

Reception of norms of international law in the Brazilian Constitutional Experience: Doctrinal Conceptions about Executive Power overlays Between the Empire and the Republic (1824-1988)

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Introduction

Since the granting of its first Constitutional Charter in 1824, the reception of the norms of international order in Brazilian domestic law has found its broad lines in the constitutional texts. Such phenomenon is presented as a common feature in the two constitutions of the nineteenth century – 1824 and 1891 – as well as in the five from the twentieth century – those of 1934, 1937, 1946, 1967 and 1988. On the one hand, there is a continuous line connecting constitutional texts, on the other hand, the absence of an exhaustive and clear description of the way in which the norms of international order would be received are quite salient.

The existence of this gap has resulted, throughout the Brazilian constitutional experience, due to a growing presence of political constraints that, in turn, have led to the insertion and application of international postulates in the domestic legal sphere. These constraints were materialised through frequent overlapping of Ex-

ecutive acts in relation to the other powers, unbalancing the then desired separation of constituted powers.

In this context, the aim of this article is to analyse how the normative instruments and doctrinal discourses at the international and constitutional levels were built in the nearly two hundred years of history of the national legal system. Moreover, emphasising the role to be played mainly by the Legislative and Executive in the process of receiving international treaties and conventions, underlining the most successful attempts by the Executive to impose its supremacy, thus undermining the role of the Legislative.

1. Approaches of 19th century Brazilian doctrine to the constitutional regulation of receiving treaties

The overlap between the Executive and the Legislative in the process of receiving in-

ternational norms has been observed since the imperial period. This phenomenon is already explained in the device contained in art. 102 of the 1824 Constitutional Charter, which provided for the submission of covenant rules to the Parliament, only «[...] when the interest and security of the state permit». Approval by the General Assembly for ratification of an international treaty was required only if they were concluded in peacetime and if they involved cession, the exchange of Empire Territory or Possessions. This arrangement allowed Emperor D. Pedro I to enter into a series of commercial agreements that were not beneficial to Brazil, shortly after independence, generating the opposite manifestation of the General Assembly that claimed participation in the approval or rejection of treaties of any nature, as they affect interests, as well as in national life and invasion of legislative competence, derogating from national laws¹.

The executive overlay was mitigated through mechanisms of political background, as established in the text of art. 20² of the Regency Law, which required the prior approval of the General Assembly for all types of treaties³. After the period of regency as interpreted by the Marquis of São Vicente, the conviction was established that international treaties establishing benefits of the national treasury, altering the established rights of importation, exportation, or derogating from the provision of laws, could generate rights and obligations for the Brazilian State, which would only be valid with the prior approval of Parliament⁴. The powers originally assigned to the Executive, therefore, began to be subject to a process of limitations, which required the approval of the Legislative. Throughout the years

of the empire, it is thus, possible to see the growing position of the doctrine in favour of the flexibility of what was born as an initial rigid overlap of the Executive, interpreting it in an increasingly moderate way.

Still, in the doctrinal field, the few books on international law published in Brazil in the nineteenth century⁵ are silent on the subject, which emerges, however, in those of constitutional law. The silence of the internationalists can be identified as a reflection of the fact that international law, in many academic environments of the time, is still confused with natural law, and progressively considered as a kind of international "moral". This is directed to the duties in covenant norms, so that the set of mechanisms and technical instruments proper for the internationalist universe, in that context, did not exceed the limits of treaty law, maritime law, and diplomatic and consular law⁶. It is a scenario that seemed to be symptomatic of a conception that was not seen as necessary to theorise the subject, hence relegating it to the universe of constitutionalists. It will only be possible to find an approach to the issue in the internationalist books published in Brazil, from the beginning of the twentieth century, when the positivist ideas that sponsored the Republic gained strength and the law came to be seen as a social fact – with the doctrine of international law accompanying this interpretation.

2. «Interludes» in the republican period

The process initiated with the first Republican Constitution⁷, in 1891, regarding the conclusion of international treaties and its

incorporation into Brazilian law, implies a complex composition of constitutional powers of the Executive and Legislative, of which, due to the clear inspiration in the North American model⁸, subsists the tendency to constitute a strong Executive in relation to the other powers⁹.

In this context, in the absence of a constitutional definition of the legal status of norms arising from international treaties, it was left to the Federal Supreme Court to decide on the primacy of the international treaty or domestic law, with oscillations in its positions. Contrasting with the American model in this regard, under the first Republican Constitution, even with the debate on doctrine, the Supreme Court was in favour of the prevalence of international treaties on the infra-constitutional legal system¹⁰.

From a strictly formal point of view, the Constitution of 1891¹¹ is marked by the provision of Parliament's active participation in all treaty-taking processes, giving the last word in each new pact that the Brazilian State might participate. In its original text (art. 34, 12), it stated that among the competences of the National Congress was «to settle definitively on treaties and conventions with foreign nations.» This is an approach that will continue to be present in the other republican constitutions, even reaching the last and still active, issued in 1988.

Likewise, in the Constitution of 1891, the Executive is given the possibility of

entering into international negotiations, entering into adjustments, conventions and treaties, always *ad referendum* of Congress, and approving those which the States conclude in accordance with art. 65, submitting them, when fulfilled, to the authority of the Congress (art. 48, 16).

The mechanism, as it turns out, does not harm Parliament's ultimate power (art. 34). Innovation aroused resistance both in doctrine and in its practical application, being the subject of subsequent regulation in which the need for Parliament's approval was reiterated (Law n. 23/1891, art. 9, para. 3). It stated that

the adjustments, conventions and treaties entered into by the President of the Republic, due to the attributions conferred on him by art. 48, no. 16, of the Constitution, shall be subject to ratification by Congress, by means of a bill formulated by the Executive Power, pursuant to art. 29 of the Constitution¹².

In the international law doctrine, in 1902, Lafayette Rodrigues Pereira timidly and superficially approached the already constitutionally declared definitive competence of the Parliament in the matter. With his lens still based on the constitutional experience of the Empire, the author at first emphasises the Executive's action in the process of receiving treaties, approving them or not – «Ratification is the act by which the Head of State approves, confirms and accepts the treaty confirmed by his mandates and formally undertakes to fulfil and enforce it»¹³ – to later cite, but without further analysis, the approval from Parliament as well – «Ratification presupposes a tract made, agreed upon in all clauses and articles, regularly formulated and solely dependent upon it to become definitively binding»¹⁴.

In this line, therefore, ratification «[...] shall not be given until after all the requirements necessary for the legal existence of such acts, as in the approval of the legislative power or one of its branches, have been fulfilled, whenever this is required by constitutional law [...]»¹⁵.

As can be seen, Lafayette does not discuss definitive competence. On the contrary, he relativizes the need for passage through the Legislative. With this, he subverts the Constitution of 1891. In a footnote on the same page, trying to give more density to the hypothesis, he speaks of the need to

[...] distinguish between the case in which the approval of legislative chambers is necessary for the legal existence of the tract and that in which the intervention of the said power is only required to vote the auxiliary laws necessary for the execution of the stipulated¹⁶.

In the latter case, the intervention of the «[...] legislative power is only necessary for execution, and therefore post-ratification»¹⁷. The author continues:

The ratification given in the first case before the approval of the tract is irregular and does not make it compulsory, if the approval is later denied. The other party is not entitled to any compensation because it should first be aware of the constitutional law of the country with whom it has contracted.

