INCORPORATION AND HIERARCHY OF INTERNATIONAL TREATIES IN BRAZIL

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ABSTRACT: This paper aims to describe and thereby establish - based on exclusively normative premises; anchored, therefore, in exclusively deductive conclusions (this, therefore, is its method) - what is the mechanism and timing of the incorporation of an international treaty into the Brazilian internal legal system, what is the effectiveness of conventional norms before and after incorporation, before and after being in force internationally, what is the hierarchical stature of incorporated international treaties. The normative analysis reveals the following results and conclusions: (I) Mechanisms and stages of incorporation: (a) signature or accession (when not binding, when dealing with fundamental rights and guarantees), (b) legislative decree (when binding); (II) Effectiveness: (a) partial (since signature) - related to obligations to do; (b) total (from the international validity or unilateral commitment) - which also covers the obligations not to do, (III) Hierarchies of treaties: (a) infra-constitutionality in relation to the establishment of competence to conclude treaties, (b) constitutionality when incorporated by the procedure of article 5, §3 of the Brazilian Constitution, (c) constitutionality or para-constitutionality in relation to human rights, (d) supra-legality for the other cases.

KEYWORDS: International Conventions – Incorporation – Internal Legal Order – Effectiveness – Hierarchy – Dialogue of Sources

Introduction

The Brazilian Constitution of 1988, although it belongs to that type of Constitution that also aims to be norma normarum (establishes in detail how the legislative process should be), has no clear or evident solution (for immediate glances) to the following questions: How does the incorporation of international treaties into our legal order take place? From when do they produce effects in our legal system, that is, when do they bind to its commands? What is the normative hierarchy of these norms once they have been incorporated?

In view of these questions, which have not yet been answered with the necessary clarity, in order to better understand them and, consequently, to answer them in a legally precise manner, we propose an epistemological analysis of the incorporation, effectiveness, and legal hierarchy of these documents in strict constitutional terms (considering the provisions of the 1988 Constitution) and conventional terms (considering the Vienna Convention on the Law of Treaties) in force in Brazilian lands.

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To this end, a qualitative bibliographic analysis (books, scientific articles, and case law interpreting these norms) was added to the document analysis (norms in force in Brazil on the issue), following the synoptic method indicated by Mortimer Adler and Charles Van Doren (2014). In any case, deductive logic was the research agenda and drove its results - exclusively normative premises, exclusively deductive conclusions.

I. THE QUESTION OF INCORPORATION

Regarding the issue of incorporation, the Brazilian Constitution of 1988 presents the following normative commands: article 84, VIII; article 49, I; and article 5, §2.

A. The Signature or the Legislative Decree

The article 84 (item VIII) attributes to the President of the Republic the privative (delegable) competence to conclude treaties (attribution that is realized by signature or accession): “Article 84. The president of the Republic shall have the exclusive power to: [...] VIII - conclude international treaties, conventions and acts, ad referendum of the National Congress”. Treaties, after being concluded by the head of the federal executive power, according to article 84, VIII, "may" be subject to a referendum of the National Congress.

What is subject to the referendum is the treaty itself, not the competence to sign it (since private or exclusive competences are not subject to homologation, to confirmation). The article 49 (item I) clarifies this "may", since it establishes that it is the exclusive (non-delegable) competence of the National Congress to definitively resolve (which is done by legislative decree) treaties that result in charges or commitments that are onerous to the national property: “Article 49. The National Congress has exclusive power: I - to decide conclusively on international treaties, agreements or acts that result in charges or commitments that are onerous to the national property”. The Constitution does not establish congressional competence to "resolve" any and all treaties, but only to "resolve" those that entail “result in charges or commitments that are onerous to the national property”.

Under the 1824 constitutional regime, the Executive Power had broad powers to conclude and ratify international treaties. Ratification depended on legislative approval only if the treaty was concluded in peacetime and if it concerned the cession or exchange of territories or possessions (article 102, VIII). It was in the 1891 constitutional regime that the Executive Power's ratification powers were limited, establishing the need for a legislative referendum (article 48, 16) and the Legislative Power's competence to definitively rule on all treaties (article 34, 12). The constitutional regimes that followed (1934, 1937, 1946 and 1967), repeated this logic.

The 1988 Constitution, however, innovated. The 1988 regime, the current constitutional rule, establishes a limitation to the dependence of the Legislative Power: that treaties entail result in charges or commitments that are onerous to the national property (article 49, I).

On one hand, the President of the Republic has exclusive competence to conclude, and on the other hand, the National Congress has exclusive competence to resolve. However, there is no antinomy, what happens is the harmonization of the exercise of power (by democratically elected representatives): the state sovereignty is subjugated, it needs to be "confirmed" by the popular sovereignty.

In view of the above, the INCORPORATION of an international treaty into the internal legal system takes place in the following ways:

i. by SIGNATURE or ACCESSION by the head of the federal executive power (if the treaty does not entail in charges or commitments that are onerous to the national property),

ii. by LEGISLATIVE DECREE of the National Congress (if the treaty entails result in charges or commitments that are onerous to the national property).

