

DOMESTIC LAW AND INTERNATIONAL LAW IN BRAZIL

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Abstract: International law, which main sources are agreements and international conventions, is increasingly present in internal affairs in such way that it is difficult to imagine an area of national law which has not been affected in some way by standards imposed by agreements. But how and to what extent international law will be applied internally will depend on the way in which States comply with their international obligations. Therefore, it is essential to know how States bestow domestic legal effect to their agreements. The theoretical question about the relationship between domestic law and international law is usually presented on the basis of dualistic (or pluralistic) and monistic theories, that can not, however, comprehensively cover all aspects of this relationship. The Constitution of the Federative Republic of Brazil recognizes, yet indirectly, international agreements as part of domestic law, but left important aspects related to its application without answers. Thus, the Brazilian judiciary has faced critical issues relating to the impact of agreements in domestic law, particularly regarding its duration, effects and hierarchical position. Despite the Brazilian judicial performance, legal uncertainties regarding the matter persist, which will be exposed in this article.

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1. INTRODUCTION: THEORETICAL FRAMEWORK OF THE MONISTIC AND THE DUALISTIC THEORIES VERSUS PRACTICE

The relationship between domestic law and international law is a problem that has been worrying the legal community for a long time. There are countless cases where international rules have dispositions in conflict with domestic rules, but the most important historical event in Brazilian history is the conflict between the Geneva's Uniform Law For Bills of Exchange and Promissory Notes, which was promulgated into law by the Decree 57.663 on January 24, 1996, and the Law-Decree 427 of January 22, 1969¹.

The normative conflict, however, is not the only problem. In fact, at least three other relevant aspects should be taken into consideration while analyzing the interaction between domestic law and international law: the conjugation of the conceptions related to the structure of the international law with the domestic law; the pattern utilized to give domestic relevance to norms of international law and the hierarchy relations between the norms of international law and the ones of domestic law².

There is not, in practice, a prevailing answer to the questions emanating from those aspects, and the preeminence of the international law, defended by many internationalists, is only a doctrinal position, inasmuch as *"decentralized the international society sees each of its members defining for its own interest the rules regarding the relation between international law and domestic law"l order and not the people in the internal order"*³.

On the other hand, the doctrine segregates itself into two schools of thoughts to answer those questions, the thirst school of thought, that, based on legal and philosophical foundations, tries to explain how the relationship between international law and domestic law works, and

1 In this case, the Brazilian domestic law instituted an registration obligation of Bills of Exchange and Promissory Notes, which was not part of the Geneva's Uniform Law. The case was submitted to the Supreme Federal Court, whose decision is currently one of the major case law on the relation between international and domestic law. This decision (the Extraordinary Appeal 80.004/SE) will be later analyzed on this article.

2 BYSTRONSKI, Guilherme Fonseca. *Concretismo : uma abordagem institucional para analisar as relações entre o direito internacional e o direito interno*. 2003.301p. Dissertação (Mestrado em Direito Internacional e da Integração Econômica) – Faculdade de Direito, Universidade do Estado do Rio de Janeiro, 2003, p.21.

3 CASTRO, Amílcar de. *Direito Internacional Privado*. 3ªed, Rio de Janeiro:Forense, 1977, p.93.

the second school of thought of practical nature, that tries to find on the norms of the legal systems involved the solution for a potential conflict⁴.

The theoretical view about the relationship between international law and domestic law is generally presented based on the dualistic (pluralistic) and the monistic theories, according to Ian Brownlie⁵.

The dualistic doctrine, which one of the biggest exponents was Triepel, whose work *Völkerrecht und Landesrecht* (1899) can be considered the first systematic study of the matter, champion that the essential difference between domestic law and international law consists primarily on the fact that those laws are applied to different subjects: the international law governs the relations between sovereign states, whilst the domestic law governs the relations between individuals or between those and the executive power. Triepel, while analyzing the relationship between international law and domestic law, begins from the premise that both are different notions⁶.

Triepel asserted that the international law and the domestic law were distinct legal systems, and were not distinct parts of a single system, however it was certain that there could be contact points, but not intersections and, as a result, conflicts⁷.

Based on this theory, neither of those laws have jurisdiction to make or to modify norms of the other. When domestic law asserts that international should be applied, integrally or partially, to domestic jurisdiction, it is only exercising its authority of domestic law, adopting or transforming norms of international law into domestic norms. In case of conflict between international law and domestic law, the second should have primacy over the first⁸. This is due to the fact that the nature of interstate relations is fundamentally different from the nature of intrastate relations, from which it follows that international law would only produce any domestic effect when authorized by the domestic legislation⁹. Triepel's ideas find support on the Italian doctrine, manly

4 BYSTRONSKI, Guilherme Fonseca. Concretismo : uma abordagem institucional para analisar as relações entre o direito internacional e o direito interno. 2003.301p. Dissertação (Mestrado em Direito Internacional e da Integração Econômica) – Faculdade de Direito, Universidade do Estado do Rio de Janeiro, 2003, pp.21-22.

5 BROWNLIE, Ian. Principles of Public International Law. Sixth Edition. New York: Oxford University Press Inc. 2003, p. 31. Note-se que, em realidade, o autor refere-se ao direito municipal, e não ao direito interno, haja vista a autonomia legislativa dos estados federados norte-americanos.

6 TRIEPEL, Carl Heinrich. Les rapports entre le droit interne et le droit international. Recueil des Cours. Académie de Droit International de la Haye. Dordrecht (Pays-Bas) : Martinus Nijhoff. Tomo 1, 1923. pp. 79.

7 TRIEPEL, Carl Heinrich. *Völkerrecht und Landesrecht*. Leipzig : C.L. Hirschfeld, 1899, p.111.

8 BROWNLIE, Ian. Principles of Public International Law. Sixth Edition. New York: Oxford University Press Inc. 2003, p. 32

9 SHAW, Malcolm N. International Law. Seventh Edition. Cambridge: Cambridge University

after the works of Anzilotti¹⁰.

In Brazil, the dualistic Italian doctrine was followed by Amílcar de Castro, according to whom *“treaty is no law, it is na international act which obliges the people considered as a whole, obliges the government in the external order; and not the people in the internal order”*¹¹.

The dualistic theory is adopted specially in the United Kingdom of Great Britain and Northern Ireland and in its previous colonies, with the notorious exception of the United States of America, because of its extreme separation of powers. In the former country, the fact that the British crown had maintained the powers to conduct foreign relations and to establish agreements without the intervention of the parliament, while it maintains the power to legislate almost exclusively has made the prevalence of dualism unavoidable¹².

In opposition to the dualistic doctrine, appears the monistic view, which essence can be extracted from the fact that a treaty can become, without the necessity of a domestic normative act, part of the domestic law since the moment that it is concluded in accordance to constitutional dispositions¹³. The monistic view, therefore, admits the existence of normative conflicts between international treaty and domestic norm¹⁴.

One of the biggest exponents, and perhaps the main monistic theorist, was Hans Kelsen, who suggests that domestic law and international law are parts of the same normative order, namely, there is a unitary view of law¹⁵. For Kelsen, domestic law and international law are just two normative systems that are in correlation, composing only one legal order, dispelling the idea of the state as a stranger to the law, and, therefore, not bound to international law¹⁶. Moreover, both domestic and international law would have their validity grounded

Press, 2014, p.93.

10 DOLINGER, Jacob. *Direito Internacional Privado: parte geral*. 9^a ed, Rio de Janeiro: Renovar, 2008.

11 From the original in portuguese: “tratado não é lei; é ato internacional que obriga o povo considerado em bloco; que obriga o governo na ordem externa e não o povo na ordem interna”. In: CASTRO, Amílcar de. *Direito Internacional Privado*. 3^aed, Rio de Janeiro:Forense, 1977, p.93.

12 AUST, Anthony. *Modern Treaty Law and Practice*. Third Edition. Cambridge: Cambridge University Press, 2013, p.167.

13 Idem, p.163.

14 DINH, Nguyen Quoc; DAILLER, Patrick; PELLET, Alain. *Droit International Public*. 7e edition. Paris: L.G.D.J., 2002. p.277.

15 SHAW, Malcolm N. *International Law*. Seventh Edition. Cambridge: Cambridge University Press, 2014, p.94.

16 KELSEN, Hans. *Les rapports de système entre le droit interne et le droit international public*. Recueil des Cours. Académie de Droit International de la Haye. Dordrecht (pays-Bas) : Martinus Nijhoff. Tomo 14, 1926p.231

on a basic norm, which, for the referred author, would consist on the obligation of states to continue to act as they usually had done¹⁷.

