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CONSTITUTIONAL AMENDMENT NO. 45/04 AND THE INNOVATIONS INTRODUCED IN THE THEME OF THE PROTECTION AND PROMOTION OF HUMAN RIGHTS: REPERCUSSIONS AND ADHESION OF NEW ACTORS

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ABSTRACT

INTRODUCTION: We currently have an extensive number of international standards for the protection of human rights and we find a large number of treaties of this nature. Hence, it is enough to be a human person to be able to apply for protection, whether in the domestic or international context. Fundamental rights are those related to constitutional protection (Domestic Law), while human rights are assigned to any person, without any discrimination and are collated in international instruments. What matters, according to Mazzuoli (2021, p. 762), is to admit the interaction of these same rights so that all people (whether or not they belong to the State where they are) are effectively protected.

Keywords: Constitutional Amendment No. 45/04. Human rights. New Legal Actors.

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INTRODUCTION

We currently have an extensive number of international standards for the protection of human rights and we find a large number of treaties of this nature. Hence, it is enough to be a human person to be able to apply for protection, whether in the domestic or international context. Fundamental rights are those related to constitutional protection (Domestic Law), while human rights are assigned to any person, without any discrimination and are collated in international instruments. What matters, according to Mazzuoli (2021, p. 762), is to admit the interaction of these same rights so that all people (whether or not they belong to the State where they are) are effectively protected.

Contemporary human rights are not divided, because their content is indivisible, they are interconnected. In turn, the rights of freedom (civil and political) cannot survive without those of equality (economic, social and cultural). The dimensions of human rights were based on the motto of the French Revolution: liberty, equality and fraternity.

The characteristics that are imposed on Human Rights are universality (ownership belongs to all people), non-renounceability; inalienability; inexhaustibility (expansion is allowed, being able to add new ones); the imprescriptibility (they can be requested at any time); the prohibition of retrogression (there can be no retrogression in the protection of human rights), among others.

Constitutional Amendment (EC) No. 45, of December 30, 2004 (EC) played an important role in the protection and promotion of human rights, bringing relevant adjustments to the Brazilian legal system.

Considering the purpose of immersion of this research, the referred EC will be analyzed in the context of article 5, §§2 and 3, of the Federal Constitution (FC) of 1988, under the aspect of the scope/projection of the innovations that stood out in relation to the theme of Human Rights, with special emphasis on the control and measurement of conventionality. Likewise, an approach to the Inter-American Human Rights System, whose American Convention on Human Rights (ACHR) is the main instrument and which, together with its jurisprudence, consolidates rights in the Brazilian State.

The institutionalization of human rights took place with the constitutional opening allowed by the system of article 5, §§2 and 3, of the FC, the object of this study. Hence, a multilevel tutelage, that is, the domestic legal system counts, in complementarity, with the international system for the protection of human rights which, in the case of Brazil, is due to article 5, paragraph 2, allowing the maintenance of the social contemporaneity of the FC.

This constitutional opening allowed important treaties to enter Brazil and the adoption of conventional control, in cases where a domestic rule contradicts international

provisions, was present. It is in this alignment that we emphasize the importance of carrying out conventionality checks, so that the diffuse control and measurement of domestic and international conventionality have been recognized in the States. And from there, new interpreters emerge in the implementation of fundamental rights internally, due to the doctrinal and jurisprudential evolution of the System, including the adhesion of new actors.

As a bibliographic support, the research will be carried out in a doctrinal context and on official websites, given the great relevance of the theme for Brazilian law regarding the protection and promotion of human rights.

THE INTER-AMERICAN SYSTEM ON HUMAN RIGHTS AND THE GOVERNING BODIES

And with the greater purpose of protecting human rights, those States that adhere to the American Convention on Human Rights (ACHR) must observe its guidelines and comply with them, in accordance with the principles of good faith and *pacta sunt servanda*, which are the basis of the Vienna Convention (VCLT) and the source of conventional law and, equally, cannot invoke provisions of their domestic law as a justification for non-compliance with the treaty. by virtue of having assumed legal obligations at the international level.

This idea of protection was not reduced to the reserved domain of the State, nor was it restricted to domestic jurisdiction, exclusively. With the facts that devastated humanity, originating from wars, the protection of human rights reached the international domain, at the global level and took place more diligently in the post-World War II period. With legal globalization, domestic law, from being sovereign, has become relativized.

The expansion of the protection and promotion of fundamental rights has a history in the Inter-American Human Rights System (IAHRS), whose main instruments were the Universal Declaration (1948) and the Charter of San Francisco (1945). The purpose of the ISHR is to curb human rights violations by the states parties (VARELLA. 2016, p. 20), and the Pact of San José definitively created another door of access to justice to claim rights in the regional international context. The dignity of the human person and the benefit of institutionalized international guarantees are ensured. The mechanisms for the protection of human rights in the ISHR have undergone a progressive process of implementation, and the Inter-American Commission (IACHR) has an important role.

