# THE DISSONANT POSITION OF THE SUPREME FEDERAL COURT IN FRONT OF THE JURISPRUDENCE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS AND THE NEED FOR OPENING THE BRAZILIAN LEGAL ORDER TO INTERNATIONAL LAW – THE CASE OF RECURRENCE AS AN AGGRAVANT OF PENALTY

CAMILA DE ASSIS SANTANA SILVA [1]

ABSTRACT: This paper intends to demonstrate the need for opening the Brazilian legal order to international law, in order to harmonize the commands and perspectives. Only in this way, will there be an effective protection of human rights. Only if the internal system accept truly and recognize the international system, can the commands to protect human rights be implemented effectively. In order to develop this study, the institute of recidivism was analysed under the IACHR, Brazilian and Argentinian perspectives. It was possible to verify that there is still a discrepancy between Brazilian order and the commands of the IACHR which shows fragility in the protection and implementation of human rights. Using Neves's theory, it is possible realize that a constructive and permanent dialogue is need between these order in order to secure the promotion and protection of human rights. If it does not happen, the legitimacy and effectiveness of these orders can be questioned.

KEYWORDS: International law. Inter-American Court of Human Rights. Dialogue

RÉSUMÉ: Cet article a l'intention de démontrer la nécessité d'ouvrir l'ordre juridique brésilien au droit international, afin d'harmoniser les commandes et les perspectives. Ce n'est que de cette manière qu'il y aura une protection efficace des droits de l'homme. Ce n'est que si le système interne accepte

[1] Pós-graduação lato sensu em Direito Penal Econômico e Corporativo pelo Instituto de Direito Público de São Paulo (IDP-SP). Membro-pesquisador do Núcleo de Estudos em Tribunais Internacionais da USP. Pós-graduação lato sensu em Direito Internacional pelo Centro de Direito Internacional (CEDIN). Graduação em Bacharelado em Direito, Universidade Estadual de Feira de Santana (2016).

véritablement et reconnaît le système international, que les règles de protection des droits de l'homme soient effectivement mises en œuvre. Pour développer cette étude, l'institut de récidive a été analysé sous les perspectives de la CIDH, du Brésil et de l'Argentine. Il a été possible de vérifier qu'il existe encore un écart entre l'ordre brésilien et les commandes de la CIDH qui montre une fragilité dans la protection et la mise en œuvre des droits de l'homme. En utilisant la théorie de Neves, il est possible de réaliser qu'un dialogue constructif et permanent est nécessaire pour assurer la promotion et la protection des droits de l'homme. Si cela ne se produit pas, la légitimité et l'efficacité de ces commandes peuvent être remises en question.

**MOTS CLÉS:** Droit international; Cour interaméricaine des droits de l'homme; Dialogue.

**SUMMARY:** 1.Introduction. 2. The legal prevision of recidivism as a way to aggravate the penalty in the Brazilian order. 3. The position of the IACHR about the application of recidivism as a way to aggravate the penalty. 4. How the STF has understood this subject even after the IACHR had taken its position. 5. How other states which are parts in the Inter-American System of Human Rights deal with the recidivism as a way to aggravate the penalty. 6. The transconstitucionalism. 7. Final considerations: The necessity of recognition of the necessity of open Brazilian order to international order. 8. Bibliographic references.

# 1. INTRODUCTION

Brazil is part of the Inter-American System of Human Rights due to which the State should comply with the decisions of the main organs of this system: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. However, it is a known fact that Brazil still does not observe and accomplish some decisions and opinions of these organs.

This study intends to analyse the position of the Supreme Federal Court of Brazil (STF) in front of the jurisprudence of the Inter-American Court of Human Rights (IACHR). Therefore, this discussion will be restricted around the roles of these two organs.

This paper aims to analyse how the IACHR has decided about the legal prevision of recidivism as a way to aggravate the penalty and its use in criminal judgements. In addition, the STF's posture about the same object will be considered. Therefore, it will be possible to compare both positions and verify if the STF has accomplished the understandings of the IACHR.

