

THE NORMATIVE HIERARCHY OF TREATIES IN BRAZILIAN LEGAL SYSTEM

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Abstract: Through the Federal Supreme Court appeals' analysis (appeal 80.004/SE and appeal 466.343/SP) regarding treaties' hierarchical position and enforcement in the Brazilian legal system, this paper indicates, from a historical and deductive method, how Brazilian doctrinal and jurisprudential contributions have caused more issues than solutions to determine where treaties belong in Brazilian system order (especially regarding the relationship between international law and domestic law). A particular topic about human rights treaties have been written to show the logical flaws in terms of hermeneutic perspective whether is considered human rights treaties as a constitutional block or a supralaw (supralawfulness) hierarchical position. In the last topic, it is discussed how 1969 Vienna Convention on the Law of Treaties has undeniably influenced Brazilian treaties' hermeneutics.

Keyword : International Law; Treaties; 1988 Federal Constitution; 1969 Vienna Convention on the Law of Treaties; Human Rights.

INTRODUCTION

From the appeals 80.004/SE and 466.343/SP, it will be shown the current jurisprudential understanding of where treaties belongs in Brazilian legal system. This work has structured the evolution of the hierarchy of those treaties in Brazilian legal order by an historic method through the deep analysis of these appeals.

The discussion virtually surpassed between monism and dualism is brought back in the merits of these judgements especially as a matter of whether Brazil has adopted the former or the later when targeting the incorporation of treaties in Brazilian legal system in the view of the Supreme Federal Court.

Following the forehead, this article also aims to deal with the specific case of human rights treaties in a manner to typify the hermeneutic problems originated by the Constitution's special treatment given to those treaties.¹ As one direct consequence, two different perspectives of where they should be normative and hierarchically understood coexist: one as *supralegality* (its value is below the Constitution and above *infraconstitutional* law) and another as a constitutional block (art. 60, §4º of the 1988 Brazil's Federal Constitution).

Given the considerations regarding the human rights treaties in the Brazilian legal order, it will be possible to identify serious problems about the conception itself of human rights in Brazil. This occurs precisely due to several hermeneutic positions adopted for its hierarchical interpretation.

Beyond the description of hermeneutic problems, in a third step, this work will develop the possibility or not to face the monism and dualism dichotomy discussed in the first topic when the incorporation of 1969 Vienna Convention on the Law of Treaties in Brazil arises in the debate field. For this reason, this article supports the existence of a real chance of an unavoidable change in Brazilian understanding (principally of judges in the Supreme Federal Court) about the place of treaties in the Brazilian legal system after 1969 Vienna Convention's incorporation.

The interpretation of 1969 Vienna Convention in conjunction with constitutional text (arts. 2º and 5º of Brazil Federal Constitution of 1988) lead to affirm the prevalence, positively speaking, to an international hermeneutic. If that is not true, a logical problem in the normative hierarchy structure can be easily verified such an *infraconstitutional* norm (1969 Vienna Convention) ruling hermeneutically norms "above"

1 In the same manner, Juan Antonio Travieso states, in verbis, "Los tratados modernos sobre derechos humanos en general, y, en particular la Convención Americana no son tratados multilaterales del tipo tradicional concluidos en función de un intercambio recíproco de derechos para el beneficio mutuo de los Estados contratantes. Su objeto y fin son la protección de los derechos fundamentales de los seres humanos independientemente de su nacionalidad, tanto frente a su propio Estado como frente a los otros Estados contratantes. Al aprobar estos tratados sobre derechos humanos, los Estados se someten a un orden legal dentro del cual ellos, por el bien común, asumen varias obligaciones, no en relación con otros Estados, sino hacia los individuos bajo su jurisdicción. Por tanto, la Convención no sólo vincula a los Estados partes, sino que otorga garantías a las personas. Por ese motivo, justificadamente, no puede interpretarse como cualquier otro tratado." (Derechos humanos y derecho internacional, Buenos Aires, Editorial Heliasta, 1990, p. 90). Compartilhando do mesmo entendimento, leciona Jorge Reinaldo Vanossi: "La declaración de la Constitución argentina es concordante con las Declaraciones que han adoptado los organismos internacionales, y se refuerza con la ratificación argentina a las convenciones o pactos internacionales de derechos humanos destinados a hacerlos efectivos y brindar protección concreta a las personas a través de instituciones internacionales." (La constitución nacional y los derechos humanos, 3. ed. Buenos Aires, Eudeba, 1988, p. 35).

her (for example, human rights treaties incorporated with constitutional standard).