Access to the ISHR is granted by petition to the IACHR, a diplomatic or political body, which issues Advisory Opinions (OC); precautionary measures; it assesses human rights violations, in a judgment of admissibility, and conventional control can be carried out by the IACHR itself.

In view of the fundamental point of the research, in domestic law the measurement and control of conventionality of the primary normative species can be carried out, that is, in two stages. In the assessment, the MP, for example, makes a request for appreciation without invalidating the norm, a check of the internal norm in relation to human rights treaties. In the control of conventionality, the internal norm is invalidated if it is in dissonance with the treaty.

The IACHR strengthened its *legal status* by putting an end to any objections and began to be endowed with a conventional basis: not only with a mandate to promote, but also to control and supervise the protection of human rights. (CANÇADO TRINDADE. 2003, v. III, p. 36-37).

For Mazzuoli (2009, p. 253) there is a genre called conventionality examination, which is divided into conventionality control and measurement, and in the first there is the invalidation of the Brazilian norm for violation of a human rights treaty, while in the measurement it brings only an indication that the internal norm is unconventional. The checks take into account the term plan.

The IACHR precedes the Pact of San José, as it is based on Article 106 of the Charter of Bogotá and carries out the assessment. The basis of control is the ACHR. (MAZZUOLI. 2009, p.252). Petitions or communications are sent to the Commission, which makes a judgment of admissibility, which Cançado Trindade (1997, p. 23) explains has a residual character and the principle of exhaustion.

The performance of internal judges in exhaustion is a requirement, and only acting in the omission, inefficiency, failure or deficiency of the State. The exhaustion of domestic remedies in Brazil occurs with a final and unappealable judgment, as the State will have priority in the investigations, but with the exceptions of article 46, paragraph 2 of the Pact.

In the IAHRS, we also have the Inter-American Court of Human Rights, which performs advisory and litigation functions and dictates provisional measures, in cases of urgency and gravity. In its advisory role, the ACHR vests the Inter-American Court with the task of interpreting the American Convention on certain human rights treaties in proceedings that do not involve specific judgments. The Inter-American Court of Human Rights issues the CO and all member states of the Organization of American States (OAS) can consult regardless of whether they are parties to the ACHR.

The contentious jurisdiction of the Inter-American Court of Human Rights is inherent to the role of an international Court of Justice in taking upon itself the task of resolving controversies of a legal nature permeated by violations of rights protected by the American Convention on Human Rights. This contentious jurisdiction does not operate automatically

because a State has signed the American Convention, it must be expressly declared, which does not occur in the advisory jurisdiction. This recognition is optional and may take place *a posteriori*.

The Brazilian State adhered to the contentious jurisdiction of the Inter-American Court of Human Rights in 1998, through Legislative Decree 89 (BRAZIL) and, in 2002, through Decree 4463 (PLANALTO), promulgated the Declaration of Recognition of the Contentious Jurisdiction of the Inter-American Court of Human Rights, subject to reciprocity, in accordance with Article 62 of the ACHR, with the note that it would be *for events after December 10, 1998*. The Advisory Opinions issued by the Inter-American Court of Human Rights are not binding, but they are relevant, however, their effectiveness has been increasing.

RELEVANT ASPECTS OF THE PROTECTION OF HUMAN RIGHTS IN THE CONTENT OF ARTICLE 5 OF THE FEDERAL CHARTER OF BRAZIL

The Federal Charter of 1988 has a relevant role in the process of redemocratization of the Brazilian State because it is the one that regulated and granted an opening for the reception of several international treaties that entered our legal system.

Brazil's ratification of the treaties culminated in expanding the protection and promotion of human rights internally, at the global level/United Nations system, as well as in the Regional of the Americas.

Within the protective aspect, we can mention important articles that were constitutionally enshrined as fundamental principles of the Federative Republic of Brazil, being Article 1, III (the dignity of the human person); Article 4, II (prevalence of human rights) and, a significant step was with Article 5, paragraph 2 when it established that *the rights and guarantees expressed in this Constitution do not exclude others arising from the regime and principles adopted by it, or from international treaties to which the Federative Republic of Brazil is a party.*

From the reading of this paragraph 2, of article 5, it is observed that the reception of other treaties expands the block of constitutionality and, in turn, doubly protects (internally and internationally) human rights in the national system, with multilevel protection. This multilevel evolution provides greater effectiveness of human rights, serving as an appreciation of the democratic character of the State in international commitments.

In search of the optimization of such systems, the *pro homine principle in* the protection of rights is vindicated, so that the most favorable norm is the one adopted in case of any conflict of norms in the domestic and international system. This principle is already

enshrined in the Brazilian constitutional text, in Article 4, II, according to which the Brazilian State must be governed in its international relations by the principle of *the prevalence of human rights*.

