International Conventions on Aviation and the Brazilian Constitution: The Case of the CDC

by Delphine Defossez*

1. *Introduction*

Plato differentiated norms from values or conventions. Norms protect values but the two are different and should not be confused.[1] However, the approach taken by the Federal Supreme Court of Brazil with regard to that nation's Consumer Code has disregarded this principle. Indeed, the norms that are enacted within Brazil's Constitution should not be mixed with values, in this case the protection of the consumer. The approach taken by the Federal Supreme Court is also dangerous on another level as it does not respect the principle of reciprocity with regard to treaties. It seems that the Brazilian Federal Court itself has confused values with international obligations.

The exercise of a State's power is based on a legal infrastructure, which is anchored in a constitution that guarantees minimum rights to the population.[2] These rights are preserved by institutional mechanisms based on the concept of the Rule of Law. Brazil has ratified both the Warsaw and the Montreal Conventions, which apply to liability cases involving international transportation by air. The Warsaw Convention established a fault-based system of responsibility and a limitation of liability for air carriers. The Montreal Convention of 1999 modernized the Warsaw system and consolidated it into a single document, while retaining the limitation of liability.

In Brazil, the liability of air carriers for damages was regulated by the Civil Code in conjunction with Article 84 do *Decreto no.* 16.983, 1925. Then the *Código Brasileiro do Ar* de 1938 (Decreto-Lei no. 483, de 08.06.1938) was enacted but later replaced by the *Novo Código Brasileiro do Ar* de 1967 (Decreto-Lei no. 32, de 18.11.1966). The Warsaw Convention was transposed in the *Código Brasileiro de Aeronáutica* de 1986 (Lei no. 7.565, de 19.12.1986). However, none of these laws provide an answer for delayed flights, cancelled flights, or denied boarding.

When the Brazilian Constitution was enacted, it provided in its Article 5 V and X for moral damages. The Constitution is superior to all other laws, including international treaties, as made clear by the Federal Supreme Court in *Da Silva Couto v. Iberia-Lineas Aereas de Espana*

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[1] RICHARD MARBACK, PLATO'S DREAM OF SOPHISTRY (1999).

[2] Not all modern societies have a Constitution to limit the sovereign's power. For example, in the U.K. the Parliament is seen as the sovereign, having the power to change any rules that exist in its political system. *See* A.V. DICEY, THE LAW OF THE CONSTITUTION 27–49 (Oxford University Press 2013).

S/A.[3] The CODIGO DE PROTEÇAO E DEFESA DO CONSUMIDOR[4] (Consumer Code, or CDC) is based on Article 5 of the Constitution. In spite of the existence of a specific federal agency with its own rules to govern civil aviation, the services rendered by airline companies are also subject to the Consumer Code. For an obscure reason, and even though logic would favor application of the Montreal Convention, Brazilian judges prefer to apply the Brazilian Consumer Code to international air service, in cases involving consumers.

The conflict between the Montreal Convention and the CDC is limited to one area, which is one of the most important areas regulated by the Convention, namely the civil responsibility of the carrier. It should be reiterated that there is no apparent conflict of norms between the two regimes when no consumer relationship is involved. Indeed, typical commercial relationships will not be sheltered by the CDC. The conflict of norms is evident when analyzing cases dealing with delay, cancellation, luggage loss, etc.[5]

The argument is that the Brazilian Consumer Code is based on a Constitutional principle, and according to the Federal Supreme Court in *da Silveira Gois v. Leão Trindade*,[6] laws flowing from the Constitution have the capacity to override treaties and conventions with regard to consumer questions.

This type of reasoning cuts against the principle of the *lex specialis derogat lex generalis* embodied in Article 2(2) of the Law of Introduction to the Brazilian Civil Code.[7] Even though the CDC is considered as a specific law it was not enacted to specifically regulate aviation issues nor does it specifically refer to aviation.[8] The main argument for the use of the CDC rather than the Warsaw Convention, in cases involving flight delays or cancellations, was that the Warsaw Convention was appropriate for its time but did not fit modern reality. The objective of the Convention was predominantly economic, which was fundamental for the development of civil aviation, while the objective of the CDC is the protection of consumers. Therefore, the two

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[3] RE no. 172720-RJ, Feb. 6, 1996, R.T.J. 162-03/1093. The fact that the Warsaw Convention contains rules limiting the compensation of material damages does not exclude the possibility to grant moral damages. This possibility is amplified by the discomfort, embarrassment, boredom, and humiliation suffered by a passenger whose suitcase has been lost. For this reason, and following the observation made by the Political Letter of the Republic, Articles 5 V and X override treaties and conventions ratified by Brazil:

> O fato de a Convenção de Varsóvia revelar, como regra, a indenização tarifada por danos materiais não exclui a relativa aos danos morais. Configurados esses pelo sentimento de desconforto, de constrangimento, aborrecimento e humilhação decorrentes do extravio de mala, cumpre observar a Carta Política da República – incisos V e X do artigo 5º, no que se sobrepõe a tratados e convenções ratificados pelo Brasil.
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> RE No. 172720-9-RJ, Min. Marco Aurélio, DJ, 21.02.1997.

[4] CÓDIGO DE PROTEÇAO E DEFESA DO CONSUMIDOR [hereinafter CDC].

[5] In a report from the secretariat for consumers of the Ministry of Justice, it was not excluded that the CDC would apply in accidents as well. *See* MINISTÉRIO DA JUSTIÇA SECRETARIA NACIONAL DO CONSUMIDOR GABINETE DA SECRETÁRIA, OFICIO CIRCULAR N. 5762-2012/Senacon/MJ, Sept. 2012 [hereinafter CIRCULAR NO. 5762-2012].

[6] RE No. 80004-SE, Relator: Min. Xavier de Albuquerque, 29.12.1977, R.T.J. 83-3/809.

[7] Decreto-Lei No. 4.657, de 4 de Setembro de 1942, Lei de Introdução às normas do Direito Brasileiro. The previous name was Lei de Introdução ao Código Civil Brasileiro.

