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CONSTITUTIONALIZATION OF INTERNATIONAL LAW AND THE UN CHARTER ON AN INTEGRATED ANALYSIS

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The international realm could be defined as indefinite if it is taken into account the unpredictability brought by the anarchic system. In this sense, the concept of order emerges as an essencial issue for human beings socialization and the organization of institutions and relations of power, because it is characterized by a set of foundation and specific rules that make human interaction predictable. Thus, it works as an antidote to the indefinition of anarchy, which scares decision makers and rulers from all over the world in making policies and plans. Regarding to this, international law can be a good example of an instrument of ordering, since it tries to define actors, values and principles; and predict actions, reactions and penalties, as well.

Based on this assumption, many scholars have been considering that the constitutionalization of international law "would be able to draw the conclusion of the increasing institutionalization of the international realm" (PAULUS, 2009, p.69) and also to resolve the issues of legitimacy and authority, between domestic and international law. It is clear that it is not an easy process, it does not have the approval of the majority and the possible ways in which it could be realized are divergent. However, it is based on the belief that institutionalization and materialization of interests and values are essential to the international community.

The basic premise of international law is that we have common interests and values, and there are two manners that we can reach them. The first is assuming that we should start from the bottom, through the dialogue in a political way in order to build new rules and to creat norms onwards, the discussion of what is important for all the society. In its turn, the second one is about the belief that our common values already exist, they are transcendent, and we should just discover and interpret them. In the same way, the process of constitutionalization of international law must follow one of these paths.

LOOKING FOR A CONSTITUTION

Among the existent conventions on international law, it could be possible to regard the United Nations Charter as a potential constitution, since it is a mechanism to protect

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common interests that has primacy. On this attempt, Bardo Fassbender gives an important explanation and advocacy of the UN Charter as "a constitution in the clothes of a treaty" (FASSBENDER, 2009, p.133). This way, his claim is that "today the constitutional law of the universal community (of states) has its foundation in the UN Charter" (FASSBENDER, 2009, p.136). That means that the international constitution already exists and just must be claimed as such, giving up the distinction between general international law and the law of the Charter.

The constitutionalization of international law by the recognition of the UN Charter as such relies, in the author's opinion, on the constitutional predisposition of the Charter. Basically, his principal reason is explained by the fact that it is one visible and existent document with authority and primacy, which sets the members' rights and responsibilities, and also the values which the community is committed. So to say, the charter brings definition and gets the community out of the fog and the unpredictability.

In this way, Fassbender chooses a functionalist approach and, through the Max Weber's ideal type concept, he defines constitution as a supreme law (in the sense that others must conform to the constitutional rules), binding to the governmental institutions and the community members, which provides a legal frame for the political life and regulate the organization/performance of governmental functions and the relationship between government and those who are governed. In comparison, the author perceived many ideal constitution features within the Charter, for instance, the horizontal and vertical system of governance, the definition of the constitutional community members, the supremacy over "ordinary" international law, the aspiration to eternity and the universality, in the sense that applies to all members of the community.

In order to strengthen his attempt, Fassbender points out that many international organizations and international treaties put themselves under the primacy of the Charter and ensure the commitment with it. As well, most of the states have recognized the authority of the Charter as the ultimate source of legitimacy in international law, since they are constantly affirming the place of the Charter in the international law structure, not only in situations that the cost of commitment is low. In this regard, this is the representation that the international law, and precisely the UN Charter, are not purely abstract, but something embodied on the reality through the states' legitimization, which seems to give more relevance to the Charter than many lawyers do.

In order to avoid interpretations and judgments, Fassbender affirms that qualify the Charter as a constitution is not the only way to identify its position on legal order, but, since the "global idea of constitution" is an autonomous concept and a already defined and accepted notion of law, "the idea of constitutionalism encapsulates much of what contemporary international law, guided by the UN Charter, is striving for" (FASSBENDER, 2009, p.145). It means that being or not being a constitution is important to interpret the norms of systemic interaction and the Charter's ability to reinvent itself assuring and ensuring the states' needs. Moreover, since the blindness of the society, regarding the Charter constitutional features, relies on its own incapacity to recognize themselves as an international society, the author's claim becomes also relevant to the emergence of an international community and to the peo-

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ple realization as members of this community.

