opción

Revista de Antropología, Ciencias de la Comunicación y de la Información, Filosofía, Lingüística y Semiótica, Problemas del Desarrollo, la Ciencia y la Tecnología

Año 35, 2019, Especial N° 22

Revista de Ciencias Humanas y Sociales
ISSN 1012-1587/ ISSNe: 2477-9385
Depósito Legal pp 198402ZU45

Universidad del Zulia
Facultad Experimental de Ciencias
Departamento de Ciencias Humanas
Maracaibo - Venezuela

Opción, Año 35, Especial No.22 (2019): 1507-1520
ISSN 1012-1587/ISSNe: 2477-9385

Sources of international law in the legal system of a modern state

Konstantin A. Polovchenko
MGIMO University, Moscow, Russia
kpolovchenko@ac.au

Abstract

The paper presents an analysis of the problem of the relationship between international and domestic sources of law in the legal system of the Republic of Serbia under the 2006 Constitution. The structural-functional and comparative-law methods allowed analyzing the hierarchy of sources of law and the role of the Constitutional Court in ensuring it. The author came to the conclusion that the modern Constitution of Serbia solved the issue of the relationship between international and domestic laws in favor of the monist doctrine, in accordance with which international and domestic laws are two components of the unified legal system.

Keywords: Constitution, Serbia, International law, Preliminary.

Fuentes del derecho internacional en el sistema legal de un estado moderno

Resumen

El documento presenta un análisis del problema de la relación entre las fuentes internacionales y nacionales de derecho en el sistema legal de la República de Serbia bajo la Constitución de 2006. Los métodos de derecho estructural-funcional y comparativo permitieron analizar la jerarquía de las fuentes del derecho y el papel del Tribunal Constitucional para garantizarlo. El autor llegó a la conclusión de que la Constitución moderna de Serbia resolvió el problema de la relación entre las leyes internacionales y nacionales a favor de la doctrina monista, de acuerdo con la cual las leyes internacionales y nacionales son dos componentes del sistema legal unificado.

Palabras clave: Constitución, Serbia, Derecho internacional, Preliminar.

Recibido: 10-12-2018 •Aceptado: 15-03-2018

1. INTRODUCTION

Despite the fact that the basic principles of global legal order oblige all countries to respect international law, nevertheless, the legal conditions under which states are obliged to fulfill this obligation still are not clearly defined (such conditions are usually established by the constitutions of sovereign states). Thus, according to Article 16 of the Constitution of Serbia, the foreign policy of the Republic of Serbia is based on generally accepted principles and norms of international law. These accepted norms and ratified international treaties are applied directly; such norms are an integral part of the legal system of Serbia. Also, ratified international treaties must comply with the Constitution. A number of conclusions of major importance can be made from the above provisions of Article 16 of the Constitution:

Firstly, the fact that generally accepted norms of international law and ratified international treaties are an integral part of the legal system of the Republic of Serbia means that the Constitution of Serbia has solved the issue of the relationship between international and domestic laws in favor of the monist doctrine; international and Serbian national laws are two parts of a single legal system.

Secondly, the sources of international law, in terms of the current Serbian Constitution, are generally accepted norms of international law and ratified international treaties. However, the concept of an international treaty has a definite meaning (include but not be limited to the framework of international law itself), which

cannot be said of the concept of generally accepted norms of international law. Thus, according to Part 1 of Article 2 of the Law on the Conclusion and Execution of International Treaties, an international treaty is an agreement that the Republic of Serbia will conclude in writing with one or more states or with one or more international organizations; named agreement is governed by international law regardless of the number of contained related documents and regardless of its name. Special attention should be paid to the fact that there are terminological differences between the terms used in the first and second parts of Article 16: the term universally recognized principles and norms of international law was used in the first case, however, when it comes to the legal system of Serbia, the second one came under the benefit of the term generally accepted norms of international law. According to Professor Violetta Beširević, these terms are not of universal use. Thus, the German Basic Law speaks of the general rules of international law. At the same time, Professor Beširević rightly draws attention to the fact that the use of the terms of Article 16 is a consequence of the influence of the Russian constitutional tradition. In addition to the above, according to Serbian human rights activist and international law expert, Professor Vojin Dimitrijević, the use of the term of generally accepted norms of international law seems to be quite successful because it allowed the Serbian doctrine and judicial practice to include them as norms of customary international law, as well as general principles of international law and other sources stipulated by Part 1 of Article 38 of the Statute of the International Court of Justice, with respect to the fact that all these sources are generally accepted (DIMITRIJEVIĆ, 2012).

