

LEGAL ASPECTS OF THE PROBLEMS IN THE AREA OF DENOUNCEMENT OF INTERNATIONAL TREATIES

Nataliia Khatniuk, Borys Grinchenko Kiev University
Liudmila Olefir, Academy of the State Penitentiary Service
Sergey Ivashko, Academy of the State Penitentiary Service
Ievgen Malyshenko, Academy of the State Penitentiary Service
Nelli Pobiianska, Vatutinsky City Notarial District of Cherkasy Region

ABSTRACT

In the article a new scientific problem is set and solved—there were given the international legal characteristic and defined the content of the denouncement institute, and the international legal basis of relations of its application were clarified. International treaties, which are constitutional documents of international organizations, are inherently more complex, because they not only establish the rights and obligations of states, as a regular multilateral international treaty does, but they also create international organizations, institutions, bodies, determining their competence, relationships, establishing the legal position of members of the organization. In spite of this, the fundamental legal norms of international treaties apply to the constitutional documents of international organizations mutatis mutandis. The member states of the international organization, by virtue of the principle of respect for sovereignty, have the right to unilaterally withdraw from it, subject to appropriate procedures. There are cases of withdrawal from international organizations, which statutes did not contain exit clauses, and in practice, such situations were resolved through the institute of inactive membership.

Keywords: International Law, International Treaties, Denouncement Institute, International Organizations, Procedure.

JEL Classifications: M5, Q2.

INTRODUCTION

In modern international relations the international treaty is the main instrument with the help of which states, as the main subjects of international law, can create and secure international law and order. Only legally valid treaties can affect international relations and ensure their stability and effectiveness. The entire international system is based on the principle of *pacta sunt servanda*, according to which each treaty must be observed in good faith by the parties.

The importance of the principle of *pacta sunt servanda* in the international trade is stressed by the fact that the general place in the legal regulation of relations between states is also taken by anything that may be related to limiting this principle. These include issues related to the invalidity and termination of international treaties. Clarity on these issues is of paramount importance for the quality of international cooperation, for the stability and security of international relations.

Termination of the treaty is a natural phenomenon. There are many grounds for termination of international treaties known to international law. The most controversial are the grounds arising from the right of states to unilaterally decide on their participation in the treaty. This right is the most important limitation of the principle of *pacta sunt servanda*, which is directly envisaged or follows from the treaty itself or from another agreement of the parties.

The purpose of the study is a comprehensive analysis of the international legal relations that arise between states in the process of denouncement of international treaties, constitutional documents of international organizations where the denouncement procedure is provided for or not.

REVIEW OF PREVIOUS STUDIES

The relevance of denouncement study is that it is the most common method of unilateral termination of a treaty. At first glance, this kind of termination may seem to be extremely contrary to the principle of *pacta sunt servanda* (Hostovsky, 2019). Indeed, in a narrow sense, some authors reduce it to a unilateral statement, but this opinion seems incomplete and needs clarification.

The essence of denouncement is that in this case the termination act is based on the pre-agreed will of the parties, which they have embodied in the provisions of the treaty, thus preconditioning the possibility of unilateral termination of the international treaty, taking into account all the potential consequences related to such termination (Drobyazko et al., 2019).

By including the denouncement provisions in the text of the treaty the parties provide each other with maximum flexibility of conduct and minimize losses, since such termination eliminates the offense due to its conciliatory contractual nature (Woolaver, 2019).

Although the issue of termination of an international treaty has long attracted the attention of scientists the topic has not received comprehensive coverage (Risvas, 2017).

Currently, denouncement is one of the main and most commonly used practices of states to terminate a treaty or their participation in the treaty (Tetiana et al., 2019; Kwilinski et al., 2019). The use of this method involves many legal issues of considerable importance.

In practice, particular difficulties arise regarding the treaties that do not contain denouncement provisions. The issue of their termination has an open character, which could provoke a crisis in the case of unfavorable circumstances (Hilorme et al., 2019).

