Treaties X Human Rights Treaties

A Critical Analysis of the Dual Stance on Treaties in the Brazilian Legal System

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Abstract

The Constitution of the Federative Republic of Brazil provides two procedures for incorporating treaties into domestic law. Human rights treaties must be approved by a special quorum: it is necessary that of three-fifths of the members of each legislative house vote in favour, with two rounds in each chamber. This proceeding is similar to a constitutional amendment. Treaties on other subjects need only the approval of the majority. This system has been in place since 2004. The Brazilian Supreme Court decided that human rights treaties incorporated after 2004 have the same hierarchical level of constitutional provisions but human rights treaties enacted before that have the same hierarchical position of ordinary statutory laws. This system needs to be reformed in order to allow an easier integration with international law. All human rights treaties should have the same position as constitutional provisions.

Keywords: human rights, international treaties, hierarchy of the treaties.

A. Introduction

The integration of countries within supra-national regional legal systems or in global legal systems is becoming ever more common. There is a special need to universalize the protection of human rights, a movement that has been increasing since the end of World War II. Establishing clear procedures to incorporate international agreements is a challenge for legal systems, which strengthens agreements so that they directly impact upon legal relations. This challenge faces various obstacles, including the inclination to rigorously enforce sovereignty.

Brazil is not unfamiliar with this scenario. It actively participates in international politics, playing a central role in discussions and abiding by regulations that are passed. It is worth highlighting Brazil's participation in the MERCOSUL, a customs agreement and, more recently, in UNASUL, an initiative that aims to integrate MERCOSUL with the Andean Community of Nations. It is also impor-

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tant to highlight Brazil's participation in the creation of the inter-American human rights system.

Defining how international agreements are internalized becomes an important legal matter to be resolved when the law is applied. As well as the legal procedures required for the enforceability of the treaties internally, it is necessary to define the hierarchical position of international agreement introduced in a particular country when compared with the other statutes that comprise its legal system.

In this article, I will present a panorama of the national debate about the consequences of incorporating treaties ratified by Brazil into the Brazilian legal system. In particular, I want to highlight the issue of the specificity of treaties that have the declaration of human rights as their subject, presenting and discussing the changes resulting from the alteration of the Brazilian Constitution in 2004 through Constitutional Amendment no. 45, and the interpretation of this new constitutional law by the Brazilian Supreme Court.

Over the past few years, this subject has suffered change in the understanding of jurisprudence, from an interpretation that weakened the legal strength of human rights law to one that recognizes its specificity and importance. However, the Brazilian system is not yet able to adequately internalize the acts of international law to which Brazil will abide by in the future.

This study will be divided into four parts. In the first part I will present the progression of incorporation of international treaties into the Brazilian legal system since the ratification of the 1988 Constitution. Next, I will present the main international commitments Brazil has undertaken in the area of human rights. Then, I will describe, in more detail, the most recent interpretation by the Brazilian Supreme Court of the current version of Article 5, paragraph 3, from the Brazilian Constitution (*RE* 349703, *RE* 466343 and *HC* 87585) *[RE and HC are acronyms for Appeal to Supreme Court and Habeas Corpus, respectively]*. Finally, I will discuss the basis for the decision made by the Brazilian Supreme Court and its consequences.

B. Note about the Historical Evolution of How This Problem Has Been Treated

For instructional purposes, the historical evolution of the debate about the status of treaties within the Brazilian legal system can be divided into three phases: (1) before Constitutional Amendment no. 45/2004, (2) between the ratification of the Constitutional Amendment no. 45/2004 and the inclusion of the decisions in *RE* 349703, *RE* 466343 and *HC* 87585 by the Brazilian Supreme Court, and (3) after the inclusion of the decisions in *RE* 349703, *RE* 466343 and *HC* 87585 by the Brazilian Supreme Court.