The incorporation of international treaties into the Brazilian legal system occurs through accession or signature (even if the signature is made subject to ratification), or through the issue and publication of a legislative decree.

Integrated into the national legal system, they have IMMEDIATE EFFECTIVENESS for the OBLIGATIONS NOT TO DO (the obligations not to act in a manner inconsistent with the international commitment in formation), even before the international validity of the treaty. This is the conclusion resulting from the provisions of article 18, paragraphs 'a' and 'b', of the Vienna Convention on the Law of Treaties of 1969:

> Article 18 Obligation not to defeat the object and purpose of a treaty prior to its entry into force A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

The treaty that the State has signed without reservation of ratification[1], the current treaty to which the State has accession[2], as well as the current treaty that has been ratified[3] integrate the national legal system with FULL EFFECTIVENESS[4] , since the other positive normative commands of the international treaty become obligatory, i.e. all OBLIGATIONS (to do, to act in such a way as to make the content of the international commitment positive), as provided in article 26 of the 1969 Vienna Convention on the Law of Treaties: "Article 26 [pacta sunt servanda] Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

Note that the first hypothesis (signature without reservation) constitutes a peculiar situation, typical of the effects of the unilateral declarations of will of States; the treaty may not be in force internationally but may already be fully effective.

B. The Praxis of the Executive Decree

Although there is no constitutional provision that foresees any normative act after the legislative decree for incorporation (neither in previous constitutional regimes, nor in the current one), the Brazilian praxis has been consolidated in a different way: it has been rooted in the view that the final act of incorporation (after the legislative decree) should be the editing and publication of an executive decree. In practice, the presidential decree, once published, is seen as the legal act that would incorporate the international treaty into the internal legal system.

This praxis is contrary to the Brazilian Constitution of 1988, notably the expression "definitely" added to the congressional competence (article 49, I).

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[1] Under the terms of article 12 of the 1969 Vienna Convention on the Law of Treaties. Option that the plenipotentiary may adopt only if the treaty does not contain charges or commitments that are onerous to the national property or if there is a prior authorizing legislative decree.

[2] Under the terms of article 15 of the 1969 Vienna Convention on the Law of Treaties. Option that, in the case of charges or commitments, depends on prior authorization by legislative decree.

[3] An international act that takes effect after it is signed, and, in cases involving onerous commitments or charges, after the legislative decree.

[4] In the case of ratification, the treaty would already be integrated, ratification would only modify its effectiveness.

This praxis is also not supported by the constitutional concept of executive decree, since this figure is not listed in article 59, the device that presents the primary normative forms; since it is intended, as article 84 reveals, for other purposes: to regulate primary norms (IV), organize or establish the functioning of the public administration (VI, a), extinguish vacant public functions or positions (VI, b), institute a 'state of defense' or 'state of siege' (IX) or federal intervention (X), and mobilize the nation (XIX).

The article 84 (VIII) itself seems to signal that it is not necessary to issue an executive decree after the congressional referendum, even when the latter is necessary, since it does not provide that the head of the federal executive Power is responsible for issuing an act after the congressional referendum which, as seen, in light of article 49, I, resolves, when pertinent, the incorporation issue "definitely".

The article 84 (VIII) does not impose the need for a presidential decree after an eventual congressional referendum. It only attributes to the President of the Republic the competence to "celebrate international treaties, conventions and acts, subject to referendum of the National Congress". Insistently, it does not provide for an eventual decree supervening the said referendum.

The argument that has legitimized this practice has always been the following: publicity must be given for a normative command to be imperative in Brazilian Law. This is partially correct and, as such, it perplexes us.

This argument is logically admissible for requiring the publication of the signed international treaty, or for requiring the publication of the legislative decree, but it is not reasonable for requiring the executive decree, unless it is seen as a non-normative act that enables the duty to publish.

The signature of the international treaty by the President of the Republic does not enjoy internal publicity, therefore, it would be reasonable to require its publication in order for it to become effective (article 1 of the Law of Introduction to the Norms of Brazilian Law), and not the publication of another normative act.

This was the solution adopted by France since the issue of the March 14, 1953 decree (to require compliance with the publication obligation), because its 1946 French Constitution had already established that it was inadmissible to require any normative act that had not been necessary for signature or ratification (DINH; DAILLIER; PELLET, 2003, p. 235-237).

It so happens that all international treaties open for signature have been and are published by the conferences or international organizations where they were created and are always widely available. We do not think that it would be inadmissible to recognize publication in such widely accessible and widely publicized media (even larger than the national official journals) as a valid publication for the purposes of our Law of Introduction to the Norms of Brazilian Law. What our law requires is that it be "officially published". The national normative law does not require publication only via the official gazette. In cases, therefore, in which incorporation occurs by simple signature, given that the treaty has already been published, the requirement for entry into force would already be met.

For international treaties incorporated by means of a legislative decree (listed among the primary normative species of article 59 of the Brazilian Constitution of 1988), which already enjoys publicity, it would not make sense to require an executive decree, because the requirement for effectiveness has already been met.