Due to the evolution of doctrine and jurisprudence based on the *pro-homine principle*, mentioned above, in addition to the provisions of the Pact of San José de Costa Rica and the United Nations Convention on the Law of Treaties, as well as the jurisprudence of the Inter-American Court, new interpreters emerge in the implementation of fundamental rights.

Mazzuoli (2021, p. 777) teaches that the opening clause of the aforementioned paragraph 2, of article 5, of the FC/88, has always admitted the entry of international treaties for the protection of human rights at the same hierarchical level and not in another scope of normative hierarchy. Therefore, he argues that the fact that these rights are found in international treaties has never prevented their characterization as rights of *constitutional status*.

Commenting on paragraph 2 of article 5, Piovesan (2015, p. 52) points out that this implies that the international rights and guarantees contained in the human rights treaties ratified by Brazil are included in our domestic legal system, as if they were written in the Constitution.

Mazzuoli (2021, p. 776) concludes, adopting a syllogism for the understanding of this paragraph 2, if the rights and guarantees expressed in the FC do not exclude others arising from international treaties to which Brazil is a party, it means that to the extent that such instruments ensure other rights and guarantees, the FC, in turn, includes them in the list of protected rights.

However, this theme was not unanimous in the doctrine, given the understandings of the supra-constitutional status of the treaties dealing with human rights (Mello. 2001, p. 25), and the Supreme Court of Brazil never reached a uniform position, despite the clarity of this paragraph 2, of article 5, Constitutional.

Thus, Constitutional Amendment No. 45/2004 added paragraph 3 to article 5, to state that *international treaties on human rights that are approved in each House of the National Congress, in two rounds, by three-fifths of the votes of the respective members, will be equivalent to constitutional amendments*.

By this provision, international treaties and conventions on human rights, as long as they are subject to the aforementioned special conditions of approval for internalization in national law, will undoubtedly acquire the hierarchical status of constitutional amendments.

The wording of this article, according to Valério de Oliveira Mazzuoli (2021, p. 778), is materially similar to that of article 60, paragraph 2 of the FC, whose similarity is linked to the fact that, before the entry into force of EC 45/2004, international human rights treaties, in order to be ratified later, were exclusively approved (by means of a Legislative Decree) by a simple majority in Congress, under the terms of Article 49, I, of the Federal Constitution, which generated jurisprudential controversies about the apparent infra-constitutional hierarchy (level of ordinary norms) of these international instruments in our domestic law.

CONCERNS ABOUT THE CONTENT OF PARAGRAPH 3, ARTICLE 5, OF CF/88

Despite the fact that paragraph 3 of article 5 of the Constitution provides that international treaties and conventions on human rights approved by a qualified majority are equivalent to constitutional amendments, concerns have arisen on the subject.

For example, what status would they have in those international treaties prior to EC 45/2004? Valerio de Oliveira Mazzuoli (2021, p.781) asks, and could it also be interpreted as meaning that, despite a human rights treaty having been ratified several years ago, can the National Congress approve it again, however, now, by the quorum of paragraph 3, for there to be a change of *status*? What *status* would it be? Ordinary law (according to the old jurisprudence) or supra-legal law (as of December 3, 2008, in view of the judgment of RE 466.343-1/SP) to hold the *status* of a constitutional norm?

Mazzuoli (2021, p. 781) certifies that even though the STF has started to attribute to human rights treaties (when not approved by the special quorum of paragraph 3, article 5, of the FC) the level of supra-legal norm, the doctrine has correctly understood that such treaties have the *status* of constitutional norm. This would ensure the internal effectiveness of international human rights protection standards.

In this regard, José Roberto Anselmo (2023, p. 126) asserts that,

> however, in relation to treaties that were already in force on the date of the enactment of the Amendment and that were not subject to differentiated approval, the understanding of equivalence to ordinary laws still prevailed. This position lasted until the judgment of RE 466.343/SP, where the civil imprisonment of the unfaithful trustee was discussed (art. 5, LXVII) in comparison with the prohibition of civil imprisonment established in the American Convention on Human Rights – Pact of San José de Costa Rica (art. 7, 7), the Supreme Court changed its understanding. The interpretation of the Federal Supreme Court in the aforementioned judgment is that these treaties have supra-legal hierarchy, and should prevail in relation to infra-constitutional norms. Thus, human rights treaties prior to Amendment 45/04 have a special character, being below the Constitution, but above domestic legislation.