The issue of denouncement of constitutional documents of international organizations, which provisions do not contain conditions for withdrawal is similar by its consequences (Von-Elbe, 2017). This procedure is not characterized by stability, which increases the possibility of differences between members of the international organization, which explains the need for further study of this issue.

METHODOLOGY

The use of historical and dialectical methods has made it possible to analyze the various stages of the development of ideas about denouncement and the transfer of these views to the practice of international relations. On the basis of the systematic method, it was considered the classification of ways of termination of treaties and the place of denouncement among them.

The formal and legal method was used for the legal analysis of the provisions of international legal acts that regulate the procedure for denouncement, as well as the analysis of normative legal acts of different states regulating the denouncement procedure.

The study is also based on the principles of interdisciplinarity, pluralism and additionality. Using the principle of interdisciplinarity, a functional characteristic of the denouncement institute was produced, and its political role and influence on the image of the state in international relations were also analyzed.

The legal framework of the study is international legal acts, international legal practices, domestic acts of legal and political character, decisions of international courts, acts of national law of different states.

RESULTS AND DISCUSSIONS

The denouncement of an international treaty creates a new legal situation determined by the norms of universal international law. In some treaties, the parties establish provisions governing certain effects of denouncement. These provisions always have priority over the norms of general international law, which in this case only fill in the gaps.

The scope of the effects of denouncement differs in the case of bilateral and multilateral treaties. In the first case, the effects of the denouncement shall be extended to both parties. In the second case, the scope of the legal effects of denouncement is generally limited.

According to the existing assumption, the denouncement of a multilateral treaty excludes only the initiator of the denouncement from the agreement. It can lead to the absolute denouncement of the treaty only if the number of parties to the treaty becomes less than two as a result of the denouncement. In general, there is no norm of general international law according to which the denouncement resulting in the reduction of the number of parties to a treaty to the number that is lower than the number required for it to enter into force would cause an absolute termination of the treaty. There is no principle of parallelism between the requirements for the treaty to enter into force and its termination.

Given that the states are obliged to adhere to the provisions contained therein, regardless of whether they are adhered to by other parties or not, the fact of the withdrawal of one party or even several parties does not affect the behavior of the remaining parties. The states are obliged to permanently adhere to the corresponding provisions not only among themselves but also with respect to, for example, citizens, property or ships of the state that was the initiator of the denouncement. To the treaties of such kind you can refer the conventions of ILO, human rights conventions, etc.

There is another situation when the denouncement is related to multilateral treaties, which are a source of obligations of mutual and conceptual character. If the other parties as a whole are exempted from the enforcement of the treaty with respect to the initiator of the denouncement, they apply it exclusively between themselves.

Finally, there are multilateral treaties that create a system of obligations of fully interdependent type where the participation of all parties is a condition for the existence of such a system and the denouncement of such a treaty by one of the parties destroys this system leading to the absolute termination of the treaty.

However, there are cases when the parties to the treaty envisage the possibility of partial denouncement limited by the territorial application of the treaty. The partial territorial

denouncement clauses most often corresponds to the colonial clauses and, accordingly, to the provisions empowering states to unilaterally decide to extend the treaty to dependent territories and colonies. Colonial empires have the right to extend the scope of the treaty to such territories or exclude them from its scope.

The partial territorial denouncement clause complements and extends this right giving the state concerned greater room for maneuver. The decision taken at the time of signing, ratification or accession to extend the treaty to a dependent territory or colony does not bind the state for the entire duration of this treaty.

In contrast to the competence to conclude treaties, the regulation of which is now expressly prescribed across the board (usually at the constitutional level), in most states the competence to denounce them is based on more or less established rules that are formed in practice. Constitutional provisions relating to the denouncement of international treaties are, as before, a fairly rare phenomenon.

In addition, the constitutions of a number of states do not contain provisions for the denouncement of international treaties. For example, in the USA the practice of state bodies in denouncing international treaties proceeds from the presumption that the right to denounce an international treaty belongs to the body, which had the right to accept it.

