed entity cannot subsist without incurring the risks of economic and social decay and delays, since today the revenues of states are not derived solely from revenues from their economic or regulatory activity, but also from revenues from business, tourism and people interested in different cultures. For modern states to have more flow of visitors, business with other States and with business societies, a system must be in place to ensure the rights of all those actors within it.

The effectiveness and communicability of constitutional systems impose themselves as an objective tool for safeguarding human rights, but this does not mean the loss of sovereignty, but above all, the affirmation of this before the global order as a form of protection and solidification of rights of man in the inner order.

In this sense, the "Cooperative Constitutional State", before opening itself to the world, should seek to make human rights strong in the local sphere, thus implementing the formula of "thinking globally and acting locally", since only then will it be a strong world, a country with a strong constitution and a strong rule of law, being able to open the protection of all the men who are under its tutelage, regardless of their nationality.

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¹⁰⁸ HÄBERLE, P. La garantía del Contenido esencial de los derechos fundamentales..., p. 20-23.

¹⁰⁹ See, HALE, T.; HELD, D.; YOUNG, K. *Gridlock*..., p. 34.

- ¹ ANISTIA INTERNACIONAL (AI). “Síria: Matadouro humano: enforcamentos em massa e extermínio na prisão de Saydnaya”, available on: <https://anistia.org.br/direitos-humanos/publicacoes/siria-matadouro-humano-enforcamentos-em-massa-e-extermínio-na-prisão-de-saydnaya/>, accessed on 09, fev, 2017.
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