

Human Rights from a Latin American Perspective

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Abstract:

This paper deals with human rights from a Latin American perspective and, more specifically, from the Brazilian one. Human rights are present in the Brazilian Constitution, and Brazil, like the other Latin American countries, adopted the majority of international conventions about human rights. The real problem isn't the absence of a normative or formal prevision in constitutional texts, which is common in almost all Latin American nations, but of their implementation, for the Judiciary, which is now in a hard position and must implement public policies in view of the omission of the Executive and Legislative Powers in implementing them. From an international perspective, we examine the international protection of human rights and Brazilian law, with an emphasis on the Inter-American Human Rights System and on the constitutional problems that arose with the signing of the Treaty of Rome which created the International Criminal Court. Finally, we work out the domestic and international perspectives of the issue of social justice, human rights and poverty.

1. Introduction

This paper deals with human rights from a Latin American perspective and, more specifically, from the Brazilian one. Brazil, in a way, and in spite of differences and peculiarities of each country located in Central and South America, has features that are the same, either because of its Iberian and Catholic past or because of the similar permanence of social, economic and legal inheritance, marked by a historic economic inequality and a chronic presence of negative social indicators.

On the other hand, fundamental rights can be studied under two different points of view (perspectives): internal (national) and international.

From the internal perspective, we will examine the situation of fundamental rights in the national constitutions of the Latin American states, which essentially incorporate all the advances brought from the international field regarding these rights. However, the problem of fundamental rights today is not the absence of a normative or formal prevision in constitutional texts, which is common in almost all Latin American countries. The difficulty consists of their implementation, for the Judiciary, which is now in a hard position and must implement public policies in view of the omission of the Executive and Legislative Powers in implementing them.

From the international perspective, we will examine the international protection of human rights and Brazilian law, with an emphasis on the Inter-American Human Rights System and on the constitutional problems that arose with the signing of the Treaty of Rome which created the International Criminal Court.

Finally, we work out the domestic and international perspectives of the issue on social justice, human rights and poverty.

2. The Constitution and the Fundamental Rights

Latin American countries generally follow the European Continental Tradition (Civil Law), in which a legislative act of the legislative branch (the Constitution) is usually elaborated with more complex requirements on the procedure and requires a number of votes necessary for approval hierarchically superior to other legislative acts (laws, decrees etc.).

In almost all Latin American countries, the Constitution has become a kind of normative support for both the organization of the Powers and of the State, and for individual, political, nationality, collective, social and economic rights.

A higher position of the constitution in relation to the internal laws placed the constitutional rules as a safe repository of rights that an occasional majority of a body of parliamentarians would not be able to affect or change. In addition to formal (quorum, two rounds of voting etc.), circumstantial (the Brazilian Constitution shall not be amended while federal intervention, a state of defense or a state of siege is in force) and temporal limits (a proposal of amendment that is rejected or considered impaired shall not be the subject of another proposal in the same legislative session, etc.) there are material limits to reforming the Constitution, in order to keep inviolate the rights that it established. The Brazilian Constitution, Paragraph 4 of article 60 says: "No proposal of amendment shall be considered which is aimed at abolishing: the federative form of State; the direct, secret, universal and periodic vote; the separation of the Government Powers; and individual rights and guarantees." Several other Latin American constitutions created similar and adamant provisions, in order to protect the fundamental rights. These provisions (limits) are called "constitutional petrous clauses".

Restrictions are, however, possible, but only in exceptional situations. In Brazil, only when the actually infrequent state of defense or a state of siege is in force, for some rights. But there will be always the control by Parliament, that remains in operation until the end of coercive measures.

The role of fundamental rights in the constitutions of most Latin American countries follows the already large positivation effected on the international field. Therefore the mention of the existence of the phenomena of "constitutionalization of international law" or the "internationalization of constitutional law." International Law has become virtually a real source to national constitutions, which must "comply with international minimum parameters aimed at protecting human dignity, converted to an undischarged assumption of all constitutionalisms"¹.

As an example, let us take the Brazilian Constitution, which opens with the Fundamental Principles. Then Title I says that the "The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state and is founded on sovereignty, citizenship, the dignity of the human person,

¹ Piovesan, Flavia. *Globalização Econômica, Integração Regional e Direitos Humanos*, at 59. Article in *Direitos Humanos, Globalização Econômica e Integração Regional: Desafios do Direito Constitucional Internacional*. São Paulo: Max Limonad, 2002.

the social values of labor and of the free enterprise and political pluralism”, and “All power emanates from the people, who exercise it by means of elected representatives or directly, as provided by this Constitution”.

This Title says that “The Legislative, the Executive and the Judicial branches, independent and harmonious among themselves, are the powers of the Union” (Article 2), and that “The fundamental objectives of the Federative Republic of Brazil are to build a free, just and solidary society; to guarantee national development; to eradicate poverty and substandard living conditions and to reduce social and regional inequalities; to promote the well-being of all, without prejudice as to origin, race, sex, colour, age and any other forms of discrimination” (Article 3). Finally, as fundamental principles, “The international relations of the Federative Republic of Brazil are governed by the following principles: national independence; prevalence of human rights; self-determination of the peoples; non-intervention; equality among the States; defense of peace; peaceful settlement of conflicts; repudiation of terrorism and racism; cooperation among peoples for the progress of mankind; granting of political asylum” (Article 4). The sole paragraph of Article 4 says that “The Federative Republic of Brazil shall seek the economic, political, social and cultural integration of the peoples of Latin America, viewing the formation of a Latin-American community of nations.”

In the Brazilian Constitution, the Title II is about Fundamental Rights and Guarantees (with these chapters: Chapter I - Individual and collective rights and duties; Chapter II - Social rights; Chapter III – Nationality; Chapter IV - Political rights; Chapter V – Political parties).

The rules defining fundamental rights and guarantees were applicable immediately.

Title VII is about the economic rights, and Title VIII is entirely about social rights, with a large provision in the fields of health, social security and assistance, education, cultural rights, sports, social communication, environment, family, children, adolescents, the elderly and Indians.

The Brazilian Constitution is very systematic in comparison with the US or UK Constitution because it followed a model set by European constitutions, like those of Portugal and Spain, which are “*dirigiste*”.

This type of Constitution (*dirigiste*) is not only concerned with affirming individual rights versus the State, in the classical sense (where the State has a negative presence and the Constitution functions as a restraint to State power). A *dirigiste* Constitution provides for State intervention in the economy, with a positive presence. It brings about plans, programs, and goals for further action, and has a prescriptive character with a great deal of non self-executing rules dependent on law (complementary legislation). This consists of programmatic norms, depending upon administrative measures and material operations.

If the government fails to carry out certain activities, its non-action is unconstitutional by omission. Moreover, the government can be judicially compelled to carry out constitutional rights. We will show the aspects of the judiciary's intervention next.

3. The role of the Judiciary Power and the Realization of Social and Economic Rights

It is known that individual freedom, which is constitutionally protected, claims "rights of defense" against the State, so that the latter refrains from undue state interference in the private sphere. But it is not enough to consider freedom in the negative sense, since many individual choices can only be realized with the creation of preconditions that social rights are the only way to guarantee. That is the moment to leave those "without guarantees" freedoms, already described by so many authors. Freedom must thus be treated also in the positive sense, through the so-called "rights to something" or "rights to services".

These "rights to something," or social rights, as they have been repeatedly referred to, are not rights against the state, but rights through the state, requiring from the Public Power some material or normative (regulatory) provisions. They seek the equalization of unequal social situations, creating practical conditions for effective enjoyment of rights. It was a pre-Aristotelian proverb to say that equality is to treat equally the same and the unequal unequally, to the same degree that they are unequal. After, we learned that between the strong and the weak, sometimes it is liberty that enslaves and the law (in the sense of state intervention) that liberates.

