

СУВЕРЕНИЗМ И НАЦИОНАЛИЗМ: ПОСЛЕДСТВИЯ ДЛЯ ФРАГМЕНТАЦИИ МЕЖДУНАРОДНОГО ПРАВА

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Аннотация. Современная политика в сфере имплементации международного права прав человека во внутренние правовые системы ряда государств и правовую систему Европейского Союза отражает суверенистскую и националистическую тенденцию. В центре внимания настоящей статьи находится взаимодействие международного правопорядка и внутреннего правопорядка в сфере защиты прав человека. В качестве примеров взяты Германия, Италия, Великобритания и Россия. Анализ также включает взаимодействие между международным правопорядком и правопорядком Европейского Союза.

Автор приходит к выводу, что суверенистские и националистические тенденции в имплементации международного права прав человека приводят к фрагментации международного права, появлению множественных правовых ценностей и практик, различному пониманию и толкованию права и противоречиям между правовыми режимами государств и/или международных организаций и международным правопорядком. Приведенные примеры показывают, что национальные (региональные) интересы преобладают над международным правом независимо от взятых ранее международных обязательств. Сопrotивление авторитету международного права и попрание верховенства права – тревожная тенденция, поскольку международно-признанный многовековой свод правил, выстраданный поколениями, перенесшими мировые войны, поддерживающий порядок и баланс, взаимную ответственность и уважение, ставится под сомнение. Диалог субъектов международной системы – наиболее ценный и возможный способ преодоления вызовов современному международному праву.

Ключевые слова: суверенизм, национализм, суверенитет, международный правовой порядок, внутренний правовой порядок, правовой порядок ЕС

SOVEREIGNTISM AND NATIONALISM: CONSEQUENCES FOR THE FRAGMENTATION OF INTERNATIONAL LAW

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Abstract. Contemporary policies for implementing international human rights law within the domestic legal systems of a number of states and the EU's legal system reflect the

sovereigntist and nationalist turn. This article focuses on the interplay between the international legal order and the domestic legal order in the sphere of human rights protection. Germany, Italy, the UK, and Russia are taken as examples. The analysis also includes the interplay between the international legal order and the legal order of the EU.

I argue that the sovereigntist and nationalist trends in the implementation of international human rights law lead to fragmentation of international law, the emergence of multiple legal values and practices, different understandings and interpretations of law, and contradictions between the legal orders of states or international organizations and the international legal order. The examples explored in the text show that national (regional) interests prevail over international law irrespective of the international obligations agreed to by states previously. Resistance to the authority of international law and a dangerous interference with the rule of law constitute an alarming tendency since the internationally recognized and centuries-old set of rules experienced by generations familiar with the world wars, which introduced order and balance, mutual responsibility, and respect, is put in doubt. The dialogue of the actors in the international system is the most valuable way and the best possible way to overcome the challenges to contemporary international law.

Key words: *sovereigntism, nationalism, sovereignty, international legal order, domestic legal order, EU legal order*

“New Sovereigntism” as a phenomenon and a concept introduced in the social science literature at the beginning of the 21st century aggravated the debate over the relationship between international and national law. Increasingly, contemporary nations have been committing to a territorial stance, prioritizing their exclusive political and economic interests, and confronting international law. Sovereigntism as an ideology and a policy is a dominant trend in the present-day relation between the international legal order and the domestic legal order in a number of states. States embrace sovereigntism to highlight their policies of resisting international law and to justify derogations from their international obligations. The EU has exhibited what can be called “sovereigntist behavior”¹ or “nationalism”² by putting its order before the international order, especially in the sphere of human rights.

The present article touches on one of the aspects of sovereigntism—its reflection in domestic constitutional law and judicial practice with respect to human rights protection. The sphere of human rights is my focus since it forms the arena of *erga omnes* (“toward all”) norms of international law, being understood as the obligations of states owed to “the international community as a whole” (Fragmentation 2006: 196).

¹ The term “sovereigntist order” is used with a certain degree of analogy, since the EU is not a sovereign state. However, comparable practices allow reference to the example of the EU in order to demonstrate the processes of sovereigntization in a wider sense.

² As Juliane Kokott, German advocate general at the EU’s Court of Justice, and Christoph Sobotta, legal secretary (*référéndaire*) In Kokott’s chambers, put it after the *Kadi* case (see: Grand Chamber 2008).

In a famous obiter dictum, the International Court of Justice in the 1970 case concerning Barcelona Traction, Light and Power Company, a Canadian company operating utilities in Barcelona, stated:

[O]bligations erga omnes . . . derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. (International Court of Justice 1970: 32)

Examples of the sovereigntist behavior of the subjects of international law appear from time to time (Alles & Badie 2016), and these examples unfolded well before the respective concept, sovereigntism, was introduced into broad circulation in the scientific discourse. During the last decade, sovereigntism has strengthened, especially in the sphere of human rights protection. Among other states, Germany, Italy, the UK, and Russia put the provisions of their respective constitutions above the Council of Europe conventional order and claimed that, in certain circumstances, they could derogate from executing the judgments of the European Court of Human Rights (ECtHR) in Strasbourg. This legal view is based on a presumption (and ideology) of the superiority of a nation-state's interests vis-à-vis universal norms, a posture that undermines the authority of international law, and is supported by the respective countries' practices. Constitutional courts (or supreme courts) exercise the prerogative of declaring a nation's position in regard to the possibility of carrying out the ECtHR judgments. William Pomeranz makes the general case in discussing the specific case of Russia:

By its very mandate, the ECtHR intrudes on the national sovereignty of its members, and Russia is by no means unique among member states in reacting to what it perceives as direct interference in domestic affairs. This inherent tension will not go away any time soon, especially in light of Russia's poor human rights record. (Pomeranz 2011: 21)

The ECtHR held that the Russian legal system provides lower human rights protection than the ECHR does in matters concerning discriminatory treatment based on sexual orientation and the right to a fair trial and freedom of assembly³ in comparison with the equal or higher human rights protections afforded by the legal systems of Germany, Italy, and the UK.

These four legal systems were selected for analysis because they reflect liberal (Germany and Italy) and radical (the UK and Russia) approaches. Moreover, these approaches are easily discernible in the respective national legislation and judicial practice in each country. Last but not least, these countries have a statistical record of pending ECtHR judgments (Ministry of Justice 2014: 61–63). Finally, analysis of the practices of the EU contributes to a holistic picture since the tendency toward nationalism can be identified from EU policies regarding human rights protections, which border those of a sovereigntist, especially the practices of the Court of Justice of the European Union.

³ See, for example, cases adjudicated by the ECHR (2017, 2010, 2015).

Germany

The Bundesverfassungsgericht (BVerfG), or German Federal Constitutional Court, was the first among the higher national courts of Council of Europe member states to formulate its position in regard to the limits of implementing the decisions of the ECtHR. Its case law may lead to the nonexecution of international judgments.

The BVerfG in an order dated October 14, 2004, voted unanimously to apply the well-known counterlimits theory as developed in the *Solange* case to the relationship between the German Federal Constitution and the European Convention on Human Rights (and, more generally, international law). In the first part of the decision, “[T]he ECHR is equalized to any other statutory norm . . . [I]n the German legal order, the Convention, since it is given force by an ordinary federal statute, gets the same rank as the ordinary ratification norm” (Dal Monte & Fontanelli 2008: 29).

The court stated that in national law, the ECHR is subordinate to Germany's Basic Law (the German Federal Constitution). However, the provisions of the Basic Law are to be interpreted in a manner that is open to international law. At the level of constitutional law, the text of the European Convention and the case law of the ECtHR function as interpretation aids to determine the contents and scope of fundamental rights and of rule-of-law principles of the Basic Law. The possibility of interpreting the Basic Law in a manner open to international law ends when it no longer appears justifiable according to the recognized methods of interpretation of statutes and of the German Constitution (Bundesverfassungsgericht 2011).

When no “adapting” interpretation is possible, there is an unresolvable conflict between the domestic source and the conventional one. Such a conflict occurs when the statutory norm, as interpreted in light of the ECHR, counters the substance of a fundamental constitutional right: the statutory domestic norm—as construed following the German Constitution’s directions—must then prevail over the international obligation (Dal Monte & Fontanelli 2008: 917).

Italy

The Italian Constitutional Court has a duty to examine whether the provision of the ECHR as interpreted by the Strasbourg Court is compatible with the Constitution of Italy, if a national court raises before it a question of compatibility of a domestic provision with ECtHR case law (Judgments Nos. 348 and 349, 2007). The Italian Constitutional Court held that international law may not be used to set aside Italy's constitutional law and that the Constitutional Court “must always aim to establish a reasonable balance between the duties flowing from international law obligations, as imposed by Article 117(1) of the [Italian] Constitution, and the safeguarding of the constitutionally protected interests contained in other articles of the [Italian] Constitution” (Corte Costituzionale 2007a).

The Constitutional Court reaffirmed its position regarding the place of the ECHR in the hierarchy of the Italian legal system in its Decision 349 of 2007. As far as the provisions of the ECHR are concerned, in the absence of a specific constitutional

provision, and in light of its internal ratification by ordinary legislation, the ECHR acquires the same status and hence is not classified as constitutional legislation (Corte Costituzionale 2007b; Judgments No. 388 [1999], 315 [1990], 188 [1980]; and Order No. 464 [2005]).

The ECHR, as interpreted by the Strasbourg Court, does not acquire the force of constitutional law and is not immune to assessments by the Italian Constitutional Court of its constitutional legitimacy. It is precisely because the provisions in question supplement a constitutional principle, while always retaining a lower status, that it is necessary that they respect the Italian Constitution. Since the ECHR is given the force of law through an act of ordinary law in the Italian order, that will be the place in the system of sources occupied by its norms, next to other Italian statute laws: chiefly, this means that the European Convention is subordinate to Italy's constitution (Dal Monte & Fontanelli 2008: 67).

The Strasbourg Court stressed that no limitation on national sovereignty can be identified in favor of the specific treaty provisions in question (Judgment No. 188 [1980]). It should also be emphasized that fundamental rights cannot be considered a "field" in relation to which it is possible for the state to relinquish its sovereign powers beyond the granting of jurisdiction limited to the interpretation of the convention (Corte Costituzionale 2007b; Judgment No. 349).

