FACTA UNIVERSITATIS
Series: **Law and Politics** Vol. 14, N^{o} 1, 2016, pp. 133 - 142

Review Paper

APPLICABILITY OF THE VIENNA CONVENTION RESERVATIONS REGIME TO HUMAN RIGHTS TREATIES

UDC 341.231.14:004.738.4](4-672EU)
343.45:004.738.4](4-672EU)

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Abstract. *International law is facing global unremitting challenges, which are constantly increasing in both scope and content, especially in the context of rising security problems. Universal values:human rights and freedoms are first to be undermined. In such circumstances, states resort to different ways of "relieve" themselves from the imposed obligations by imposing reservations. However, the reservations regime established by the Vienna Convention on the Law of Treaties (1969) is pretty clear. The problems arise in the course of its interpretation and enforcement. The debate on applicability of the reservations regime in the field of human rights treaties has not been exhausted yet. This paper is aimed at examining these challenges in an attempt to find answers to these global issues by analyzing the theoretical approaches to the problem and practice of eminent institutions in the area.*

Key words: *international law, approach, normative agreement, international institutions.*

1. INTRODUCTION

The Vienna Convention on the Law of Treaties (1969) allows the possibility for alteration of the actions of the international agreements in regards to the reservations. The only envisaged limitations by the convention in regard to the reservations are those that are forbidden by the agreement itself, or when it allows only certain type of reservations and limitations regarding the third states: the reservations cannot be contrary to the subject and aim of the agreement. Whether one reservations is compatible or not with the subject and aim of the agreement is determined by the state itself. Raising an objection to the reservations imposed by one state does not mean that the state which imposed the reservations cannot be part of the agreement, but the state opposing the reservations can request the reciprocated approach to the specific reservations in regard to the state that imposed the reservations, or

Received March 23rd, 2016/ Accepted April 19th, 2016
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that the state does not consider to be in a contractual relationship with the state that imposed the reservation.

This system is quite different but much more efficient than the one established by the League of Nations, a system based on consensus, which is quite rigid but difficult to sustain. In spite of being more flexible and relatively detailed, the regime of the Vienna Convention is unclear and ambiguous in regard to reservations. In 1996, there was an initiative to draft guidelines for the application of the Convention, which would make it complete.

The lack of specific rules related to the reservations in human rights treaties is a result of the fact that, in that period, the agreements related to the human rights did not have the same significance they have today, and because the primary aim of the framers of these agreements was to establish uniform system. On the other hand, starting from the premise that the roots of modern international public law arise after World War II, when the individual gets *ius standi in iudico* in front of the International Tribunal, the most extensive activity has been underway in the area of human rights. The Charter of the Organization of the United Nations is written in that spirit, and the international human rights rules have become a norm. For all these reasons, the very thought of establishing a system of reservations on international agreements pertaining to human rights seems to be illogical.

In addition, in public international law there are so-called social/public obligations and rights or duties to the community, where the right is exercised on behalf of the entire international community with *erga omnes* effect in order to protect the common values and attainments of human civilization. In the authors' opinion, the restrictive interpretation of the system of reseravations makes this system difficult to apply in respect of human rights treaties.

2. THE TREATIES IN THE FIELD OF HUMAN RIGHTS AS NORMATIVE AGREEMENTS

International law has advanced to such an extent that we may speak of obligations "*erga omnes*" (Cassesse, 2005: 58), which imply obligations of the state towards the international community, as one of the values of the contemporary international society. In the case of *Barcelona Traction*, the International Court of Justice emphasized that we must distinguish between *interpartes* obligations between states and *erga omnes* obligations that a state has towards the entire international society, such as the protection of human rights.

In the case of *East Timor*, the Court confirmed its position, stressing that *erga omnes* obligations are reciprocal by nature (Crawford, 2000: 3-5). Regarding the existence of obligations *erga omnes* ("towards all"), there is extensive case-law of the most prominent international bodies and judicial authorities. For example, the International Court of Justice (ICJ) considered the Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the case *Bosnia and Herzegovina v. Yugoslavia*, 1996 ICJ; the dissenting opinion of Justice Weeramantry stated that: "*The Convention on Genocide as any other humanitarian treaty it is not an exchange of interest and benefit between states in a conventional sense…Human rights and humanitarian law constitute a liability of states to protect the values recognized by the international community…*" In this regard, the Court recognized the non-reciprocal nature of the treaty as well as the ***erga omnes*** obligations in the international law. Another respectable international forum, the European Court of Human Rights, which was asked to rule in the case of *Al Adsani v.*

United Kingdom (2001), concluded that "*The European Convention on Human Rights (ECHR) cannot be interpreted in a vacuum, and the Court must be aware of the special character of the Convention as a human rights treaty, while taking into account the relevant rules of international law …. It is necessity for the Convention to be interpreted in harmony with other rules of international law, of which it is a part….* ".