The judgment of this RE 466.343-1/SP, by the STF, involving the aforementioned issue of the civil imprisonment of the unfaithful trustee in the emblematic vote of Justice Gilmar Mendes who, taking up the view of Justice Sepúlveda Belongs on the occasion of the judgment of Habeas Corpus n. 79.785/RJ, highlighted that the constitutional reform demonstrated a clear special character of human rights treaties and conventions in relation to the others, and that such a change pointed to the insufficiency of the thesis of hierarchical parity to the ordinary laws whose Court had upheld since the judgment of RE 80.004/SE, in 1977. Defending the need for an urgent review of the position to provide better protective effectiveness of these human rights, it was concluded, in the end, that there is an intermediate thesis of infra-constitutionality, but with supra-legal status of these international instruments.

On the occasion, the exquisite vote of Justice Celso de Mello should be highlighted, reviewing his own position issued on March 12, 2008, in the judgment of Habeas Corpus No. 87.585-8. This time, deciding in the light of the principle of maximum constitutional effectiveness, based on the axiological premises of the Constitution, emphasizing the ethical-legal value of the prevalence of human rights, based on the influence and effectiveness of treaties and conventions on the matter under consideration, as well as on the reflections brought about by the reform that introduced paragraph 3 to article 5 of the Federal Charter of 1988, and with the exception of the previous hypotheses, it defended the need to attribute to them, formally and materially, *the status* of constitutional norms. Finally, it noted that with regard to the treaties and conventions prior to the advent of paragraph 3, the provisions of paragraph 2, both of article 5, of the Federal Constitution, should be applied to them to give them a materially constitutional nature, thus providing their subsumption to the block of constitutionality.

On December 3, 2008, the Supreme Court unanimously dismissed Appeal 466.343, giving precedence to the *libertatis status* of the individual over the equally constitutional right to property, emphasizing respect for human rights. It also converged with regard to the hierarchical specialty of international treaties and conventions that deal with human rights, remaining divided, however, in relation to the level of this hierarchy: between constitutionality and supra-legality. In this last question, in a close vote, the (mistaken) understanding of the thesis of supra-legality (and infra-constitutionality) finally prevailed, with Justices Celso de Mello, Cesar Peluso, Ellen Gracie and Eros Grau being defeated, who in turn followed the thesis of constitutionality.

Despite the interpretative evolution of the Supreme Court, there is no way to forget the thesis of the substantive constitutionality of international treaties and conventions in the

field of human rights, as defended by the internationalists and the minority of the Justices of the STF. After all, the matter of human rights coincides exactly with the fundamental rights established in our Federal Constitution, which are even insusceptible to any measures aimed at abolition (article 60, paragraph 4, of the FC).

In any case, the STF definitively broke with the paradigm of the thesis of parity between international treaties and conventions and ordinary infra-constitutional legislation, which had remained alive for more than three decades, providing a catalytic effect so that the other organs of the Judiciary could also promote the essential control of conventionality, as directed by the IACHR, in its OC 22, of 2/26/2016, requested by the Republic of Panama.

Thus, currently, the colenda Court remains faithful to the understanding it adopted from the judgment of RE 466.343, whose jurisprudence denotes a consolidation of the special character of international human rights treaties and their supra-legality if not submitted to the special procedure equivalent to that of constitutional amendments, as provided for in paragraph 3, article 5, of the FC/88.

Notwithstanding the divergences, the text of paragraph 3 of article 5 of the CF/88 came with the intention of clarifying the position in which international treaties and conventions specifically in the field of human rights occupy the pyramid of norms in the Brazilian legal system. This is a special quorum for voting on international human rights treaties and conventions.

Valerio de Oliveira Mazzuoli (2021, p. 784) also clarifies that the Constitution does not say that an amendment will be approved, but an act (in this case, a legislative decree) that will allow the treaty to have (after ratified) equivalence of a constitutional amendment. Even with EC 45/2004, the treaty will follow the normal procedural course, that is, it must be approved by Congress by legislative decree, and Parliament may decide with the quorum (and only the quorum) of a constitutional amendment or without it. Therefore, the National Congress does not use the process of proposing constitutional amendments, but only has to issue a legislative decree by qualified majority.

OBLIGATED TO CASES INVOLVING HUMAN RIGHTS IN THE COURTS

It is important to highlight that regardless of the *constitutional status* of human rights treaties in Brazilian law, their application is immediate due to the fact that the norms related to fundamental rights and guarantees have immediate application in accordance with the provisions of paragraph 1 of article 5, which reads as follows: *the norms defining fundamental rights and guarantees have immediate application*, which does not depend on

the form of approval, whether by qualified majority or not. Thus, treaties of this nature must be applied immediately by the Judiciary.

A relevant issue that needs to be brought to light was that, in addition to EC 45/2004 adding paragraph 3 to article 5 of the CF/88, it also changed the wording of article 109 of the Federal Constitution of 1988, adding item V-A and paragraph 5, so that the Federal Court could raise before the Supreme Court, the invocation of any cause, regardless of whether an investigation or a lawsuit, related to human rights.