The Court recognizes that in accordance with Article 32(1) of the ECHR, the ECtHR is charged with interpreting the provisions of the convention. The international law obligations undertaken by Italy in signing and ratifying the ECHR include the duty to bring its own legislation in line with the convention, that is, in line with the meaning attributed by the court specifically charged with its interpretation and application. The ECtHR took all relevant ECtHR case law under consideration, since "[ECHR] law lives in the interpretation given by the ECtHR on it" and because the constitutionality test's object is to view the norm as the product of an interpretation activity, rather than just the provision in itself (Dal Monte & Fontanelli 2008: 898).

The UK

A somewhat extreme position is held by the UK. The UK Supreme Court has said it might decline to follow Strasbourg jurisprudence if it contradicts the fundamental principles or fundamental substantive or procedural aspects of UK law.

The UK Supreme Court, in answering the question, "Should the Supreme Court follow Strasbourg case law?," pointed out that, under section 2(1) of the Human Rights Act, it is obliged only to "take into account" any judgment or decision of the ECtHR when determining a question that has arisen in connection with a convention right (Supreme Court 2013).

The UK Supreme Court held that the requirement to "take into account" Strasbourg jurisprudence would normally result in the domestic court applying principles that were clearly established by the Strasbourg Court. There would, however, be rare occasions on

which the domestic court would have concerns as to whether a decision of the Strasbourg Court sufficiently appreciated or accommodated particular aspects of the UK domestic process. In such circumstances, the domestic court may decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is at issue, so that there takes place what may prove to be a valuable dialogue between the domestic court and the Strasbourg Court (Supreme Court 2013).

This court is not bound to follow every decision of the European court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law . . . Of course, we should usually follow a clear and constant line of decisions by the European court . . . But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber . . . Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line. (Supreme Court 2010)

The Court states, however, that there are limits to this process, particularly where the matter has been already to a Grand Chamber once or, even more . . . It would have then to involve some truly fundamental principle of . . . [the UK domestic] law or some most egregious oversight or misunderstanding before it could be appropriate . . . to contemplate an outright refusal to follow Strasbourg authority at the Grand Chamber level. (Supreme Court 2013).

The English Court of Appeal has in the past disagreed with the decisions of the ECtHR; the case of *Vinter and Others v. the United Kingdom* (ECHR 2013) can serve as an example. *Vinter* is one in a series of ECtHR's rulings on whether so-called "life sentences"—imprisonment for an indefinite term—are compatible with the European Convention or constitute inhuman or degrading treatment under Article 3. The Court of Appeal concluded that the UK system met the Article 3 criteria (Court of Appeal 2014).

It "clarified" the operation of the Home Secretary's statutory power of compassionate release, describing it as having a "wide meaning" beyond its literal (and non-binding) wording, allowing (and requiring) the evaluation of penological grounds for incarceration. (Graham 2018: 9)

Russian Federation

The Constitutional Court of the Russia Federation has provided vast legal analysis as to the grounds of implementation and interpretation of the judgments of interstate bodies in the national legal system.

The Constitution of the Russian Federation establishes that human rights and fundamental freedoms are recognized and guaranteed in the Russian Federation in accordance with generally recognized principles and norms of international law (Article 17, part 1). International treaties of the Russian Federation form an integral part of its

legal system, and if an international treaty of the Russian Federation establishes rules other than those provided by law, then the rules of the international treaty are applied (Article 15, part 4) (KS RF 2012).

It follows from the above legal provisions that the Russian Federation has no right to evade implementing in good faith international treaties that have entered into force and to which it is a party. The Russian Federation, possessing the state sovereignty (Preamble; Article 3, part 1; Article 4, part 1, of the Constitution of the Russian Federation), is an independent and equal participant in interstate communication and, at the same time, declaring itself a democratic legal rule-of-law state (Article 1, part 1 of the Constitution of the Russian Federation), must follow the obligations voluntarily assumed under international agreements, which is confirmed by the provisions of the Vienna Convention on the Law of Treaties.

The Russian Federation has ratified the ECHR and thus has recognized it as an integral part of its legal system. The Russian Federation has recognized the jurisdiction of the ECtHR by virtue of Article 46 of the convention, ipso facto and without a special agreement, binding on the interpretation and application of the provisions of the convention and its protocols in cases of their alleged violation by the Russian Federation.

Russia, as a member of the world community, in which universally recognized principles and norms of international law operate, concludes international treaties and participates in interstate organizations, transferring to them a part of its powers (Preamble; Article 1, part 1; Article 15, part 4; Article 17, part 1; Article 79 of the Constitution of the Russian Federation), which, however, does not mean it renounces state sovereignty.

However, the Russian Constitutional Court admits that Russia may, as an exception, deviate from the fulfillment of international obligations imposed on it when such a deviation is the only possible way to avoid violation of the fundamental principles and norms of the Constitution of the Russian Federation (KS RF 2015).

