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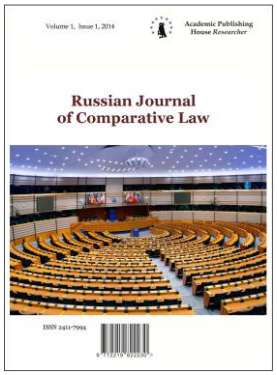

Articles and Statements

American Restatements of Law: Nature, Concept and Axiological Value

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Abstract

One of the most important secondary sources in American legal system is a restatement of law. The nature of this source of law, its significance, contents and application are not studied well in Russian legal doctrine. The understanding of the place and role of the restatement of law in the legal system of the United States allows to comprehend in-depths the essence of American law taking into account the practice of application of legal provisions on the territory of the United States (including the international law provisions).

The article analyses the nature, substance, role and place of the restatement of law in the American legal system and considers the Restatement of Foreign Relations Law of the United States (Third), its role and significance in more detail.

Keywords: US legal system, common law, sources of law, secondary sources of American law, Restatements of the law, digests, codification, American Law Institute – ALI, Restatement Foreign Relations Law of the United States (Third), «black letters», international law, Louis Henkin.

1. Introduction

Whenever I studied the leading American textbooks and treatises on the international law (International Law, 2010; International Law, 1995; International Law: Cases and Materials, 2009; Teacher's Manual to International Law, 2009; McCaffrey, 2006) or asked my colleagues from the Columbia University for the best source of information with respect to the American concept of international law, I invariably received a persistent recommendation, "For a modern, accurate and correct understanding of the American concepts of the international law, you should look at the Restatement of the Foreign Relations Law of the United States (Third)."

They claimed that the Restatement was the quintessence of international law as perceived and interpreted in the US, noting that in the US, courts apply international law by relying not only on statutes and case law, but also on restatements of law. This seemed rather unusual to me as a Russian lawyer and I decided to get deeper understanding of this source of law. This paper will discuss and explain the origins, definition, the nature and concept of restatements and will used Restatement of the Foreign Relations Law of the United States (Third) as illustration.

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2. Material and methods

This research is based on the following materials: documents of the American Law Institute, in particular, Restatements of the Law and Restatement of the Foreign Relations Law of the United States (Third) (1987); American definition and explanatory dictionaries, including legal dictionaries; American case law; American and Russian books concerning US legal system and American approach to international law.

To examine the issue comprehensively, we used a broad spectrum of general methods. In particular, we used the method of text analysis to study theoretical papers, we used a comparative method to compare Russian and American legal systems, to analyze case law and legal provisions we used the formal legal method.

3. Discussion

The term *restatement of law* was coined by the American Law Institute (ALI) to describe one of the products and forms of its work.

The translation of this term into Russian requires special attention. In various English-Russian dictionaries the word "*Restatement*" is translated as repeated application (confirmation), new wording, review, collection of provisions, narrative of legal provisions (vocabularies on web-sites). This term was translated in our scientific and academic texts differently with an attempt to get the meaning of it properly, e.g., code of provisions, code of legal provisions special law, restated narrative of law, etc. (Biriukov, Galushko, 2018: 201; Kochemasov, 2016: 128; Zweigert, Koetz, 2011, 254; Skakun, 2008: 242; Kokh et al., 2011: 361; Lezhe, 2009: 147). However, none of these translations into Russian fully convey the nature and meaning of this term, hence we believe we should abandon any attempts at literal translation and use the same name as in the American law, that is, "*restatement of law*".

Restatements are generally accepted collections of opinions of legal practitioners (attorneys), acting judges, legal scholars (teaching at America's leading universities) in a specific area of law or on a particular institute of the US common law, carrying normative value. These summaries are derived from primary legal sources, such as statutes, case law, as well as legal doctrines, general principles of law, judicial pronouncements and common law that judges rely on in their practice. Apart from these sources, in drafting new restatements, the ALI recommends using foreign law (where an analogy is possible), other secondary sources of the US law (Akchurin, 2016b), and past restatements (Capturing the Voice of the American Law Institute, 2004).