The purpose of changing this prerogative of original action is to safeguard compliance with international treaties and conventions whose subject matter affects human rights, with the Brazilian State as a signatory. Let's see:

> Article 109. Federal judges are responsible for prosecuting and judging:
> V-A the cases related to human rights referred to in paragraph 5 of this article;
> Paragraph 5 - In the event of a serious violation of human rights, the Attorney General of the Republic, in order to ensure compliance with obligations arising from international human rights treaties to which Brazil is a party, may raise, before the Superior Court of Justice, at any stage of the investigation or proceeding, an incident of transfer of jurisdiction to the Federal Courts.

It is observed that there was a shift of competences from the State Courts to the Federal Courts, with a view to effectively complying with the provisions of international treaties and conventions on human rights.

The study of EC 45/2004 ensured in its content innovations and expansion of the protection of human rights. However, it could be in line with other constitutions around the world, in the sense that all human rights treaties ratified by Brazil had constitutional hierarchy and, therefore, immediate applicability. This understanding would void any doubt in the jurisprudential or doctrinal context that might eventually arise.

THE CONVENTIONALITY CONTROL

Arising from contentious jurisdiction is the control of conventionality, which corresponds to a normative control carried out by the Inter-American Court of Human Rights when the cause of the violation of a human right is a provision of domestic law, by virtue of which there is a confrontation between the American Convention on Human Rights and a provision of domestic law. such as the Political Charter, a legislative act, a law, a decree, a sentence or an administrative act, among others.

The Control of Conventionality defines the obligation of every public authority not to apply a domestic rule if it is contrary to the American Convention on Human Rights or to the interpretation made by the Inter-American Court of Human Rights.

According to Constança Nuñez Donald (2015, p. 159),

> This – which is the current conceptualization of conventionality control – has its origin in the jurisprudence of the Inter-American Court. At the current stage of the evolution of the concept in the jurisprudence of the Inter-American Court, it has four constituent elements: a) it consists of verifying the compatibility of the norms and other practices with the ACHR, the jurisprudence of the Inter-American Court of Human Rights, and the other inter-American treaties to which the State is a party; b) it is an obligation that corresponds to every public authority within the scope of its competences; c) it is a control that must be carried out *ex officio* by any public authority, and d) its execution may imply the suppression of norms contrary to the DAC or their interpretation in accordance with the ACHR, depending on the powers of each public authority.

The control of conventionality is not opposed in cases where the rule is incompatible with the Political Charter, which means, in this case, unconstitutionality. Unconventionality, in turn, is when the law, although valid in comparison with the constitutional text, suffers from the vice of invalidity because it is incompatible with the international instruments to which the country is a signatory, dealing with the protection of human rights.

In the context of conventionality control, internal rules must be in accordance with international treaties and conventions, otherwise they will reach unconventionality.

The prevailing understanding is that the validity and effectiveness of ordinary rules must be subject to double checking, as to control. In other words, both in the control of constitutionality to verify its harmony with the Constitution of the States, and in the control of conventionality, in order to conform its adequacy with international human rights treaties and conventions, a double filtering of the domestic norm is carried out, in order to confer the best protection of human rights to the jurisdictional.

Of paramount importance is this internal control of the norms – laws, regulations, etc., which must be in harmony with the conventional provisions and from the elaboration of the norm, under penalty of its incompatibility implying unconstitutionality or unconventionality and consequent distancing from the legal world.

The control of conventionality within the scope of the Inter-American Court of Human Rights has evolved:

In the case of Almonacid Arellano et al. v. Chile, the Inter-American Court refers to the "Judiciary"; in the case of the Dismissed Workers of Congress v. Peru, the Inter-American Court of Human Rights is positioned by the "organs of the Judiciary"; in the case of Cabrera Garcia and Montiel Flores v. Mexico, the Inter-American Court deliberates on the "Judges and bodies linked to the administration of justice at all levels"; in the case of Gelman v. Uruguay, the Inter-American Court of Human Rights took the position that the control of conventionality would be the responsibility of 'any public authority', at all levels, *ex*

officio, within the scope of their respective competences and the applicable procedural rules. With this decision, there was a significant expansion of the range of scope of those required to control conventionality. There was the addition of new actors in the panorama of conventional control.

Hence, it is also allowed the extension of control and the measurement of conventionality and the defense of the filing of constitutional actions by the Attorney General of the Republic (PGR) to invalidate a rule that violates the Convention that deals with human rights.