2. METHODOLOGY

The thesis research was conducted with the use of a number of methods. The leading within the framework of this study was the structural-functional method, which allowed the author to analyze the position and role of international sources of law in the Serbian legal system. The fact is that the 2006 Constitution established the unity of the legal system of the Republic of Serbia as a basic principle. To ensure compliance with the hierarchy of law, the Constitutional Court of Serbia was provided with two new powers: first, the authority to monitor compliance of laws and other general acts with generally accepted norms of international law and ratified international treaties, and second - the authority to verify the constitutionality of international treaties. At the same time, the aforementioned last of the cited powers of the Constitutional Court of Serbia has significant features, for the study of which the author actively used the comparative law methodology.

3. RESULTS AND DISCUSSION

3.1. Generally accepted norms of international law and international treaties as sources of international law in the Republic of Serbia

Unlike the generally accepted norms of international law, international treaties do not automatically become part of the legal

system of the Republic of Serbia. To this end, the 2006 Constitution of the Republic of Serbia provided for the need to comply with two conditions: first, their ratification; and the second is the promulgation of the law on ratification. Ratification as a state's consent to be bound by the provisions of a ratified international act is conducted by the Serbian parliament - the National Assembly of the Republic of Serbia. As it was rightly noted by Professor Beširević, the consent of the parliament with an already signed international treaty is what gives democratic legitimacy to international treaties (BEŠIREVIĆ, 2012). At the same time, Article 17 of the 2006 Constitution of Serbia points out that, in accordance with international treaties of the Republic of Serbia, foreign nationals hold all the rights guaranteed by the Constitution and the law with the exception of the rights which, in accordance with the Constitution and the law, were entitled only to the citizens of the Republic of Serbia. Analyzing the fact that the above mentioned constitutional provision reflects on non-ratified international treaties, Professor Pajvančić wonders whether the Republic of Serbia will be under certain obligation by non-ratified international treaties in the sphere of the legal status of foreign nationals (whereas the Constitution points them out directly) even though in accordance with Part 2 of Article 16 they are not part of the Serbian system of justice (PAJVANČIĆ, 2009).

Paragraph 4 of Part 1 of Article 99 of the Constitution of the Republic of Serbia presupposed that the National Assembly ratifies international treaties if the law presupposes the obligation of their ratification. Professor ĐURIĆ (2007) noted that the above-mentioned

constitutional norm established that there was no constitutional obligation for the National Assembly to ratify all international treaties. Moreover, the Constitution provided the legislature with the power to formulate the relevant provisions in a special bill, which, in accordance with paragraph 6 of Part 3 of Article 105 of the Constitution of Serbia, should be passed by a majority vote of the total number of deputies. In such a manner, namely, by the adoption of the corresponding law, the National Assembly was required to determine what international agreements are subject to the obligatory verification (ĐURIĆ, 2007). Such an instrument of legislation became the Law on the Conclusion and Execution of International Treaties. From then onward, in accordance with Article 14 of this Law, the National Assembly confirms international treaties of military, political and economic character; agreements, with which the financial obligations are created for the Republic of Serbia; conventions, demanding the introduction of changes in the existing laws or adopting new ones, as well as the treaties whose provisions represent a departure from existing legislative decisions. Furthermore, international agreements not related to the above types of international treaties, do not fall under the procedure of verification.

Articles 142 and 145 of the Constitution of the Republic of Serbia, regulating the procedure for applying sources (including international ones) during judicial proceedings, deserved particular attention within the framework of the conducted study. Thus, Article 142, which established the principles of justice, provided that the courts, being discretionary and independent, exercise justice on the

basis of the Constitution, laws and other general acts, and, if it is provided by law, generally accepted norms of international law and ratified international treaties. At the same time, Article 145, which provided for acts on the basis of which court decisions are issued, does not contain generally accepted norms of international law. Such a constitutional decision has caused serious concern among Serbian researchers in reference to the fact that the provisions of Article 145 can be interpreted in conjunction with other provisions of the Constitution so that generally accepted norms of international law may be derived from rendered judgments. In particular, Draško Đurović, considering current court practices in 2008, drew attention to the fact that the provisions of Article 145 may serve as a constitutional basis for avoiding the use of this legal source (ĐUROVIĆ, 2009; MLADENOV, 2014).

3.2. International sources in the Serbian hierarchy of sources of law

The 2006 Constitution of the Republic of Serbia, unlike, for instance, the 1992 Constitution of the Federal Republic of Yugoslavia (FRY), does not contain a provision on the superiority of the norms of international law over the norms of domestic legislation. However, the legal efficacy of the norms of international law may well be established by analyzing the provisions of the Constitution governing both the hierarchy of domestic and international legal acts and the competence of the Constitutional Court of the Republic of Serbia.