Individual rights unaccompanied by positive entitlements from the state often don't have real value (it is necessary to remember the concept of "nominal constitution") or, on the other hand, at a formal plan of freedom and equality, whereby these rights are merely mentioned in the legal texts and absent in fact. Social conflicts, the growth of the urban population and the emergence of the working class, among many other phenomena of the contemporary age, made inevitable the idea that the State should not limit its services, in the absent and merely negative practice of not intruding into the sphere of the private individual's rights. The police State has to move over and be replaced with the welfare State, a State that creates development, that intervenes and that provides services.

The social rights chapter has become part of the constitutional texts. Nevertheless this, in and of itself, does not guarantee its effectiveness. The firmness of the Judiciary is more effective to require the services desired by society, as set forth in the Constitution, than the lengthy and ineffectual formalism and "programmability".

In Brazil now it is fashionable to discuss the limits faced by the Judiciary while it seeks to enforce social rights.

The Judiciary as of now, according to Mauro Capeletti, in his book "Juizes Legisladores" [freely translated "law-making judges"], has to live with the boom of litigation resulting from the current interventionism itself, on the part of the welfare state, and has become or is due to

become, after all, the third giant, “capable of controlling the mammoth lawmaker and the leviathan-like administrator”².

The definition of public policies traditionally has been reserved for the Legislative and Executive Powers in accordance with the “discretionary reserve” that has always been guaranteed to them. It is intended, as of now, that faced with rights that cannot be ignored by the state’s authorities (which would thus correspond to an existential minimum that the individual would be entitled to), the Judiciary may act, making good on the wishes related to these rights, regardless of budgetary forecasts, written rule or a decision on the part of the Executive and Legislative Branches to that effect.

This understanding, while it doesn’t give prestige to the “discretionary reserve” in favor of the Legislative or Executive Powers, is offensive to the principle of “separation of powers.”

The discourse of “existential minimum” sometimes faces the impossibility of full judicial protection (by the material or juridical impossibility to give some social concession or benefit, that corresponds to the idea of “reserve of the possibilities”) and sometimes stumbles in the exact comprehension of what is the essential minimum to be protected by the Judiciary.

A “reserve of the possibilities” in its factual aspect is more easily assimilated, even by those who see no limits to the role of Judiciary in the case of implementation of social rights. Thus, the complete absence of material means is almost always seen as an obstacle to the legal acknowledgement of the right to some service.

The problem becomes more severe when one contemplates the legal sense of “reserve of the possibilities” or “reserve of the doable”. In this case, one is not faced with the total lack of resources; one is facing only the relative absence thereof, such as, for instance, in the case of the lack of provision, in the budgetary law, for the expense (corresponding to not choosing the entitlement seen as a priority for the country’s authorities). The resources do exist, but they were allocated to another public destination. Many see that the administrative discretionality cannot be seen as existent when the state’s omission results in not complying with a fundamental right, especially when that is related to the existential minimum.

How can this problem be overcome?

It is not infrequent that judgments invade the field of administrative discretion or of the “reserve of the possibilities” to enforce the Public Power to do or give something. In this case, the Judiciary should have to choose the appropriateness and desirability of the practice of certain measures.

How is it possible to ensure health care to a disabled individual, when we are faced with the need to ensure the “existential minimum” related to the right to live, overriding the action of

² Cappeletti, Mauro. Juízes legisladores. Porto Alegre: SAF, 1988.

building a road or a hydroelectric dam (by forcing the displacement of the resources allocated to these works), that might, respectively, provide quick access to a hospital or ensure the operation of an ICU in this hospital, and thus, for a much larger number of people?

How can one position himself or herself when facing plans such as the construction of additional lanes for an existing highway in a given area of the country (whose poor condition causes accidents and loss of life) when the budgetary resources are limited and have been allocated to the construction of another road, in the extreme north of the country, for instance, that as the legislator and the Executive Branch see it, can save more lives and be of more use to the country's community as a whole?

How can one determine, based on the consideration of the right to live, that the social services bear the cost of an organ transplant abroad, at very high costs, as if the individual's interests would always override the general population's interest? What are the effects of it on the costing of social security, and what is the impact caused by the lack of resources, for example, on the queues at the outpatient clinics and how many lives has this jeopardized or extinguished?

How to act when faced with what is affordable for the government? How to recognize the judge's the ability to judge, if the complexity of the use of public resources or the consequences of the monocratic judgment are unknown? How to produce this kind of interference on the pretense of good governance, made by Powers (Legislative and Executive) whose officers were democratically elected to act with possible discretion to distribute limited resources for unlimited needs?

In this case it is often said that an individual's decision is not capable of affecting the country's finances, and thus it is doable³. But how can we measure this, considering the possibility of causing further repeated interventions to take place?

What is the sense in changing the legal public policies, turning the judge into a manager, and often a manager that can only see the limits of his or her jurisdiction and the object claimed in the legal action, instead of seeing the needs of the population in general and the universe of the public policies to be adopted?

For certain and at this point, there is an absence of the necessary use of the rule of weighting that Robert Alexy uses in his "Theory of Fundamental Rights"⁴, since no principle, even the principle of protection of life, is absolute.⁵. All we have to do is remind ourselves of the conflict between an individual's life and the life of a group of people. The Supreme Court of

³ See the judgment, by the Superior Tribunal de Justiça (Superior Court of Justice), AgRg 888.325/RS.

⁴ See Alexy, Robert. *Teoría de los derechos fundamentales*. Madrid: CEPC, 2001, and *Constitucionalismo Discursivo*. Porto Alegre: Livraria do Advogado Editora, 2007. See too Ávila, Humberto. *Teoría dos princípios*. São Paulo, Malheiros, 2003.

⁵ See the judgments, by the Supremo Tribunal Federal (Supreme Court of Justice), RE 436.996-6/SP and RE-AgR 393175.

Germany has ruled that the dignity of a human being is not hurt when the exclusion of legal protection is not caused by a lack of consideration or the underestimation of the individual, but by the need to meet a public requirement. Would it be possible that there are no public interests in the “rights to something” theme, just individual interests? Alexy does not believe in the existence of any absolute principle and principles, for him, are both about individual rights and about the community’s property or interests. Principles aren’t only related to individual rights. And for Alexy, when there is a conflict between principles, the solution calls for the use of the proportionality rule, investigating the adequacy (whereby the smallest loss is preferred), the necessity (also referring to the factual possibilities – if the means are appropriate to the purpose) and proportionality in the strict sense (now juridical possibilities – if the sacrifice of one right is justified by the preservation or affirmation of an other right). After all, principles are no more than optimization mandates, which order that something be done in the greatest extent possible, but within the existing juridical and factual possibilities. Only rules are used in the sense of all or nothing.

Following the division made by Robert Alexy, the "rights to benefits" in a positive sense involves rights to juridical and rights to material (*de facto*) benefits. They are the opposite of "defense rights" and involve (a) rules of protection (state impositions – positive and negative - over particulars to protect other individuals), (b) rules of organization and procedures (competences in private law, legal and administrative procedures, organizational norms in the strict sense and electoral rules), and (c) material benefits from the state.

"Rights to benefits" can be binding rules, such as "existential minimum" (which in truth is merely the result of a previous “deliberation” or “balancing”), or principles, but valid only *prima facie*". And, according to Alexy’s Theory, even binding rules can be relativized (by the phenomenon of adscription to the principles, when “balancing” became necessary).

Alexy talks about the “competence argument”, according to which the budgetary policy cannot be controlled by the Judiciary Branch. But at the same time, this author refers to the "paradox of democracy", considering that major decisions such as those relating to fundamental rights may not be in the hands of a simple parliamentary majority. After all, the fundamental rights also bind the legislators. Separation of powers thus corresponds to a principle that may be subjected, once the conflict is established, to consideration or to a “deliberation” (“balancing”). If there is a small sacrifice to the "principle of competence", then the Judiciary wins the ability to act. The problem must be overcome on a case-by-case basis, and no prior solution is feasible, even on what the substantive content of the so-called "existential minimum" is. The analysis about this content always depends on the circumstances of time and place. The more one is sure about the existence of a fundamental right, the more significant is the possibility of the Judiciary Branch’s intervention. This is the "epistemic law of the or balancing”: the more intense is the intervention on a fundamental right, the more certain must the premises be that provide the underpinnings of such interventions. Formal principles, such as democracy, can prevail only when connected to other material principles. This, according to Alexy, is the “law of connection”.