A few years after the publication of Lafayette's «Princípios», Clóvis Bevilacqua's «Direito Público Internacional» handbook was launched between 1910 and 1911. The work would quickly dominate the doctrinal landscape and remain so for the first decades of the twentieth century. It presents, in a very detailed way, the system adopted by Brazil, which from the author's perspective, as in the case of Argentina and Switzerland, was «[...] undoubtedly more in conformity with the democratic regime», because «Legislative in its entirety, was called upon to rule on the treaty»¹⁸. Narrating the procedure, Bevilacqua points out that, after concluding the treaty,

[...] the Government submits it to the Congress for approval, through a bill formulated by it, starting the discussion of the matter in the Chamber of Deputies. Congress approves or rejects the treaty; one is not entitled to amend or approve it only in part. After the treaty has been approved by Congress, the President of the Republic ratifies it¹⁹.

The rest of the internationalist doctrine between the emanation of the Constitutions of 1891 and 1934 adopts even more timid attitudes or does not even examine the matter, ignoring it altogether²⁰.

The subject was also addressed by Epitácio Pessoa within the scope of his «Project for the Codification of International Law»²¹, published in 1911, without its author deepening it. Throughout four articles inserted in Section I of Chapter III, entitled «Formation, Ratification and Effects of the Treaties», the jurist tries to explain the procedure and the effects of ratification. However, in Article 206, the figure of the Head of State empowered to conclude treaties without the need for ratification when «[...] national law does not require the intervention of another power, nor the pacts stipulated by military leaders within the limits of their powers». Without making any reference to the Brazilian legislation on the matter, Pessoa legitimises the exclusive intervention of the Executive in the reception process, strengthening, therefore, the idea of its overlap in relation to the Legislative. As noted, there is still no mention in the article about institutes such as «reception» or «incorporation» of treaties, understanding that in the author's expression «ratification», these terms are already included.

Rui Barbosa²², on the contrary, commented on the issue amid debates about the process of incorporating Acre into the Bra-

zilian territory, criticising the Executive's overlaps:

First of all, the duties of international politics, for any government, is not to assume authority, in its negotiations with foreigners, that national laws do not recognise it. And that lacked our duty in the negotiations with Bolivia, before the legislative vote, definitively giving the transmission of the Acrean territory. [...] Bolivia knew and even had the opportunity to officially remind the Brazilian government that territorial assignments depend on legislative ratification in order to be final; and if the Rio de Janeiro government had not forgotten this lesson, it would have subordinated its agreement on the dismemberment of Acre to the Congress hearing. Failing to do so, it promoted an extra-constitutional situation, a revolutionary situation.

In the text «Limits between Ceará and Rio Grande do Norte»²³, which reproduces the final reasons offered by Rui as a lawyer in the case file before the Federal Supreme Court with the two states as contenders, he uses more didactics, elucidating the dynamics between the powers, but emphasising the need for the Legislative to have the last word in the process of receiving norms. The exercise of different functions would be at the root of the interdependent action between powers «[...] the executive deals; the Legislative ratifies. One resolves *ad referendum*. It solves the other definitively, so that the final solution of the second presupposes the conditional solution of the first. [...] The definitive one reserves itself to the cases, in which competence is distributed to two powers, one with jurisdiction over the previous deliberation of the other». The dependence on the Executive's action is configured, then, by conditioning «[...] the subsequent assent of what is above it, being a provisional resolution of what had the initiative, the one who is responsible

for the sanction is *definitive*». Finally, on returning to the theme of incorporating Acre several years later, in the writing entitled «O direito do Amazonas ao Acre setentrional», Rui returns to the work disagreeing with the directions given by the Baron of Rio Branco in the negotiations. In this context, Senator Lauro Muller speaks in Parliament to make his conviction clear regarding the impossibility of overlapping the Executive with the Legislative in the process of receiving treaties:

It cannot be assumed that they do not have to come to Congress, claiming the Constitution of the past regime, which only required the approval of the Parliament for the treaties that would give up territory. Given that, by our Constitution, not only these acts have to be submitted to ratification by the National Congress as any adjustments or conventions with foreign powers [...] Thus, the adjustments that the [two] governments make, will have to be submitted to Congress, whose turn to speak has [...] not yet arrived²⁴.

In the constitutional law doctrine²⁵, the central debates that arise concerning the reception of international norms are primarily regarding the North American, Argentine and Swiss constitutional models, and, as a result, the limits of the Legislative actuation as well. In this debate, Aristides Augusto Milton²⁶ highlighted the Swiss influence and, consequently, the impossibility of the Legislative to create an amendment to a treaty signed by the Executive. The author's argument is based on an analogy with private law, through the impossibility of contractual innovation by only one of the parties as well as the international legal personality belonging to the Union and not only to one of the powers²⁷:

Moreover, there would be a clamorous absurdity – if one of the parties had the right to innovate

on its own, which among them had been settled. In terms of contracts, nothing is conceived as less admissible and fair. Nor should Congress, in the act of approval, graft any new provision in the treaty submitted to it; since, depending on its publication, after the act of approval, it could nevertheless carry provisions with it, which required *presidential sanction* to have effect and value. — And since the international juridical personality belongs to the Union, it is only fair that the relevant attribution of this paragraph falls within n. 12.

In the same vein, João Barbalho resumed the debate by stating that

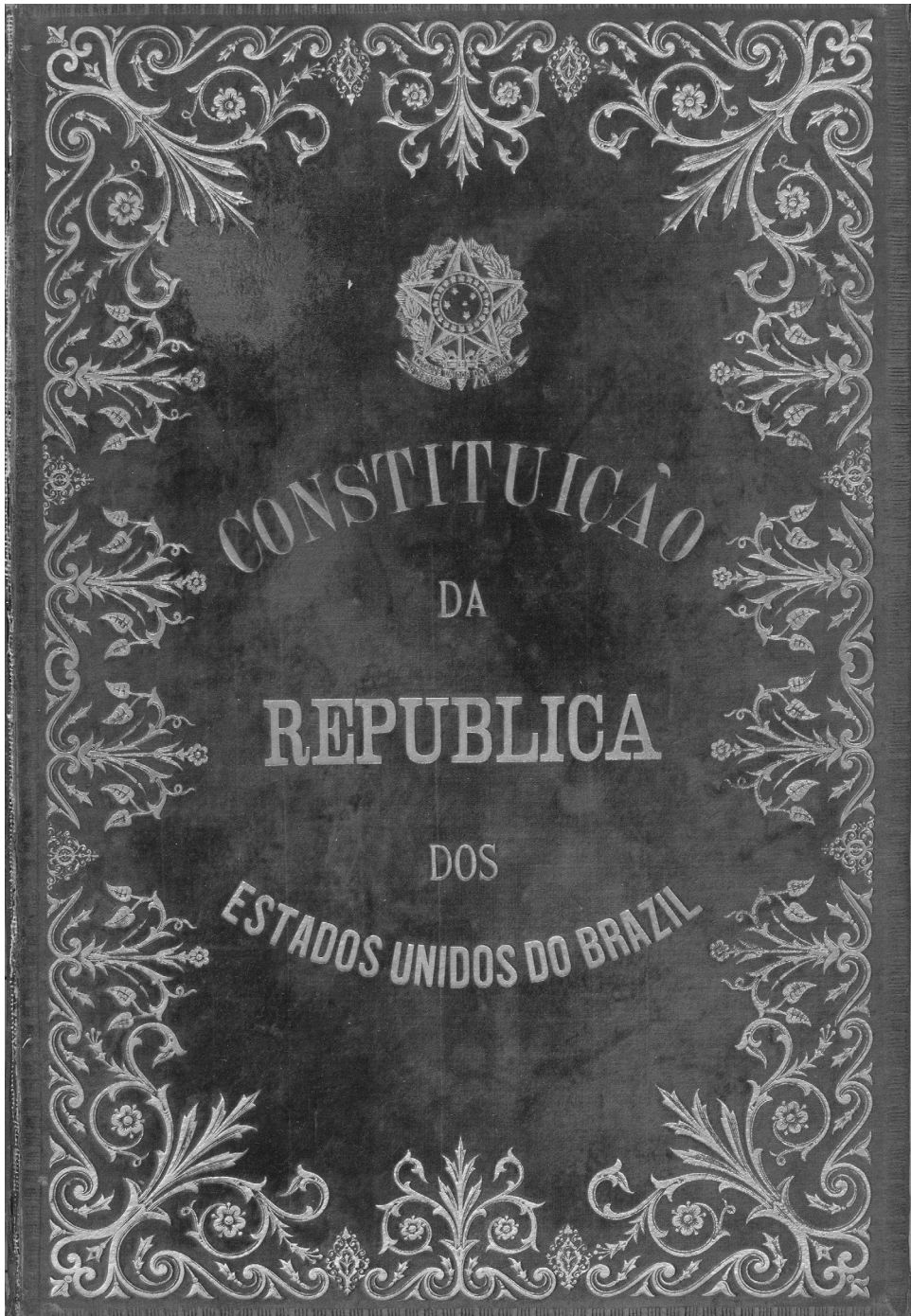
it is up to [...] the congress, which represents the nation in its name, and is responsible for ensuring the custody of the [...] Constitution and the laws [...] to become aware of these treaties and, if they find them worthy of this approval, in the performance of their very remarkable assignment.