When the 1988 Constitution was ratified, the Brazilian Supreme Court had a very clear position regarding the role of treaties incorporated into the legal system. This understanding was adopted in 1977, when the 1967 Constitution was still in effect, under Constitutional Amendment no. 1/69. In that year, the Brazil-

ian Supreme Court adjudicated Appeal no. 80.004/SE, which questioned the validity of Executive Order no. 427/1969, which contained a provision that would contradict the 'Convention for the adoption of a uniform law about bills of exchange and promissory notes', also known as the Geneva Convention, to which Brazil had adhered. In this decision, the Brazilian Supreme Court ruled that the convention and the law would exist at the same hierarchical level, meaning the former could not prevail over future law. In the summary ruling it is stated that

> Although the geneva convention which established a uniform law about bills of exchange and promissory notes can be applied in brazilian law, it does not prevail over the country's law from which the constitutionality and consequent validity of the executive order no 427/69 derive, which establishes the compulsory registration of promissory notes at a fiscal agency, under the penalty of nullity of title.

Under the new Constitution, this continued to be the paradigm used to resolve issues involving conflicts between national laws and international treaties to which Brazil adhered. At this time, human rights treaties were not in any way treated differently. Having said that, in the 1988 Constitution a concern is expressed that identifies a special role within the legal system, for international treaties that deal with human rights, thus differentiating them from treaties in general.

The 1988 Constitution refers to international treaties in at least three different circumstances: (1) when it deals with the specificity of human rights treaties in Article 5, which lists a combination of fundamental guarantees and rights; (2) when it discusses the procedure of the incorporation of treaties to the Brazilian legal system in the provisions that deal with the competence of the Brazilian Congress and the obligations of the Brazilian President; and (3) when it envisions control over the constitutionality of treaties in the articles that define the competence of the Brazilian Supreme Court.

Under heading II of the Constitution, which outlines fundamental rights and guarantees, Article 5, paragraph 2, from the 1988 Constitution states:

> 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.[1]

A new provision dealing specifically with the procedure required for the adoption of this kind of treaty was added to Article 5, in 2004, through a Constitutional Amendment. Such procedure will be discussed in this article.

Article 49 of the Brazilian Constitution lists a number of acts for which the Brazilian Congress is solely accountable. The provision states that it is the Brazil-

1 Brazil, Constitution of the Federative Republic of Brazil: constitutional text of 5 October 1988, 2nd edn, <http://bd.camara.gov.br/bd/bitstream/handle/bdcamara/1344/constituicao_ingles_2ed.pdf?sequence=3>.

ian Congress's obligation 'to authoritatively decide upon treaties, agreements or international actions that create burdens or obligations that might interfere with national wealth' with reference to international commitments undertaken by Brazil. The text does not demand a special quorum in order to approve treaties, which means the ordinary criterion is applied: a simple majority, in other words, the majority of people present. Such approval of a treaty by the Brazilian Congress occurs through the issuance of a Congress Resolution.[2]

To complement this, Article 84 from the Brazilian Constitution states that it is the duty of the President of Brazil 'to honour treaties, conventions and international acts, all of which are subject to a referendum in the Brazilian Congress'. The President of Brazil represents the Federative Republic of Brazil in discussions to establish international agreements and, once agreed, they are submitted to the Brazilian Congress. If Congress approves the treaty, the President of Brazil announces an Executive Order, ratifying the treaty, which then becomes part of our legal system.

To further complicate this topic, Article 102, III, a, of the Brazilian Constitution establishes that the Supreme Court can adjudicate appeals submitted regarding decisions that 'state the unconstitutionality of a treaty or federal law'.

Control over the constitutionality of executive acts is carried out in Brazil combining elements from the most well-known models of constitutional jurisdiction: (1) the concentrated and abstract, which permits an act to be protested via a legal action, *in abstrato*, before the Brazilian Supreme Court, which will make a decision based on the principles *erga omnes*, and (2) the diffuse and concrete, which allows any judge or court to dismiss statutory rules that they consider incompatible with the Constitution when judging a real dispute, based on principles *inter partes*, with the duty of appeal falling to the Brazilian Supreme Court.