Similarly to the majority of secondary sources of the US law (Alekseev, 1998: 155; Biriukov, 2017), restatements cannot be binding, yet they are *persuasive and authoritative*; that is, they carry weight and relevance for most practicing lawyers, although they are not formally mandatory in their day-to-day professional work. As secondary sources of law, restatements essentially reflect the generally accepted opinion of the American legal community. Admittedly, they do not amend statutes or case law, but are a distillation, in one document, of the essential common law rules on relevant issues already existing in the American legal system and/or the legal systems of states taken together.

Occasionally, scholars opine that restatements are merely doctrinal in nature; but whenever a relevant rule is not to be found in the primary legal sources, courts refer to them, as amply demonstrated by the Annual Supplement of the ALI to each version of a restatement, setting out the cases where this or that restatement rule was invoked (Case Citations to the Restatement, 2014). Thus, restatements are widely used by law enforcement authorities and judges in decision-making where the law is unclear or lacking (Capturing the Voice of the American Law Institute, 2004), since they accumulate common law rules (legal positions) and are, accordingly, highly useful for finding a specific precedent.

It would not be entirely correct, however, to confine the functions of restatements to law enforcement, as they can just as well be used in law-making. They also facilitate understanding of the complex US common law and help clarify the meaning and legal position of a court on each of the restated rules. Notably, the recent versions of restatements sometimes contain legal novelties and proposals for updating legal rules and regulations, and although they are not binding, states sometimes use them to adopt legislative acts incorporating such rules into their legal systems. The ALI's new proposals respond to the pressing legal issues, challenges and lacunae that have not as yet been resolved in the primary sources or case law. Thus, restatements are, among other things, aimed at introducing to both the professional legal community and the public at large the

trends, avenues and prospects of development of the American law, the finest legal ideas and up-to-date legal doctrine.

Being what they are, restatements foster a deeper understanding of the American law, since they contain a rather comprehensive doctrinal overview and discussion of common law rules and primary legal sources as applied by courts. It is also significant that they are familiar to American legal practice, since enactment of new legal rules in primary sources of law in the US (Petrova, 2004) is a complex process, and the American law itself largely relies on the practice of application of primary sources of law (judgments), which is what the restatements rest on.

A restatement's legal nature, it appears, finds no analogy in the Russian legislation, not only because the Russian law lacks a common law element, but also because of this source is unique. Thus, while putting together legal rules from different sources and finally uniting them in a single document, a restatement nonetheless does not become a code in the civil-law system's understanding and is not legally binding. In the US, it is customary to distinguish the following types of systematization of law: unification of legal rules and acts in a chronological order, uniting them into a system, and their consolidation (Bobotov, 1973: 120). The term "codification" is, indeed, used, and means "The collection and systematic arrangement, usually by subject, of the laws of a state or country, or the statutory provisions, rules, and regulations that govern a specific area or subject of law or practice." (West's Encyclopedia of American Law, 1998: 470). Since when a restatement is being written its authors do not just use statutes, but also resort to other sources of law, and the wording of the rules found in a restatement might not textually coincide with that found in other legal sources, it seems that one cannot call a restatement a proper codifiction. Nor can it be called an incorporation, given that in a restatement, rules are revised, rather than merely collected (by topic or period).

