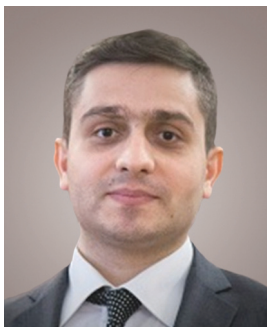


STATES AND INTERNATIONAL ORGANIZATIONS IN THE EARLY 21ST CENTURY: RETHINKING THE CONCEPT OF SOVEREIGNTY



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Abstract

The active participation of states as members in international organizations, including regional economic integration organizations, and the recent rapid growth in the number of such organizations, has necessitated renewed discussions of the idea of potential limitation of state sovereignty in the early 21st century. The analysis of the texts of basic laws (constitutions) of a number of member-states of certain international organizations, as well as the contemporary doctrine of international law, draws us to the conclusion that the limitation of sovereignty today is quite possible on account of the transfer of sovereign powers from the state to the international organization. Meanwhile, the article justifies the impossibility of the transfer of state sovereignty to the international organization in its entirety.

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I. INTRODUCTION

Today, in the early 21st century, international organizations play a vital role in almost every field of international relations, and according to data collected by the Union of International Associations (UIA) by 2015 the number of public international organizations had risen to 7757.²

Active participation of states in international organizations as members has necessitated renewed discussions of the idea of potential limitation of state sovereignty.

In order to clear up the ambiguities surrounding the discussion it seems essential to refer to the constituent instruments of international organizations, as well as to the texts of basic laws (constitutions) of a number of member-states of certain international organizations.

² Yearbook of International Organizations (2015/2016), Union of International Associations. München, 2015. P. 25. Available at: https://www.uia.org/sites/uia.org/files/misc_pdfs/stats/Number_of_international_organizations_by_type_2014.pdf.

II. DISCUSSION

Basic Law for the Federal Republic of Germany of 1949 contains a separate Article 24 entitled “Transfer of sovereign powers — System of collective security”. Para. 1 of the aforementioned Article says that “The Federation may by a law transfer sovereign powers to international organisations.”³

Article 11 of the Constitution of the Italian Republic of 1947 proclaims that “Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends.”⁴

Article 92 of the Constitution of the Kingdom of the Netherlands of 2008 enshrines that “Legislative, executive and judicial powers may be conferred on international institutions by or pursuant to a treaty, subject, where necessary, to the provisions of Article 91 paragraph 3.”⁵

Section 93 of the Spanish Constitution of 1978 envisages that “Authorization may be granted by an organic act for concluding treaties by which powers derived from the Constitution shall be transferred to an international organization or institution. It is incumbent on the Cortes Generales or the Government, as the case may be, to ensure compliance with these treaties and with resolutions originating in the international and supranational organizations to which such powers have been so transferred.”⁶

³ Basic Law for the Federal Republic of Germany, 23 May 1949. Available at: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html.

⁴ Constitution of the Italian Republic, 22 December 1947. Available at: https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

⁵ Constitution of the Kingdom of the Netherlands, 1815. Available at: <https://www.government.nl/binaries/government/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008/the-constitution-of-the-kingdom-of-the-netherlands-2008.pdf>.

⁶ Spanish Constitution, 6 December 1978. Available at: http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_o.pdf.

However, the Constitution of the Republic of Macedonia of 1991 (Macedonia is a potential candidate for EU membership) stands aloof from the above listed constitutions. It contains two interrelated articles which explicitly rule out the possibility of state sovereignty limitation. Article 1 of the Constitution states that “The sovereignty of the Republic of Macedonia is indivisible, inalienable and non-transferable” and Article specifies that “In the Republic of Macedonia sovereignty derives from the citizens and belongs to the citizens.”⁷

One may easily infer from the analysis of the relevant constitutional provisions that different phrases appear in them when it comes to sovereignty in the context of participation of states in international organizations as members, that is to say, limitation of sovereignty; transfer of sovereign powers; conferral of legislative, executive and judicial powers; transfer of powers; non-transferable sovereignty.