In Kelsen's logic, the referred basic norm gives base to the international law and allows revolutions to be facts that result on the creation of norms. As a result of the necessary effectiveness of the basic norm, the primary constituent, while determining the new fundamentals of the domestic law, is constricted by international law¹⁸.

Indeed, the method utilized by Kelsen to elucidate his monistic perception utilizes Kant's philosophy as a base, treating the law as an order that stipulates patterns of actions that must be observed, followed by sanctions that can be applied when an illegal act is committed. As the same logic can be applied to domestic law and international law, there is a legal unity, and as the states must obey in their relations with others to the international norms, such as those that establish equality between them, international law would be superior, or at least would be closer to the basic norm, in relation to the domestic law¹⁹.

Even though Kelsen establishes the monistic view with formal bases of his own theory and defends more proximity of international law with the basic norm, he does not defend the absolute primacy of the international law above the domestic law, because, for him, the question of primacy can only be decided taking into account considerations that are not strictly legal. It can be speculated if Kelsen avoided an element of admission when he established that the basic norm of international law in a way determines the validity of the domestic basic norm: the validity of each one would depend more on the relation of interdependency than on a "hierarchical relationship"²⁰.

Other monistic theorists tend to justify their positioning with ethical arguments, showing concern with the protection of human's rights. This is the case of Hersch Lauterpacht, a British lawyer, that see the protection of individual's welfare as the key objective of law, being the supremacy of international law the best method to achieve this end²¹.

There is also a naturalistic monism, which, at least superficially, is similar to Kelsen's provision of a universal basic norm. According to this theory, domestic and international legal systems are subordinated to

17 BROWNLIE, Ian. *Principles of Public International Law*. Sixth Edition. New York: Oxford University Press Inc. 2003, p. 32.

18 BROWNLIE, Ian. *Principles of Public International Law*. Sixth Edition. New York: Oxford University Press Inc. 2003, pp. 32-33.

19 SHAW, Malcolm N. *International Law*. Seventh Edition. Cambridge: Cambridge University Press, 2014, p.94.

20 BROWNLIE, Ian. *Principles of Public International Law*. Sixth Edition. New York: Oxford University Press Inc. 2003, pp. 33.

21 SHAW, Malcolm N. *International Law*. Seventh Edition. Cambridge: Cambridge University Press, 2014, p.94.

a third legal system, usually postulated in terms of natural law or general principles of law, superior to them both and capable of determining their respective spheres²².

In addition to the monistic and dualistic theories, many conciliatory have appeared, among which the group formed by Spanish doctrinaires stands out. These vindicate that domestic law and international law compose independent legal systems, but coordinated by natural law²³.

Some other authors set aside the monism-dualism dichotomy, establishing that the logical consequences of both theories are in conflict with the way that domestic and international organs behave. Gerald Fitzmaurice challenge the premise, adopted by monists and dualists, that the domestic law and the international law have the same field of operation. According to the author, both systems do not enter into conflict as systems, for they act in different spheres. Each one is supreme in its own field. However, a conflict of obligations can happen, an inability of the state, in domestic level, to act as is determined by international law: the consequence of this will not be the invalidity of domestic law, but the responsibility of the state in international level²⁴.

Rousseau, for his turn, proposed similar view when characterized international law as a law of coordination which do not determine automatic derogation of the domestic norm that is in conflict with international obligations. These authors, among others, express their preference for the practice above the theory.²⁵

If in domestic level there are doubts about the production of direct effects of norms of international law, in international level there are no doubts that domestic law cannot be called upon to discharge the state of an obligation internationally accepted. Therefore, international law has, in international level, unequivocal supremacy, defined in article 27 of the 1969's Vienna Convention on the Law of Treaties, from a series of sentencings posteriors to its elaboration, which, no doubt, consisted in established case law about the matter²⁶.

For Aust, the supremacy of international law, at least in international level, comes from the principle *pacta sunt servanda*, being certain that the failure of the state obliged by a treaty to assure its

22 BROWNLIE, Ian. Principles of Public International Law. Sixth Edition. New York: Oxford University Press Inc. 2003, pp. 33.

23 MELLO, Celso D. de Albuquerque. Curso de Direito Internacional Público. 1º Volume, Cap. XXII, 14ª. ed. Rio de Janeiro: Renovar. 2002, p.125.

24 BROWNLIE, Ian. Principles of Public International Law. Sixth Edition. New York: Oxford University Press Inc. 2003, pp. 33.

25 Idem, pp. 33- 34

26 BROWNLIE, Ian. Principles of Public International Law. Sixth Edition. New York: Oxford University Press Inc. 2003, pp. 34.

domestic application can result in his responsibility²⁷.

2. ENTRY INTO FORCE OF INTERNATIONAL TREATIES IN BRAZIL'S LEGAL SYSTEM

Apart from discussions about the relationship between international law and domestic law, the international treaty, to enter into force in the domestic legal order, needs to follow the conditions of form and substance that are imposed.

In general, the regulation established by the Constitution of the Federative Republic of Brazil de 1988 (CFRB) manifests that a huge part of the script for internalization of treaties in Brazil's legal order is based on customary norms resulting from a ritual consolidated in practice by domestic authorities. It is important to highlight that Brazil, after almost four decades from the signature, has ratified the 1969's Vienna Convention on the Law of Treaties in 2009, being it now fully applicable.

The procedure of internalization of international treaties can vary in some aspects depending on their object, but there will always be, in the begging and ending of the procedure, the imperative participation of the President.

The procedure begins with the negotiations between the involved parties and the signing of the final version, acts exercised by the President or by plenipotentiary nominated by him, because, in accordance to article 84.VIII of the CFRB, the President has the exclusive power to "*conclude international treaties, conventions and acts, ad referendum of the National Congress*". Once the treaty is signed, the President submit it to the National Congress by means of a presidential message²⁸.

The CFRB establishes, in its article 49, I, that the National Congress has exclusive jurisdiction to "*to decide conclusively on international treaties, agreements or acts which result in charges or commitments that go against the national property*". There is, in this point, clear contradiction between the text of the cited disposition and the article 84 VIII already mentioned, because one requires National Congress endorsement for any and every treaty, and the other attributes to the National Congress only the appreciation of treaties that results in onus or harmful commitment to national property.

The mismatch between the text of both dispositions maintained, in practice, the jurisdiction of the President to sign the so called "executive agreements", which do not need legislative endorsement. This legislative intervention, established in the Constitution of the majority of states, had as goal the democratization of foreign relations,

27 AUST, Anthony. *Modern Treaty Law and Practice*. Third Edition. Cambridge: Cambridge University Press, 2013, p.161.

28 TIBURCIO, Carmen. *Temas de Direito Internacional*. Rio de Janeiro: Renovar, 2006, p.5.

admitting that the power with theoretically more popular representation, especially if we consider monarchic states, integrates the procedure²⁹.

The delay on the ratification entailed by the complex procedure of treaty celebration, and, in Brazil's case, the text of article 49, I, of the CFRB, led to the proliferation of the so-called executive agreements. Therefore, the dual procedure, with concurrence of the Legislative, was reserved to the more complex matters that indeed result in onus or harmful commitment to national property.

According to Paula Almeida, *"currently the majority of the treaties is concluded following the simplified process, excluding the participation of the legislative and as consequence the need of ratification"*³⁰. As a general rule, those treaties have as object matters of exclusive jurisdiction of the Executive, but the absolute absence of control has made it possible that in Brazil 80% of the International Acts are made only by the Executive, involving even matters of great complexity that, in theory, should follow the ordinary procedure for ratification, involving the Legislative Power³¹. In these cases, the mere signature of the treaty by the President or his plenipotentiary already bounds Brazil definitively, in the terms of article 12 of the Vienna Convention on the Law of Treaties.

The National Congress concurring for the treaty ratification, it deliberates by majority of the presents, in separated polls at the Chamber and the Senate, without being able to modify the text of the international act, being able only to approve or reject it. The decision is published by legislative decree promulgated by the President of the National Congress and it authorizes the ratification or accession to the treaty by Brazil³².