René David wrote that a restatement of law is "a kind of systematic Digest in which one only finds the judicial decisions on point" (René, Spinosi, 1998: 405). However, Justinian's special constitution *Deo auctore* of December 15, 530 commanded Tribonian to start compiling the Digests with the following phrase: "We order you to collect and separate the books of ancient wiseman relating to Roman law, to whom holy princeps provided the power of drafting and interpreting the laws, so that the materials so collected do not contain any repetition or contradiction to the maximum extent possible but so that one book is created out of them all which is sufficient instead of them." (Kofanov, 2002: 13). In other words, Tribonian was to oversee an effort of analysis and systematization of the binding teachings of famous Roman lawyers, since they could contradict each other. The other reason was that the ordinary judges and officials lacked access to certain treatises and it was necessary to make them accesible. The compilers, as the Digests' authors later came to be called, were to endeavor to accumulate and systematize the whole legacy of prominent Roman lawyers, as well as all Roman laws (from the Law of the Twelve Tables up to senate decrees (*senatus consultum*) and Imperial Constitutions); further, they were to release the new systematization of outdated norms. Therefore, we cannot claim that in preparing Restatements, American lawyers fully copied the form or the idea of Justinian's Digests.

Without doubt, the concept of compiling a document similar to the Digests underlay the drafting of restatements by the ALI, since many provisions of the US common law are rooted in the Roman law. But American lawyers certainly inventively transformed and adapted that idea to the new conditions, so it attained a new meaning and a new form.

One could compare restatements to theoretical and practical commentaries to a law or a code; *e.g.*, to the Russian Criminal Code. But even then, differences would remain: unlike commentaries, authored by groups or individual scholars, restatements are drafted collectively by the best lawyers from all US states and adopted following multiple rounds of discussion. Commentaries are written on a law already in effect and may not change it, as a prescription enacted by a competent state authority, while restatements represent a form of collective law-making by persons not vested with the power to legislate. Moreover, an American judge may invoke a restatement rule when rendering a judgment in certain circumstances; on the contrary, commentaries to a regulation cannot be used by a judge in decision-making process. Furthermore, commentaries are merely an exercise in construction of the existing rules and cannot contain novel proposals for the improvement of the rules of law, while restatements may, among other things, have new rules proposed by their drafters. Finally, commentaries cannot serve as the foundation for the legal rules adopted by the constituent parts of a federation (states), unlike restatements, etc.

Therefore, restatements as such constitute new sources of law, no analogy to which existed before they emerged. That said, American legal dictionaries do not provide a detailed definition of what a restatement is. Thus, the authoritative Black's Law Dictionary, in effect, fails to define the term and merely explains its structure and scope (Black's Law Dictionary, 2014: 1339). Merriam-Wester's Dictionary of Law also refers to it being the product of work of the ALI and proceeds to list the types of restatements (Merriam-Webster's Dictionary of Law, 2011: 426). Webster's Law Dictionary limits itself to saying that a restatement summarizes common law based on judgments, and provides a list of types of restatements (Webster's New World Law Dictionary, 2010). West's Encyclopedia of American Law provides the following definition: "a series of volumes regarded as an authoritative work of legal scholarship prepared by the authors, scholars, and members of the judiciary who comprise the American Law Institute (ALI), which presents a survey of a general area of the law and the changes that have occurred therein" (West's Encyclopedia of American Law, 1998: 336). Gale Encyclopedia of American Law also refers to "a series of volumes regarded as an authoritative work of legal scholarship prepared by the authors, scholars, and members of the judiciary who comprise the American Law Institute (ALI), which presents a survey of a general area of the law and the changes that have occurred therein." (Gale Encyclopedia of American Law, 2004: 194). Online legal dictionaries also does not define the term, merely describing its structure and supplying a list of restatements.

All restatements are created by the ALI, which is a private non-for-profit legal organization, in order to explain and interpret the ever-increasing bulk of complex precedents clearly, precisely and concisely (Capturing the Voice of the American Law Institute, 2004; Akchurin, 2015a: 203-205).

The procedure for creating a Restatement, established in the ALI's by-laws, is as follows: first, the ALI Council appoints a Reporter placed directly in charge of organizing the Committee's and its members' work, overseeing it and rendering assistance, where needed. After the Committee produces a draft, the Council may recommend it for all-member discussion or revision by the Committee. Publication of the document requires consent from *all* ALI members (Bylaws in American Law Institute, 1993: 50-58).