The Constitutional Court of the Russian Federation in its ruling concerning the execution of the ECtHR's judgment in the case of *Anchugov and Gladkov v. Russia* states that the Russian constitutional order is not subordinate to the ECHR system (KS RF 2016).

The Constitutional Court further points out that the ECHR, as an international treaty to which the Russian Federation is a signatory, has greater legal force in the law enforcement process than a federal law, but not equal and not greater than the legal force of the Constitution of the Russian Federation (KS RF 2016). The place of the ECHR in the hierarchy of the Russian legal system is below the Federal Constitution but higher than ordinary federal law.

The Constitutional Court found it impossible to execute the ECtHR's judgment in the case of *Anchugov and Gladkov* since it contradicted the imperative prohibition enshrined in the Constitution of the Russian Federation, which has supremacy and the highest legal force in the Russian legal system.

The Constitutional Court asserts that “the interaction of the European conventional and the Russian constitutional legal orders is impossible in the conditions of subordination, insofar as only a dialogue between different legal systems is a basis for the proper balance” (KS RF 2016).

Examining the possibility of executing the judgment of the ECtHR in the case of *AO Neftyanaya Kompaniya Yukos v. Russia*, the Constitutional Court of the Russian Federation in its judgment of January 19, 2017, stated that a judgment of the ECtHR cannot be considered binding on the Russian Federation if the specific provision of the ECHR on which this judgment is based, as a result of an interpretation carried out in violation of the general rule of interpretation of treaties, in its meaning enters into a contradiction with the provisions of the Constitution of the Russian Federation, which are grounded in the international public order and form the national public order, primarily related to the rights and freedoms of a person and a citizen and to the foundations of the constitutional system of Russia (KS RF 2017).

The recent amendments to the Russian Federal Constitution, adopted by a nationwide vote held on June 25 to July 1, 2020, are in line with the decisions of the Russian Constitutional Court of 2016 and 2017, which expressed the opinion that a judgment of the ECtHR cannot be regarded as binding for execution by the Russian Federation “if its interpretation comes into conflict with the provisions of the Constitution of the Russian Federation” (KS RF 2016).

Article 15(4) of the Federal Constitution, which declares the universally-recognized norms of international law and international treaties of the Russian Federation a component part of its legal system, was not changed. This article also determines that if an international treaty of the Russian Federation establishes rules other than those envisaged by law, the rules of the international treaty shall be applied. Amendments were made to Article 79:

Decisions of interstate bodies adopted on the basis of the provisions of international treaties of the Russian Federation in their interpretation, contrary to the Constitution of the Russian Federation, are not subject to execution in the Russian Federation.

It is presumed that not the international treaties of the Russian Federation but the decisions of interstate bodies adopted on the basis of such treaties shall not be subject to enforcement if construed contrary to the Russian Federal Constitution. Moreover, Article 125(4) of the Russian Constitution was amended to state that the Constitutional Court of the Russian Federation resolves the issue on the possibility of executing such decisions and the decisions of foreign or international courts in case they contradict the foundations of public order of the Russian Federation.

European Union

The Court of Justice of the European Union in the judgment in *Kadi* focuses on the interplay between the provisions of international law and EU law. The Court of Justice states that if international law contravenes the basic values of the EU, especially in the

sphere of human rights protection, the EU law provisions should prevail (Grand Chamber 2008). Therefore, the EU may not be able to fully implement UN Security Council resolutions that are in conflict with fundamental human rights obligations flowing not only from the EU legal order and the European Convention but also from the UN Charter itself. Although the Court of Justice's focus is on the implementation of Security Council resolutions by the EU and the European Community, rather than on the validity of the international norms as such, the consequence of this exercise could very well be that any implementation of a Security Council resolution could entail the violation of fundamental EU rights. In this concrete case, the Court of Justice annulled the contested acts. Rather than taking the formal hierarchical relationship between UN law and EU law as the basis for establishing an immunity from jurisdiction of the Security Council, the Court of Justice chose to look at this hierarchy in more substantive terms. Security Council resolutions remain "untouchable," but the acts by which the EU implements the resolutions are not, and are subject to the fundamental rights and constitutional principles that form the basis of the EU's legal order (Grand Chamber 2008).

Analysis of the cases before the EU Court of Justice shows that the judgments of the court depend on whether the issue of human rights protection is at stake. As examples, in *Intertanko*, the court did not give priority to international law since no individual rights or obligations were affected. By contrast, in *Kadi*, where the rights of individuals were affected, the court underlined "domestic" constitutional principles.

Well before *Kadi*, in the famous case of *Flaminio Costa v. ENEL*, decided in 1964, the European Court of Justice established the primacy of EU law (then European Community law) over the laws of EU member states. At the same time, the court underlined the separate character and the special and original nature of the European Community law:

[The Treaty instituting the E.E.C. has created its own order . . . by creating a Community of unlimited duration, having its own institutions, its own personality and its own capacity in law, . . . the member-States, albeit within limited spheres, have restricted their sovereign rights and created a body of law applicable both to their nationals and to themselves. . . .