In turn, a discussion about the necessity for opening the Brazilian legal order to the International Law will take place. Some theories will be mentioned, such as the theory of transconstitucionalism by Marcelo Neves.

This authors claims that a dialogue between different orders is necessary. In the case of this study, this theory can be applied to understand and recognize that an open in the national order to the international law has to be imposed.

The structure of the world has changed as well as the relationships throughout it. More and more different legal orders have to deal with same problems. Sometimes, these orders understand the same situation in different perspectives in turn which conflicts can appear between them.

It cannot be denied the prevalence of the international law over national orders. This understanding has been shared among doctrinators. However, more than only impose the international perspective to the national order; the recognition of the necessity of opening the domestic order to the international order by the Brazilian State is fundamental. All the internal systems need to understand that the Brazilian order cannot oblivious the international positions, decisions and perspectives. Brazilian legislative, executive, judiciary

and the civil society need to understand that Brazil is part of a global society which requires a position according to the international law. Deny or ignore the jurisprudence of the IACHR, for example, is unacceptable. Brazil cannot judge its demands ignoring opinions and IACHR alignment.

First of all, Brazil needs to observe and respect international rules as well as judging according the international law when the case requires the observation of this normative. Furthermore, only applying the rules without observing the interpretation given by international courts is not enough. Actually, it is nonsense. Brazil has to follow the orientations of the IACHR even if they require changes in the internal legal or social structure, such as legislative changes and so on.

Therefore, a constant constructive dialogue between these orders has to receive incentive. Brazil needs to understand this current necessity as to establish a dialogue when the understandings are different. Actually, according to Neves[1], both systems need to be open to appreciate foreign needs and perspectives to improve themselves. Constant updating and reconstructions are necessaries to allow the existence and legitimacy of both systems.

To concretize this paper, a study about the national legal prevision of recidivism as a way to aggravate the penalty. In addition, the position of IACHR about this topic was analysed. In the end, the posture of the STF and national courts was collated. Furthermore, a view of other states' postures which are also part in the Inter-American System of Human Rights was taken. Therefore, it was possible to compare the reality of Brazilian order to international requirements.

## 2. THE LEGAL PREVISION OF RECIDIVISM AS A WAY TO AGGRAVATE THE PENALTY IN THE BRAZILIAN ORDER

According to the article 61 of the Penal Code of Brazil[2]:

---

[1] NEVES, 2009.
[2] BRAZIL, 1940.

> They are circumstances that always aggravate the sentence, when they do not constitute or qualify the crime: (Redaction given by Law nº 7.209, of 11.7.1984)
> I – recidivism

The concept of recidivism is also brought by the mentioned law[3]:

> Article 63 - Recidivism is verified when the perpetrator commits a new crime, after resorting to a sentence that, in the country or abroad, convicted him for a previous crime. (Drafting provided by Law No. 7.209, dated 11.7.1984)
> Art. 64 - For purposes of recidivism: (Redaction given by Law No. 7,209, dated 11.7.1984)
> I - the previous conviction does not prevail, if between the date of compliance or extinction of the sentence and the subsequent infraction has elapsed period of time over 5 (five) years, computed the period of proof of suspension or conditional release, if not occur revocation; (Drafting provided by Law No. 7.209, dated 11.7.1984)
> II - do not consider the own military crimes and political. (Redaction given by the Law nº 7.209, of 11.7.1984)

Recidivism is the repeating of or returning to criminal behavior by the same offender or type of offender. It is a type of aggravating circumstances which are Circumstances, facts, or situations that increase the culpability, liability, or the measure of damages or punishment for a crime. Based on prevailing doctrinal and jurisprudential understanding, the increase of the sentence is often in 1/6 (one sixth) of the base-penalty. However, it is a discretionary power of the judge as long as it is reasonable and proportional[4]:

> CRIMINAL - DRUG TRAFFICKING - ABSOLVATION - IMPOSSIBILITY - PROVEN AUTHORITY AND MATERIALITY - REDUCTION OF PENALTY-BASE - POSSIBILITY - EXCEEDED REPRIMANDS - AGGRAVATING CIRCUMSTANCES OF RECIDIVISM - PENALTY INCREASED IN 1/6 [ONE SIXTH] – SUITABLE – DISMISSAL OF CAUSE OF INCREASE OF ARTICLE 40 SUBSECTION VI OF LAW 11.343/06 - IMPOSSIBILITY - APPEAL PARTIALLY PROVIDED. 1. If the authorship and the materiality of the crime of drug trafficking are proven,

[3] *Ibidem.*
[4] TJ-MG, 2015.