For the next step on the dual procedure, the Legislative is governed by the Vienna Convention on the Law of Treaties. It consists on the manifestation of the definitive consent to be bound by the treaty. Generally, it is given by the ratification or the accession to the treaty, necessarily signed by the Head of State, by the Head of Government, by the Foreign Minister or by a plenipotentiary³³. A long standing doctrinaire discussion has developed in Brazil about the necessity of

29 ALMEIDA, Paula Wojcikiewicz Almeida. A tendência de conclusão dos acordos em forma simplificada: evolução e prática brasileira. Assunção, Paraguai. Revista da Secretaria do Tribunal Permanente de Revisão, vol.1, 2003, p.183.

30 From the original in portuguese : "atualmente a maior parte dos tratados internacionais é concluída seguindo o trâmite dos acordos em forma simplificada, ou seja, excluindo-se a participação do poder legislativo e, consequentemente, a exigência de ratificação". Ibidem.

31 Ibidem.

32 TIBURCIO, Carmen. Temas de Direito Internacional. Rio de Janeiro: Renovar, 2006, p.6.

33 AUST, Anthony. Modern Treaty Law and Practice. Third Edition. Cambridge: Cambridge University Press, 2013, p.99.

ratification by the President of treaties approved by Brazil. Nowadays, the majority of the doctrine understands that the ratification is a private and discretionary act of the President³⁴.

Another relevant controversy that appeared on this specific phase is related to the possibility of the President ratify treaties that create obligations to states, counties and the federal district, because, in the terms of article 1º of the CFRB, the Brazilian state is organized in the form of a Federative Republic, which results that each entity of the federation has its own field of attributions.

Especially problematic was the question of the ratification of treaties, by the Union, which resulted in the exemption of taxes that were of the jurisdiction of another entity, because article 151, III, of the CFRB forbids the Union *“to institute exemptions from tributes within the powers of the states, of the federal district or of the municipalities”*.

The question of the possibility of ratification of a treaty that resulted in heteronomous exemption, in theory forbidden by the above mentioned article, was analyzed by the Supreme Federal Court on the judgement of the Extraordinary Appeal (RE) n.º 229.096-0/RS³⁵, on 16/08/2007. In these case, the validity/applicability of article III.2 of The General Agreement on Tariffs and Trade (GATT) to the case sub judice was questioned utilizing the argument that the article regulated a matter that was of exclusive jurisdiction of the states of the federation, the Tax on the Circulation of Good an on the Rendering of Interstate and Intermunicipal Transportation Services and Services of communication

34 TIBURCIO, Carmen. Temas de Direito Internacional. Rio de Janeiro: Renovar, 2006, p.6.

35 EMENTA: DIREITO TRIBUTÁRIO. RECEPÇÃO PELA CONSTITUIÇÃO DA REPÚBLICA DE 1988 DO ACORDO GERAL DE TARIFAS E COMÉRCIO. ISENÇÃO DE TRIBUTO ESTADUAL PREVISTA EM TRATADO INTERNACIONAL FIRMADO PELA REPÚBLICA FEDERATIVA DO BRASIL. ARTIGO 151, INCISO III, DA CONSTITUIÇÃO DA REPÚBLICA. ARTIGO 98 DO CÓDIGO TRIBUTÁRIO NACIONAL. NÃO CARACTERIZAÇÃO DE ISENÇÃO HETERÔNOMA. RECURSO EXTRAORDINÁRIO CONHECIDO E PROVIDO. 1. A isenção de tributos estaduais prevista no Acordo Geral de Tarifas e Comércio para as mercadorias importadas dos países signatários quando o similar nacional tiver o mesmo benefício foi recepcionada pela Constituição da República de 1988. 2. O artigo 98 do Código Tributário Nacional “possui caráter nacional, com eficácia para a União, os Estados e os Municípios” (voto do eminente Ministro Ilmar Galvão). 3. No direito internacional apenas a República Federativa do Brasil tem competência para firmar tratados (art. 52, § 2º, da Constituição da República), dela não dispondo a União, os Estados-membros ou os Municípios. O Presidente da República não subscreve tratados como Chefe de Governo, mas como Chefe de Estado, o que descaracteriza a existência de uma isenção heterônoma, vedada pelo art. 151, inc. III, da Constituição. 4. Recurso extraordinário conhecido e provido. (RE 229096, Relator(a): Min. ILMAR GALVÃO, Relator(a) p/ Acórdão: Min. CÁRMEN LÚCIA, Tribunal Pleno, julgado em 16/08/2007, DJe-065 DIVULG 10-04-2008 PUBLIC 11-04-2008 EMENT VOL-02314-05 PP-00985 RTJ VOL-00204-02 PP-00858 RJTJRS v. 45, n. 275, 2010, p. 29-42)

(ICMS), of state jurisdiction. According to the authors of the action, the cited disposition affronts the article 151.III of the CFRB of 1988, which forbids the Union, one of Brazil's administrative entities, to establish exemptions of taxes that are of the jurisdiction of the states, the federal district or the municipalities.

According to the Supreme Federal Court (SFC)'s understanding, the President, while exercising its private jurisdiction to maintain foreign relations on the terms of article 84, VIII, of the CFRB, acts as Head of State, representing the Federal Republic of Brazil, and not as a representative of the Union, which is seen as a composing part of the federation.

Finally, the ratified treaty – and, except in suspensive conditions, bounding for Brazil in the international level – is submitted to promulgation by the President and, subsequently, it is published. These acts are not prescribed by the CFRB or by Brazil's legislation, but consist on the existing practice since the Empire of Brazil³⁶.

The SFC has decided on the judgement of the Letter of Request 8.279/AT³⁷ that treaties only are binding in domestic level

36 TIBURCIO, Carmen. *Temas de Direito Internacional*. Rio de Janeiro: Renovar, 2006, p.7.

37 E M E N T A: MERCOSUL - CARTA ROGATÓRIA PASSIVA - DENEGACÃO DE EXEQUATUR - PROTOCOLO DE MEDIDAS CAUTELARES (OURO PRETO/MG) - INAPLICABILIDADE, POR RAZÕES DE ORDEM CIRCUNSTANCIAL - ATO INTERNACIONAL CUJO CICLO DE INCORPORAÇÃO, AO DIREITO INTERNO DO BRASIL, AINDA NÃO SE ACHAVA CONCLUÍDO À DATA DA DECISÃO DENEGATÓRIA DO EXEQUATUR, PROFERIDA PELO PRESIDENTE DO SUPREMO TRIBUNAL FEDERAL - RELAÇÕES ENTRE O DIREITO INTERNACIONAL, O DIREITO COMUNITÁRIO E O DIREITO NACIONAL DO BRASIL - PRINCÍPIOS DO EFEITO DIRETO E DA APLICABILIDADE IMEDIATA - AUSÊNCIA DE SUA PREVISÃO NO SISTEMA CONSTITUCIONAL BRASILEIRO - INEXISTÊNCIA DE CLÁUSULA GERAL DE RECEPÇÃO PLENA E AUTOMÁTICA DE ATOS INTERNACIONAIS, MESMO DAQUELES FUNDADOS EM TRATADOS DE INTEGRAÇÃO - RECURSO DE AGRAVO IMPROVIDO. A RECEPÇÃO DOS TRATADOS OU CONVENÇÕES INTERNACIONAIS EM GERAL E DOS ACORDOS CELEBRADOS NO ÂMBITO DO MERCOSUL ESTÁ SUJEITA À DISCIPLINA FIXADA NA CONSTITUIÇÃO DA REPÚBLICA. - A recepção de acordos celebrados pelo Brasil no âmbito do MERCOSUL está sujeita à mesma disciplina constitucional que rege o processo de incorporação, à ordem positiva interna brasileira, dos tratados ou convenções internacionais em geral. É, pois, na Constituição da República, e não em instrumentos normativos de caráter internacional, que reside a definição do iter procedimental pertinente à transposição, para o plano do direito positivo interno do Brasil, dos tratados, convenções ou acordos - inclusive daqueles celebrados no contexto regional do MERCOSUL - concluídos pelo Estado brasileiro. (...) A recepção dos tratados internacionais em geral e dos acordos celebrados pelo Brasil no âmbito do MERCOSUL depende, para efeito de sua ulterior execução no plano interno, de uma sucessão causal e ordenada de atos revestidos de caráter político-jurídico, assim definidos: (a) aprovação, pelo Congresso Nacional, mediante decreto legislativo, de tais convenções; (b) ratificação desses atos internacionais, pelo Chefe de Estado, mediante depósito do respectivo instrumento; (c) promulgação de tais acordos ou tratados, pelo Presidente da República, mediante decreto, em ordem a viabilizar a produção dos seguintes

after the promulgation and the publication of the presidential decree. This understanding results in severe situations, if we consider the common practice of the last Presidents of promulgating and publishing ratified treaties. Indeed, the Inter-American Convention on Forced Disappearance of Persons of 1994 was ratified by Brazil on the 2nd of March of 2014 and, more than two years later, the promulgation is still pending. A more concerning situation is that of The International Convention for the Protection of All Persons from Enforced Disappearance, ratified on the 29th of November of 2011 and waiting for promulgation and publication for almost 5 years. In these interim, these texts are internationally, but not internally binding.

