ПРАВО

Legal competition on different levels: Supranationalism or Intergovernmentalism?

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Իրավական մրցակցությունը վերպետական եվ միջկառավարական մակարդակներում

Խուդոյան Գ. Մ.
Հայաստանի Հանրապետության Ոստիկանության կրթական համալիրի քրեական գործընթացի ամբիոն,
ՀՀ ոստիկանության շտաբի միջազգային համագործակցության վարչության ԱՊՀ երկրների հետ համագործակցության բաժին /Հայաստան, Երևան/
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Ամփոփում: Գիտական հոդվածը նվիրված է վերպետական և միջկառավարական իրավական կարգավորումների մրցակցությանը: Աշխատանքում քննարկվել են ԵՄ վերպետական և միջկառավարական կառավարման համակարգերի, հատկապես ԵՄ ընդհանուր արտաքին և պաշտպանական քաղաքականության առանձնահատկությունները: Հիմնախնդրի լուսաբանման նպատակով անդրադարձ է կատարվել նաև եվրոպական դատական ատյանների իրավակիրառ պրակտիկային: Վերջաբանում հեղինակը իր տեսակետն է արտահայտում Եվրոպական իրավական համակարգի վերպետական և միջկառավարական իրավակարգավորումների վերաբերյալ և ներկայացնում որոշ առաջարկներ:
Վճռորոշ բառեր. վերպետականություն, միջկառավարականություն, եվրոպական իրավական համակարգ, ԵՄ ընդհանուր արտաքին և անվտանգության քաղաքականություն, Գերմանիայի սահմանադրական դատարան, հիմնական օրենք, եվրոպական ինստիտուտներ:

Юридическая конкуренция на разных уровнях: наднациональность или межправительственность?

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Резюме: В научной статье рассматривается вопрос конкуренции наднационального и межправительственного регулирования. Проанализированы некоторые краеугольные аспекты наднационального и межправительственного управления в Европейском Союзе и, в частности, в Общей Внешней и Оборонной политике ЕС. В статье рассмотрены некоторые решения Европейских судебных инстанций относительно затрагиваемой проблемы. В заключении автор выдвигает ряд предложений касательно наднационального и межправительственного правового регулирования в Европейской правовой системе.
Ключевые слова: наднациональность, межправительственность, Европейская правовая система, Общая Внешняя Политика и Политика Безопасности ЕС, Конституционный Суд Германии, Основной закон, европейские институты.

In the modern world a level of supranational governance is inevitable. Success in combating international terrorism, global warming, exhaustion of resources, lack of food to trade liberalization and public health programs, as well as other areas of cooperation, will be easier to achieve if global policymaking institutions operate effectively, together and on the supranational level (being in a deep cooperation and subjection to supranational regulations). National governments alone cannot confront threats. Continuous worldwide economic integration and military political allies' formation need to be ruled by special higher-level legal rules accepted by all parties on supranational level. Simultaneously, cooperation on intergovernmental level continues to keep its actuality for regulating important legal relations. It is useful and active tool on international relations level. The question to be answered is what kind of legal regulation (or governance) must be given preference and why.

The notion 'intergovernmental' is understood as referring to an institution or organization dominated by the governments of the participating States. Decisions are taken by unanimity giving each government the right of veto. Moreover, an intergovernmental institution is composed of government representatives, answerable to the governments of the participating States. The United Nations, NATO, and most international organisations are more intergovernmental in nature. The notion 'supranational' is understood as referring to an institution or organization with a degree of independence from the government of the participating States. Decision are taken majority voting. Independent institutions have the power to take decision, which are binding on the participating States even against the latter's will. The European Coal and Steel Community and her High Authority are the best example for a more supranational organisation and institution. There are no purely intergovernmental or supranational organisations and institutions. The notions of 'supranational' and 'intergovernmental' are rather understood as opposite ends of a spectrum. This spectrum allows to to classify organisations and institutions as 'more intergovernmental' or 'more supranational'[1]. The European Community, for example, is more supranational organization, but the position of the Council, which is composed of representatives of the governments of the Member States and is main decision-making body, represent a considerable intergovernmental element. The Council is a more intergovernmental institution, but the dominance of qualified majority voting adds an important supranational element since individual Member States governments can be outvoted. The Commission is more supranational institution as they are independent and able to take binding decision. However, the considerable influence of the Member States on their appointments adds an intergovernmental aspect.

At the institutional level a clear definition of supranational organization is difficult to make due to different interpretations, it is submitted that it is characterized by the combination of three factors. First, the decision-making machinery is at least partly independent from the member States and the decisions of this machinery are binding on them. Second, there is a legal system or order with its own judicial body and its decisions are binding on the member States. Third, there are direct legal relations between the international authority or institutions and individuals[2].