The author from the state of Pernambuco also pointed out that although the US Constitution had influenced the Brazilian, it provides for the submission of treaties made by the Executive only to the Senate. On the contrary, our Constitution in this regard would have followed the example of the Argentine Constitution, of 1853, in its articles 64.19²⁸; 83.14²⁹ and 105³⁰; and the Swiss Constitution, of 1874, in its article 85.5³¹, choosing to comply more fully with the «democratic representative principle», which ensures that treaties are submitted to both houses of Parliament, as well as the primacy of the treaty over the infra-constitutional law. Through this strategy, according to the debates of the time, it would be possible to better clarify the legal business, making it less susceptible to abuse or misconduct, even to the detriment of the speed of North American internalisation³².

In disagreement with Barbalho, the American influence was affirmed by Wilson Accioli, who, as a result of this influence, saw the possibility of the Legislative to «*amend or reserve*» international treaties³³ as legitimate.

The first Republican Constitution, therefore, changes the powers of the Legislative by stating that the latter participates in all reception processes, and can only entirely approve or reject the treaties signed by the Executive. This new reading implies the impossibility of approval with reservation of international legal affairs, contrary to the assumptions of the doctrines in effect in the United States at that time³⁴. The Federal Constitution of 1934 reinforced the Union's private competence concerning international relations and the conclusion of treaties and conventions through typical acts of the chief executive, subject to the approval of Parliament³⁵. In the constitutional law doctrine, however, Francisco Campos³⁶ stated that the Legislative «cannot alter, amend or modify international treaties», from which the conclusion is drawn that it is not even possible to present reservations³⁷.

The 1934 constitutional text retains the formula of the Federal Constitution of 1891 (art. 40, a) by making two minor innovations, stating that it is for the Union «to maintain relations with foreign states, to appoint members of the diplomatic and consular corps, and to enter into international treaties and conventions» (art. 5, 1) and it is incumbent upon the President of the Republic «to conclude international conventions and treaties, *ad referendum* of the Legislative»³⁸ (art. 56, para. 6). Without major material impact on the subject, such changes could have been overlooked



The 1891 Brazilian Constitution

if it were not for the fact that variations of the texts of both devices integrated later constitutions, such as those of 1946, 1967, and 1988. Although not implemented in practice, the exception to this model can be clearly observed in the 1937 Constitutional Charter.

Even though it provided for the Parliament's approval of treaties and conventions signed by the President of the Republic, the 1937 Constitutional Charter reflected the political context of the Vargas era³⁹. Designed to be the bulwark of the «New State», it did not, however, have applicability, as the latter ended up compromising its existence by preventing the plebiscite stipulated in its art. 187⁴⁰. The text of the new constitution, nonetheless, strengthened the Executive's role in international relations by affording, for example, the possibility of determining that treaties or conventions should be provisionally implemented before approval by Parliament, provided that it was in the «interest of the country». This is what the letter "r" of art. 74 provides: «order the provisional implementation, before approval by Parliament, of international treaties or conventions if so advised by the interests of the country»⁴¹. The participation of the Legislative in the reception process, therefore, remained, but limited due to the possibility of provisional entry of the international standard in effect until legislative approval. The view was also maintained that it is the Parliament's responsibility to approve or reject treaties in their entirety, without the possibility of making reservations apart from their content⁴².

In addition to the debate mentioned above about the validity of the Constitution before the non-compliance with its art. 187,

the rules on the reception of treaties were not applicable, as the activities of the Parliament were suspended by Vargas on 10 November 1937, thus remaining until 31 January 1946. In the meantime, the ratification of the treaties was the sole responsibility of the head of the Executive. As it happened in the "New State" and, a few decades later, also in the civil-military dictatorship (1964-1985), the concrete applicability of treaty submission to Parliament's approval was limited to periods when the latter was not suspended for typical acts of state of exception issued by the Executive⁴³.

Less expressive and less fruitful, the internationalist doctrine will only have significant innovations after the end of the "New State", while remaining silent on the subject⁴⁴.

With the reestablishment of democracy, the previous model was followed, providing for the conclusion of treaties by the Executive, with the necessary referendum of the Legislative⁴⁵.

The International Law doctrine of the period has Hildebrando Accioly as one of the first authors to speak out on the subject, set out in his «Tratado de Direito Internacional», published in 1956. In this, the author summarises the problem in a few concise words:

In Brazil, the current Federal Constitution (1946) makes no express reference to the law of the people. However, it is generally considered that, in principle, international treaties and conventions to which Brazil is a party are incorporated into national law only after approval by Congress⁴⁶.

Besides the eminently technical issue linked to the slow and gradual rise of legal positivism in Brazilian law schools, another possible cause for the insertion of the subject in Accioly's handbook can be found in

the fact that he is one of the main exponents among the Brazilian authors who defended the «dualist» theories in the relations between international and internal orders, in particular those elaborated by Dionisio Anzilotti⁴⁷ and, even earlier, by Karl Heinrich Triepel⁴⁸. Dualist theories, of course, assume that international norms have a different nature from internal norms – due to the different nature of their subjects – and it is impossible to apply them to internal ordering without reception through legislative mechanisms, in the Brazilian case culminating in the edition of legislative decree⁴⁹. The rest of the internationalists of the period refer little or nothing to the subject⁵⁰, continuing the aforementioned practice that relegated the issue to the world of constitutional law.