These peculiarity of the regime of internalization of treaties by Brazil makes part of the doctrine characterize the Brazilian system as dualist, because these complex mechanism of reception, with the demand for a particular normative act (presidential decree), would consist in clear evidence of the absence of practicability and of effect of the international law in domestic level³⁸.

The Brazilian law, however, is integrally clear, being indispensable the concession of publicity to all the normative acts by means of promulgation and publication on the *Diário Oficial*³⁹. Moreover, the CFRB establishes, in its article 105, III, a, that the Supreme Federal Court has the competence to “judge, on special appeal, the cases decided, in a sole or last instance, by the federal regional courts or by the courts of the states, of the federal district and the Territories, when the decision appealed is contrary to a treaty or a federal law, or denies it effectiveness”; and in its article 102, III, b, to be of the Supreme Federal Court jurisdiction the judgement of, by an extraordinary appeal, law suits judged, in single or only instance, when the appealed decision declares the unconstitutionality of treaty or federal law.

Now, if it is possible the constitutional control of the international treaty – and not of the presidential decree that promulgated it – there is no doubt that it emanates effects by itself in Brazil, and the presidential decree has the sole role of making public the ratification of the international treaty.

efeitos básicos, essenciais à sua vigência doméstica: (1) publicação oficial do texto do tratado e (2) executoriedade do ato de direito internacional público, que passa, então - e somente então - a vincular e a obrigar no plano do direito positivo interno. (...)

(CR 8279 AgR, Relator(a): Min. CELSO DE MELLO, Tribunal Pleno, julgado em 17/06/1998, DJ 10-08-2000 PP-00006 EMENT VOL-01999-01 PP-00042)

38 ARAUJO, Nadia de. *Direito Internacional Privado: teoria e prática brasileira*. 4ªed., Rio de Janeiro: Renovar, 2008.p.166

39 REZEK, José Francisco. *Direito Internacional Público*. 11ªed, São Paulo: Saraiva, 2008, pp.78-79.

3. EFFECTS OF TREATIES IN BRAZILIAN LAW

The fact that an international treaty has been incorporated to a legal system of a given state, however, does not signify that it will be considered capable of creating rights or obligations demandable at local courts⁴⁰.

On the other side, in international law there are obligations that can (or must) be followed directly by states, like treaties that aim sole the accession to an international organization, and obligations which its fulfillment depends on the adoption of practical measures by states, especially its domestic regulation. Therefore, when ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, there was not the instant criminalization of torture in Brazil's legal system, there was, however, the assumption of the commitment by the state to adopt all the necessary measures to thwart the practice of those acts.

In both of the mentioned cases, what is discussed is the nature of the accepted obligation by the state in international level: on the first, the main obligation, which is the accession to the international organization, was a direct obligation that was fulfilled in the moment of ratification, while on the second there are indirect obligations that still need to be satisfied. In relation to the direct as well as the indirect obligations, there is still the analysis of the substance of the norms of the treaty, if they are programmatic norms or self-executing norms.

Treaties which norms are self-executing will establish rights and obligations demandable at local courts, while treaties which norms are simply programmatic will not. The most sensitive question, however, is the fact that it is domestic law that determines if a certain category of treaties will be considered as consisting of self-executing norms or simply programmatic norms⁴¹.

One of the most relevant cases analyzed by the Brazilian judiciary involving the question was about the TRIPS Agreement. The controversy consisted on the production, or not, of direct effects of the cited Agreement for the individual, namely, if an individual could claim at national courts a right founded on the Agreement⁴².

In a brief summary, the cases taken to the Brazilian judiciary were about the period of duration of the letters patent issued before the Agreement was in force in Brazil, because the deadline established by

40 BUERGENTHAL, Tomas. Self-Executing and Non-Self Executing Treaties in National and International Law. *Recueil des Cours. Académie de Droit International de la Haye. Dordrecht (Pays-Bas) : Martinus Nijhoff. Tomo 235, 1992. p. 317.*

41 Ibidem.

42 PEREIRA, Ana Cristina Paulo. *A Proteção Patentária Interna e Internacional: implicações do acordo TRIPS/OMC na ordem jurídica brasileira.* Rio de Janeiro: Lumen Juris, 2009, p.35,

the Agreement (20 years) was superior to the deadline of the protection of patents established by the legislation in force⁴³ (15 years).

The firms that, in 1995, were almost losing patent protection started an action claiming basically that the TRIPS Agreement had direct application in Brazilian territory, without the need of regulation, because it is a self-execution agreement.

For the identification of the self-execution of an international treaty it is indispensable the analysis of its norms. The interpreter must utilize the adequate interpretative methods to determine if the treaty has norms of programmatic nature, about principles, establishing goals, guidelines, etc., or if there are norms with full applicability.

Article 1.1 of the TRIPS Agreement refers expressly to the domestic law of OMC members, establishing clearly the necessity of regulation, even because the Agreement establishes only minimum of patent protection, being the state able to offer a bigger protection. There wasn't, however, an established jurisprudence over the matter.

At this point, it is convenient to remember two fundamental concepts: uniformity of international law and harmonization of international law. The first are "*activities which are essentially international, object of international conventions that uniformize the juridical rules applicable to a given matter through uniform laws*"⁴⁴. The second are the activities practiced only to achieve the harmonization of the treatment of certain matter generally establishing minimum parameters to be followed, but leaving to the state the choice of the best way to adapt his legal system.

As a general rule, treaties that aim for the uniformity of law, namely, the adoption of the same rules by states – the case, as an example, of the Geneva's Uniform Law For Bills of Exchange and Promissory Notes –, are self-execution treaties. Now, treaties that aim only for the harmonization of laws tend to be considered as simply programmatic, in need, therefor, of posterior regulation.

Except for punctual examples, it is not possible to fully define which treaties will be considered as self-executive in a certain state, especially for being the classification of a treaty as simply programmatic utilized frequently as a subterfuge by local judiciary to evade the application of a treaty that is considered as undesirable⁴⁵.

43 Lei 5.772. de 21/12/1970, que permaneceu em vigor até 21/12/1970.

44 From the original in portuguese: "atividades de caráter internacional, objeto de convenções internacionais que uniformizam as regras jurídicas disciplinadoras da matéria por meio de leis uniformes". In: DOLINGER, Jacob. *Direito Internacional Privado: parte geral*. 9ª ed, Rio de Janeiro: Renovar, 2008, p.40.

45 BUERGENTHAL, Tomas. *Self-Executing and Non-Self Executing Treaties in National and International Law*. *Recueil des Cours. Académie de Droit International de la Haye*. Dordrecht (Pays-Bas) : Martinus Nijhoff. Tomo 235, 1992. pp. 368-369.

4. HIERARCHICAL POSITION OF TREATIES IN BRAZILIAN LAW

Established the initial assumptions for the theme's comprehension, it is time to analyze the predominant positioning in Brazil about the hierarchic position of treaties.

Brazilian doctrine historically defended the direct application of treaties in domestic level, with their absolute preponderance. It was adopted, therefore, the absolute monism, as defended, among others by Oscar Tenório and Haroldo Valladão⁴⁶. Nevertheless, the predominance of the filiation to absolute monism by the majority of the international Brazilian doctrine, the constituent opted for the omission, not being any disposition on CFRB about the matter⁴⁷, with the exception of human rights treaties, that will be analyzed posteriorly.

Even theoreticians that defended absolute monism diverged about conflicts between treaties and the constitution. According to Jacob Dolinger, Valladão affirmed that a new constitution would not revoke a treaty that had already been ratified, but a treaty ratified in contradiction with the constitution would be internationally invalidated, while Hildebrando Accioly would defend the predominance of international treaties even in relation to the constitution, utilizing for that a 1932's jurisprudence of the International Court of Justice⁴⁸.

