IMPACT OF INTERNATIONAL LAW ON CONSTITUTIONAL ORDER

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Abstract

The relationship between international law and national law of states is an expression of the natural interaction of state sovereignty and engagement in international relations. The extent to which states are responsible for the transfer of international law obligations into their own legal systems is given by the Constitution and its transposition framework. The paper deals with the impact of international law on the constitutional order of states, along with selected examples.

Key words: *transposition, interaction, constitutionality, intervention, international standards*

INTRODUCTION

The relationship between international law and the Constitution as well as the constitutional order of states is a challenge for the traditional setting of the rule of law and the basic tasks of the state. The state is still a central element of international law, but it is no longer the sole result of its activities. The existence and position of the state is not dependent on the internal confirmation of its sovereignty, but also on its acknowledgment and evaluation by the international community. [Crawford 2006 :140] In addition, with the objectives of maintaining peace and protecting human rights that have enjoyed a privileged position since 1945, international law has lost the neutrality value of classical international law, but at the same time it has created a problem of value collision.[Pollman, Lohman, 2017: 151]

The relationship between international law and the national law of states is an expression of the natural interaction of state sovereignty and engagement in international relations. The degree of responsibility of States for the delegation of

international law obligations to their own legal system and their respect is given by the Constitution and its transposition framework. In addition, it is possible to state, that there is a common area in which both the international and national legal systems operate in the same way if the same subject of the legislation is concerned. [Brownlie 2013: 37]

Since the signing of the Peace of Westphalia, the state has traditionally been defined by international law as its basic entity if it has territory, population, controls its internal and external relations, and it exercises above all unconditional sovereignty.[Seidl-Hohenveldern 1999:133] If the state accepts these basic requirements and recognizes their responsibilities to other states, so it in return becomes part of the world order. The Peace of Westphalia has become a turning point in the history of nations, as the elements on which it is built are simple, universaly acceptable and far-reaching. The state was declared as a building block (no longer an empire, a dynasty or a religious conviction) of construct. The concept of state sovereignty started to exist. [Kissinger 2016:38]

The significance and value of the state in international law has changed after the creation of other international actors, in particular by creating the supra-state bodies. This development also has an impact on their internal organization, but also on the functioning of the international legal order. The question is whether it is a positive influence and an advantage for all, not just for state actors.

The role of legal science is not to predict the future, but from the present elements, to predict with some degree of correction the possible development of the system. From the above assumptions, it is possible to state just its instability. As mentioned above, the state is one of many entities of international law, and the whole system is in a permanent process of transformation. The importance of the state for the organization of social relations is still crucial. It is therefore not possible to share an opinion on any dismantling of the state, its need and its further existence. However, state´s fundamental issues - the definition and assignment of rights and freedoms - are no longer exclusive and unconditional, but under a strong influence of international law. [Hodás 2016: 180] Subsequently, there is a great harmonization and conformation of the content of the constitutions and other basic legislation of the national legislature, regardless of the geographical location of the state, form of government, historical development or other criteria. [Anghie 2005: 235]

The scientific scope of the relationship between national and international law is theoretically complex and very comprehensive. We have, therefore, chosen a method of analyzing specific institutions with a focus on whether they contain standards governing the status of international law in national law and how they are defined in it. We have selected the constitutions of the countries according to their inclusion in legal cultures, so we have analyzed, for example, the Constitutions of Sweden, Belarus, India, Albania, Uruguay, Russian Federation, South Africa and Tunisia, alongside the Constitution of the Slovak Republic.

This document develops a discussion on the relationship between international law and national law through both legal theory and legal philosophy, so the language of the document uses the terms of both areas. The results of research should confirm or demonstrate changes in the constitutional practice of states in terms of the relationship between international and national law.

1. THE BORDERS OF IMPACT

International law creates the assumptions that it´s influenced the creation of such a legal order in a country that contains minimally expressed principles of international law, but more often the whole body of human rights theory. Transformation of states takes place in a way that unifies their constitutions (with some authors even contemplating the formation of a future supranational constitutional law).