Thus, the reference made by the Constitution to the treaty is in the provision that deals with the competence of the Brazilian Supreme Court to judge the appeal; so-called diffuse control. The Constitution establishes that the Brazilian Supreme Court has the power to hear an appeal of a decision made in a sole or final jurisdiction that declares a treaty unconstitutional in a recorded case. In Article 102, I, a, there is no reference to treaties as statutory rules subjected to abstract control of constitutionality exercised through the direct action of unconstitutionality. It is merely stated that it is the responsibility of the Brazilian Supreme Court to prosecute and judge 'a direct action of unconstitutionality of a law or a federal or State executive act and declaratory action of constitutionality of a law or federal statutory provisions'. However, there is no questioning of the power of the Brazilian Supreme Court to appreciate in a direct action of unconstitutionality of treaties, as they would be included in the concept of 'federal statutory provisions'.

When the new constitutional system was first adhered to, despite the 1988 Constitution's openness in relation to the incorporation of fundamental rights

2 Congress resolutions are a type of ruling written by the Brazilian Congress about matters for which they are solely accountable. Different from laws, these orders are not subject to sanctions or veto by the President of Brazil.

which resulted from Brazil's adherence to treaties, the authors that used to discuss this topic diverged with regards to the consequences of the constitutional clause. Between the enactment of the 1988 Constitution and Constitutional Amendment no. 45/2004, the Brazilian Supreme Court did not consider the specificity of human rights treaties as a factor that could change their hierarchical position within the legal system. A consolidated jurisprudence was applied before the enactment of the Constitution, which compared treaties to laws, that is placing infra-constitutional acts at the same level as ordinary laws.

However, there was an influential current within the constitutional debate that highlighted the need to revise the jurisprudential positioning around the role of treaties in the legal system, drawing attention to the emphasis that the Constitution had given to human rights treaties. It is important to mention the contribution of two authors who stood out while defending this idea: Cançado Trindade and Flávia Piovesan.

While interpreting Article 5, paragraph 2, Flávia Piovesan stated that

> The 1988 Constitution innovates by including, amongst constitutionally protected rights, those established in international treaties to which Brazil has subscribed. By incorporating this, the Constitution attributes a special and differentiated hierarchy to international rights that is that of a 'constitutional clause'.

Cançado Trindade was a member of the Inter-American Court of Human Rights and its president for a period of time. His position was also especially marked by a concern with the need to bring into effect rights and guarantees, which were the subject of international treaties.[3]

However, during this period, the Brazilian Supreme Court remained impervious to the way it considered the incorporation of international commitments to our legal system and reaffirmed its consolidated understanding that the hierarchical position of the treaties should be at the same level as ordinary laws. This occurred in certain circumstances, under the 1988 Constitution, when matters involving conflicts between internal and international rights were presented.

An example of the persistence of the consolidated understanding of treaties, before the ratification of the Constitution, is the decision made in the Provisional Remedy in Direct Action of Unconstitutionality no. 1480, in 1997, which was published in 2001. In the summary, there is even reference to the existing controversy in the theoretical debate, where the Brazilian Supreme Court states that the solution must not be sought in this debate but in the Constitution itself. This decision is interesting for this study as it reaffirms that in Brazil treaties are (1) formally and materially subject to the Constitution, (2) subject to constitu-

3 A.A. Cançado Trindade, *A proteção internacional dos direitos humanos* [The international protection of human rights], Saraiva, São Paulo, 1991. A.A. Cançado Trindade, 'Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century', *Tulane Journal of International and Comparative Law*, Vol. 5, 2000.

tional jurisprudence, including in actions for the abstract control of constitutionality, and (3) at the same hierarchical level as ordinary laws.

Faced with this persistent issue, the Brazilian Congress passed Constitutional Amendment no. 45, which introduced Paragraph 3 of Article 5, among other alterations, under the context of a 'Reform of the Judiciary' in 2004, with the following text:

> 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.[4]

With the ratification of the aforementioned Constitutional Amendment, two distinct processes for the incorporation of treaties into the Brazilian legal system became clearly existent: a process for human rights treaties and a process for general treaties. The first requires a special quorum and two rounds of voting in each of the houses of Brazilian Congress. In the second, approval takes place in a single-round of voting with an ordinary quorum, that is, a simple majority.

There was still a significant doubt as to what position human rights treaties already passed in Brazil before the constitutional reform occupy in our legal system. As we will see the most important documents regarding international public law that are applied in Brazil were already passed at that time, which took the matter for the appreciation of the Brazilian Supreme Court.