Thus, it can be summarized that the Vienna Convention on the Law of Treaties of 1969 confers the right to denounce international treaties to the head of the state, the head of government and the minister of foreign affairs in the sense that they are not required to do so as by virtue of their functions and powers these persons are considered to represent their state.

The act of denouncement, in turn, is the result of the will of the state, which is carried out in the field of legal regulation of both international and domestic law. Failure to comply with the procedure for the formation of the will established by the domestic law may lead to such defects of the will that it will no longer be the true will of the state. A defect of the will is a sufficient basis for the invalidity of acts in international law. The fact that the act of denouncement does not express the true will of the state can be invoked only by the party of the treaty, which interests were violated by such will.

The issue of denouncement of international treaties is not regulated by the provisions of the constitutions of the USA and the countries of Latin American, as well as a number of Western European countries (including Austria, Germany, and Italy). African states also did not include them in their constitutions.

While presenting the problem of competence to denounce treaties in the light of national laws, it should be noted that the empirical source materials as well as theoretical insights into the issue are rather modest and incomplete, especially given the varied regulatory and scientific framework concerning the legal regulation of the competence of state bodies regarding the conclusion of international treaties.

Obviously, such a state of legal regulation and investigation of the denouncement issue does not deny the fact that the decision to terminate a treaty is usually no less important than the decision to conclude a treaty. It is known that denouncement determines the extent and scope of international rights and obligations to the same measure, and this can sometimes have serious political consequences. Actually, according to the rather widespread view, the denouncement of treaties is simply an *Acte Contraire* as regards its conclusion, and the rules relating to its conclusion are applied to the handling of legal issues related to exercising the competence to denounce treaties.

In principle, it is difficult to question such approach. As envisaged in the presumption itself, the act of cancellation of a treaty is derivative in relation to its conclusion. According to this logic, since the body concluding a treaty can, in the provisions that make up the content of the treaty, determine the duration of its validity (for example, by recognizing the expiration of time or change of another reason as a condition of termination), in any case this body has the same competence to denounce the treaty. However, should the decision to denounce a treaty be taken in the same manner as the decision to conclude a treaty? And a more important question is whether a treaty can be denounced by the body that agreed on its conclusion?

In reviewing the laws and practices of different states we will try to answer these questions. The information was arranged taking into account, on the one hand, political differences and, on the other, the chronology.

The analysis of national law and practice of states should begin with the United States of America where the existing legal system is based on the oldest of the current constitutions of the world. Although in this constitution great attention is paid to the problems of international treaties, the issue of their denouncement is not mentioned in any of its resolutions.

However, it was a matter of argument whether the President could make the corresponding decision on his own, or whether he should do so with the participation of the Senate, the House of Representatives, or, finally, the entire Congress.

It is impossible to explain the origin of this argument without referring to some rules concerning the conclusion of international treaties produced in US practice. Important provisions in the area of competence for the conclusion of international treaties are articulated in paragraph 2 of Art. II of the US Constitution, where it is stated that the President "*has the right, on the advice and with the consent of the Senate, to conclude treaties subject to the approval of two-thirds of the senators present*".

In addition to the way of concluding agreements, defined by the term "*treaties*" in the national law of the USA, which is described in the Constitution, there are also other ways of concluding international agreements—agreements defined by the general term "*executive agreements*".

Among the executive agreements, depending on which bodies are involved in the process of making decisions on the conclusion of an agreement, two main types of agreement are identified:

Congressional-Executive Agreements—agreements concluded by the Government with the participation of Congress; this participation may be expressed either by the prior authorization of the executive body to take specific actions aimed at the conclusion of the agreement, or may consist in the subsequent approval of the concluded agreement;

Presidential Agreements—"presidential agreements" concluded independently by the president in the exercise of his/her constitutional powers (in particular, agreements concluded in connection with the exercise of his/her function as the commander-in-chief of the armed forces).