> a conviction shall be imposed. 2. The basic penalty shall be altered as it is applied in an exacerbated manner. 3. The increase in sentence for the aggravating circumstance of recidivism must occur in the fraction of 1/6 [one sixth] according to prevailing doctrinal and jurisprudential understanding. 4. It is necessary to maintain the cause of increased sentence of article 40, section VI of the Drug Law, once the involvement of the minor has been confirmed. 5. Appeal partially provided. (Free translation made by the author).

In the Brazilian legal system, a criminal type is followed by a penalty which has a minimum and a maximum limits. Therefore, the judge has a discretionary margin of appreciation to determine what will be the definitive sentence for the case. It is called individualization of the penalty. In this moment, the judge has to considerate some criteria, such as judicial circumstances, aggravating, attenuating, causes of increase and causes of reduction of penalty[5].

Among the aggravating, recidivism takes place. Recidivism occurs when the person commit a crime after a previous final sentence with *res judicata* which had condemned him for a previous crime. However, this situation can remains only for five years after which the former condemnation cannot be considered as recidivism if the person commits another crime. The former crime will be considered as bad criminal records which will be take into account in the first stage, as judicial circumstances[6].

Moreover, the institute of recidivism impacts also others situations, such as the penalty regime. Depending on the existence of recidivism, the execution of sentence can variate. For instance, the person who is recidivist cannot go to the semi-open regime, even if his penalty is between 4 (four) and 8 (eight) years. The open regime also be excluded even if the penalty is equal or less than 4 (four) years.

Some authors claim that recidivism would be *"bis in idem"* as the person would be punished two times for the same act[7]. However, others authors, such as the STF's ministers, believe that the conduct of the offender deserves greater reproach[8].

---

5 CUNHA, 2016, p. 242.

6 CUNHA, 2016, p. 424.

7 QUEIROZ *apud* CUNHA, 2016, p. 426.

8 STF, 2013.

Despite the divergences, the mentioned legal prevision takes place in all Brazilian courts as the judges base their sentences on it.

## 3. THE POSITION OF THE IACHR ABOUT THE APPLICATION OF RECIDIVISM AS A WAY TO AGGRAVATE THE PENALTY

During the judgment of the case Fermín Ramírez vs. Guatemala, the IACHR could give its understanding, which is binding for the states which recognized this jurisdiction, about the possibility of using personal criteria to qualify the crime or impose penalties other than those fixed by the criminal type, such as the dangerousness of the agent[9]:

> 81. La Comisión alegó que el Estado incurrió en una violación del derecho de defensa cuando el Tribunal de Sentencia, en el fallo de 6 de marzo de 1998, no expresó fundamento alguno sobre la peligrosidad del agente, sino concluyó, a partir de una relación de las mismas circunstancias que utilizó como causales de agravación del delito, que el señor Fermín Ramírez revelaba una mayor peligrosidad.
>
> Desde el punto de vista procesal, es grave que la acusación no se hubiese referido a las circunstancias que demostrarían la peligrosidad del señor Fermín Ramírez. La Corte estima que esta cuestión debe ser analizada a propósito de la compatibilidad del artículo 132 del Código Penal con el artículo 9 de la Convención (infra párrs. 87 a 98).
>
> 94. En concepto de esta Corte, el problema que plantea la invocación de la peligrosidad no sólo puede ser analizado a la luz de las garantías del debido proceso, dentro del artículo 8 de la Convención. Esa invocación tiene mayor alcance y gravedad. En efecto, constituye claramente una expresión del ejercicio del *ius puniendi* estatal sobre la base de las características personales del agente y no del hecho cometido, es decir, sustituye el Derecho Penal de acto o de hecho, propio del sistema penal de una sociedad democrática, por el Derecho Penal de autor, que abre la puerta al autoritarismo precisamente en una materia en la que se hallan en juego los bienes jurídicos de mayor jerarquía.