1. THE CURRENT HERMENEUTIC SCENARIO OF WHERE TREATIES BELONGS IN BRAZILIAN LEGAL SYSTEM

The starting point of this discussion recalls the polemic decision that decided the conflict between domestic law and treaties.² The controversy was about a collision between Act 427 (22.01.1969), which has required the registration of promissory note in tax public institution under penalty of invalidity with basis in the Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes (Geneva, 1930) into force in Brazil as recognized by the Supreme Federal Court.

This dispute lied in the claim of unconstitutionality of the requirement for the registration of promissory notes in tax public institutions since it had not any normative provisions in 1930 Geneva Convention about this matter. Therefore, the Act 427 should be considered unconstitutional as it caused the breach of the referred treaty.

The Court left precedents and doctrinal manifestations of Brazilian authors in the line of an act could not modify treaty in force. It has been preferred to sustain the argument that there was no constitutional hierarchy between treaty and act. In such way, one revokes the other. The fact that treaty obliges State in the international order and the correct form of its revocation is the denunciation did not affect the Court.

The criticized rationality behind the judgement was that Brazilian legislative process was described in the Constitution of the Republic in which there was not any mention to treaty nor any indication of eventual hierarchical position of Acts. The only *a priori* exception was the one established in the National Tax Code: treaty is superior to Act and it prevails when it is considered as complementary Act to Constitution. For this reason, if treaty revokes Act as the former is posterior to the latter; Act can also revoke treaty, independently if the State is still obliged to obey in the international sphere because it has not been denounced.

According to this point of view, the State is obliged to international law, due to the fact that it has incorporated a treaty and, as it has not denounced by means provided in the treaty itself or, if it is omitted, in the customary form codified in the 1969 Vienna Convention on the Law of Treaties (VCLT).³

2 Appeal n. 80.004/SE published in RTJ 83/809. For more, see MAGALHÃES, José Carlos de. O STF e as Relações entre Direito Interno e Direito Internacional, in *Revista de Direito Público*, vol. 51/52 (jul-dez., 1979), pages 122-125.

3 VCLT – “Article 54. TERMINATION OF OR WITHDRAWAL FROM A TREATY UNDER

It must be remarked that VCLT was only incorporated in Brazil twenty-nine years after it has into force in 1980. In that event, in the appeal 80.004/SE, Brazil has not ratified VCLT. Notwithstanding the absence of ratification, the Legal and Consular Department of Foreign Affairs, in 1989, managed its activities about the negotiation of treaties rendering what was concerned in the VCLT.⁴

In the understanding of the Supreme Federal Court, the absence of denunciation of a treaty does not represent an obstacle to the State, in the internal scenario, to withdraw its effects and in doing so not entering into force. It does not matter, in this conception, the emergence of international responsibility by the breach committed.

Concerning the incompatibility between treaty and Federal Constitution, Francisco Rezek states: “confronting de constitution’s primacy with the norm *pacta sunt servanda*, it is acceptable to sustain the authority of the fundamental State law even if it signifies that an unlawful act is made for which, in the international scenario, must be accountable”.⁵

Otherwise, Vicente Marotta Rangel highlights this incompatibility must be clear and unambiguous. Consequently, the State may argue the nullity of treaties that manifestly violate constitutional norm about competency to incorporate them.⁶ In fact, this is the subject of the article 46 of VCLT. Furthermore, incompetency to approve treaty, which justifies the nullification as mentioned by Marotta Rangel, cannot be mistaken with the approval of treaty by competent authority, whereas

ITS PROVISIONS OR BY CONSENT OF THE PARTIES

The termination of a treaty or the withdrawal of a party may take place:

In conformity with the provisions of the treaty; or

At any time by consent of all the parties after consultation with the other contracting States”

Article 56. DENUNCIATION OF OR WITHDRAWAL FROM A TREATY CONTAINING NO PROVISION REGARDING TERMINATION, DENUNCIATION OR WITHDRAWAL

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

(a) It is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(b) A right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months’ notice of its intention to denounce or withdraw from a treaty under paragraph 1” (Available in: <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>, accessed in 24.04.2018).