[T]he law stemming from the treaty, an independent source of law, . . . because of its special and original nature. (EuroLex 1964)

The International Law Commission in its report *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* describes the European law/EU law as a "self-contained (special) regime." Among others, the European law/EU law is often identified as "special" in the sense that the rules of general international law are assumed to be modified or even excluded in its administration (UN GA 2006: 68).

As we see, in *Kadi* the EU Court of Justice took another step, based on *Costa*, and declared the EU legal order separate not only from the legal orders of its member-states but also from the international legal order. After *Kadi*, the court's dual approach was described as unfaithful to its traditional fidelity to public international law and inserting itself in the tradition of nationalism (Kokott & Sobotta 2012: 1015).

The above examples can be regarded as sovereigntism and nationalism leading to the fragmentation of international law, whereas regional and national legal regimes may be contradictory to universally adopted principles and norms. Fragmentation and diversification account for the development and expansion of international law in response to the demands of a pluralistic world. At the same time, fragmentation may occasionally create conflicts between rules and regimes in a way that might undermine their effective implementation (UN GA 2006).

The UK and Russia exhibit a radical attitude in comparison with Germany and Italy. In the UK, despite ratification of the ECHR, the decisions of the ECtHR are considered acts “to be taken into account,” but create no obligation. The Russian Federation has constitutionalized the conditions for nonexecution of judgments of the ECtHR since the enforcement of decisions of international organizations in which Russia participates (such as the judgments of the ECtHR) often poses allegedly “serious” problems (Opinion of the Venice Commission 2020: 12). The respective positions of the constitutional courts of Germany and Italy are liberal, leaning toward consensus and dialogue (i.e., the principle of openness toward international law—*Völkerrechtsoffenheit* and *Völkerrechtsfreundlichkeit*—of the German legal system). The comparative analysis of the place of the ECHR in the hierarchy of domestic legal systems shows that in Germany and Italy, the European Convention has the same legal rank as an ordinary law, while in Russia it occupies a place higher than ordinary (federal) law but lower than the Federal Constitution.

The EU is not backing down from its commitments to human rights, but it has created the relatively autonomous internal system of human rights protection, thus fragmenting and behaving as “a self-contained regime,” which can come into contradiction with the universal legal order.

The examples provided in this article show how the principle of sovereign equality of states, one of the ten main principles of contemporary international law, recognized by the UN Charter, has transformed into its antipode, exaggerating its essence to the point of meaninglessness. It is not merely heightened sovereigntization. State sovereignty has never ever been understood in a way contemporary sovereigntists choose to understand it. The very meaning of state sovereignty is highly diversified; different concepts of state sovereignty are operationalized in different contexts. Moreover, “the sovereignty principle is less and less considered as a rule” (Alles & Badie 2016: 19). Neo-sovereigntism can be described by way of six specific features: self-affirmation, self-protection, a new mutualism, an assertion of antihierarchy, protest, and flexible norms. Sovereignty is thus more a protest than it is the basis of real institutions, and is used by the neo-sovereigntists in the battle against the institutionalized hierarchy (Alles & Badie 2016: 16, 19).

As an independent exercise of internal and external affairs, state sovereignty always and necessarily correlates with the sovereignty of other states, subjects of international law. The international legal maxim *Par in parem non habet imperim*, “Equals have no sovereignty over each other,” has been proved by the judiciary in many states. The classic definition from *The Parlement Belge* case recalls “a consequence of the

absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state” (Parlement Belge 1880: 214–215).

This indispensable correlation, the vital importance of coexisting with other sovereignties, requires a state to take into account the presence and the legitimate rights of other states and other subjects of international law in its behavior.

As a result, a certain degree of self-restraint of state sovereignty takes place. Each state possesses its “personal space,” and no other state has a right to infringe on it; however, in behalf of mutual interest and cooperation, and with a certain degree of proportionality, states limit their personal space in order to coexist in the community of states.

There is a clear distinction between state sovereignty and sovereigntism. State sovereignty respects other sovereignties, has the ability to be flexible and to shrink, and is capable of managing its own scope, if international relations so demand, while sovereigntism, being an extreme form, ignores or denies other sovereignties and the rights inherent in a sovereignty.

Sovereigntism has a direct impact on international law, international relations, and the international system as a whole. The role and authority of the general legal regulator in the international system—international law—is undermined by states demonstrating the possibility to derogate from the previously agreed-upon rules and, claiming their own singularity, allow such derogation for themselves, while not recognizing the right to such derogations for other states. The collapse of the international system is evident if the majority of states behave in such a way. For the time being, international law has proved able to cope with the situation. The vast majority of states are respectful of international law, keeping the whole system from failure.

The reasoning *in abstracto* is important for the analysis of the functioning of the European Convention's system of human rights protection as specified in the ECHR and protocols to it. The ECtHR found that failure to comply with its decisions amounted to a violation of the ECHR and, in a wide sense, an undermining of the whole system of Council of Europe human rights protection. The Committee of Ministers stressed that speedy and efficient execution of judgments is essential for the credibility and efficacy of the ECHR as a constitutional instrument of European public order, on which the democratic stability of the continent depends.

