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THE DEVELOPMENT OF THE JUDICIARY IN THE CONTEXT OF GLOBALIZATION

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Abstract

Globalization as a multidimensional objective process has covered all spheres of public life. In the legal sphere, globalization has manifested itself in a radical change in the paradigm of legal understanding, the creation of new concepts of transnational, global, "non-state" law. Many scientific papers are devoted to General issues of law and state development in the conditions of globalization. However, the impact of globalization on the development of the judiciary is poorly understood and requires further research. Globalization processes lead to the "denationalization" of the institution of the judiciary, the emergence of a significant number of international justice institutions. The activities of international judicial bodies with recommendatory jurisdiction and ad hoc judicial bodies initially lead to the possibility of limiting sovereignty or "sovereignty cession", subject to the agreement of the state. A radical paradigm shift in the understanding of the judiciary institution in the context of globalization is the formation of judicial bodies with binding jurisdiction, triggering the redistribution of sovereignty on the basis of voluntary authorizing of judicial bodies for a number of functions by states, including the function of monitoring the implementation of international treaties by the states. A hypothesis was put forward that the process of globalization contributes to the creation of a new type of judiciary, acting at the international level and objectively acquiring the properties of sovereign power within the "separation of sovereignty" process, gradually appropriating the law-making powers..

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1. Introduction

The process of globalization radically changes the structure of modern society. The globalization process rises from the economic sphere and objectively covers the state and legal spheres of society. Recognizing changes in the society structure, predicting the future movement of society towards "activity expansion without state boundaries" (Held & McGrew, 2003), the creation of a "network society" (Castells, 2010), scholars have identified trends towards the weakening of state sovereignty, and termination of its monopoly on the legal framing. The recognition of sovereignty as a "mistake, an illegitimate offspring", the identification of the tendency to "extinction of the state" (Schreurer, 1993) leads to radical changes in the legal sphere. A number of scholars raise the question of the emergence of a new concept of law: transnational, global, world. Changes in the state legal sphere inevitably result in a transformation in the understanding of the judiciary and changes in national judicial systems.

The general trend of globalization influence on the judiciary institution is reflected in the emergence of a huge number of international, interregional and regional judicial bodies. Before 1990 there were only 6 permanent international courts in the world, but by 2016 their number exceeded 30 (Ispolinov, 2018). The basis for the establishment of international courts is the process of sovereignty dividing between a state and an international judicial body. Within the framework of integration associations, courts are authorized for the largest amount of powers by the member States of integration entities (the European Union, the Eurasian Economic Union). Under the influence of law internationalization trends, international judicial bodies formulate unitary law standards, assuming the law-making function at the international and supranational levels. Binding authority of international and integration judicial bodies resolutions gives them the ability to influence national judicial systems directly. Empirical material based on the analysis of the practice of international judicial authorities shows the impact of global trends in the standardization of law on the development of the judiciary at the international level, which allows us to hypothesize about the emergence of a special type of judicial power (international or global judicial power). New tendencies are formed for establishing a dialogue between national and international judicial bodies and the emergence of a global community of judges.

2. Problem Statement

A great number of foreign and Russian studies (Giddens, 2004; Lukashuk, 2005; Twining, 2009 etc.) are devoted to the study of the main trends in the impact of globalization on state and legal structures in general. General issues of international justice development in the context of globalization (Alter, 2019a; Romano, 2014, etc.), the creation of a "global community of courts" (Martinez, 2003; Slaughter, 2003) are actively studied in foreign legal doctrine. However, in Russian legal science, the problems of the impact of globalization on the judiciary as an institution of society and the judicial systems of states are underexplored and require further research.

The novelty of the study consists in the analysis of the influence of globalization on the judiciary from the perspective of general theoretical issues, the transformation study of judiciary essence and nature under the influence of globalization, through the prism of sovereignty separation concept.

Extensive empirical material in the framework of the international, interregional judicial bodies activities offers an opportunity to take the first steps in conceptualizing the impact of globalization on the essence of judiciary institution and on national judicial systems.

3. Research Questions

Intensification of globalization processes in the legal sphere, growth of international, supranational, regional organizations and associations leads to the fact that international supranational community is becoming more and more "judicial".