[9] OAS, 2005, p. 48 and 51.

The article 9 of the American Convention on Human Rights states[10]:

> Article 9. Freedom from Ex Post Facto Laws. No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

In addition, the mentioned Convention highlights that[11]:

> Article 2. Domestic Legal Effects Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

The IACHR has decided that the recidivism as a way to aggravate the penalty is not harmonious with the principles of a democratic state. Indeed, this institute must be removed from internal rules. It is based on the theory called "the criminal law of the author" which worsens the situation according to the agent's personal characteristics, instead of taking into account the fact exclusively. In addition, this institute is a type of *"bis in idem"* which is forbidden by the Convention in its article 8.

Therefore, being a member of the Inter-American System of Human Rights as well as had recognized the jurisdiction of the IACHR, Brazil should comply with its decisions, promoting internal changes in order to adapt Brazilian order to international demands.

## 4. HOW THE STF HAS UNDERSTOOD THIS SUBJECT EVEN AFTER THE IACHR HAD TAKEN ITS POSITION

In a decision rendered on April 4, 2013, the STF Court decided that the application of recidivism as an aggravating factor is constitutional. The decision was rendered in the

[10] OAS, 1969.
[11] *Ibidem*

judgment of Extraordinary Appeal (RE 453.000)[12] applied by the Public Defender's Office against a judgment of the Court of Justice of the State of Rio Grande do Sul, which held a conviction for extortion a sentence of four years and six months, applying the aggravation of recidivism at the time of the sentence. The Ministers decided to apply the effects of the general repercussion to the decision, given that in RE 732290 the subject had already had general acknowledged repercussions. Therefore, the constitutionality of the application of recidivism as an aggravating factor of punishment should be applied to all other proceedings in the courts of the country, as well as may be applied by the Supreme Court's own ministers in monocratic decisions rendered in habeas corpus that the same matter.

This is a quotation of the judgement[13]:

> Take away the possibility of thinking about duplicity. Of course, at the time of the previous condemnation, the institute was not considered. It must be considered in the following judgement because of the fact that has occurred another criminal practice without the interregnum referred to in article 64 of the Penal Code - five years. Therefore, there is not increasing in the penalty on the previous sentence. Actually, given the minimum and maximum limits versed in relation to the new crime, in the second stage of the dosimetry of the penalty, in the field of aggravation, there is an increasing in the basic penalty fixed. The judge must have in view parameters to establish the appropriate sentence for the specific case, individualizing it. It is in this moment that that raises the recidivism which is the fact that the accused committed a new crime, despite the previous one in life in society.
>
> There is a factor of discrimination which is reasonable, following the natural order of the things. I repeat that it takes into account the profile of the accused to realize the need for greater penalties, considering the minimum and maximum penalty of the type, because the person committed a crime again, despite the prior condemnation, in what should be taken as an alert, a greater warning about the need to adopt a posture proper to the average man, the integrated citizen To the gregarious life and solidarity with the similar ones. (Free translation made by the author)

However, even after the IACHR had decided for the unconventionality of this prevision, STF and Brazilian courts still base their judgements in this institute.

Moreover, there has not happened any legislative change in order to adjust the Brazilian normative system to the international commands.

---

[12] STF, 2013.

[13] STF, 2013, p. 04

Although the IACHR had decided about the unconventionality of applying the recidivism in 2005, the STF still uses this institute, ignoring and contradicting the jurisprudence of the IACHR.