Recently there have been attempts to make a clear distinction between the terms “limitation of sovereignty”, “delegation of sovereign powers” and “transfer of sovereign powers” in the doctrine of international law. It is worthy to note that some authors go even further and speak of “transfer of sovereignty” without making any differences between the terms “transfer of sovereignty” and “transfer of sovereign powers”.⁸

Antonio Cassese, an internationally renowned Italian law professor, in his course of lectures delivered at the Hague Academy of International Law in 1985 observed that the decisive criterion used to determine whether the sovereignty has or has not been transferred lies in the scope of sovereign powers which are conferred on international organizations. He argued that whenever in addition to legislative and judicial powers states also delegate or transfer executive powers to an international

⁷ Constitution of the Republic of Macedonia, 17 November 1991. Available at: [http://eudo-citizenship.eu/NationalDB/docs/MAC%20Constitution%20\(amended%20by%20XXX\)%20eng.pdf](http://eudo-citizenship.eu/NationalDB/docs/MAC%20Constitution%20(amended%20by%20XXX)%20eng.pdf).

⁸ MM Martin Martinez, *National Sovereignty and International Organizations* (Kluwer Law International 1999) 11.

organization, which include the all-important function of enforcement, it can be said that a “transfer of sovereignty” has taken place⁹.

It should be noted, however, that the state which transfers the sovereign powers does not confer its powers *in toto* on the international organization. The state retains some portion of sovereignty, agreeing only to limit on a voluntary basis the exercise of certain sovereign powers in favour of an international organization. Hence, one may speak of a possible transfer of certain sovereign powers but cannot speak of a transfer of sovereignty in its entirety.

Further, the view advanced above may be reinforced by the position of the European Court of Justice reflected in the following quote from the landmark judgment in *Flaminio Costa v E.N.E.L.* Case: “By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States *have limited their sovereign rights, albeit within limited fields* (italics supplied), and have thus created a body of law which binds both their nationals and themselves.”¹⁰

A much tougher stance on the issue of possible transfer by states of their sovereignty to international organizations was initially taken

⁹ A Cassese, *Modern Constitutions and International Law* (1985) 192 *Recueil des cours de l'Academie de droit international de La Haye* 416.

Different points of view on this issue has instead been expressed by eminent scholars and experts in international law. As Martti Koskenniemi points out, “formal sovereignty may today co-exist even with a situation where state organs have almost fully given up their decision-making powers in some area — economic or energy policy for example — to an international organization”. M Koskenniemi, *What Use for Sovereignty Today?* 1 *Asian Journal of International Law* (2011) 62–63.

Kamil Bekyashev argues that “Vesting a number of international organizations with executive functions does not imply transfer of the part of sovereignty of states or their sovereign powers to them. International organizations does not possess sovereignty and cannot possess it”. *Mezhdunarodnoe publichnoe pravo / Otv. red. K. A. Bekyashev. Moskva: Prospekt, 2009. S. 120* (Bekyashev, K. A. (ed). *Public International Law*. Prospekt. 2009. 120).

¹⁰ Judgment of the Court of 15 July 1964 — *Flaminio Costa v E.N.E.L.* (Case 6/64). P. 593. EUR-Lex Database. Available at: <http://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:61964CJ0006&from=EN>.

by the Constitutional Council of the French Republic in its decision rendered in 1976. The Council held unequivocally that “no provision of a constitutional nature authorizes transfers of all or part of national sovereignty regardless of the international organization.”¹¹ The Council, however, later softened its stance in its judgment of 9 April 1992 declaring that “It follows from these various institutional provisions that respect for national sovereignty does not preclude France, acting in accordance with the Preamble to the 1946 Constitution, from concluding international agreements for participation in the establishment or development of a permanent international organisation enjoying legal personality and decision-making powers on the basis of transfers of powers decided on by the Member States, subject to reciprocity.”¹²