C. Brazil and the Creation of International Systems to Protect Human Rights

The 1988 Constitution has an article (4) dedicated to outline the principles that guide Brazil's participation in the international scenario. One of the principles chosen by the constituent was the 'prevalence of human rights'. In its single paragraph, the article has a rule that points to the creation of a comprehensive process to integrate Latin America, determining that Brazil will work towards the 'economic, political, social and cultural integration of the Latin American people, with the aim to form a Latin American community of nations'.

As it was mentioned in the introduction of this work, Brazil actively participates in MERCOSUL – Common Market from the South, a process to regionally integrate South American countries that are in agreement around customs procedures. Brazil also participates in UNASUL – Union of South American Nations, whose objective is to integrate the countries that are part of MERCOSUL with the ones from the Andean Community of Nations. Within these areas there are a set of commitments established and incorporated into the Brazilian legal system.

4 Brazil, Constitution of the Federative Republic of Brazil: constitutional text of 5 October 1988, with the alterations introduced by Constitutional Amendments no. 1/1992 through 64/2010 and by Revision Constitutional Amendments no. 1/1994 through 6/1994, (3rd edn), <http://bd.camara.gov.br/bd/bitstream/handle/bdcamara/1344/constituicao_ingles_3ed.pdf?sequence=7>.

However, we are more interested in the international obligations around the assurance of human rights.

The great number of documents of international law to which Brazil has adhered to highlights the importance to define the role such documents have in the Brazilian legal system – particularly those which oversee the protection of human rights.

In the global system of human rights protection, Brazil is signatory to the Pact on Civil and Political Rights and the Pact on Economic, Social and Cultural Rights from 1966. Both treaties were ratified in Brazil by executive orders on 6 July 1992 (Executive Orders 591 and 592). It is also important to highlight the ratification, in Brazil, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Congress Resolution no. 4/1989 and Executive Order no. 40/1991) and the Convention on the Rights of the Child (Congress Resolution no. 28/1990 and Executive Order no. 99.710/1990).

Brazil ratified the Treaty of Rome, which created the International Criminal Court (Congress Resolution no. 112/2002 and Executive Order no. 4.388/2002). With the ratification of Constitutional Amendment no. 45/2004, Brazil included explicit statutes (Art. 5, paragraph 4) that subject the country to the jurisdiction of the International Criminal Court.

Brazil is also a member of the Organization of American States, which took the initiative to create an inter-American human rights system. This system is described in the Pact of San Jose (from Costa Rica), 1969, and relies on Executive Power, the Inter-American Commission on Human Rights, with headquarters in Washington, USA, and a jurisdictional body, the Inter-American Court of Human Rights, with headquarters in San Jose, Costa Rica. This system is still in a phase that does not allow the citizens of the countries, which subscribe to the convention, to petition the Court directly. The citizens of these countries can only present demands (1) to the Inter-American Commission on Human Rights and (2) to the countries that are members of the convention.

Despite the Pact of San Jose, Costa Rica being in effect in Brazil since 1992, it was only in 1998 that the Resolution was published in the Brazilian Congress determining the 'recognition of the enforced jurisdiction power of the Inter-American Court of Human Rights'.

The study of the global and regional systems of human rights protection and the impact of the positioning taken by the Inter-American Court of Human Rights over the jurisprudential practice shows that the discussion on internal, supra-national and international law needs to evolve considerably in Brazil. Virgílio Afonso da Silva[5] demonstrated in a very interesting research paper that (1) Brazilian universities rarely address the systems for protection of human rights, (2) there are more quotations of decisions made by the European Court of Human Rights than the Inter-American Court of Human Rights in academic work

5 V.A. da Silva, 'Integração e diálogo constitucional na América do Sul' [Integration and constitutional dialogue in South America], *in* A. von Bogdandy, F. Piovesan & M.M. Antoniazzi (Eds.), *Direitos humanos, democracia e integração jurídica na América do Sul* [Human Rights, democracy and legal integration in South America], Lumen Juris, Rio de Janeiro, 2010.

and (3) that the Brazilian Supreme Court in a sample of 138 verdicts mentioning decisions made by foreign tribunals, did not once mention decisions made by the Inter-American Court of Human Rights. On the other hand, decisions made by the US Supreme Court were mentioned 80 times and those made by the Federal Constitutional Court of Germany cited 58 times.