## 5. HOW OTHER STATES WHICH ARE PARTS IN THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS DEAL WITH THE RECIDIVISM AS A WAY TO AGGRAVATE THE PENALTY

The Supreme Court of Justice of Tucuman, in Argentina, in a judgement made in November, 2012, argues that[14]:

> En fin, de lo analizado se observa que “Los parámetros de fundamentación de la 'reincidencia' coinciden con los de la 'peligrosidad'; funcionan como un análisis extraíble de un patrón de comportamiento de una determinada personalidad, agravando la respuesta penal, más allá de las consecuencias y modalidades del acto realizado. Con la reincidencia, como con la peligrosidad, se castiga algo diferente del hecho criminoso realizado por el autor; se esta castigando algo que, en verdad, tiene que ver con lo que ese autor estaría demostrando ser. Como sostiene Zaffaroni, el agravamiento nada tiene que ver con el injusto, porque el contenido injusto del delito del reincidente es igual al del primario. Como afirma Ferrajoli, ambas se basan en un modo de ser, más que un modo de actuar, y como tal se erigen en un sustitutivo de la culpabilidad constitutivos de tipos penales inconstitucionales.

And continues[15]:

> A su vez, en la misma línea de razonamiento y siguiendo el análisis de validez constitucional de la norma en cuestión, se advierte que “no admitiendo, pues, el derecho penal de autor, no encuentro respuesta a la objeción: toda consecuencia más gravosa del segundo delito deriva de un primer delito que ya ha sido juzgado en sentencia firme. No tiene sentido caer en sutilezas ilógicas, como pretender que deriva de la condenación o del cumplimiento de la pena, porque, en definitiva, cualquier matiz de éstos obedece al hecho básico de un primer delito, sin el cual no pueden concebirse” (conf. Voto en disidencia del Dr. Zaffaroni en: Cámara Nacional

---

[14] ARGENTINA, 2012, p. 17-18.
[15] *Ibidem,* p. 18 and 20.

> de Apelaciones en lo Criminal y Correccional, en pleno, in re "Guzmán, Miguel F." del 08/08/1989, La Ley 1989-E, 165)
>
> (...) En efecto, no existe una interpretación que permita validar el instituto de la reincidencia, y utilizando la expresión de la Corte Suprema de Justicia de la Nación en la causa "Gramajo", podemos decir que los que defienden el instituto, se encuentran en una verdadera "disyuntiva de hierro", dado que la pena impuesta en el segundo delito con mayor poder punitivo, importa o bien afirmar que la pena se corresponde al último hecho cometido, en cuyo caso se viola el principio de culpabilidad y proporcionalidad, al ejercer un plus de poder punitivo con base a una motivación interna que no tiene correlación con un mayor contenido de injusto o por una mayor lesión a un bien jurídico ajeno, o bien importa afirmar que el plus se impone atendiendo a los hechos cometidos y juzgados con anterioridad, en cuyo caso resultaría irrefutable que se lo penaría dos veces por los mismos hechos.

Mentioning the jurisprudence of the IACHR, the Supreme Court of Tucuman follow the inadmissibility of this institute which is against the American Convention on Human Rights[16]:

> El pronóstico será efectuado, en el mejor de los casos, a partir del diagnóstico ofrecido por una pericia psicológica o psiquiátrica del imputado' (CIDH, Serie C N° 126 caso Fermín Ramírez contra Guatemala, sentencia del 20 de junio de 2005). En consecuencia, no puede sostenerse seriamente que se autorice a un estado de derecho para que imponga penas o prive de libertad a una persona -con independencia del nomen juris que el legislador, la doctrina o la jurisprudencia eligiera darle al mecanismo utilizado para ello-, sobre la base de una mera probabilidad acerca de la ocurrencia de un hecho futuro y eventual" y luego agrega "Que cabe destacar finalmente que la Corte Interamericana de Derechos Humanos, siguiendo una línea argumental similar a la aquí expuesta, consideró que la invocación a la peligrosidad 'constituye claramente una expresión del ejercicio del ius puniendi estatal sobre la base de las características personales del agente y no del hecho cometido, es decir, sustituye el Derecho Penal de acto o de hecho, propio del sistema penal de una sociedad democrática, por el Derecho Penal de autor, que abre la puerta al autoritarismo precisamente en una materia en la que se hallan en juego los bienes jurídicos de mayor jerarquía... En consecuencia, la introducción en el texto legal de la peligrosidad del agente como criterio

[16] *Ibidem*, p. 16-17.