In the constitutional law context, Afonso Arinos de Melo Franco⁵¹ dealt with the theme on several pages of his «Curso de direito constitucional brasileiro», showing that he is fully aware that «[...] it is not a recent phenomenon that the incorporation, in the constitutional order of international precepts, exist both in customary and written law countries»⁵². This statement follows the analysis of the constitutions of various countries, including England, the United States, Germany and France. Two phenomena, however, are significant in the pages of Afonso Arinos: first, the fact that after a dozen pages written on the general theory of the issue, with abundant examples of models of incorporation, the work does not present a particular technical analysis of the Brazilian constitution from 1946; second, the absence of references to the Argentine and Swiss models, cited in the writings of the first republic. This last phenomenon is emblematic of the abandon-

ment that occurred in the doctrine after the emanation of the 1946 text.

Less than two decades after redemocratisation, however, Brazil was again under dictatorship, which began in 1964, and the provisions in the text of the 1946 Constitution were no longer applicable.

Following the previous texts, the 1967 Constitutional Charter, issued during the period of the civil-military dictatorship⁵³, provided the definitive resolution on the treaties concluded by the President of the Republic⁵⁴ as the competence of the National Congress (art. 47, I). Much of the debate among the few constitutionalists on the subject was still on the possibility of Parliament imposing reservations or amendments. This context is illustrated by Magalhães, when he stated that the National Congress lends internal efficacy to the international act, through referendum⁵⁵, approving it or not, without introducing «[...] amendments, although it is lawful to suggest to the Executive the need to propose them in the context in which the convention or treaty took place»⁵⁶.

Consequently, two new situations emerged with the publication of this new text. First, with particular attention to the above theme, Wilson Accioli indicated it as «controversial», stating that as the Brazilian paradigm is the United States Constitution, it is up to the National Congress, as well as the US Senate, to impose amendments to the treaties⁵⁷. This Constitutional Charter, however, brings a peculiarity regarding the other, i.e., it is the only constitution that determines the deadline for the Executive to submit to Congress the treaties concluded by the President (art. 47, § only).

The second question is raised by Manoel Gonçalves Ferreira Filho⁵⁸, who points out

that the 1967 Constitutional Charter was subject to such a regime «[...] treaties, conventions and international acts»⁵⁹, thus differing from the previous Constitution which «[...] only submitted to the approval of the National Congress international treaties and conventions»⁶⁰. The term «international acts» would thus encompass «[...] much more than treaties and conventions. It is a genre where treaties and conventions appear as species»⁶¹. For this reason, any legal act that would entail the «[...] creation of rights and obligations for Brazil in international orbit must be signed by the President of the Republic and approved by the National Congress to be valid under domestic law»⁶². The interpretation given by the jurist, however, seems to go beyond the probable intention of the constituent assembly, as the wording of the constitutional text would be a reaction to the «[...] universal tendency of the Executive to conclude international agreements without the form of treaty and convention, and thus bypassing the control of the Legislative»⁶³. Such agreements would escape «[...] the need for approval by the Legislative, although their repercussions are often relevant and serious. That is why the expression *international acts* does not, therefore, encompass unilateral acts»⁶⁴.

The situation worsened when the Executive closed Parliament, initially in 1966, but also between December 1968 and October 1969, due to art. 2 of Institutional Act no. 5, to Complementary Act no. 38 and, finally, in 1977, through Complementary Law no. 102. At these times, the Executive began to perform the functions of the Legislative, acting with Decree-Laws and «Institutional Acts»⁶⁵. Even after the reopening of Congress, the dismissal of 173 deputies and

the appointment of one third of senators by the government reinforced the overlap of the Executive and the «orchestration» of Legislative decisions.

The dictatorial context had repercussions within the Judiciary, and in this sense, the Federal Supreme Court in 1977, when it started to affirm the parity between norms derived from international treaties and the ordinary federal legislation⁶⁶.

3. *Incorporation of international standards under the 1988 Constitution*

After the end of the dictatorship, a new constitution was drafted, aiming at the return to democracy and the adoption of new political and legal values. The constitutional design, however, did not leave gaps that would open the political game. In this sense, the 1988 Constitution provides that it is for the President of the Republic to «conclude international treaties, conventions and acts, subject to referendum by the National Congress» (art. 84, VIII) and the approval of Congress in «international treaties, agreements or acts that entail arduous burdens or commitments to the national heritage» (art. 49, I)⁶⁷. Most of the doctrine, which is mainly represented by the writings of Francisco Rezek⁶⁸, recognises – with approval or rejection – the Congress, making no exception for treaties on human rights or those arising from Mercosur⁶⁹.

The main dissonance on the subject lies in the internationalist doctrine about the reception of treaties signed by the Executive and approved by the Legislative whenever «arduous burdens or commitments to the national patrimony»⁷⁰ remain. The

core of the debate lies in the legitimization of the practice of concluding agreements in a simplified manner⁷¹ within a dualist system, such as the Brazilian one. In current practice, the conclusion of these treaties implies the performance of acts necessary for international validity and the publication in the Federal Official Gazette, dispensing with the Presidential Decree of Promulgation⁷². It is an alternative form of reception, avoiding the referendum of the Legislative and easing the assumptions of the dualist doctrine. The adept doctrine of dualism, observing the corrosion of its dogmas in this proposal, distinguishes that all international acts, even those that apparently do not impose encumbrances on the patrimony, must be submitted to the Legislative⁷³.

The option in favour of the conclusion of this type of treaty – a phenomenon that is continually expanding worldwide⁷⁴ – argues for the demand for speed and discretion in the negotiations or the conclusion, as well as the existence of technical-administratives⁷⁵. The Constitution does not mention the possibility of concluding such agreements, although the practice recognises the norms of international law that legitimise them, such as the principle of freedom of forms of conclusion. Paradoxically, the application of international norms legitimising the simplified agreements in the Brazilian context has the effect of strengthening the overlapping attempts of the Executive analysed so far.

The Constitution does not define the *status* of international standards in domestic law. The only exception to the rule is given by Amendment n. 45, which in 2004, granted constitutional amendment status to human rights treaties adopted in each

House of Parliament with three-fifths of the votes of the respective members⁷⁶.

This evident gap regarding to the legal *status* of international treaties has been remedied through the interpretation of the Federal Supreme Court, whose understanding has changed over time. Until 1977, it was understood that in the event of a conflict between an international treaty and an internal norm, either before or after the treaty, there would be the primacy of the treaty⁷⁷. In 1977, however, the Federal Supreme Court changed its perception, establishing that the federal norm repeals a previous treaty. If, on the one hand, the decision was considered controversial by the doctrine, on the other, the old rule regarding tax legislation remained⁷⁸. Such understanding is currently maintained, evidencing the subordination of treaties to the Constitution and reaffirming that, when they are regularly incorporated into the internal order, they are situated in the «[...] plans of validity, effectiveness and authority in which the ordinary laws are positioned»⁷⁹. The violation of art. 27 of the 1969 Vienna Convention on the rights of treaties, in this case, is striking, and does not exempt, but promotes the international accountability of the country⁸⁰. However, there are exceptions to this rule. In addition to international tax law treaties, the 2008 Federal Supreme Court in RE 466.343-SP, extended the 'supralegal norm' statement to human rights treaties and conventions that were incorporated into the Brazilian legal system without being approved under Amendment 45, which inserts in art. 5, § 3⁸¹. Thus, the aim was to harmonise the provisions of the 1988 Constitution (art. 5, § 2), stating that the rights and guarantees expressed herein do not exclude others

arising from international treaties to which Brazil is a party.