Thus, according to Article 194 of the Constitution of Serbia, the legal system of the Republic of Serbia has a unified basis. The Constitution is the highest legal act of the Republic of Serbia; accordingly, Article 194 of the Constitution directly indicates that the Constitution occupies the top of the hierarchy of legal sources in the Republic of Serbia. On the one hand, Part 5 of Article 194 stipulates that laws and other general acts adopted in the Republic of Serbia should not contradict ratified international treaties and generally accepted norms of international law, which testifies in favor of the supremacy of an international treaty over domestic legislation.

In this regard, Professor Vladan Petrov commented that, apparently, for the founders of the Serbian Constitution, the constitutional formulations to comply and not to contradict had the same meaning; although they express two different levels of subordination of the ratified international treaty to the Constitution. Professor Petrov also argued that not to contradict for an international treaty denotes the need for the absence of provisions that are in direct contradiction with the text of the Constitution, while to comply means that the formulated provisions of an international treaty are based on (among others) the principles laid down by the Constitution itself, which ensures not only the consistency of the international treaty to the Constitution but also the fundamental interrelation (VUČIĆ, PETROV & SIMOVIĆ, 2010). Under all circumstances, the only general legal act that is located in the hierarchy of legal acts over a ratified international treaty is the Constitution of the Republic of

Serbia, while all other general legal acts, including laws, have less authority than ratified international treaties.

3.3. Sources of international law and the Constitutional Court of the Republic of Serbia

The competence of the Constitutional Court of the Republic of Serbia was significantly expanded with the adoption of the 2006 Constitution. As a result, the Constitutional Court became the most important participant in the process of control over ensuring the hierarchy of sources of law in the legal system of the Republic of Serbia. This refers to such new powers of the body of constitutional review as overseeing the compliance of laws and other acts with generally accepted norms of international law and ratified international treaties and control over the constitutionality of international agreements. Undoubtedly, these new powers of the Constitutional Court were the result of the inclusion in the text of the 2006 Constitution of provisions defining the hierarchy of domestic and international legal acts.

The Serbian constitutionalists cited three arguments in favor of the preliminary control of the constitutionality of international treaties: a reason for internationally accepted statutory nature, a comparative-law, and, finally, a constitutional-legal argument. Thus, citing an internationally accepted statutory argument in favor of applying preliminary control of the constitutionality of ratified international

treaties, Irena Pejić pointed out that this way "...one can avoid a conflict between the Constitution and an international treaty, that is, between the domestic legal system and obligations of the state at the international level" (PEJIĆ, 2008: 753).

According to Professor Pejić, Article 169 of the Constitution is not only applicable to ratified international treaties, but also the control of the constitutionality of ratified international treaties itself should be conducted exclusively in the framework of this procedure, i.e. subsequent overseeing should be completely replaced by previous control of ratified international treaties. Professor Pejić justified this position as follows:

Preliminary control of constitutionality... can be used as an effective and expedient legal instrument; it is also able to square both requirements with regard to the inclusion of sources of international law in the national legal system: a) to control the constitutionality of ratified international treaties pursuant to the constitutional principle that ratified international treaties must comply with the Constitution; b) to confirm the contractual capacity of the Republic of Serbia, and to proof that latter is able to fulfill its international legal obligations without consequences for the state, following pacta sunt servanda rules (PEJIĆ, 2008: 752-753).

The comparative-law argument that Professor Pejić highlighted was, in particular, that most European constitutions established control

over the constitutionality of international treaties as a priori rule (PEJIĆ, 2008).

Finally, the third constitutional-legal argument was primarily related to the interpretation of Article 169 of the Constitution, which regulates the procedure for monitoring the constitutionality of a law before it enters into legal force. Thus, the former President of the Constitutional Court of Serbia, Professor Bosa Nenadić stated that

> A priori compliance assessment of the constitutionality of laws was established by the Constitution of the Republic of Serbia as universal control for all laws... there is no law in our legal system that is exempt from such control (NENADIĆ, 2008)

From this perspective, Professor Nenadić concluded that "in absence of any constitutional implications, the law on ratification of an international treaty a priori can be subjected to the control of constitutionality, just like any other law" (NENADIĆ, 2008; NENADIĆ, 2009b; PEJIĆ, 2008). This refers to the formal and material verification of the constitutionality of the law on the ratification of an international treaty;Bosa Nenadić also emphasized, that since it is also a matter of material constitutionality, the Court has the right to verify the provisions of an international treaty, which is part of the law on ratification (NENADIĆ, 2009a). As a result, almost all Serbian academicians who were in favor of prior control of the constitutionality of ratified international treaties admitted that the Constitution does not directly provide for this type of control of international treaties; scholars also reputed that the wording of Part 1

of Article 169 of the Constitution makes this type of control legally permissible. Nevertheless, Professor Vladan Petrov appealed to the fact that the Venice Commission in its Opinion did not provide an analysis of the content of Article 169 of the Constitution (VUČIĆ et al., 2010).