Would it make sense then to require the executive decree in order to be sure of the full effectiveness of the international treaty, of its obligations to do, which in a shallow vision would only be possible after ratification?

No, because the full effectiveness of the treaty, ordinarily possible only after its international validity (ordinarily, because there is the peculiar hypothesis of the internal validity before the international), does not come only from the ratification of a sovereign state, but from other rules that each treaty establishes, such as the minimum number of ratifications or some specific date.

The only reason that seems to justify this unadvised look would not be exactly legal, but political. Although the Brazilian constitutional norms leave (in certain cases) the last word to the National Congress, the Presidency of the Republic, with this deviation, would have the last word.

A careful look at the various executive decrees that have made the publication of ratified international treaties possible is enlightening to our concern. The Presidency of the Republic, in many of them, recognizes that the international validity is already operating or is about to operate regardless of the presidential decree. It uses, however, the presidential decree to establish internal validity.

Take, for example, the unique case of the International Convention on the Rights of Persons with Disabilities. Presidential decree n. 6,949, of August 25, 2009, begins by invoking the competence of article 84, IV (a device that brings together the presidential obligation to publish laws and to ensure the faithful execution of laws) - which apparently would not offend what we are defending here. It points out that the Legislative Power approved the convention by Legislative Decree 186, of July 9, 2008, according to the procedure of §3 of article 5 of the Constitution; that the Presidency deposited the instrument of ratification on August 1, 2008; and that the international validity of the treaty for Brazil will occur on August 31, 2008. In article 1, it gives the order of fulfillment of the treaty.

At the end, however, in Article 3, it states that Presidential Decree 6949 (and consequently, its compliance order) will come into force on the date of its publication - here is where the confusion is born.

By carelessness or by cunning, it talks about the validity of the decree and not about the internal validity of the treaty. In this way, the turn of power without legal basis to which we refer is achieved.

And in this case, the contradiction would be extreme. Would an executive decree give effect to a treaty that has constitutional amendment status in our country? An executive decree cannot limit the effects of norms that enjoy constitutional force.

C. Constitutional Innovation

The Brazilian Constitution of 1891 (article 78) has long recognized that the rights and guarantees expressed in the Constitution did not exclude others not expressed, but which were logical consequences of

i. deriving from the regime by it
ii. deriving from the principles adopted by it

The 1934 Constitution (article 114) maintained this logic but changed the expression "form of government" to a broader term: "regime". The Constitution of 1937 (article 123) again used the expression "form of government". The 1946 Constitution (article 144), in turn, resumed the use of the expression "regime", which was continued by the 1967 Constitution (article 150, § 35).

The 1988 Constitution (article 5, §2º), however, imposed an innovation to this logic, since it inserted one more hypothesis of rights and guarantees that are not expressed, but that can be considered part of the legal order:

iii. deriving from the international treaties to which the Federative Republic of Brazil is "a party".

We speak, in this case, of the principle of the non-exhaustiveness of the constitutional list of fundamental rights or the materially open concept of fundamental rights.

From this angle, the thesis of the incorporation of international treaties into the internal legal order by signature does not derive only from the realization of the unnecessary need for congressional action due to the absence of burdens or burdensome commitments, but also from the regime extravasated by §2º of article 5º: "The rights and guarantees established in this Constitution do not exclude others deriving from the regime and principles adopted by it, or from the international treaties to which the Federative Republic of Brazil is a party ".

The 1988 Constitution established another way of incorporating international treaties or parts of international treaties (those related to rights and guarantees) into the internal legal system, without the need for a legislative decree, by simply signing the document.

In fact, the Federative Republic of Brazil becomes a party to a treaty simply by signing or adhering to it.

It must be admitted that RIGHTS and GUARANTEES expressed in international treaties are incorporated into our system by simple SIGNATURE or ACCESSION of international treaties (and the treaty does not need to be a full human rights treaty; although, in this special case, we should speak of partial incorporation).

If the Constitution recognizes legal value for norms of rights and guarantees of international treaties by the simple signature, it must be recognized that the legislative decree, in international treaties, with respect to rights and guarantees, is dispensable.

Consequently, it seems to us that the rights and guarantees present in international treaties signed by Brazil, even if their respect brings burdens or onerous commitments to the national patrimony, do not require a legislative decree.

This constitutional innovation may still not be seen by many, but it is very consistent with today's understanding that no longer admits the resistance of state sovereignty in the face of human rights.

This is in line with the provisions of article 4, II, of the Brazilian Constitution of 1988, which establishes the "prevalence of human rights" as the principle that governs Brazil's international relations.

It seems clear to us that, in order to make this prevalence effective in the external sphere, that is, in international relations, it is necessary to "do our homework", which means that we must seek to make this prevalence effective internally, which is done, for example, by removing the requirement for a legislative decree for the incorporation of treaties, wholly or partially, that deal with human rights.