If state transformation is to be constructive, it is necessary to carefully consider and predict which State will be its result and how it will participate in the further functioning of the system of international law. This is an important issue because it focuses on the essence of how the international order works and will work.

The uncertainty of the effect of international law on the structure of the state is often due to the uncertainty of the boundary between international and national law. Its definition is applied by the States also through the institutions of mandatory interpretation of the Constitution. Differences, therefore, occur not only between states, but also depending on the time of interpretation within the State alone. [Goldsmith, Posner 2005: 155] Similarity can be indicated within regional groups of states, but this is not the rule that would predict their common development. As a consequence, in the complexity of the impact of international law on the state we need to examine its connection and recognition of its operation by other legal orders. This requires research and application of institutes of Constitutional law, International law and Comparative law.

State administration havs also changed over time - the state is no longer the sole subject of international law, it is not even its sole creator. The differences can be found in the procedures when the state recognizes and applies international law. It is no longer an external element but a part of its constitution. International law´s rationale and recognition of its validity come from the very essence of the state. The Constitution is no longer the first obstacle to the fulfillment of international obligations, but the first instrument for their implementation. Rationale of international law is strictly connected by its constitutional relationship.

The basic criteria of constitutionality - the separation of powers and democratic legitimacy - are also criteria for external recognition under international law. However, international law is no longer an autonomous and separate part of legal system but can be considered as a part of the legal norms of a state, that not only complements, but in many ways should exceed the scope of the national regulation. States are no longer entities with unlimited sovereignty, but entities that are in a constant and fluid relationship with international law. State´s sovereignty in law creation can be superseded by the existence of international law.

The transmission of the International law rules is a subject - matter of the Basic Law of each participating State. The view of legal science points to the interdependence and conditionality of relationship between constitution and international law. In our opinion it is necessary to study the intensity and extent of the impact of international law on the constitutionality of states as well as the search for its minimal common basis in all constitutions. It will allow to understand the role of the state and the possible future aims of its further development in compliance with international law.

The consequences of sovereignty of states we can find in their prima facie exclusive jurisdiction over the national territory and the inhabitants, then the duty of the

state not to interfere with the exclusive jurisdiction of other states. Nevertheless, the sovereignty of modern states we can find in their dependence on and impact of international law rules. [Brownlie 2013: 315]

2. THE SOVEREIGN EQUALITY

The state is a central element of national and international law (with respect to the regional law as a part of international law). Different roles within two legal systems are unified by state´s specific legal status, which is the source of its existence. Furthermore, as an exemption, international law does not always require State approval for its validity. This is not necessary (for example), in the field of ius cogens norms (as this kind of legal norms cannot be characterized as purely consensual) or in the area of the obligations of membership in international organizations, in particular in the field of human rights. Sovereignty as a traditional aspect of statehood, is subject to the changes invoked by international law. These changes are on a scientific basis, subjects of the theories of global legal pluralism and constitutionality, which consider in particular the transformation of international law into its new, hybrid form.

We can find the definition of state in the writings on international law in three forms - in the classical, Westphalian type, then the modern state and eventually in its third, postmodern form as a one subject - actor from many.

In classical literature, the international law is focused on the state, as a single entity, with exclusive and unique normative power. All other bodies and authorities, such as international organizations, create international norms dependently, based on delegation of powers by the states. According to this theory, the only exceptions are norms erga omnes and ius cogens, which limits the sovereignty of the state even without its consent.

The key to understanding of the traditional definition of the state lies in its sovereignty. [Brownlie 2013: 315] As we have mentioned above, the meaning of this term differs according to the development of international law. The simplified meaning, the reference to the sole and highest authority in a particular territory, is contained in Article 2 (1) of the Charter of the United Nations[1]. The sovereign equality of every state was the core principle of the international order, as the world was structured just after the Second World War. International law and sovereignty are dependent on each other. Sovereignty does not exist without a state and is strictly linked to its international recognition.