The constitutional courts of Italy, Germany, and Russia and the Supreme Court of the UK have declared that in their respective legal systems, the European Convention acquires the same status as ordinary legislation or higher, but is not equal to that of the constitutions of these states. And therefore, when the ECtHR's judgment and the constitutional provisions come in conflict, a state can derogate from executing its obligations under the European Convention. It is equally the same when the ECtHR's judgment is based on the interpretation of the ECHR by the ECtHR in a way contrary to a state's constitution. In other words, the states do not dispute the meaning of the provision of the ECHR, but find its interpretation by the ECtHR incompatible with their

constitutions. The question is whether a state is bound by the ECtHR's interpretation. There is no doubt that a state is bound by international treaties it has duly ratified, including the ECHR. Is a state also bound by the *consequent* interpretation of ECHR in the decisions of the ECtHR, and therefore obliged to execute such decisions?

The jurisdiction of the ECtHR is determined by Article 32 of the ECHR, which states:

1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto. (CoE 1950)

The ECtHR is the only body granted the privilege to interpret the provisions of the ECHR. If a party to the convention accepts the jurisdiction of the ECtHR, it is also bound by the ECtHR's interpretation of the convention.

The very essence of international legal norms is that they are the result of a coherence of wills of different states in order to achieve their common interests, sometimes at the expense of a part of their state sovereignty. State sovereignty envisages that a state is free to enter (or not to enter) into an international agreement, because by doing so a state sacrifices a part of its sovereignty. And so do other states. International law is able to exist because of the mutual restriction of sovereignty by the subjects of international law, especially states. For the smooth operation of the international legal system, domestic law should be in conformity with international law; so, prior to taking an obligation under international law, a state should revise its national legislation in order to reveal collisions with international norms and put it in accordance with them. Of course, this situation is somewhat ideal.

In terms of the interrelation of international law and domestic law it is obvious that when a state recognizes its obligations under an international treaty—that is, when expresses its *opinio juris*—the domestic law should be brought into conformity with provisions of a relevant treaty.

The 1969 Vienna Convention on the Law of Treaties in Article 27 declares:

- A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. (United Nations 1969)

However, the problem of a state's noncompliance with the fundamental principle of international law—*Pacta sunt servanda* (“Every treaty in force is binding upon the parties to it”), in this case connected with the ECHR—and the possible answers are not so straightforward. At the heart of the problem is not only the issue of interplay (and/or precedence) of international and domestic law but also the problem of application and interpretation of international treaties in good faith.

The Vienna Convention on the Law of Treaties of 1969 in Article 31(1) states:

- A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. (United Nations 1969)

The aim of interpretation of an international treaty is the clarification of the content of the negotiated wills of states-parties to a treaty. Therefore, any interpretation

given should take into account these agreed-to wills, not just the will of a single party. An interpretation in good faith would not add to or diminish the rights or obligations of states-parties under a treaty.

If interpretation is not in good faith, it does add to or diminish the rights or obligations of states, thus changing the treaty provisions already agreed upon, including the object and purpose of the treaty. Therefore, what is in question is not the treaty, consent to which was given at the time of its ratification. Otherwise, could a state derogate from its obligations under this “new” treaty, which is actually found in the instrument of its interpretation?

According to Article 32 of the ECHR, the states-parties a priori accept that any future interpretation of the ECHR by the ECtHR will be in good faith. Bearing in mind the collective character of ECHR, the result of an accumulated joint will of the states-parties, we can assume that every state-party has a right to participate in defining the content and scope of this will, that is, in interpreting the rights and obligations of the states-parties to the ECHR. The right to interpret the European Convention vested in the ECtHR should imply a dialogue between the court and the states, because it was the states that created this court of their own volition. Moreover, the ECHR and the protocols to it are international treaties, and they can be renegotiated by the states-parties any time.

Sovereignism and nationalism lead to a system of international law whereby there is no unity; and this is accompanied by the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions, and spheres of legal practice (UN GA 2006: 11). This situation in turn leads to the diversification of the meaning of state sovereignty and a blurring of the concept of state sovereignty. Implementation of the vague principle of sovereign equality is a serious obstacle to the proper functioning of international system.

The phenomenon of a fragmented international system discourages efforts to protect human rights as the highest value. The examples of Germany, Italy, the UK, Russia, and the EU show how human rights are endangered or suffer depending on the level of human rights protection. At the same time, the trend toward sovereignism and nationalism reveals the problems that exist in the sphere of international human rights protection, especially in the Council of Europe Human Rights system; It lays bare the weak link in an otherwise relatively successful and sustainable mechanism. Any system is a living organism; by the same token, the ECHR is a living instrument. Dialogue and openness of the actors in the international system who create the system itself and vest their rights in its bodies are the most valuable way, and the only possible way, to overcome the challenges to contemporary international law.

Библиография:

- Alles, Delphine and Badie, Bertrand. (2016). Sovereignism in the international system: from change to split. *European Review of International Studies* 3(2): 5–19.
- Barnhoorn, L. A. N. M. and Wellens, Karel (eds.). (1995). *Diversity in Secondary Rules and the Unity of International Law*. The Hague: Nijhof.