Rezek, analyzing the matter, concluded that by occupying the summit of the domestic legal system, the constitution has an especially important role, from what follows that *"hardly one of these fundamental laws would despise, in this historical moment, the ideal of safety and stability of the juridical order subjecting itself to the State's normative exterior commitments"*⁴⁹.

Nowadays, the text of the already mentioned 102, III, b, of the 1988's CFRB, which establishes expressly the unconstitutionality of international treaties does not leave doubts about the supremacy of the constitution, even in relation to international law. But what if there were constitutional rules that affronted imperative international rules, like the prohibition of genocide? In these cases, the majority of the

46 DOLINGER, Jacob. *Direito Internacional Privado: parte geral*. 9ª ed, Rio de Janeiro: Renovar, 2008, p.92.

47 TIBURCIO, Carmen. *Conflito entre fontes: os casos da prisão civil*. In: BAPTISTA, Luiz Olavo; MAZZUOLI, Valerio de Oliveira. *Doutrinas essenciais: direito internacional*. São Paulo: Revista dos Tribunais, 2012, p.96.

48 DOLINGER, Jacob. *Direito Internacional Privado: parte geral*. 9ª ed, Rio de Janeiro: Renovar, 2008, pp. 94-95.

49 From the original in portuguese: "difícilmente uma dessas leis fundamentais desprezaria, nesse momento histórico, o ideal de segurança e estabilidade da ordem jurídica a ponto de subpor-se, a si mesma, ao produto normativo dos compromissos exteriores do Estado". REZEK, José Francisco. *Direito dos Tratados*. Rio de Janeiro: Forense, 1984, pp.461 – 462.

doctrine defends the predominance of international law even in relation to the republic constitution.

Moreover, during the judgement of the Direct Action of Unconstitutionality (ADI)1480, the SFC ended all doubts about the possibility of abstract control of constitutionality of international treaties, relevant exposure, before the omissive disposition of article 102, I, a of CFRB, that does not include the agreements as possible objects of a direct action of unconstitutionality⁵⁰.

Indeed, *“so strong is the conviction that the fundamental law cannot succumb in any kind of confrontation, that even in the most obsequious systems with the International Law one can find the precept according to which all treaties that contradicts the constitution can only be completed after the promotion necessary constitutional reform”*⁵¹.

The Minister of the SFC Luís Roberto Barroso refutes the idea of the unlimited sovereignty of the constituent power, affirming that international law, especially certain universal values, impose limits to the original constituent⁵². Thus, even though, as a rule, the constitution prevails before international treaties as a whole, it, as defended by Kelsen, is subject to limits imposed by international law.

About the unconstitutionality of treaties, two possibilities are indicated: formally unconstitutional treaties, namely, ratified in disagreement with the constitutional order, and substantially unconstitutional treaties, which substance contradicts constitutional norms.

Formal unconstitutionality of treaties occurs when they are completed in disagreement with the ritual established constitutionally, for example, if ratified by incompetent authority. This is the only hypothesis, by the way, admitted by the Vienna Convention on the Law of Treaties. Indeed, according to it, *“the claim of a certain state, in the sense that its consent to be bound by the treaty was invalid for violating provision of its domestic law, will lack value internationally, unless such provision (internal law) is about the competence to conclude a*

50 Art. 102. The Supreme Federal Court is responsible, essentially, for safeguarding the Constitution, and it is within its competence: I - to institute legal proceeding and trial, in the first instance, of: a) direct actions of unconstitutionality of a federal or state law or normative act, and declaratory actions of constitutionality of a federal law or normative act;

51 From the original in portuguese: *“tão firme é a convicção de que a lei fundamental não pode sucumbir, em qualquer espécie de confronto, que nos sistemas mais obsequiosos para com o Direito das Gentes tornou-se encontrável o preceito segundo o qual todo tratado conflitante com a constituição só pode ser concluído depois de se promover a necessária reforma constitucional”*. In: REZEK, José Francisco. *Direito dos Tratados*. Rio de Janeiro: Forense, 1984, p. 462.

52 BARROSO, Luís Roberto. *Constituição e tratados internacionais: alguns aspectos da relação entre direito internacional e direito interno*. In: BARROSO, Luís Roberto; Tiburcio, Carmen. *Direito Constitucional Internacional*. Rio de Janeiro: Renovar, 2013, p.201.

treaty and it's also of a fundamental importance"⁵³.

About the substantial control of constitutionality, this has been admitted since the first Republic Constitution⁵⁴. In this sense, while judging the Representação 803/1977, the Supreme Federal Court decided for the unconstitutionality of parts of the ILO's Convention 101⁵⁵. In the same sense, while judging Extraordinary Appeal 109.173, the SFC affirmed to be inadmissible the predominance of international treaties and conventions before the Republic Constitution⁵⁶.

53 From the original in portuguese: "a alegação de determinado Estado, no sentido de que seu consentimento em obrigar-se pelo tratado foi inválido por violar disposição de seu Direito interno, carecerá de valor no âmbito internacional, a menos que tal disposição (do Direito interno) seja sobre competência para celebrar tratados e, ainda, de importância fundamental". MAZZUOLI, Valerio de Oliveira. Curso de Direito Internacional Público. 8ªed. São Paulo: Revista dos Tribunais, 2014, p.318.

54 BARROSO, Luís Roberto. Constituição e tratados internacionais: alguns aspectos da relação entre direito internacional e direito interno. In: BARROSO, Luís Roberto; Tiburcio, Carmen. Direito Constitucional Internacional. Rio de Janeiro: Renovar, 2013, p.211.

55 REPRESENTAÇÃO QUE SE PRENDE AO DECRETO LEGISLATIVO N.33, DE 5.8.1964, QUE RATIFICOU A CONVENÇÃO N. 110, RELATIVA AS CONDIÇÕES DE EMPREGO DOS TRABALHADORES EM FAZENDAS, CELEBRADA EM GENEVRA A 26.6.1958, E AO DECRETO N. 58.826, DE 14.7.1966. II- INCONSTITUCIONALIDADE DAS LOCUÇÕES 'SEM AUTORIZAÇÃO PREVIA' E ' COM A ÚNICA CONDIÇÃO DE SE SUJEITAREM AOS ESTATUTOS DESTAS ULTIMAS', CONSTANTES NO ART. 62, POR AFRONTAREM O DISPOSTO NO ART. 159 DA CONSTITUIÇÃO FEDERAL. VENCIDO, EM PARTE, O MINISTRO ELOY DA ROCHA. III- O ART. 63 NÃO PADECE DE INCONSTITUCIONALIDADE POIS PRESSUPOE O RESPEITO A LEI, SEGUNDO ESTA DITO NO SEU N. 2 . ADEMAIS, MERECE CONJUGAÇÃO COM O ART.68, N.1, ONDE SE FALA EM OBEDIENCIA AS LEIS LOCAIS. DECISÃO POR MAIORIA DE VOTOS. IV- INCONSTITUCIONALIDADE DA EXPRESSAO 'OU SUSPENSÃO' DO ART. 64, POIS SE CONTRAPOE AO ALCANCE DO ART. 159 DA CONSTITUIÇÃO. DECISÃO POR MAIORIA DE VOTOS. V- REJEITADA, POR MAIORIA DE VOTOS, A ARGÜIÇÃO DE INCONSTITUCIONALIDADE DO ART-65,DESDE QUE A REGRA SE HARMONIZA COM O DIREITO DE ASSOCIAÇÃO. VI- REJEITADA A ALEGAÇÃO DE INCONSTITUCIONALIDADE DOS ARTS. 66 E 67, DESDE QUE FORAM EXPUNGIDOS DOS ARTS. 62 E 64 AS EXPRESSÕES CONTRARIAS A CONSTITUIÇÃO. VENCIDOS O RELATOR E O PRESIDENTE, QUE OS CONSIDERAVAM ILEGITIMOS NAS REMISSÕES AOS ARTS. 62 E 64. VII- ACOLHIDA A INCONSTITUCIONALIDADE DO ART. 68, N.2, POR VIOLAR O ART. 159 DA CONSTITUIÇÃO, VENCIDO O MINISTRO ELOY DA ROCHA. VIII- REJEITADA A ILEGITIMIDADE DOS ARTS. 69 E 70. O PRIMEIRO CINGE-SE A FIXAR O CONCEITO DE ORGANIZAÇÃO, EM TERMOS QUE NÃO CONTRARIAM O NOSSO SISTEMA CONSTITUCIONAL, ENQUANTO O SEGUNDO PRENDE-SE A UM COMPROMISSO PARA TORNAR EFETIVO O LIVRE EXERCÍCIO DO DIREITO SINDICAL. INFERE-SE DA SUA LEITURA A INEXISTÊNCIA DE CONFLITO MANIFESTO COM A LEI MAGNA. (Rp 803, Relator(a): Min. DJACI FALCAO, Tribunal Pleno, julgado em 15/09/1977, DJ 17-03-1978 PP-01414 EMENT VOL-01088-01 PP-00019 RTJ VOL-00084-03 PP-00724)