INNOVATIONS INTRODUCED IN THE THEME OF THE PROTECTION AND PROMOTION OF HUMAN RIGHTS IN THE DOMESTIC SYSTEM: REPERCUSSIONS AND PERMISSION OF NEW ACTORS

It can be seen from what is provided in paragraph 3 of article 5 of the CF/88 that it is not a determining constitutional norm, but a mere faculty made available to the National Congress to, if it so wishes, approve international treaties and conventions through a special procedure to confer them formally *constitutional status*.

Thus, in harmony with the current constitutional text and in line with the special quorum, some treaties have already been approved in the Brazilian State with the equivalence of constitutional amendment, as stated on the official website of the Planalto:

Acts	Syllabus
Decree No. 10,932, of 01.10.2022 Published in the Official Gazette of 01.11.2022	Promulgates the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance, signed by the Federative Republic of Brazil, in Guatemala, on June 5, 2013.
Legislative Decree No. 01 of 18.02.2021 Published in the Official Gazette of 02.19.2021	Approves the text of the Inter-American Convention against Racism, Racial Discrimination, and Related Forms of Intolerance, adopted in Guatemala at the 43rd Regular Session of the General Assembly of the Organization of American States, on June 5, 2013.
Decree No. 9,522, of 10.08.2018 Published in the Official Gazette of 10.09.2018	Promulgates the Marrakech Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print-Impaired, signed in Marrakech on June 27, 2013.
Legislative Decree No. 261 of 25.11.2015 Published in the Official Gazette of 11.26.2015	Approves the text of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print-Impaired, concluded within the framework of the World Intellectual Property Organization (WIPO), signed in Marrakech on June 28, 2013.
Decree No. 6,949, dated 08.25.2009 Published in the Official Gazette of 08.25.2009	Promulgates the International Convention on the Rights of Persons with Disabilities and its Optional Protocol, signed in New York, on March 30, 2007.

Legislative Decree No. 186 of 09.07.2008 Published in the Official Gazette of 07.10.2008	Approves the text of the Convention on the Rights of Persons with Disabilities and its Optional Protocol, signed in New York on March 30, 2007.

Source: *Official website* of the Planalto da República.

The aforementioned treaties were approved with a qualified quorum, however, the Supreme Court of Brazil did not express itself on the hierarchy. As it turned out, it manifested for supra-legality, equivalent to the block of constitutionality.

As exposed, paragraph 3 of article 5 does not oblige the Legislature to approve a human rights treaty by the qualified quorum it establishes. What it does is only authorize the National Congress to give, when it suits it, at its discretion the "equivalence of amendment" to the human rights treaties ratified by Brazil. This means that such international instruments may continue to be approved by a simple majority of the National Congress (article 49, I, of the Federal Constitution), leaving for a future moment the attribution of equivalence to a constitutional amendment.

To say that a treaty is equivalent to a constitutional amendment is to say that it formally and materially integrates the block of constitutionality. From a systematic interpretation, the reformed constitutional text intended to say that these human rights treaties ratified by Brazil, which already have *the status* of constitutional norm, under the terms of paragraph 2 of article 5, may be formally constitutional (that is, be equivalent to constitutional amendments), provided that, at any time, after their entry into force, are approved by the quorum of paragraph 3 of article 5 of the FC. (Mazzuoli. 2021, p. 786 and 790). However, these cannot be reported.

From this conclusion, it can be observed that international human rights treaties have been passed in two moments, the first being under the dictates of paragraph 2 of article 5 and a second moment under the auspices of paragraph 3, article 5 of the FC.

And in a better explanation, it is clear that the human rights treaties in force in the country, regardless of having been ratified before or after EC 45/2004, have *the status* of (materially) constitutional norm (subject to the diffuse control of conventionality), but only those approved by the qualified quorum of article 5, paragraph 3, will have *the status* of material and formally constitutional (they will be subject to concentrated control or abstract control of conventionality). This has important implications regarding the subject of denunciation.

Nothing would technically prevent the denunciation of a human rights treaty that has only the *status* of a constitutional norm, because internally it would not modify anything, since they are already petrified in our system of rights and guarantees, importing such

denunciation only in freeing the Brazilian State from being responsible for the fulfillment of the treaty in the international sphere. But if the human rights treaty has been approved under the terms of paragraph 3 of article 5, Brazil can no longer disengage from the treaty, either internationally or internally (which does not occur when the treaty has only *the status* of a constitutional norm), and the President of the Republic may be held responsible if he denounces it (and such denunciation must be declared ineffective). Concluding the reasoning, Valerio de Oliveira Mazzuoli (2021, p. 798 and 800) states that either under the terms of paragraph 2 or paragraph 3 of article 5, human rights treaties are not susceptible to denunciation because they are stony constitutional clauses; what differs is that, once the treaty is approved by the quorum of paragraph 3, its denunciation entails the responsibility of the President of the Republic, which does not occur in the system of paragraph 2 of article 5.