[8] "Ressalta-se, ainda, que o Código de Defesa do Consumidor (Lei No. 8.078/90) é norma especial de ordem pública, de caráter cogente e de observância obrigatória, aplicando-se integralmente a toda relação de consume." Translation: "[i]t results that the CDC is a specific law that has the force of public order and therefore which is mandatory to obey. The law is entirely and totally applicable to all consumer relationships." *See* CIRCULAR NO. 5762-2012, *supra* note 5.

instruments had different objectives, leading to the CDC being considered more appropriate to regulate cases involving consumers. Indeed, the social function carried out by consumption relationships introduced by the CDC is important to be examined in conjunction with other legislative instruments.[9] The argument was that the Brazilian Consumer Code had been enacted after *Código Brasileiro do Ar* and, therefore, relying on the principle that newer law derogates older law, judges applied the Brazilian Consumer Code.[10] However, such an argument is not viable with regard to the much newer Montreal Convention. Indeed, the Montreal Convention entered into force after the CDC and is a more specific law. Still, the Brazilian judiciary takes a constitutional approach resulting in the prevalence of the CDC.[11]

The relationship between the CDC and the Montreal Convention, with regard consumer-related cases was discussed by the Federal Supreme Court in 2014.[12] Although Ministers Gilmar Mendes, Luís Roberto Barroso, and Teori Zavascki favored the prevalence of Articles 17(2) and 19 of the Convention over the application of the CDC, nothing changed.[13] By using the Code instead of the Convention, the Brazilian courts ensure that their nationals are overly well protected. Indeed, the Brazilian Consumer Code offers extensive protection to consumers. At the same time, the Code gives Brazilian judges jurisdiction to hear any case involving a Brazilian consumer, even if all of the elements tend to favor another jurisdiction.[14]

The constitutional argument used to set aside international conventions and apply the Consumer Code is imaginative. This approach is also based on the theory followed by the country with regard to international law. Indeed, international law does not determine which theory, monism or dualism, is to be preferred; the only requirement is that international law is respected. Consequently, it is left to every State to decide which is the most suitable, according to its legal traditions. It is not the role of international law to determine this aspect of legal enforcement.[15]

This paper explains the place given to the CDC, together with the danger it can bring for international relations. First, the Brazilian position regarding international treaties will be discussed. Second, the paper will address the Constitutional arguments. Third, the international conventions will be explored, followed by a discussion of the problems the CDC creates.

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[9] Rodrigo C. Rebello Pinho, O Transporte Aéreo e o Código de Defesa do Consumidor, http://www.mpsp.mp.br/portal/page/portal/cao_consumidor/doutrinas/VARIG%20Consumidor.htm (last visited June 20, 2016).

[10] Ali Taleb Fares, Novo Panorama da Responsabilidade Civil no Transporte Aéreo, Revista Brasileira de Direito Aerospacial, http://www.sbda.org.br/revista/Anterior/1731.htm (last visited June 20, 2016).

[11] S.T.J.-Recurso Especial, AgRg No. AREsp 388975 MA 2013/0289400-6, Relator: Min. Marco Buzzi, 17.10.2013.

[12] Joined cases S.T.F.-Recurso Extraordinário, RE No. 636331 e Recurso Extraordinário com Agravo ARE No. 766618, 08.05.2014. *See* Press Release, Federal Supreme Court, Suspended Judgment on Compensation Rule in International Air Transport, May 8, 2014, http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=266374. In *Air Canada v. Giardulli*, ARE No. 766618-SP, Relator: Min. Roberto Barroso, 13.11.2013, a passenger who suffered a 12-hour delay on an international flight was granted R$ 6000 for moral damages. This decision was contested by Air Canada, which argued that the parameters of the Montreal Convention should have applied.

[13] S.T.J.-ES, APL 00355503420138080024, Relator: Samuel Meira Brasil Junior, 26.4.2016. The decision against Alitalia was upheld on appeal, with the court stating that the CDC prevailed.

[14] CDC, art. 1.

[15] ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 21–22 (1986).

2. *Monist, Dualist, and the Position of Brazil*

The status of international law in the national legal order varies drastically from country to country.[16] However, two main theories describing the relationship between international law and national law – monism and dualism – have emerged. Within the monist theory, two options exist: either international law is on top of the hierarchy of legal norms or national law is on top of that hierarchy.[17] On paper, it appears easy; however, no consensus exists regarding the definition of these terms. Some scholars employ the term "dualist" to contrast theoretical perspectives on the relationship between international and domestic law. For the scholars advocating this approach, dualism "points to the essential difference of international law and municipal law, consisting primarily in the fact that the two systems regulate different subject-matter."[18] However, most scholars follow the approach that will be described below. Needless to say, hardly any countries only rely on one theory. Most States have a somewhat hybrid system, relying partly on monism and partly on dualism in their application of international law in their national systems.[19]

a. Monism

Under the monist theory, the internal and international legal systems form one system. Most constitutions specify that treaties ratified by the State are part of domestic law without the need for further action from the State.[20] In other words, international rules that a State has accepted, through ratification of a treaty or signing a convention, are an integral part of the national legal order. In determining whether actions are legal or not, both national rules and international norms are taken into consideration.[21] Kelsen associates the decision on which order prevails – national or international – with ideology. In his view, countries giving prevalence to international law are following the ideology of pacifism, while countries giving prevalence to national law are associated with the ideology of imperialism.[22]

Most monist States make a distinction between international law embodied in treaties and other forms of international law, such as customary international law or *jus cogens*. In pure monist states, customary international law is regarded as part of national law. Some countries, such as The Netherlands, follow the monist approach but still require implementation of international law into domestic law.[23] When this approach is adopted, the State no longer can be

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[16] THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY (David Sloss & Derek Jinks eds., 2009).

[17] HANS KELSEN, PURE THEORY OF LAW (2d German ed., Max Knight trans., Univ. of Cal. Press 1967) (1960).

[18] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 31 (7th ed. 2008).

[19] David Sloss, *Treaty Enforcement in Domestic Courts: A Comparative Analysis*, *in* THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY (David Sloss ed., 2009).

[20] David Feldman, *Monism, Dualism and Constitutional Legitimacy*, 20 AUSTL. Y.B. INT'L L. 105, 105 (1999).

[21] PIETER KOOIJMANS, INTERNATIONAAL PUBLIEKRECHT IN VOGELVLUCHT 82 (Wolters-Noordhoff 1994).

[22] KELSEN, *supra* note 17, at 332–44.

