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Review paper

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SOME REMARKS ON THE CONCEPT OF GLOBAL CONSTITUTIONALISM AND THE PROTECTION OF NATIONAL SOVEREIGNTY

ABSTRACT

Globalisation is a process that has brought new challenges not only to the economy, the labour market, and the environment, but also to constitutional law since regional and global international organizations are gaining increasing powers and competences, that traditionally belonged to individual nation states. These trends are often described by the concept of global constitutionalism. However, this concept is subject to a number of concerns in the legal literature. On the one hand, the truly global nature of the theory is questionable, on the other hand, its impact on national sovereignty raises several issues. This contribution will analyse the two main elements of global constitutionalism, that is convergence of constitutional solutions and constitutionalisation of international organizations. Regarding the convergence of constitutional solutions, it is important to underline that this process is developing in two main directions: the convergence of constitutional structures and the convergence of the protection of fundamental human rights and freedoms. As the latter direction is much more prevalent, the convergence of the protection of fundamental human rights will be analysed in more depth. As regards the other element of global constitutionalism, the constitutionalisation of international organizations, one can observe this disputable trend both at the regional and global level. After presenting all these elements of global constitutionalism, the paper will conclude with a brief overview of the reservations concerning the concept.

Keywords: *the concept of global constitutionalism, sovereignty, the convergence of constitutional solutions, constitutionalisation of international organizations*

1. INTRODUCTION

In an increasingly globalised world, it is becoming more and more difficult for the states to maintain their powers, as the decisions are mainly taken by universal (for example UN, WTO, WHO), regional (for example European Union, Arab

League) or sub-regional international organizations, rather than by national actors. In this way, constitutionalism has become in many cases globalised and increasingly internationalised, creating the legal concepts of global constitutionalism and multilevel constitutionalism. Nonetheless, these concepts are the subject of considerable academic discussion and criticism, and one can also observe considerable difficulties in defining them precisely.

According to some scholars, global constitutionalism can be defined as the scientific concept “that examines the effects of globalisation in constitutional law, that is seeks to detect and explore the effects of globalisation in constitution making, constitutionalisation, constitutional lawmaking and enforcement (constitutional justice, fundamental rights justice).”¹

Global constitutionalism can basically be approached from two perspectives. From a constitutional law perspective, it describes the convergence and approximation of different constitutional solutions. In contrast, from an international law perspective, the concept refers to the constitutionalisation of international law.²

From the first perspective, global constitutionalism, along the lines of convergence of constitutional solutions, can be divided into two main components. On the one hand, one can notice a structural, institutional convergence and, on the other, a convergence related to the protection of human rights.³ This convergence of constitutional solutions also raises the issue of multilevel constitutionalism and constitutional dialogue, as this process of bringing the constitutional solutions closer to each other is essentially a result of the dialogue between the different levels of regulation and enforcement. Multilevel constitutionalism appeared at the same time as the emergence of the global markets and is intended to describe the constitutional impact of national and supranational actors on each other.⁴ At the same time, the question arises as to how the transfer of certain, traditionally national powers to supranational level affects sovereignty of individual states? This question should be considered in the light of the provisions of national constitutions relating to international standards. These provisions indicate that, by joining certain international organizations, states have not relinquished their sovereignty, but have merely

¹ Chronowski, N., *Globális vagy lokális alkotmányosság?*, Jogelméleti Szemle, 4/2015, p. 20–21.

² *Ibid.*, p. 15.

³ Tushnet, M., *The Globalisation of Constitutional Law as a Weakly Neo-Liberal Project*, Global Constitutionalism, 1/2019, p. 31.

⁴ Sajó, A., Uitz, R., *A szabadság alkotmánya. Bevezetés a jogi alkotmányosságba*, HVG-ORAC Lap- és Könyvkiadó, Budapest 2019, p. 611.

transferred certain competences to the regional and global level, in order to ensure that some common, international objectives and goals can be easily achieved.

With regard to the international law approach to global constitutionalism, Christine Schwöbel highlighted four dimensions. According to this opinion, global constitutionalism can be understood as (1) a social constitutionalism, whereby global constitutionalism is based on a particular international social order; (2) an institutional constitutionalism, which focuses on the division of powers between international institutions; (3) a normative constitutionalism, that focuses on a system of shared norms and values and—unlike the institutional constitutionalism—does not necessarily have an institutional background; and (4) an analogical constitutionalism, which assumes a global constitutionalism based on existing constitutional orders.⁵

In the following, this contribution aims to analyse the concept of global constitutionalism in more detail along the lines of these two approaches. At the same time, in the second part of the paper, I would like to draw attention to all the objections and criticisms that are frequently raised in the legal literature in connection with global constitutionalism and which make this concept (in its current form) difficult to promote.