The Judiciary Branch has the mission of distinguishing, in the constitutional order of a State, among the required contents, the possible contents and the impossible contents. When operating in the realm of possibility, it chooses the possible, excludes the impossible, demands the necessary. The understanding of what can be demanded, that is, of what is required, is an open field. One can think that this field can be filled or defined by choosing the “principle of efficiency,” currently placed by the Brazilian Constitution side by side with legality, morality, publicity and impersonality, as something that can be controlled by the Judiciary Branch. In addition, Law # 9.784/99 adds (as a clarification) the criteria of reasonability and proportionality, when it regulates the administrative process within the Federal public administration. And efficiency cannot be seen as a blocking mechanism and solely actionable in a negative sense, making it impossible for the state to perform inefficient actions. One must seek, with the application of the principle of efficiency, to ensure the provision of services by the state, which is desired by the individual, if such provision is required and possible. The state, when it does not provide the services that are required and possible, is acting inefficiently. Sometimes one must see that is adequate that Judiciary Branch decisions result in budgetary consequences. And the Judiciary Branch is an indispensable agent for this integration.

4. The International Protection of Human Rights and the Brazilian Law

4.1. The international and the internal validity of treaties.

International treaties are, for Brazil, written law, with international validity for any State or only for the States-parties.

Treaties for third-party states are justified (among other reasons) as valid by the fact that there are treaties which disseminate cogent international law rules (*jus cogens*), affirming international law principles or customs that are already mandatory. The fact that these international rules (principles or mandatory customs) come to be rendered into treaty between determined States does not impede their applicability in any other State whatsoever.

Beyond international validity, treaties may attain internal validity, integrating within the national juridical system of a State-party. In this case, the problem arises in knowing the status of the treaty rules in relation to internal rules. And international validity doesn't always mean immediate internal validity.

For international validity, the treaty must be celebrated by a capable party (State or international organization, by rule) and capable representative (authorized signing agent), in addition to having lawful grounds.

A state may declare its consent to be bound by a treaty through diverse means. Signature and ratification are listed in the Vienna Convention on Treaties, 1969, among other means.

This Convention—though not ratified by Brazil—is considered applicable within internal law, to the extent that a particular clause (of a treaty) in question may be regarded as relating to a cogent rule of international law (*jus cogens*).

The mere signature of a treaty is considered a definitive means of expression of consent if deemed as such by the treaty or negotiators, or if it is entailed by the full powers of the representative. This is called ‘full’ signature, and pertains to executive agreements in Brazil. These treaties (by not incurring any charges or restrictive obligations to the national patrimony) need not pass through the preliminary scrutiny of the National Congress. Nowadays, in Brazil, nearly half of all treaties are executed without examination in the Legislature, since it is understood that they do not entail charges or restrictive obligations, or that they result from other restrictive treaties already authorized by Parliament, among other exceptions.

Ratification is a way of expressing consent that occurs after the preliminary signature (done under pledge of ratification) of the treaty, carried out by the authorized agents in charge of negotiating, formulating, and authenticating it. The ratification implies the definitive expression of agreement by the competent State authority.

The ratification procedure serves the purpose of conferring greater security with respect to international relations. By postponing the definitive demonstration of agreement to a treaty, one can: gauge the possible excess of power given to the signing agent; circumvent any fundamental shift in the circumstances or an undesirable action (whether by error, fraud, or coercion); better evaluate the basis and consequences of the treaty; permit legislative competition in the development of consent (thus offering a greater chance for democratic control of the State’s actions); confirm the constitutionality or legality of the pact (applied to internal law); and discern any necessary adjustments to the text not seen during the negotiation.

In Brazil, a treaty text (if it is not an executive agreement) signed by the authorized signing agent is sent to the national congress through a message signed by the President of the Republic. Once in Parliament, it goes on to follow the process foreseen in the House of Representatives and Federal Senate’s Internal Rules, generally undergoing analysis in the Foreign Relations Committees and later the Constitution, Justice, and Editorial Committees. While the first committee weighs in on the merit of the treaty, the second looks after its constitutionality, legality, juridical legitimacy, regimetal accuracy, and legislative procedure (and eventually, still, its merit). Other committees may also comment on the treaty, if the content pertains to their capacity. In the House of Representatives’ Foreign Relations Committee, an official appraisal is already included within the Legislative Decree, a type of legislation which indicates the acquiescence of the Legislature to the terms of the treaty text, in such an event. Once the committee makes its assessment, the process becomes urgent. The text is considered approved upon obtaining the simple majority vote of those present in each Legislative chamber, in committees and in full sessions (in single debate). In the Senate, the Internal Rules of Procedure allow that the Foreign Relations and National Defense

Committee evaluates, definitively, international treaties and agreements, with an anticipated appeal to the full session, signed by at least one-tenth of the members of the Senate.

If approved, it is the President of the National Congress's job to write the Legislative Decree, and to determine its publication, even if there has been an amendment in the Senate (in which case the House of Representatives has the last word since it evaluates amendments). If rejected, a message must be sent to the President of the Republic giving an account of the deliberation ending in rejection.

Once the Legislative Decree is published, the President of the Republic may complete the ratification of the treaty, issuing a letter of ratification. It is once again a matter of discretion, not bound by any kind of deadline, and retractable as long as the letter's deposit has not been carried out, nor has the exchange of instruments been effected.

In Brazil, this ratification (or signature, in the case of an executive agreement) effects the treaty's validity on the international level, with consequential international ramifications if obligations are unfulfilled.

International validity does not always mean immediate internal validity.

Once the treaty is ratified by the President of the Republic, internal promotion is necessary for it to become valid; this is done through the issuance of a presidential decree. This decree is simple in form, alluding to the fact that a signature has been produced with a pledge to ratify (or full ratification in the case of executive agreements), a legislative decree has been issued (proving the legislative authorization of ratification or compliance), and a letter of ratification (or compliance/adherence, if that is the case) was sent. The presidential decree gives an account of when international validity became effective (since there could be a *vacatio* - a certain interval after the last ratification -, or because of the necessity of a minimum number of States-parties for the international application of the treaty to begin), and heeds the principle of publicity, so that no Brazilian subject is obligated to guess when a treaty becomes internationally valid, in order to understand that it has been introduced into the Brazilian legal system.

4.2. Status of treaties.

With respect to the status of international treaties in Brazilian law, a special observation should be made about treaties on trade and treaties concerning human rights.

First, we will discuss treaty status in general, which says nothing of trade and human rights treaties.

In Brazil, treaties in general are given the same status as ordinary laws, and as such are subject to the control of constitutionality before any judge or tribunal, since ordinary laws are of a lesser status (hierarchy) than the Constitution.

4.3. Treaties and trade.

Treaties on trade, however, may include general and abstract clauses (in which case they are called normative treaties) as well as special and concrete ones (representing no convergent obligations). Normative treaties involve an agreement of convergent interests, with respect to common/shared objects and obligations. Contractual treaties involve opposite interests which arrive at a consensus, where the obligations are contrasting and different. An example of a normative treaty is one that establishes a uniform standard for a particular commodity. An example of a contractual treaty is one that establishes the sale of this commodity in exchange for a certain value.

Contract treaties are considered superior to Brazilian internal legislation, even in the tributary field, as decided by the Supreme Federal Tribunal, and even if the rule contradicting the treaty has constitutional status. This serves to preserve vested right or the perfect juridical act, also guaranteed by the Brazilian Federal Constitution in a specific provision. The opposite occurs with normative treaties in the commercial or tributary field, which are considered equivalent to normal laws and may be refuted accordingly. It is worth noting that normative treaties contradicted by new internal laws are not definitively revoked or excluded from the legal system. Such treaties are merely suspended, becoming effective once again if the newer and contradictory internal law is revoked. This is so because internal laws in Brazil cannot serve as the means by which the international norms and obligations of countries are internationally eliminated (however, only internally, while they are still valid).