About the scope of this prevalence, we have already expressed ourselves:

> "Furthermore, by expressly providing for the prevalence of human rights, even in the context of international relations, it seems to us legally valid to exegete that such prevalence must also be adopted in the internal context, that is, in internal relations, which normatively consolidates in our 1988 Federal Constitution the 'permeability' proposed by Peter Häberle" (OLIVEIRA, 2020, p. 115).

Still:

> "In summary, the incorporation of these Human Rights in the national legal scenario, as Fundamental Rights, must occur in such a way that they are necessarily hierarchized above others. We reproduce, again, the term: "prevalence". In spite of our own argumentation previously aired, that constitutional interpretation should not be technical-grammatical, we emphasize that this line of argumentation concerns legal concepts that may be provided for in the constitution, which differs from words, terms or expressions whose origin or relevance do not have an eminently technical-legal connotation, as is the case here. In another twist of words, it seems credible to us that the intention of the Original Constituent was even to establish the permeability of Human Rights in our legal system, not only by providing for their inclusion, but, moreover, with prevalence, which suggests more than simple competition with other Rights. Such an implication is extremely important when faced with a supposed collision or tension between Fundamental Rights, because, in this case, the constitutional rule itself will already rule out any divergence. It will be, then, only apparent". (OLIVEIRA, 2020, p. 149)

So, in these cases, incorporation takes place by signature or by accession. Obligations not to do are immediately effective. The effectiveness of obligations to do depends on the international validity of the treaty itself, not on the (dispensable) legislative decree. If the signature of the international treaty took place without ratification, the positive obligations are also immediate, even before the international validity of the treaty.

Under the regime pointed out so far (arts. 84, VIII, c/c 49, I, and 5, §2), the INCORPORATION of an international treaty into the internal legal order takes place in the following ways:

- by the SIGNATURE or ACCESSION of the head of the federal Executive Power (if the agreements or acts that *do not result* in charges or commitments that are onerous to the national property);
- by the publication of the LEGISLATIVE DECREE of the National Congress (if the agreements or acts *that result* in charges or commitments that are onerous to the national property);
- by the SIGNATURE or ACCESSION of the head of the federal Executive Power (if the treaty or even part of it deals with *fundamental rights and guarantees, even if they may imply* in charges or commitments that are onerous to the national property).

II. THE QUESTION OF HIERARCHY

As to the question of hierarchy, the Brazilian Constitution of 1988 presents the following normative commands: article 5, § 3º and article 102, III, b.

A. The Infra-constitutional or Derived Constitutional Status

Article 102, III, b of the Brazilian Constitution of 1988 states that the Judiciary may declare the unconstitutionality of a treaty: “Article 102. The Federal Supreme Court has, essentially, responsibility for safeguarding the Constitution with the power: [...] III - – to try, on extraordinary appeal, cases decided in a sole or last instance, when the decision challenged: [...] b) declares a treaty or a federal law unconstitutional”.

The infra-constitutional nature of treaties in general - whether incorporated by signature, accession or legislative decree - therefore seems manifest. Or, at least, the derived constitutional nature since our system admits the control of constitutionality of constitutional amendments. Apparently, therefore, it would fix the infra-constitutionality.

However, as we will see below, it seems necessary to make the interpretation of this device compatible with the logic of para-constitutionality.

In any case, the STF could judge the unconstitutionality of treaties that offend the constitutional rules that determine the competence to conclude treaties.

B. Constitutional Amendment Status

The advent of §3 of Article 5 (included by constitutional amendment n. 45/2004) made it possible to grant constitutional amendment status to human rights treaties: "International human rights treaties and conventions on human rights approved by both Houses of the National Congress, in two different voting sessions, by vote of three-fifths of their respective members, shall be equivalent to Constitutional Amendments."

As these treaties refer to fundamental rights and guarantees, they would be incorporated into our legal system from the moment of signature or accession (whether or not there are charges or onerous commitments). Following the established ritual (approval in two rounds, in each house of congress, by 3/5 of the respective members), the legislative decree issued by the National Congress would establish the status of constitutional norms.

Without the legislative decree, international human rights treaties would already be incorporated. With the legislative decree, they acquire special stature, becoming equivalent to constitutional amendments. These are, however, distinct legal phenomena: one concerning the incorporation of the international human rights treaty, the other concerning the legal hierarchy of its commands.

Note that the stature of amendment does not prevent the control of constitutionality (foreseen in article 102, III, b), since it is still possible to discuss whether it would offend, in each case, the formal and material limits of alteration of the original constitutional order (article 60).

On the other hand, this provision (§3) creates a clear hypothesis of the usefulness of the legislative decree, to give constitutional amendment status, and reinforces the unnecessary need for executive decree. If the procedural regime chosen to give the human rights treaty the status of constitutional amendment was identical to the legislative process established for the reforming constituent power, any manifestation by the Executive Power is unnecessary, as happens in the case of constitutional amendments.

C. The fight between Hierarchical logic and the Dialogue of sources

From the wording of §2º of article 5º of the Brazilian Constitution of 1988, it is possible to extract the following consideration: The list of fundamental rights and guarantees expressed in the text of the Constitution "does not exclude" other rights and guarantees already incorporated in the legal system because they are expressed in international treaties signed or adhered to by Brazil.

