



Research Article

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Suspension of Treaties: An Analysis of This Institute and Its Necessity

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Abstract

The treaty suspension is an institute of the international right and especially of treaty law which has a great importance and is directly related to the implementation of internationally concluded agreements between the subjects of this law. Although of particular importance, it should be said that the suspension seems to have been left a little in the shadows in terms of its treatment as often being treated together with termination of treaties it seems as if the latter has somewhat eclipsed it. This article aims that through a qualitative methodology based on the study of literature and relevant legislation, to analyze the institute of suspension of treaties, cases and arrangements made by the Vienna Convention as well as the procedure followed by states in this regard. An important aspect that is mentioned in this paper will be the case of suspensions of human rights treaties referring to the situation caused by Covid -19 in this regard. Also included in the paper is the case of Albania, legislative provisions and cases of temporary withdrawal from the European Convention on Human Rights.

Keywords: *treaty, suspension, causes of suspension, derogation, suspension procedure*

1. General Considerations for the Suspension of Treaties as an Institute of the Treaty Law

Suspension of a treaty means a temporary cessation of its legal force; in other words, it does not apply between the parties for a period of time that may be fixed or indefinite. The concept of suspension as a term is not explained by the specification of terms in Article 2 of the Vienna Convention on the Law of Treaties 1969 (hereinafter referred to as the Convention), however its meaning is clear from the provisions of this Convention in Article 57 and sequential.

According to Article 57 in question, the suspension of a treaty can be done with the consent of all parties to the treaty or according to the procedure provided in the treaty itself. From this provision we understand that a general overview is made of what are the cases when the suspension can be made. On the other hand, first, a distinction must be made between the suspension of bilateral and multilateral treaties.

In the situation when we have a bilateral treaty, it is enough for one of the parties to express that

it wants to suspend the treaty and this treaty ceases to act temporarily, while in multilateral treaties if one party wants to suspend the implementation of the treaty with the other parties the treaty can continue to be applied and remain in force for all other parties between them. On the other hand, the suspension may be total, that all the provisions of the treaty may not be implemented for a period of time, but it may be partial in the situation when the parties do not apply only certain provisions of the treaty, they are normally implementing the rest. Article 57 explains that the treaty itself may contain a provision which explains the conditions and the procedure to be followed for the suspension of the treaty and in this case the parties are obliged to adhere to these provisions, but if the treaty is silent on the matter then the procedure followed may be that provided in the Vienna Convention or it may require the consent of all other parties to the treaty. On the issue of the suspension of a treaty, by agreement between the parties, the convention has further elaborated by explaining a series of cumulative conditions which must be met in order for the suspension to be "lawful" or valid.

In order for two or more parties of a treaty to suspend the rights and obligations arising from it by agreement, the possibility of suspension under such an agreement must first be provided for in the treaty itself and in this case all the other parties must be notified regarding the purpose of the suspension and the concrete provisions to be suspended. It should be clarified here that this is a situation where some parties by agreement decide to suspend the treaty between them, but it continues to remain in force and is normally implemented with other parties. Although the convention does not explicitly clarify this, logically the new suspension agreement between some parties should not affect the implementation of the rights and obligations created by the treaty between the other parties and should be fully implemented between them based on the principle *pacta sunt servanda*, as the opposite would raise the issue of international responsibility (Shqarri.F, 2015).

In the case when there will be a partial suspension, when the implementation of only some articles will be suspended, this suspension should also not be explicitly prohibited by the treaty itself, for example it may be the case when the suspension of implementation of an obligation may bring problems in the implementation of all other obligations deriving from the treaty. Apart from the fact that the suspension should not be expressly prohibited by the treaty and as mentioned above should not infringe the rights and obligations of other parties, it should also not be incompatible with the object and purpose of the treaty itself.

We find such a condition provided by the convention even in the case of prohibited reservations to a treaty and in the same form we can say that the convention does not provide the way or conditions when we can say that in fact the suspension does not agree with the object and the purpose of the treaty. So in fact there are no clear criteria on the basis of which to check the compliance and on the other hand in most treaties is not provided the creation of specific bodies that can consider such a matter. However, unlike the case of reservations, perhaps the sensitivity of other parties in the case of suspension may be higher and there will probably be a greater activation of them in the process of reviewing the admissibility of the suspension.