The controversy around the compatibility between the Brazilian Amnesty Law and the 1988 Constitution clearly shows the difficulty our Judiciary has to communicate with the institutions responsible for the application of regional human rights law.

The Act no. 6.683, from 23 August 1979 awarded amnesty to those who committed political crimes or crimes that had political motivation during dictatorship, including the amnesty of agents of the State. In 2009 the Brazilian Supreme Court reassured its positioning regarding this law, considering it in compliance with the principles of the 1988 Constitution. However, the Inter-American Court already had a consolidated jurisprudence, on the date the Supreme Court made the decision, based upon the analysis of amnesty laws published in other Latin American countries. From these, it was understood that amnesty laws that frustrate the investigation and punishment of serious crimes against humanity committed by agents working for the State are not valid as they are incompatible with the Pact of San Jose, Costa Rica. This position was reassured in 2010, and this time in a trial of a case related to Brazil.[6]

The study of community law and international law needs to be encouraged in Law schools. Brazil's participation in the Inter-American System on Human Rights Protection makes the discussion between national tribunals and the jurisprudence of the Inter-American Court of Human Rights inevitable. In light of the impossibility of citizens to directly petition the Inter-American Court of Human Rights, it seems even more important to properly incorporate the principles of the Pact of San Jose, Costa Rica into the national legal system. This process should allow the principles of the Convention to be important information on which to base solutions for legal proceedings in demands taken to the Judiciary.

D. The Current Understanding by the Brazilian Supreme Court Regarding the Hierarchical Position of Treaties

The clear confrontation regarding the hierarchy of treaties, which consequently changed the guidelines of the Brazilian Supreme Court occurred in December 2008, with decisions stated in three processes: (1) Appeal to Supreme Court-*RE* 349703, (2) Appeal to Supreme Court-*RE* 466343 and (3) *Habeas Corpus-HC* 87585.

Appeals to the Supreme Court and the *Habeas Corpus* discussed the possibility or not to establish the arrest of a defaulter in the infra-constitutional legislation. The 1988 Constitution prohibits civil arrest in Brazil, with two exceptions: (1) the

6 B.K. Comparato, 'The Amnesty Between Memory and Reconciliation in Brazil: Dilemmas of a Political Transition Not Still Concluded', <http://saopaulo2011.ipsa.org/sites/saopaulo2011.ipsa.org/files/papers/paper-1100.pdf>.

arrest of a person who does not pay alimony and (2) the arrest of a defaulter. However, the Pact of San Jose, Costa Rica – declaration of rights of the Inter-American System of Human Rights Protection – establishes only one exception with respect to the prohibition of civil arrest, which is the arrest of a person who did not pay alimony.[7] As well as this, the Covenant of Civil and Political Rights from 1966 prohibits imprisonment as a result of a simple breach of contract.[8]

The cases discussed in the Appeals to the Supreme Court were about the billing of debtors that had acquired products financed by banks by means of a chattel mortgage as guarantee. The infra-constitutional legislation considered the use of a chattel mortgage as a guarantee a type of deposit contract to take advantage of the permissive constitution regarding the arrest of defaulters. In truth, the deposits were false. The case discussed in the *Habeas Corpus* was about the arrest of a defaulter of agricultural products that was contracted to deliver an amount of rice, under their responsibility, to a public supplier but did not deliver within the deadline established in the contract.

In the three processes, the votes of Justice Gilmar Mendes stand out, as although he was not the judge who delivered the opinion in any of the processes, he analyzed the issue more thoroughly, guided by a concern to establish a clear position for the human rights treaties in the Brazilian legal system, thus guaranteeing their efficiency.

It is also noticeable, in the votes given by Gilmar Mendes, a Justice of the Brazilian Supreme Court, a strong concern to preserve the possibility to carry out the jurisdictional control of the constitutionality of the treaties incorporated into the legal system, as in Brazil the Constitution is formally and materially superior to all statutes in the system.