Constitutional supremacy would allow the exclusion of any rule of the system that contradicts the main text. However, the eventual contradiction of norms of rights and guarantees present in international treaties should not produce this effect. This is a very coherent concretization with the theory of the dialogue of sources.

The set of rights and guarantees must remain in the system, without any incompatibilities being considered.

Several scholars - among them Cançado Trindade (1996, passim), Celso Lafer (2005, passim), Flávia Piovesan (2012, pp. 107-145) - argued that §2º of article 5º granted constitutional stature to human rights treaties, that the Constitutional Text did not present an

exhaustive list of rights and guarantees, that the rights and guarantees arising from international treaties were part of this list.

Although this interpretation is beneficial for human rights and we are aware that we should always seek the solution that expands them, since this is one of those postulates that justifies constitutionalism itself and that was embraced by our legal system when it established the prevalence of human rights (article 4, II), it does not seem to us that this is exactly what was established by §2º of article 5º.

The Brazilian Constitution of 1988 simply states that the rights and guarantees expressed therein "do not exclude" others. This does not necessarily mean that it "includes" them. It means, minimally, that other rights and guarantees "are not incompatible" with those it expresses.

The Constitution, in this §2, reinforces the possibility of incorporating treaties by signature, but does not say that they should have the stature of a constitutional norm.

The incorporation of any norm into the Constitution itself, and not simply into the legal order (giving it constitutional stature would amount to this) is regulated by the constitutional amendment procedure (article 60), which requires a peculiar procedure, marked especially by a differentiated quorum (3/5) that must even be reconfirmed (two rounds of voting).

If to the incorporation into the legal order by simple signature, as established in §2 - even if reinforced (because it is dispensable) by the legislative decree (which is approved by simple majority and in one round of voting) - we were to add the constitutional nature, we would be allowing constitutional change in disagreement with the strict provisions of article 60 of the Constitution itself. We would admit (which does not seem sustainable to us) the insertion of constitutional provisions without the concern that the "reforming constituent power" would effectively manifest itself. It is in this hypothesis, with which we disagree, that national sovereignty would be shaken.

The situation in §3 is different since the parallelism of rites was respected.

We defend, in spite of all this (all this logical reasoning), a solution disconnected from hierarchical logic: a harmonic dialogue between the external and internal sources of human rights (which in no way harms national sovereignty), as proposed by the theory of the dialogue of sources (BENJAMIN; MARQUES, 2020, pp. 21-40), which sees possible to give practical, not theoretical, preeminence to the most protective norm.

D. Supra-legality and Para-constitutionality

Some foreign constitutions establish that international treaties, once incorporated, have supra-legality status:

> CONSTITUTION OF GERMANY: Article 25[Primacy of international law] The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.
>
> FRENCH CONSTITUTION: Article 55. Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.
>
> GREEK CONSTITUTION: Article 28, 1. The generally recognized rules of international law, as well as international conventions as of the time they are ratified by statute and become operative according to their respective conditions, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law. The rules of international law and of international conventions shall be applicable to aliens only under the condition of reciprocity.

The Brazilian constitutional provisions are in line with this thesis of supra-legality, since they have established special judicial competencies to judge possible offenses against treaties. Let's see:

> Article 105. The Superior Court of Justice has the power to: [...] III - to try, on special appeal, the cases decided, in a sole or last instance, by the Regional Federal Courts of Appeal or by the Courts of Appeal of states, of the Federal District and the Territories, when the decision appealed: a) is contrary to a treaty […] or denies it effectiveness;
>
> Article 109. Federal judges have jurisdiction to preside over and try: [...] III - cases based on a treaty or a contract between the Union and a foreign State or
> international organization [...] V - crimes covered by an international treaty or convention, when, the prosecution having started in the country, the result has taken place or should have taken place abroad, or conversely; [...] Paragraph 5. In cases of serious human rights violations, and with a view to ensuring compliance with obligations arising from international human rights treaties to which Brazil is a party, the federal attorney general may request the removal of the action or the inquiry to the Federal Justice before the Superior Court of Justice upon an incident of competence in the course of any of their stages.

In the national infra-constitutional legislation, we found a long time ago a provision in the National Tax Code (Law no. 5.172, of October 25, 1966) that admitted supra-legality for tax issues: "Article 98. International treaties and conventions revoke or modify the internal tax legislation and will be observed by the one that comes after them".

The 1969 Vienna Convention on the Law of Treaties, incorporated in our legal system, is more radical, placing treaties above all internal legislation, including the Constitution, with only one exception: that it does not manifestly contradict the provisions of internal legislation on competence to conclude treaties (the power to enter into them) of fundamental importance (which in our case would be the Constitution):

> Article 27 Internal law and observance of treaties A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.
>
> Article 46 Provisions of internal law regarding competence to conclude treaties 1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

Thus, the international treaties signed or acceded to would be supra-constitutionality, except with regard to the power to conclude (article 84, VIII) and the power to approve such treaties definitively by legislative decree, when they involve onerous charges or commitments (article 49, I); provided that they do not involve fundamental rights and guarantees (article 5, §2), because, for the latter, it is enough to respect the power to conclude - only these two matters would logically be infra-constitutionality. In other words, the provisions of international treaties, if not affecting the executive power to conclude and the power of congressional approval, would have supra-constitutionality status.