Therefore, he briefly admits the United Nations limitations, the violation of its rules and "how the members of the international community are far away from uniting their strength in an effort to give new life and vigor to the Charter system of international governance" (FASSBENDER, 2009, p.146). Likewise, the Charter sometimes seems to be a historical document, enclosed on the past, under the specificities of the post-war period, which does not fit our world anymore, and that is why there is so much skepticism around its constitutionalization.

Nonetheless, according to him, the violation of rules does not remove the Charter's definition and validation, because the rules are still being binding and the states still admitting them. Make this statement should not imply that the international community and the international law have reached a state of perfection, that is to say, "labeling the Charter a 'constitution' does not make the world a better place" (FASSBENDER, 2009, p.147). Instead, the goal is to identify and to interpret the changes of the international legal order since 1945 and discover how the organization can work, adapt and reinvent itself on the foundations of a new world. In short, the UN Charter as a constitution is not an inevitable perception or a predestinated process; rather it is a choice, that can be a starting point to follow the path towards a better realization of the fundamental values of the international community.

A CRITICAL POINT OF VIEW

For sure, the attempt of constitutionalization of international law is not summed up on the UN Charter, more abstractly; it can be described as a process based on the consideration of the international law as a coherent system, which does not tolerate anarchy as a rule. This is how Andreas L. Paulus initiates his chapter "The International Legal System as a Constitution", where he debates some questions about the possibility of the constitutionalization of international law. Essentially, this is a path strictly related to the institutionalization of international law, rather than its strengthening or the strengthening of the actors. However, being a coherent system does not imply following the way toward a constitution because a constitution is something that goes beyond a system of formal rules and that includes comprehensiveness, hierarchy, judicial control, strengthening of international organization and supplementation to domestic constitutions (PAULUS, 2009).

Regarding the UN Charter and its potential of becoming a constitution, Paulus also offers some analysis, but in a critical way. According to him, the United Nations has many characteristics that organize the world in a legal system, like the hierarchical superiority, the division of competences, the protection of foundational states and individual rights, etc. However, in his words, "the reality of international relations does not quite fit into a view of the Charter as the comprehensive document of international legal relations" (PAULUS, 2009, p.78). That happens because it is still weak, its supremacy is not recognized by all the international actors, the conditions for membership are not clear and there are no mechanisms of sanction for violations, most of the time it is a matter of international law observation and good faith. In short, the Charter seems to rely on international law rather than defining or

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creating it.

Many reasons can be cited in order to clarify this perception. First, legitimate violence is not totally monopolized. Second, a constitution cannot be so easily violated as the UN Chapter is. Third, most of the time, the UN is just one among many possibilities for the states act through. Forth, the Charter own pillars are calling into question its effectiveness. Finally, the UN Charter as a constitution is doubtful in relation to domestic ones and with its recognition by the subjects of law.

According to Paulus, the order of the day is fragmentation, since we can see the "legal regulation of international relations as isolated islands of stability in a sea of international anarchy" (PAULUS, 2009, p.82), and that can be the reason why it is becoming difficult to talk about unity. Although, in order to develop the constitutionalization effort, he proposes a debate about the principles of the international legal system. In that way, Paulus takes domestic constitutions as an "ideal type" concerning its process of creation and defines six elements that are present in domestic constitutions and must be on an international one.

To begin with, democracy is conceived a foundation concept of government. It is necessary because the cosmopolitan morality that rules the international legal order is not enough as the basis of a system. However, there is a lack of democracy that makes it "appears possible only within a nation-state or local setting" (PAULUS, 2009, p.94), once there are not institutions that can convert the world's needs into law. The second pillar is the rule of law as the major source of authority and a precondition for any legal ordering. However, there is also a lack of judicialization and adjudications, which threat the process of constitutionalization. The third is the separation of powers, which is linked with the rule of law and it is also lacking in international law. It is very important because the constitutional governance lies on the protection of individual rights against governments, but the international legal order seems to protect the states rights above all. The fourth one is the delimitation of competences since we are dealing with a multilevel system. Once more, he cites the UN Charter and its attempt to protect rights and intervene, nevertheless, the judicial control is based on the consent of states and it is far from having mechanisms of protection worthy of a constitution. Fifth, there is the importance of the protection of human rights against states. Here, besides the human protection necessity, its importance is perceived on the claim of authority outside and the legitimacy inside; but its violations and lack of control are clear. Finally yet importantly, there is the element of solidarity, which is extremely relevant for the community strengthening and for the predisposition to suffer on behalf of something we belong to. Again, "it remains questionable whether the solidarity toward faraway people and peoples is comparable to the communal bond between conationals of a single state" (PAULUS, 2009, p.105).