56 EMENTA: - ICM. Importação de bens de capital. Súmula 575 (inaplicação). Art. 23, II, §

In this context, appears discussions about treaties which have themes that are subject to special treatment on the established constitutional regime. In the cited Extraordinary Appeal n.º 229.096-0/RS, although the SFC decided in favor of the validity of GATT based on the understanding that the treaty was celebrated by the Head of State, and not the Head of Government (Union), this argument, standing alone, would not suffice to dispel the prohibition of the supra constitutional disposition. In this sense, the vote of the SFC Minister, Sepúlveda Pertence, in this case, clarify that the simple fact of being the Head of State whom is compromised in international level does not suffice by itself to allow the celebration of treaties that establishes taxes exemptions that are of the jurisprudence of States, the federal district and municipalities. Indeed, it is necessary that the contested disposition, i.e. the article 1.II of GATT, is not about matter that by constitutional force is of exclusive jurisprudence of the states of the federation. In this sense, he clarifies on his vote that:

(...) To the argument that it is not the Union as a partial legal order firming na international treaty, but the Federative Republic of Brazil, as a global legal order (the Brazilian State), we oppose that, internally, even when that political person represents the Federation, it cannot grant heteronymous exemptions except those expressly authorized in articles. 155, § 2, XII, 'and', and 156, § 3, II both from the Federal Constitution⁵⁷.

As the rapporteur of the judgement, Minister Ilmar Galvão, well explains on his vote, the GATT does not offend the norm of article 151. III of 1988's CFRB, inasmuch as it does not impose a tax exemption or something similar. Furthermore, the disposition determines that the members of the World Trade Organization (WTC) must confer equal

11, da Constituição Federal. Se a importação ocorreu na vigência da Emenda Constitucional n.º 23/83, incide o ICM na importação de bens de capital. Inadmissível a prevalência de tratados e convenções internacional mais contra o texto expresso da Lei Magna. Recurso extraordinário conhecido e provido. (RE 109173, Relator(a): Min. CARLOS MADEIRA, Segunda Turma, julgado em 27/02/1987, DJ 27-03-1987 PP-05166 EMENT VOL-01454-02 PP-00406 RTJ VOL-00121-01 PP-00270)

57 From the original in portuguese: "(...) Ao argumento de que não é a União, enquanto ordem jurídica parcial central, que firma o tratado internacional, mas sim a República Federativa do Brasil, enquanto ordem jurídica global (o Estado Brasileiro), contrapomos que, no plano interno, mesmo quando essa pessoa política representa a Federação, não pode conceder isenções heterônomas, com exceção das expressamente autorizadas nos arts. 155, § 2º, XII, 'e', e 156, § 3º, II ambos da CF". RE 229.096/RS, DJE n.º 065, Publicação 11/04/2008, p. 1002.

tariff treatment to imported and national products that are similar. It is, therefore, a norm of general character that governs the way of application of domestic taxes and, on no account, imposes any specific exemption.

Another contradictory issue is the approval of treaties about matters that are reserved for complementary law. The main issue is if an international treaty, which ratification is authorized by simple majority on both houses that form the National Congress, can enter on the field of subjects that, according to the current constitutional regime, are reserved to complementary law, demanding approval of the absolute majority of the two houses.

The issue was submitted to the SFC on the judgement of the Direct Action of Unconstitutionality 1480, which object was the Convention 158 of the ILO - concerning Termination of Employment at the Initiative of the Employer, subject that is reserved to complementary law by article 7º, I, of the CFRB⁵⁸

The SFC pronounced, in this case, an extremely detailed decision, in which it summarized didactically its position at the time about the main controverted issues relative to the relation between domestic law and international law. In particular, it ended the controversy about the possibility of ratification of a treaty about a subject reserved to complementary law.

Hereupon, the SFC understood that the primacy of the constitution prevails before the *pacta sunt servanda* principle, even for the rules about ritual and procedures for the edition of normative acts about certain subjects. Thus, is not possible the celebration of a treaty by Brazil related to a subject that is reserved to complementary law⁵⁹.

58 Art. The following are rights of urban and rural workers, among others that aim to improve their social conditions: I - employment protected against arbitrary dismissal or against dismissal without just cause, in accordance with a supplementary law which shall establish severance-pay, among other rights;

59 E M E N T A: - AÇÃO DIRETA DE INCONSTITUCIONALIDADE - CONVENÇÃO Nº 158/OIT - PROTEÇÃO DO TRABALHADOR CONTRA A DESPEDIDA ARBITRÁRIA OU SEM JUSTA CAUSA - ARGÜIÇÃO DE ILEGITIMIDADE CONSTITUCIONAL DOS ATOS QUE INCORPORARAM ESSA CONVENÇÃO INTERNACIONAL AO DIREITO POSITIVO INTERNO DO BRASIL (DECRETO LEGISLATIVO Nº 68/92 E DECRETO Nº 1.855/96) - POSSIBILIDADE DE CONTROLE ABSTRATO DE CONSTITUCIONALIDADE DE TRATADOS OU CONVENÇÕES INTERNACIONAIS EM FACE DA CONSTITUIÇÃO DA REPÚBLICA - ALEGADA TRANSGRESSÃO AO ART. 7º, I, DA CONSTITUIÇÃO DA REPÚBLICA E AO ART. 10, I DO ADCT/88 - REGULAMENTAÇÃO NORMATIVA DA PROTEÇÃO CONTRA A DESPEDIDA ARBITRÁRIA OU SEM JUSTA CAUSA, POSTA SOB RESERVA CONSTITUCIONAL DE LEI COMPLEMENTAR - CONSEQÜENTE IMPOSSIBILIDADE JURÍDICA DE TRATADO OU CONVENÇÃO INTERNACIONAL ATUAR COMO SUCEDÂNEO DA LEI COMPLEMENTAR EXIGIDA PELA CONSTITUIÇÃO (CF, ART. 7º, I) - CONSAGRAÇÃO CONSTITUCIONAL DA GARANTIA DE INDENIZAÇÃO COMPENSATÓRIA COMO EXPRESSÃO DA REAÇÃO

Established the understanding of the hierarchical inferiority of international treaties before the republic constitution, it proceeds to analyze the issue of the relation between international treaties and domestic law.

The majority of the Brazilian doctrine identified the state as being monist with predominance of international law before infraconstitutional law, given the content of the civil appeals numbers 7.872 and 9.587 judged by the SFC, respectively, in 1943 and 1951, which tended for the impossibility of revocation of treaties by posterior legislation. According to Jacob Dolinger, these decisions, as well as the others identified with the predominance of international law, referred