VERIFICATION BY MEASUREMENT BY THE PUBLIC PROSECUTOR'S OFFICE OF BRAZIL

The jurisprudence of the Inter-American Court of Human Rights says that other actors must enforce the rights provided for in the treaties, and the doctrinal advances point to the legitimacy for the measurement and control of conventionality by the MP.

This is justified by the difficulties encountered within the scope of the IAHRS, such as the delay in the trials of cases in the Inter-American Court, as well as the large number of cases that are not accepted by it.

There are possibilities for growth in the exercise of checking in internal control, with the presence of the Public Prosecutor's Office and the Ombudsman's Office, including the Inter-American Court of Human Rights.

The judgments of the Inter-American Court of Human Rights are always the *initial legislative steps, taken by a few States Parties to the Convention, in order to ensure their faithful compliance at the level of domestic law* (CANÇADO TRINDADE. 1998, p. 29), that is, the protection of fundamental rights is being expanded.

For Lazcano (2013, p. 79) this expansion is supported by the Court of the Americas and inter-American law becomes a direct formal source of national law and, in turn, all those cited must follow conventional law.

The assessment takes place without invalidation within the verification work, similar to the work done internationally in the OCs of the Inter-American Court of Human Rights and by the IACHR, without removing its legal effects, while, in the control, the norm will be invalidated

The basis of the ministerial activity comes from the judgment of Gelman v. Uruguay, which refers to the violations of the fundamental rights of Maria Claudia García Iruretagoyena Gelman as a result of her forced disappearance in 1976 and the suppression of the identity of her daughter María Macarena Gelman Garcia Iruretagoyena, within the framework of *Operation Condor.* Maria was kidnapped and raised as the daughter of one of her mother's executioners, who died in the hospital.

The sentence brings the legal figure of *the custus juris,* which has to manifest itself in the actions, giving an opinion, that is, it can assess the conventionality. Thus, the sentence brings the duty of the Public Prosecutor's Office (MP) to carry out this function of measurement, one of the types of checking.

Article 127 of the CF/88 states: *The Public Prosecutor's Office is a permanent institution, essential to the jurisdictional function of the State, and is responsible for defending the legal order, the democratic regime and the inalienable social and individual interests* and, provoked within its typical functions in the defense of the legal order, it assesses the norm under discussion in the specific case if it is in harmony with treaties and jurisprudence of the Inter-American Court.

The Public Civil Action Law No. 7.347, of 1985 (LACP), is based on liability for damages caused to the environment, to the consumer, to goods and rights of artistic, aesthetic, historical, touristic and landscape value.

And the defense of transindividual rights, with legitimacy for the ministerial body to promote Public Civil Action, and the thesis for the defense of these assets may be a human rights treaty, which includes the measurement.

It should be noted that the main action and the injunction may be filed by the MP, the Union, the States and Municipalities, as well as they may also be filed by an autarchy, public company, foundation, mixed capital company or association.

The *Parquet* also defends the democratic regime and if it is not a proponent, in defense of the legal order, it must act as an intervening party in the process, including being able to request the production of evidence. Within the due process, he will have a view of the records, after the parties, and at this time the MP must check the compatibility with treaties ratified by Brazil. Therefore, prosecutors and prosecutors must assess whether the law is in accordance with treaties and jurisprudence and even Advisory Opinions.

This doctrinal construction is also present in Mexico. Lazcano (2014, p.77) cites a Mexican contribution from *La SCJN* of 07/14/2011, of the so-called *Expediente varios 912/2010*, which brings the ex *officio* control of conventionality as a model of diffuse control according to the Constitution of Mexico, by which all the country's authorities, within the

scope of competences, are obliged to ensure the human rights that are in international instruments, adopting the most favorable interpretation of the law, by the *pro persona* principle, given the superiority of human rights norms and the reflex protection of fundamental rights.

PUBLIC PROSECUTOR'S OFFICE: POPULAR ACTION AND IN SIMILAR SITUATIONS

The popular action is defined as the procedural means to which any citizen who wishes to judicially question the validity of acts that he considers harmful to public property, administrative morality, the environment and historical and cultural heritage is entitled, and the MP will carry out the measurement of conventionality, through the phenomenon of checking, protecting human/fundamental rights.

The action consists of expressing whether or not there is compatibility of domestic law with treaties, such as cases involving native peoples (quilombolas and indigenous peoples), under the terms of article 232 of the CF/88, in the case of the Federal Public Prosecutor's Office (MPF).

The constitutionally protected fundamental right is that of the Indians, their communities and organizations, and it is up to the MPF, consequently, to comply with the jurisprudence of the Inter-American Court of Human Rights regarding collective territory and ancestral lands. In case of injury, the concentrated control of constitutionality (abstract control of the rule, whose treaties were approved by four votes of 3/5 and are equivalent to amendments) and, by extension, the conventionality, will be proposed in the Supreme Court of the Brazilian State, as it corresponds to a functional duty of the Attorney General of the Republic (PGR).