The 1969 Vienna Convention, when integrating our legal system, established: a limited supra-constitutionality (except in what concerns the power to conclude and approve) and a broad supra-legality.

This is the solution that makes the most sense from an international point of view since internal normative acts are acts of their own. And no one can allege his own conduct in order to escape from obligations assumed.

Brownlie (1997, p. 47) makes this clear: "Legislative acts and other sources of internal rules and decision-making powers should not be regarded as acts of third parties for which the state is not responsible."

Therefore, the state cannot claim in the international sphere that its domestic law has prevented it from fulfilling its international obligations.

The same reasoning applies to constitutional provisions, as was recognized by the Permanent Court of Justice in 1932: "a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force".

The idea of para-constitutionality, however, is more in line with the dialogue of sources (in the terms proposed in the previous section) than that of supra-constitutionality.

We note that the expression para-constitutionality deliberately rejects the use of the prefixes "supra" and "infra", because the prefix "para" (of Greek origin), among other meanings, brings the idea of proximity, which is maintained with its Latin counterpart "ad", which brings the idea of adjunction. Therefore, para-constitutionality refers to a legal norm parallel to the constitutional norm, which coexists harmonically with it. Para-constitutionality means that the international rule is neither above nor below the constitutional rule, but coexists with it, and the rule that is most beneficial to the human being should always prevail.

III. CRITICAL ANALYSIS

The considerations critically presented so far on the incorporation and legal hierarchy of international treaties allow us to point out our view on the legal regime of treaties in force in our lands and its consequences.

First, we will look at how the foregoing resolves the incorporation and hierarchy of the Vienna Convention on the Law of Treaties itself.

Next, we will point out a summary of the regime applicable, today, to the treaties that Brazil signs, ratifies or adheres to.

A. Incorporation and Hierarchy of the Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties was adopted on May 22, 1969 and was opened for signature on May 23, 1969, when Brazil became a signatory.

International treaties can be concluded by attributing to the signature the effect of consolidating the obligation to submit to what has been agreed (article 12). Normally, however, the signature produces only certain effects (the effects of article 18), and the consent to be bound in full is subject to a subsequent act of ratification, acceptance or approval (article 14). The Vienna Convention on the Law of Treaties expressly provides for this logic, the need for ratification (article 82).

The international validity of the Vienna Convention on the Law of Treaties was intended to begin, even for states that had immediately or promptly ratified or acceded to it, only on the thirtieth day after the date of deposit of the thirty-fifth instrument of ratification or accession (article 84, 1); this took place on January 27, 1980.

For Brazil, a later ratifier than the general rule of entry into force, the international validity occurred on the thirtieth day after the deposit of the instrument of ratification (article 84, 2);

that is, on October 25, 2009. From then on, the Vienna Convention on the Law of Treaties has full binding force for international behavior (article 26).

From the Brazilian signature on May 23, 1969 until October 25, 2009 (international entry into force for Brazil), it is necessary to point out if any binding force of commands of this treaty could be admitted. Two hypotheses need to be verified.

The first, provided for in article 18, concerns the binding force for all signatories of the treaty (even for those who sign subject to ratification) related to *the obligation not to frustrate the object and purpose of the treaty.* In other words, upon signature, every signatory state is obligated not to do (negative obligation), not to adopt conduct and not to approve norms that contradict the object or purpose of the treaty. The moment a state signs a treaty, it manifests its intention to act in a certain way, to collaborate and not to frustrate what has been negotiated. As a result of good faith, it is prevented from adopting contradictory behavior.

This immediate legal effect is very important for us to analyze the national practices consolidated since then regarding the use of the executive decree, which we had criticized before.

The second, provided in article 25, concerns the possibility of giving binding force to all the obligations or a subset of obligations (negative and positive) provided for in a given treaty before it enters into force, which is called provisional application. Provisional application is the possibility of all the obligations or part of the obligations foreseen in a given treaty acquiring force, binding force, before it becomes effective for each State.

Upon ratification, on September 25, 2009, Brazil made a reservation to articles 25 and 66. A reservation is a unilateral declaration made by a state concomitant to the act of signature, ratification, or accession that excludes or modifies the legal effect of certain provisions of a treaty for the respective state (article 2, 1, d of the Convention).

The reservation to article 25 occurred because, at the time, the Foreign Relations Commission of the House of Representatives understood that the inclusion of an international commitment in the national legal system depends, by constitutional imposition, on a complex act of the Executive Power (signature) and the Legislative Power (legislative decree). That is why Legislative Decree no. 496, of July 17, 2009, established this reservation that was not initially pointed out at the signing. Therefore, the provisional application of treaties in Brazil has no legal effect.