4.4. Treaties and Human Rights.

Nowadays human-rights treaties may enter into constitutional hierarchy, if approved by the same quorum and procedure used in constitutional amendments. This innovation stems from Constitutional Amendment number 45, approved in December of 2004.

Until this amendment, human-rights treaties in Brazil are understood to have the same status as ordinary laws, as do treaties in general, in spite of the foresight of Brazilian Federal Constitution (1988), in the second paragraph of article 5, that “the rights and guarantees expressed in this Constitution do not exclude others resulting from the judicial system or from principles adopted by the judicial system, or from international treaties of which the Federal Republic of Brazil may be part.”

For many jurists and even some judges and some tribunals, the paragraph referred to confers constitutional status to human rights treaties, yet this reasoning was not accepted by the Supreme Federal Tribunal in a leading case concerning civil imprisonment of an unfaithful depositary (expressly accepted by the Brazilian Constitution and prohibited by the Inter-American Human Rights Convention, ratified by Brazil in 1992, after the current Constitution). Essentially, the Brazilian High Court’s understanding was based on the fact that treaties are approved by the National Congress (House of Representatives and Senate) by

a simple majority of those present in each house, and after only one round of voting (after which they are ratified), whereas alteration of constitutional text (by constitutional amendment) requires two rounds of voting in each chamber (House and Senate) and a qualified majority of three fifths of their members. The Court reasoned that because of the simplicity of their approval, international treaties could not do what only constitutional amendments (through an exceptionally demanding procedure) were capable of doing.

The solution to the impasse was to introduce, by amendment to the Federal Constitution, a provision granting constitutional status to human rights treaties if the same procedure and quorum were followed and respected as those followed and respected in the approval of constitutional amendments, which are capable of altering or expanding the list of human rights in the Constitution.

But there was, after the amendment, a great change regarding the Brazilian High Court's understanding. A modification of its composition created the idea that human rights treaties are under the constitution but over the internal law⁶.

This same constitutional amendment (EC 45/2004) hastened to guarantee the internal validity of the Rome Treaty, which created the International Criminal Court, adding a fourth paragraph to article 5 of the Constitution, to the following effect: "Brazil shall be submitted to the jurisdiction of International Penal Tribunal to which creation it had manifested agreement". Thus, Brazil expedited the resolution of any difficulties that could result in relation to the unconstitutionality of the Rome Treaty. As it is well known, the jurisdiction of the International Criminal Court is supra-national, causing the Brazilian Federal Supreme Tribunal to concede its role as the terminal stage for the resolution of crimes which pertain to the capacities of the international court. Thus, in the footsteps of numerous other countries, Brazil affirmed the supra-nationality of the ICC (which has not been done by the USA), effecting an opening to international human-rights law to an extent that was previously unimaginable.

In Argentina, by way of example, the most relevant international treaties on human rights have constitutional hierarchy (art. 75, par. 22 of the Constitution).

4.5. The United Nations System and the Latin American Countries

As already pointed out, Latin American countries have settled tradition concerning to the incorporation of adjective and substantive rules of international law, through the ratification and adherence to international treaties on human rights. These rules enter into the internal law directly, if the national constitution allows it, or by a legislative act. So, the problem is not the existence of standards of protection of human rights, but rather in their internal effectiveness.

Brazil adopted the UN Human Rights Conventions of 1966 and is part of virtually all treaties

⁶ See judgement by the Supremo Tribunal Federal (Supreme Court of Justice), RE 349703/RS.

on human rights created since the edition of the UN Universal Declaration of Human Rights (1948).

Following the guidelines of the Declaration and of the Vienna Action Program of Human Rights (1993), Brazil has already adopted the National Program for Human Rights (1996) and created the Human Rights National Secretariat (1997). The activities of this Secretariat and of the International Criminal Court shall be highlighted below.

4.6. The Inter-American System

The Inter-American system is made up not only of substantive rules, since the Pact of San José of Costa Rica (1969), the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have been progressively active.

Since 1948 Latin America has been producing a large body of international rules in the field of human rights, even before, in certain matters, the production from the United Nations or of other regional systems, such as the European one. Examples include the following Conventions: American Declaration of the Rights and Duties of Man, American Convention on Human Rights "Pact of San Jose, Costa Rica," Protocol to the American Convention on Human Rights to Abolish the Death Penalty, Inter-American Convention to Prevent and Punish Torture, Inter-American Convention on Forced Disappearance of Persons, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, Statute of the Inter-American Commission on Human Rights, Statute of the Inter-American Court of Human Rights, Rules of Procedure of the Inter-American Commission on Human Rights, Rules of Procedure of the Inter-American Court of Human Rights, Charter of the Organization of American States, Inter-American Democratic Charter, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women "Convention of Belem Do Pará", Petition Form, Statute of the Inter-American Commission of Women, Inter-American Convention Against Corruption, Regulations of the Inter-American Commission of Women, Declaration of Principles on Freedom of Expression, Inter-American Convention on the Granting of Civil Rights to Women, Inter-American Convention on the Granting of Political Rights To Women, Inter-American Convention on Support Obligations, Inter-American Convention on the International Return of Children, Inter-American Convention on Conflict of Laws on Children Adoption, Inter-American Convention on International Traffic in Minors, Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, Convention on Territorial Asylum, Convention On Diplomatic Asylum and Convention On Political Asylum.

These conventions, in great measure, either have immediate applicability right away in the countries which adopt them, with even constitutional force, or only require the later introduction of internal rules with a view to their effectiveness, which occurs continually less.

And, without any doubt whatsoever, the Inter-American system revolves around the Inter-American Convention on Human Rights (1969), which foresaw executive bodies of prevention and repression of the violation of foreseen human rights.

The Court is qualified, under the terms of Article 62.3 of the Convention, to hear and determine cases of human rights violations. Brazil, for example, is Part State in the American Convention since 25th September, 1992, and recognized the contentious jurisdiction of the Court on 10th December, 1998. Argentina, in another example, is Part State to the American Convention since 5th September, 1984, the date in which it also recognized the contentious jurisdiction of the Court. Paraguay is part since 24th August, 1989, and recognized the contentious jurisdiction of the Court on 26th March, 1993. The same for Venezuela, on 9th August, 1977 and 24th July, 1981, respectively.

Thus, Brazil has brought two cases to trial (the cases of Damião Ximenes Lopes and Nogueira de Carvalho) and endured three protective measures from the Inter-American Court. Argentina up to this time, has already endured six contentious cases and three protective measures. Paraguay has also endured six contentious cases, and Venezuela also six other cases, beyond the thirteen protective measures. Today, twenty five American nations have ratified the Inter-American Convention on Human Rights⁷, and twenty-one accept the contentious jurisdiction of the Inter-American Court⁸. Only the nations of Antigua and Barbuda, Bahamas, Belize, Canada, Guyana, St Kitts and Neves, St. Lucia, St Vincent and the Grenadines and the USA aren't part to the Convention, certainly for reasons involving the maintaining of sovereignty, already overcome by the majority of countries of the continent for the sake of bringing about human rights.

Between 1979 and 2008, the Court issued 192 sentences, passed final judgment on 105 cases, gave out 75 protective measures and issued 21 consultations. Sixteen cases were awaiting judgment in 2008. Ninety-four cases are under supervision of fulfillment of the sentence (2008). The average time for judgment of contentious cases is 19 months, since the adoption of the new regulation in 2000. The rate of total or partial fulfillment of sentences issued is 81%⁹.