In conclusion, Paulus affirms that the domestic constitutional principles do have international equivalents, but their realization is precarious and far from being reached, as well as the constitutional characteristics of the UN Charter are potential but incomplete. It is central in his view that constitutionalization is much more a process than an event, and it is more relevant, pertinent and profitable as such because "while international law may never possess a constitution in the strict sense of domestic constitutions, international con-

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stitutionalism as an attempt to establish and control international power remains a worthy endeavor" (PAULUS, 2009, p.88). As a result, having in mind that this process always means limitation of power rather extension, the constitutionalization of international law continues to have great potential to command the world as a rule of law instead of a rule of power.

INTEGRATED ANALYSIS

After the overlook of these two authors, it can be observed that they have several points of contrast. In the first place, Paulus sets his argumentation on an effort to bring the domestic legal frame as examples to the international community, taking the domestic institutions and cohesion as ideal types to be followed, with modifications in order to adapt to the multilevel system. On the other hand, Fassbender focuses on the specificities of the international community that should not be replicated from national ones. In addition, Paulus' point of view focuses on the process of constitutionalization, while Fassbender sees it as something stablished and already done, that should be labeled. Furthermore, whereas the Fassbender's text is entirely about a possible solution to the constitutionalization issue, the Paulus' text define the characteristics and the restrictions of the international law in face of the constitution concept, but does not offer a solution to this question, since he poses a critical understanding.

Recalling the distinction between construction and discovery, it is clear another dichotomy among them. Fassbender relies his claim on the discovery of the international constitution itself by means of the recognition of the constitutional capacity of the United Nations Charter. Meanwhile, Paulus believe that the constitutionalization of international law must be constructed from the debate about the foundational principles of constitution. Then, it is possible to see that it is a much more flexible process, that may never happen or that can happen in different patterns. As a matter of fact, he offers two options as long as the constitution is lacking: lead back the international organizations control to the domestic level or make a constitutional reading of the constitutive elements of international organizations.

With this in mind, it is clearly noticeable the critical perspective of Paulus that has a skeptical opinion about the effectiviness of the constitutionalization of the UN Charter and about the constitutionalization theory itself. His focus on the domestic level can be interpretated as a belief that the states should contiue having power, influence and control over the international institutions. In other words, he does not believe in a supranational structure that transcend the international level and are hovering over the states and free from domestic interference. In its turn, the Fassbender position can sound naive or idealist due to the evident limitations of the United Nations as an organization that should correspond to the all countries needs, and the Charter as a constitution because of the several violations. Although, it is also not so idealistic on the sense that it does not avocate an utopian attempt, rather it shows an easy way to reach a better ordering, claiming to a already existing concept and document.

Regarding to the international law theory, another dichotomy arise between monism and dualism. Fassbender explicitly has a monism approach since he vindicates the UN Char-

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ter to have primacy over the others, within a hierarchical structure. On the other hand, Paulus seems to have an dualist approach due to the centrality that he gives to the domestic frames and to the pluralistic sources of the constitution legitimacy. In other words, he tends to believe on the fragmentation process that take place on the international law practice, instead of the hierarachical perspective. Perhaps this is the reason for his uncertainty of how a supranational constitution could work together with the national ones, and how it could arise if there is a pluralistic origin of law and the fragmentation subsystems.

In summary, having a constitution in a very undefined realm is difficult because consensus is also hard to reach among several specificities and large differentiation. Possibly, the international constitution would be very abstract or idealistic in order to have agreement between the members. However, if we choose to look to the constitutionalization of international law from an optimistic point of view, we can see it as a way to reach a well-ordered society. In doing so, considering both perceptions, it is possible to create an integrated analysis. In this sense, one could talk about the topic as a process that create a new constitution from the bottom, but also consedering its background, making adaptations and following insights from the existent establishments. Thus, as well as the United Nations took many institutions, ideas and procedures from the League of Nations, and also learned with its mistakes, a new order or a new constitution can learn and have insights from the UN Charter too.

At last, clearly, the constitutionalization of international law is contraversial in its essence taking into consideration that it exists because the community itself is far from being a true world government based on cooperation. But, at the same time, it can be reached just through community cooperation. Maybe that is why it is so difficult to achieve, because its goal is also its route. However, the fact the world cannot subsist in a totally anarchical sphere and the international law relevance to avoid it are undenible.

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