4 MEDEIROS, Antonio Paulo Cachapuz de. O poder de celebrar tratados. Doctoral thesis presented in the Law School of the University of São Paulo, 1995, page 440.

5 REZEK, José Francisco. Direito dos Tratados. Forense, Rio de Janeiro, 1984, pages 462/463.

6 RANGEL, Vicente Marotta. Os conflitos entre o direito internacional e os tratados internacionais, in Boletim da sociedade brasileira de Direito internacional, Rio de Janeiro, n. 63, dec. 1967, pages 45/46.

regularly ratified; it may be afterwards considered unconstitutional. Those are different hypothesis. In the first case, treaty is null because who has ratified did not have constitutional competency as result he or she could not internationally compromise the State. In the second case, treaty is valid once who have signed and ratified were competent authorities to do it as provided by the country's Constitution. On that occasion, consequences are distinct. In the case of nullity, the State will not be accountable for breach, exactly because of this nullity; the same will not happen if treaty is validly signed and ratified. This leads to what Francisco Rezek defended: an idea of Constitution's primacy over *pacta sunt servanda* that can characterize an unlawful act in international scenario for which the State is accountable.

Under these circumstances, the observation made by Amílcar de Castro about the legal nature of treaty⁷, and on which Minister Cunha Peixoto has based himself, should not be taken into consideration. This view reveals a government detached from the nation and not identifying itself with the latter. The Amílcar de Castro's understanding cannot explain how a treaty obliges people considered as a block and why this obligation took as a block does not worth in domestic order. Moreover, this rationality does not take into account, since the Constitution of the Empire in 1824, the Brazilian State powers have authority derived from nation – and not from itself.

On the opposite of a king in remote ages, the republic president does not have jurisdiction by divine right, but by election and people's delegation. Article 1, §1º of the Constitution expresses “all power emerges from the people that exercises it through elected representatives or directly in the terms of this Constitution”.

The same applies to other powers inasmuch as judicial power is included in that logic. In such manner, when the executive power compromises the State in a treaty ratified by the legislative power understood as delegated authorities to nation, the former immediately compromises the nation. In this degree, the idea of people compromise itself through government in the international order but not in the domestic order has no foundation. The government compromises the nation as a whole once the former represents the latter to the extent which its authority or right is not based on itself.⁸

It is important to stress the fact that Brazilian Constitution known as a State organization tool and to possess the capacity to declare the Law did not make any difference between domestic order

7 “Treaty is not Act; it is an international act that obliges a considered people in block; which obliges the government in the international order but not the people in domestic order” (CASTRO, Amílcar de. *Direito Internacional privado*, Forense, vol. II.

8 MAGALHÃES, José Carlos de. *O Supremo Tribunal Federal e o Direito Internacional*. Editora Livraria do Advogado, Porto Alegre, 2000.

and international order. In fact, it has limited only the competency of the republic president to celebrate treaties *ad referendum* of National Congress and maintain relationships to foreign States (Article 84, VII and VIII). It also has limited the competency of National Congress to definitely solve matters of treaties, agreements or international acts that implies burdens or excessive commitments to national patrimony (Article 49, I).

To this purpose, Judge Sir Hersch Lauterpacht in his separate opinion at the Permanente Court of International Justice in the case *Certain Norwegian Loans* (1957) has stated that:

*“It may be admitted, in order to simplify a problem which is not at all simple, that an “international” contract must be subject to some national law; this was the view of the Permanent Court of International Justice in the case of the Serbian and Brazilian Loans. However, this does not mean that that national law is a matter which is wholly outside the orbit of international law. National legislation - including currency legislation-may be contrary, in its intention or effects, to the international obligations of the State. The question of conformity of national legislation with international law, is a matter of international law. The notion that if a matter is governed by national law it is for that reason at the same time outside the sphere of international law is both novel and, if accepted, subversive of international law. It is not enough for a State to bring a matter under the protective umbrella of its legislation, possibly of a predatory character, in order to shelter it effectively from any control by international law”.*⁹

In the same way, the Court through an advisory opinion, in 1930, settled this understanding when it asserted that “it is a well-known recognized principle of international law in the relationships of contracting States that normative provisions of their domestic law cannot prevail over the treaty”.¹⁰

Overall, the Appeal 80.004/SE consisted in the declaration of the equivalence, in terms of hierarchy, between treaties and Acts. In 2004,

9 INTERNATIONAL COURT OF JUSTICE – Available in: <http://www.icj-cij.org/files/case-related/29/029-19570706-JUD-01-03-EN.pdf>, p. 37, accessed in 25.04.2018.