In Brazil, as in many other countries, the sentence issued after judgment of the contentious case by the Inter-American Court on Human Rights does not need internal acceptance, as

⁷ Trinidad and Tobago denounced the Convention. Nowadays, OAS members include Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Colombia, Costa Rica, Cuba, Chile, Dominica, Ecuador, El Salvador, United States, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Saint Kitts and Nevis, Saint Lucia, Saint Vicente and the Grenadines, Suriname, Trinidad and Tobago, Uruguay and Venezuela.

⁸ Costa Rica, Peru, Venezuela, Honduras, Ecuador, Argentina, Uruguay, Colombia, Guatemala, Suriname, Panama, Chile, Nicaragua, Paraguay, Bolivia, El Salvador, Haiti, Brazil, Mexico, Dominican Republic and Barbados.

⁹ See Annual Report of the Interamerican Human Rights Court (2008). In Spanish: <http://www.corteidh.or.cr/docs/informes/spa20081.pdf>.

foreign sentences in general depend on. The Court sentences are immutable in the national system and capable of suspending the effectiveness of any contrary national command.

In the Tamayo and Castillo Petruzzi case, the Court conceded to Peru the period of 6 months to adapt the internal legislation about treason and terrorism. In Argentina, something similar occurred as to the internal provision of double degree.

In fact, the recognition of the jurisdiction of the Court is inevitable for the nations which adhere to or ratify the Convention. It would not make sense to accept the content of the agreement and not to accept the mechanisms to guarantee the consecrated rights of the same. And, as was already established in 1923 by the Permanent Court of International Justice in the case of S.S. Wimbledon, the engagement of obligations for a nation is not an abandonment of sovereignty, for such engagement is exactly the attribute of sovereignty.

4.7. The Mercosul System.

Mercosul (Mercosur, in Spanish) today brings together formally Argentina, Brazil, Uruguay and Paraguay. Chile and Bolivia are associated nations and Venezuela awaits admission by all members of the bloc for its definitive entry. Thought of as a common market, it is today considered an imperfect customs union, or a free commerce zone in an implementation phase.

There was not, in Mercosul, something so explicit as the Treaty of Amsterdam (1997), in the scope of the European Union, as to the protection of human rights. This treaty introduced a serie of precepts on development of a new human rights policy in the scope of the European Union, founded on the principles of liberty, democracy, human rights and the state of Law, demanding the actuation of the Court of Justice for their protection, introducing the possibility of suspension of rights of member states in case of violation of human rights, and foreseeing the observance of the same rights by states that desire to sign co-operation, aid or commercial preference agreements with the European Union. This because the European Union is transformed from a decidedly economic organization into a political organization *par excellence*, human rights becoming, thus, more and more important in the extra and intra-communitarian fields.

In Mercosul, the wide field of human rights derived from the Inter-American system dispensed greater elaboration in this sense, which perhaps may also be explained by the phase of essentially economic integration which still exists today. Mercosul is still an intergovernmental institution, supranational bodies not having been established up until the moment.

This does not impede, however, that the economic agenda might have already been enlarged so as to achieve the foreseeing of cooperation and jurisdictional assistance in civil, commercial, and administrative work (Las Leñas Protocol, 1992), of protective measures to impede the irreparability of damage in relation to people, goods and obligations (Protective Measures Protocol, 1994), of protection to the consumer and to competition (Santa Maria

Protocol on International Jurisdiction on Consumer Relations, 1996; and the Defense of Competition in Mercosul Protocol), of child and adolescent protection (Agreement among the Part Nations of MERCOSUL and Associated Nations for Regional Cooperation for the Protection of Child and Adolescent Rights in Vulnerable Situations, 2008), of education and culture (Cultural Integration Protocol to Improve the Enrichment and the Diffusion of Cultural and Artistic Expressions of Mercosul, 1996; Protocol of Educational Integration for continuing post graduate studies at the Universities of the Countries of Mercosul, 1996; Admission Agreement for Titles and University degrees for the Exercise of Academic Activities in the member States of Mercosul, in the Republic of Bolivia and in the Republic of Chile, 1999; and Protocol of Educational Integration Recognition of Certificates, Titles and Primary and Middle Non-Technical Levels among Member States of MERCOSUL, the Republic of Bolivia and the Republic of Chile, 2002), of the environment (Expansion of Acts Referring to the Environmental Illicit constant of the General Plan of Co-operation and Reciprocal Co-ordination for the Regional Security of MERCOSUL, of the Republic of Bolivia and of the Republic of Chile, 2002, and various bilateral agreements), of work (Socio-labour Declaration of Mercosul; Agreements Against the Illegal Trafficking of Migrants among the Member States of MERCOSUL and the Republic of Bolivia and the Republic of Chile, 2004; agreements and studies for compatibility of work and social security standards), of legal or judicial cooperation (Agreement on Extradition among Mercosul, the Republic of Bolivia and the Republic of Chile, 1998; Agreement on Mutual Legal Assistance on Penal Subjects among Mercosul, the Republic of Bolivia and the Republic of Chile, 2001; Cooperation on Combined Police Intelligence Operations on Terrorism and Connection Violations among Member states of MERCOSUL, the Republic of Bolivia and the Republic of Chile, 2002; Combating Corruption on the Borders between Member States of MERCOSUL, the Republic of Bolivia and the Republic of Chile, 2002), and of access to the Justice (Agreement on the Benefit of Free Justice and Free Legal Assistance between Member states of MERCOSUL, the Republic of Bolivia and the Republic of Chile, 2000), among other matters .

The Protocol of Ushuaia on Democratic Commitment in MERCOSUL (1998) deserves mention. It is a matter of the democratic clause of Mercosul, when as an indispensable requirement of its members the adoption of the democratic regime. When there was the political crisis in Paraguay in 1999, this clause was invoked to suggest the expulsion of that country from Mercosul, which did not though occur. Resolution 1/93 of the Mercosul Joint Parliamentary Commission states that only subject to the democratic system, the objectives of the Treaty of Asuncion, which instituted Mercosul, shall be achieved.

5. The International Criminal Court and the Brazilian Constitution

5.1. The Ratification of the Rome Treaty by Brazil

In the case of the International Criminal Court, the signature of the Brazilian signing agent for the Rome Treaty was carried out on 02/07/00, with ratification occurring on 06/14/02, Brazil being the 69th country to ratify the Treaty. It took effect internationally on 01/07/02.

In accordance with article 126.1 of the Rome Treaty, it would take effect “on the first of the first month following the sixtieth day after the signing date of the sixtieth document of ratification, acceptance, approval, or adherence delivered to the Secretary General of the United Nations.” And, if the ratification were made after the delivery of the sixtieth document of ratification, acceptance, approval, or adherence (as in the case of Brazil), the Treaty would go into effect on the first day of the month following the sixtieth day after the delivery of the very same document. Thus, for Brazil the Rome Treaty went into effect on 09/01/02.

The implementation of the ICC occurred on 03/11/03, after the election (by 33 ballot votes) of 18 judges by the Assembly of States-parties, realized in New York, between 02/03/03 and 02/07/03. The ICC Prosecutor was elected on 04/21/03. The Treaty today includes 139 signatures and 109 States-parties¹⁰.

5.2. Constitutional problems with the ratification of the Rome Treaty.

With the Rome Treaty coming into effect (thus creating the International Criminal Court), a number of questions have arisen regarding international perspectives on the functioning of this Court, and, for Brazil, regarding the constitutionality of many of the provisions laid out in the conventional text.

Questions relating to the constitutionality of the Rome Treaty did not impede the Brazilian Executive Branch from signing it and conveying it to the National Congress (who then authorized its ratification by Legislative Decree) nor did it impede the Treaty from moving forward any further. But, this new international law rule, that has internal validity in Brazil, can create disputes in the judiciary field. Then, it is necessary to discuss its constitutionality.

And these problems are not exclusively Brazil's, but many other Constitutions follow the same parameters set by Brazilian law.

Among other significant questions, some notable issues include: the absence of *res judicata*, life-sentencing, extradition of nationals and foreigners, the imprescriptibility of the crime and the absence of immunity for certain public officials.

