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The Status of the International Treaties of Human Rights in the Brazilian Constitutional System

Abstract

The objective of this paper is to present the problem of the status of the international treaties on human rights in the Brazilian constitutional system, especially after the advent of the amendment 45 in the Constitution. To accomplish this objective the Author analyzes international treaties – first their concept, then their classification, afterwards the procedure of their approval (internal and external), as well as their normative status at last. After that he checks the differences between regular international treaties and those which subject is human rights. When he reaches that point he analyzes the problem of qualifying their normative status before the amendment of the Brazilian Constitution number 45 was introduced, which means if they had had supra constitutional status, constitutional status, supra legal but under constitutional status, or the same status as the law. Finally, he analyzes the problem of the normative status of the human rights treaties after the amendment number 45 came into force, paying special attention to the theories which attribute them constitutional status and their arguments. In the end he presents his personal opinion on this problem.

Key words: *international treaties, human rights, Brazilian Constitution, normative status qualification, human rights treaties.*

Status umów międzynarodowych dotyczących praw człowieka w brazylijskim systemie konstytucyjnym

Streszczenie

Celem opracowania jest przedstawienie problemu statusu umów międzynarodowych dotyczących praw człowieka w brazylijskim systemie konstytucyjnym, szczególnie po wprowadzeniu poprawki nr 45 do Konstytucji. W tym celu Autor dokonuje analizy umów międzynarodowych – ich pojęcia, klasyfikacji, procedury wprowadzenia (wewnętrznej i zewnętrznej) oraz ich statusu normatywnego. Następnie Autor rozważa różnicę pomiędzy zwykłymi umowami międzynarodowymi

a tymi, których przedmiotem regulacji są prawa człowieka. Później Autor analizuje kwestię ich usytuowania w hierarchii aktów prawnych przed wprowadzeniem poprawki 45 do brazylijskiej Konstytucji, tj. czy posiadały one rangę wyższą niż konstytucja, status konstytucyjny, ponadustawowy, ale niższy od konstytucji czy równy ustawie. Ostatecznie Autor dokonuje analizy rangi umów dotyczących praw człowieka w hierarchii aktów prawnych po wprowadzeniu poprawki nr 45, ze szczególnym uwzględnieniem teorii, które przyznają im rangę konstytucyjną oraz ich argumentacji. Na koniec Autor przedstawia własne stanowisko w tej materii.

Słowa kluczowe: *umowy i traktaty międzynarodowe, prawa człowieka, brazylijska konstytucja, kwalifikacja statusu normatywnego, traktaty o prawach człowieka.*

1. International Treaties

1.1. Concept

According to the Vienna Convention of 1969 an international treaty is an "international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, whatever their specific names"[1].

Complementing the concept of an international treaty drafted in 1969, the Vienna Convention of 1986 brought new elements, including between the subjects of international law not only states but also international organizations[2].

From the concept at hand we can identify the elements of the international treaty: first, it is a legal act and, therefore, creates obligations between the parties; second, it has as object the manifestation of the will of the individuals involved in that dealings; and third, it must be concluded in the written form[3].

1.2. Classification

The international treaties can be classified according to their shape or as the matter treated on them.

For the formal criteria the treaties can be classified according to the number of parties or to the approval procedure adopted. Regarding the number of parties they are bilateral agreements, if

[1] Vienna Convention of 1969, article 2°, item I, "a".
[2] Vienna Convention of 1969, article 2°, Item I, "a", sub-items "i" e "ii".
[3] Notwithstanding the Vienna Convention determine as essential requirement of the international treaty the written form, the Convention itself in its Article 3, "a" provides that, even when not respected this formality, is not hampered the effectiveness of the legal agreement.

celebrated for only two parties, or multilateral agreements, if celebrated for three or more parties. Note that by parties we mean center of interest. Thus, an international treaty concluded between a State and an international organization will be bilateral, even if the organization in question is composed of different countries. Concerning the procedure, treaties divide themselves into solemn and simplified form. The first are those which go through all the necessary stages for approval, including the parliamentary analysis, while the second does not require much formality and enter into force by the mere signature, dismissing the analysis of the parliament.

On the substantive criteria international treaties are classified according to their subject matter. In the contractual treaties the parties have unequal objectives which complement each other, as in the classical idea of a contract. The normative treaties stipulate that those regulations are rules which must be obeyed by the parties, instituting rights and duties. There are also institutional treaties, which create international organizations. Finally, there are treaties which create companies for the exploration of determined activity jointly by the parties which have established it (for example the Itaipu Binational hydroelectric plant, owned by Brazil and Paraguay).