The aforementioned Justice comprehensively explained through his vote how various constitutional orders rely on provisions that without doubt open the Brazilian legal system to integration with rules from international law, and assured that this is a worldwide tendency. Thus, the Justice proposes to critically review the jurisprudence that has so far been consolidated at the Brazilian Supreme Court that compared all treaties to ordinary laws.

His vote highlights that maintaining the previous view embraced by the Brazilian Supreme Court would mean that Brazil would be allowed to unilaterally alter the contents established in multilateral agreements to which it is signatory, by merely passing an ordinary law, which would create a problematic situation for Brazil in front of the other signatories.

In his discussion, Gilmar Mendes focuses on what would be the status of human rights treaties already incorporated into the Brazilian legal system before the changes as a result of the Constitutional Amendment no. 45/2004, as this

7 "Article 7. […] 7. Right to Personal Liberty. 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", OAS, *American Convention on Human Rights 'Pact of San Jose, Costa Rica'*, <www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf>.

8 "Article 11. No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation", UN, 'International Covenant on Civil and Political Rights', <www2.ohchr.org/english/law/ccpr.htm>.

definition would be fundamental for decisions of appreciated matters that revolved around the enforcement of the Pact of San Jose, Costa Rica. The Justice presents the main positions at the debate, discussing their principles, and rejects the theses of supra-national nature, constitutional nature and nature of ordinary law.

In one passage from his vote, Justice Gilmar Mendes even quotes the current Article 5, paragraph 3 from the Constitution, which was introduced by Constitutional Amendment no. 45/2004, against the application of the constitutional hierarchy thesis for treaties prior to the reform, affirming that it is clear in the current text that the previous treaties cannot have constitutional status. The Justice expressed his understanding as follows:

> In practical terms, it is a very persuasive statement that says that treaties already ratified by Brazil prior to the constitutional change, and not submitted to the special legislative process of approval in the Brazilian Congress cannot be compared to the constitutional clauses.[9]

Gilmar Mendes concludes his vote with a proposal to recognize a special role for treaties already in effect on the date the Constitutional Amendment no. 45/2004 was passed, combining an infra-constitutional nature and supra-legal nature for treaties. Nevertheless, the treaties' rules would be subject to compliance with the Constitution, but would be a parameter to control the validity of infra-constitutional clauses.

In the case of the arrest of defaulters, Gilmar Mendes considered that Brazil's adherence to the Pact of San Jose, Costa Rica did not revoke the constitutional rule that exempts a defaulter from the prohibition of arrest resulting from debts. Because of what he calls the 'paralysing effect' of a treaty containing contradictory infra-constitutional clauses, the infra-constitutional clauses that establish the arrest of a defaulter are no longer applicable.

E. The Virtues and Problems of How Human Rights Treaties Are Perceived in Brazil

The position of the Brazilian Supreme Court towards human rights treaties already in effect on the date that Constitutional Amendment no. 45/2004 was enacted made the situation of the treaties even more complex in our legal system than if it had simply adopted the position taken by those who defend the constitutional status of human rights treaties, such as those mentioned by Cançado Trindade and Flávia Piovesan. This interpretation was fairly solid and its adoption by the Brazilian Supreme Court could have made great progress towards the

9 F. Piovesan, 'A incorporação, a hierarquia e o impacto dos tratados internacionais de proteção dos direitos humanos no direito brasileiro' [The incorporation, hierarchy and impact of international treaties to protect human rights], *in* F. Piovesan & L.F. Gomes (Eds.), *O sistema interamericano de proteção dos direitos humanos e o direito brasileiro* [The inter-American system to protect human rights and the Brazilian law], RT, São Paulo, 2000, p. 160.

recognition of a constitutional dignity towards human rights treaties, and if adopted, would even make the Constitutional Amendment no. 45/2004 unnecessary. The human rights treaties would constitute, together with the Constitution, what the French Constitutional Council calls 'Constitutional block', which serves as a parameter to control the constitutionality of statutory provisions.[10]

It is essential to recognize that the Brazilian Supreme Court started to recognize a distinctive dignity with regards to human rights treaties after the jurisprudential change, protecting them from the ordinary legislator's day-to-day work. This position is more coherent with the objective to build a legal system open to international commitments, however, it should still be subjected to a critical view.