3. System of Reservations Established by the Vienna Convention on the Law of Treaties

Article 1 of the Vienna Convention on the Law of Treaties (hereinafter: VCLT), defines a *reservation* is a unilateral statement, no matter how it is phrased or named, imposed by a state when signing, ratifying, accepting, approving or acceding to a treaty with intent to exclude or to modify the legal effect of certain provisions of the treaty in respect of their application to a specific State. Article 19 of the VCLT prescribes that the State may impose reservations when signing, ratifying, accepting, approving or acceding to the treaty unless: a) the reservation is prohibited by treaty; b) the treaty only allows specific reservations, which do not fall under the reservations it plans to impose; or c) in cases not mentioned above, the reservation is incompatible with the object and purpose of the treaty (in which case the problem arises with the universal human rights treaties).

A reservation that is explicitly permitted by a treaty does not require any additional acceptance by the other contracting State, unless the treaty provides so. When the treaty is a constitutive instrument of an international organization, and unless otherwise specified, the reservation should be accepted by the organization (Art. 20, item 1 and 3).

The acceptance of the reservation establishes appropriate contractual relationship between the state that imposed the reservation and the one that accepted it. Objection to the reservation does not preclude the implementation of the treaty between the State which has imposed a reservation and the objecting one, unless an opposite intention is clearly expressed by the objecting State (Art. 20, item 4b).

A reservation is considered to have been accepted by a State if no objection is raised within a period of 12 months after the notification (Art. 20, item 5). When the State that objected to the reservation does not oppose the implementation of the treaty, the provisions related to the reservation do not apply between the two States (Art. 21, item 5).

4. Relationship between the Reservations System Established by the Vienna Convention on the Law of Treaties and treaties in the Field of Human Rights

4.1. Position of the International Law Commission

The International Law Commission (Simma, 1998) took quite a rigid position on this issue, stating in in its preliminary conclusions that the regime of the Vienna Convention on the Law of Treaties is applicable to all types of international agreements, whatever their nature, primarily because of its flexibility, and because of the ability to achieve a balance between universal participation or involvement of the largest possible number of states and the integrity of the treaty. The Commission also declared that the bodies established under human rights treaties can provide recommendations and opinions. The

Commission issued Draft Guidelines on this matter, which were provided in the form of a preliminary conclusion, but the problem still remained unresolved (Fitzmaurice, 2006: 133).

4.2. Council of Europe

4.2.1. Recommendation 1223 concerning the reservations made by the Council of Europe member states on the Council of Europe conventions

The Council of Europe (CoE), in its Recommendation 1223 (1993) concerning the reservations of the CoE member states on the CoE conventions, embraced the opportunity afforded by the Vienna Convention on the Law of Treaties (VCLT) to use reservations in order to model the effects of the agreement on the state, but it also pointed out to several drawbacks embodied in reservations as such. First, they may impair the coherence and integrity of the convention. The legal machinery established by the Convention is weakened, and problems arise in the harmonization and unification of the laws. The fact that countries do not have equal international obligations violates the equality between the parties and complicates the relations between them. Therefore, the General Assembly and the CoE Council of Ministers recommends and consider it necessary to substantially reduce the number of reservations established to the CoE conventions. In terms of the conventions that have already been accepted (item 7a), this Recommendation invites the member states to carefully review previously established reservations, to withdraw them as quickly as possible and to submit a reasoned report to the Secretary General if they still have certain reservations which remain applicable. With regard to the CoE conventions which are to be concluded in the future (item 7b), it is recommended that:

a) Each Convention should contain a clause that will specify whether the convention would permit reserves and the conditions under which a state may make reservations;
b) The validity of reservations should be restricted to a maximum period of ten years; after that period, the Secretary General of the Council of Europe shall invite the state which made the reservation to review it, to withdraw it as soon as possible, or to send a reasoned report to the Secretary general if it wishes to maintain the reservation; if the state does not renew the reservation within one year after the invitation of the Secretary General to react, the reservation shall be deemed withdrawn;
c) The bodies established by specific conventions shall be given the authority to issue s reasoned opinions on reservations that a state may wish to make.