Concerning to Supranational governance, it might therefore refer to any number of policymaking processes and institutions that help to manage international interdependence, including (1) negotiation by nation-states leading to a treaty; (2) dispute settlement within an international organization; (3) rulemaking by international bodies in support of treaty implementation; (4) development of government-backed codes of conduct, guidelines, and norms; (5) prenegotiation agenda-setting and issue analysis in support of treatymaking; (5) technical standard-setting to facilitate trade; (6) networking and policy coordination by regulators; (7) structured public-private efforts at norm creation; (8) informal workshops at which policymakers, NGOs, business leaders, and academics exchange ideas; and (8) private sector policy-making activities[3]. With supranational governance, member states cede sovereignty (or parts of their sovereignty) to a new governing body by allowing the institution to possess jurisdiction over certain policy domains[4]. Complementarity manages the allocation of jurisdiction between the supranational and the national level, while subsidiarity determines the location of prosecution within the national level[5]. The continuum measures the movement from inter-

[1] See Martin Trybus European Union law and Defence Integration /Hart publishing Oxford and Portland Oregon 2005, p. 3:

[2] See interpretation of F. Capotori, entry on 'Supranational Organisations' in Bernardt, vol V, p. 264.

[3] See Esty, Daniel C., "Good Governance at the Supranational Scale: Globalizing Administrative Law" (2006). Faculty Scholarship Series. Paper 428. p. 1498.

[4] See Tillman, Kathrine (Katie), "Why States Seek Membership in Supranational Institutions" (2015). Honors Theses. Paper 76., p 11.

[5] See Burke-White, William W., "A Community of Courts: Toward a System of International Criminal Law Enforcement" (2002). Faculty Scholarship. Paper 1288, p. 91.

governmental to supranational governance in three interrelated dimensions:

• EC rules: the legal, and less formal, constraints on behavior produced by interactions among political actors operating at the European level;

• EC organizations: those governmental structures, operating at the European level, that produce, execute, and interpret EC rules; and

• transnational society: those non-governmental actors who engage in intra-EC exchanges - social, economic, political - and thereby influence, directly or indirectly, policy-making processes and outcomes at the European level[6].

Contrary to it, we argue that governments do not control legal integration in any determinative sense and therefore cannot control European integration more broadly. We do not want to be misunderstood. The EC polity contains strong "intergovernmental" components, that is, EC politics are partly constituted by the interactions among representatives of the governments. But it is our contention that "intergovernmentalism"[7], when that term denotes the body of theory and causal propositions about European integration, is deeply flawed (see also Pierson 1996). In using the word intergovernmentalism, we need to distinguish the descriptive from the theoretical label. Moreover, any theory of European integration must notice and take account of the role of governments, clearly stating how that role is conceptualized[8]. The Council of Ministers and representatives of the member states are important actors in European politics. We understand their effect on integration to be positive when they (1) work with supranational institutions to adopt, at the supranational level, Euro-rules and (2) transpose, on the national level, European directives into national law.

Intergovernmentalists accord relative priority to member state governments representatives of the national interest who bargain with one another in EC fora to fix the terms and limits of integration. Supranationalists (especially the heirs of neofunctionalism), accord relative priority to EC institutions-representatives of the interests of a nascent transnational society, who work with public and private actors at both the European and national levels to remove barriers to integration and to expand the domain of supranational governance[9].

Lisbon started out as a reinforcement of supranationalism (the Constitution) but seemed to have strengthened supranationalism. The new functions such as the European External Action Service (EEAS), the permanent president of the European Council and the formalisation of the European Council as an EU Institution, reinforce according to some the intergovernmental sides of the EU (Defraigne, 2010; Behr, 2010)[10]. Academics interested in the daily working process of the European Political Cooperation and later on of the Common Foreign and Security Policy (CFSP) structures have been interested in looking at the actors and their interaction. In 1998, Allen coined the term of 'Brusselisation' to describe the transfer of competences from the member states' capitals to Brussels. This is made possible via the working groups of the Council dealing with CFSP (Allen, 1998)[11]. There is an approach which justifies (reasoning) that roots of lag (retard) on the field of legal and institutional formalization of the Common Foreign and Security Policy and Common Defense and Security Policy on progress in creating the Single Market, Economic and Monetary Union, preference for intergovernmental rather than supranational tooling production, making and implement-ting decisions[12]. Hence, at first sight, CFSP maintained the "intergovernmental" nature that it, allegedly, had when it was established in 1992[13]. However, over the past year research revealed that actually CFSP is clearly different from the policy that was created twenty-five years ago. The legal order of the European Union proved to have its own dynamics, which resulted in an increasing number of similarities between CFSP and the policies of the European Community. Step by step the subsequent treaty modifications introduced, sometimes rather technical innovations, which in turn led to a new legal and political situation. In addition, and apart from formal treaty changes, the CFSP legal order was affected by the case law of the

[6] See Sweet, Alec Stone and Sandholtz, Wayne, "European Integration and Supranational Governance" (1997). Faculty Scholarship Series., (Journal of European Public Policy), Paper 87, p. 304.