The shortcomings of the constitutional text also gave way for the action of other international sources, such as the norms of a customary nature, accepted by case law. The relationship between the Constitution and international law, therefore, goes beyond the process of incorporation of treaties, with the insertion of postulates of international law in the constitutional text, as well as the process of «integration» of constitutional norms through international customs. This tendency is common in countries, such as Brazil that has democratic states, seek to harmonise their constitution with the international order⁸². This intention can also be observed in the activity of the Judiciary, which welcomes international custom by outlining practice that goes beyond the Constitution and often even contradicts it, giving it less stability and fostering legal uncertainty⁸³.

Decisions found on the application of international custom mainly concern the immunity of jurisdiction and enforcement. Brazilian constitutions, while on the one hand, never refer to international custom, on the other hand have always provided jurisdiction in cases involving foreign states⁸⁴. Constitutional provisions were not applied because they were interpreted by both the Judiciary and the Executive in light of the international custom manifested by the expression *par in parem non habet iudicium*. In this context, the acquiescence of the foreign state, through the waiver of immunity from jurisdiction, was paramount, as seen in a consolidated manner in 1923, in the opinion of Clóvis Bevilacqua⁸⁵. The decisions of the Federal Supreme Court, under the 1967 Constitutional Char-

ter, recognised absolute immunity from jurisdiction to the foreign State by applying the customary international norm⁸⁶. This guideline was amended in 1989, through a decision in Civil Appeal n. 9696/SP, which removed the immunity of foreign State jurisdiction in acts of mere management by diplomatic and consular missions⁸⁷. However, the advance did not safeguard the rights of the requesting party, considering that the Supreme Court still rules out the possibility of the execution process of property owned by other countries on Brazilian territory, except in the case of a waiver of intangibility⁸⁸.

Final considerations

Over almost two centuries of different experiences in its constitutional laboratory, the dynamics between powers experienced in the historical itinerary of the Brazilian constitutions led to a slow but growing process of executive intervention to the detriment of the Legislative concerning treaty reception mechanisms and international conventions within domestic planning. A nonlinear process, that in practice, led to Parliament's submission to the Presidency of the Republic, often completely ignoring the former. This movement can be attributed, in part, to the logic that drives the Brazilian presidential system, which since its inception, has concentrated on the figure of the President of the Republic numerous decision-making areas and direct influence, particularly about foreign policy. In the daily life of the Brazilian-institutions, the current system in Brazil makes the will and insights of the chief executive excel widely

in the process of legitimization of State options in the field of international relations, often reducing the work of the Legislative to mere consultative activity.

The prevalence of the Executive's interventions, although discontinued, is echoed in the various generations of the doctrine – initially not very interested in the subject – but which, has been stimulated since the late nineteenth century by discourses either in the internationalist or constitutionalist sphere, which are adopting more technical aspects that are profoundly stateist and mainly based on postulates typical of logical positivism. Stateism uses the nationalist moments derived from the authoritarian regimes of the 40s and 70s of the twentieth century, in which Brazil acquires prestige in an international scenario taken by dictatorships. This fuels the process of legitimising incisive actions of the Executive and doctrinal discourses centred on a strong presidentialism focused on the need to intensify and detail technical procedures on the subject.

Even in the presence of the phenomena described above, the various Brazilian constitutional experiences are also characterised by the option for a partial or incomplete treatment of the subject – making no reference, for example, to the reception of the international custom –, thus leaving significant gaps that indirectly ended by potentiating the process of weakening the Legislative. It will be this constant choice, affirmed and reiterated in the Brazilian legal laboratory in the emanation of each constitutional text that will serve as the support of the persistent substantive policy that, in practice, makes the executive supremacy in the issues of international relations possible. An exception to the phenomenon,

among the few that escape this apparently insatiable voracity of the Executive, is the reception of acts linked to the immunity of execution of foreign States, a theme often received in the jurisprudential framework, which, however, has not yet been pacified in the higher courts. This fact, nonetheless, even removing the Executive's fury, highlights the Brazilian inconsistency among the forms of incorporation of international law into domestic law.

- ¹ A.P. Cachapuz de Medeiros, *O poder de celebrar tratados. Competência dos poderes constituídos para a celebração de tratados, à luz do Direito Internacional, do Direito Comparado e do Direito Constitucional Brasileiro*, Porto Alegre, Sergio Antonio Fabris Editor, 1995, p. 91.
- ² The Regency Law of 14 June 1831 instituted the «Regency Period», which begins with the abdication of the Emperor Pedro I, and concludes with the «Declaration of Majority» of Pedro II (1840).
- ³ In 1840, with the majority of Pedro II, the power to conclude treaties returned to the Executive, according to art. 102, being that the latter could hear the Council of State, created by Law n. 234 (1841), art. 7.
- ⁴ J.A. São Vicente, P. Bueno, marquês de, *Direito Público brasileiro e análise da Constituição do Império*, in E. Kugelmass (ed.), *José Antônio Pimenta Bueno, marquês de São Vicente*, São Paulo, Ed. 34, 2002, p. 326. Pimenta Bueno's statements are particularly interesting when considering his career between judiciary, parliament and diplomacy during the empire.
- ⁵ P.A.M. Albuquerque, *Elementos de direito natural e privado*, Recife, Imparcial, 1848; J.M. Avellar Brotero, *Questões sobre presas marítimas*, São Paulo, Imparcial, 1863; A. Pereira Pinto, *Apostamentos para o direito internacional ou Collecção completa dos tratados celebrados pelo Brasil com diferentes nações estrangeiras*, Rio de Janeiro, Pinto & C.^a, 1864; A.V.M. Drummond, *Prelecções de diplomacia com referencia e applicação de seus princípios às leis particulares do Brasil até 1867*, Recife, Correio do Recife, 1867; A.V.M. Drummond, *Prelecções de direito internacional com referencia e applicação de seus princípios às leis particulares do Brasil até 1867*, Recife, Correio do Recife, 1867b; C.V.O. Freitas, *Elementos de direito internacional maritime*, Rio de Janeiro, Lombaerts & Comp., 1884; J.S. Souza, *Licções Elementares de Direito das Gentes sobre o Compendio do Sr. Conselheiro Autran*, Recife, Economica, 1889.
- ⁶ A.R. Silva Jr. *Teaching International law in the Nineteenth Century Brazil: A history of appropriation and assimilation (1827-1914)*, Tese de doutorado. Università degli studi di Firenze, 2018, <<http://hdl.handle.net/2158/1124811>>, July 2019.
- ⁷ The constituent assembly presented a draft prepared by a commission appointed by the Executive in January 1889, and revised by the Provisional Government, which published it by Decree n. 510 (1890) and n. 914-A (1890).
- ⁸ It is a phenomenon very present in the republican thought not only Brazilian, but in the entire subcontinent, for some time, as reported by Marcello Cerqueira: «The North American model, cherished since the Inconfidência Mineira and widespread in Latin American countries, it would be the most appropriate to found the republic, especially when the French costume emphasised the popular participation in the formation of the power». M. Cerqueira, *A Constituição na História*, Rio de Janeiro, Revan, 2006, p. 443.
- ⁹ In the words of Marcello Cerqueira, it is a «[...] transplant that could not but absorb characteristics of the long authoritarian tradition of the Brazilian elites, further deforming the matrix», coinciding with the American costume, who, after overcoming revolutionary impulses aimed at guaranteeing liberties and abolishing citizen controls by a central government, eventually admitted a president with powers similar to those previously exercised in the colonial period as the representative of the king of England». *Ibidem*.
- ¹⁰ P. Azevedo, *Os tratados e os interesses privados em face do direito brasileiro*, «Boletim da Sociedade Brasileira de Direito Internacional», 1, 1945, pp. 12-29. The aforementioned court revised its position in 1977, when it began to treat international treaties and ordinary federal legislation on an equal basis, with the most recent rule prevailing.
- ¹¹ The first Republican Constitution, issued by the National Congress on February 24, 1891, presents the American influence allied to the values of French positivism, inserting the presidential and federative models for the first time in the Brazilian order, as well as the direct vote – limited to men – for representatives of the Executive and the Legislative, the separation of church and State and the independence of the powers of the republic.
- ¹² The wording of such a provision, however, was criticized by Beviláqua: «The law [...] calls for ratification of the act by which Congress approves the treatment; but of course, the denomination is incorrect», C. Beviláqua, *Direito Público Internacional*, to. II, Rio de Janeiro, Freitas Bastos, 1939, p. 18.
- ¹³ L.R. Pereira, *Princípios de Direito Internacional*, Rio de Janeiro, Jacintho R. Santos, 1902, p. 340.
- ¹⁴ Ivi, p. 341.
- ¹⁵ *Ibidem*.
- ¹⁶ *Ibidem*.
- ¹⁷ *Ibidem*.
- ¹⁸ Beviláqua, *Direito Público Internacional* cit. p. 18.
- ¹⁹ *Ibidem*.
- ²⁰ B.S. Arruda, *Direito das gentes, direito internacional privado, direito constitucional*, São Paulo, Siqueira, 1919; R. Pederneiras, *Direito internacional compendiado*, Rio de Janeiro, Freitas Bastos, 1931.
- ²¹ E. Pessoa, *Projecto de código de direito internacional publico*, Rio de Janeiro, Imprensa Nacional, 1911. On the writings of Epitácio Pessoa in international law, vide M. Cantarelli, *Epitácio Pessoa e a história do Direito Internacional*, in «Revista académica», 84, 2012, pp. 175 ss.; e a obra M. Franca et al. (orgs.), *Epitácio Pessoa e a Co-*