The 1937 constitutional regime was the only constitutional regime that ever provided for the provisional application of treaties. It expressly stated that it was the President's exclusive competence (article 74, n): "to determine that international treaties or conventions enter provisionally into force, before they are approved by Parliament, if the interests of the country so advise". This rule was not repeated in subsequent Constitutions and was not considered to be compatible with the constitutional regime in force at the time of the legislative approval of the Vienna Convention on the Law of Treaties.

Note, however, that Brazil did not present a reservation to article 18.

The rules of the Convention on Treaties became, in any case, fully applicable from the beginning of its effectiveness for the Brazilian State, to all treaties that Brazil signs, ratifies or accedes to (article 4)

As a consequence of all these considerations, it is possible to state that:

- Since May 23, 1969, Brazil is prevented from creating or consolidating practices, understandings, or legal norms (negative obligations) that contradict what was intended by the Vienna Convention on the Law of Treaties;

- Since October 25, 2009, all the Convention's rules on treaties condition Brazilian law on the subject (negative and positive obligations), as a result, all treaties signed, ratified, or acceded to by Brazil are now governed by this Convention.

It is also possible to affirm that the incorporation of the Vienna Convention on the Law of Treaties in the Brazilian legal system, as it does not directly entail burdens or burdensome commitments to the country, occurred with its signature on May 23, 1969. Its effectiveness, however, was limited until October 24, 2009 to only prevent the consolidation of new practices, new understandings and new rules that would frustrate the desired regulation of the Treaty Law.

When the Vienna Convention on the Law of Treaties came into force for Brazil on October 25, 2009 (not since December 14, 2009, the date of publication of the presidential decree), this Convention became the rules of the matter for the country. Since then, it has acquired full effectiveness.

As its hierarchy is that of supra-constitutionality (except for the constitutional rules of competence) and supra-legality (Arts. 27 and 46), no constitutional or infra-constitutional legislation that may arise to regulate the Law of Treaties will modify it, unless a constitutional amendment modifying the competence to conclude or definitively decide on treaties arises.

Seeing this convention as para-constitutionality does not affect its supra-legality, but it would allow, on the other hand, to accept that any possible collision with future norms of constitutional stature could be resolved by the pre-eminence of the most beneficial to human rights.

B. Incorporation and the Hierarchy of Treaties since October 25, 2009

As the Vienna Convention on the Law of Treaties is in force and fully effective in the internal order, the incorporation and hierarchy of the treaties that Brazil signs, ratifies or accedes to since October 25, 2009 are governed by the following rules.

Regarding the INCORPORATION of international treaties into the internal legal system:

- **signature** and **accession** incorporate international treaties that *do not contain commitments or charges* that are onerous to the country (CF/88, article 84, VIII);

- **signature** and **accession** incorporate the *fundamental rights and guarantees* (human rights) stated in international treaties, even if they imply commitments or charges that are onerous to the country (CF/88, article 5, § 2º);

- the publication of the **legislative decree** incorporates the international treaties which entail *commitments or charges* that are onerous to the country (article 49, I, of the FC).

Table 01 – Incorporation of international treaties

TIME OF INCORPORATION	HYPOTHESES
SIGNATURE or **ACCESSION** of the President (Federal Executive Power)	1. if the international treaty does not entail burdens or commitments that are onerous to the national patrimony; and 2. if the international treaty, in whole or in part, deals with fundamental rights and guarantees, even if, by any chance, it implies burdensome charges or commitments to the national patrimony.
LEGISLATIVE DECREE of the National Congress (Federal Legislative Power)	3. if the international treaty entails burdens or commitments that are onerous to national assets, as long as they do not involve fundamental rights and guarantees (which will follow signature or precede accession)

Source: Own elaboration.

Legend: Legal-normative fundament - CF/88, arts. 84, VIII; 49, I; and 5, § 2º.

Table 02 – Internal effectiveness of international treaties

INTERNAL EFFECTIVENESS	HYPOTHESES
OBLIGATION NOT TO DO	**Before** international validity: 1. Signing of treaty without reservation of ratification 2. Signing of treaty with ratification reservation 3. Adherence to the treaty
OBLIGATION TO DO	**Before** international validity: 4. Signing of treaty without reservation of ratification **From** the international validity: 5. No charges or commitments: Membership 6. With charges or commitments: Legislative Decree + Adhesion 7. Ratification

Source: Own elaboration.

Regarding the HIERARCHY of international treaties in the internal legal system:

- the constitutional rules determining the competence to conclude treaties (Vienna Convention, article 46) prevail over incorporated international treaties;
- incorporated international treaties prevail over all other constitutional rules, if more beneficial – para-constitutionality (Vienna Convention, article 27);
- human rights treaties can acquire a special status, equivalent to that of a constitutional amendment (CF/88, article 5, § 3º);
- incorporated international treaties are superior to all other infra-constitutionality norms – supra-legality (Vienna Convention, article 27).