With regard to the effects of the international treaties they can cover the signatories or eventually a third party. The signatories are obligated by international treaty, and they are subject to its terms. This is because treaties become a part of the legal system of the signatory countries, having the hierarchical structure of a national law – when they do not have larger hierarchy. For the third parties to be involved in the treaty, they should express consent. If the prediction involving third assign a right, the silence will be interpreted as acquiescence. If the prediction establish an obligation, silence will be taken as negative.

1.3. External Procedure of Approval

The procedure for the adoption of an international treaty begins with the presentation of the letter of full powers by the plenipotentiary. This letter is issued by the Head of State that grants its bearer the necessary powers for the conclusion of the treaty intended. The head of state, the head of government and the Minister of Foreign Affairs are exempt from carrying this letter.

Shortly thereafter begins the stage of negotiations, in which the international subjects engaged attempt to establish a common denominator which meets the interests of the parties involved. It is at this stage that must occur the agreement between the parties without the addiction of consent. After all, the existence of such a defect can give rise to annulment of the addicted clause or to the invalidation of the entire treaty[4].

[4] Article 52 of the Vienna Convention of 1969: "A treaty is void whose completion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations".

Once a common denominator found, the object of the treaty is then defined, which should be possible, lawful, permitted by international law and conform to the moral.

Afterwards comes the stage of signing the treaty. The signature does not have the power to create obligations between the parties. It only attests the authenticity of the terms agreed, which are still subject to internal approval.

If the content of the international treaty is approved in the domestic spheres of the signatory countries it will then be ratified. Ratification is a unilateral and discretionary act emanated internationally, directed to the other signatories of the treaty, in which the party expresses the ultimate will to take personal responsibility before the international community under the terms agreed. This act marks the inception of the treaty concluded.

1.4. Internal Procedure of Approval

Among the steps to sign and ratify a treaty at the international level it goes through a process of analysis and approval in the internal system of the signatory part.

In Brazil the competence of the National Congress for the consideration of the treaty is restrict to the approval or rejection of its text. After all, it is not allowed to this body to change the content that was previously agreed with the other signatories internationally. Thus, in the stage of internal review either the treaty is approved and goes to ratification, or it is rejected and therefore will not be ratified.

This analysis begins with the receipt by Congress of the message forwarded by the President, accompanied by explanatory memorandum prepared by the Foreign Minister. The message and the exhibition will be followed by the text with the entire content of the treaty.

Once received the message will be routed first to the Chamber of Deputies, where it will be first analyzed and, if approved, will be sent for consideration by the Senate.

In the Chamber of Deputies the first reading in plenary is made, so the Members are aware of the content of the treaty which aims to ratify.

Afterwards, they form a process that receive numbering itself, and this will be sent to the Committee on Foreign Relations, where there will be appointed a rapporteur, who shall render an opinion and present a draft legislative decree.

The draft legislative decree which brings the entire content of the treaty will then be subjected to the scrutiny of the Committee on Constitution and Justice.

Once approved at the above two committees, the draft legislative decree will be voted in plenary on a single shift, at which a quorum need a simple majority (more than half of the votes of

the Members present at the meeting) to be approved. Once the project is approved, the legislative decree will be sent to the Senate.

Coming to the Senate it will be read in Parliament, so that all the Senators are aware of its contents. It is then sent to the Committee on Foreign Relations and National Defense and, if approved by the commission, may be included into the agenda for a plenary vote.

Once approved in plenary without amendments, in a single round, it is exempted from preparing the final draft. Thus, the President of the Senate makes the promulgation of the Decree on behalf of the Congress, giving it a number.

After the promulgation of the Decree the President issues an executive order giving publicity to the treaty approved. The expedition executive order is a condition of validity of the treaty domestically, which once published is attributed normative force and repeals provisions to the contrary.

1.5. Normative Status of International Treaties

Once incorporated into the Brazilian legal system international treaties must be assigned to a particular normative status itself. After all, internally, solving eventual collision between a treaty and law it must go through the analysis of the normative status with which the treaty was incorporated into the legal system.

At this point it is important to note that, unless express provision in the Brazilian Tax Code which establishes that international treaties repeal tax laws establishing device otherwise, there is no other normative device where we can find similar provision. Thus, the definition of the normative status of international treaties in general – except for those treated with rules of tax law – was in charge of the judiciary.

The Supreme Court, the body in charge to find a solution, established precedent at the beginning of the last century when judging in 1914 an extradition request declared a treaty in force in spite of subsequent law otherwise. In the same vein the Civil Appeal n° 7.872 of 1943 established that the law did not repeal the treaty.

However, in the 1977 trial of the Extraordinary Appeal n° 80.004 the Supreme Court modified the preceding, and admitted the repeal of the treaty by subsequent law to the contrary. Since then this has been the understanding of that court.

2. Human Rights International Treaties

2.1. Normative Status before the Constitutional Amendment n° 45/2004

Regarding the incorporation by Brazilian law of international human rights treaties it must be said that there has always been a discussion about the normative status with which they would be incorporated. Even before the constitutional reform that included § 3 of the Article 5 of the Constitution much was discussed regarding this topic.