10 ACCIOLY, Hildebrando; SILVA, Geraldo Eulálio Nascimento. Manual de Direito Internacional Público. 2ª Edição, São Paulo: Saraiva, 1996, p. 60.

in the judicial reform through the constitutional amendment 45/2004, human rights treaties could have *status* of constitutional amendment if they follow the procedure established in Article 5º, §3º (three-fifths vote, two shifts in each legislative house).

Two years later, in 2006, the Appeal 466.343-1/SP concerning the civil imprisonment of unfaithful depositary (which regardless of the modality of the deposit it was considered unlawful by the Supreme Federal Court) discussed the interpretation of Article 5º, LXVII and §§1º, 2º and 3º in the light of Article 7º, §7º of American Convention on Human Rights. This case led to a new comprehension about the hierarchical place of treaties, particularly human rights treaties, in Brazilian legal system that will be explained in the next topic.

2. THE SPECIFIC CASE OF HUMAN RIGHTS TREATIES

In the Appeal 466.343-1/SP, the Minister Gilmar Mendes argued there were four different positions about the normative *status* of human rights treaties in a legal order: (i) the supraconstitutional nature of human rights treaties¹¹; (ii) the constitutional character of these international diplomas¹²; (iii) the trend that recognizes the *status* of Act to this kind of international document¹³; (iv) the supralegal interpretation given to human rights treaties and conventions.¹⁴

In the first position, human rights treaties would be superior to the Constitution because of the concern of the effectiveness of these rights in domestic law associated to the guarantees of human person.¹⁵ In this sense, constitutional norms would not have the power to revoke international human rights norms. In other words, not even constitutional amendments would have the power to suppress international human rights law subscribed by the State.

The Minister Gilmar Mendes stands out the difficulty of application of this theory in Brazil since the formal and material

11 MELLO, Celso Duvivier de Albuquerque. O §2º do art. 5º da Constituição Federal. In: Torres, Ricardo Lobo (Org.). *Teoria dos Direitos Fundamentais*. Rio de Janeiro: Renovar, 1999, pp. 25-26.

12 CANÇADO TRINDADE, Antônio Augusto. Memorial em prol de uma nova mentalidade quanto à proteção dos direitos humanos nos planos internacional e nacional. *Boletim da Sociedade Brasileira de Direito Internacional*, Brasília, nº 113-118, 1998. pp. 88-89; e PIOVESAN, Flávia. *Direitos humanos e o Direito Constitucional Internacional*. São Paulo: Max Limonad, 1996. p. 83.

13 Appeal nº 80.004/SE, Rel. Min. Xavier de Albuquerque, DJ 29.12.1977.

14 Article 25 of Germany's Constitution; Article 55 of France's Constitution; Article 28 of Greece's Constitution.

15 BIDART CAMPOS, German J. *Teoría General de los Derechos Humanos*. Buenos Aires: Astrea; 1991, 353.

Constitution supremacy principle organizes the whole Brazilian legal order. Different view would enable the constitutionality control of international diplomas.

In the second theory, assuming that Article 5º, § 2º of Brazilian Constitution is an opening reception clause for other rights contemplated in human rights treaties incorporated by Brazil, it is understood that Brazilian Constitution would impute constitutional hierarchy to international documents. Furthermore, Article 5º, §1º of Brazilian Constitution would guarantee to those treaties immediate applicability both in international and national orders since the ratification act regardless any legislative intermediation.

The constitutional hierarchy *status* would be applied only to human rights treaties taking into account their special character when compared to common treaties¹⁶ which would have infraconstitutional statute. To this thesis, eventual conflicts between treaty and Constitution should be settled by the application of the most favorable norm to the victim¹⁷, the right holder. This hermeneutic task would be exercised by national tribunals and other law applicant organs.¹⁸

In Brazil, this thesis is defended by Antônio Augusto Cançado Trindade¹⁹ and Flávia Piovesan who assert that Article 5º, §§1º e 2º of Brazilian Constitution characterizes, respectively, as holders of the direct applicability and the constitutional spirit of human rights treaties signed by Brazil.²⁰

16 Article 102, III, “b” of 1988 Federal Constitution admits the culmination of appeal proceedings against decision that declares treaty’s unconstitutionality.

