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THE PARTICIPATION OF BRAZIL IN THE BRICS GROUP[*] CONSTITUTIONAL GROUNDS

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1. The world has changed and individuals now face a new array of challenges. At the dawn of the twenty-first century, we are immersed in a society affected by a far-reaching phenomenology that confronts men, women and the State with issues that require attention and, above all, a new path for public policies and institutions, as well as the related legal framework.

Indeed, the present context of **globalization** reveals the fragility and precariousness of traditional instruments, as **the key issues that arise in this scenario**, such as the demographic explosion, mass migration, overpopulated megacities, the preservation of the environment and the energy problem, **are global in scale**. Additionally, various other concerns, such as the need to change consumer habits, the new forms of delinquency that have produced organized crime on an international scale, international terrorism, the lack of political representation, the gap between the society and political parties and institutions that are already weakened, discredited and increasingly unsuited to fulfil their mission as a channel of communication with the government, are all evidence of the importance and scale of the issues that demand solutions and renewed action.

The world has changed, as Paulo Borba Casella often reminds us in his pioneer work on the BRICS group[1]. The phenomenon of globalization has resulted in the widespread mobility of capital and thus taken competition to unprecedented levels, all of which anticipates sombre and painful times, as described by Brecher and Costello in "Global Village or

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[1] Casella, Paulo Borba. *BRIC – Brasil, Rússia, Índia, China e África do Sul*: una perspectiva de cooperação internacional. São Paulo: Atlas, 2011. ISBN 978-85-224-6113-4.

Global Pillage"[2]. There is, in fact, an environment of global rivalry that can take on a destructive connotation.

We are dealing with a complex and controversial subject compounded by serious problems whose analysis, given the pluralistic nature that characterizes the widely expanded domain of democratic societies, necessarily leads to sensitive integration operations. Furthermore, such operations involve few parameters regarding their *modus operandi* due to the limited number of previous experiences.

Granted, trade and the wars of conquest of the past involved development and reciprocal influences across various civilizations and cultures. However, they always took place under the context of a certain order – the one established by the "Empire"[3]. The world, however, **has become a "global village" where all tribes are encouraged to live and share.**

The pursuit of an **environment of "global harmony"** in order to avoid chaos and destruction should reflect the larger goal of building blocks of cooperation and joint action for development. In this context, bloc formation and cooperation between states have become instruments for the accommodation of the divergent interests that characterize the globalized challenges the future holds.

2. At its inception, the idea of creating multi-state blocks aimed at regional integration and mutual cooperation to strengthen its members and enable higher levels of development was inspired by the federalist[4] principles the American model is founded on. The implementation of the European Community – today far advanced and already provided with a Constitution established by treaty – served as a model for new practices of a cooperative nature between partners, most notably regarding macroeconomic issues and trade platforms, with a particular emphasis on matters involving customs duties and tariffs.

For its part, the Southern Common Market (Mercosur), established by the Treaty of Asunción (March 1991), confirmed and enshrined by the Protocol of Ouro Preto of 1994, was meant to bring the European experience to Latin America by introducing a formula that would establish a common market through indigenous institutions, as a result of an ever-

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[2] Brecher, Jeremy; Costello, Tim. *Global village, economic reconstruction from the bottom up, south end press*. Cambridge, Mass.: South End Press, 1998.

[3] On the subject, see Casella, Paulo Borba. op. cit., supra, chapter 8.

[4] It is fitting to think that the twentieth century presented to the analyst the phenomenon of a federalized Europe. The yearning for a unified Europe led to the adoption of innovative measures that, although not fully akin to the federalist model formulated by the forefathers of the American Constitution, have certainly found inspiration in the principles it is based on, especially with regard to the building of a strong and constantly enhanced democracy.

expanding process of globalization. This was an attempt to reproduce the success enjoyed by Europe for several decades.