4.2.2. Report of the European Commission for Democracy through Law (Venice Commission)[1]

The Venice Commission report presents five approaches to the treatment of human rights treaties.

[1] In the framework of the Portuguese Presidency of the Council of Ministers of the Council of Europe, in cooperation with the Faculty of Law of Coimbra University (IUS GENTIUM CONIMBRIGAE CENTRE) and the International Association for Constitutional Law - IACL, the *Report of the European Commission for Democracy through Law*, from October 2005 (titled: The human rights treaties and the Vienna Convention on the Law of Treaties: conflict or harmony) was submitted by Prof. Martin Scheinin, Director of the Institute for Human Rights in Finland and a member of the IACL.

4.2.2.1. The Positivist approach to the Vienna Convention on the Law of Treaties

An extremely positivist approach to the Vienna Convention on the Law of Treaties (VCLT) would imply that it should be treated only as a treaty about treaties. Such an approach would significantly marginalize the role of the VCLT and have a destructive impact on human rights' treaties. It would further imply that the overall number of states that have ratified the VCLT would be lower that the number of countries the number of states that signed other treaties, such as the six major human rights treaties of the UN: the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination Against Women; Convention against Torture and Inhuman or Degrading Treatment or Punishment; and the Convention on the Rights of the Child. This approach would mean that the VCLT would apply only between parties that have concluded it. Moreover, this Convention envisages a non-retroactive effect, which further implies that it should be applied only to treaties which are to be concluded after its entry into force. Such an approach would destroy not only the human rights treaties but it would also be a huge regress for the international law in general. Therefore, this approach cannot be taken as an appropriate approach because the Vienna Convention on the Law of Treaties represents something much more.

4.2.2.2. The Dogmatic approach to the Vienna Convention on the Law of Treaties as a codification of customary rules of Treaty law

It is a fact that there is a relationship between the customar international law and the Convention but the question that arises is whether it would be accepted as codification in absolute terms or as some other looser relationship. This approach faces several problems. Namely, the provision of the Convention on non-retroactive effect accepts the existence of rules that apply beyond those provided by the Convention. Therefore, in terms of the Vienna Convention, the codification may not be taken in the absolute and final sense.

The Convention is silent on the institutional interpretation practice by the international monitoring bodies established by a treaty, which could be interperted ada interprpretacija nrmi od straten tih telaq nema nije od ynacaja. Also, the legal effect of prohibited reservations is not regulated, which further implies that all legal rules have not been taken into account; in effect, these areas can be covered only with a broader interpretation.

Bearing in mind the preparatory work of the International Law Commission regarding the Convention, it is clear that the framers had never intended to regulate the regime of prohibited reservations given that the common law rules in respect of reservations were ambiguous in the period when the Convention was being prepared. What should be taken into account within this approach is the advisory opinion of the International Court of Justice in respect of reservations to the Convention on the Prevention of Genocide (referenced at the beginning of this paper).[2]

[2] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, International Court of Justice, Advisory Opinion of 28 May 1951.

4.2.2.3. Human Rights Treaties as a separate system in the light of fragmentation of international law

Although the Vienna Convention on the Law of Treaties (VCTL) was originally designed to apply to all types of international treaties, it includes many (implicit) provisions that cannot be justified by referring to human rights treaties. First, the Convention applies only if it concerns the (contracting) States, which implies that only (contracting) States may be parties to these agreements and create correlative relations of rights and obligations. In that case, each of them seems to be obliged to monitor whether the other party fulfills its part of the agreement.

On the other hand, human rights treaties provide rights to third parties, i.e. citizens of the states that are parties to the treaty. Many of these treaties also envisage the establishment of special courts or monitoring bodies. For this reason, human rights lawyers call for a more modern approach to the Convention and propose that monitoring bodies should be able to comment on the reservations; alternatively, the institutional interpretation practice by the monitoring bodies established under the specific treaty should be taken into consideration in the course of further interpretations. Others feel that the states should not leave room for reservations because the area of human rights is not only about the state but it also involves a third party, i.e. individual citizens as direct beneficiaries.