[23] CASSESE, *supra* note 15 (quoting G.J. Wiarda). Most treaties do not require a new Act to be adopted in order to implement the treaty into Dutch law, as The Netherlands strictly follows the monist approach. But there are cases of treaties and other international agreements that necessitate implementation, such as the International Criminal Court statutes. The statutes were implemented through the International Criminal Court (Implementation) Act and the accompanying Amendment Act, enacted on June 20, 2002. The Implementation Act entered into force on July 1, 2002. *See* Anne Meuwese & Gerhard van der Schyff, *Dutch Constitutional Law in a Globalizing World*, 9 UTRECHT L. REV. 2 (2013).

regarded as a purely monist state, as it has begun to partly rely on the dualist theory. For instance, in the U.K., customary international law is recognized as being an integral part of the common law, following the decision in *Trendtex Trading Corp. v. Central Bank of Nigeria*.[24] However, a dualist stance is followed in respect to treaties. Indeed, without specific legislation transforming a treaty into municipal law, the treaty does not have direct effect. This approach is exemplified by the fact that English courts often use treaties as an aid in deciding questions, but rarely as a source of law. Therefore, in the U.K., until an Act of Parliament is passed to give effect to an international instrument, the latter does not have effect in domestic law.[25]

Pure monist States are rare. When the monist theory is followed in its purest form, States are not required to translate international law into national law in order for the international law to be applicable. In addition to being directly applicable, international law is given primacy under the purest form of the monist theory.[26] The international law will be incorporated and automatically effective just by the simple act of ratification. The fact that a treaty is directly effective upon ratification comes from the fact that in the vast majority of countries, the legislature participates in the process of ratification. Due to the legislature's involvement in the ratification process, the ratification becomes in itself a legislative act, therefore leading the international instrument to become effective simultaneously within the international and domestic sphere.[27] For instance, the U.S. Constitution grants to the President the power to make treaties as long as a two-thirds majority of the Senate concurs. When a treaty is ratified in accordance with the Constitution it automatically becomes part of U.S. law.[28]

Nonetheless, the U.S. system is not a purely monist system, but rather a mixture of both monist and dualist systems. Indeed, in some instances international law can be directly relied upon before U.S. courts, and in others it cannot. Article VI of the U.S. Constitution elevates treaties as part of the Supreme Law of the Land. But, in *Medellín v. Texas*,[29] the Supreme Court took the view that treaties are not self-executing and therefore should be implemented by statute. The Supreme Court also stated that customary international law is part of U.S. law but could be disapplied if the international law goes against a legislative, executive, or judicial act. For this reason, it has been said that the United States has a monist supremacy clause within its Constitution and a dualist Supreme Court.[30]

Under the monist theory, international law can be directly invoked by nationals and directly applied by national judges, just as if it was national law. The monist approach places the State directly within the community of nations. At the same time, the role of international law in defining the scope of the authority of a State is recognized. This is also the reason why in some States, international rules have priority over national rules, which enables a national judge to declare a national rule invalid if it contradicts international rules.[31] In some jurisdictions, which

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[24] [1977] QB 529 (Eng.).
[25] MICHAEL BARTON AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 45 (6th ed. 1987).
[26] ANTONY AUST, MODERN TREATY LAW AND PRACTICE 183–87 (2nd ed. 2007).
[27] AKEHURST, *supra* note 25, at 45.
[28] U.S. CONST. art. VI, § 2.
[29] 552 U.S. 491 (2008).
[30] D.A. Jeremy Telman, *A Monist Supremacy Clause and a Dualistic Supreme Court: The Status of Treaty Law as U.S. Law*, *in* BASIC CONCEPTS OF PUBLIC INTERNATIONAL LAW: MONISM AND DUALISM 571 (Marko Novaković ed., 2013).
[31] Feldman, *supra* note 20, at 105.

follow the purest form of monism, national law contradicting international law can be rendered null and void, even if it was enacted after the international rule.

Monist systems differ in their approach. Under some constitutions, ratification leads to direct incorporation of international obligation into national law, while for others, direct incorporation is only available for self-executing treaties. The monist approach restricts the sovereignty of the State and might restrict its capacity to enact new laws, as the State needs to first comply with its international obligations. Such a restriction is what has led other States to follow the other approach, namely the dualist theory.

b. Dualism

On the other side of the spectrum resides the dualist theory. Dualism separates national law from international law. According to this theory, international and domestic law are understood as separate and independent legal orders.[32] The theory emphasizes this difference and requires the translation of international law into domestic law. Without such translation, international law is not directly applicable domestically, meaning that it cannot be invoked before national courts. Dualist systems need to strike the right balance. Indeed, as long as it does not adapt its national law to conform to the treaty, or enact its national law explicitly incorporating the treaty, a State can be considered in violation of international law. International law still remains supreme, even in dualist systems. States cannot explain the non-fulfilment of their international obligations by relying on national law,[33] although national laws that contradict international law remain in force.

Germany, even though classified as dualist, is a far more complex system. Dualist countries are considered as having two or more branches of jurisdiction. Germany possesses five branches of jurisdiction, in addition to constitutional jurisdiction, each with its own organization.[34] These five branches are ordinary jurisdiction, fiscal jurisdiction, administrative courts, labor jurisdiction, and social jurisdiction.[35]

The fact that a nation has a mechanism for domestic implementation of treaties does not necessarily mean that its system is dualist; as long as there is an assumption that international norms will be incorporated into (and recognized as binding within) the domestic legal order, the system can be monist. Moreover, both monist and dualist States are under the same obligation to comply with international law.

The advantage of monism compared to dualism is that the risk of violating international rules is less present, as national judges can apply international law directly.[36] Moreover, negligence or unwillingness to implement international law is not an issue for monist States. However, if a judge wrongly applies international law in a monist system, the country will be regarded as having violated international law, just as a dualist country which fails to effectively interpret international law. States are under the false impression of being free to choose;

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[32] Telman, *supra* note 30.
[33] HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 262 (1982).
[34] Michel Eichberger, *Monism or Dualism?*, 2 LA REVUE ADMINISTRATIVE 10 (2000).
[35] *Id.*
[36] KOOIJMANS, *supra* note 21, at 8.

however, if they fail to adapt their national legal system to respect international rules, they will be held accountable.

Then we have Brazil, which has proclaimed itself "moderate monist." The moderate monist theory was developed by Alfred Verdross; however, in his conception, international law is primary.[37] Nonetheless, as will be shown *infra*, the position of Brazil's Supreme Federal Court in respect to the Consumer Code runs counter to the principle of primacy of international law.

3. *Federal Constitution of Brazil*

A constitution is the backbone of any modern legal system. Under Kelsen's theory, an act gains its normative meaning from a higher legal norm. At some point, a norm has not been authorized by any other legal norm, but is presupposed to be legally valid. Kelsen called the normative content of this presupposition the basic norm. The constitution is always the basic norm.[38]

The Federal Constitution of Brazil was adopted by the National Constituent Assembly in 1988. In fact, the National Congress stopped functioning as a legislative body and dedicated itself for nearly a year to the writing of the Brazilian Federal Constitution. The 1988 Federal Constitution is a complex document, full of self-executing dispositions. It did not follow the path of previous constitutions. Indeed, some articles, sections, and subsections were removed and some were added.