2. Causes of Suspension

The reasons for the suspension of a treaty can be various, they may be foreseen or not, but in the Vienna Convention some general situations for the reasons for the cessation of the legal force of the treaty or its temporary suspension are given and then by referring to these definitions the treaties depending on their content may concretize their specific provisions relating to the matters in question.

Among the reasons for the suspension we can mention the case when all the parties enter into a new agreement on the same issues and the new treaty states about the suspension of the previous one or it is decided otherwise that this was the intention of the parties. Determining the intent of the parties in this context can be another challenge in implementing this provision, we must also be clear that this provision does not overlap and does not collide with the provision of Article 30 of the convention, which deals with the primacy of norms and obligations when both treaties are in force between the parties and not when the intention of the parties is to suspend the former (A. Aust, 2007).

2.1 *Suspension as a result of a violation by one of the parties*

Another reason for suspension is the violation of the treaty by one of the parties and in this situation the termination or suspension of the treaty with the violating party can be requested by the other parties or the injured party. Article 60 of the Vienna Convention in fact treats jointly the material violations of the treaty as grounds for either its termination or suspension; however, the situation of suspension also deals with it.

According to the Convention, for a breach to be considered sufficient to terminate or suspend a treaty it must be merely a material breach, that is to say, a rejection of the treaty not provided for by the Vienna Convention itself, or a breach of an essential provision for fulfilling the purpose and object of the treaty.

When we say that it should be an essential provision we mean a serious violation which makes it impossible to implement the purpose or object of the treaty, while the doctrine makes another distinction between the material violations mentioned above and the essential violations, where the latter considers them as violations not only of the essential provisions related to the object and purpose of the treaty, but also of an important obligation or right deriving from the treaty (M.Villiger, 2009). Material breaches of the treaty give the other parties the right to decide to terminate its legal force in part or in full, or even to terminate this treaty between them and the violating party.

Two specific situations that the Convention mentions only for suspension in the event of a breach are: first, if the breach of the treaty has specifically affected only one of the parties, it may decide to suspend the treaty with the infringing party and second, if the treaty is of a nature such as the material violation of its provisions by one party radically changes the position of each party regarding the further fulfillment of its obligations under the treaty and this may also constitute a reason for partial or complete suspension with the violating party (Convention of Vienna 1969, Article 60).

Discussion in this provision is the fact that it provides for the possibility of full or partial suspension assuming that the partial suspension will only affect the provisions that have been violated. Meanwhile we know that a material breach could be the violation of a provision which impedes the implementation of the object and purpose of the treaty, how could it be possible to suspend the application of the provisions relating to the object and purpose and meanwhile continue to be in power for the rest? We think that perhaps the purpose of the partial suspension may refer to the application of the principle of reciprocity and proportionality, that it intends to apply in relation to the offending party only the provisions that it mutually applies, while the suspension is proportionate, ie appropriate to the violation and its measure (FLJR. Kyrgis, 1989). Likewise, the violation in the case suggested above can be referred to the situation when the violation has to do with the rejection to implement the treaty unforeseen by the Vienna Convention or even by the text of the treaty itself. It would be of interest to mention here the provision of the last paragraph of Article 60 of the Convention "*Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.*"

From this provision we understand that human rights treaties may not cease to function or be suspended if one of the parties fails to implement or violates them. In treaties of this nature, in general the principle of reciprocity is not very obvious, given that these treaties are applied by each party in its own territory and to its own citizens, and not mutually between parties and the breach of the treaty by the other parties does not have direct effects on the implementation of obligations or gaining the rights deriving from the treaty for the other parties.