The existence of various types of making decisions regarding the conclusion of agreements on behalf of the USA, in the absence of a clear legal regulation of the issue of making decisions on the denouncement of agreements, gave wide interpretive opportunities.

In practice, these types of decision-making procedures for denouncement are distinguished:

1. The action of the executive power in accordance with the prior authorization or directive of the

Congress;

2. The action of the executive power in accordance with prior authorization or directive of the Senate;
3. The action of the executive power that is not based on a special authorization or directive but subsequently approved by the Congress or Senate;
4. The action of the executive power without special authorization or directive and without further approval by the Congress or Senate.

It should be noted that in the practice of the United States there is no principle of parallelism; denouncement is not recognized as an *acte Contraire* as regards concluding an agreement. Agreements concluded with the consent of the Senate should not be denounced with the participation of this body; Congressional-Executive Agreements should not be denounced with the participation of the Congress. However, there is some relationship between the type of agreement and the way of its denouncement. The authors absolutely agree that it is comparatively easier-in terms of the national law-to denounce executive agreements than treaties, and the executive power has the most advanced freedom in denouncing presidential agreements.

In conclusion, one can say the following: the denouncement exercised by the executive power is always valid (of course, if it meets the requirements of international law, that is, when it is exercised on the basis of the right of denouncement). The denouncement deprives an agreement of its binding force in the field of both international law and national law, regardless of how it was exercised (with or without the participation of the Congress or Senate).

On the other hand, in the US system, the legislative power can indirectly influence decisions of the executive power as regards the denouncement by the way of adopting a corresponding law that deprives an international treaty of its force in the field of national law.

RECOMMENDATIONS

The conducted review of the legislative practice of different states on the competence to denounce international treaties allowed to identify a number of laws and to highlight certain trends in the development of legal regulation of the denouncement procedure.

The decision to denounce a treaty is usually no less important than the decision to conclude a treaty, since the denouncement determines the scope of international rights and obligations to the same extent, and sometimes it can have serious political consequences. In this regard, the state of regulation of the competence of state bodies to denounce international treaties in the national legislation of some states is insufficient, but the situation is gradually changing.

In the development of legal regulation there is a tendency of more active involvement of the legislative power in the process of denouncement of international treaties. On the other hand, the lack of explicit parliamentary powers to denounce international treaties has led to the fact that in practice the denouncement of such treaties was independently carried out by the executive power.

In most cases, in the new legislation of the states the perception of the principle of parallelism of the form and procedure of denouncement is reflected placing the competence to denounce on the same bodies, which participated in expressing consent to the bindingness of specific treaties. In the light of this approach, the decision to denounce a treaty is an *acte Contraire* as regards its conclusion, which is it is made in the same manner as the decision on its conclusion.

Despite the absence of a fixed principle of parallelism, there is certain interdependence between the way a treaty is concluded and the way it is denounced. There is some relationship between the type of a treaty and the way of its denouncement. In the light of the current regulation, there is no doubt that the government cannot denounce a treaty concluded under the ratification procedure.

However, the laws of each country do not define the material boundaries between treaties to be concluded under the ratification procedure and treaties that can be independently concluded by the executive body.

Accordingly, the limits of the competence of the representative body and executive authorities to denounce international treaties have not been established, so the competence to denounce international treaties in such cases is further interpreted in favor of the executive power.

The principle of parallelism has attracted the attention of the doctrine and has been discussed in the International Law Commission. The Commission concluded that this rule reflects the practice of individual states only, not international law.

CONCLUSIONS

The legal consequences of denouncement are the main directions of the legal impact of the act of denouncement on the content of international obligations of the states (both the initiator and destinator(s) of denouncement) that find expression as follows:

1. In the object area: the initiator of the denouncement is deprived in whole or in part of the rights, obligations and benefits of a treaty;
2. In the subject area: the initiator of the denouncement withdraw from the number of the parties to a treaty, which in its turn, as a bilateral treaty, loses its validity and, as a multilateral treaty, remains in force with respect to the other parties, unless the participation of the initiator was not ideologically important for the validity of the treaty;
3. In the territorial area: the denouncement exempts from the obligation to abide by the treaty all territories belonging to the initiator and where it exercises its sovereign power; autonomous entities within its territories can only resolve this issue on their own if they have the relevant competence under the national law;
4. Temporally: The denouncements terminate a treaty and have no retroactive effect.