At the outset, the ALI, in first report of Council of 35 in 1923 set out the general approaches and principles for drafting the key forms (resulting documents) of the Institute's work.

The first requirement was their uniformity; that is, although the work was conducted by different experts, they all had to follow the same form: "The questions of form are of the first importance" for restatements, "should be the separation by typographical or other device of the statement of the principles of law and the analysis of the legal problems involved"; there should be a "statement of the present condition of the law and reasons in support of the principles as stated." (Frank, 1998: 10-11). American lawyers call the first and foremost part of a restatement paragraph "black letters", emphasizing its text in bold; this part contains the key terms, approaches and legal principles envisaged in the restatement.

For example, the first paragraph of the Restatement of the Foreign Relations Law of the United States, contains the following black-letter provision: "The foreign relations law of the United States, as dealt with in this Restatement, consists of

(a) international law as it applies to the United States; and

(b) domestic law that has substantial significance for the foreign relations of the United States or has other substantial international consequences" (Restatement of the Foreign Relations Law of the United States (Third): 7). The "black-letters" are followed by the authors' comments who clarifies that those sources include the "the United States Constitution, United States statutes, rules, decisions of courts, and actions of federal regulatory agencies. Law of States of the United States may also have "substantial significance for the foreign relations of the United States or other substantial international consequences, subject to the limitations imposed by the United States Constitution and the supremacy of federal law" and

(c): "Scope of this Restatement." – as defined in the commentary – "does not set forth all the foreign relations law of the United States as defined in this section; it deals only with selected areas of particular importance, but these may give guidance for analogous or related issues." (Restatement of the Foreign Relations Law of the United States (Third): 7-8).

The *reporters' comments* set out specific legal rules and judgments related to the practical application of the legal rules and institutes in question, the theoretical explanation of the conclusions, the history of a legal rule or approach featured in the text, this time in a simpler and

smaller font. In the above example, the reporters' notes cover the issues of how foreign relations are governed by (1) the US Congress, (2) the US President, (3) the principle of separation of powers, (4) the courts, (5) states; as well as (6) the interrelation between foreign relations and individual rights; and, finally (7) a comparison against the preceding restatement.

All these issues are abundant with references to statutes and other primary sources of law; moreover, one can find examples from the case law the Restatement is built on (Restatement of the Foreign Relations Law of the United States (Third): 8-18). This is the general structure of each paragraph (part) of any restatement. The number of such paragraphs (parts) is defined by the committee creating a restatement.

The second mandatory requirement is that restatements must not be hardline, but must rather follow the flexibility of common law. By their nature, restatements are framework common law acts based on systematic, competent doctrinal and practical interpretations and commentaries. This allows them to be used by states in law-making and by courts in their practice.

Moreover, Restatements must be "analytical, critical and constructive" all at the same time, harmonious and coordinated, details must be clear-cut, and "each subject [must be seen] clearly and as a whole" (Capturing the Voice of the American Law Institute, 2004: 5).

Throughout the years of existence of this organization, it has produced the following restatements in 17 areas of regulation:

- Agency (Second);
- Apportionment of Liability (Third);
- Conflict of Laws (Second);
- Contracts (Second);
- Foreign Relations (Third);
- Judgments (Second);
- Law Governing Lawyers (Third);
- Products Liability (Third);
- Property (Third);
- Prudent Investor Rule (Third);
- Restitution (First);
- Security (First);
- Suretyship and Guaranty (Third);
- Torts (Second);
- Trusts (Second);
- Unfair Competition (Third);
- Wills and Donative Transfers (Third).

Restatements have been drafted for quite a long time and were released in three revisions (series): First Restatement – from 1923 through 1944; Second Restatement from 1957 through 1981; Third Restatement (Series) – from 1986 to the present day. Now, the ALI is drafting the Fourth Restatement Series. Each new revision updates the older one by adding up-to-date analysis, new sources, terms and judgments. Each new series usually introduces a new restatement: thus, for instance, in 1952, the ALI started preparing the Restatement on the Foreign Relations Law (international law) of the US.