17 CANÇADO TRINDADE, Antônio Augusto. A proteção dos direitos humanos nos planos nacional e internacional: perspectivas brasileiras. San José de Costa Rica/Brasília, Inter-American Institute of Human Rights, 1992, p. 317-318. In the same sense, Arnaldo Sussekund says: “In the field of labor law and Social Security, however, the solution of conflicts between international norms is facilitated by the application of the principle of the norm more favorable to workers. It is true that multilateral treaties, whether universal (e.g. International Covenant on Economic, Social and Cultural Rights, and ILO Conventions), or regional (e.g. European Social Charter), have the same conception of legal institutes especially in the field of human rights, which facilitates the application of the principle of the most favorable norm” (*Direito internacional do Trabalho*, São Paulo, LTR, 1983, p. 57).

18 PIOVESAN, Flávia. A Constituição Brasileira de 1988 e os Tratados Internacionais de Proteção dos Direitos Humanos. In: *Temas da Direitos Humanos*. 2a Ed. São Paulo: Max Limonad; 2003, pp. 44-56

19 CANÇADO TRINDADE, Antônio Augusto. *Tratado de Direito Internacional dos Direitos Humanos*. Porto Alegre: Sergio Antônio Fabris Editor; 2003

20 Cançado Trindade was responsible for the proposal of §2º into Article 5º to National Constitutional Assembly in 1987: “the aim of paragraphs 2 and 1, Article 5º of Constitution was not but assure the direct applicability of international law of protection by Judicial Power in a constitutional level (...)” (CANÇADO TRINDADE, Antônio Augusto. *Memorial em prol de uma nova mentalidade quanto à proteção dos direitos humanos nos planos internacional e*

The constitutional hierarchy of human rights treaties is found, for example, in Argentina's Constitution which limits the list of international diplomas with differentiated normative *status* if compared to other treaties with common character.²¹ Similarly, Venezuela's Constitution, apart from the constitutional hierarchy, establishes the immediate and direct applicability of treaties in domestic legal order. In addition, it fixes the interpretation of the application of the most favorable norm to the victim.²²

After the Judicial Reform (Constitutional Amendment 45/04), it turned almost impossible to defend the third position sustained into the hierarchical equivalence between treaty and infraconstitutional law. As seen, in this thesis, agreements would not have legitimacy to confront neither to complement constitutional norms in terms of human rights.

Before the arguments mentioned, Minister Gilmar Mendes was in favor of supralegality thesis which human rights treaties and conventions are *infraconstitutional*, but, because of its special character when compared to other international normative acts, they have the supralegal character (they are above Acts but inferior to Constitution).

Given that supralegal character of international normative documents, the posterior infraconstitutional legislation with which may exist a conflict that will have its efficacy paralyzed. It is what happens to article 652 of the new civil code (Act n. 10.406/2002) which reproduces identical provision of the article 1.287 of the 1916 civil code.

In other terms, in Gilmar Mendes's view, human rights treaties could not be above Constitution's supremacy, but they deserve a special place in Brazilian legal order. Match them to ordinary Acts would

nacional. Boletim da Sociedade Brasileira de Direito Internacional, Brasília, n° 113-118, 1998, pp. 88-89.).

21 Article 75 (22) Argentine's Constitution. In verbis: "La Declaración Americana de los Derechos y Deberes del Hombre; la Declaración Universal de Derechos Humanos; la Convención Americana sobre Derechos Humanos; el Pacto Internacional de Derechos Económicos, Sociales y Culturales; el Pacto Internacional de Derechos Civiles y Políticos y su Protocolo Facultativo; la Convención sobre la Prevención y la Sanción del Delito de Genocidio; la Convención Internacional sobre la Eliminación de todas las Formas de Discriminación Racial; la Convención sobre la Eliminación de todas las Formas de Discriminación contra la Mujer; la Convención contra la Tortura y otros Tratos o Penas Crueles, Inhumanos o Degradantes; la Convención sobre los Derechos del Niño: en las condiciones de su vigencia, tienen jerarquía constitucional, no derogan artículo alguno de la primera parte de esta Constitución y deben entenderse complementarios de los derechos y garantías por ella reconocidos".