Objective data on activities of the international judicial bodies demonstrate the main globalization trend in the field of judicial power – expansion in the number of judicial bodies and strengthening their authority. International organizations initially faced the question of control mechanism establishment to ensure the process of their existence and achievement of integration goals. Determination of the entity exercising control functions over their activities made it possible to exclude integration participants from direct conflict with each other. The "Third force" capable of resolving conflicts in integration entities is the international judicial bodies.

Initially, the jurisdiction granted to international judicial bodies was recommendatory in nature, requiring states consent for a case to be submitted to the court and to consider adjudication against them. Thus, the first international judicial body with universal jurisdiction, the Permanent Court of International Justice of the League of Nations, had merely recommendatory jurisdiction. Created on its prototype, the mechanism of the International Court of Justice of the United Nations has also had merely recommendatory jurisdiction since the moment of creation.

However, the further development of globalization processes, primarily, the increase in the number of participants taking part in integration processes, the change in the society structure under the influence of these processes led to the search for a more reliable mechanism to ensure control over their activities, which caused the need to establish new-format courts. By the mid-1990s, the control mechanism desperately need a feedback guarantee, lack of which turned its existence, in most cases, in illusion. Thus, two states (USA, France) withdrew from the Advisory Jurisdiction of the International Court of Justice, withdrawing the Declaration on the Binding Jurisdiction of the ICJ, after the dispute was settled in their disfavour.

The process of authorizing international judicial bodies with binding jurisdiction was intended to guarantee the effectiveness of their supervisory powers. Since the mid-1990s, there has been an "snowballing growth of courts" with binding jurisdiction (Ispolinov, 2018). It became clear to states that the courts can exercise real control over the implementation of international treaties only by attributing binding competence.

It seems that the attributing of binding jurisdiction to international courts means nothing more than the consent of states to transfer part of their sovereignty in favour of international judicial bodies. According to Golovko and Mat'e (2018) the partition of sovereignty "is due to the fact that justice is one of the sovereignty instruments, it is administrated in a single and undivided way on behalf of the state" (p. 67).

By submitting part of the disputes to their consideration, the state a priori agrees to the possibility of sovereignty restriction or allows certain actions related to the binding to voluntarily restrict its sovereignty. Binding jurisdiction means the voluntary consent of states to the execution of international courts decisions, acceptance of binding interpretation and application of international treaties in their wording.

Professor Romano (2014), who studies the issues of international justice, rightly emphasizes that the real revolution in the paradigm of understanding the judiciary is the emergence of international courts with binding jurisdiction.

The famous American scientist Alter (2019b), who established an interdisciplinary approach to international justice, develops the concept that States, establishing courts, act as principals, delegating to the agents a number of functions that are more effectively implemented by the courts, and not by a group of states.

A comprehensive analysis of international treaties clearly demonstrates that States delegate a number of functions to international judicial bodies: dispute settlement, control over the international treaties implementation by States, interpretation and application of these international treaties.

Thus, a patent example is article 32 of the European Convention on Human Rights (ECHR), according to which ipso facto all issues of interpretation and application of the Convention belong to the European Court of Human Rights (ECHR). This provision allowed the ECHR to develop the provisions of the Convention, using the living instrument doctrine and actually become the Creator of legal standards.

However, the courts of integration associations (the court of the EU, the court of the EAEU) are vested with the largest scope of powers. The integration courts are also given control over the actions of the international organizations institutions, compliance of their decisions with the constituent documents of the organizations, which leads to the constitutionalization of the courts (Keleman, 2016). Thus, as authorized by the EU Court of Justice in Case of Costa V. E.N.E.L. "By creating communities, States have agreed to transfer part of their competence to the supranational level, thereby leaving part of their issues to the discretion of special bodies and agreed in advance with their decisions." Judge of the EAEU court Chaika (2019) rightly points out that member States, by establishing integration associations, transfer to them sovereign powers in certain areas where courts will resolve issues between States.

The analysis of international legal documents and the practice of authority delegation to the courts, allows us to formulate a hypothesis that the basis for the establishment of international courts is the process of sovereignty partition between the state and the international judicial body. Since the advent of courts with binding jurisdiction, the principle of consent decree by a state to the recognition of a rule of international law as compulsory has gradually but steadily begun to lose its influence. This principle is transformed into the principle of implicit acceptance of the international judicial bodies interpretation.