> para la calificación típica de los hechos y la aplicación de ciertas sanciones, es incompatible con el principio de legalidad criminal y, por ende, contrario a la Convención' (CIDH, Serie C. N° 126, caso Fermín Ramírez contra Guatemala, sent. del 20 de junio de 2005)." (CSJN, in re "Gramajo, Marcelo E." del 05/09/2006, publicado en La Ley 2006-E, 65, Fallos 329:3680).

In other words, the Court of Tucuman followed the orientation and decision of IACHR. The Argentinian Court agreed with the IACHR's arguments in turn which the Argentinian judiciary declared the unconstitutionality of the institute of recidivism.

It claimed that the basis of the institute of dangerousness is the same as that of the institute of recidivism. Both of them take into account only personal aspects of the accused. While the first one is based on the probability of the person commit another crime in the future, the last one is related to prior crimes.

Applying these institutes, the judge punishes something different from the criminal fact made by the author; it is punishing something that the accused is supposed to be.

Furthermore, it argued that the position which defends that any more serious consequence of the second crime derives from a first offense that has already been tried in a final judgment cannot be accepted because it is against the principles of the "criminal law of fact.

Therefore, it is clear the commitment of Argentina to implement the IACHR decisions in order to secure and protect the human rights.

## 6. THE TRANSCONSTITUCIONALISM

It cannot be denied that the world order has changed. The interstate notion has been substituted by a new notion which englobes other international actors. States are no longer able to solve all the issues throughout the world only by themselves.

An important reflection of this change is the role of international courts which has complemented and supervised the activity of internal courts, when these are not capable to or do not have interest in implementing the international requirements.

International courts and national courts have been demanded to give their opinion about a specific subject. Sometimes, this leads in conflicts between these positions. National

courts issue in a way while international courts support a different perspective. In these cases, a dialogue is needed between the legal systems.

Firstly, a mention has to be made of the Brazilian recognition of the jurisdiction of the IACHR.

Brazil recognized the competence of the jurisdiction of the Inter-American Court of Human Rights in 1998, liable to reciprocity and for facts subsequent to the declaration. Therefore, it is subordinated to its decisions.

The Inter-American Court of Human Rights is the independent judicial body of the Inter-American Convention on Human Rights. It is competent to analyse contentious cases presented by the Inter-American Commission on Human Rights or by the States Parties; to issue provisional measures in cases of seriousness and urgency; and to issue interpretative interpretations of treaties or on the compatibility of domestic law with the Convention.

The judgments of the Inter-American Court of Human Rights may establish obligations to do, not do and give right, including in this path the duties to guarantee the enjoyment of the violated right, to repair the damage, to investigate and punish the perpetrators of the violations, to Specific or structural measures to prevent or remedy the violation.

Furthermore, having recognized the jurisdiction of the Inter-American Court of Human Rights, it is also up to the Brazilian State to comply with the interpretations given by the Inter-American Court of Human Rights to the human rights treaties, including the Inter-American Convention on Human Rights.

Therefore, the Brazilian State recognized the jurisdiction of the Inter-American Court and, in turn, must comply with what this international body proclaims.

However, it is a known fact that implementing in Brazil sentences from international courts is still an enormous challenge.

It is well known that decisions of the Inter-American Court of Human Rights, whether provisional or final, have binding force on the States that have recognized their jurisdiction, as well as impose obligations on these States for their compliance. However, there are no international mechanisms to enforce such decisions. The execution of the judgment of the

Inter-American Court of Human Rights depends on national authorities and internal normativity[17].

Some challenges permeate the implementation of such decisions. For example, the shock between decisions and interpretations of domestic and international law.

Is it fundamental to develop a permanent dialogue between these systems able to promote interactions, concessions and flexibility in order to harmonize the shocks and different perspectives between the Brazilian state order and international courts, such as the IACHR.