2. GLOBAL CONSTITUTIONALISM FROM A CONSTITUTIONAL LAW PERSPECTIVE: THE CONVERGENCE OF CONSTITUTIONAL SOLUTIONS

As mentioned above, the constitutional law approach is based on two main components: convergence of structural elements and convergence of the regulation of the protection fundamental human rights and freedoms. The two forms of convergence should not be confused. In the words of Dixon and Posner, “structural convergence occurs when the form of government—separation of powers for example—converges; convergence of rights occurs when states adopt similar constitutional rights.”⁶ Although structural convergence and the convergence of the protection of fundamental human rights can occur in parallel, they can also take different paths.⁷ However, as has been argued in the legal

⁵ E. J. Schwöbel, Ch., *Organic Global Constitutionalism*, Leiden Journal of International Law, 3/2010, p. 530–532.

⁶ Dixon, R.; A. Posner, E., *The Limits of Constitutional Convergence*, Chicago Journal of International Law, 2/2011, p. 404.

⁷ *Loc. cit.*

literature, the convergence of structural and institutional elements is relatively limited,⁸ hence in the followings, this chapter will focus on the convergence of the regulation of fundamental human rights and their protection.

Several pivotal factors have contributed to the approximation of fundamental human rights regulation at the national level, such as the transfer of judicial practice, the role of NGOs and the migration of constitutional law solutions,⁹ that is the incorporation of certain international standards into domestic law.¹⁰ Moreover, some international conventions contain specific provisions on the concrete steps that states must take in order to fulfill their treaty based obligations.¹¹ These kinds of provisions are key in promoting convergence.

At the same time, it is salient to note that two major theories have emerged concerning the relationship between international and national law, and these theories also influence convergence. According to the dualist theory, international and national law are separate, independent, they exist in parallel, with different sources of law and different spheres of application.¹² In contrast, the monist theory presupposes a single legal order, of which both national and international law are part. This theory is therefore based on the unitary structure of law.¹³

All in all, two main factors play a key role in the convergence of human rights regulations: regional and global international conventions, respectively the institutions that interpret (and in some case enforce) these international provisions.¹⁴ In essence, the convergence of standards and regulations of the protection of fundamental human rights and freedoms at the national level is the result of (1) the interaction of the different norms at national, regional, and international levels of multilevel constitutionalism, and (2) the constitutional

⁸ Tushnet, *op. cit.* note 3, p. 31.

⁹ Nevertheless, it is important to point out that the legal literature distinguishes between the concepts of constitutional borrowing and convergence. "Convergence can take place only against a background in which majority of states recognize a constitutional rule, and the members of the minority borrow from the majority." Dixon, R., A. Posner, E., *op. cit.* note 6, p. 408.

¹⁰ Chronowski, N., *Alkotmányosság három dimenzióban*, TK Jogtudományi Intézet, Budapest 2022, p. 19.

¹¹ Florea, F., *Implicarea statelor în procesul de formare a normelor juridice internaționale. Răspundere și sancțiuni internaționale*, Editura Universul Juridic, București 2023, p. 61.

¹² *Ibid.*, p. 62.

¹³ *Loc. cit.*

¹⁴ Sandholtz, W., *Human Rights Courts and Global Constitutionalism: Coordination through judicial dialogue*, *Global Constitutionalism*, 3/2021, p. 440.

dialogue¹⁵ that occurs between the institutions at these levels. For this reason, it is noteworthy to briefly highlight all the regional and global conventions and institutions that have an impact—through the concepts of multilevel constitutionalism and constitutional dialogue—on the convergence of national standards.