The Brazilian Supreme Court's concern to maintain control over the constitutionality of treaties need not necessarily result in the adoption of the decision taken by it. The inexistence of hierarchy between Constitution and treaties would not stop the Judiciary from declaring a possible incompatibility between the Constitution and a statutory rule introduced into the Brazilian legal system by treaty, in the same way that it is possible these days to control the constitutionality of Constitutional Amendments. The only difference would be that within this control of treaties that alter the Constitution, the rule that would serve as a parameter would not be the full Constitution, but only so-called 'entrenchment clauses' that is rules that materially limit constitutional reform.

A small digression can be made to question the dependence between judicial review and the rigidity of the constitution. Control over the constitutionality of laws arises from the concept of constitutional supremacy, which must not be reduced to the concept of constitutional rigidity.[11]

Even in circumstances when constitutions are not protected by a special quorum, it is possible to format a judicial review proceeding. The mere requirement for a distinct procedure to both amend the constitution and create laws can be justified to guarantee the control system, even if in both procedures the quorums required for the approval of the proposals are the same. A law that has been approved even though it is formally or materially incompatible with the constitution could be declared unconstitutional. In this case, to alter the constitution, a 'constitutional amendment' would need to be presented, aimed at changing the constitutional parameter. This understanding would put an end to the Brazilian Supreme Court's consolidated view that because treaties are approved with the same quorum required for the approval of ordinary laws, they could, in general, be altered or considered revoked by forthcoming laws of contradictory content. Even if the procedural required quorums are the same, the ideal situation would be that the subject matter of treaties could only be removed through the formal action of denouncing the treaty and therefore withdrawing Brazil from the group

10 B. Francois, 'Le Conseil constitutionnel et la Cinquième République. Réflexions sur l'émergence et les effets du contrôle de constitutionnalité en France', *Revue française de science politique*, Vol. 47, No. 3-4, 1997, pp. 377-404.

11 For a more detailed discussion, check L.P. Sanchis, *Justicia constitucional y derechos fundamentales*, Trota, Madrid, 2003, p. 152.

of countries that accepted the terms of the agreement. Possible conflicts between laws and treaties, regardless of the content of the treaties would be resolved by declaring the laws invalid.

To reinforce the possibility of detaching 'quorum' and 'hierarchy', a position also consolidated at the Brazilian Supreme Court, that there is no hierarchy between Complementary and Ordinary Law should be remembered. For the Brazilian Supreme Court, both aforementioned statutory provisions, which must have distinct quorums in order to be approved in Parliament, are only differentiated by the subjects they address. The Complementary Law, for instance, are restricted to addressing matters provided for in the constitution.

In the case of human rights treaties which Brazil adhered to before Constitutional Amendment no. 45, the application of concepts widely accepted as 'constitutional law within distinct periods of time' would resolve any problem. With the drafting of new constitutional clauses through Amendments, the previous rules are compared to the new ones and acknowledged when their compatibility is established, or revoked when incompatibility is agreed upon.

This acknowledgement is carried out by means of a comparison made between the content of the previous rule and the content of the constitutional rule included through Amendment. This verification, therefore, is only for material compatibility, meaning that previous rules cannot be revoked for being formally incompatible. During elaboration, only what is set out in the Constitution at the time of elaboration of infra-constitutional clauses[12] can be required by the rules.

If the formal requirement for the production of a certain type of executive act is altered, the previous executive acts about the same matter will have the same status as that attributed to the executive act in the new system, even if not submitted to the new procedure. The rule for formal aspects is *tempus regit actum*.

As an example, we can mention a Brazilian case of the so-called 'Complementary Law'. This type of statutory rule did not exist in the constitution prior to 1988. The new Constitution created the Complementary Law and defined certain matters that could only be regulated under this new type of executive act, which, differently from the simple majority quorum required for the creation of laws, requires the approval of the absolute majority in Parliament. The interpretation unanimously accepted by doctrine and jurisprudence is that all the laws prior to the Constitution that address matters, which now demand Complementary Law, are considered acknowledged by the new Constitutional order as if they were Complementary Law, provided that they are not materially incompatible with the Constitution. The analysis of the compatibility of previous executive acts with the Constitution is carried out only materially and not formally.