- Belgium v. Spain. (1970). *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase)*. I.C.J. Reports, 1970.
- Bundesverfassungsgericht. (2011). Headnotes to the judgment of the Second Senate of 4 May 2011. *Bundesverfassungsgericht*, 2 BvR 2365/09, paras. 1-178, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2011/05/rs20110504_2bv_r236509en.html (accessed November 21, 2020).
- CoE. (1950). Convention for the Protection of Human Rights and Fundamental Freedoms. *Council of Europe (CoE)*, n. d., https://www.echr.coe.int/documents/convention_eng.pdf (accessed March 29, 2021).
- Corte Costituzionale. (2007a). Judgment No. 348 Year 2007. *Corte Costituzionale*, July 3, <https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2007&numero=348> (accessed November 29, 2020).
- Corte Costituzionale. (2007b). Judgment No. 349 Year 2007. *Corte Costituzionale*, October 22, https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S349_2007_Eng.pdf (accessed November 29, 2020).
- Cour Internationale de Justice. (1970). Case concerning the Barcelona Traction, Light and Power Company, Limited. *Cour Internationale de Justice*, February 5, <https://www.icj-cij.org/public/files/case-related/50/050-19700205-JUD-01-00-EN.pdf> (accessed March 29, 2021).
- Court of Appeal. (2014). McLoughlin Regina - and - Lee William Newell Appeal. *Court of Appeal*, January 24, <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/r-v-mcloughlin-and-r-v-newell.pdf> (accessed March 11, 2021).
- Dal Monte, Francesca Biondi and Fontanelli, Filippo. (2008). The Decisions No. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System. *German Law Journal* 9(7): 889–931.
- Dupuy, Pierre Marie. (2002). L'unité de l'ordre juridique internationale. Cours général de droit international public. *Recueil des Cours* 297. Leiden: Martinus Nijhoff Publishers.
- ECHR. (2010). Case of Sakhnovskiy v. Russia. *European Court of Human Rights*, November 2, <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%5B%5C2001-101568%5D%7D> (accessed 11 March 2021).
- ECHR. (2013). Case of Vinter and Others v. the United Kingdom. *European Court of Human Rights*, July 9, <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%5B%5C2001-122664%5D%7D> (accessed 29 March 2021).
- ECHR. (2015). Case of Navalnyy and Yashin v. Russia – 2015. *European Court of Human Rights*, n.d., https://hudoc.echr.coe.int/rus#_ftnref3 (accessed March 11, 2021).
- ECHR. (2017). Case of Bayev and Others v. Russia. *European Court of Human Rights*, June 20, https://www.doev.de/wp-content/uploads/2017/Leitsaetze/19/E_0561.pdf (accessed March 11, 2021).
- EuroLex. (1964). Case of Flaminio Costa v. ENEL. *EuroLex*, n.d., <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61964CJ0006&from=EN> (accessed March 11, 2021).
- Fisher-Lescano, Andreas and Teubner, Günther. (2004). Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law. *Michigan Journal of International Law* 25(4): 999–1046.
- Govaere, I., and Garben, S. (Eds.). (2019). *The interface between EU and international law: contemporary reflections*. New York: Bloomsbury Publishing.
- Graham, Lewis. (2018). From Vinter to Hutchinson and Back Again? *The Story of Life Imprisonment Cases in the European Court of Human Rights*, n.d., <https://core.ac.uk/download/pdf/189162901.pdf> (accessed March 11, 2021).
- Grand Chamber. (2008). Judgment of the Court (Grand Chamber) of 3 September 2008. Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the