The ALI is currently working on 20 projects at the same time: in each case, it is drafting a specific legal product, be it a new restatement or an update of an old one, new principles of law, a new model code or a revision of an existing one (ALI).

Restatement of the Foreign Relations Law of the United States (Third) (1987) occupies a special place among restatements. It also belongs to secondary sources of law, hence it plays a subsidiary role in the US legal system. The principal object of that Restatement is to supplement the primary sources of law (here, customary international law, treaties, general principles of law, judicial decisions and writings), by elaborating their meaning, interpreting, and analyzing international legal rules in line with the American doctrine.

Restatement of the Foreign Relations Law of the United States (Third) (1987) illustrates the approach of the American legal community, represented by the ALI, responding to the new challenges of the time and readily supplying recommendations not only on the US common law,

but also in other key areas of legal regulation. This Restatement helps to coordinate and unify the application of international legal rules by the US states represented by their law enforcement agencies, by creating a uniform legal framework to that end.

The creation of the Restatement of the Foreign Relations Law of the United States (Third) (1987) reflected the need for uniform understanding and application by all state agencies, and especially the law enforcement authorities of the US, of the international law in its territory.

The committee that drafted that Restatement was headed by the Columbia University Professor Louis Henkin (November 11, 1917 – October 14, 2010), a distinguished American international lawyer specializing in public domestic and international legal relations, founder of the Center for the Study of Human Rights (1978) and the Human Rights Institute (1998). The group that ran the project also included other famous American international lawyers who had worked in the UN and at the US Department of State: New-York University Professor Andreas Lowenfeld, Georgetown University Professor Louis B. Sohn, Harvard University Professor Detlev F. Vagts. 28 professors of other American universities, attorneys specializing in the international law and international relations, as well as 6 professors and specialists in international law and international relations, judges of international courts from Uruguay, France, the Netherlands, the UK, and Switzerland took part in the drafting of the Third Restatement. The document took from 1979 to 1987 to complete. Other ALI members regularly participated in the discussions of the project at the annual meetings on the Restatement. The resulting version was a revised (new) edition of the Restatement of the Foreign Relations Law of the United States (1965).

The Introduction to the Restatement of the Foreign Relations Law of the United States (Third) (1987) states that it rests not only on the international legal rules, but also on the rules of the domestic US law that make an integral part of the US foreign relations law: the US Constitution, the rules adopted by the US legislature, executive and judiciary, to the extent they relate to applying the international law in the US territory (Restatement of the Foreign Relations Law of the United States (Third) (1987).

Restatement of the Foreign Relations Law of the United States (Third) (1987) comprises two volumes; 9 parts; 907 sections; an index of cases mentioned or discussed in the drafting of the Restatement; indices of all statutes, international treaties, authors and their publications referred to during its drafting; a table comparing the 1965 and the 1987 versions of the Restatement; an index of terms used and other reference tools (Restatement of the Foreign Relations Law of the United States (Third), 1987).

The 1987 Restatement of the Foreign Relations Law of the US has had a profound effect on the application and enforcement of law in the US related to the use and implementation of the international law in the US territory, in particular, as regards the work of the US Department of State (Hollis, 2012), and the courts. To understand the significance of this document, one can simply look into the practice of the US highest judicial body – the Supreme Court. The most famous cases where its members have used that Restatement, are: Sanchez-Llamas, Sosa, Empagram, Hartford Fire, Saudi Arabia v. Nelson, Dames & Moore, Sabbatino etc. (Sanchez-Llamas v. Oregon; Sosa v. Alvarez-Machain; F. Hoffman-La Roche Ltd. v. Empagran; Hartford Fire Insurance Co. v. California; Saudi Arabia v. Nelson; Dames & Moore v. Regan; Banco Nacional de Cuba v. Sabbatino).

4. Results

The legal nature of restatements is characterized by a set of unique features.