Article 4 governs Brazil's international relations under the following ten principles:

- national independence;
- prevalence of human rights;
- self-determination of peoples;
- non-intervention;
- equality among States;
- defense of peace;
- peaceful settlement of conflicts;
- repudiation of terrorism and racism;
- cooperation among peoples for the progress of mankind; and
- granting of political asylum.

Article 4 further states: "the Federative Republic of Brazil shall seek economic, political, social, and cultural integration of the peoples of Latin America, in order to form a Latin-American community of nations." However, nowhere in the Constitution is the place of international law as a source of domestic law discussed. This omission was criticized by various authors as a missed opportunity by Brazilian legislators to choose between one of the two theories and create legal certainty with regard to international norms.[39]

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[37] ALFRED VERDROSS, DIE EINHEIT DES RECHTLICHEN WELTBILDES AUF DER GRUNDLAGE DER VOLKERRECHTSVERFASSUNG (Tubingen 1923).

[38] HANS KELSEN, GENERAL THEORY OF LAW AND STATE (Anders Wedberg trans., Harvard University Press 1945); HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY xvii (Bonnie Litschewski Paulson & Stanley L. Paulson trans., Clarendon Press 2002) (Stanley L. Paulson's Introduction).

[39] CELSO BASTOS & IVES GANDRA MARTINS, 1 COMENTARIOS A CONSTITUÇAO DO BRASIL 452 (Oct. 5, 1988).

Article 5(2) stipulates that "the rights and guarantees established in this Constitution do not preclude others arising out of the regime and principles adopted by it, or out of international treaties to which the Federative Republic of Brazil is a party." But at the same time, Article 102 requires the Federal Supreme Court to safeguard the Constitution and the obligations provided by it. Specifically, Article 102 III (b) grants the Federal Supreme Court, on extraordinary appeal, the power to "declare[ ] the unconstitutionality of a treaty or a federal law." The Federal Supreme Court, under Article 105 III (a), can judge, on special appeal, a decision that is contrary to a treaty or federal law, or which denies the effectiveness of such instruments. The power of federal judges is further extended with respect to international treaties in Article 109 III. Under this Article, federal judges have the competence to institute legal proceedings in "cases based on a treaty or a contract of the Republic with a foreign State or international organization."

Article 21 stipulates the jurisdiction and power of the Federal Republic of Brazil. This Article gives Brazil the power to:

- maintain relations with foreign States and participate in international organizations;
- declare war and make peace;
- ensure national defense;
- allow foreign forces, in the cases provided for in a supplementary law, to pass through the national territory or to remain therein temporarily;
- declare a state of siege, a state of defense and federal intervention;
- authorize and control the production and trade of military matériel;
- issue currency; and
- manage the foreign exchange reserves of the country and control financial operations, especially those of credit, exchange, and capitalization, as well as insurance and private security.

The division of the matters that fall within the jurisdiction of the Republic and the ones left to the states, is expressed in Article 25(1). Brazilian states have jurisdiction over matters that are not forbidden in the Constitution.

Another interesting point is the participation of the Brazilian Congress in the treaty-making process, located in Article 49-I. The intention behind this Article is to establish the control of the legislative branch over the treaty-making process.

However, with regard to international transportation, a specific article was added in the Constitution. Indeed, Article 178(1) states that "[t]he law shall provide for the regulation of air, water and ground transportation, and it shall, in respect to the regulation of international transportation, comply with the agreements entered into by the Union, with due regard to the principle of reciprocity." Consequently, the approach taken by Brazilian courts to raise the Brazilian Consumer Code to the level of a superior law is therefore contrary to the requirement of this Article.[40] Furthermore, such an approach violates the principle of reciprocity.

[40] The argument of Air France in Extraordinary Appeal (Recurso Extraordinário) No. 636331 was heavily based on conflict.

4. *Warsaw and Montreal Conventions*

a. *Warsaw Convention*

The Convention for the Unification of Certain Rules Relating to International Carriage by Air, commonly known as the Warsaw Convention, was signed in 1929.[41] The Convention was the result of the proposal six years earlier by the French government to establish a convention regulating liability in international carriage by air. The first conference was held in Paris and it soon became obvious that a group of technical and legal experts was needed to study the draft convention previously submitted. Accordingly, in 1925, the *Comité International Technique d'Experts Juridique Aériens* (CITEJA) was formed. CITEJA presented the draft convention at the Warsaw Conference which met October 4–12, 1929.[42] The Convention unified an important sector of air law. Indeed, the Convention regulates liability issues for international carriage of persons, luggage, or goods performed by aircraft for reward. The Convention came into force in 1933. It was amended on several occasion by various protocols, including The Hague Protocol of 1955.[43] Failed attempts at amendment include the Guatemala City Protocol of 1971.[44]

As early as 1948, the Convention was again put under the scrutiny of a legal committee set up by the International Civil Aviation Organization (ICAO). This legal committee prepared a draft to replace the Convention; however, it was rejected. Instead, the work done by the committee was utilized to amend the Convention through The Hague Protocol of 1955. For the parties adhering to the Protocol, it was agreed that the Protocol and the Convention were to be read and interpreted in conjunction, as one single instrument.

The Protocol cannot be solely regarded as an amendment to the Convention, instead it is a new and separate legal instrument as it is only binding between the parties. Therefore, if one State is a signatory only of the Warsaw Convention and one is a signatory of the Hague Protocol, the Convention will apply to commercial flights operated between them.[45] However, if the Protocol amends a provision of the Convention, the obligations under the Convention that were not amended will still be applicable.[46]

The Convention is divided into five chapters. The first chapter embodies all of the definitions, while the second chapter is preoccupied with the documents necessary for the carriage of luggage and passengers. The third chapter – the chapter that is the most relevant for this discussion – lays down the rules on air carrier liability. The provisions relating to combined

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[41] Convention for the Unification of Certain Rules Relating to International Carriage by Air, *opened for signature* Oct. 12, 1929, 137 L.N.T.S. 11, 49 Stat. 3000 (entered into force Feb. 13, 1933) [hereinafter Warsaw Convention].
[42] ICAO, The Warsaw System on Air Carrier Liability, http://www.icao.int/secretariat/postalhistory/the_warsaw_system_on_air_carriers_liability.htm (last visited June 20, 2016).
[43] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, *opened for signature* Sept. 28, 1955, 478 U.N.T.S. 371 (entered into force Aug. 1, 1963).
[44] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, as Amended by the Protocol Done at The Hague on 28 September 1955, *opened for signature* Mar. 8, 1971, ICAO Doc. 8932 (not in force).
[45] At least that is the interpretation in the United States under *Hyosung (America), Inc. v. Japan Airlines Co.*, 624 F. Supp. 727 (S.D.N.Y. 1985).
[46] Chubb & Son, Inc. v. Asiana Airlines, 26 Av. Cas. (CCH) 15,936 (S.D.N.Y. Sept. 22, 1998). *See* LAWRENCE GOLDHIRSCH, THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK 16 (2000).

carriage, i.e carriage by more than one carrier, are to be found in the fourth chapter, while the Convention's general and final provisions are embodied in the fifth chapter.