Professor of the University of Oxford Den Sarooshi in his fundamental work entitled “International Organizations and Their Exercise of Sovereign Powers”, which appeared in 2005, singles out the following important features of transfers of sovereign powers which allow to distinguish between the “transfers” and “delegations” of sovereign powers. The features of transfers of powers are that they are generally irrevocable, states cannot exercise direct control over the

¹¹ Décision n° 76-71 DC du 30 décembre 1976 — *Décision du Conseil des communautés européennes relative à l'élection de l'Assemblée des Communautés au suffrage universel direct* (para. 2). Les décisions du Conseil constitutionnel français. Available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/pdf/conseil-constitutionnel-7453.pdf>.

¹² Decision 92-308 DC of 9 april 1992 — *Treaty on European Union* (para. 13). Les décisions du Conseil constitutionnel français. Available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/92-308DC-a92308dc.pdf>.

Following the signing of the Treaty of Lisbon of 2007, the Constitution of France of 7 October 1958 has been supplemented by a new Article 88-1: “The Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December, 2007”. Constitution of France, 4 October 1958. Available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/pdf/conseil-constitutionnel-25742.pdf>.

organization, and states consent to be bound by the decisions of an organization.¹³

In cases where the constituent instrument of an international organization does not expressly provide for withdrawal of a member-state from an organization one may speak of transfers of sovereign powers which are irrevocable.¹⁴ Irrevocable nature of transfers of powers (*ad aeternitatem*) makes it possible to generally distinguish the latter from the delegations of powers which can be revoked by states at any time. Today the constituent instruments of several international organizations do not contain any provisions on withdrawal of member-states (e.g., the United Nations, the World Health Organization, Association of Southeast Asian Nations).

Prior to the Treaty of Lisbon of 2007 there was no express provision on withdrawal from the European Union under the Treaty on European Union of 1992 (Maastricht Treaty).¹⁵ In the same period the European Court of Justice had also the occasion to pronounce on the nature of sovereign powers conferred upon the EU by its member-states. The Court in the already cited judgment in *Flaminio Costa v E.N.E.L.* Case explained that “The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations

¹³ D. Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (Oxford University Press 2005) 65.

¹⁴ The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986 provides in Article 56 that: “A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal”. The Article contains, however, 2 exceptions to this rule. Denunciation or withdrawal is still possible if: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty. The applicability of the 1986 Convention “to any treaty between one or more States and one or more international organizations which is the constituent instrument of an international organization...” has been confirmed in Article 5 of the Convention. It is worthy of note that the 1986 Convention has not yet entered into force. United Nations Treaty Collection. Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-3&chapter=23&clang=_en.

¹⁵ Article 50 of the Treaty of Lisbon of 2007 provides as follows: “Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.”

arising under the Treaty carries with it *a permanent limitation of their sovereign rights* (italics supplied), against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.”¹⁶

However, the revocability of the sovereign powers is not the sole and precise criterion required to qualify the powers granted by states to international organizations as transferred. The transfer of sovereign powers can also take place in cases where states confer upon international organizations powers which are revocable, but which deprive the states of control over the organization’s exercise of powers.

Thus, the presence of clear provisions in constituent instruments of international organizations on direct applicability (direct effect) of acts of international organizations within the territory of member-states, without the need for any special implementing national legislation, may serve as an important indicator of “transfer” of sovereign powers.

The European Union provides a classic example of “transfer” of sovereign powers by its member-states. As specified in para. 2 of the Article 288 of the Treaty on the Functioning of the European Union of 2007: “A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.”¹⁷

This provision has been subject to interpretation by the European Court of Justice. The Court in its judgment of 14 December 1971 held that “Under the terms of the second paragraph of Article 189 regulations ‘shall have general application’ and ‘shall be ... directly applicable in all Member States’. Therefore, by reason of their nature and their function in the system of the sources of Community law, regulations *have direct effect* (italics supplied) and are as such, capable of creating individual rights which national courts must protect.”¹⁸ The Court has

¹⁶ Judgment of the Court of 15 July 1964. Op. cit. P. 594.