2.2 *Rebus sic stantibus and impossibility to fulfill the treaty obligations*

Substantial change of circumstances or what we call the clause *rebus sic stantibus* is also a case that may cause the suspension of the treaty. We are in front of this possibility when the circumstances in which the treaty was concluded and which have been a fundamental element in forming the will of the

parties in expressing consent, have changed substantially and this radically affects the implementation of the remaining obligations of the treaty. Another important element of the fundamental change of circumstances as a cause of suspension is that it should not have been foreseen in advance by the parties to the treaty, so it seems that we are dealing with a new and unforeseen situation, as otherwise the suspension would be done within the framework of the provisions of the treaty and the procedure provided by it.

The reason for the suspension (or termination) of a treaty may also be the impossibility of fulfilling the obligations deriving from the treaty. At the time of concluding a treaty, it is understood that any entity with international legal personality that will be part of the international legal relationship established by the treaty assesses or weighs its possibilities to fulfill the obligations arising from this treaty before giving consent to be bound by it.

The problem is what happens if at the time of giving consent a party is able to fulfill the obligations but then becomes incapable of fulfilling them? In such cases, the inability to meet the obligations may serve as a cause or reason for the party incapacitated to request the suspension or termination of the treaty. We must clarify here two main points: first, the impossibility of fulfilling the obligations does not automatically lead to the termination or suspension of the treaty, but the impossible party must request such a thing if it deems it reasonable and second, if the impossibility is permanent it can serve as a reason for the termination of the treaty, but if it is temporary it serves as a cause for the suspension of the treaty and when the cause of inability to fulfill the obligations disappears the treaty can resume action between the parties (F. Shqarri, 2015).

The concept of impossibility to fulfill the obligations of the treaty is not precisely explained by the convention, but is extensively elaborated by the Commission of International Law, which explains how impossibility can be called the complete disappearance of the object on which the rights and obligations of the treaty fall or cases of major force. However, the ILC clarifies that when the complete disappearance of the object of the treaty happens, it causes the termination of its legal force, while the cases of major force cause temporary impossibility to fulfill the implementation of the treaty (Commission of International Law, 2001) and consequently may be a cause for suspension.

A special case that is worth discussing in the context of the suspension of treaties and its importance are precisely the treaties related to human rights. Usually in such treaties the concept of suspension as an institute of treaty law overlaps with the concept of derogation as part of human rights science, as it is the non-implementation of a law or certain rights when the conditions set out in the treaty bring its suspension (the concept of suspension is broader in this regard because it is not limited to special cases). Usually treaties related to fundamental rights and freedoms also have provisions regarding derogations.

Is the derogation a suspension as a result of the inability to fulfill the obligations of the treaty or a suspension as a result of a substantial change of circumstances? If we refer to the analysis made above for both reasons of suspension, we would conclude that the derogation is a suspension as a result of the inability to fulfill the obligations arising from the treaty as a result of the major force. This also because in the case of substantial change of circumstances this situation should not have been foreseen in the text of the treaties themselves, while derogations are foreseen, they even have the procedure and conditions to be followed.

An other thing to mention here is the fact that derogation is limited in time, so if a state doesn't want to implement some of the treaty's provision for an unlimited time, and this suspension is not imposed by specific causes, the right way to solve the problem is a reservation of the treaty, not a suspension of it.

3. ECHR and the Situation Cause by Covid-19 from the Point of View of Treaty Law

As we discussed above, the suspension in the case of human rights treaties coincides with the concept of derogation. Specifically, the European Convention on Human Rights in its article 15 provides the possibility that member states, in cases of war or other dangers threatening the life of the nation may

temporarily evade the obligations provided for in the convention but, for this must notify the Secretary General of the Council of Europe of the measures taken, of the rights which are not enforced, and of when such measures expire.

The situation caused by covid-19 was treated by about 10 member states of the ECHR as an emergency situation that endangered the life and health of the nation and the Secretary General of the Council of Europe was notified for the derogation of the specific articles of the convention. Seen from the point of view of treaty law here is the case of a partial suspension of the treaty according to the procedure provided by it. The temporary suspension of the ECHR has been widely discussed by scholars whether it is a proportionate measure to the situation or not and whether it is necessary as there are opinions that this is an extreme measure while this function could very well perform even the restriction of some rights provided by the convention.