[7] In political science, intergovernmentalism treats states, and national governments in particular, as the primary actors in the integration process: See Teodor Lucian Moga (2009). "The Contribution of the Neofunctionalist and Intergovernmentalist Theories to the Evolution of the European Integration Process" (PDF). Journal of Alternative Perspectives in the Social Sciences. Retrieved 21 May 2012.; See web sours: https://en.wikipedia.org/wiki-/Intergovernmentalism.

[8] See Alec Stone Sweet; Thomas L. Brunell, "Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community". Faculty Scholarship Series. Paper 86., The American Political Science Review, Vol. 92, No. 1. (Mar., 1998), p. 73.

[9] See Alec Stone Sweet; Thomas L. Brunell. Above, at 63.

[10] See Schout, A., S. Wolff. (2011) "Ever closer Union: supranationalism and intergovernmentalism as scale or concept? in F. Laurson (ed.), (PORTO 2010), p. 2.

[11] See Schout, A., S. Wolff. Above, at 15.

[12] See European Law. The Law of the European Union and legal protection of human rights. Textbook for High Schools / Executive editor L. M. Entin. - 3rd edition, revised and enlarged – M. : НОРМА : ИНФРА-М, 2012. – p. 428.

[13] See Denza, E. (2002). The Intergovernmental Pillars of the European Union, Oxford: Oxford University Press p. 95.

European Court of Justice, which further defined its relation to the external relations of the Community, as well as the effect of its instruments[14]. This development was even labelled "progressive supranationalism" by one (close) observer[15]. Based on earlier research on the development of the CFSP legal order, our hypothesis is that the new Lisbon rules on the right of initiative and the voting rules show a move towards a lessintergovernmental CFSP, or perhaps even a "progressive supranationalism"[16]. Thus a new, more supranational element into the CFSP by allowing initiatives in this area to be taken by an "agent" of the Union, rather than just by Member States. Similarly, the competence to convene an extraordinary meeting was moved from the Presidency to the High Representative, which implied that for the first time the Council could be convened on the initiative of the EU itself[17].

Social exchange across borders drives integration processes, generating social demands for supranational rules, and for higher levels of organizational capacity to respond to further demands[18]. In the activities of the institutions of the integration community the supranationality is the scope of the powers of the institutions of the integration community, defined in the constituent agreements, to take decisions that are mandatory for the member states, according to the procedure established in the constituent contracts[19]. Thus, we can speak only about certain elements of supranationality in the activities of the institutions of the Union, and not about supranationality in broad sense. In addition, the limits of supranation-nality are established by the states in the constituent treaties[20]. Supranational functions are given to integration institutions when, in order to simplify decision-making in areas that are exhaustively enumerated in constituent contracts, supranationality is necessary as a mechanism to avoid deadlocks in the process of harmonizing the will of states. However, in this case it is considered that such an agreement has already been reached in the constituent agreements. Therefore, it is sovereignty that creates supranationality[21]. This relationship between supranational institutions and the citizens and subjects of domestic governments represents another departure from the bedrock assumption of traditional public international law: that states, functioning as unitary entities, are the only subjects of international rules and institutions and hence the only recognized actors in the international realm. Supranational-ism, like contemporary human rights law, acknowledges that states are themselves composed of governments interacting with a panoply of non-state actors: individuals, groups, corporat-ions, and voluntary organizations. Recognizing rights for these non-state actors and granting them distinct and independent status before supranational institutions dismantles the fiction of the unitary state[22].