- European Communities. *Grand Chamber*, September 3, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62005CJ0402&from=EN> (accessed November 12, 2020).
- Kokott, Juliane and Sobotta, Christoph. (2012). The Kadi Case – Constitutional Core Values and International Law – Finding the Balance? *The European Journal of International Law* 23: 1015–1024.
- Konsultant Plus. (1993). The Constitution of the Russian Federation (adopted by popular vote on 12.12.1993 with amendments approved during the all-Russian vote on 01.07.2020). *Konsultant Plus*, December 12, http://www.consultant.ru/document/cons_doc_LAW_28399/ (accessed March 11, 2021).
- Koskenniemi, Martti and Leino, Päivi. (2002). Fragmentation of International Law. Postmodern Anxieties? *Leiden Journal of International Law* 15: 553–579.
- KS RF. (2012). Postanovleniye Konstitutsionnogo Suda RF (KS RF) ot 27.03.2012 N 8-P "Po delu o proverke konstitutsionnosti punkta 1 stat'i 23 Federal'nogo zakona "O mezhdunarodnykh dogovorakh Rossiyskoy Federatsii" v svyazi s zhaloboy grazhdanina I.D. Ushakova" [from Rus.: Resolution of the Constitutional Court of the Russian Federation of 27.03.2012 N 8-P "In the case of checking the constitutionality of paragraph 1 of Article 23 of the Federal Law" On International Treaties of the Russian Federation "in connection with the complaint of the citizen I.D. Ushakov"]. *Sobraniye zakonodatel'stva RF*, 09.04.2012, N 15, st. 1810 [from Rus.: Collection of laws of the Russian Federation, 09.04.2012, N 15, art. 1810].
- KS RF. (2015). Postanovleniye Konstitutsionnogo Suda RF ot 14.07.2015 N 21-P [from Rus.: Resolution of the Constitutional Court of the Russian Federation of 14.07.2015 N 21-P]. *Sobraniye zakonodatel'stva RF*, 27.07.2015, N 30, st. 4658, para. 2.2. [from Rus.: Collection of laws of the Russian Federation, 27.07.2015, N 30, art. 4658, para. 2.2.].
- KS RF. (2016). Postanovleniye Konstitutsionnogo Suda RF ot 19.04.2016 N 12-P "Po delu o razreshenii voprosa o vozmozhnosti ispolneniya v sootvetstvii s Konstitutsiyey Rossiyskoy Federatsii postanovleniya Yevropeyskogo Suda po pravam cheloveka ot 4 iyulya 2013 goda po delu "Anchugov i Gladkov protiv Rossii" v svyazi s zaprosom Ministerstva yustitsii Rossiyskoy Federatsii" [from Rus.: Resolution of the Constitutional Court of the Russian Federation of 19.04.2016 N 12-P "In the case of resolving the issue of the possibility of execution in accordance with the Constitution of the Russian Federation of the judgment of the European Court of Human Rights of July 4, 2013 in the case "Anchugov and Gladkov v. Russia" in connection with by the request of the Ministry of Justice of the Russian Federation"]. *Sobraniye zakonodatel'stva RF*, n.d., <https://legalacts.ru/doc/postanovlenie-konstitutsionnogo-suda-rf-ot-19042016-n/> (accessed November 21, 2020).
- KS RF. (2017). Postanovleniye Konstitutsionnogo Suda RF ot 19.01.2017 N 1-P [from Rus.: Resolution of the Constitutional Court of the Russian Federation of 19.01.2017 N 1-P]. *Sobraniye zakonodatel'stva RF*, n.d., <https://legalacts.ru/sud/postanovlenie-konstitutsionnogo-suda-rf-ot-19012017-n-1-p/> (accessed 11 November 2020).
- Ministry of Justice. (2014). Report to the Joint Committee on Human Rights on the Government response to human rights judgments 2012–13. *Ministry of Justice*, December (61–63), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/389272/responding-to-human-rights-judgments-2013-2014.pdf (accessed March 11, 2021).
- Molnár, Tamas. (2021). *The Interplay between the EU's Return Acquis and International Law*. London: Edward Elgar Publishing.
- Parlement Belge. (1880). Public Vessel – Exemption from Arrest – Trading by Public Vessel. *The Parlement Belge – Court of Appeal*, February 27. <https://www.uniset.ca/other/css/5PD197.html> (accessed November 11, 2020).
- Pomeranz, William. (2011). Uneasy Partners: Russia and the European Court of Human Rights. *Corte Interamericana de Derechos Humanos*, n.d., <https://www.corteidh.or.cr/tablas/r29628.pdf> (accessed March 11, 2021).

- Supreme Court. (2010). Manchester City Council v Pinnock, UKSC 45. *The Supreme Court*, November 3, <https://www.supremecourt.uk/cases/docs/uksc-2009-0180-judgment.pdf> (accessed November 11, 2020).
- Supreme Court. (2012). Judgment R (on the application of Chester) (Appellant) v Secretary of State for Justice (Respondent). McGeoch (AP) (Appellant) v The Lord President of the Council and another (Respondents) (Scotland). *The Supreme Court*, October 16, <https://www.supremecourt.uk/cases/uksc-2012-0151.html> (accessed November 11, 2020).
- Supreme Court. (2013). R v Secretary of State for Justice, UKSC 63. *The Supreme Court*, October 16, <https://www.supremecourt.uk/cases/docs/uksc-2012-0151-judgment.pdf> (accessed March 29, 2021).
- UN GA. (2006). Fragmentation of international law: difficulties arising from the diversification and expansion of international law. Report of the Study Group of the International Law Commission. *UN General Assembly (UN GA)*, July 18, https://legal.un.org/ilc/documentation/english/a_cn4_l702.pdf (accessed November 29, 2020).
- United Nations. (1969). Vienna Convention on the Law of Treaties. *United Nations legal documents collections*, n. d., https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (accessed March 11, 2021).
- Venice Commission. (2020). Russian Federation - Opinion on draft amendments to the Constitution (as signed by the President of the Russian Federation on 14 March 2020) related to the execution in the Russian Federation of decisions by the European Court of Human Rights, adopted by the Venice Commission on 18 June 2020 by a written procedure replacing the 123rd Plenary Session. *The Venice Commission website*, March 14, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)009-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)009-e) (accessed March 11, 2021).
- Wellens, Karel and Huesa Vinaixa, Rosario (eds.). (2006). *L'influence des sources sur l'unité et la fragmentation du droit international*. Brussels: Bruylant.
- Ziegler, Katja. (2016). *The Relationship between EU Law and International Law*. In book: *A Companion to European Union Law and International Law*. London: Wiley-Blackwell.
- Zimmermann, Andreas and Hoffmann, Reiner. (2006). *Unity and Diversity of International Law*. Berlin: Duncker & Humblot.