¹⁷ Consolidated Version of the Treaty on the Functioning of the European Union, Article 288. EUR-Lex Database. Available at: http://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_2&format=PDF.

¹⁸ Judgment of the Court of 14 December 1971 — *Politi s.a.s. v Ministry for Finance of the Italian Republic (Case 43/71)*. P. 1048. EUR-Lex Database. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61971CJ0043&from=EN>.

confirmed this position and has given precision and definiteness to it in its subsequent practice.¹⁹

The issue of state sovereignty becomes particularly relevant for the Russian Federation in the context of formation of a new international organization in the Eurasian space — the Eurasian Economic Union, and active participation of Russia in it.

The Constitution of the Russian Federation of 1993 provides a clear legal basis for the participation of the Russian state in interstate associations and the transfer of the part of its sovereign powers to them. Thus, under Article 79 of the Constitution of the Russian Federation “The Russian Federation may participate in interstate associations and transfer to them part of its powers according to international treaties and agreements, if this does not involve the limitation of the rights and freedoms of man and citizen and does not contradict the principles of the constitutional system of the Russian Federation.”²⁰

States Parties to the Treaty on the Eurasian Economic Union of 29 May 2014 (the Republic of Armenia, the Republic of Belarus, the Republic of Kazakhstan, the Kyrgyz Republic and the Russian Federation) decided on the basis of this Treaty to give direct effect to certain acts of the Union within their national legal systems. Thus, under Para. 13 of the Annex 1 to the Treaty on the Eurasian Economic Union “The Commission shall, within its powers, adopt decisions with

¹⁹ *E.g., Judgment of the Court of 7 February 1973 — Commission of the European Communities v Italian Republic Case (39/72)*. P. 114. EUR-Lex Database. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61972CJ0039&from=EN> (“According to the terms of Article 189 and 191 of the Treaty, Regulations are, as such, directly applicable (*italics supplied*) in all Member States and come into force solely by virtue of their publication in the Official Journal of the Communities, as from the date specified in them, or in the absence thereof, as from the date provided in the Treaty. Consequently, all methods of implementation are contrary to the Treaty which would have the result of creating an obstacle to the direct effect of Community Regulations and of jeopardizing their simultaneous and uniform application in the whole of the Community”); *Judgment of the Court of 4 April 1974 — Commission of the European Communities v French Republic (Case 167/73)*. P. 372. EUR-Lex Database. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61973CJ0167&from=GA> (“...Article 48 and Regulation No 1612/68 are *directly applicable* (*italics supplied*) in the territory of the French Republic...”).

²⁰ The Constitution of the Russian Federation, 12 December 1993. Available at: <http://www.constitution.ru/en/10003000-04.htm>.

regulatory and binding effect for the Member States, organizational and administrative dispositions and non-binding recommendations. Decisions of the Commission shall form part of the Union law and shall be *directly applicable* (italics supplied) on the territories of the Member States.”²¹

The Treaty on the Eurasian Economic Union, however, like the Treaty of Lisbon of 2007, contains a provision on withdrawal of member-states from the organization.²² The latter circumstance, as noted earlier, is not a decisive criterion in determining whether or not there has been a transfer of sovereign powers.

III. CONCLUSION

Summarizing the arguments presented above, the following conclusions can be drawn. The limitation of state sovereignty is possible.²³ In practice, sovereignty is limited only on account of the

²¹ The Treaty on the Eurasian Economic Union (29 May 2014) and Annex 1 to the Treaty on the Eurasian Economic Union (Regulation on the Eurasian Economic Commission). Available at: <https://docs.eaeunion.org/en-us>.

²² Article 118 of the Treaty on the Eurasian Economic Union (“Withdrawal from Treaty”) provides as follows: “Any Member State may withdraw from this Treaty by sending to the Depositary of this Treaty via diplomatic channels a written notice of its intention to withdraw from this Treaty. The effect of this Treaty in respect of such state shall cease after 12 months from the date of receipt of the notice by the Depositary of this Treaty”.