22 Venezuela's Constitution of 2000, Article 23. In verbis: "Los tratados, pactos y convenciones relativos a derechos humanos, suscritos y ratificados por Venezuela, tienen jerarquía constitucional y prevalecen en el orden interno, en la medida en que contengan normas sobre su goce y ejercicio más favorables a las establecidas por esta Constitución y en las leyes de la República, y son de aplicación inmediata y directa por los tribunales y demás órganos del Poder Público".

represent an underestimation of their special value in the context of human rights protection system.

This thesis was the one adopted in Brazil until now by the Supreme Federal Court. The same rationality can be found in Germany's Constitution²³, France's Constitution of 1958²⁴ and Greece's Constitution of 1975²⁵.

However this idea has prevailed, in some doctrinal opinions²⁶, the 1988 Federal Constitution strengthens the interaction and combination of international and domestic law, which fortifies the system of fundamental rights protection with its own principles and logic based on the principle of the primacy of human rights and not of the Constitution once the principle of the most favorable rule to the victim has its occurrence in Brazilian legal order and it has its independence from domestic or international law. The Charter of 1988 launches a democratizing and humanist project, and it is incumbent upon the law operators to introject, to incorporate and to propagate their innovative values. Legal agents will become agents that propagate the democratic order of 1988, preventing the perpetuation of the old values of the authoritarian regime, legally repudiated and abolished.

Summarily, it can be noticed from the historical Supreme Federal Court's decision of the Appeal 466.343-1/SP that: (i) human rights treaties approved under non-qualified quorum have supralegal hierarchical value; (ii) human rights treaties approved under qualified quorum by National Congress have constitutional amendment

23 Article 25: "the general norms of international public law are part of federal law. They prevail over Acts and their rights and obligations arises directly to the habitants of the national territory".

24 Article 55. In verbis: «Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie.»

25 Article 28: "The generally recognized rules of international law and the international conventions after their ratification by law and their having been put into effect in accordance with their respective terms, shall constitute an integral part of Greek law and override any law provision to the contrary."

26 PIOVESAN, Flávia. A CONSTITUIÇÃO DE 1988 E OS TRATADOS INTERNACIONAIS DE PROTEÇÃO DOS DIREITOS HUMANOS. This article is based on a lecture delivered in May 16 of 1996 in the General Attorney of São Paulo State. Available in: <http://www.pge.sp.gov.br/centrodeestudos/revistaspge/revista3/rev6.htm>, accessed in 14.04.2018. "We break away from the chains of the old and idle polemic between monists and dualists; in this field of protection, it is not a matter of the primacy of international law or of domestic law, here in constant interaction: primacy is, in the present domain, the rule that best protects, in each case, the consecrated rights of the human person, whether is a rule of international law or of domestic law" (CANÇADO TRINDADE, Antônio Augusto. A proteção dos direitos humanos nos planos nacional e internacional: perspectivas brasileiras, San José de Costa Rica/Brasília, Instituto Interamericano de Derechos Humanos, 1992, p. 317-318).

hierarchical value²⁷; (iii) non-human-rights treaties have ordinary legal hierarchical value (equivalence thesis); (iv) to some authors there is an exception to this last rule which is the eventual tax law treaty (as an interpretational consequence of article 98 of National Tax Code that it would establish supralegal hierarchical value to this specific type of treaty).

3. HERMENEUTIC CONSEQUENCES AFTER 1969 VIENNA CONVENTION ON THE LAW OF TREATIES' INCORPORATION IN BRAZILIAN LEGAL ORDER

Brazil enacted and incorporated 1969 Vienna Convention on the Law of Treaties in the year of 2009. For this Convention's purposes, in its preamble, in case of disputes under international or treaty law "they must be settled by peaceful means and in accordance with the principles of Justice and International Law" as well as "a party cannot invoke provisions of its domestic law as justification for non-compliance with the treaty" (good faith's principle). In addition, it is deduced from Article 3, §1º of the 1969 Vienna Convention that "a treaty shall be interpreted in good faith and in accordance with the meaning of its terms in its context, in the light of its object and purposes".