ESTATAL À DEMISSÃO ARBITRÁRIA DO TRABALHADOR (CF, ART. 7º, I, C/C O ART. 10, I DO ADCT/88) - CONTEÚDO PROGRAMÁTICO DA CONVENÇÃO Nº 158/OIT, CUJA APLICABILIDADE DEPENDE DA AÇÃO NORMATIVA DO LEGISLADOR INTERNO DE CADA PAÍS - POSSIBILIDADE DE ADEQUAÇÃO DAS DIRETRIZES CONSTANTES DA CONVENÇÃO Nº 158/OIT ÀS EXIGÊNCIAS FORMAIS E MATERIAIS DO ESTATUTO CONSTITUCIONAL BRASILEIRO - PEDIDO DE MEDIDA CAUTELAR DEFERIDO, EM PARTE, MEDIANTE INTERPRETAÇÃO CONFORME À CONSTITUIÇÃO. PROCEDIMENTO CONSTITUCIONAL DE INCORPORAÇÃO DOS TRATADOS OU CONVENÇÕES INTERNACIONAIS. (...) TRATADO INTERNACIONAL E RESERVA CONSTITUCIONAL DE LEI COMPLEMENTAR. - O primado da Constituição, no sistema jurídico brasileiro, é oponível ao princípio *pacta sunt servanda*, inexistindo, por isso mesmo, no direito positivo nacional, o problema da concorrência entre tratados internacionais e a Lei Fundamental da República, cuja suprema autoridade normativa deverá sempre prevalecer sobre os atos de direito internacional público. Os tratados internacionais celebrados pelo Brasil - ou aos quais o Brasil venha a aderir - não podem, em consequência, versar matéria posta sob reserva constitucional de lei complementar. É que, em tal situação, a própria Carta Política subordina o tratamento legislativo de determinado tema ao exclusivo domínio normativo da lei complementar, que não pode ser substituída por qualquer outra espécie normativa infraconstitucional, inclusive pelos atos internacionais já incorporados ao direito positivo interno. LEGITIMIDADE CONSTITUCIONAL DA CONVENÇÃO Nº 158/OIT, DESDE QUE OBSERVADA A INTERPRETAÇÃO CONFORME FIXADA PELO SUPREMO TRIBUNAL FEDERAL. - A Convenção nº 158/OIT, além de depender de necessária e ulterior intermediação legislativa para efeito de sua integral aplicabilidade no plano doméstico, configurando, sob tal aspecto, mera proposta de legislação dirigida ao legislador interno, não consagrou, como única consequência derivada da ruptura abusiva ou arbitrária do contrato de trabalho, o dever de os Estados-Partes, como o Brasil, instituírem, em sua legislação nacional, apenas a garantia da reintegração no emprego. Pelo contrário, a Convenção nº 158/OIT expressamente permite a cada Estado-Parte (Artigo 10), que, em função de seu próprio ordenamento positivo interno, opte pela solução normativa que se revelar mais consentânea e compatível com a legislação e a prática nacionais, adotando, em consequência, sempre com estrita observância do estatuto fundamental de cada País (a Constituição brasileira, no caso), a fórmula da reintegração no emprego e/ou da indenização compensatória. Análise de cada um dos Artigos impugnados da Convenção nº 158/OIT (Artigos 4º a 10). (ADI 1480 MC, Relator(a): Min. CELSO DE MELLO, Tribunal Pleno, julgado em 04/09/1997, DJ 18-05-2001 PP-00429 EMENT VOL-02031-02 PP-00213)

solely to contract-treaties, without any type of applicability to the so-called law-treaties, or to conflicts between posterior treaties and previous law⁶⁰.

The main Brazilian judicial paradigm about the subject was the Extraordinary Appeal 80.004⁶¹, sentenced in the 1st of June 1977, and which was about the conflict between the Geneva's Uniform Law For Bills of Exchange and Promissory Notes, which was promulgated into law by the Decreto nº 57.663 on January 24, 1996, and the Decreto-Lei 427 of January 22, 1969, which restricted the execution of promissory notes to its previous registry at Ministério da Fazenda, requirement that did not exist in the Uniform Law.

The judgement of the RE80.004 stretched for 3 years, from 1975 to 1977, prevailing the thesis whereby, happening a conflict between a previous treaty and a posterior law, it shall prevail the posterior law, because it would be the last will of the legislator, without prejudice of the consequences of the noncompliance of the treaty in international level, inasmuch as posterior law is not capable of disoblige the country internationally, for it is not the equivalent of its denouncement. This fact is due to the absence, in Brazil, of a guarantee of hierarchical privilege to international treaties, which receive identical treatment to the one given to an ordinary law⁶².

After the judgement of the RE80.004, it was consolidated in SFC the adoption, by Brazil, of the so-called moderate monism, in which there is no hierarchical distinction between international treaties and ordinary laws, and casual conflicts must be resolved by the traditional rules of antinomy solution – posterior prevail over previous, special

60 DOLINGER, Jacob. *Direito Internacional Privado: parte geral*. 9ª ed, Rio de Janeiro: Renovar, 2008, p. 111.

61 CONVENÇÃO DE GENEBRA, LEI UNIFORME SOBRE LETRAS DE CâMBIO E NOTAS PROMISSÓRIAS - AVAL APOSTO A NOTA PROMISSÓRIA NÃO REGISTRADA NO PRAZO LEGAL - IMPOSSIBILIDADE DE SER O AVALISTA ACIONADO, MESMO PELAS VIAS ORDINÁRIAS. VALIDADE DO DECRETO-LEI Nº 427, DE 22.01.1969. EMBORA A CONVENÇÃO DE GENEBRA QUE PREVIU UMA LEI UNIFORME SOBRE LETRAS DE CâMBIO E NOTAS PROMISSÓRIAS TENHA APLICABILIDADE NO DIREITO INTERNO BRASILEIRO, NÃO SE SOBREPÕE ELA ÀS LEIS DO PAÍS, DISSO DECORRENDO A CONSTITUCIONALIDADE E CONSEQUENTE VALIDADE DO DEC-LEI Nº 427/69, QUE INSTITUI O REGISTRO OBRIGATÓRIO DA NOTA PROMISSÓRIA EM REPARTIÇÃO FAZENDÁRIA, SOB PENA DE NULIDADE DO TÍTULO. SENDO O AVAL UM INSTITUTO DO DIREITO CAMBIÁRIO, INEXISTENTE SERÁ ELE SE RECONHECIDA A NULIDADE DO TÍTULO CAMBIAL A QUE FOI APOSTO. RECURSO EXTRAORDINÁRIO CONHECIDO E PROVIDO.

(RE 80004, Relator(a): Min. XAVIER DE ALBUQUERQUE, Tribunal Pleno, julgado em 01/06/1977, DJ 29-12-1977 PP-09433 EMENT VOL-01083-04 PP-00915 RTJ VOL-00083-03 PP-00809)

62 REZEK, José Francisco. *Direito dos Tratados*. Rio de Janeiro: Forense, 1984, pp.471 – 472.

prevail over general. This is the understanding that prevails in the Brazilian judiciary until now, with some few punctual exceptions.

The first relevant exception is related to tax matter. The National Tax Code ⁶³ establishes, on its article 98, that international treaties and conventions revoke or modify domestic tax law, and shall be governed by the one that comes after it. On the field of tax law, therefore, for the existence of a direct disposition, there is predominance of the international law.

The second exception normally indicated by the doctrine refers to the extradition treaties. The subject is governed by the Foreign Statute ⁶⁴, which is only applicable in cases where there is not an extradition treaty. In this sense, there are many decisions of the SFC, including the Habeas Corpus 58.727⁶⁵. There is not, however, a real choice for the international law in extradition cases, but only application of the classical positioning of the SFC, according to which treaty and ordinary law have the same hierarchical position. In the case of extradition, the treaty is the special rule in relation to the Foreign Statute, and it shall, therefore, prevail ⁶⁶.

The third important exception, that, in a way, covers the two previous exception is related to the so-called contract treaties, which are the opposite of the law making treaties. This classification, developed originally by Charles Rousseau, defends the existence of a special category of treaties, the contract-treaties, whereby its parts realize a juridical operation, while on other treaties there is the adoption of an objectively valid rule of law⁶⁷. In the case of contract treaties, the tendency of the Brazilian judiciary is for the predominance of those over the domestic law, as was decided by the SFC on the Extraordinary Appeals 114.784, 113.156 and 130.765, as well as by the STJ in the judgement of Special Appeal 228.324⁶⁸.