At global level, special mention should be made of the Universal Declaration of Human Rights (hereinafter: UDHR) adopted under the auspices of the United Nations on 10 December 1948. Although the UDHR is not a treaty but was adopted as a non-binding resolution,¹⁶ “it has undergone important changes in this respect. Its impact on the entire international human rights protection system has, over time, conferred a quasi-normative character on it, creating legal obligations for UN Member States.”¹⁷ Research in this area has shown that the rate of recognition and protection of the rights enshrined in the UDHR by national constitutions has increased significantly after 1948 (from 20 rights in 1948 to 35 in 2013).¹⁸

Among the global international conventions, it is also important to highlight the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Both documents were adopted in 1966 by the United Nations General Assembly. Together with the United Nations Charter, these three documents (Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights) form the so-called International Bill of Human Rights.¹⁹

All in all, at the global level, the first pillar—i.e. the normative standards—is well-developed and provides a general framework. At the same time, one can notice that, in parallel with these normative standards, the institutional part is underdeveloped, since no international institutions are taking binding decisions in the field of human rights protection at the global level. Even if one can notice

¹⁵ Constitutional dialogue may exist between national institutions (e.g., between national constitutional courts, or between a given Constitutional Court and the Ombudsman), or between national and international institutions. The latter, vertical constitutional dialogue is decisive with regard to convergence. What is more, convergence is mostly based on this kind of dialogue. For more on constitutional dialogue see: Drinóczi, T., *Az alkotmányos párbeszéd. A többszintű alkotmányosság alkotmánytana és gyakorlata a 21. században*, TK Jogtudományi Intézet, Budapest 2017, p. 46–49.

¹⁶ Universal Declaration of Human Rights, Proclaimed by the United Nations General Assembly Resolution 217 A (III), A/RES/3/217 A, 10 December 1948, Paris.

¹⁷ Selejan-Guțan, B., *Protecția europeană a drepturilor omului*, Editura C.H. Beck, București 2011, p. 8.

¹⁸ Sandholtz, *op. cit.* note 14, p. 448.

¹⁹ Selejan-Guțan, *op. cit.* note 17, p. 6.

specialized institutions that interpret and protect the different conventions, these institutions do not issue generally binding decisions. Examples of such institutions, operating under the auspice of the United Nations, include the United Nations Human Rights Council²⁰ or the Human Rights Committee (hereinafter: HRC).

Even if it does not issue binding decisions, a number of interesting findings have been made in the legal literature on the latter institutions. The HRC's main task is to monitor the implementation of the International Covenant on Civil and Political Rights. The HRC can adopt both state-specific comments (based on the reporting procedure) and general comments on some provisions of the Covenant.²¹ In addition, an optional inter-state complaint procedure also exists. Under this procedure the HRC tries to find amicable solutions. Moreover, the first Optional Protocol to the International Covenant on Civil and Political Rights created the framework for individual complaints. Nevertheless, it has to be noticed that "these complaints can be made by individuals, not by groups of individuals or legal entities."²²

One can observe that the HRC also maintains a judicial dialogue with the regional human rights courts, hence, the so-called cross-fertilisation occurs between them. However, it should be noted that "regional courts cite the HRC not because it holds some sort of superior authority [...] the HRC serves as a central reference point for the regional courts as they participate in the development of international human rights jurisprudence."²³ Based on these findings it is pivotal to note that the interrelation between the HRC and the regional human rights courts strengthens human rights protection, and dialogue between them promotes convergence.

At the regional level of multilevel constitutionalism, it is first and foremost salient to look at the European system of human rights protection. At this level,

²⁰ The United Nations Human Rights Council (UNHRC) replaced its predecessor, the United Nations Commission on Human Rights in 2006. Originally, the United Nations Commission on Human Rights was established in 1946 based on the provisions of Article 68 of the United Nations Charter, according to which: "[t]he Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions." On this basis, the United Nations Commission on Human Rights and its successor, the UNHRC, operate essentially as a human rights protection body established under the United Nations Charter, unlike, for example, the Human Rights Committee, which was established and operates under a separate convention (under the International Covenant on Civil and Political Rights).

²¹ Selejan-Guțan, *op. cit.* note 17, p. 10.

²² *Ibid.*, p. 11.