- dificação do Direito Internacional, Porto Alegre, Fabris, 2013.
- ²² R. Barbosa, *Ideal dos Seringai*, in *Obras completas de Rui Barbosa*, vol. XXVII, Rio de Janeiro, Ministério da Educação e Cultura, 1900, pp. 95-96.
- ²³ R. Barbosa, *Limites entre o Ceará e o Rio Grande do Norte*, in *Obras completas de Rui Barbosa*, cit., vol. XXXI, to. IV, Rio de Janeiro, Ministério da Educação e Cultura, 1904, p. 33.
- ²⁴ R. Barbosa, *O direito do Amazonas ao Acre setentrional*, in *Obras completas de Rui Barbosa*, cit., vol. XXXVIII, to IV, Rio de Janeiro, Ministério da Educação e Cultura, 1910, p. 15.
- ²⁵ About the books of constitutional law published in the old republic, see P.M. Pivatto, *Leituras republicanas: Produção e difusão de livros de Direito Constitucional brasileiro na Primeira República*, in «História», XXX, 2011, n. 2, pp. 144-178. Most of the works of the period do not include a theme related to or close to the reception of treaties norms: J.A.M. Castro, *Algumas notas à Constituição dos Estados Unidos do Brasil precedidas de introdução e paralelo ou comparação da Constituição Política do Imperio de 1824 com a Constituição decretada pelo governo provisório da República de 1890*, Rio de Janeiro, Typographia Perseverança, 1890; R. Otavio, *Constituições Federaes. Confronto da Constituição Federal dos E. U. do Brasil com a as Constituições da Republica Argentina, dos E. U. da America e da Suissa*, Rio de Janeiro, Alves & C., 1897.
- ²⁶ The author is also clearly opposed to the conduct of international treaties by the federated member states. See, A.A. Milton, *A Constituição do Brasil: Noticia historica, texto e commentario*, Rio de Janeiro, Impr. Nacional, 1898, p. 141 s.
- ²⁷ Milton, *A Constituição do Brasil* cit., p. 142.
- ²⁸ «Corresponde al Congreso: [...] 19 Aprobar ó desechar los tratados concluidos con las demás Naciones, y los concordatos con la silla Apostólica; y arreglar el ejercicio del patronato en toda la Confederacion», in *Constituciones argentinas. Compilación histórica y análisis doctrinario*, Buenos Aires: Ministerio de Justicia y Derechos Humanos, 2015, p. 145.
- ²⁹ «El Presidente de la Confederacion tiene las siguientes atribuciones: [...] 14. Concluye y firma tratados de paz, de comercio, de navegacion, de alianzas, de limites y de neutralidad, concordatos y otras negociaciones requeridas para el mantenimiento de buenas relaciones con las potencias extranjeras, recibe sus Ministros y admite sus Cónsules», idem, p. 151.
- ³⁰ «Las Provincias no ejercen el poder delegado a la Confederacion. No pueden celebrar tratados parciales de carácter político; ni espedir leyes sobre comercio, ó navegacion interior ó exterior; ni establecer Aduanas Provinciales; ni acuñar moneda; ni establecer bancos con facultad de emitir billetes, sin autorizacion del Congreso federal; ni dictar los códigos civil, comercial, penal y de minería, despues que el Congreso los haya sancionado; ni dictar especialmente leyes sobre ciudadanía y naturalizacion, bancarrotas, falsificacion de moneda ó documentos del Estado; ni establecer derecho de tonelaje; ni armar buques de guerra ó levantar ejércitos, salvó el caso de invasion exterior ó de un peligro tan inminente que no admita dilacion, dando luego cuenta al Gobierno federal; ni nombrar ó recibir agentes extranjeros; ni admitir nuevas órdenes religiosas», idem, p. 155.
- ³¹ «Les affaires de la compétence des deux conseils sont notamment les suivantes: [...] 5. Les alliances et les traités avec les États étrangers, ainsi que l'approbation des traités des Cantons entre eux ou avec les États étrangers; toutefois, les traités des Cantons ne sont portés à l'Assemblée fédérale que lorsque le Conseil fédéral ou un autre Canton élève des réclamations».
- ³² J. Barbalho, *Constituição Federal Brasileira: comentários por João Barbalho U.C.*, Ed. fac-similar 1902, Brasília, Senado Federal, 1992, p. 196 and p. 110: «The President of the Republic is the organ of communication with the other nations, it is he who, by his agents, is responsible for negotiating the treaties (Constitution, art. 48 nos. 14 and 16)».
- ³³ W.A. Vasconcelos, *O Congresso Nacional e o Treaty Making Power*, in «Revista de informação legislativa», XIII, n. 50, 1976, pp. 115 s. The question, according to the author, was clarified in 1964, by means of an opinion prepared by Haroldo Valladão, as a consultant at Itamaraty, about «issues raised by the approval, with amendments, that the National Congress gave, by Legislative Decree n. 17, 1961», to the «Agreement between the United States of Brazil and the Czech Republic-Slovakia, signed in Rio de Janeiro on June 24, 1960». The opinion states that on the basis of art. 66, I, of the Constitution, the National Congress may approve an international act with amendments, and the Executive Power has to consider them. See H. Valladão, *Cooperação construtiva entre o Legislativo e o Executivo na apreciação dos atos internacionais*, in «Revista de Informação Legislativa», I, 1964, n. 1.
- ³⁴ Barbalho, *Constituição Federal Brasileira* cit., p. 111.
- ³⁵ Art. 5, I, 40, a; 56, §5 and §6; 91, f.
- ³⁶ F. Campos, *Direito Constitucional*, vol. II, Rio de Janeiro, Freitas Bastos, 1956, p. 309. During the 1934 Constituent Assembly, the insertion of a provision in the constitutional text that guaranteed the overlapping of international treaties on ordinary federal laws was rejected. The constitutional dispute has not removed the tendency of jurisprudence to

maintain the prevalence of international treaties. See also, J.F. Rezek. *Direito Internacional Público: curso elementar*, São Paulo, Saraiva, 2013, p. 129.