However, Mercosur is virtually inoperative due to the lack of autonomous institutions capable of expressing their will independently from that of member states. This precludes the establishment of a specific jurisdiction for Mercosur and of a previously defined set of procedures to investigate violations and enforce sanctions, which has resulted in only a few minor achievements. Its significance will probably not extend far beyond words.

3. It should be noted that the European Union has evolved along well-defined federal standards. **There was an effort to create a single citizenship** within the context of an institutionalized Europe[5]. **An effort was also made to ratify a Constitution** that would consolidate the Union, as well as to create **a single legal system** that would accommodate diversity and maintain balance among members whose cultures, traditions, languages and historical trajectories are widely different. This Constitution, however, came under criticism and was widely rejected, despite being approved by international the treaty[6] that came to be known as the Treaty establishing a Constitution for Europe.

Nevertheless, the relevance of the Treaty has become the topic of discussion in the face of the economic and political crisis that has gripped its member states. **Once again, concerns** regarding **sovereignty** and even **challenges to the legitimacy** of a supranational political entity involved in the decision-making process of key policies **have invaded a context characterized by globalization[7].** This happens because **successful political and economic integration is contingent on the acceptance** of a common core of values that involve recognizing the **legitimacy** of the established supranational order, and this requires constant renewal.

Thus, it is paramount for this study to recognize and identify the difficulties faced by integration processes **that involve creating autonomous and supranational power centres that are capable of issuing commands and enforcing their decisions on the various individuals, citizens and groups that make up society.** In this perspective, it is important to highlight the obstacles to the realization of regional integration processes, which are more complex than national ones. This happens because the **non-legal factors of integration** in an international –

[5] On the subject, see Tanasescu, Elena Simina (Coord.). *Cetățenia Europeană*. Bucureşti, România: Editura All Beck, 2003. (Studii Juridice).
[6] Treaty of Lisbon 2007.
[7] Vrabie, Genoveva; Marin, Andra. *La souveranité d'État et le caractère obligatoire des normes juridiques européennes*. In: Vrabie, Genoveva (Dir.). **Droit constitutionnel - droit international: frontières et interférences**. Iasi, România: Institutul European, 2011.

or global – context are only tentatively established, if not absent altogether. Generally speaking, there is no common language, culture, tradition or awareness. There is no respect for common symbols, nor can a common political tradition be discerned. Instead, **the emerging decision-making process appears extremely difficult and bureaucratic.** In this context, the **highly destructive atmosphere of global rivalry**[8] reinforces the complaints that arise from a growing desire to preserve relevant national and private interests. Against this background, the process of integration is confined exclusively to its legal framework.

4. Evidently, this state of affairs demands a reconsideration of the instruments adopted for integration and cooperation among states in a globalized and borderless world. Furthermore, it requires a re-evaluation of the jurisdiction of the state, which has been hit hard by the international supranational order that was the object of particular admiration in the twentieth century.

The informal block is **the structure best suited to accommodate the new formula for cooperation implemented by the BRICS group**. It was conceived for and aimed at development by means of specific actions combined with practices and incentives in areas that could likely benefit from the results of this collaborative effort. This eliminates the risk associated with the expansion of a bureaucratic structure. Additionally, any issues regarding sovereignty and the exercise thereof are taken out of the equation and the legitimacy of political decision-making remains intact.

Although still in its infancy, the BRICS formula already has followers. In May this year another bloc was formed – **the Pacific Alliance** – involving Mexico, Colombia, Peru and Chile, which have created a new free trade area based on tariff exemptions and broader free trade agreements.

5. The world is changing, and the question that lingers in the minds of analysts concerns the national legal order and its effective accommodation to the extremely swift dynamics that characterize the current social fabric with its multiple social action networks and new factors of development, which in many cases emanate from the international domain.