In practice, decisive political processes take place outside the formal framework of the UN. Although the United Nations, by admitting the veto power of the five powers, has tried to take account of the fact that there are power differences between states, it nevertheless emphasizes the principle of the sovereign equality of all its members. Such a finding is inconsistent with the real power relations that really determine the functioning of the world. [Seidl-Hohenveldern 1999: 30] The principle of sovereign equality is at the same time controversial in the emergence of new states and the recognition of their sovereignty. [Bureš, Faix, Svaček 2013: 17]

The principle of sovereignty is based on the subordination of the equality and autonomy of states within the international system. Sovereign states respect each

[1] The Organization is based on the principle of the sovereign equality of all its Members. In: O chartě Spojených národů a statutu Mezinárodního soudního dvora, 30/1947 Coll.

other's equivalence with regard to their foreign relations, irrespective of their true power, size, and its Constitution. Classical international law considered these States' rights often analogous with the fundamental rights of autonomous individuals. States were even understood as moral persons. [Pollman, Lohman 2017: 490]
The traditional view of the state and its recognition through international law and sovereignty is historically overwhelmed and inaccurate. Instead, the modern concept of political authority of the rule of law, linked to legitimate governance and legitimate lawmaking, is being used. [Reif 2000: 1-69] The basic principles of the concept of the rule of law can be defined as the guarantees of fundamental rights and freedoms, the legitimacy and legality of the exercise of public authority, the sovereignty of the people, the separation of powers, the balance of powers, the supremacy of constitution and law, the application of the principle of justice, the principle of legal certainty, judicial independence, non - retroactivity, the principle of proportionality, the principle of the protection of legally acquired rights, etc. [Hodás 2016: 189]

3. GLOBALIZATION

The importance of sovereignty for the expression of statehood diminished after the global United Nations' multilateralism, in particular through the formation of three groups of states. The US and the USSR have formed two groups of supporting countries that have exchanged part of their sovereignty for economic or military assistance (or both). The non-aligned states that have chosen their own way of international policy lost part of their sovereignty in a superpower battle when both groups questioned their sovereign equality mostly due to their non-participation.
A real competitor to the statehood sovereignty was the process of globalization, due to the states have lost some of their power in favour of non-state actors. The movement of capital and human resources is no longer the exclusive competence of states, as they have become partners of multinational organizations for which they create a stable and predictable legal environment. [Held, Mcgrew 2000: 22] The meaning and the force of globalization can be demonstrated in states that do not participate in this process due to various reasons. Their lagging in economic development is considered as a measurable indicator of their sovereignty in international relations. Although they retained their sovereignty in their traditional, Westphalian meaning, according to all criteria they are not successful subjects of international law. [Kausikan 1993: 28]
The People's Republic of China can be used as a practical example of the perception and transition from the Westphalian model of the state to its modern form. This country was engaged in international trade in the early 1980s, with the international recognition and confirmation of its sovereignty after PRC adapted the required standards of international law in its internal arrangements. [Kausikan 1993: 28] For comparison, the Democratic People's Republic of Korea we can use as an example of an unsuccessful state whose sovereignty is questioned also by its allies. [Engle 2000: 300] The traditional meaning of sovereignty is in time of interdependence, global interconnection, and high degree of technical progress, only the institute of history of international law. We can find the gap between the State´s constitution and the State´s perception in an international arena. For example, the

Belarusian Constitution declares openness to international law, but in fact this country is considered as a country with a weak sovereignty.[1]

Changing the status of the state requires a reassessment of the state and the importance of its sovereignty. The emergence of non-state actors is not only an aspect of the change in a number of subjects of international law. While the States have retained the power to regulate relations within their territory, they have to take into account the commitments to act for the benefit of all subjects within their jurisdiction. For example, they have to follow the rules based on the principle of the protection of common values of humanity which are part of international human rights law. The state ensures compliance with these rules, regardless they are not created only by states. The non-state actors play a significant role in the creation and subsequent implementation of minimal business standard rules for entrepreneurs too, with strong influence by International organizations and monopolies.