There is a current necessity of instigate these systems to review and update their guidelines, functions and understandings, constantly.

It is not proposed here to defend the unilateral imposition of the Court's decisions, but rather to discuss the construction of a constructive dialogue between the internal power authorities and the international mechanisms for the protection of human rights.

As mentioned, an enormous challenge is the shock between the national decisions and interpretations and the international's[18]:

> The jurisprudence of the Court has faced, and has the possibility of continuing to face, some difficulties in complying with its decisions due to the apparent or effective contradiction of these with doctrinal or national jurisprudential developments.
>
> Therefore, compliance with the decisions of the system requires enriching debates at the national level and a fluid dialogue between the various local actors and the regional protection bodies. Ultimately, the execution of decisions is subordinated to certain doctrinal or jurisprudential developments, which instruct domestic practice in order to comply with the decisions of the international system. (Free translation made by the author).

Regarding the shock between the interpretations given by international and national bodies of international human rights diplomas, Ramos[19] stresses "the need to reconcile national interpretation with the international interpretation of human rights," proposing what he calls the "Dialogue of the Cortes":

---

[17] RAMOS, 2016, p. 385.
[18] KRSTICEVIC, 2009, p. 41.
[19] RAMOS, 2016, p. 378.

> A first alternative is the encouragement of dialogue between national courts and international bodies, whereby arguments and considerations are known and can mutually influence decision-making by national and international bodies.

Neves[20] views and discusses possible conflicts between international human rights determinations, understandings of fundamental rights of the internal order and the rights of extra-state local communities, sustaining the imperative need of these instances to open themselves to a constant dialogue and revisions of their guidelines "to yield to the demands of the perspectives of other normative orders in relation to the meaning and scope of conflicting rights". It is not a matter of imposing an understanding over the other, mandatorily, but of recognizing such conflicts and promoting adjustments and conciliations between the different perspectives. Neves then proposes a trans-constitutional dialogue, through a re-reading and new understanding of both norms, international human rights norms and norms of extra-local local communities[21]:

> In the context of a positive transconstitutionalism, it is necessary, in these cases, a disposition of the state and international orders to be surprised at a reciprocal learning with the experience of the other, the native in his self-understanding.

Neves[22] supports that it must be a dialogue between national sources of law, even that made by non-state authors, and international sources of law. In addition, he claims that the world has become more and more complex as it is composed by a huge number of systems. Even more, these systems become specialized and develop their own codes. However, they are not isolated. They are able to receive external irritations. In order words, there is a doubtless relationship between these systems. Each system determines whether it will receive the irritation and how will process it. The systems cannot close themselves. Contrarily, each one must develop criteria to adopt these external irritations.

He suggests what he calls "Structural coupling"[23] which would secure a constant adaptation between different systems, keeping their specificities.

---

[20] NEVES, 2014, p. 208.
[21] *Ibidem*
[22] NEVES, 2014
[23] LUHMANN, 2005, p. 18

According to Neves[24], there is a relationship between constitutionalism rules and international rules. At the time that there is an international scope of the constitutional rules of the State, there is a constitutional scope of international standards. It means that same issues are analysed and considered by different orders and perspectives in the same time.

He points that the fact that the state open itself brings interpenetration between internal order and international order. This fact requires learning and exchange between the experiences of each system permanently. It must consider both perspectives[25].

He recognizes that in the relationship between international legal orders and state legal orders, more and more legal-constitutional cases arise as well as the solutions interests both or orders involved[26].

Finally, he highlights that a overcoming of the provincial treatment of constitutional problems by the states is necessary. However, it cannot lead to believe in the superiority of the international orders. He claims that both of orders can misunderstand or equivocate when they deal with constitutional issues, including human right demands[27].

Therefore, it is clear that Brazilian order needs to be open to international requirements and demands in order to adjust the national system according to its international obligations.