These discussions are based on Resolution 2209 of the General Assembly of the Council of Europe which deals with the state of emergency and proportionate measures in accordance with Article 15 of the Convention.

According to this resolution, the Assembly recommends that member states, before using derogation, study the possibility of other measures and if derogation is necessary, justify their necessity and limit the purpose of each derogation. According to the resolution in question, member states should take care that during the emergency situation when derogations are in force, the principle of control and balance in a pluralistic democracy led by the rule of law, functions to the maximum possible, respecting the independence of institutions, structures for the protection of human rights, freedom of association and expression, especially of the media and civil society (Resolution 2209, prg.19).

Article 15 of the Convention and point 19 of the Resolution also require that the Secretary-General be notified without delay in the event of a derogation, not only for the measures taken in this context, but also for the reasons and purpose of such measures, as well as the situation justifying their duration or extension.

The role of the Secretary-General in the situation of derogations is to monitor the measures taken by the member states but also to advise them so that the derogations are in line with the standards set by the convention. Thus, in the framework of the law of treaties, we say that the treaty itself (ECHR) creates a system of supervision of suspensions by member states, but also limits the possibility of their doing so. We find a similar system in the European Social Charter, while in the case of the Covenant on Civil and Political Rights and the American Convention on Human Rights, the purpose of notifying derogations is not to monitor them, but to notify other parties of the treaty (K.Istrefi, 2020).

4. Provisions of the Albanian Legislation for the Suspension of Treaties

Procedure according to the convention and the procedure followed in the Republic of Albania according to law 43/2016, case of ECHR (situation of the competent body, is it related to the state of emergency and natural disaster). The suspension of international treaties is also provided in Law 43/2016 "On international agreements in the Republic of Albania", Article 30 of which states that the Republic of Albania may temporarily suspend the implementation of international agreements related to other subjects of international law but must always do so in accordance with the provisions of the treaty or law in question.

Law 43/2016 makes a distinction between international and governmental or interdepartmental agreements. Thus, according to the law in question, agreements on behalf of the Republic of Albania are signed by the President of the Republic or any person authorized by him with full power, intergovernmental agreements are signed by the Prime Minister or any person authorized by him and interdepartmental agreements are signed by the head of the relevant institution. In the same form, Article 30 provides that, depending on the type of agreement and its nature, the bodies that may suspend the agreement are the same ones that have the capacity to sign the agreement.

Regarding the internal procedure to be followed, the law stipulates that the proposal for

suspension of the international agreement is made by the competent ministry and this proposal is accompanied by a list of documentation such as draft law or suspension decision, explanatory report, which argues the reasons for suspension and opinions expressed by interested ministries. The law in question explains that the opinion of the Ministry of Foreign Affairs and the Ministry of Justice is necessary in any case, while when the international agreement has financial effects, the opinion of the Ministry of Finance is also needed. A special category of agreements are those that either relate to or touch on issues regulated by the *acquis* of the European Union, for which the opinion of the Ministry of European Integration is definitely required.

The situation caused by the COVID-19 virus caused the Albanian state to take the decision to suspend the special articles of the ECHR and the Secretary General of the Council of Europe was notified with a verbal note. This is the second case when Albania, due to the state of emergency, derogates from the Convention after it was initially suspended in 1997.

5. Conclusion

Suspension of treaties is an institute of treaty law which enables states parties to a treaty to be part of it by not applying one or several provisions of the treaty temporarily. The suspension of a treaty is usually motivated or forced by certain situations within the member states or even in the relations between them. Suspension is a necessary tool in moments when states due to impossibility can not ensure the full implementation of the treaty and creates the possibility for them to implement it partially, without risking having international responsibilities to other member states.

Suspension, as an institute of treaty law is a present and useful instrument in cases of human rights treaties, when a state can not fulfill all the obligations deriving from the treaty itself. This kind of partial suspensions are called derogations, and as a specific part of suspension, have conditions and procedures which should be followed by the state. Derogations should be always temporary and also in this cases exist specific bodies which should be notified about the derogation and are encharged to supervise this proces. If the derogation is not temporary, we can say that it is not a suspension but it is more like a reservation to the treaty.

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