Some scholars find a possible solution in the fragmentation of general international law, which is related to the dogmatic approach; thus, in order to maintain the regime established by this Convention, the human rights treaties should be regarded as international agreements *sui generis*, which are described as semi-autonomous and self-regulatory regimes that operate in accordance with rules that reflect their characteristics as *lex specialis* arising from general international law embodied in the Vienna Convention. A similar concept exists in international trade agreements or environmental protection agreements; on the other hand, they warn that excessive fragmentation of general international law could lead to its erosion.

4.2.2.4. Human rights treaties as a global Constitution of Public International law

This approach can be built on the basis of the existence of core norms that the Convention itself recognizes as inviolable, and calls for the doctrine of separation of prohibited reservations. Such is the case with the European Convention on Human Rights, which strictly separates non-derogable human rights.

4.2.2.5. Reconciliation of the Vienna Convention on the Law of Treaties with human rights treaties

This approach is based on the adoption of the Convention as a reflection of norms of customary international law. It takes into consideration that, in the preparatory phase of the Convention, it was intended to be applicable to interstate agreements, which established rights and obligations but did not establish monitoring bodies. These authors perceive the Convention not as codification but as an approximation of customary rules applicable at the time of preparing the Convention. Moreover, Article 5 of the Vienna Convention provides that the Convention applies to any treaty which is the constituent instrument of an international organization or to any treaty adopted within the international organization, without prejudice to the validity of the rules of the organization. Article 20 provides an

obligation of consent from the organization when it comes to reservations related to the constituent treaty of an international organization. These provisions enable human rights lawyers to use (for example) the International Covenant on Civil and Political Rights, which established the Human Rights Committee as a body with specified responsibilities.

Another attempt at reconciling the Vienna Convention and human rights law is embodied in Articles 57 and 58 of the Convention in respect of suspension of the operation of a treaty, which highlights that such suspension shall not be contrary to the object and purpose of the treaty. The third argument is found in Article 31. According to the report of the Venice Commission, the positivistic, the dogmatic and the fragmentary approaches to the Vienna Convention on the Law of Treaties are not acceptable. The constitualisation approach is the best choice in terms of human rights which may contribute to the progressive development of international law, but it may also be perceived as too ambitious.

The reconciliation approach is currently the most acceptable in spite of the existing legal gaps. Such an area could be the concept of setting aside the prohibited reservations, which has been accepted by the Human Rights Committee and the European Court of Human Rights but has not been accepted by counties (such as the United States); there are also cases where two out of the three countries that responded to the opinion of the Human Rights Committee (France and UK) state that they accept the concept of setting aside the prohibited reservations at the regional level in terms of the European Convention on Human Rights, which ultimately gives rise to inconsistent practice. For these reasons, the Venice Commission report gives priority to the constitutionalisation approach.

The Human Rights' Committee was established within the framework of the International Covenant on Civil and Political Rights. The Committee believes that the regime established by the Vienna Convention in respect of reservations is inadequate and may not apply to human rights treaties. [3] The absence of objection does not mean that a reservation is incompatible with the object and purpose of the treaty. Given the special nature of human rights, compatibility must be assessed objectively, which is the duty of the Committee.

The Committee shall decide in line with the concept of setting aside the prohibited reservations, without excluding the possibility that reservations may be imposed. The Committee shall insist on the clarity and transparency of the imposed reservations, which shall not result in any systemic reduction of obligations envisaged in the specific treaty.

5. CONCLUSION

The debate on applicability of the system of reservations in the field of human rights treaties has not been exhausted yet. The practice is very inconsistent and the opinions of scholars on this issue are contradictory. Notably, the countries that consider themselves as greatest promoters of democracy and human rights find it very difficult to decide to accede to such treaties; when they eventually decide to do so, they make a huge number of reservations, primarily calling upon the Vienna Convention on the Law of Treaties, which ultimately implies serious abuses of the reservations regime. As a matter of fact, the Convention does not allow reservations which are contrary to the object and purpose of the treaty; the reservation makes the regime applicable. The key problem lies in the

[3] General comment 24 on reservations to the International Covenant on Civil and Political rights, HRC 1994(1995).

following question: who determines whether the object and purpose are compatible with the reservation? Under the current regime, it is the countries themselves. The relevant international monitoring bodies which are created by the treaties themselves should be allowed to decide on compatibility. If interpreted broadly, the current regime would be more consistent. This may be supported by the competence theory, which has already been used in the practice of the European Court of Human Rights and the Human Rights Committee established under the International Covenant on Civil and Political Rights. Moreover, according to the Vienna Convention, a reservation cannot be made on a cogent norm, which again gives rise to interpretation issues given the fact that human rights fall into the category of higher-rank norms.