The PGR acts by expressing on the possible injury, or not, of a domestic law in relation to these treaties, carrying out the verification by measurement, however, it will not be the author of the concentrated control actions.

ROLE OF THE PUBLIC PROSECUTOR'S OFFICE AND ATTORNEYS GENERAL

The legitimacy of the ministerial body to carry out the control of conventionality arises in the Gelman v. Uruguay, already mentioned, with the expansion of the list of legitimates, whose performance ranges from the filing of lawsuits to the archiving of Civil Inquiry; in addition to those activities that are discriminated in rules by the exclusive action of the PGR and the State Attorney General (PGE). Therefore, this position has the predictable duty to file a lawsuit both domestically and internationally.

It is understood that ministerial participation in the invalidation of a domestic norm that violates human rights treaties is possible because, above all, Brazil has ratified the ACHR and has the duty to comply with the jurisprudence derived from the Inter-American Court, including the hypotheses of investigative procedures in the Civil Inquiry and in the Public Civil Action, when defending or protecting individual interests and in criminal prosecution.

Heemann (2018, p.8) says that it is important for any and all public authorities to exercise control of conventionality, as it ends up maximizing the principle of maximum effectiveness of human rights, after all, the greater the number of those legitimized to exercise control, the greater the international protection of rights.

And the performance of the *Parquet*, incident of unconventionality of an internal normative act, will be supported by the decisions rendered by the Inter-American Court of Human Rights, where a rule will be valid in the Brazilian legal system if it passes through the sieve of the control of constitutionality and conventionality (RAMOS, 2016, p. 60).

The initial hypotheses are those of the Civil Inquiry, although Valério de Oliveira Mazzuoli (2009, p. 267) assures that there is also conventional control in the filing of the Public Civil Action, but it is necessary to analyze whether there is even an effective control of ministerial conventionality.

There is control when the Public Prosecutor's Office requests the archiving alleging contravention of a treaty within its institutional functions in the defense of the legal order (Article 129 of the FC, III): *to promote the civil inquiry and the public civil action, for the protection of public and social property, the environment and other diffuse and collective interests*, protecting the said individual meta assets.

The protection of diffuse and collective assets implies the protection of the environment and public property, via Public Civil Action that proposed, must demonstrate the violation of an international treaty by an internal rule. The petition does not imply the withdrawal of the internal rule, being an assessment, since the Judiciary will invalidate it by sentence. It is a fundamental provocation that points to control, but which does not constitute an effective invalidation of a norm, although it defines the molds. There is an investigation, with ministerial action in the protection of human rights.

When the Public Prosecutor's Office adjusts a Term of Conduct with a view to preserving human rights protected in International Treaties, there is a control of conventionality, ending with the obligations collated in the Instrument.

The conventional control by *the Parquet* in criminal prosecution will occur when the Police Inquiry (IP) or criminal investigation procedure (PIC) is archived, when it does not

promote the Public Criminal Action and the Public Prosecutor's Office alleges as a motivation a treaty to which Brazil is a party. In the IP and PIC, there is no referral to the Judiciary, since it is only communicated to the investigated, victim or police authority, which corresponds to the effectiveness of control within the ministerial body itself.

The Criminal Action constitutes a control, as it is not limited to the proposal, but to all the measures of ministerial action with the purpose of its regular processing, for example, in the protection of the rights of the victims, whose function is to ensure human/fundamental rights. Thus, the Attorney General of the Republic may propose constitutional actions with the purpose of invalidating an internal rule that violates conventional law.

CONCLUSION

Complaints of human rights violations are sometimes impacted by the delay in the process and the high number of lawsuits, added to structural precariousness, in addition to the fact that the State is sometimes responsible for the facts. Justice is slow, not effective for access and sentences are subject to mistakes. Hence, the citizen can exercise his right by resorting to an International Court, if the case involves an injury to human rights and, through Conventional Law, rights are protected in the legal systems of States. Therefore, internal control and measurement are pointed out as important possibilities to ensure rights and the performance of the Parquet in the filing of constitutional actions in cases of treaties approved with a qualified quorum by the PGR. The ministerial action in the check when proposing the Criminal, Popular and Public Civil actions and, when they are intervening, there will be no departure from the rule.

This ministerial action has as its aspect a human rights treaty, as in the case of archiving the IC and a Criminal Procedure, which will result in conventional control, without forgetting to mention, also, the elaboration of Conduct Adjustment based on a Convention. With a view to the protection of human and fundamental rights, it is noted the possibility that the PGR, the only one constitutionally legitimate, may propose actions with the purpose of informing norms that diverge from the conventional context, within the scope of Brazilian law.

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