The Warsaw Convention achieved breakthroughs on issues such as legal jurisdiction, carrier liability, and limitation thereof. Article 29 limited the claim period to two years. Articles 17 and 18 established the liability of the carrier. However, the major advantage of the Convention was a monetary cap limiting the carrier's liability in relation to both passengers and their luggage, as well as cargo. At the same time, it created a presumption of fault on the part of the carrier. The burden was on the carrier to prove that it was not at fault by using one of the limited defenses that were available. The limitation of carrier liability was fixed in Article 22 at up to 125,000 gold francs (about US$ 5,000 at the rates of exchange prevailing in 1929)[47] for passenger injury or death; 250 gold francs (about US$ 10) per kilogram for loss or damage to cargo or registered baggage, and 5,000 gold francs (about US$ 200) per passenger for unregistered baggage.[48] Under certain circumstances specified in the Convention, the conduct of the carrier may be considered so reprehensible that a claimant can ask the court to break the limit and grant full compensation. However, such circumstances are strictly limited.

One may have noticed that the Convention does not regulate the liability of the air carrier in cases of delay, cancellation, or denial of boarding. The Convention also stipulates in Article 20 that the carrier will not be responsible if the damage results from the passenger's own fault or from the fault of one of its temporary servants.

After being amended by six protocols over a period of 46 years, creating the so-called "Warsaw System," the Warsaw Convention was replaced by the Montreal Convention in 1999.[49] Nonetheless, the number of ratifications of the new convention has never reached the level of the Warsaw Convention. The Warsaw Convention is considered as one of the most important instruments of private international law. It was the first comprehensive legal framework governing aviation at the international level, playing an essential role in supporting the development of the sector and establishing a set of principles, most of which are still effective and constitute the basis of modern aviation law.[50] However, the system grew too complicated and burdensome due to the various amendments, and an update was regarded as the best option. As a result, the Montreal Convention was enacted.

b. *Montreal Convention*

The Convention for the Unification of Certain Rules for International Carriage by Air, or Montreal Convention, is a multilateral treaty adopted by a diplomatic meeting of ICAO member

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[47] CHRISTOPHER N. SHAWCROSS & K.M. BEAUMONT, 1 AIR LAW ¶ 106 (J. D. McClean et al. eds., 2009).

[48] The Convention set out the sums in gold francs (defined in terms of a particular quantity of gold under Article 22, paragraph 5). The French gold franc was later replaced by an expression given in terms of Special Drawing Rights, or SDRs. Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, as Amended by the Protocol Done at The Hague on 28 September 1955, *opened for signature* Sept. 25, 1975, 2097 U.N.T.S. 69, ICAO Doc. 9146 (entered into force Feb. 15, 1996) (not in force for the United States).

[49] U.N. CONF. ON TRADE & DEV., CARRIAGE OF GOODS BY AIR: A GUIDE TO THE INTERNATIONAL LEGAL FRAMEWORK, UNCTAD/SDTE/TLB/2006/1 (2006).

[50] ICAO, The Warsaw System on Air Carriers Liability, http://www.icao.int/secretariat/postalhistory/the_warsaw_system_on_air_carriers_liability.htm.

States in 1999.[51] The main aim of the Convention is to re-establish uniformity and predictability of rules relating to the international carriage of passengers, baggage, and cargo. The Convention maintains the core provisions of the Warsaw regime but modernizes this regime in a number of key areas.

The Convention protects passengers by introducing a two-tier liability system that eliminates the previous requirement of proving "wilful misconduct" by the air carrier to obtain more than US$75,000 in damages, which it was hoped would eliminate or reduce protracted litigation.

Similar to the Warsaw Convention, the liability of the carrier is strict for proven damages up to a fixed amount, now set at 113,100 special drawing rights (SDRs).[52] When damages are sought for more than 113,100 SDRs, the airline may seek to avoid liability by proving that the accident which caused the injury or death was not due to its negligence or was attributable to the negligence of a third party.[53] Generally, compensation for purely psychiatric injury or damage is not available unless inextricably linked to the physical injury.[54] The Montreal Convention also increased the maximum liability of airlines for lost baggage to 1,131 SDRs per passenger.[55]

Significantly, the jurisdictional provisions of the Warsaw Convention were amended in the Montreal Convention so that victims or their families generally can sue foreign carriers in the country of their residence.[56]

5. *The Problem with the CDC*

Like most countries, the approach that Brazil took with the CDC flowing from the Constitution reflects the pure theory of law of Kelsen. Indeed, for Kelsen, an act gains its legal-normative meaning by another legal norm that confers this normative meaning upon it.[57] An act can modify the law if it is created in accordance with another higher legal norm. The Brazilian Constitution is the highest norm, and the chain comes to an end at this level. In Kelsen's opinion, the legal validity of the Constitution must be presupposed.[58]

In any constitution, there are enumerated and unenumerated rights. The distinction between enumerated and unenumerated rights leads to a major constitutional issue linked to the question of whether courts have authority to enforce rights that are not actually directly granted by the Constitution itself.[59] A subquestion is whether, even though the right has been enumerated in a very broad abstract way, courts may give prevalence over international treaties.