Cultural relativism is another possible justification for the possibility of establishing a system of reservations in human rights treaties. Yet, human rights are universal, and they are not intended to be relative and applicable in a single social and political context. Human rights are absolute, inalienable and indivisible; they belong to all and and are equally applied everywhere. They are the ultimate value.

The Vienna Convention reservations regime envisages that, if a State party (A) considers that the reservation imposed by another State party (B) is contrary to the object and purpose of the treaty, it may consider that the State party (B) that imposed the reservation is not a party to the treaty. But what does this actually mean? For example, if a State party imposes a reservation of the right to life and the other State party objects to it, does it mean that the objecting State is entitled to kill any citizen of the other State who enters its territory?

What is the real meaning of this provision in practice? As much as we talk about the society of states and the importance of sovereignty, we must not forget the Radbruh thesis: the purpose of law is an individual. The impact of politics on the law may be limited only by providing strong human rights guarantees (Fitzmaurice, 2006: 133). It would be too ambitious to conclude that international law has reached such a point in its development that it may fully and consistently defend the constitutional nature of human rights in full observance of the changing reality. It may be unrealistic to pursue the adoption of a specilized treaty concerning the law of treaties the field of human rights. In the end, the establishment of one regime does not necessarily imply the destruction or undermining of another. Thus, at this point, a possible solution may be the appropriate extensive interpretation of the Convention, by relying on the practice of courts and other bodies related to human rights. The principle governing the reservations regime should be compliance with the object and purpose of the treaty. The compatibility shall be assessed by the bodies established under the treaty, and States shall be given a chance to submit their justification. The reservations that are incompatible with the object and purpose of the treaty should be set aside and shall not have any legal effect, or states may be given a chance to rephrase the reservations. The problem that can occur at this point is the sovereign will of the state and the current horizontal placement of international law. The best solution would be if each treaty would include specific provisions regarding the reservations.

The ultimate goal of international law scholars and professionals should be the constitutionalisation of the general public international law, particularly in the field of human rights which are essential for stability and prospective development. In this regard, if international agreements were more precise, there would be less room for imposing reservations. Yet, bearing in mind that it is almost impossible to regulate the area of human rights completely, the first steps to be taken are as follows:

a) to provide clear and unambiguous international law norms in compliance with the modern civilization principles and proactively promote the concept of cogent norms of international law, their interpretation, application and concrete implementation;
b) to grant broader authorities to the bodies envisaged within the treaty framework and provide them with more powerful legal instruments and mechanisms.

Above all, although it may not be fully possible in the world driven by the *real-politik* principles, it is important to develop trust in a collective system that really takes action when necessary, preventing disasters and ensuring balanced development. That is the only way to overcome many dilemmas, particularly those resulting from cultural relativity.

The authors of this article believe that reservations are not compatible with the nature of the human rights. But, there is a concern that the abolishment of reservations in regards of human rights treaties may seriously marginalize the international agreements in this area and cause very little interest of the states to accede to these treaties. The current reservation regime gives the opportunity to achieve a minimum consensus and progressive development by correlating the international law *de lege lata* and *de lege ferenda.*

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PRIMENA REŽIMA REZERVI BEČKE KONVENCIJE O UGOVORNOM PRAVU NA UGOVORE IZ OBLASTI LJUDSKIH PRAVA

Globalni izazovi sa kojima se suočava međunarodno pravo ne prestaju. Naprotiv, oni dobijaju sve veće dimenzije, posebno u kontekstu povećanja bezbednosnih problema. Prvi na udar su univerzalne vrednosti: ljudska prava i slobode. Države nalaze različite oblike "oslobađanja" od tako nametnutih obaveza. Međutim, režim uspostavljen Bečkom konvencijom o ugovornom pravu je jasan. Problemi koji se nameću dolaze iz tumačenja i primene. Debata o primjenjivosti režima rezervi na ugovore iz oblasti ljudskih prava još nije iscrpljena. Praksa je veoma suprotstavljena, isto kao i mišljenja teoretičara i pravnika. Ovaj tekst ima za cilj da ispita upravo ove izazove i da pokuša da nađe odgovore na univerzalna pitanja, kroz analizu teorijskih pristupa problemu i praksi uglednih institucija u ovoj oblasti.

Ključne reči: *međunarodno pravo, pristup, ugovor, međunarodne institucije*