For many years, Brazil did not constitutionally define the legal nature of international treaties and their hierarchy within its legal system, for which reason the prevailing tendency is to recognize the primacy of domestic law. In this respect, Brazil has moved away from the more

[8] Brecher, Jeremy; Costello, Tim. op. cit., p. 31.

contemporary solutions adopted by Paraguay in 1992 and Argentina in 1994.

According to that reasoning, which was summarized in the well-known judgment given by the Justice Leitão de Abreu, the Federal Supreme Court ruled that the judicial branch is constitutionally obligated to enforce domestic law[9]. As explained by **Mirtô Fraga**, this effectively established the superiority of domestic laws enacted after the ratification of a conflicting treaty or convention. According to the judgment, in case of conflict domestic law "automatically displaces conventional law, which, however, may regain its full effectiveness once the domestic law conflicting with it is repealed"[10].

Today, this prospect has undergone considerable improvement. The rule enshrined in article 5, paragraphs 3 and 4 of the Brazilian Constitution[11] now establishes Brazil in the international scenario as a nation that abides by the conventions and treaties it signs and ratifies, a position that is further reinforced by its submission to the jurisdiction of the International Criminal Court.

The original version of the constitutional text established:

Article 5 of the Brazilian Constitution:

Paragraph 2. The rights and guarantees expressed in this Constitution do not exclude others deriving from the regime and from the principles adopted by it, **or from international treaties to which the Federative Republic of Brazil is a party.**

The debate focused on whether domestic law enacted after the ratification of a conflicting treaty prevailed over said treaty. The Federal Supreme Court proved relentless in rendering a treaty ineffective when confronted with the subsequent enactment of an ordinary law incompatible with that treaty.

The inclusion of paragraph 3 tempered somewhat the rigorous understanding of the Federal Supreme Court on the issue. The amended constitutional provision now reads:

Article 5 of the Brazilian Constitution:

Paragraph 3. International human rights treaties and conventions which are approved in each House of the National Congress, in two rounds of voting, by three fifths of the votes of the respective members, **shall be equivalent to constitutional amendments.**

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[9] RE n. 80 004-SE, in RTJ vol. 83, p 809. (Rel: Min Xavier de Albuquerque. Tribunal Pleno)

[10] Fraga, Mirtô. *O conflito entre tratado internacional e norma de direito interno*. Rio de Janeiro: Forense, 1998. p. 111-112.

[11] Paragraphs 3 and 4 of Article 5 of the Brazilian Constitution, promulgated on 5 October 1988, were included by Constitutional Amendment nº 45 of 2004.

The new provision established that constitutional norms and human rights treaties or conventions hold equal value. One should take into account, however, that **the term "human rights"** cannot and must not be limited to "first generation" individual rights. Its interpretation should encompass social and economic rights and even diffuse rights. The reason for this is the welfare character of such rights, which empower individuals and groups in the society. If their preservation is not guaranteed, it is not possible to ensure the enforcement of all the rights inherent to human beings.

The purpose of the rule established in Article 5, paragraph 3 of the Brazilian Constitution is to confer stability and balance to international relations, in order to lend greater credibility to the treaties and conventions signed by Brazil by placing them on an equal footing with constitutional norms and thereby above ordinary law. This means ordinary law can no longer render a treaty effective, a measure that will ensure the implementation and enforcement of obligations undertaken internationally by Brazil.

It is true that in development blocks, which act autonomously and outside institutional contexts, the continuance of joint activities and cooperation will always be contingent on the convenience of the parties involved, meaning that the sovereign decisions of each member state depend on an evaluation regarding the convenience of the policies adopted. However, as long as the treaty or agreement is in force, as long as there is an interest in its preservation, it cannot be rendered ineffective by ordinary law.

The constitutional provision on the matter increases legal certainty in international relations and stimulates the concrete realization of partnerships that can contribute to the advancement of society and improve the lives of citizens, thereby avoiding the disastrous consequences of global rivalry.

We welcome the formula adopted by the BRICS group, and hope it will facilitate and stimulate the formation of other blocks aimed at development.

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