5.3. Absence of *res judicata*.

The Brazilian Federal Constitution stipulates, in subsection XXXVI of Article 5, that “the law shall not injure the vested right, the perfect juridical act and the *res judicata*.”

Res judicata is characterized by the quality of a decision or sentence in which no further appeal is granted; in such cases in Brazil, one may appeal to the higher courts. If there is no obstacle or limitation to the admissibility of the appeal, the Federal Supreme Tribunal is the

¹⁰ On June, 2009.

national court with the mandate for final evaluation of judgments, since one of its functions is to uphold the Constitution, above any other rule (including rules of treaties) that there may be. It was stipulated that the Federal Supreme Tribunal was the authority sanctioned (in the case of extraordinary appeal) to judge cases when the ruling being appealed contradicts a Federal Constitutional provision or asserts the constitutionality of a treaty or federal law (art. 102, III, “a” and “b”).

The problem of the Rome Treaty’s constitutionality is addressed in Article 17, making an exception for cases of *res judicata* made by national courts when, despite having upheld the principle of complementarity, the International Criminal Court can act:

- a) when the case is being processed or investigated by a State with the proper jurisdiction, but the International Criminal Court deems that the State in question “is genuinely incapable or indisposed to effectively carry out the investigation or process”.
- b) When the case is being processed or investigated by a State with the proper jurisdiction, but the State in question has decided not to apply penal action against the individual in question, and it is deemed that such decision has resulted in the failure of the State’s willingness to effectively carry out the process, or in the impossibility of performing it otherwise;
- c) When the case is being processed or investigated by a State with the proper jurisdiction, but the International Criminal Court recognizes that the procedure of the other Court has served the purpose of discharging the accused of his or her penal accountability for crimes under the jurisdiction of the International Criminal Court.
- d) When the case is being processed or investigated by a State with the proper jurisdiction, ending in conviction or acquittal, but the International Criminal Court recognizes that the procedure of the other Court has not been conducted independently or impartially and--though in accordance with the rules of due process recognized by international law—in such a way that was incompatible with the aim of effectively submitting the individual in question to the action of justice.
- e) When the case is sufficiently severe to justify the action of the International Criminal Court.

In order to assess whether or not there was willingness to act in a certain case, the Court (taking into account principles of due process recognized by international law) will look for the following conditions:

- a) circumstances in which the process was or continues to be conducted toward the end of discharging the individual in question of his or her penal accountability in the Court, or in which a national decision was made with this goal in mind.
- b) an unjustified delay in the process which, given the circumstances, is incompatible with the goal of effectively submitting the individual in question to the action of justice.
- c) circumstances in which the process has not been or is not being conducted in an independent and impartial manner, or has been or is being conducted in a manner which, given the circumstances, is incompatible with the goal of effectively submitting the individual in question to the action of justice.

And, in order to ascertain the failure to investigate or process a certain case, the International Criminal Court may assess whether or not the State (due to a total or substantial collapse of its national judicial system, or its incapacity otherwise) is able to assure the appearance of the accused in court, to coordinate pieces of evidence and the necessary witnesses, and to effectively carry out the process, independently of any other factors.

As we see, the Court's assumed complementarity undeniably contests the dogma of national *res judicata*, which is arguably held up in Brazil by the Federal Supreme Tribunal; the Rome Treaty suggests the re-examination of trials already decided at the sovereign level.

The question arises: is there a juridical solution to this problem, or is it an inevitable obstacle stemming from Article 1 of the Brazilian Federal Constitution which establishes the sovereignty dogma¹¹?

The answer to this question is relatively easy, found in the Constitution itself.

Article 7 of the Temporary Constitutional Provisions Act stipulates that "Brazil will uphold the creation of an international human rights court."

Now, any systematic interpretation of the constitutional text can only come to the conclusion that, if the creation of an international human rights court was anticipated, the jurisdiction of this court must be recognized (reflexively) in Brazil.

In 2004, to definitively clear up any doubt with respect to this issue, Amendment 45 added a fourth paragraph to Article 5 of the Federal Constitution, stating that "Brazil shall be submitted to the jurisdiction of International Penal Tribunal to which creation it had manifested agreement."

Thus, the International Criminal Court only formalizes this constitutional aim; therefore, any obstacles based on the dogma of sovereignty or *res judicata* should be considered irrelevant.

5.4. Life-Imprisonment.

Another problem that has arisen is from a Rome Treaty provision concerning life-sentences (if the crime was extremely severe, also taking into account the personal circumstances of the convicted person - art. 77, b), which is something prohibited by the Federal Constitution [art. 5, XLVII: "there shall be no punishment of life-imprisonment" (b)].

And this national provision may not even be altered by constitutional amendment, owing to the strict clause inserted in § 4º of Article 60 of the Brazilian Constitution: ["No proposal of amendment shall be considered which is aimed at abolishing individual rights and guarantees"].

¹¹ The provision takes the following form: "The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state and is founded on: I – sovereignty".

However, this is an apparent conflict between the Rome Treaty provision and the Federal Constitution.

The Federal Constitution allows the death penalty (more severe than life imprisonment) in cases of declared war, in the terms of article 84, XIX (art. 5, XLVII, a).

In the terms of Article 5 of the Rome Treaty, the ICC's jurisdiction covers crimes of genocide, crimes against humanity, as well as war crimes and crimes of aggression. And the UN Charter, ratified by Brazil, stipulates that in cases of preservation or restoration of international peace and security (which may be threatened by any crimes pertaining to the ICC's capacity) the UN may resort to force, with the necessary support of its members. This potentially makes the ICC's powers pertinent, in any penal capacity, as a case of war.

Or rather, the Brazilian Federal Constitution already stipulates a punishment which is more severe than life-imprisonment for a good portion of the crimes brought before the International Criminal Court, or even for all crimes brought before the ICC, in the sense that the UN regards these criminal acts as occurring in a state of war.

This is merely one argument among many others.

Extradition in Brazil has had the seal of the Federal Supreme Court for many years, allowed to occur when the death penalty is commuted for the lifelong deprivation of liberty. The rationale for this is that the Federal Constitution prohibits life imprisonment within the country, but does not bar it from happening abroad (when pertaining to foreign jurisdiction). Mandatory sentence-commuting merely reflects a humanitarian outlook in Brazil.

By this same logic, it is possible to comprehend how life imprisonment would be valid: the conviction is determined by the International Criminal Court, thus by those same powers the sentence should be carried out on foreign soil. Or rather, carrying out an imposed life sentence would only be invalid if it had to occur in Brazil, since, in this scenario, the convicted party must be granted freedom as soon as maximum time allotting by sentencing (according to Brazilian law) has been completed. Thus, in order for the ruling to be valid (and to prevent the flagrant failure of Brazil to comply with the Rome Treaty) the International Criminal Court holds the authority to determine that the sentence shall be completed in any other country. Taking this into consideration, the rules of the Rome Treaty are thus compatible with the Brazilian Federal Constitution.

A few other countries adopted their own arguments to circumvent any constitutional obstacles that arose.

Italy, for instance, ratified the Rome Treaty while claiming (through spokespersons) that its text indicated the mandatory possibility of evaluating the life-sentence after a period of 25

years, with the aim of determining if the sentence should then be reduced (article 110); hence, the sentence could not be considered necessarily a “life sentence”.

5.5. Extradition of Individuals.

Article 89 of the Rome Treaty explicates the handover of both nationals and foreigners by the State. The International Criminal Court may issue a request for the capture and handover of an individual, directed to whatever country in which that individual may be found.

The same provision is at odds with the constitutional rules set out in Article 5:

“LI – no Brazilian shall be extradited, except the naturalized ones in the case of a common crime committed before naturalization, or in the case there is sufficient evidence of participation in the illicit traffic of narcotics and related drugs, under the terms of the law ”.

“LII - extradition of a foreigner on the basis of political or ideological crime shall not be granted”.

The solution to this problem is extremely simple.

Properly speaking, the handover of individuals to the International Criminal Court is not extradition, which is considered to be the handover of an accused or convicted individual to a competent foreign jurisdiction to be judged and punished.