Over the years, the debate has become more diverse, evolving from a 'trade-off' analysis to addressing the overlap. Wallace (2007) posits that supranationalism is to a large extent intergovernmentalism in disguise: "the original European Communities represented a negotiated compromise, in which rhetorical commitment to integration, even to eventual federation, was intertwined with the promotion and protection of national interests"[23]. Whether the EU becomes more supranational or more intergovern-mental is important for practitioners and for EU integration theory. Sovereign states functioned as the chief actors within the system, while intergovernmental and nongovernmental organizations played relatively minor roles. Custom and state practice came to be seen as primary sources of the law of nations, which largely mirrored and ratified state conduct[24]. The issue of confrontation and primacy of some categories such as State sovereignty vs Supranational institutions or more precisely Supranational regulations vs intragovernmental regulations, or EU regulations vs Stats basic laws - so they have been resolved by European court. If we look to the Solange jurisprudence of the German Constitutional Court, which was considered by many observers to provide a persuasive model for addressing the kind of conflict at issue in Kadi, we see that the German court's decision – especially but not only in Solange II[25] - is expressed in a more

[14] See Ramses A. Wessel, Initiative and Voting in Common Foreign and Security Policy: The New Lisbon Rules in Historical Perspective (2012), p. 2.

[15] See (Director of the Legal Service of the Council) Gosalbo Bono, R. (2006). Some Reflections on the CFSP Legal Order. 43(2) CMLRev, p. 349.

[16] See Ramses A. Wessel, Above, at 2.

[17] See Ramses A. Wessel, Above, at 23.

[18] See Sweet, Alec Stone and Sandholtz, Wayne. Above, at 300.

[19] See Мещерякова О. М. Наднациональность в Европейском Союзе и принципы действия коммунитарного права // Вестник РУДН: Серия "Юридические науки" - М.: Изд. РУДН, 2011, №4 – p. 173.

[20] See Мещерякова О. М. Above, at 174.

[21] See Мещерякова О. М. Above, at 175.

[22] See Toward a Theory of Effective Supranational Adjudication, Laurence R. Helfer, Anne-Marie Slaughter (1997), p. 288.

[23] See Schout, A., S. Wolff. Above, at 12.

[24] See Why Do Nations Obey International Law? Harold Hongju Koh, (Yale Law School, 1997), p. 2607.

[25] See Solange II, BVerfGE 73, 339 2 BvR 197/83 (1986), [1987] 3 CMLR 225. This stance was subsequently confirmed and even strengthened in the Solange III judgment of the

directly dialogic and outward-looking terms which reflect the core elements of a soft constitutionalist approach. The conflict at issue in the German case was between a provision of the German Basic law and an EC regulation, but in that sense also a conflict between the internal constitutional norms of one political entity and the legal requirements imposed by an international or supranational system of which the former entity is a part. In its Solange I judgment the Bundesverfassungsgericht (Federal Constitutional Court) declared that each of the two organs in question - which in that case were the Constitutional Court and the ECJ respectively – had a duty "to concern themselves in their decisions with the concordance of the two systems of law"[26]. The relationship between the EC and Germany was not presented by the German Constitutional Court in hierarchical terms, but neither was it described in strongly pluralist or confrontational terms. Instead the judgment emphasized the mutually disciplining relationship between the two legal systems[27]: "The binding of the Federal Republic of Germany (and of all member states) by the Treaty is not, according to the meaning and spirit of the Treaties, one-sided, but also binds the Community which they establish to carry out its part in order to resolve the conflict here assumed, that is, to seek a system which is compatible with an entrenched precept of the constitutional law of the Federal Republic of Germany. Invoking such a conflict is, therefore, not in itself a violation of the Treaty, but sets in motion inside the European organs the Treaty mechanism which resolves the conflict on a political level"[28]. During this period, the ECJ found that certain treaty provisions (Van Gend en Loos, ECJ 1963)[29] and a class of secondary legislation, called "directives" (Van Duyn, ECJ 1974a)[30], were directly effective. The "regulation," the other major type of secondary legislation, is the only class of Euro-rule that was meant (according to the Treaty of Rome) to be directly applicable in national law. These moves integrated national and supranational legal systems, establishing a decentralized enforcement mechanism for EC law. The mechanism relies on the initiative of private actors. The doctrine of direct effect empowers individuals and companies to sue national governments or other public authorities for not conforming to obligations contained in the treaties or regulations or for not properly transposing provisions of directives into national law[31].

Summarizing the issues, we need to emphasize that each of mentioned categories whether it be supranational or international legal regulation proved their legal capacity and necessity be in-demand. Eventually, due to the peculiarity of regulated legal relations and the extent of involvement and spheres of governed legal relations each of them is in its place. There is no need to replace them, only the appropriate combination and complementarity and integration in accordance with generally accepted international standards in the international system of legal regulation. On subject of supranational legal regulations and governance we should emphasize that current level of integration and globalization requires more such a kind of legal regulations. The role of the supranational governance should be increased and finally it could become centralized management with a single center for planet earth, single legal field for all people.

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[28] Ibid.

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