## 7. FINAL CONSIDERATIONS: THE NECESSITY OF A RECOGNITION OF THE NECESSITY FOR OPENING BRAZILIAN ORDER TO INTERNATIONAL ORDER

It is known that Brazil recognized the jurisdiction of the IACHR. In addition, Brazil has concluded a huge amount of treats of human rights. In this way, going contrary to the international demands and perspectives is unacceptable. It would seem a contradictory

---

[24] NEVES, 2014, p. 134-135.
[25] NEVES, 2014, p. 134.
[26] Ibidem, p. 132.
[27] Ibidem, p. 151.

position taken by the Brazilian state. However, decision and legislation opposite to international commands are not rare in Brazil.

Concluding treaties and recognizing international jurisdiction are acts of sovereignty which show the will of the State properly. Therefore, ignoring or reject international perspectives are paradox.

According to the above information, it is clear that Brazil has been positioned in disagreement with the international commands which can be frustrating for whom awaits progress in the protection of human rights.

A specific case is the issue of the use of recidivism as a way to aggravate de penalty. Although the IACHR has rejected this institute and other American countries have followed this command, Brazil still has internal legislation which has this institute as all internal courts have applied the legal prevision. The STF, the court which is responsible for protect the constitution applying the constitutional control, addressed that recidivism is compatible with the Brazilian constitution, ignoring the American Convention and the IACHR which is totally worrying.

Considering the lectures of Neves, it can be concluded that Brazil needs to open its order to international system. Brazilian cannot ignore the international system. Which one has your structure and functions both of which are defined by each system by themselves. However, Brazilian system and international system are not closed, and they cannot be. Sometimes, they need to deal with same problems which affect both of them.

Therefore, a constructive and permanent dialogue between these systems is essential. They need to recognize the other system, their functions in order to define criteria which enable harmonization of the different perspectives. Each system can be upgraded. Each one can review your conceptions and operation. Only in this way, will the issues of human rights aim the most effective solutions which will be able to be implemented by different systems.

## 8. BIBLIOGRAPHIC REFERENCES

ARGENTINA. Supreme Court of Justice of Tucuman, “A.,E.O. y V.,S.H. S/ Robo Agravado”, Expte. Nº 24846/2007, President. Dr. Antonio Daniel Estofán, Prevailing vote. Dr.

Gandur, J. 20/11/2012. Available in: < http://www.cij.gov.ar/nota-10365-La-Corte-Suprema-de-Tucum-n-declar--la-inconstitucionalidad-de-la-reincidencia-como-fundamento-para-agravar-la-pena.html>. Access on: 22/08/2017.

BRAZIL. **Decree-law nº 2.848, 07 december** 1940.

BRAZIL. STF, RE 453.000/RS, Rapporteur on the case. Minister Marco Aurélio, J. 04/04/2013, DJ. 03/10/2013.

BRAZIL. TJ-MG, APR: 10283140012388001/MG, Rapporteur on the case. Judge Pedro Vergara, J. 01/09/2015, DJ. 09/09/2015.

CUNHA, Rogério Sanches. **Manual de direito penal**: parte geral (arts. 1o ao 120). 4. ed. Salvador: JusPODIVM, 2016.

KRSTICEVIC, Viviana. Reflexões sobre a execução das decisões do Sistema Interamericano de Proteção dos Direitos Humanos. *In:* **Implementação das decisões do Sistema Interamericano de Direitos Humanos: jurisprudência, instrumentos normativos e experiências nacionais**. Organized by: Centro pela Justiça e o Direito Internacional; [translation: Rita Lamy Freund]. Rio de Janeiro: CEJIL, 2009.

LUHMANN, Niklas. **El derecho de la sociedade**. 2ª ed. in Spanish. México: Herder, 2005.

NEVES, Marcelo. **Transconstitucionalismo.** São Paulo: WMF Martins Fontes, 2009.

OAS. American Convention on Human Rights, **Adopted at the Inter-American Specialized Conference on Human Rights**, San José, Costa Rica, November 22, 1969.

OAS. Inter-American Court of Human Rights. **Case of Fermín Ramírez v. Guatemala**. Judgment of June 20, 2005.

RAMOS, André de Carvalho. **Processo internacional de direitos humanos**. 5. Ed. São Paulo: Saraiva, 2016.