The creation of international law is no longer monopolized within exclusive entities – the states. The European Union and its relation to law deserves particular attention. In addition to goods, services, intellectual property and other commodities, its export article is also a law. This is done in trade agreements which always contain more or less bulk of EU rules. We can say that the Europeanisation of non-European space is a process with impact to the Constitutional order of the third countries too. [Kováčiková, Považanová 2017: 154]

The change in subjects of international law creators is a central element in the understanding of its current structure. This shift does not diminish, respectively does not exclude a state within international law but notes that its traditional interpretations of sovereignty are no longer applicable. [Cohen 2010: 25] The overall dynamics has also been transposed into the application of international law, when the Supreme Constitutional Authority (typically the Constitutional Court) must often decide not on its applicability but on its direct inapplicability. So the mere admission of the action can be regarded as a confirmation of the importance of that legal question for the (national) constitutional development, as well as the question, if the rule of international law is a direct component of the national law. [Goldsmith, Posner 2005: 222] The States changed their national law to solve and to receive international law rules, not just comply with international obligations, but with respect to success in international relations too.

As we can see, the system of international law needs for its existence the state as its original entity. Transformation of the state and its sovereignty, even under the influence of globalization, does not result in its abolition, but only in the transformation of internal structures. An increase of the importance of international and transnational organizations, non-governmental organizations and corporations does not weaken states, but it is an opportunity for them to take advantage of functional statehood - the unity of power, the efficiency of implementation and its legitimacy. However, international standards are set high, so the states are actively

[1] Article 8. The Republic of Belarus shall recognize the supremacy of the universally acknowledged principles of international law and ensure that its laws comply with such principles. The Republic of Belarus in conformity with principles of international law may on a voluntary basis enter interstate formations and withdraw from them. The conclusion of international treaties that are contrary to the Constitution shall not be permitted. In: https://www.osce.org/odihr/31881?download=true

participating in the application of the rules to succeed in raising of international standing and recognition. [Wade 1996: 25]

We can find this process, for example, within the increasing interconnection of international commercial law and human rights. Almost every international institution - for example, the World Bank, when granting a loan, requires prior fulfillment of strict rules on environmental protection and development as well as demonstrable respect for employees' rights. Templates and sources for national adaptation are found in international law, which, for efficiency reasons, are often taken over in its entirety in the process of ratification and publication in the State Collection of Laws.

States' own legislative activity with connection and implementation of the international law is also linked to future possible non-guaranteed membership in international groups of states. As Mokra states, "the most important point in terms of building the international status of the Slovak Republic is the regulation of the relationship between the international law and the transnational law of the European Union to the national legal order." [Mokrá 2011: 16] For example, the Slovak Republic began to autonomously adjust its law to the law of the European Union nine years before becoming its regular member. [Mokrá 2008: 191-196] The precondition for such a procedure was just the conclusion of the Europe Association Agreement between the European Communities and their Member States and the Slovak Republic[2] on 4 October 1993 (in force on 1 February 1995), which in the preamble formulated Slovakia's accession to the Community as its final objective. The Slovak Republic also undertook to make efforts to ensure the gradual compatibility of its legislative regulations with Community rules. [Kováčiková 2016: 170]

CONCLUSION

We can promulgate that the relationship between national and international law is influenced by various inputs and factors.