It is a matter of submitting the accused or convicted to the proper jurisdiction, even if that means directing it to an international court. The provisions in Article 7 of the ADCT (concerning the International Human Rights Court), and in Paragraph 4 of Article 5 of the constitutional text (concerning the internal jurisdiction of the ICC) sanction the creation of an organ which can be considered into the Brazilian judicial structure, as a final appeal.

5.6. Imprescriptibility of Crimes.

Article 29 of the Rome Treaty stipulates that criminal acts under the jurisdiction of the International Criminal Court do not have lapse.

However, according to the Brazilian Magna Carta, the only imprescriptible crimes are those of racism, or concerning the actions of armed groups (civil or military) against the constitutional order and/or the democratic State (art. 5, XLII e XLIV).

We should consider that the strict rule concerning imprescriptibility cannot imply that this list may not be expanded, whether by ordinary law or by international treaty. Individual rights are protected by both the prescriptibility provision, pertaining to the agent of the crime, and the imprescriptibility provision pertaining to the victim and to society.

This application of imprescriptibility (merely for crimes of racism or actions of armed groups, civil or military, against the constitutional order and the democratic State) seems to be just one more example of a rule that is formally constitutional, but not materially so.

5.7. Absence of Immunity of Certain Public Officials.

Article 27 of the Rome Treaty specifies that a person's official position is totally irrelevant with respect to their being held criminally responsible and punished by the International Criminal Court.

The article states that:

“1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence”

“2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”

This provision conflicts with numerous provisions of the 1988 Federal Constitution, which assigns particular rules for criminal proceedings involving political officials from the three Branches of the Republic, with a privileged forum in certain Courts.

This is perhaps the most difficult issue to resolve regarding the compatibility of the Rome Treaty with the Brazilian Federal Constitution. The criminal responsibility of high-level political figures was not something that could have been disregarded by the architects of the Rome Statute, because of the great majority of crimes are directed, organized or approved by those same people, leaving the allegation to lower figures; this was recognized in part in the Treaty. And it is precisely against political figures that the functioning of the national justice mechanism makes itself most ineffective; which justified the initiative to create a mechanism capable of avoiding the fact that impunity puts international peace and security at risk, as well as the fundamental rights of individuals.

Nonetheless, we can easily circumvent this obstacle of the material and procedural immunity laid out in the Brazilian Federal Constitution.

Domestic procedures regarding privileged forums should be considered unacceptable, because national practices should be regarded as operative only in cases where national jurisdiction applies, ending where the International Criminal Court's jurisdiction begins. Once again, we should call to mind every argument made to justify the departure from the *res judicata* dogma, especially the constitutional provision (which must be upheld) regarding the functioning of the International Human Rights Court's jurisdiction (CF 88, ADCT, art. 7) and

Brazil's recognition of it, and acknowledgement of the domestic jurisdiction of the ICC (CF, art. 5, §4º).

6. Social Justice: Human Rights, Poverty and Financial Resources

On this topic, we shall attempt to reconcile what has been said about making social and economic rights a reality, and the international order.

The Washington Consensus of 1991 adopted a frankly neo-liberal position, which recommended a reduction in public expenditures, privatization, flexibilization of labor relations, fiscal discipline, balanced public accounts, the elimination of tariff and non-tariff barriers to the opening of markets, redirecting of public spending towards education, health care and public infrastructure investments, the adoption of market interest and free exchange rates, opening of the market to foreign investment, deregulation, protection of property, the consumer and the environment.

It would thus only be possible to overcome poverty in developing countries through economic growth and investment.

This affirmation is still true. However, reality has shown us that the issue of poverty appears not to be merely an economic matter, but also a political one, since the suggested division of wealth does not appear to occur naturally in countries, but rather, requires direct interference by the Government.

As an index of bad income distribution, Brazil is a paradigm case, as it has one of the worst income distributions in the world. In 1993, in Brazil, the richest 5% of the population controlled 38.4% of the country's income, while the poorest 95% had 61.6% of this income. The richest 10% became 39% richer between 1960 and 1989¹². These numbers have not changed significantly to this day. Using the figure of the "income scissors", in which the tips indicate the highest and lowest incomes, its opening is significantly large in Brazil (15 times) in relation to that of other countries.

This explains the consensus later achieved on the need to adopt national income distribution policies. Markets seek only efficiency of production, maximization of the quantity of merchandise and services produced, and not the social distribution of the benefits created. Distribution is necessarily unequal, unless there is a public policy guided to somehow distribute the benefits produced. This is the theme of the "Post-Washington Consensus", to the point where Michel Candessus, then Director of the IMF, declared in his last official speech that "poverty is the fundamental systemic threat to a globalizing world," asking for "humanization" of globalization.¹³ The Berlin Consensus, in June 2000, made the same recommendations (economic growth with social justice, by fighting poverty and

¹² Dados, Revista de Ciência Social, v.36, 1993, at 233-259.

¹³ Piovesan, Flavia. *supra*, at 66.

unemployment). This is the so-called “anti-hegemonic globalization” (as termed by the Portuguese legal scholar Boaventura de Souza Santos), or the social dimension of globalization.

Uncontrolled globalization produces enormous disparities. The German Professor Friedrich Muller, describing it, said that it “eliminates customs tariffs that until then had been designed to produce producers and local and regional markets. It subjects producers in small countries to international competition that they are often unable to bear. It undermines the possibility of national governments to protect their economies and financial systems. Generalized growth in the labor market weakens the influence of labor unions and neutralized the effect of normative standards for the protection of workers. Farmers in the so-called third world are made to produce for the global market, while their own countries begin to depend on imports of foodstuffs. International competition destroys local artisans, and the number of jobs eliminated exceeds those created by foreign investment. Natural resources are consumed at an alarming rate”¹⁴.

It is necessary to add the incapacity of national governments to stabilize the fragile free market economy system. The effects of this situation fall upon poor and developing countries, as seen above, and on developed countries too, thanks to the impact of migration on a planetary scale, leading to unemployment, growth of public debt, terrorism, environmental degradation, creation of urban ghettos and the growth of terrorism and organized crime. This is the so-called “secondary exclusion”, which is also the fruit of globalization as it is experienced today. Or the risk of “social rupture”, since society in rich countries was divided among the rich, a degenerating middle class, and a growing number of excluded people, a situation that was forecast by John Kenneth Galbraith¹⁵, and with serious risks for democracy, since even if capitalism can stand such a rupture, democracy cannot, according to American analyst Lester Thurow¹⁶.

Only cooperation on a global scale, with the establishment of solidarity rules and limits to commerce, in order to safeguard and protect human rights, can break the consequences created by unchecked globalization. Thus, initiatives proposed, like the creation of international agencies to monitor the conditions of commerce and international financial transactions, taxation of speculation, or the adoption of clauses in commercial treaties that safeguard unprotected social interests.

Internally, measures should seek to distribute income to compensate for imbalances. This is done through programs of agricultural reform, reduction of the tax burden on the poor, investments in infrastructure, health and education, fiscal equilibrium to permit such investments, encouragement of the organization of social pressure groups, correction of regional imbalances, competition and access to the justice system.

¹⁴ Muller, Friedrich. Que Grau de Exclusão Social ainda pode ser tolerado por um sistema democrático? Revista da Procuradoria-Geral do Município de Porto Alegre, outubro/2000.

¹⁵ Idem, *ibidem*.

¹⁶ Idem, *ibidem*.

It was precisely for this reason that the Brazilian researcher Anete Ivo said that “at the end of the 20th century, the discussion on poverty and social exclusion returned to the concerns of social sciences, and to the priority agenda of international agencies and governments, in the form of an action by society and governments to ‘fight against poverty’”¹⁷.

But the government activity is still to this day, in Brazil and other Latin American countries, accompanied by generalized corruption, both passively and actively, which siphons off a large part of the real capacity to transform reality by the public powers. And corruption, in turn, cannot survive without impunity being a basis of the relations between government and society.