²³ Sandholtz, *op. cit.* note 14, p. 451.

both pillars are clearly developed: there are conventions and also institutions which ensure that the provisions contained in these conventions are respected. The European Convention on Human Rights (hereinafter: ECHR) was signed in 1950 and entered into force in 1953. At the same time, the ECHR itself provided for the establishment of the European Court of Human Rights (ECtHR), which is responsible for interpreting the ECHR, investigating possible violations, and establishing whether there has been a breach of the ECHR. The role of the ECHR and the ECtHR is underlined by the fact that according to some scholars: “[t]he European Convention and the case law of the ECtHR have broadly been incorporated into domestic legal systems in Europe.”²⁴ Nonetheless, as it was highlighted in the legal literature, “the ECtHR’s case law is, by its nature, applied by individual states based on the voluntary acceptance of international principle of *pacta sunt servanda*.”²⁵

Besides, some elements of structural convergence can also be observed when scrutinizing the case law of the ECtHR and its impact on national law,²⁶ for example in relation to the principle of division of powers, organisation of justice or certain requirements of the legislative process. Furthermore, as regards structural convergence, it is important to highlight the role of the Venice Commission as well. The Venice Commission was established in 1990, under the framework of the Council of Europe, primarily to promote the constitutionalisation of the Central and Eastern European countries. Today, Venice Commission works basically as “a general international advisory body on constitutional law reforms.”²⁷

At the same time, regarding the regional level, Europe is not the only area worth mentioning. For example, in the case of Africa, the African Charter on Human and Peoples’ Rights (known also as the Banjul Charter) was adopted under the aegis of the African Union in 1981. Moreover, as in the European human rights protection system, an institutional pillar is functioning in Africa as well. The African Court on Human and Peoples’ Rights was established under a protocol of the African Charter on Human and Peoples’ Rights adopted in 1998.²⁸ The situation is more or less similar within the Organization of American States as well. The American Convention on Human Rights (also known as the Pact of San José) was adopted in 1969 under the auspice of this organization. At the

²⁴ *Ibid.*, p. 446.

²⁵ Poniatowski, M., *Content of the Right to Parental Responsibility in the Case Law of the European Court of Human Rights*, in: Sobczyk, P. (ed.), *Content of the Right to Parental Responsibility. Experiences – Analyses – Postulates*, CEA Publishing, Miskolc–Budapest 2022, p. 21.

²⁶ Chronowski, *op. cit.* note 10, p. 22.

²⁷ *Loc. cit.*

²⁸ Sandholtz, *op. cit.* note 14, p. 447.

same time, the inter-American system of protection is somewhat specific due to its dual institutional background since the adherence to the provisions of the Convention is guaranteed simultaneously by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

The provisions of all these global and regional human rights conventions, as well as the relevant principles of the case law of regional courts, can be incorporated into national legislation in a number of ways. The relevant legal literature highlighted, for example, that convergence can take place both at the level of national constitutional provisions and at the level of national judicial interpretation.²⁹ It goes without saying that, on the one hand, national constitutions incorporate regulatory models from international conventions.³⁰ The result of this reception is a kind of approximation in the field of protection of fundamental human rights. At the same time, this convergence has resulted in the emergence of a core of human rights that is widely recognized and protected by the national constitutions.³¹

Furthermore, it is also necessary to take into account how the constitution of each state relates to international conventions and treaties. For example, in Romania, according to Article 20 paragraph (2) of the Constitution “where any inconsistencies exist between the covenants and treaties on fundamental human rights Romania is party to, and the national laws, the international regulation shall take precedence, unless the Constitution or national laws comprise more favourable provisions.”³² This provision refers to the norms contained in international conventions and treaties, as an inherent part of the so-called “constitutional bloc”. Moreover, these international norms serve as a reference for constitutional justice.³³ Such constitutional provisions promote the convergence and the constitutional dialogue between human rights protection institutions situated at different levels of multilevel constitutionalism.

²⁹ *Ibid.*, p. 448.

³⁰ For example, in Romania the exception of non-retroactivity of the law was extended to the more favorable administrative law, during the constitutional amendment of 2003, by considering the relevant principles of the ECtHR. For details see: Stanciu, L. D., Safta, M., *Report of the Constitutional Court of Romania*, XVIII Congress of the Conference of European Constitutional Courts, Czech Republic 2021, p. 11. Online available on the following link:

https://www.cecc2017-2020.org/fileadmin/Dokumenty/Pdf/Questionnaire/National_Reports/English/Romania_-_Questionnaire_XVIII_Congress_of_CECC_eng.pdf, 29 February, 2024.

³¹ Chronowski, *op. cit.* note 10, p. 22.

³² The Constitution of Romania is available in English at the following link: <https://www.presidency.ro/en/the-constitution-of-romania>, 29 February, 2024.

³³ Toader, T., Safta, M., *Contencios constituțional*, Editura Hamangiu, București 2020, p. 438, 442.