Thus, the most adequate solution to the question of hierarchy regarding human rights treaties in effect in Brazil before the drafting of Constitutional Amendment no. 45, would be to consider them as acknowledged by the Amendment from the date they are enacted. They would receive the same status as that

12 L.R. Barroso, *Interpretação e aplicação da constituição* [Interpretation and application of the constitution], Saraiva, São Paulo, 1998, p. 81.

attributed to new human rights treaties that comply with the new requirements, similar to that for the creation of Constitutional Amendments, which are required for incorporation into the legal system.

In this case we would then only have two regimes for treaties under Brazilian law: (1) human rights treaties with constitutional status, and (2) treaties in general with the status of ordinary law. Under the current understanding of the Brazilian Supreme Court, human rights treaties are divided between ones that were ratified in Brazil after the drafting of the Constitutional Amendment no. 45/2004, which in terms of hierarchy have a similar level to that of the Constitution, and ones ratified before the aforementioned amendment, which, despite having supra-legality, are below the Constitution.

Under the current scenario, future human rights treaties can be tried by the Judicial Department through the constitutionality control system, the parameters being the constitutional boundaries for power of reform set out in Article 60 from the Brazilian Constitution, and the required quorum for the approval of the new treaty as set out in Article 5, paragraph 3, of the Constitution. This possibility cannot be dismissed as the Brazilian Supreme Court understands that Constitutional Amendments can be declared unconstitutional if they exceed boundaries established in the constitution for the power of reform.

The problem is that for the statutes of human rights treaties ratified in Brazil before the drafting of Constitutional Amendment no. 45/2002, the parameter for control is not only the statutes referred to in the previous paragraph, but the entire constitution, as according to the stance I presented above and taken by the Brazilian Supreme Court, they function at a level inferior to the Constitution. The ideal situation would be if such commitments were also only controlled by those parameters used to control Constitutional Amendments.

F. Conclusions

With the adoption of Constitutional Amendment no. 45/2004, and the new stance taken by the Brazilian Supreme Court, Brazil has overcome a situation of total vulnerability regarding international law occasionally exercised by ordinary legislators, to experience a situation where human rights treaties are protected by the need for a special quorum for their approval by Brazilian Congress, and are recognized to be at the same hierarchical level as constitutional clauses.

However, the solution given by the Brazilian Supreme Court for human rights treaties enacted before the drafting of Amendment no. 45/2004, despite being an unquestionable advance when compared to the prior situation, still weakens these documents. Despite their aforementioned supra-legality, these documents would be subject to the complete Constitution, which could potentially allow them to be submissive to the control of the constitutionality of the laws, with any constitutional statute as a parameter.

I believe that the most adequate solution would have been to consider human rights treaties already ratified in Brazil as acknowledged by the new constitutional statute introduced by Constitutional Amendment no. 45/2004, giving

them the same hierarchical level as that of the Constitution. By doing that, it would still be possible for the Judiciary to verify the compatibility between such statutes and the constitutional clauses which limit the Power to Reform the Constitution and allow appreciation of the constitutionality of Constitutional Amendments.

Even if human rights treaties are considered hierarchically comparable to the Constitution, they can be submitted to the control of constitutionality in the event they breach constitutional clauses that materially limit the power of constitutional reform.

This debate should evolve beyond the specificity of human rights treaties and discuss the position of treaties in general, which are still perceived in Brazil as comparable to ordinary legislation produced by the Brazilian Congress. This being true, even without a formal act denouncing the treaty, the ordinary legislator can simply draft an ordinary law that conflicts with provisions set out by the treaty, making it inapplicable in the Brazilian legal system.

A more effective dialogue between international treaty law and the national law must be encouraged. A legal framework that opens up the country not only to the use of treaties directly in concrete legal situations, but also enables the authority of institutions created by treaties is necessary. In this way, comparing international human rights treaties to the Constitution also imposes a reflexion about the role of jurisprudence of international or supra-national courts responsible for the enforcement of these treaties. In the case of the Inter-American System of Human Rights, the jurisprudence of the Inter-American Court of Human Rights needs to play a more prominent role in the discussion around the application, by the Brazilian tribunals, of constitutional provisions that ensure human rights.