We can find the countries with reasonable dualism of national and international law, according to which international treaties are not directly applicable in the national legal order but must be at first ratified by a Legislative body and subsequently published in a central source of law. Only the ratified and published treaties create international obligations for the State, which may then, in its national legal order, adopt the relevant legal acts to implement and comply with such obligations, for which it is also responsible under international law.[3]

There are the constitutions with normative basis in which international law prevails over national law. This mode of expression is less used, in particular because of the negative impact on legislation created exclusively by the state. We can find this model most often in the constitutions of so-called new democracies which give

[2] In: Oznámenie Ministerstva zahraničných vecí Slovenskej republiky, 158/1997 Coll.

[3] For example, the Constitution of India, which does not deal directly with international law. Following the pattern of the original colonial country, the regulation, interpretation and inclusion of international treaties into the national order is governed by the decision-making process of the Constitutional Court. The basis for its activity is Article 51 of the Constitution, which states: The state shall endeavour to: Promote international peace and security; Maintain just and honourable relations between nations; Foster respect for international law and treaty obligations in the dealings of organized peoples with one another; and Encourage settlement of international disputes by arbitration.

precedence to the principles of international law, or to some of its segments. This includes international treaties on human rights and fundamental freedoms, international treaties not required by law, and international treaties which directly create rights or obligations of natural or legal persons and which have been ratified and proclaimed in the manner prescribed by law.[4] Although the Constitution of the State defines the intensity of the permissible effect of international law, (for example its preference to the national law), the decision-making practice of the institutions for the constitutional interpretation of the Constitution should extend its scope beyond that framework[5].

The scope contains the constitutions with unconditional dominance of national law too[6]. Such form of the constitutions very often speaks directly about a priority of national norms, the provisions with respect to international law are defined in very abstract language and placed in the articles dealing typically with foreign policy.[7]

The State remains the important part of the international legal order. The international law is significantly influenced in the process of creation and further application by its new subjects and new factors (globalization, economic and social development, etc.). With different impact and ways of influence is the international law a variable instrument for transformation of states in the processes with different levels and aims.

The ever-growing intrusion of international law into spheres of national law (from economy, defence to human rights), and the expansion of the prerogatives of new subjects of international law objectively lead to the de facto affirmation of the primacy of international law and induce States to recognize de jure this primacy in their Constitutions.[8]

As we can see, the modern definition of the state is based neither just by its interactions with international law, nor the recognition of its souvereignty within the limits of the own Constitution.[9] The impact of international law on constitutional order alongside the admissibility of direct application of international

[4] In: Art. 7 - 5 Constitution of the Slovak republic, 460/1992 Coll.

[5] The supremacy of international treaties proclaims e.g. the Constitutions of Armenia and Russia. Art. 15 – 4 of the Russian Constitution envisages: The universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied. Some other constitutions establish the priority of general principles or 'generally accepted norms' of international law, that is of customary international law. Such is the case with the Constitutions of Uzbekistan and Belarus.

[6] This model is rare and limited to few countries. For example Art. 16 of the Constitution of The Democratic People´s Republic of Korea: DPRK shall guarantee the legal rights and interests of foreigners in its territory; with some others examples of supremacy of national law (Art. 15, 17).

[7] Art. 15 of the Republic of Uzbekistan Constitution: The Constitution and the laws of the Republic of Uzbekistan shall have absolute supremacy in the Republic of Uzbekistan. The state, its bodies, officials, public associations and citizens shall act in accordance with the Constitution and the laws.

[8] The gradual process of the de jure recognition is clearly manifested in the respective stipulations of the new constitutions and amendments of existing. In: Vereshchetin 1996:41

[9] For comparison, the Constitution of the Republic of Albania and the Kingdom of Sweden, taking into account the fulfillment of their international obligations and the transposition of international standards into national law: Albania, Art. No. 5: The Republic of Albania applies international law that is binding upon it. Sweden, Chapter 10, which contains a comprehensive adjustment of international relations, including the process of concluding international treaties.

law is influenced by 1) the form of state institutions, together with their functions, openness and receptivity to international law 2) the level of rule of law by rating of the international organizations, and 3) predictable and recognized realization of state power in coincidence with international standards.

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