In the context of the protection of fundamental human rights, the three levels of multilevel constitutionalism and the institutional background that guarantees the protection of these provisions are very clearly distinguished. The constitutional dialogue between these levels, the cross-fertilisation, the reference of the courts to each other's case law and the adoption of normative frameworks lead to the approximation, and convergence of national regulations.

3. GLOBAL CONSTITUTIONALISM FROM AN INTERNATIONAL LAW PERSPECTIVE: THE CONSTITUTIONALISATION OF INTERNATIONAL LAW

This idea is mainly “based on the observation that some international treaty-based organizations treat their founding documents, or certain [...] provisions thereof [...] as quasi constitutional.”³⁴ The international law approach to global constitutionalism is nothing more than the conception of international law as a constitutional order, which idea has spread mainly at the European level but is increasingly expanding at the international level as well.³⁵ Even if the European Union is the most prominent example, global international organizations, such as the World Trade Organization or the United Nations “are also increasingly subject to a constitutional discourse with the intention to check, regulate and assess the legitimacy of the politics of world trade policy, environmental policy, human rights policy and post-conflict policy.”³⁶ The most noticeable problem with this approach, however is that the conception of international conventions as quasi-constitutions is not the result of an explicit decision of the member states of the different international organizations. Besides, with regard to the European Union, one could observe that as soon as a document is treated as a constitution, it is subject to considerable concerns (for example, the Treaty establishing a Constitution for Europe was rejected both in France and the Netherlands). At the same time, it is noteworthy to assay the arguments that are used to justify the international approach of global constitutionalism.

Whilst one can observe significant differences between the functioning of different international organizations, legal literature has highlighted a number of common characteristics as well. These common elements are factors that can

³⁴ Chronowski, *op. cit.* note 1, p. 21.

³⁵ *Loc. cit.*

³⁶ Wiener, A.; F. Lang Jr., A.; Tully, J.; Maduro, M. P.; Kumm, M., *Global Constitutionalism: Human Rights, Democracy and the Rule of Law*, Global Constitutionalism, 1/2012, p. 5.

promote the constitutionalisation of these organizations. First of all, international organizations exercise power through law, therefore “they are subject to a high degree of legalization.”³⁷ Moreover, they adopt legislation that can affect individuals and states at the same time. In addition, international organizations have a complex relationship with states, since the latter, for example, play a key role in their foundation.³⁸

All these common features of international organizations, and in particular the legalization, can lead to the constitutionalisation of these international actors. At the same time, the international approach to global constitutionalism, i.e. the constitutionalisation of international organizations, is not based solely on the common features of the institutions, but also on some kind of presupposed change in international relations. For example, some scholars argue that international relations have switched from globalised to constitutionalized.³⁹ Besides, according to this approach, this switch can be considered a social phenomenon.⁴⁰

At the same time, other scholars tried to describe these changes in international relations along different theories. In this way, one can differentiate between several assumptions. According to Christine Schwöbel three major assumptions must be highlighted:

- 1st assumption: international relations between the individual nation-states have shifted from coexistence to cooperation;
- 2nd assumption: one can notice some kind of unity and homogeneity at international level;
- 3rd assumption: global constitutionalism can be described by universality.⁴¹

Nonetheless, all these assumptions - as we will see in the next section of this contribution - raise a number of concerns. Whatever the approach, it is clear that globalisation is leading to a constitutionalist and democratic deficit at national level.

The constitutionalisation of international organizations (both at regional and global levels) can be seen through a number of examples. The most striking is the case of the European Union, which was set up as a regional economic

³⁷ Fabbri, F., *The Constitutionalization of International Law: A Comparative Federal Perspective*, European Journal of Legal Studies, 2/2013, p. 6.

³⁸ *Loc. cit.*

³⁹ Wiener, A. *et al.*, *op. cit.* note 36, p. 5.

⁴⁰ *Ibid.*, p. 8.

⁴¹ E. J. Schwöbel, *op. cit.* note 5, p. 534–535.

organization, but which – due to the constant extension of its competences – now has some competences with possible constitutional features.⁴² At the same time, many Member States have reservations about the European Union's extension of powers and are trying to protect their sovereignty and constitutional identity. It is therefore pivotal for the debate on the future of the European Union to better reflect the specific interests of the Member States. For example, the content of the constitutional identity, which can differ from one Member State to another, should be defined through constitutional dialogue between the national constitutional courts on the one hand and the national constitutional court and the Court of Justice of the European Union on the other. Loyal cooperation should therefore serve as a basis in the relationship between the European Union and its Member State. A dialogue, in which both sides take into account the interests and the reservations of the other is of utmost importance.