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[51] Convention for the Unification of Certain Rules for International Carriage by Air, *opened for signature* May 28, 1999, T.I.A.S. No. 13,038, 2242 U.N.T.S. 372 (entered into force Nov. 4, 2003) [hereinafter Montreal Convention].
[52] Under the terms of the escalator clause contained in Article 24 of the Convention, this amount was increased from 100,000 SDRs, effective January 1, 2010.
[53] Montreal Convention, *supra* note 51, art. 21(2)(a & b).
[54] This interpretation of Article 17(1) varies among countries. *See* BRIAN F. HAVEL & GABRIEL S. SANCHEZ, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL AVIATION LAW 291–92 (2014).
[55] Montreal Convention, *supra* note 51, art. 22(2). Under the terms of the escalator clause contained in Article 24 of the Convention, this amount was increased from 1,000 SDRs, effective January 1, 2010.
[56] *Id.* art. 33(2). *See* HAVEL & SANCHEZ, *supra* note 54, at 276, 304.
[57] KELSEN, *supra* note 17, at 44.
[58] H.L.A. HART, THE CONCEPT OF LAW ch. 3 (1st ed. 1961).
[59] Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should be Overruled*, 59 U. CHI. L. REV. 381 (1992).

a. *The CDC*

The Consumer Code brought important modifications to the Brazilian legal order. The Warsaw system was already incompatible with Brazilian law,[60] but this incompatibility was nothing compared to the changes brought by the Code. Indeed, the Code established the principles of integral refund and objective responsibility. These two principles are rooted in the Brazilian Constitution,[61] as are principles of economic order.[62] The Code is considered the exclusive law applicable to consumers' cases. A decision of the Federal Supreme Court attests to such an approach with regard to airline tickets.[63] The same holds true for lost luggage, which entitles the owner of the luggage to a minimum compensation of R$ 4.000.[64]

Article 2 of the CDC defines a consumer as a legal or physical person that uses the product or service as an end consumer.[65] But the article allowing the Brazilian courts to rely on the CDC is Article 3. This article refers to the service provider, which can be either a national or a foreigner.[66] "Service" is defined in Article 3(2) in such broad terms that any type of service would fall within its definition.[67]

The system created by the CDC does not require any fault for the service provider to be held liable to the consumer, according to Article 14.[68] Exclusions of liability are embodied in the third paragraph of that article. The burden of proof is on the service provider invoking one of the exemptions, namely that the fault is solely due to the passenger or that there is no defect on the side of the service provider.[69] Surprisingly, the CDC does not refer to *force majeure* or Act of

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[60] The liability was much higher in the Warsaw Convention than in the Code. Under the Brazilian Code of Air, the damages are calculated in Obrigações do Tesouro Nacional, not in SDR. Fernando Noronha, *A Responsabilidade Civil do Transportador Aéreo por Dano a Pessoas, Bagagens e Cargas,* 44 REVISTA DE DIREITO DO CONSUMIDOR 168, 173 (2002).

[61] CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5 XXXII (Braz.).

[62] *Id.* art. 170 V.

[63] Varig S/A v. Jardim, RE No. 351750, Relator: Min. Marco Aurélio, 17.03.2009, R.J.S.P. 57-384/137.

[64] In 2012, this equaled approximatively 1,600 euros. *See, e.g.*, Eboli v. TAP Air Portugal, T.J.R.J., Ap. Civ. No. 0033664-97.2012.8.19.0001, Relator: Des. Andre Ribeiro, 25.10.2012. For other judgments of the same court, see *Empresas Aéreas – Extravio, Violação E Furto De Bagagens*, BANCO DO CONHECIMENTO, http://www.tjrj.jus.br/documents/10136/31308/responsabilidade_civil_empresas_aereas_extravio_violacao_furto_bagagens.pdf.

[65] CDC, *supra* note 4, art. 2 ("Consumidor é toda pessoa física ou jurídica que adquire ou utiliza produto ou serviço como destinatário final."). Passengers are within the definition as made clear in two 2009 cases: Silva v. C.A. Viagens Ltda., T.J.S.C., Ap. Civ. No. 2008.024456-5, Relator: Des. Fernando Carioni, 25.11.2008, and América Latina Companhia de Seguros v. Deustche Lufthansa AG, STJ–AgRg No. REsp 262687/SP no. 2000/0057696-4, Relator: Exmo. Sr. Min. Fernando Gonçalves, 15.12.2009.

[66] *Id.* art. 3 ("Fornecedor é toda pessoa física ou jurídica, pública ou privada, nacional ou estrangeira, bem como os entes despersonalizados, que desenvolvem atividades de produção, montagem, criação, construção, transformação, importação, exportação, distribuição ou comercialização de produtos ou prestação de serviços. . . .).

[67] *Id.* art. 3 §2 ("Serviço é qualquer atividade fornecida no mercado de consumo, mediante remuneração, inclusive as de natureza bancária, financeira, de crédito e securitária, salvo as decorrentes das relações de caráter trabalhista.").

[68] *Id.* art. 14 ("O fornecedor de serviços responde, independentemente da existência de culpa, pela reparação dos danos causados aos consumidores por defeitos relativos à prestação dos serviços, bem como por informações insuficientes e inadequadas sobre a fruição e risco.").

[69] *Id.* ("I – que, tendo prestado o serviço, o defeito inexiste; ou II – a culpa é exclusiva do consumidor ou do terceiro.").

God, adopting a similar system as maritime or road conventions.[70] This omission is in direct contradiction with the extraordinary circumstances provisions embodied in both the Warsaw and Montreal Conventions.[71] This omission renders the CDC stricter than the other systems.

Article 22 imposes a certain threshold on companies offering services to the public.[72] Airlines definitely fall into this category. Beyond that threshold, if a company fails to meet the required standards, it is obliged to fully and integrally compensate the consumer for both material and immaterial damages.[73] Articles 25[74] and 51[75] restrict greatly any limitation of liability that the carrier could try to invoke. Article 51 also renders void any no-show clauses.[76] The CDC has created an imbalance between the parties, but contrary to the situation in the European Union,[77] this imbalance favors consumers. Article 39 of the CDC prohibits any situation that leaves the consumer in excessive disadvantage. Therefore, if any alteration to a flight occurs before the check-in time, airlines are required to contact passengers by all possible means available, such as e-mail, telephone, and on-site contact. In order to avoid running afoul of Article 39, airline companies must seek confirmation that passengers have knowledge of the alteration.

Under the CDC, the Brazilian consumer is treated like a king. Indeed, passengers can refuse alterations to their flights. The position of Brazilian law is that the contract previously established has been altered and therefore the customer has a right to refuse the changes. Similarly, if the passenger feels that the alternative offered is not viable, s/he can refuse the changes and start an action for compensation, for both material and moral damages. Of course, most of these cases are negotiated with the airline company or sent to the Agência Naciaonal de Aviação Civil (ANAC) and never reach the court system. However, when a case does reach the courts, the result is typically harsher than that seen in the European Union, and the fines levied are much higher than in Europe. A recent decision of the 6th Civil Court of Belo Horizonte demonstrates this approach. The court ordered the air carrier Gol to compensate R$ 30 thousand in moral damages to a passenger and her two children for negligent service offered by the

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[70] The same exclusions exist in the CMR or in The Hague or Hague Visby Convention. All of these conventions deal with the carriage of goods.

