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RESEARCH ARTICLE

Reservations to international human rights treaties.

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Abstract

The article considers an issue of legality of reservations, made by States to the international instruments on human rights and freedoms. The issue is estimated both by the existing possibilities of international instruments on personal rights as independent regulators of individual rights and freedoms, and by the position of the fundamental act in the field of the law of treaties - the Vienna Convention on the Law of Treaties of 1969. This is about the regime of inadmissible reservations as one of the most considerable gaps in this matter. In particular, it is about reservations, incompatible with the object and purpose of the treaty, in respect of which there is no document, establishing criteria for determination of compatibility with the treaty's provisions. A practice of the International Court of Justice in hearing of cases, involving the status of individuals, is given as examples of the legal analysis of the reservations practice, as well as of the European judicial authorities - the European Court of Human Rights and the Court of Justice of the European Union. Finally, the author comes to a conclusion on illegality of reservations, restricting the personal rights and freedoms, contradicting the obligations of States under these agreements.

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Introduction:-

The International human rights instruments contain obligations of States to provide people, who are in their territory or within their jurisdiction, with a scope of rights and freedoms, which is provided by this agreement [1]. In this regard, the one of the discussed questions is a question of whether the international norms establish only the obligations for States to provide the rights and freedoms, listed in a given treaty, or, along with States' obligations, the norms of international treaties provide individuals with legal rights?

V.S. Vereshchetin and R.A. Myullerson expressed the opinion that "a citizen of the law-governed state has the right to demand that government authorities observe the voluntarily adopted international obligations, which directly affect the individual's interests. The Human rights treaties establish obligations also for citizens, not only for the participating countries" [2].

The question of whether the international standards in the field of human rights are independent regulators of human rights and freedoms hasn't got a single decision in the theory of international law up to now. Nevertheless, the problem of implementation of the undertaken international legal obligations, allows to look at this problem differently.

As early as 2001, the International Court of Justice noted in the judgment in the LaGrand brothers that the USA, without having fulfilled these requirements, violated not only the rights of Germany, but also the rights of Karl and Walter LaGrand.

"The clarity of these conditions (cl. 1, Art. 36 of the Convention), considered in this context, doesn't let in a possibility of doubt. The Court thinks that the cl. 1 of the Article 36 creates individual rights, which ... were violated in the present case" [3].

The decision of the International Court of Justice in the matter of Aven and others of March 31, 2004 became a confirmation of the stated thinking. The USA authorities arrested, detained, convicted and sentenced about fifty Mexican citizens, without having informed properly the Mexican Consulate and detainees on the rights, embodied in the Art. 36 of the Convention of 1963. Mexico demanded a restitution in the form of *restitutio in integrum* (remission of a sentence or its resentence), and also cessation of these violations. The Court admitted violations of the Art. 36 and the duty of the USA to provide review of the cases [4].

Thus, the International Court of Justice confirmed that not only the rights and duties for States, but also the individual rights of private natural persons, are formed by certain international treaties between States.

Moreover, a number of the rights (for example, the individual right for access to justice) aren't stipulated as the rights, applied only within national jurisdiction. This conclusion follows from the simple fact of existence of international judicial institutions: as the right of access to judicial protection is stipulated in general, so, it is logical to assume that it concerns the courts of any kind.

The international treaties, regulating the human rights and freedoms, also contain the articles, which concern an ability of States to restrict legally these rights and freedoms in their territory, and also the duties of individuals to be exposed to such restrictions.

Thus, the Universal Declaration of Human Rights of 1948 in clause 2 of the Art. 29 regulates a duty of a person "to be exposed only to such restrictions, which are set by the law only for the purpose of due recognition and respect of the rights and freedoms of others and satisfaction of fair requirements of morals, a public order and general well-being in a democratic society" at implementation of his/her rights and freedoms. And the Art. 30 states that "nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein".

The International Covenant on Civil and Political Rights of 1966 establishes in cl. 1 of the Art. 4: "In time of public emergency, which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures, derogating from their obligations under the present Covenant to the extent, strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discriminations solely on the ground of race, color, sex, language, religion or social origin", and in the Art. 5 - "1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent".

The European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the American convention on Human Rights of 1969, the Charter of Fundamental Rights of the European Union of 2000, etc. contain similar requirements.