This was caused by the fact that, for some scholars the international human rights treaties, because of the matters addressed therein, had a status of supra-constitutional norm, meaning that they would be above the Constitution. This is obviously a jusnaturalistic view, as it attaches to the rights of this nature an even better position than the Constitution itself.

In turn, other authors understand that the international human rights treaties had normative constitutional status. According to proponents of this current, § 2 of Article 5 of the Brazilian Constitution establish this rule, as long as the constitutional provision invoked provides that "the rights and guarantees expressed in this Constitution do not exclude others deriving from the regime and from the principles which it adopted, or international treaties in which the Federative Republic of Brazil is a party". In other words, according to the proponents of this position, when this provision determines the non-exclusion of the rights and guarantees under international treaties of human rights this device would be assigning them a status of a constitutional rule.

On the other hand, there were those who argued that international human rights treaties should have received treatment similar to that accorded to other international treaties, regardless of the subject. Among them it was possible to find two streams: the first advocated super legality, however under constitutionality of international treaties, while the second defended the parity with the law of treaties.

For those who defended the first current, international treaties, even though the human rights ones, had legal status superior to the law, and they based their position on the principle of good faith. After all, the state would not be possible to conclude a treaty, assuming an obligation on the international level, and then refrain from claiming that an internal later law repealed the treaty. This is also provided in the Vienna Convention of 1969[5].

However, the proponents of the legal parity understand that domestic law and an international treaty – even though they verse about human rights – have the same hierarchy, one can revoke the other, using for this the time criteria (*lex posterior derogat legi priori*).

[5] Article 27. "Internal law and observance of treaties: A party may not invoke the provisions of its internal law to justify its failure to perform a treaty. This is without prejudice to Article 46".

Despite the existence of four distinct streams, most of the Brazilian doctrine became polarized into two: the one which attributed international human rights treaties the status of a constitutional rule, and the other which understood that those treaties, like any other ones, were at the same level as the laws, and may have also revoked one another.

The discussion came to the Brazilian Supreme Court, which stated that the prevailing understanding was the one that attributed international human rights treaties the status of a normative law and they might also be repealed by subsequent a law.

It illustrates that understanding the trial of ADI n° 1.480-3/DF, which had as its object the Convention n° 158 of the International Labour Organization, in which the Supreme Court stated that, even if on a question involving human rights the international treaties were subordinate to the Constitution, and they were on a par with the law, and might also revoke one another.

2.2. Normative Status after the Constitutional Amendment n° 45/2004

In 2004 there was enacted an amendment number 45 to the Brazilian Constitution. This amendment, among other things, included § 3 (previously nonexistent) in the Article 5 of the Constitution, which addresses the following:

"§ 3. The international treaties and conventions on human rights approved in each House of the Congress, in two shifts, three-fifths vote of the members, shall be equivalent to constitutional amendments".

It is interesting to keep in mind that this requirement in two rounds of voting in each House of the Congress by a qualified quorum is similar to that provided by the original constituents in Article 60, § 2 for the approval of an amendment to the Constitution, regardless of the matter:

"§ 2. The proposal will be discussed and voted in each House of the Congress, in two shifts, considering approved if obtained in both three fifths of the votes of its members".

One problem has appeared. Those who defended the constitutional status of human rights began to seek the most diverse and creative solutions for interpretation, even with the inclusion of § 3 in the Article 5 of the Constitution of Brazil, maintaining the status of constitutional norm of international human rights treaties. Those who defended the legal status started to say that, after the inclusion of § 3 in the Article 5 of the Brazilian Constitution, the systematic interpretation of the constitutional system pointed to the following conclusion: the international human rights treaties, as well as any international treaty or other matters not contrary to the Constitution, can be raised to the level of a constitutional law if approved by the quorum provided for the adoption of constitutional amendments.

2.3. Criticism of Different Interpretations

Despite the understanding which establishes that the only interpretation which preserves the unity of the constitution is the one that requires the formal constitutionalization of international human rights treaties, there are other interpretations of the constitutional provisions mentioned (§§ 2 and 3 of Article 5) which seek to preserve the status of a constitutional rule already advocated earlier by his interpreters.

The first theory states that the combination of §§ 2 and 3 of the mentioned article establishes two kinds of constitutional norms. According to the proponents of this theory the international human rights treaties approved before the constitutional amendment n° 45 would be materially constitutional norms, while the international human rights treaties adopted after this amendment, with qualified quorum, would be materially and formally constitutional norms[6]. Because of this fact, the first one can be terminated while the second one cannot.