Evidence of the fact that States transfer part of their sovereignty to international judicial bodies is provided by quantitative indicators of the enforceability of international judicial decisions. So, according to the studies of Posner and Yoo (2005) indicators of enforceability of international courts decisions are quite high: EU Court of Justice – 82 %, ECHR – 80 %, WTO Dispute Settlement Body – 66 %, Inter-American Court of Human Rights – 4%. There is no enforcement mechanism in international law that

could compel courts to execute judgments, in the manner of national mechanisms. It turns out that States consciously limit their sovereignty.

The final stage of the concept implementation of binding jurisdiction of international courts under the influence of the global trend on law internationalization is the creation of uniform standards within international organizations. The new concept of law in the context of globalization contributes to the emergence of new lawmaking subjects. By establishing uniform law standards, international judicial bodies gradually assume the function of law creators at the international and supranational levels and create a new type of law.

Analysis of the establishing and functioning of international and supranational courts, created as a result of the application of their sovereignty by the state, the procedure for vesting them with powers, allows us to identify trends in the formation of a special type of judicial power: international judiciary or global judiciary.

The proposed hypothesis is confirmed by the provisions of a number of theories about the judiciary development in the context of globalization processes and the formation of integration processes within the judicial community.

The binding jurisdiction of international and integration courts gives them the ability to directly influence national judicial systems. A number of foreign authors in the light of globalization processes intensification suggest talking about the creation of a "global community of courts" (Martinez, 2003; Slaughter, 2003). Combining professionally homogeneous judicial corps, uniform relations in the legal proceedings field and the judicial system, such a structure can become a new integration Association.

Global Association of judges presupposes the interpenetration of the judicial sphere in the form of mutual citation of the legal rulings of the courts, the dissemination of legal doctrines and concepts based on universal values. Thus, the EU Court has actively cited the legal rulings of the ECHR in its resolutions (for example, for the first time the EU Court referred to the practice of the ECHR in the Rutili case of 1975) (Kassoti, 2015).

It seems that it is the global organization of judges that is gradually transformed into a new lawmaking subject in the context of globalization. De facto, even nowadays, States tacitly acknowledge the precedent-setting nature of the international courts rulings. International courts, proceeding from the peculiarities of the construction of international treaties, tacitly assume the functions of the state to create rules of law. It turns out that the court becomes the Creator of a new transnational, global law.

4. Purpose of the Study

The aim of the study is a comprehensive analysis of the impact of the main globalization processes on the judiciary development, changing its essence, the emergence of a new type of judicial power.

5. Research Methods

The main research method was the comparative legal method. A specific sociological method was used to analyze empirical data reflecting the impact of globalization processes on the functioning of the judiciary.

6. Findings

The tendency of "denationalization" of the judiciary institution, which has arisen under the influence of globalization, leads to the emergence of a significant number of international, interregional and regional institutions of justice.

Internationalization and standardization as the main trends of globalization processes in the field of law led to the state sovereignty weakening, the formation of a tendency to transfer sovereignty from the state to the international judicial bodies.

The initial attributing of international judicial bodies with Advisory jurisdiction meant only the possibility of limiting the sovereignty of the state, since the enforceability of decisions was subject to the consent of the state.

A radical paradigm shift in the understanding of the judiciary and the distribution of powers at the international level in the context of globalization is the formation of judicial bodies with binding jurisdiction. Binding jurisdiction, triggering the redistribution of sovereignty on the basis of voluntary authorizing of judicial bodies for a number of functions by states, including the function of monitoring the implementation of international treaties by the states;

The analysis of international legal documents and the practice of authority delegation to the courts, allows us to formulate a hypothesis that the globalization process contributes to the creation of a new type of judicial power (international judicial power or global judicial power), acting at the international level and objectively acquiring within the process of "partition of sovereignty" the properties of sovereign power, gradually appropriating the law-making powers.

Empirical evidence of judiciary sovereignty is the integration processes within the judicial community, the formation of a global community of courts and the establishment of a dialogue between national and international judicial authorities.

7. Conclusion

The presented analysis is devoted to the conceptualization of the impact of globalization on the development of the judiciary institution, generalization of approaches to the establishment of international judicial bodies, which allows us to comprehend the denationalization experience of judiciary and determine the guidelines for further scientific research. The conclusions of the presented study are of practical importance for understanding the formation of a global community of courts, effective dialogue between national and international judicial authorities, as well as determining the possibility of the judiciary to act as an element of the mechanism of global governance of society.

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