4. CONCLUSION

Thus, the modern Constitution of the Republic of Serbia has resolved the issue of the relationship between international and domestic law in favor of a monistic doctrine, in accordance with which international and domestic law are two components of the single legal system. The 2006 Constitution is the supreme legal act of the Republic of Serbia where all accepted norms of international law and ratified international treaties are applied directly; such norms are an integral part of the Serbian legal system. As a result, Serbian judicial bodies quite actively apply the norms of international law in their current practices; they also honor the practice of international institutions that monitor the implementation of rights and freedoms in interpreting the constitutional provisions governing human rights. In addition, the 2006 Constitution established a hierarchy of sources of law in the Serbian legal system, according to which ratified international treaties should not contradict the Constitution, and laws and other general acts adopted in the Republic of Serbia should not contradict ratified international treaties and generally accepted norms of international law. To ensure compliance with the hierarchy of law,

the Constitutional Court of Serbia was provided with two new powers: first, the authority to monitor compliance of laws and other acts with generally accepted norms of international law and ratified international treaties, and second – the authority to verify the constitutionality of international treaties. Thus, the Constitutional Court of Serbia, on the one hand, ensures the supremacy of the Constitution in the legal system of the Republic of Serbia by exercising control over the constitutionality of international treaties, and on the other hand, along with verification of constitutionality within the framework of compliance assessment, monitors compliance of the law and other general acts of the Republic of Serbia to generally accepted norms of international law and ratified international treaties, which undoubtedly ensures the integration of the legal system of Serbia to the European and global legal framework.

REFERENCES

BEŠIREVIĆ, V. 2012. **A new division of power: the (secret) life of a democratic deficit setting in concluding international treaties.** Parliamentary practice. KAS. p. 83. Belgrade, Serbia.

DIMITRIJEVIĆ, V. 2012. **Osnovi međunarodnog javnog prava [Fundamentals of public international law].** Center for Human Rights. p. 26. Belgrade, Serbia.

ĐURIĆ, B. 2007. **Устави међународниу говори [Constitution and international treaties].** Center for Human Rights. p. 382. Belgrade, Serbia.

ĐUROVIĆ, D. 2009. "Odnosu nutrašnjeg i međunarodnog prava u pravnom poretku republike Srbije [Relationship between state and international laws in the legal order of the Republic

of Serbia]". **Belgrade University School of Law.** Vol. 57. Nº 2: 344. Serbia.

MLADENOV, M. 2014. "Status međunarodnih izvora prava u ustavnom pravnom poretku [Status of international sources of law in the constitutional legal system]". **LAW – theory and practice.** Vol. 01: 21. Serbia.

NENADIĆ, B. 2008. "Претходна контрола уставности закона – усветлу Устава Републике Србије од 2006 [Preceding control of constitutionality of laws in the light of the Serbian 2006 Constitution]". **Legal Word.** Nº 14. pp. 72-81. Serbia.

NENADIĆ, B. 2009a. "Ustavni sud Republike Srbije u svetlu Ustavaiz 2006 [Constitutional Court of Republic of Serbia in the Light of 2006 Constitution]". **Revus.** Vol. 11. p. 135. Serbia.

NENADIĆ, B. 2009b. **О контроли уставности међународних уговора [On the control of the constitutionality of international treaties].** Legal Word. Nº 18. p. 91. Serbia.

PAJVANČIĆ, M. 2009. **Komentar Ustava Rebublike Srbije [Commentary on the Constitution of the Republic of Serbia].** KAS. p. 26. Belgrade, Serbia.

PEJIĆ, J. 2008. "Уставни суд и контрола уставности међународних уговора [Constitutional Court and control of constitutionality in international treaties]". **Legal life.** Vol. 14: 750-755. Serbia.

VUČIĆ, O., PETROV, V., & SIMOVIĆ, D. 2010. **Уставни судови бивших југословенских република [Constitutional courts in former Yugoslavian republics].** Legal life. pp. 139-142. Belgrade, Serbia.

UNIVERSIDAD DEL ZULIA

opción

Revista de Ciencias Humanas y Sociales

Año 35, Especial No. 22 (2019)

Esta revista fue editada en formato digital por el personal de la Oficina de Publicaciones Científicas de la Facultad Experimental de Ciencias, Universidad del Zulia.
Maracaibo - Venezuela

www.luz.edu.ve

www.serbi.luz.edu.ve

produccioncientifica.luz.edu.ve