[71] Warsaw Convention, *supra* note 41, art. 20; Montreal Convention, *supra* note 51, arts. 19 & 20.

[72] CDC, *supra* note 4, art 22 ("Os órgãos públicos, por si ou suas empresas, concessionárias, permissionárias ou sob qualquer outra forma de empreendimento, são obrigados a fornecer serviços adequados, eficientes, seguros e, quanto aos essenciais, contínuos.").

[73] *Id.* art. 6 ("São direitos básicos do consumidor: . . . VI – a efetiva prevenção e reparação de danos patrimoniais e morais, individuais, coletivos e difusos.").

[74] *Id.* art. 25 ("É vedada a estipulação contratual de cláusula que impossibilite, exonere ou atenue a obrigação de indenizar prevista nesta e nas seções anteriores.").

[75] *Id.* art. 51 ("São nulas de pleno direito, entre outras, as cláusulas contratuais relativas ao fornecimento de produtos e serviços que:

> I – impossibilitem, exonerem ou atenuem a responsabilidade do fornecedor por vícios de qualquer natureza dos produtos e serviços ou impliquem renúncia ou disposição de direitos. Nas relações de consumo entre o fornecedor e o consumidor-pessoa jurídica, a indenização poderá ser limitada, em situações justificáveis . . . .").

[76] *Id.*

[77] In the EU, the airlines' abuse of the extraordinary circumstance defense leads to most of the cases being dismissed. *See, e.g.*, **[cite an example of such a case here]**. https://www.airhelp.com/en/know-your-rights

company.[78] The judge took into account the upsets that the family suffered during a trip from Belo Horizonte to Lisbon in September 2006. According to the family, after a lot of difficulties, they managed to travel to their destination, but on a different itinerary than the one contracted for. Besides the change in itinerary, the company only paid part of the altered tickets, meals, transport, and telephone expenses. Such a case in Europe would not have brought any compensation to this family.[79]

b. *The Relationship between the CDC and the Conventions*

Brazil is a signatory to both the Warsaw and Montreal Conventions;[80] however, it rarely relies on them, as explained *supra*. Both Conventions define the term "international transport" in their first Articles. International transport encompasses all international carriage of passengers, baggage, or cargo, performed by aircraft for reward, with the departure and the arrival point "situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party."[81] The two Conventions were enacted to regulate any international transport and to harmonize the international system. Articles 17 to 37 deal with the carrier's responsibilities as well as the liability limitation that can be invoked by the carrier.

Brazil takes a moderate monist approach with regard to international norms, which complicates the situation. The relationship between the CDC and the Convention was briefly explained *supra*. Brazilian Courts do not like the idea of being limited, which therefore disadvantages the Montreal Convention. The CDC leaves plenty of maneuvering room for judges. The Brazilian courts and legislature, by using such an approach, convey the impression that they are still autonomous in decisions involving private relationships. However, what the courts and legislature forgot is that airlines are choosing to protect themselves from these decisions by raising their prices in comparison to those applicable in Europe.[82]

The conflict between the CDC and the Montreal or Warsaw Convention was intensely debated. Indeed, in this polemic, two groups emerged. On one hand is the group that *favors* the prevalence of the CDC over the Conventions. They base their argument on the fact that the obligation to fully compensate, as introduced in Article 6 VI, is a basic right of consumers. Therefore, according to this group, the limitation of liability cuts directly against this principle and should be disapplied in cases involving consumers.

On the other hand, the opposition bases its argument directly on aviation law, arguing that the CDC cannot alter the Conventions and therefore the Conventions prevail over the

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[78] In 2006, this amount equaled approximately 12,000 euros. SÉRGIO CAVALIERI FILHO, PROGRAMA DE RESPONSABILIDADE CIVIL (Atlas 2010).

[79] *See, e.g.*, Joined Cases C-402/07 & C-432/07, Sturgeon v. Condor Flugdienst, & Böck v. Air France SA, 2009 E.C.R. I-10923 (ruling that compensation was also available for passengers of delayed flights); Case C-83/10, Sousa Rodríguez v. Air France SA, 2011 E.C.R. I-9469. In *Aurora*, Air France refused to pay for the accommodation of the passengers, and the Court – while granting the compensation for the hotel – refused to extend the compensation to the two telephone calls and other assistances to which the passengers were entitled under Articles 8 and 9.

[80] The Montreal Convention was ratified through the *Decreto Legislativo* No. 59/2006, promulgated by *Decreto* No. 5.910/2006.

[81] Montreal Convention, *supra* note 51, art. 1(2).

[82] **[a citation supporting this statement is needed here]**. Taleb Fares, *supra* note 10

CDC.[83] The position of the Federal Supreme Court, as outlined in *da Silveira Gois v. Leão Trindade*,[84] tends to favor the second group. In this judgment, the Tribunal established that international conventions do not prevail over the internal laws of the country, but in the case of conflict, the *lei posteriori* prevails.[85] Accordingly, the Montreal Convention should prevail over the CDC, as it entered into force nearly 20 years after the CDC. However, in the rest of the judgment, and perhaps because it realized that air carrier liability would then be limited, the Tribunal went on and explained that laws deriving from the Constitution are supreme.

Finally, Article 170 of the Constitution stipulates the principle of consumer protection.

The major problem of the Brazilian approach – putting aside that it disregards two principles of international law, namely *lex posterior derogat legi anteriori* and *lex specialis derogat lex generalis* – is that it neglects the principle of reciprocity and of legal certainty. Indeed, the nature of the airlines' activities is *per se* risky. The Warsaw and Montreal Conventions instituted a system whereby companies are made aware of the amount of compensation that a failure to safely carry passengers or their baggage will be required from them, leading to legal certainty. The European regulation[86] follows the same principle, even though, as explained *supra*, in the case of the EU it is rather the passengers that are left without the certainty of being compensated.[87] More importantly, the principle of reciprocity is stepped upon by Brazilian courts, in violation of Article 178 of the Constitution. Indeed, Iberia Airlines in Brazil has no clue of the amount of compensation it can be ordered to pay, while TAM in Spain knows exactly the maximum amount that it could be required to compensate. This has created a disturbing imbalance on the international level, disadvantaging major airline companies operating in Brazil. Brazil prefers to adopt a position of overprotecting social welfare rather than following the principle of reciprocity.[88]