The constitutionalisation of international organizations cannot be observed just at regional level. As Federico Fabbrini underlined: “the developments that have taken place in the EU are in no way *sui generis*.”⁴³ The United Nations itself is moving towards constitutionalisation, but sectorial international organizations (World Health Organization, regional human rights protection organizations, etc.) are also shifting in this direction.⁴⁴ For example, the “World Trade Organization agreement [...] does not simply prescribe rules governing international trade; it also sets up quasi-legislative procedures and adjudicatory institutions for interpreting and enforcing those rules.”⁴⁵ At the same time, the issues that arise with regards to the European Union, such as the democratic deficit, the protection of national sovereignty, and constitutional identity, also exist in relation to the constitutionalisation of global international organizations.

All in all, constitutionalisation of international organizations is a process that is currently ongoing and the outcome of which is unknown. At the same time, some states have reasonable reservations about this aspect of global constitutionalism. All these reservations can be overcome through loyal cooperation and dialogue between various national and international organs.

⁴² Fabbrini, *op. cit.* note 37, p. 7.

⁴³ *Loc. cit.*

⁴⁴ *Ibid.*, p. 8.; Wiener, A. *et al.*, *op. cit.* note 36, p. 4.

⁴⁵ Young, E. A., *The Trouble with Global Constitutionalism*, Texas International Law Journal, 3/2003, p. 528.

4. SOME REMARKS ON THE CONCEPT OF GLOBAL CONSTITUTIONALISM

As one can observe, global constitutionalism can be defined from both constitutional law and international law perspective. Nevertheless, whatever the approach, the concept of global constitutionalism itself raises a number of concerns. These issues are often discussed in the legal literature, drawing attention to the potential risks of the theory of global constitutionalism.

One of the most common objections is that the concept of global constitutionalism in fact is far from being global. On the one hand, the current theory is more a project of the Global North.⁴⁶ This Global North approach can also be observed in the convergence of the protection of fundamental human rights, where first generation rights are strongly guaranteed, but the protection of the right to property often takes precedence over second and third-generation rights.⁴⁷ Moreover, again referring to the convergence of the protection of fundamental rights, neither in Asia nor in the Middle East regional protection systems have developed, so for this reason again the concept cannot be considered global.⁴⁸ On the other hand, according to another opinion expressed in the legal literature, global constitutionalism cannot be considered global, because this interpretation could lead to the marginalisation of minority cultures.⁴⁹ It is a fact that the current developments do not always take into account national specificities, social, and cultural characteristics. Hence, according to some scholars “it is necessary to ensure that States are not subject to the imposition of constraints to which they have not freely adhered and that they retain their free will with regard to their national identity.”⁵⁰

At the same time, another issue of global constitutionalism concerns its effect on national sovereignty. Sovereignty became one of the main principles in international relations after the Peace of Westphalia, and as such essentially expresses that “the world is made up of sovereign states which do not recognise any power above them”⁵¹ Based on the traditional concept of sovereignty

⁴⁶ Tushnet, M., *op.cit.* note 3, p. 34.

⁴⁷ *Ibid.*, pp. 32–34.

⁴⁸ Sandholtz, W., *The ECtHR, Transregional Dialogues and Global Constitutionalism*, in. *Global Constitutionalism*, 3/2020, p. 548.

⁴⁹ E. J. Schwöbel, *op. cit.* note 5, p. 542.

⁵⁰ Mathieu, B., *Constitutional identity*, in. Raisz, A. (ed.), *International Law From a Central European Perspective*, CEA Publishing, Miskolc–Budapest 2022, p. 32.