The act of denouncement is the result of the will of the state, which is carried out in the field of both international and national law. Failure to comply with the procedure for the formation of the will established by the domestic law may lead to such defects of the will that it will no longer be the true will of the state.

A defect of the will is a sufficient basis for the invalidity of acts in international law. The fact that the act of denouncement does not express the true will of the state can be invoked only by the party of the treaty, which interests were violated by such will.

In most cases, in the new legislation of the states the perception of the principle of parallelism of the form and procedure of denouncement is reflected, according to which the competence to denounce is placed on the same bodies that took part in expressing consent to the bindingness of specific treaties. In the light of this approach, the decision to denounce a treaty is an acte Contraire as regards its conclusion that is it is made in the same manner as the decision on its conclusion.

In spite of the absence of a statutory principle of parallelism, there is certain interdependence between the way a treaty is concluded and the way it is denounced. The main tendency for the development of legal regulation of the denouncement procedure is a more active involvement of the legislative power in the denouncement of international treaties.

On the other hand, the absence of clear regulation of the procedure for denouncing international treaties is usually interpreted in favor of recognizing the independent competence of the executive bodies to denounce such treaties, which may be explained by charging the executive branch of government with the general governance in the area of foreign policy.

There is no general rule in international law that would regulate the competence of state bodies in the area of denouncement. This issue is an internal matter of the state. The violation of the national law requirements regarding the denouncement procedure can invalidate the act of denouncement only in those cases where there is a distortion of the true will of the state embodied in the act.

REFERENCES

- Drobyazko, S., Blahuta, R., Gurkovskiy, V., Marchenko, Y., & Shevchenko, L. (2019). Peculiarities of the legal control of cryptocurrency circulation in Ukraine. *Journal of Legal, Ethical and Regulatory Issues*, 22(6), 1-6.
- Drobyazko, S., Makedon, V., Zhuravlov, D., Buglak, Y., & Stetsenko, V. (2019). Ethical, technological and patent aspects of technology blockchain distribution. *Journal of Legal, Ethical and Regulatory Issues*, 22(2S), 1-6.
- Hilorme, T., Tkach, K., Dorenskiy, O., Katerna, O., & Durmanov, A. (2019). Decision making model of introducing energy-saving technologies based on the analytic hierarchy process. *Journal of Management Information and Decision Sciences*, 22(4), 489-494.
- Hostovsky, B.T. (2019). International law in domestic courts in an era of populism. *International Journal of Constitutional Law*, 17(2), 576-596.
- Kwilinski, A., Ruzhytskyi, I., Patlachuk, V., Patlachuk, O., & Kaminska, B. (2019). Environmental taxes as a condition of business responsibility in the conditions of sustainable development. *Journal of Legal, Ethical and Regulatory Issues*, 22(2S), 1-6.
- Risvas, M. (2017). Non-discrimination in international law and sovereign equality of states: an historical perspective. *Houston Journal of International Law*, 39(1), 79-111.
- Tetiana, H., Chernysh, O., Levchenko, A., Semenenko, O., & Mykhailichenko, H. (2019). Strategic solutions for the implementation of innovation projects. *Academy of Strategic Management Journal*, 18(S1), 1-6.
- Von-Elbe, J. (2017). The evolution of the concept of the just war in international law. In *The Use of Force in International Law* (pp. 23-46). Routledge.
- Woolaver, H. (2019). From joining to leaving: Domestic law's role in the international legal validity of treaty withdrawal. *European Journal of International Law*, 30(1), 73-104.