³⁷ Not all books on constitutional law dealt with the topic of receiving international treaties. See, for example, E. Hambloch. *Sua Majestade o Presidente do Brasil. Um estudo do Brasil Constitucional: 1889-1934*, Brasília, Senado Federal, 2000.

³⁸ Francisco Campos highlighted the contradictions of the 1934 constitutional text regarding the competences of the Legislative and Executive, see art. 5, 39, 56 and 90, but softens the criticism by stating that it is necessary to «grasp the intelligence or the effective meaning of concrete constitutional provisions», Campos, *Direito Constitucional* cit., pp. 313 s.

³⁹ Art. 15, I; 54, a; 54, d.

⁴⁰ Cerqueira, *A Constituição na História* cit., p. 487. According to an interview cited by Cerqueira himself and also by Vamireh Chacon (*Vida e morte das Constituições brasileiras*, Rio de Janeiro, Forense, 1987, p. 170), Francisco Campos, the main drafter of the 1937 Constitutional Charter, was acknowledged in an interview with the journalist Pompey de Souza (*Correio da Manhã*, March 3, 1945) that «since the referendum stipulated by the Constitution itself had not been held, its validity, which prior to the holding of the referendum, would be provisional, becoming final only through plebiscite approval, became nonexistent». See also R.D. Santos. *Francisco Campos e os fundamentos do constitucionalismo antiliberal no Brasil*, in «Dados. Revista de Ciências Sociais», L, 2007, n. 2, p. 281.

⁴¹ The problem regarding the reception of norms of international law in the 1937 Constitutional Charter has consequences in the doctrine

that is often mistaken in the presentation of the theme. Wilson Accioli, for example, argued that the 1937 Constitutional Charter «conferred upon the National Council – designation given to the Federal Senate – the competence to placitate agreements and conventions», mistakenly stating exception where there is none, perhaps guided by the conviction of influence of the American constitution over Brazilian ones since the Constitution of 1891. See W. Accioli, *Instituições de Direito Constitucional*, Rio de Janeiro, Forense, 1978, pp. 163 s. The Federal Constitutional Charter of 1937 provides that international treaties are carried out by the President of the Republic, ad referendum of the Legislative Branch (art. 74, f) and that the President may order that the treaties be provisionally executed before being approved by Parliament (art. 74, r).

⁴² A. Castro, *A constituição de 1937*, Rio de Janeiro, Freitas Bastos, 1938, p. 182.

⁴³ During the closing period of the National Congress in the Vargas Era (10/11/1937–31/01/1946) 126 treaties entered into force; During the three closing periods of the National Congress under the civil-military dictatorship, 70 treaties also entered into force including with the President of the Republic using the attribution granted to him by Institutional Act n. 5 (1968). See, for example, the process of approval of the Basic Agreement on Technical Cooperation between Brazil and the Swiss Confederation, signed on 26 April, 1968, approved by Decree-Law n. 661 (1969), which replaced the respective legislative decree and entered into force by Executive Decree no. 65,812 (1969). Search available in <<https://concordia.itamaraty.gov.br/>>, september 2019.

⁴⁴ J. Americano, *O novo fundamento do direito internacional e seu esteio na conciencia universal*, São Paulo,

Renascença, 1945; B.S. Arruda, *Curso de direito internacional*, Curitiba, Guaíra, 1946.

⁴⁵ Federal Constitution of 1946, art. 5, I, 66, I, 87, VI and VII.

⁴⁶ H. Accioli, *Tratado de Direito Internacional Público*, vol. I, Rio de Janeiro, Freitas Bastos, 1956, p. 82.

⁴⁷ D. Anzilotti, *Diritto internazionale nei giudizi interni*, Bologna, Zanichelli, 1905; and D. Anzilotti, *Corso di diritto internazionale*, Padova, Cedam, 1927³, p. 52.

⁴⁸ K.H. Triepel, *Völkerrecht und Landesrecht*, Leipzig, Hirschfeld, 1899; and K.H. Triepel, *Les rapports entre le Droit Interne e le Droit International*, in «Recueil des cours», I, 1923–I.

⁴⁹ Articles 49 and 62, § 3, of the 1988 Constitution, provide for the possibility of emanating a legislative decree by the Parliament also for the definitive resolution on international treaties, agreements or acts that entail arduous burdens or commitments to the national heritage.

⁵⁰ L.P. Faro Jr. *Direito Público Internacional*, Rio de Janeiro, Haddad, 1956; G.B.M. Boson, *Curso de Direito Internacional Público*, Belo Horizonte, Bernardo Alvares, 1958; C.A. Mello, *Curso de Direito Internacional Público*, Rio de Janeiro, Freitas Bastos, 1967; O. Litrento, *Manual de Direito Internacional Público*, Rio de Janeiro, Forense, 1968.

⁵¹ A.A.M. Franco, *Curso de direito constitucional brasileiro*, v. 1., Rio de Janeiro, 1958, p. 191.

⁵² Ivi, p. 201. See also the same author, *Estudos de direito constitucional*, Rio de Janeiro, Forense, 1957.

⁵³ Among the manuals of constitutional law from the silent times on the subject of reception of international law are N.R.M. Lima, *Compêndio de Direito Constitucional*, São Paulo, Juriscredi, 1971; F.I.D. Cavalcanti, *Direito Constitucional e Instituições Políticas*, Bau-ru, Jalovi, 1986; P. Jaques, *Curso*