Furthermore, Brazil's approach conflicts with Article 27 of the Vienna Convention on the Law of Treaties,[89] which states that a Contracting State cannot invoke national law as justification to avoid the application of provisions of an international treaty. The only exception allowed by Article 27 does not apply in this case. Brazil acceded not long ago to this Convention,[90] well after the CDC entered into force. The Vienna Convention renders null and

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[83] SÉRGIO CAVALIERI FILHO, PROGRAMA DE RESPONSABILIDADE CIVIL (Atlas 2010).
[84] RE No. 80004-SE, Relator: Min. Xavier de Albuquerque, 29.12.1977, R.T.J. 83-3/809. *See supra* text accompanying note 6.
[85] FILHO *supra* note 83, at 320.
[86] Regulation (EC) No. 261/2004 of the European Parliament and of the Council, Establishing Common Rules on Compensation and Assistance to Passengers in the Event of Denied Boarding and of Cancellation or Long Delay of Flights, and Repealing Regulation (EEC) No. 295/91, 2004 O.J. (L 46) 1.
[87] Fewer than one percent of the passengers eligible for compensation are indeed compensated. *See Know Your Rights*, AIRHELP, https://www.getairhelp.com/en/know-your-rights (last visited July 19, 2016).
[88] *See Varig S/A v. Jardim*, RE No. 351750 (holding that "[a]fastam-se as normas especiais do Código Brasileiro da Aeronáutica e da Convenção de Varsóvia quando implicarem retrocesso social ou vilipêndio aos direitos assegurados pelo Código de Defesa do Consumidor." Translation: "[t]he specific provisions of the Código Brasileiro da Aeronáutica and the Warsaw Convention should be disregarded when the application of such provisions imply social retrocession or dishonor of the rights guaranteed by the Consumer Code.").
[89] Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331, http://www.worldtradelaw.net/misc/viennaconvention.pdf.
[90] Legislative Decree 583/2012.

void the argument that the CDC is a superior law and that international treaties are merely normal law.

6. *Conclusion*

The approach taken by Supreme Federal Court of Brazil with regard to the Consumer Code disregards one of Plato's fundamental principles, namely the difference between values and norms. The norms that are enacted within Brazil's Constitution should not be confused with values, in this case the protection of the consumer. While the Brazilian Constitution elevates consumer protection to a constitutional right, protecting a value through a higher norm, the Supreme Federal Court elevated the status of the Consumer Code to that of a superior law, exceeding the original status given to the protection of consumers and giving to a value the importance of a norm. By doing that, the Supreme Federal Court has confused values, the protection of consumers, with international obligations, the norm, and achieved the wrong balance.

In criticizing the approach taken toward the Consumer Code, this paper's intent is not to follow the revisionist strategy, which might attempt to demonstrate that the Constitution does not mean what it says. Instead, the paper has shown that the Brazilian legislature and judiciary went above and beyond to protect consumers and follow the unenumerated rights approach.

Unenumerated rights are natural rights. Natural rights are legal rights inferred from other legal rights that are embodied in codified law but are not expressly enumerated in that law.[91] Unenumerated rights are important insofar as the positively enumerated rights could not be maintained without them.[92] Indeed, the Brazilian Constitution refers three times to consumer protection in a more abstract way. However, the Brazilian judiciary has interpreted, relying on the pure theory of law, these broad articles as requiring special laws to be enacted, and granting such special laws the status of superior law, which is reinforced by Article 1 of the CDC.

The Brazilian approach is dangerous as it does not respect the principle of reciprocity with regard to international treaties, leading to legal uncertainty. Indeed, even though Brazil has ratified both the Warsaw and the Montreal Conventions, judges prefer to rely on the Consumer Code.

Although the liability of air carriers for damages was regulated by aviation statutes, none of those laws are being applied when a Brazilian court is dealing with consumers. The reasoning of the Brazilian courts is that the Consumer Code is based on Article 5 of the Brazilian Constitution and therefore is a superior law.

This type of reasoning violates the principle of the *lex specialis derogat lex generalis* embodied in Article 2(2) of the Law of Introduction to the Civil Code. Even though the CDC is considered as a specific law, it was not enacted to specifically regulate aviation issues, nor does it specifically refer to aviation. The main argument for the use of the CDC rather than the Warsaw Convention is that the Convention was appropriate for its time but does not fit modern reality. The objective of that Convention was predominantly economic, which was fundamental for the development of civil aviation, while the objective of the CDC is consumer protection.

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[91] Dworkin, *supra* note 59.

[92] O. John Rogge, *Unenumerated Rights*, 47 CAL. L. REV. 787 (1959); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

Therefore, the two instruments have different objectives, leading to the CDC being more appropriate to govern cases involving consumers. Indeed, the social function carried out by consumption relationships introduced by the CDC is important to be examined in conjunction with other legislative instruments.[93] The argument is that the Brazilian Consumer Code was enacted after *Código Brasileiro do Ar* and therefore, relying on the principle that newer law derogates older law, judges apply the Brazilian Consumer Code.[94] However, this argument lacks viability with regard to the Montreal Convention. Indeed, the Montreal Convention entered into force after the CDC and is a more specific law. Still, the Brazilian judiciary takes a constitutional approach, resulting in the prevalence of the CDC. Finally, this approach clearly violates Article 27 of the Vienna Convention.[95]

The relationship between the CDC and the Montreal Convention was discussed in 2014 in the Federal Supreme Court, whereby Judges Gilmar Mendes, Luís Roberto Barroso, and Teori Zavascki favored the prevalence of the Convention. However, nothing has changed. By relying upon the Code instead of the Convention, the Brazilian courts ensure that their nationals are well protected. Indeed, the Brazilian Consumer Code offers extensive protections to consumers. At the same time, the Code grants Brazilian judges jurisdiction to hear any case involving a Brazilian consumer, even if all of the elements support another result.[96]

The constitutional argument that is used to set aside international conventions in order to apply the Consumer Code is imaginative. At the same time, however, such an approach confuses norms and conventions. Indeed, international norms are disregarded, which jeopardizes legal certainty. By preserving the highest level of protection possible for consumers, Brazil has placed itself in a complicated position, especially if the country begins to liberalize and open itself more fully to the world.

[93] Rebello Pinho, *supra* note 9.
[94] Taleb Fares, *supra* note 10.
[95] Article 27 goes as follows: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.' Therefore, the Brazilian judiciary could not rely on the CDC if it leads to a failure to perform treaties obligations. In this case, the fact that there are less exceptions provided in the CDC than in the Montreal leads to a breach of the obligations.
[96] CDC, art. 1.