Firstly, by meeting to this normative that manages the legal hermeneutics concerning treaties, a schizophrenic hermeneutic treatment given to an object that is protected by both Human Rights International Law and the Brazilian Constitutional Law emerges: is this interpretation internationalist or nationalistic? If the latter sets the response, there will be a secondary constitutionality control (and not control of national conventionality, since the nature of the control of conventionality should be limited to jurisdictions' sponsors for the interpretation of international law) and the effectiveness of the 1969 Vienna Convention would be deflated.

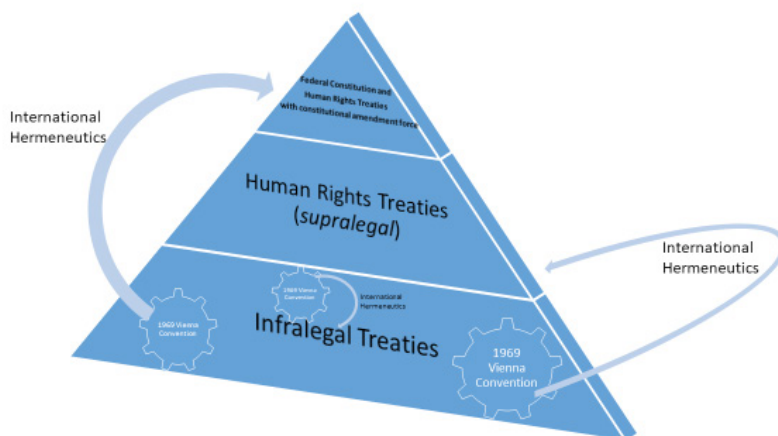
Secondly, there are the hierarchical and normative forces given

27 PIOVESAN declares that the procedure of article 5º, §3º 1988 Federal Constitution (CF/88) brought by the Constitutional Amendment of 45/2004 is an endorsement of the constitutionality present in the materiality of human rights treaties, and there can be no abolition of these rights and guarantees due to article 60, §4 of the CF/88 by virtue of the principle of non-retrocession. However, it is questionable the teleological analysis of insertion of paragraph 3 to article 5º of CF/88 understood as only an endorsement: much more resembles a barrier to the recognition of the constitutional status of human rights norms than its mere formalization (PIOVESAN, Flávia. A CONSTITUIÇÃO DE 1988 E OS TRATADOS INTERNACIONAIS DE PROTEÇÃO DOS DIREITOS HUMANOS. This article is based on a lecture delivered in May 16 of 1996 in the General Attorney of São Paulo State. Available in: <http://www.pge.sp.gov.br/centrodeestudos/revistaspge/revista3/rev6.htm>, accessed in 14.04.2018).

to this norm problems: if it is considered that there are human rights treaties with constitutional amendment or supralegality force or even constitute a block of constitutionality and the 1969 Vienna Convention is understood as a federal ordinary Act, how could this latter then guide the interpretation of treaties whose hierarchical position is superior to it?

Thirdly, if the hierarchy of treaties is reckoned as constituting a constitutional block, as it is in Piovesan's theory, it is the same as to acknowledge an instance of monism with hermeneutic primacy to International Law. André de Carvalho Ramos²⁸ does the same in his control of conventionality theory except by the fact that, in his theory, he does not admit such possibility of a hermeneutic primacy to International Law: Brazilian legal system would be categorized as dualistic. In the latter perspective, the prevalence of the international conventions' control (international hermeneutic primacy) would be restored. In a certain way, there would be a return to almost a Kelsian's monism²⁹, complexifying furthermore the Brazilian normative scenario, instead of triggering and even softening it.

To illustrate more properly the hermeneutic consequences which have arisen with 1969 Vienna Convention's incorporation in Brazilian legal order, the following picture shows exactly how illogically and epistemologically controversial has been the interpretation of treaties in Brazil:



28 CARVALHO RAMOS, André de. Control of Conventionality and the struggle to achieve a definitive interpretation of human rights: The Brazilian experience. *Revista Instituto Interamericano de derechos humanos*, v. 64, p. 11-32.

29 KELSEN, Hans. Les Rapports de Système entre le Droit Interne et le Droit International Public. In *RDC*, t 14, n° IV, 1926.