1. Restatements in the US are drafted and published exclusively and privately by the American Law Institute (ALI), while the state takes no part in them whatsoever.

2. The lawyers participating in the drafting of a restatement are not tasked with abolishing or amending any rules; this is well beyond their competence.

3. Whenever a restatement is drafted, the ALI primarily summarizes the statutory law, the judicial and other legal practice and common law rules, rather than solely the opinions of prominent scholars and the existing legislation.

4. A restatement is not a binding act to be followed by judges or other officials; rather, it is a secondary, subsidiary source that supplements and facilitates decision-making in a case, and in no way setting forth rules.

5. A restatement may contain new ideas and proposals to improve the legislation, but it may not formulate new binding legal rules.

6. Since case law constantly changes, the ALI annually issues a supplement to the relevant restatement, summarizing such new practice (Case Citations, 2014).

7. A restatement is relatively flexible and may respond to the new developments of practice: right now, the fourth edition of the restatements is in works, that is being updated for the present-day changes in politics and law not only in the US, but in the international community as a whole.

8. The US is a federation, and restatements assist its constitutive states to a certain extent in systematizing their own legislation, serving as a model document a state can use for reference in adopting its own legislative act on the restated issue.

9. A restatement is the product of collective conventional mind of the best US legal professionals (judges, attorneys, scholars) who have reached a consensus in adopting the document, which once again underscores its relevance and value for the American legal system. Another important note to make is that it is, of course, impossible to claim that a restatement is a source of the international law, but since it has a conventional normative (contractual) character, one can boldly call it a secondary source of the US domestic law, a coordinated doctrinal instrument of the American legal elite.

5. Conclusion

It is inadvisable to use any term other than “restatement” for this source of law, since there is no adequate, appropriate and accurate translation that would convey its full meaning.

Restatements in the US are an established and important secondary legal source used both in the adoption of new legal acts in states by their legislatures, and in the practice by legal theorists and practitioners, and in law enforcement (as in the case of the 1987 Third Restatement of the Foreign Relations Law of the United States) by politicians and state officials (of the US Department of State, among others). It should be noted that the 1987 Restatement of the Foreign Relations Law of the United States (Third) combines both the legal aspects of the international law, and those that deal with foreign relations (as follows the document’s name and content) that the US takes into account, that is, also the substantive issues related to the perception and implementation of foreign relations by the American State.

Given how important restatements are for the US domestic law, their legal nature requires deeper research and comprehension, since the American courts often, for instance when dealing with cases involving foreign parties or subject matters, rely on the recommendations and rules of the restatements, and in particular, the 1987 Restatement of the Foreign Relations Law of the United States (Third).

A restatement, as a legal instrument (tool or means), first emerged in the US along with the movement towards unification and harmonization of law, given that the US had both a federal and state legal systems; for bringing together and coordinating their legal rules, since the US common law applies rules adopted directly by the states.

All restatements are aimed at solving the issue of fragmentation and lack of doctrinal unity in the American common law system, by way of eliminating uncertainty, conflicts and excessive common law prescriptions, and by systematizing (codifying) them.

Irrespective of type, all Restatements have the same well-established form with specific and clearly prescribed characteristics.

New versions of restatements and new restatements are drafted where the ALI, based on a wide discussion within the American legal community, concludes that this or that restatement needs updating or preparing. With time, certain new rules have begun to be proposed for restatements, including, for example, advice on using the innovative rules of foreign laws.

Restatements also constitute a certain way of dealing with the issue of lacunae in the American legislation, since they are based on the practice of applying the law, allowing quicker identification of issues that require clearer legal regulations.

One should not forget that restatements, being, by form, secondary sources of law, are far from playing a subordinate role in the American legal system.

Therefore, studying the restatements helps to form a deeper understanding of the US common law and the existing legislation, since they contain, *inter alia*, examples of how courts apply legal rules, as well as certain advice on better implementation of the primary sources of law.

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