- de *Direito Constitucional*, Rio de Janeiro, Forense, 1987.
- ⁵⁴ Art. 8, I; 47, I; 83, VII e VIII.
- ⁵⁵ R.B. Magalhães, *A Constituição Federal de 1967 comentada*, to I, Rio de Janeiro, José Konfino, 1967, p. 165.
- ⁵⁶ Magalhães, *A Constituição Federal de 1967 comentada* cit., p. 165.
- ⁵⁷ Accioli, *Instituições de Direito Constitucional* cit., p. 163.
- ⁵⁸ M.G. Ferreira Filho, *Comentários à Constituição Brasileira*, vol. 2, Rio de Janeiro, Forense, 1974, p. 139.
- ⁵⁹ Ivi, p. 140.
- ⁶⁰ *Ibidem*.
- ⁶¹ *Ibidem*.
- ⁶² *Ibidem*.
- ⁶³ Ivi, p. 141.
- ⁶⁴ M.G. Ferreira Filho, *Comentários à Constituição Brasileira*, vol. 2., Rio de Janeiro, Forense, 1974, p. 141.
- ⁶⁵ The Institutional Acts were legal norms issued between 1964 and 1969, during the civil-military dictatorship, by the commanders of the army, navy and aeronautics or by the President of the Republic, with the support of the National Defense Council, without any action of the Legislative.
- ⁶⁶ BRAZIL. Federal Supreme Court. RE 80.004 (1977).
- ⁶⁷ Because the omission, and by constitutional custom, it is understood that ratification, after the approval of Congress, is also the responsibility of the President of the Republic and implied in the act of «celebrating». See, R. D. Gabsch, *Aprovação de tratados internacionais pelo Brasil: possíveis opções para acelerar o seu processo*, Brasília, Funag, 2010. The process of incorporation concludes with the Executive by arranging for the deposit of the instrument of ratification at the place agreed in the international act, and shortly thereafter issuing Executive Decree, promulgating and publishing the text internally.
- ⁶⁸ J.F. Rezek, *Direito Internacional Público*, São Paulo, Saraiva, 2013, p. 84. The Supreme Court commented on the topic in Letter Rogatory n. 8279-4. (1998).
- ⁶⁹ The practice of reception often entailed slow processes, as happened, for example, with regard to the main international human rights treaties adopted by the UN and ratified by Brazil, which in the period prior to 1988 had an average ratification time of approximately 7 years and 9 months, a noticeably shorter period for the same type of treaty if signed and ratified after the promulgation of the 1988 Constitution, to approximately 4 years and 11 months. The reception of treaties from Mercosur lasts 3 years on average. Delay is not only focused on legislative activity, but often on the Executive's delay in informing Congress, as well as the delay in enacting the application of the treaty or convention internally. Information available on <http://tbiinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CMW&Lang=en>, may 2019. The developments of incorporation via Executive Decree are well observed in the different interpretations and valuations that the Supreme Court has given to the instrument over time. See, in this regard, C.D.A Mello, *Direito constitucional internacional: uma introdução*, Rio de Janeiro, Renovar, 2000², p. 292.
- ⁷⁰ Art. 49, I, and art. 84, VIII, respectively. On dissonances, see J. F. Rezek, *Parlamento e tratados: o modelo constitucional do Brasil*, in «Revista de informação legislativa», XLI, 2004, n. 161, p. 138; A.P.C. Medeiros, *O poder de celebrar tratados: competência dos poderes constituídos para a celebração de tratados à luz do Direito Internacional, do Direito Comparado e do Direito Constitucional Brasileiro*, Porto Alegre, Sergio A. Fabris, 1995, p. 481; A.P.C. Medeiros, *O Brasil e os novos desafios do direito dos tratados*, in L.N.C. Brant (ed.), *O Brasil e os novos desafios do direito internacional*, Rio de Janeiro, Forense, 2004, p. 489. In the same sense, A.P.C., Medeiros. *Parecer do Consultor Jurídico do Ministério das Relações Exteriores*, de 21/03/2000, in A.P.C. Medeiros (ed.), *Pareceres dos consultores jurídicos do Itamaraty*, v. IX, 1990-2000, Brasília, Funag, 2009, p. 265; R.D. Gabsch, *Aprovação de tratados internacionais pelo Brasil* cit., p. 166.
- ⁷¹ On the differentiation in Brazilian literature between simplified agreements and executive agreements, see J. G. Rodas, *Os acordos em forma simplificada*, in «Revista da Faculdade de Direito da Universidade de São Paulo», LXVIII, n. 1, 1973; Medeiros, *O poder de celebrar tratados* cit., p. 131.
- ⁷² About the mentioned practice: A.L.P.B. Lupi, *O Brasil é dualista? Anotações sobre a vigência de normas internacionais no ordenamento brasileiro*, in «Revista de informação legislativa», XLVI, 2009, n. 184, p. 37. J.C. Magalhães, *O Supremo Tribunal Federal e o direito internacional*, Porto Alegre, Livraria do Advogado, 2000, p. 67. See Federal Supreme Court. Extradition n. 905. Belgium (2005), pp. 33-40.
- ⁷³ Jurists in favor of such a position include H. Accioli, L. Carneiro, J. H. Pereira de Araujo and G. E. do Nascimento e Silva, all based on the constitutional custom developed in Brazil, a phenomenon that would make the constitutional norm more flexible. Important jurists for Brazilian law such as C. Bevilacqua, Pontes de Miranda, J. Barbalho, T. Cavalcanti, C. Maximiliano, H. Valladão and V. Marotta Rangel are opposed to this practice, stating that the Constitutions do not present the possibility of international agreements not being subject to legislative consideration. F. Rezek states that the simplified treaty modality is infrequently used in Brazil and totally against the law. Rezek, *Direito Internacional*

Público cit., p. 84, however see p. 86.

- ⁷⁴ L. Lai, *Il controllo parlamentare sul potere estero del Governo: l'autorizzazione alla ratifica dei trattati internazionali in prospettiva comparata*, in *Il Parlamento della Repubblica: Organi, procedure, apparati*, v. III, Roma, Camera dei Deputati, 2013, p. 1007.

⁷⁵ *Ibidem*.

- ⁷⁶ With the constitutional provision and the interpretation of the Supreme Court, it is understood that such agreements are subject to the Constitution, having equivalence to the constitutional amendment (Brazilian Federal Constitution, art. 5, § 3) or the 'supralegal norm' in RE 466,343 and RE 349,703 (2008).

- ⁷⁷ In this sense, the National Tax Code (1966), art. 98; Federal Supreme Court. Ap. Civ. 9,594(1954); Ap. Civ. 8,332(1944); HC 24,637(1932).

- ⁷⁸ In restrictive interpretation, RE 80,004 (1977), the Supreme Court states that treaties and conventions override later domestic federal law in cases of contract treaties, understood as those that create subjective legal situations, such as agreements, of commerce.

- ⁷⁹ Federal Supreme Court, ADI n. 1,480 (2001).

- ⁸⁰ The convention was incorporated into domestic law by Executive Decree n. 7,030 (2009).

- ⁸¹ J. Dolinger has yet another exception, based on the specialty criterion of the international extradition treaty. It is evident, however, that the exception presented by Dolinger does not constitute 'supralegality' of the international norm incorporated into the internal legal system, but fits as a criterion of antinomy solution, according to the positivist doctrine and based on the understanding of the Supreme. See, regarding J. Dolinger, *Direito Internacional Privado. Parte Geral*, Rio de Janeiro, Renovar, 2005⁸, p. 105.

- ⁸² C. Finkelstein. *Hierarquia das normas no direito internacional. Jus cogens e metaconstitucionalismo*, São Paulo, Saraiva, 2013, p. 173.

- ⁸³ Decree Law n. 4,657 (1942), art. 4.

- ⁸⁴ Such predictions are present in the Brazilian Constitution of 1891, in art. 59, d; 60, e; in the 1934 Constitution, in art. 76, d; 81, e; in the 1937 Constitutional Charter, in art. 101, d; in the 1946 Constitution, in art. 101, I, d; 105, § 3, c; in the 1967 Constitutional Charter, amended by Constitutional Amendment 1/69, in its art. 125, II.

- ⁸⁵ Accordingly, the opinion of 11/23/1923, by C. Beviláqua, legal adviser to the Ministry of Foreign Affairs, in Rezek, *Direito internacional público cit.*, p. 214.

- ⁸⁶ On the subject, see Federal Supreme Court, AC n. 9,684 (1983); n. 9,701 (1987); RE n. 94,084 (1986).

- ⁸⁷ Since then, the Supreme Court has waived the immunity of the jurisdiction of States in cases of knowledge of labor causes, civil liability and litigation arising from ordinary situations in which the foreign State engages in acts of commerce or acts *more privatorum*. This orientation was confirmed in the judgment of RE 222,368-AgR (2003).

- ⁸⁸ On the subject, see Federal Supreme Court. ACO 526 (2013) and ACO 527 AgR (1998).