²³ In light of the above overview, it is fair to say that there have been predominant views in contemporary Russian doctrine of international law which rule out the possibility of state sovereignty limitation. According to the leading post-Soviet theoretician of international law Stanislav Chernichenko: “The sovereignty of a state is a quality of a state. This is a qualitative and not a quantitative characteristic. For that reason one cannot speak of a limitation of state sovereignty”. Chernichenko S. V. *Ocherki po filosofii i mezhdunarodnomu pravu*. Moskva: Nauchnaya kniga, 2009. S. 755 (Chernichenko, S. V. *Essays on Philosophy and International Law* (Scientific Book 2009) 755). A well-known partisan of this view is a leading Russian international legal scholar of the younger generation Alexey Moiseev. In his view, “Also in our time, one needs to recognize that sovereignty as a category bears absolute character. State sovereignty does not have limits, it cannot be divided and it symbolizes the united will of the people — it either exists or not. The existence of sovereignty serves as a decisive feature to distinguish states from other subjects of international law. Contemporary international law is based on the absolute nature of sovereignty”. Moiseev, A. A.

transfer of powers from the state to the international organization. So there can be no limitation of sovereignty without the transfer of sovereign powers.

However, the transfer of sovereign powers does not imply that the state is deprived of its sovereignty, that it transfers the sovereignty in its entirety to the international organization. The sovereignty is limited by the state voluntarily on the basis of its national constitution and to the extent set down by law as illustrated in the paper through the analysis of the texts of basic laws (constitutions) of a number of member-states of certain international organizations.

There is no limitation of state sovereignty in cases of delegations of sovereign powers where the state retains the right to revoke the sovereign powers conferred upon an international organization; the state has direct control over the organization's exercise of sovereign powers delegated to it and the decisions of international organizations does not automatically bind the member-states.²⁴

Suverenitet gosudarstva v mezhdunarodnom prave. Moskva: Vostok-Zapad, 2009. S. 58–59 (Moiseev, A. A. *Sovereignty of a State in International Law* (East-West 2009) 58–59).

As far as the Soviet doctrine of international law is concerned, a leading Soviet international law scholar and diplomat, the corresponding member of the USSR Academy of Sciences, the President of the Soviet Association of International Law Grigory Tunkin, defending the position of the Soviet State, wrote: "When we speak of the sovereignty of a state, we mean not some kind of 'absolute sovereignty' or 'unlimited freedom of action'. The sovereignty of a state in international relations is the real independence of the state which is not unlimited". Tunkin, G. I. *Osnovy sovremenego mezhdunarodnogo prava*. Moskva: Izdatelstvo Vishei partiinoi shkoly, 1956. S. 16 (Tunkin, G. I. *Fundamentals of Contemporary International Law* (Publishing house of the Higher Party School 1956) 16) Years later, in 1988, he confirmed his earlier viewpoint in a Soviet daily newspaper Pravda — the official newspaper of the Communist Party of the Soviet Union: "State sovereignty is not absolute and does not signify unlimited freedom of action". Tunkin, G. I. *Mekhanizm bezopasnogo mira* // Pravda, 18 iyunia, 1988 (Tunkin, G. I. *Mechanism of the Secure World*. Truth, June 18, 1988).

²⁴ E.g., under Article 22 of the Constitution of the World Health Organization of 1946: "Regulations adopted pursuant to Article 21 shall come into force for all Members after due notice has been given of their adoption by the Health Assembly except for such Members as may notify the Director-General of rejection or reservations within the period stated in the notice". Available at: http://www.who.int/governance/eb/who_constitution_en.pdf.

Finally, the above analysis of constituent instruments of certain international organizations has shown that the transfer of sovereign powers and hence the limitation of sovereignty take place within international organizations of regional economic integration.

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