Without a defined and limited open constitutional norm that it would conceptualize once and for all the position in which Brazil stands about the hierarchical position of treaties, Brazilian legal order keeps an application of an unreasonable interpretation about law of treaties causing a huge hermeneutic gap for law interpreters and operators.

From an international point of view which is the one which best fits in terms of logical and hermeneutical interpretation of treaties. There is a positive predominance of international interpretation, instead of, what most of Brazilian constitutional authors and domestic jurisprudence wish to believe, a constitutional interpretation. This logic comes precisely from Articles 27, 29, 31, 64 of 1969 Vienna Convention of Law of Treaties in consonance with Articles 2 and 5, §2º of 1988 Federal Constitution.

Among other measures that should be taken so that hermeneutics problem could start being solved, it is the revision of the traditional notion of absolute State's sovereignty and of constitutional model. For example, the process of sovereignty relativization which undergoes in the admissibility of human rights interventions at the national level for the protection of those particularly rights. Strictly speaking, forms of international monitoring and accountability are permitted when human rights are violated which means a non-applicable absolute conception of non-intervention in Brazil's sovereignty.³⁰

Other important point that ought to be considered is the construction of a new modern theory of human rights, especially in Brazil and in Latin America, capable of overcoming the following paradox: the State's role as human rights effector (politics theory) versus

30 In this respect, the Secretary-General of the United Nations affirmed at the end of 1992: "Although respect for the State's sovereignty and integrity is a central issue, it is undeniable that the old doctrine of exclusive and absolute sovereignty is no longer applicable and that sovereignty has never been in fact absolute as it was theoretically thought. One of the greatest intellectual demands of our time is to rethink the question of sovereignty (...) Emphasizing the rights of individuals and the rights of peoples is one dimension of universal sovereignty, which resides in the whole of humanity and which enables people to legitimately engage in issues that affect the world as a whole, a movement that increasingly finds expression in the gradual expansion of international law. (BOUTROS-GHALI, **Empowering the United Nations**, Foreign Affairs, v. 89, 1992/1993, p. 98-99, *apud* Henkin et al, International law: cases and materials, p. 18).

an universalist concept of *ius constitutionale commune*³¹ (international law theory).

CONCLUSION

Employing the historical and deductive methodology, it is clear that contrary to tending law of treaties' interpretation, Brazilian legal order remains lacking of cohesion due to the absence of determining interpretation norms. It is reflected in several issues arisen in Brazilian jurisprudence (since the Appeal 80.004 until the Appeal 466.343-1/SP) which explicates the indefatigable and non-unison doctrinal contributions of both internationalists and constitutionalists regarding treaties' matters in Brazil.

It is undeniable that not only does an well-defined open normative clause play an essential role to settle this problem, but also important law conceptions must be revised specially to update and adequate its whole system to attend social demands, especially, in terms of human rights. Pursuing an objective and a constructive human rights theory must be remarkable to law operators and researchers in order to deliverer well defined and refined human rights' conceptions to adjust them to the reality of Brazilian legal order.

Moreover, to consider law of treaties in a classical and constitutional manner is to invariably condemn its interpretation to failure. Globalization and international influence in domestic law are two aspects which have changed legal order's State as a whole.³² National judges must face these challenges in accordance to recent theories for two reasons: (i) search for a theory which better explain how international law and domestic law operates nowadays and (ii) get themselves away from the seductive and simplistic classical law view organized around, e.g., a crystalized conception of sovereignty and State's model which is no more adherent to our social and globalized reality.

Understanding treaties' hierarchy nowadays in Brazil is equivalent to acknowledge that, in this country, monism and dualism have not been overcome unfortunately. This paradigm will keep on haunting Brazilian domestic law operation and interpretation until

31 PIOVESAN, Flávia. *Ius Constitutionale Commune en América Latina : Context, Challenges and Perspectives*. In Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi and Flávia Piovesan (ed), *Transformative Constitutionalism in Latin America: the emergence of a new ius commune*, Oxford, Oxford University Press, 2017, p. 49-66.

32 To be in touch with this relationship between international law and domestic law, see: MENEZES, Wagner. *Ordem Global e Transnormatividade*. Editora Unijui, 2005.

legislative, jurisprudential and doctrinal Brazilian measures are not taken for granted.

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