There is a fourth exception, of dubious constitutionality, inscribed

63 Lei nº5.172, de 25 de outubro de 1966.

64 Lei 6.815, de 19 de Agosto de 1980

65 EXTRADIÇÃO. PRAZO DA PRISÃO. CONFLITO ENTRE A LEI E O TRATADO. NA COLISAO ENTRE A LEI E O TRATADO, PREVALECE ESTE, PORQUE CONTEM NORMAS ESPECIFICAS. O PRAZO DE 60 DIAS FIXADO NO TRATADO DE EXTRADIÇÃO BRASIL-ESTADOS UNIDOS, CLÁUSULA VIII, CONTA-SE DO DIA DA PRISÃO PREVENTIVA AO EM QUE FOI APRESENTADO O PEDIDO FORMAL DA EXTRADIÇÃO. A DETENÇÃO ANTERIOR, PARA OUTROS FINS, NÃO É COMPUTADA. (HC 58727, Relator(a): Min. SOARES MUNOZ, Tribunal Pleno, julgado em 18/03/1981, DJ 03-04-1981 PP-02854 EMENT VOL-01206-01 PP-00233 RTJ VOL-00100-03 PP-01030)

66 DOLINGER, Jacob. *Direito Internacional Privado: parte geral*. 9ª ed, Rio de Janeiro: Renovar, 2008, pp. 107-108.

67 REZEK, José Francisco. *Direito dos Tratados*. Rio de Janeiro: Forense, 1984, pp.129-130.

68 DOLINGER, Jacob. *Direito Internacional Privado: parte geral*. 9ª ed, Rio de Janeiro: Renovar, 2008, pp. 110.

in the 2002's Civil Code. Article 732 of the cited text determines that to the transport contracts, in general, are applicable, when fit, provided that it does not contradict the dispositions of this Code, the precepts fixed on special legislation and international treaties and conventions. There is a clear attempt of the ordinary legislator to determine the absolute predominance of the Civil Code above any other normative act, what is an incompatible hypothesis with Brazilian law⁶⁹. There is not, until now, decisions of the SFC or the STJ about the application of this disposition.

The last relevant exception is the treatment given to human rights treaties. The CFRB establishes, in its article 5º, §2º, that the rights and guarantees expressed in this constitution do not exclude others deriving from the regime and from the principles adopted by it, or from the international treaties in which the Federative Republic of Brazil is a party. Based in this disposition appeared a discussion about conflicts, moreover of the Republic Constitution with the Pact of San José of Costa Rica.

While the CFRB establishes in article 5º, LXVII that “*there shall be no civil imprisonment for indebtedness except in the case of a person responsible for voluntary and inexcusable default of alimony obligation and in the case of an unfaithful trustee*”, the Pact of San José of Costa Rica establishes, on article 7º, 7, that “No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support”. To make the conflict even more complex, the ordinary legislator assimilated the fiduciary debtor to the trustee (article 66 of the Law 4.728/1965). There would be, thus, two hypothesis of civil imprisonment in Brazilian law that were incompatible with the Pact of San José of Costa Rica.

The Supreme Federal Court decided repeatedly for the possibility of the imprisonment of the unfaithful trustee⁷⁰, situation that only started to

69 TIBURCIO, Carmen. Temas de Direito Internacional. Rio de Janeiro: Renovar, 2006, p.35.

70 Recurso extraordinário. Alienação fiduciária em garantia. Prisão civil. - Esta Corte, por seu Plenário (HC 72131), firmou o entendimento de que, em face da Carta Magna de 1988, persiste a constitucionalidade da prisão civil do depositário infiel em se tratando de alienação fiduciária, bem como de que o Pacto de São José da Costa Rica, além de não poder contrapor-se à permissão do artigo 5º, LXVII, da mesma Constituição, não derogou, por ser norma infraconstitucional geral, as normas infraconstitucionais especiais sobre prisão civil do depositário infiel. - Esse entendimento voltou a ser reafirmado recentemente, em 27.05.98, também por decisão do Plenário, quando do julgamento do RE 206.482. Dessa orientação divergiu o acórdão recorrido. - Inconstitucionalidade da interpretação dada ao artigo 7º, item 7, do Pacto de São José da Costa Rica no sentido de derogar o Decreto-Lei 911/69 no tocante à admissibilidade da prisão civil por infidelidade do depositário em alienação fiduciária em garantia. - É de observar-se, por fim, que o § 2º do artigo 5º da Constituição não se aplica aos tratados internacionais sobre direitos e garantias fundamentais que ingressaram em nosso ordenamento jurídico após a promulgação da Constituição de 1988, e isso porque ainda não se admite tratado internacional com força de emenda constitucional. Recurso extraordinário conhecido e provido.

be modified with the edition of the Constitutional Amendment 45 of 2004.

The CA45/2004 added paragraph 3 to article 5 of CFRB, determining that “*international human rights treaties and conventions which are approved in each house of the national congress, in two rounds of voting, by three fifths of the votes of the respective members shall be equivalent to constitutional amendments*”⁷¹.

In this new context, in which starts to be possible the existence, in Brazil, of international treaties with the same hierarchy of the constitutional text, ending, at once, with the logic of reception of treaties always with hierarchy of ordinary law. In this frame, the SFC, while judging the HC 87.585/TO⁷² changed its understanding about the cited article 5, §2º of CFRB, affirming that it gives to human rights treaties “a different status, superior to the one granted to the ordinary domestic law, though it does not make them constitutional norms (what would only be possible through the §3º of the same article”⁷³.

Finally, it is important to highlight the existence of an important doctrinaire positioning, even though it is not accepted by the SFC or the SJC yet, according to which the late ratification by Brazil of the 1969’s Vienna Convention on the Law of Treaties, only ratified by the Law-Decree 7.030 in the 14th of December of 2009, would imply on the adoption of the monism with predominance of international law, in view of the rule of article 27 of the cited convention⁷⁴.

5. CONCLUSION

In Brazil, the omission of the constituent and the ordinary legislator about the law of treaties has occasioned incertitude, making

(RE 253071, Relator(a): Min. MOREIRA ALVES, Primeira Turma, julgado em 29/05/2001, DJ 29-06-2001 PP-00061 EMENT VOL-02037-06 PP-01131)

71 So far, only the Convention on the Rights of Persons with Disabilities and its Additional Protocol were aproved according to this rite (Legislative Decree 186/2008, Presidential Decree 6.949/2009).

72 DEPOSITÁRIO INFIEL - PRISÃO. A subscrição pelo Brasil do Pacto de São José da Costa Rica, limitando a prisão civil por dívida ao descumprimento inescusável de prestação alimentícia, implicou a derrogação das normas estritamente legais referentes à prisão do depositário infiel. (HC 87585, Relator(a): Min. MARCO AURÉLIO, Tribunal Pleno, julgado em 03/12/2008, DJe-118 DIVULG 25-06-2009 PUBLIC 26-06-2009 EMENT VOL-02366-02 PP-00237)

73 From the original in portuguese: “um status diferenciado, superior ao do direito ordinário interno, embora não os eleve ao nível de normas constitucionais (o que somente seria possível pela via do §3º do mesmo artigo”. TIBURCIO, Carmen. Conflito entre fonts: os casos da prisão civil. In: BAPTISTA, Luiz Olavo; MAZZUOLI, Valerio de Oliveira. Doutrinas essenciais: direito internacional. São Paulo: Revista dos Tribunais, 2012, p.101.

74 ACCIOLY, Hildebrando, NASCIMENTO E SILVA, G.E., CASELLA, Paulo Borba. Manual de Direito Internacional Público. 21ªed, São Paulo: Saraiva, 2014, p.236.

indispensable the intervention of the judiciary, also responsible for the consolidation of the current ritual of internalization of treaties, when deciding, for example, that promulgation and publication of the presidential decree are indispensable for the beginning of its domestic continuance in force.

Although the traditional classification between monistic and dualistic states has lost part of its sense because of the difficulty of practical categorization of States, it can be said that Brazil adopts a moderate monist position in general.

Thus, happening a conflict between an international treaty that is not about human rights and an ordinary law, it will be considered that both have the same hierarchy, solving the conflict by the criteria of chronology and specialty.

The treaties about human rights have special treatment. When approved following the constitutional ritual established to the Constitutional Amendment, they will have constitutional hierarchy, integrating even the constitutional block and serving as a paradigm for the concentrated constitutional control of law and other international treaties. If they were not approved following this ritual, they will have a supralegal status, subject to constitutional control, but prevailing above all the infraconstitutional legislation.

With the exception of these cases, there are few cases where it is admitted the absolute predominance of the international law – cases of the tax matters and the extradition and of the so-called contract treaties – and a single case, which constitutionality was not appreciated yet, of absolute predominance of domestic law – cases involving contracts of transport in general, in accordance with article 732 of the Civil Code.

On account of the fast evolution of the treatment given by the SFC to the matter, especially after the promulgation of the Constitutional Amendment 45/2004 and the ratification of the 1969's Vienna Convention on the Law of Treaties in 2009, there is still some legal incertitude on the matter, pending of jurisprudence consolidation.

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