However, these problems (corruption and impunity) co-exist with a policy of positive actions by the government in the social area (which could achieve even more remarkable results without corruption and impunity, but which cannot wait for such ideal conditions). The fight against corruption and impunity have also become government policies in Brazil, and in various other Latin American countries.

Thus, we can point to a wide variety of measures in Brazil designed to promote income distribution and the eradication of poverty.

Focused on job creation, the **Industrial, Technological and Foreign Trade Policy (PITCE)** seeks technological innovation and to increase exports, in addition to strategies designed to ensure the entry of the largest possible number of companies in the microelectronics, software, pharmaceuticals and capital goods (machinery) on the international market. The **Brazil Exporter Program** seeks to present Brazil’s culture and image abroad, to strengthen credit insurance for exports, to establish lines of credit for small exporters, to train professionals in foreign trade, to aid small and micro companies with the design of their products, to create consortiums, and other activities. There is also the **Credit and Micro-Credit Support Program** for credit and micro credit activities. To make resources available for micro credit, a regulation was put into place, requiring that 2% of all sight deposits in banks be set aside for these operations. There is the **Agriculture and Animal Program**, which increases credit available for agriculture, the **Familiar Agriculture Harvest Plan** (facilitated credit with lower interest rates and special repayment terms). The number of contracts in the **National Family Agriculture Strengthening Program (Pronaf)** was from 950 thousand to 1.55 million; in other words, another 600 thousand farm families had access to a credit polity, And, finally, there is the **National Agrarian Reform Program (PNRA)**, maybe the biggest in the world. Seven thousand settlements and about one million families were settled throughout the history of the National Institute of Agrarian Reform (Incra). Its budget in 2006 was about 2 billion US dollars. In the last four years the Federal Government placed 381,419 families and brought to the agrarian reform an area of 32 million hectares, which is larger than Switzerland, Portugal, Belgium, Denmark and the Netherlands together.

¹⁷ Ivo, Anete. *Viver por um Fio: Pobreza e Políticas Sociais*. São Paulo: Annablume, 2008.

The Brazilian Government insists that the monoculture stimulus was a big mistake, because family farming generates more income per hectare in all regions of the country and in almost all the crops, and generates far more jobs¹⁸.

Currently, there are other programs in Brazil focused on fighting hunger and poverty, and we can emphasize the following:

a) Zero-Hunger – This is the main driver of the government’s social actions, more directly focused on ensuring the human right to food, and which raises living standards. Hunger began to be treated as a political matter, and no longer as an individual problem. The Zero-Hunger program, among others actions, is composed of the Family Stipend and the Food and Nutritional Safety programs;

b) Family Stipend – This program seeks social inclusion of families in situations of poverty and extreme poverty by transferring income and promoting access to basic social rights of health and education. It unifies all the income transfer programs, like School Stipend, Food Card and Gas Assistance, thus benefiting a larger number of people. The Family Stipend program benefited 11 million and 100 thousand families in 2006, or a universe of 51 million people;

c) Child Labor Eradication Program (Peti) – Grants monthly scholarship and financing of increased working hours, an activity carried out in time periods that do not interfere with school hours, to reduce the possibility that children and adolescents will enter the labor force and be exposed to risks:

d) Smiling Brazil - Guarantees specialized dental care in the public health network;

e) Popular Pharmacy – Increases access of the population to essential medicines, principally benefiting those who face difficulties in receiving treatment due to the high cost of these medicines;

f) Qualisus – In addition to improving care in medical emergencies;

g) Literate Brazil – This program creates partnerships with states, municipalities, universities, private companies, non-governmental organizations, international agencies and civil institutions as a way to strengthen the national effort to fight illiteracy.

In the field of transparent management and the fight against corruption, the **Transparency Portal** was created – this is an easily accessed Internet-based service where citizens may have access to government programs and actions. There is also the creation of the **Public Transparency Council and Combat against Corruption** and the **National Strategy to**

¹⁸ See <http://www.mda.gov.br/portal/index/show/index/cod/137/codInterno/11690>. Access on July 19, 2009.

Prevent and to Combat Money Laundering (Encla), Coordinated by the Ministry of Justice, including 33 institutions and laying out 32 goals to be reached.

In the area of justice and public security, in August 2007 the Federal Government launched the **National Program of Public Security with Citizenship (Pronasci)**, which lays out public security policies with social actions to fight criminality¹⁹.

7. Conclusions

As we told before, in the internal perspective, there is an incontestable presence of the fundamental rights in the national constitutions of the Latin American states, which essentially incorporate all the advances brought from the international field regarding these rights. However, the problem of fundamental rights today isn't the absence of a normative or formal prevision in constitutional texts, which is common in almost all Latin American countries. The difficult consists of their effectuation, for which the Judiciary is called to serve, which is now in a hard position, implementing public policies in view of the omission of the Executive and Legislative Powers to implement them.

The task of the judiciary in the fulfillment of the so-called social rights is enormous and essential for the construction and establishment of the Brazilian welfare state. After all, social law provides the underpinnings of the State, since it integrates and brings the individual closer to society.

And taking into account the already above-mentioned arguments, any problems or constitutional obstacles concerning the Rome Treaty's wording are thus surmounted, without exaggeration. Particularly, the problems of *res judicata*, of life imprisonment, extradition of nationals and foreigners, imprescriptibility of crimes, and the lack of immunity for public officials are settled.

With the ratification of the Rome Treaty and participation with the International Criminal Court, Brazil will have fulfilled its vocation as State that: is based on the dignity of human beings²⁰; aims for the construction of a free, just and united society; advances the good of all, without discrimination of any kind²¹; and sustains international relations adhering to the principle of human rights, the self-determination of the people, national independence, non-intervention, equality among States, the defense of Peace, peaceful solutions to conflicts, the rejection of terrorism and racism, the granting of political asylum, and the cooperation among all people toward the progress of humanity²².

Obviously, the operation of the ICC means a loss of sovereignty on the part of the participating countries. This is not the first example in the international society in which the

¹⁹ See http://www.presidencia.gov.br/principais_programas/. Access on July 13,2009.

²⁰ Brazilian Federal Constitution, art. 1º, III.

²¹ Brazilian Federal Constitution, art. 3º, I e IV.

²² Brazilian Federal Constitution, art. 4º.

functioning of supranational organizations meets resistance from the dogma of sovereignty. And, as happens when it comes to organizations that arise from processes of economic integration, overcoming the paradigm of reserving sovereign power for States will only be achieved when and where there is the necessity for it to happen. When efforts for achieving peace depend on effective implementation of the ICC, obstacles will disappear, without a doubt. The European Union was essentially created with the goal of peace. And to the extent that hegemonic pax must yield to peace through a universal structure, the ICC and its notion of universal justice will prosper.

On the other hand, the application of income transfer programs has had good results from the point of view of coverage of the target populations of these programs, but the greatest criticism made in Brazil of the income distribution programs is that it represents a fight against poverty “dissociated from the dimension of work”²³. Access to income and consumption is emphasized, and these are surely important dimensions, but they are not sufficient for the exercise of citizenship and entry into the labor market.

In Brazil, these programs often placed the government into the dilemma of either “giving a man a fish” or “teaching him how to fish.” In other words, when in doubt between whether to practice inconsequential assistentialism, or to put in place truly collaborative programs that would lead to an immediate reduction in poverty, with true citizenship and the creation of conditions for the social inclusion of the poor. Perhaps only time will tell whether these programs were on the right track and about the appropriateness of overcoming the contract paradigm with regards to social inclusion policies and income creation.

The contract paradigm always argued that income should be connected to work, and that no one was entitled to a benefit unless he offered something in exchange. The opposing paradigm was the paradigm of the right (and, for me, also the so-called paradigm of the gift), which justifies the income as an integral part of the private sphere of democratic rights, as an unconditional obligation of society and the government.

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²³ Ivo, Anete. *Supra*, at. 226.

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