This seems a bold interpretive maneuver, however unacceptable in the Brazilian constitutional system. After all, the mentioned notion of constitutional materiality implies the attribution of the constitutional status to the rules which are not formally in the constitution. The problem is that, according to the theory of constitutional materiality, among the matters listed as constitutional we can find the human rights but also a large part of the rules of electoral law. However, the latter ones did not receive the same treatment because this was not the constitutional option.

However, accepting the adoption of the theory only in the part which interest seems to be casuistry, is contrary to the scientific study of the law.

The second theory attempts to harmonize the interpretation of §§ 2 and 3 of article 5 of the Constitution of Brazil, also in the line of the allocation of constitutional status to the international human rights treaties adopted before and after the constitutional amendment n° 45.

According to its advocates, the constitutional amendment in question is a manifestation of the constituent power, and because of that, while including § 3 in the Article 5 of the Brazilian Constitution it would have occasioned the manifestation of the phenomenon of reception. In other words, when there was included § 3 in Article 5 of the Constitution the constitutional amendment n° 45 would have received as constitutional norms the international human rights treaties previously approved, even if approved without a quorum qualified[7].

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[6] In this sense: F. Piovesan, *Reforma do Judiciário de direitos humanos (Judiciary Reform and Human Rights)*, [in:] A. R. Tavares, P. Lenza, P. de J. L. Alarcón, *Reform of Judiciary*, São Paulo: Método 2005, p. 67-81.

[7] In this sense: J. C. Francisco, *Block of Constitutionality and Reception of International Treaties*, [in:] A. R. Tavares, P. Lenza, P. de J. L. Alarcón, *Reform of Judiciary* ..., p. 99-105.

Despite the efforts of the advocates of this trend, it seems that it suffers from a serious structural problem. This is because the phenomena of reception is inherent to the Original Constituent Power, that is, the one which gives birth to a new constitution and thus opens a new legal order. That is why it is established that the original constituent power is legally unlimited.

However, in spite of the fact that constitutional amendments are a manifestation of the constituent power, these manifestations are not original, but the result of Derived Constituent Power, which means that they are fruit of a Constituted Constituent Power that aims to change the constitutional rules within the limits established by the Constitution itself. That said, this is a limited power, and for suffering limitation cannot express the phenomenon of reception.

So, as the constitutional amendment n° 45 is a manifestation of Derived Constituent Power, it is not allowed to manifest the phenomenon of reception, since this is inherent only to the Original Constituent Power, only because this is legally unlimited.

3. A Humanistic Solution by the Theory of the Constitution

It seems to me that when the Supreme Court decided the legal parity of the international treaty of human rights it was based on an archaic concept of constitutionalism, concept that no longer exists and was based only in the simple control of political power by the legal instrument constitution.

However, some time ago the concept of constitutionalism has changed since we started to see this phenomenon as having legal, political and ethical nature[8]. In this perspective, not only the control of the power is the essence of the constitution, but also the guarantee of fundamental human rights.

When we see the Constitution as an object of constitutionalism, and recognize the ethical character along with the political and legal ones, we are led to interpret § 2 of Article 5 as establishing the constitutional status of the international human rights treaties signed by Brazil. Because it is established by the original constituent power, it should serve as a parameter to control the constitutionality of the law and also of the constitutional amendments that may be approved.

Thus, it seems that the best constitutional solution is also the simplest. Having premised that the Constitution has simultaneously ethical, political and legal nature, and knowing that the constitutional provisions serve as a parameter for the control of constitutionality of laws and

[8] “We conceptualize constitutionalism as the dialectical process of ethical, political and legal nature, which unfolds in the course of history from emancipator premises, whose purpose is the creation and maintenance of a constitution, which should appear as a tool to exercise restraint of power by the power, and as the source guarantee of the enjoyment and exercise of fundamental rights in its fullness”: R. B. M. Khamis, *Ethics, Dialectic and Constitutionalism: a Constitutional Hermeneutics Oriented to Values*, São Paulo: PUC-SP 2008, p. 77.

amendments to the constitution, it is the analysis of § 3 of Article 5 according to the provisions of the Constitution itself that will give us the answer to the problem.

As stated above, if the interpretation of § 2 of Article 5 is in line with the ethical character of the Constitution and is precisely the one conferring constitutional status to international human rights treaties, it is clear that § 3 must be interpreted based on the legal content of § 2. So, it is unconstitutional that § 3 of Article 5 of the Brazilian Constitution, was added by the constitutional amendment number 45 – a manifestation of derived constituent power.

Conclusion

Given the above, it seems that the analysis in the light of the modern concept of constitutionalism, which recognizes the Constitution character as simultaneously ethical, political and legal ones, leads to the recognition of the nullity of § 3 of Article 5 because of its unconstitutionality. The recognition of unconstitutionality is possible only because the constitutional amendment which created § 3 affronted the legal content assigned to § 2 by the original constituent.