⁵¹ Jakab, A., *Az európai alkotmányjog nyelve*, Nemzeti Közszerológálati Egyetem, Budapest 2016, p. 107.

legislation, enforcement and the resolution of disputes is in the hands of the states.⁵²

As one can notice, the classical concept of sovereignty is sometimes questioned in the current globalised world, where states are so interdependent (especially in economic, environmental and military issues) that inter-state cooperation is essential.⁵³ This inter-state cooperation entails the transfer of some elements of national competencies. However, this transfer of certain national competences does not imply the transfer of sovereignty. Hence, it is salient to distinguish between transfer of competences and transfer of sovereignty.⁵⁴ As it was mentioned in the relevant legal literature: “sovereignty also entails the right to freely delegate one’s own competences. The delegation of competences by a state for the purpose of their implementation at the international level [...] does not decrease sovereignty.”⁵⁵ It is true that some states have delegated certain competences to international organizations in order to exercise these competences jointly with other nations at international level for reasons of efficiency. Yet this transfer of competences does not imply the transfer of sovereignty. Moreover, this transfer only concerns those national competences which the states have designated when they set up or join an international organization. Thus, the subject of the transfer is essentially up to the decision of the states.⁵⁶

Besides, one of the most pivotal fundamental features of sovereignty is inalienability (alongside exclusivity and indivisibility).⁵⁷ The transfer of sovereignty to international organizations would be clearly contrary to the inalienable character of sovereignty, because limitations that affect the fundamental functions of the state are tantamount to the impossibility for it to be considered a sovereign state anymore.⁵⁸ Furthermore, the concepts that promote the divisibility of sovereignty are also “artificial and incompatible with the nature of sovereignty.”⁵⁹

⁵² *Loc. cit.*

⁵³ Jakab, *op. cit.* note 52, p. 107.

⁵⁴ In some cases, the transfer of sovereignty may also occur, for example in the case of unification of states. Czubik, P., *Sovereignty in International Law*, in. Raisz, A. (ed.), *International Law From a Central European Perspective*, CEA Publishing, Miskolc–Budapest 2022, p. 104.

⁵⁵ *Ibid.*, p. 99.

⁵⁶ For this reason, some authors have compared this transfer of competences, in a very figurative way, to the contract of donation known from private law, where the object of the donation is determined by the donor. For details see: *Ibid.*, p. 109.

⁵⁷ Florea, *op. cit.* note 11, p. 171.

⁵⁸ *Loc. cit.*

⁵⁹ *Loc. cit.*

All in all, “[t]he sovereignty of a state is not reduced by powers conferred on other entities of international law, as long as this conferral is reversible. On the other hand, the acquisition of these competences by another entity, either by coercion or judicial lawlessness [...], can be perceived as a threat to sovereignty.”⁶⁰ Once again, questions and objections that arise in relation to this transfer of competences can be resolved through loyal cooperation and dialogue between national and international actors based on mutual respect.

5. CONCLUSION

As already outlined above, cooperation between states is essential in today’s globalised world. The transfer of certain competences from national to international level, and compliance with the delegated powers can help to achieve common economic and (in some cases) political goals. One such objective is the protection of fundamental human rights.⁶¹ In this area, the emergence of international regulation and convergence has significantly improved the level of protection. Moreover, the protection of fundamental human rights is “a prerequisite for peace and stability not only within the boundaries of one State, but also in the context of international cooperation with other international subjects.”⁶²

Nonetheless, the transfer of competences cannot be considered a transfer or an abdication of sovereignty. The current concept of global constitutionalism (and especially its international law approach) tends to undermine sovereignty. The constitutionalisation of international organizations inevitably leads to the acquisition of new competences, often without these competences being explicitly transferred by the states. All these processes are aimed at creating a so-called global government or hierarchy. However, “[d]eveloping such a world order could only happen with the abandonment of not only state sovereignty, but also of democracy as the basis of their functioning.”⁶³ Such an outcome is neither optimal nor intended to be achieved considering the intention of the states. Therefore, rephrasing the current concept of multilevel constitutionalism and global constitutionalism is paramount. In the discussion about the ongoing international processes, one must consider the principles of state sovereignty and

⁶⁰ Czubik, *op. cit.* note 54, p. 112.

⁶¹ Other areas where international cooperation is essential and beneficial are for example environmental protection, crime prevention, international trade or scientific research.

⁶² Rusan Novokmet, R., International Peace and Security, in: Raisz, A. (ed.), *International Law From a Central European Perspective*, CEA Publishing, Miskolc–Budapest 2022, p. 75.

⁶³ Czubik, *op. cit.* note 54, p. 96.

loyal cooperation as well. It would be useful to simultaneously strengthen the common, international objectives (such as peace and security, the protection of fundamental human rights, equality, etc.) and the protection of sovereignty and constitutional identity of the states.

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