Considering the provided provisions of human rights treaties, a question of legality of the reservations, made by States to the specified agreements, restricting an implementation of some rights for individuals, arises.

Main part:-

The reservation became widespread in contractual practice of States only at the beginning of the XX century, though the first unilateral statements of States are belong to the end of the XVIII — the beginning of the XIX century.

Despite its short history of existence, the institution of reservations has undergone significant changes, which are explained by change of approaches in the legal regulation - a transfer from the traditional unanimity principle, concerning reservations within League of the Nations, to the liberal regime, enshrined by the Vienna Convention on the Law of Treaties of 1969.

The three universal Conventions form the basis of the legal regime of reservations to international agreements: the Vienna Convention on the Law of Treaties, 1969; the Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986; the Vienna Convention on Succession of States in respect of Treaties, 1978.

All three conventions use a single approach in regulation of reservations.

The reservation is defined in the article 2, clause 1 (d), of the Vienna Convention on the Law of Treaties as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State". This concept has gained recognition of the modern doctrine and "absolutely settled in a jurisdiction, despite a rarity of precedents, and, apparently, the States and international organizations rely on them in their practice, concerning reservations" [5].

The legal regime of reservations, enshrined in the Vienna Conventions, also is based on the principle of reciprocity – in other words, a party, which has accepted the reservation, may not apply provisions, to which a reservation is made, in its relations with a State, which made the reservation, or liable to apply this provision as it is defined in the reservation.

Conditions of making reservations to the international agreements are regulated by the Vienna Convention on the Law of Treaties of 1969, which establishes a presumption of admissibility (legality) of any reservation in the Art. 19, except for cases, when:

- a) this reservation is forbidden by the treaty;
- b) the treaty provides that only specified reservations can be made and this reservation isn't among them;
- c) this reservation is incompatible with the object and purpose of the treaty.

The last basis causes numerous disputes for a long time both in practice of the international community, and in the doctrine. Besides, the regime of inadmissible reservations is one of the most considerable gaps in the Vienna Conventions. In particular, this is also about reservations, incompatible with object and purpose of the treaty, because there is no document, which would establish criteria for determination of that compatibility with the treaty's provisions.

There are two approaches for solution of this problem in the doctrine [6], which are represented by the school of permissibility and school of opposability. The followers of the first point of view, namely, the English scientist D. Bouet, the Swedish professor F. Horn, consider that the reservation, incompatible with the object and purpose of the treaty, can't be made by a State, otherwise it will be invalid. As a result, a question of its acceptance can't even arise. Representatives of the opposability school (J. Ruda) take the position that the validity of any reservation directly depends only on its acceptance or rejection by a State. The Article 19 (c) is, in their opinion [7], an ordinary doctrinal statement, which can be considered as nothing more than a guide for countries in making reservations.

The Vienna convention doesn't determine a scope of people, who have the right to resolve an issue of a reservation's admissibility. In most cases, the treaty's party independently estimates its admissibility and makes a decision on consequences of an inadmissible reservation, and an alternative to this system doesn't exist when there are no special instructions in this respect in the treaty. As a result, an assessment of the reservation takes place at the bilateral level and has a subjective nature.

There was own practice in the field of inadmissible reservations at the European level, which was called the "Strasbourg's Approach". Its main features are an assumption by supervisory bodies of rights treaties to determine an admissibility of reservations, and in case of recognition them as inadmissible - an announcement them as invalid and application of the separation method.

Except inadmissible reservations, contradicting the object and purposes of the treaty, the European Convention forbids States to make reservations of a general nature and regulates that reservations should be made to "any particular provision" of the Convention [8]. Thus, in formulating a reservation, a state should directly refer to those articles of the Convention, to which it made it, and an effect of the reservation should be limited only by the relevant article of the Convention. According to the European Court of Human Rights, a reservation of a general nature is a particular reservation, formulated so vaguely or widely that it is impossible to define its exact value or scope" [8].

From the standpoint of compliance with the principle of legal certainty, reservations should concern the laws in force at the time of reservations' formulation in the territory of the relevant state, and contradicting the particular provision of the Convention. The Article 57 of the European Convention stated that a reservation should refer to a law in force "at this time", and it should not be of a general nature. On the other hand, these provisions are applied to reservations, which States may make or made to the fundamental provisions of the European Convention.