Table 03 – Hierarchical status of international treaties

HIERARCHICAL STATUS	FUNDAMENTALS
INFRA-CONSTITUCIONALITY	Prevalence of the national constitutional norm over the conventional one in relation to the establishment of competence for the conclusion of international treaties.
PARA-CONSTITUTIONALITY	Brazilian constitutional norms that establish the competence to enter into international treaties prevail over international treaties entered into by Brazil. Casuistically, the most beneficial for the human person must always prevail.
SUPRA-LEGALITY	The incorporated conventional norms are superior to all other infra-constitutional norms.
CONSTITUTIONAL AMENDMENT STATUS	Human rights treaties can acquire special status, equivalent to constitutional amendment. Approval in each house of the National Congress, in a double round of voting, by 3/5 of the respective members.

Source: Own elaboration.
Legenda: Legend: Legal fundament - CF/88, articles 5º, § 3º; e 102, III, b; CV, articles 27 e 46.

C. Consequences

In cases where the treaty is incorporated into the domestic legal system by signature, previous norms or behavior are derogated from.

In cases where the incorporation of the treaty into the internal order depends on legislative decree, it should be borne in mind that "There is a general duty [of the signatory state] to bring domestic law into conformity with the obligations assumed under international law" (BROWNLIE, 1997, p. 48).

The state that fails to do so violates its obligation to take the necessary measures.

If the state does not seek to overcome domestic obstacles to consolidate the international obligations it has assumed (BROWNLIE, 1997, p. 46):

> "There may be a conflict of obligations, an inability of the state to act domestically in the manner required by international law. The consequence of that inability is not the invalidity of domestic law, but the liability of the state in the international arena."

Once the treaties have been incorporated, due to the supra-constitutionality, para-constitutionality, and supra-legality hierarchy that our system has established for treaties (since the incorporation of the Vienna Convention on the Law of Treaties), it is not possible for new legal norms or new administrative or judicial decisions to evade conventional regulation.

If there are normative or judicial provisions that are contradictory to the internalized treaty rules, it is necessary to provoke the control of conventionality or the control of constitutionality (if a legislative decree has granted a human rights treaty the equivalent status of a constitutional amendment) and, through these internal channels, recognize the invalidity of the new provision.

In the field of International Law, this contradiction was not seen as invalidity, only as a violation of international obligations, as a fact that allowed the state to be held internationally responsible. In this sense, Brownlie (1997, p. 48) affirmed that for international law "the [domestic] legislation may itself constitute a violation of a treaty provision". In other words,

that "domestic law may simply constitute evidence of conduct attributable to the State concerned that generates international responsibility" (BROWNLIE, 1997, p. 51). And this contradiction may even arise from judicial decisions: "a court decision or a legislative measure may constitute evidence of a treaty violation" (BROWNLIE, 1997, p. 51). Brownlie (1997, p. 53) recognizes, however, that in individual states, national courts may have the power not to apply domestic legislation on the grounds that it is contrary to international law. This seems to be the case in Brazil.

CONCLUSIONS

For a better understanding of the legal regime of incorporation and the hierarchical status of international treaties, we suggest, as a first technique, the necessary dissociated analysis of these two phenomena, in order to avoid possible confusions.

Since October 25, 2009, when the Vienna Convention on the Law of Treaties became fully effective, the legal regime of incorporation and hierarchical status of international treaties has taken the following form:

Its incorporation, in the light of the constitutional rules of the country (arts. 84, VIII, c/c 49, I, and 5, §2) may occur upon signature or adhesion by the President of the Republic when the treaty does not entail burdensome obligations or commitments to the national patrimony or, even when it may entail them, if the international document or part of it deals with fundamental rights and guarantees (human rights); on the other hand, incorporation will occur upon publication of a legislative decree by the National Congress when the treaty entails burdensome obligations or commitments to the national patrimony and does not deal with fundamental rights and guarantees.

With regard to hierarchical status, first of all, the constitutional rules that establish the competence to conclude international treaties (CV, article 46) overlap. Next, the scenario that presents itself is one of para-constitutionality, in other words, constitutional rules coexist with conventional rules, the one that is most beneficial to the human being prevailing in the concrete case or in the case decided by concentrated control, regardless of whether the document deals with fundamental rights and guarantees (CV, article 27 and CF/88, article 5, §2). In these hypotheses, there will necessarily be a double control, of constitutionality and of conventionality, both synergistically performed and aimed at verifying which rule will prevail. Then, we discuss the possibility of international human rights treaties that have already been incorporated leaving the para-constitutionality to be recognized as constitutional (EC), once the appropriate legislative procedure is observed. Finally, confirming the para-constitutionality, the supra-legality is evidenced, i.e. the characteristic that incorporated international treaties are superior to all other infra-constitutional norms.

The legal reasoning that we propose, anchored in the constitutional and conventional legal norms that govern the incorporation and hierarchy of the international documents under analysis, reveals the need to control the conventionality of international treaties incorporated in Brazil, legally grounding and justifying it with the purpose of respecting that value that perhaps holds the highest importance from the standpoint of international law, the dignity of the human person.

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