Conclusions:-

The issue of reservations was and remains one of the most contradictory and difficult in the modern international law. As it is noted in the First report of A. Pelle on the right and practice, concerning reservations to international treaties [9], submitted for consideration to the International Law Commission, contradictions in the approaches, existing in respect of reservations, managed to be overcome only thanks to the compromise solutions, which are based on an ambiguity or carefully aimed silence.

At the 57th session of the International Law Commission, held in July-August, 2005, the project of Guidelines about reservations to international treaties was discussed. In the clause 3.1.12 – "Reservations to general human rights treaties" – the following rule was formulated: "To assess the compatibility of a reservation of a general treaty for the protection of human rights, account shall be taken of the indivisibility, interdependence and interrelatedness of the rights, set out in the treaty, as well as the importance that the right or provision which is the subject of the reservation has within the general thrust of the treaty, and the gravity of the impact the reservation has upon it" [10]. Assessing the Project, the Commission's Special Rapporteur noted that it "is quite flexible to leave a sufficient assessment field for interpreters" [10].

The analysis of the European Union law, made in one of the solutions, can be presented as one of possible examples of such interpretation: "The right of the Community, regardless of the legislation of the Member States, not only imposes obligations on individuals, but also gives them rights, which become part of their legal property. These rights arise not only when they are directly expressed in the Treaty, but also owing to obligations, which the Treaty imposes by a certain way on individuals, as well as on the Member States and the Community's institutions" [11].

In this aspect, the decision of the European Court of Human Rights in the matter of Golder against the United Kingdom is also rather interesting. Considering the question of whether the right for access to justice provided in the context of the Article 6 of the European Convention on Human Rights, the Court, among other things, noted:

"28. ... The Article 6 cl. 1 doesn't specify directly the right of access to justice. Other rights are proclaimed in the clause 1, but all of them follow from the same fundamental idea and, if taken together, make a single law, which though hasn't found its exact definition. For this reason the Court is urged to establish, by means of interpretation, whether the access to justice is a part or aspect of the specified law.

30. The "General rule of interpretation" of the international treaty, which is provided in the Article 31 of the Vienna Convention, joins together a number of parts that are listed in the four paragraphs of the same Article 31.

31. The terms, used in the cl. 1 of the Article 6 of the European Convention, taken in the context, give the reasons to think that this right is included in the established guarantees.

35. The Article 31 of the Vienna Convention states that it is necessary to consider, along with a context, "the relevant provisions of the international law, applied in the relations between parties". Among these norms are general principles of the international law and, in particular, "the general principles of the law, recognized by civilized countries" (the cl. 1 "c" of the Article 38 of the Statute of the International Court of Justice). The Legal Committee of the Consultative Assembly of the Council of Europe foresaw in August, 1950 that "the Commission and the Court will have, where appropriate, to apply such principles" in execution of their duties, and for this reason it didn't consider as "necessary" an existence of the relevant provisions in the Convention (Documents of the Consultative Assembly, working papers of the 1950 session, v. III, no. 93, p. 982, § 5).

The principle, according to which a dispute of civil nature can be submitted to the Court, refers to the number of universally recognized fundamental principles of the law; it is also fair in regard to the principle of the international law, which forbids refusal in justice. In the light of the specified principles, it is also necessary to read the Article 6,

cl. 1.

If its text was understood as speaking only about the movement of a case, which was already brought to the Court, then the Contracting state could, without violating this article, to abolish its courts or to withdraw from their jurisdiction a consideration of some civil cases, having charged them to the bodies, which are depending on the government. Such assumptions, inseparable from a risk of arbitrariness, would have very serious consequences, which are incompatible with the stated above principles; it couldn't pass by attention of the Court.

According to the Court, it would be inconceivable that the Article 6 cl. 1 contained a detailed description of the procedural guarantees, provided to the parties in civil cases, and wouldn't protect, first of all, the matter that makes it possible to use practically such guarantees – the access to the justice. Such characteristics of the process as justice, publicity, dynamism, lose sense, if there isn't a judicial proceeding" [12].

It is difficult to accept the fact that the human rights, provided by the relevant international instruments, - are "potential" rights or aren't rights at all, but are the obligations of States, separated from particular subjects. Taking into account the above arguments, we can draw a quite evidential conclusion: it is hardly possible to consider reservations of States in relation to the international treaties, regulating guarantees of the human rights and freedoms, which restrict these rights, as lawful. In this case, there is obvious violation of international legal obligations by States.

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