

УДК: 340.5[341+346]

DOI <https://doi.org/10.24144/2307-3322.2023.78.2.63>

RELATIONSHIP BETWEEN INTERNATIONAL AND NATIONAL LAW AND ISSUES OF THEIR HARMONIZATION

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Shamsan Reyad. Relationship between international and national law and issues of their harmonization.

The article is devoted to one of the aspects of the problem of correlation between international and domestic law, namely the relationship between international and national law. This relationship is developing dynamically. The development of the interconnectedness of international and domestic law occurs in connection with the constant increase in the number of international treaties and national legal acts aimed at regulating social and domestic relations, which is the object of international cooperation. At present, trends in the further development of international law and its interaction with national legal systems have begun to emerge clearly. The process of globalization has strengthened the interconnection of states, expanded the range of intrastate social relations that are a common object of regulation of two legal systems - the international legal system and the domestic legal system. Based on the analysis of the provisions of the general theory of law and the doctrine of international law and international normative acts, the theoretical and legal problems of the relationship between domestic and international law are considered. It explores the social and legal nature of the relationship between the two legal systems and explores the importance of harmonizing domestic state law with international law. It is noted that although international law and domestic law have a single social nature, they functionally act as two relatively independent and closely interacting and interdependent systems of law. The nature of their interrelations, methods and forms of interaction, as well as their functional connection, interdependence and the role of the state in this process are revealed. It is emphasized that the relationship and interaction are not limited only to the norms of the two legal systems, but cover the two legal systems as a whole. Consequently, there must be harmonization of the norms of national law with all sources of international law, including with the individual international obligations of states. The article notes that the state is a participant in the creation of legal norms of both domestic and international law. The process of coordinating the will or position of states when concluding international treaties is regulated by the norms of international law, and the process and procedure for expressing these declarations of will or positions are determined by the norms of national law. At the same time, international law does not belong to the legal system of specific states, although in fact it is part of all legal systems. If the object of regulation coincides, the norms of international law always take precedence over domestic ones. According to the author of the article, the concept of a legal conflict should not be identified with the invalidity of international treaties. It is argued that the case of conflict occurs only with a valid contract. It is also emphasized that many norms, enshrined in international law by treaty or customary means, acquire the character of *jus cogens* and therefore are binding on all states, regardless of ratification or accession to certain treaties or agreements. The article points out that international law imposes an obligation on the state as a whole, but it is domestic law that determines state bodies and officials who are responsible for fulfilling the international obligations of the state.

The purpose of the article is to theoretically clarify the essence of the relationship and interaction between international and domestic law, to identify the importance of harmonizing domestic legislation with international law and the grounds for the priority of international norms over national law.

Key words: problems of correlation between international and national law, practice of interaction between international and national law, implementation of international law in national legal systems.

Шамсан Рїяд Таха. Взаємозв'язок міжнародного та національного права та питання їх узгодження.

Стаття присвячена одному з аспектів проблеми співвідношення міжнародного та внутрішньодержавного права, а саме взаємозв'язку міжнародного та національного права. Це взаємозв'язок динамічно розвивається. Розвиток взаємопов'язаності міжнародного та внутрішньодержавного права відбувається у зв'язку з постійним збільшенням кількості міжнародних договорів та національних нормативно-правових актів, спрямованих на регулювання суспільно-внутрішньодержавних відносин які є об'єктом міжнародного співробітництва. Нині стали чітко вимальовуватися тенденції розвитку міжнародного права та його взаємодії з національними правовими системами. Процес глобалізації посилив взаємозв'язок держав, розширилося коло внутрішньодержавних суспільних відносин, які є спільним об'єктом регулювання двох правових систем - міжнародної правової системи та внутрішньодержавної правової системи. На основі аналізу положень загальної теорії права та доктрини міжнародного права та міжнародних нормативних актів розглядаються теоретичні та правові проблеми взаємозв'язку внутрішньодержавного та міжнародного права. У ній досліджуються соціальні та правові природи взаємозв'язку двох правових систем та з'ясовується значення узгодження внутрішнього державного права з міжнародним правом. Зазначається, що міжнародне право та внутрішньодержавне право хоча й мають єдину соціальну природу, але функціонально виступають як дві самостійні та тісно взаємодіючі та взаємозалежні системи права. Розкривається характер їх взаємозв'язків, способи та форми взаємодії, а також їх функціональний зв'язок, взаємозалежність та роль держави у цьому процесі. Наголошується, що взаємозв'язок та взаємодія не обмежуються лише нормами двох правових систем, але охоплюють дві правові системи загалом. Отже, має бути узгодження норм національного права з усіма джерелами міжнародного права, зокрема, з індивідуальними міжнародними зобов'язаннями держав. У статті наголошується, що держава є учасником створення правових норм як внутрішнього, так і міжнародного права. Процес узгодження волі чи позицій держав під час укладання міжнародних договорів регламентується нормами міжнародного права, а процес і процедура вираження цих волевиявлень чи позицій визначаються нормами національного права. У цьому міжнародне право належить юридичній системі конкретних держав, хоча фактично є частиною всіх правових систем. При збігу об'єкта регулювання, норми міжнародного права мають пріоритет над внутрішньодержавними. На думку автора статті, ототожнювати поняття правової колізії з недійсністю міжнародних договорів не слід. Стверджується, що випадок колізії буває лише з чинним договором. Підкреслюється так само, що багато норм, закріплені в міжнародному праві договірним або звичайним шляхом, набувають характеру *jus cogens* і тому обов'язкові для всіх держав незалежно від ратифікації або приєднання до тих чи інших договорів або угод. У статті зазначається, що Міжнародне право накладає зобов'язання на державу в цілому, але саме внутрішньодержавне право визначає державні органи та посадові особи, які відповідальні за виконання міжнародних зобов'язань держави.

Метою статті є теоретично з'ясувати суть взаємозв'язку та взаємодії міжнародного та внутрішньодержавного права, виявити значення узгодження внутрішньодержавних законодавств з міжнародним правом та підстави пріоритету міжнародних норм перед національним правом.

Ключові слова: проблеми співвідношення міжнародного та національного права, практика взаємодії норм міжнародного та національного права, реалізація норм міжнародного права у національних правових системах.

Introduction. In the general theory of law, the relationship and interaction of international and national law is one of the main aspects of the problem of the relationship between international and domestic law. The issues of interaction between international and domestic law are multifaceted and have a number of problematic aspects, the solution of which is to a large extent decisive for the entire scope of both international and domestic law.

In the legal literature, scientists have different approaches to the issue of the relationship between international and domestic law. Some define it through the category of correlation, others through interaction. According to the author of the article, along with the social nature, common and especially in international and domestic (national) law and the ratio of the legal force of their norms, as well as the legal technique for the implementation of international norms in national legal systems, the relationship between international and national law is an important aspect of scientific research problems of correlation between international and domestic law.

Despite the numerous works on this issue, it cannot be considered that in theory and practice this problem has been completely solved. There are many aspects that have not found an unambiguous solution at all and are controversial, in particular on such issues as the practice of applying international law in the domestic sphere and the choice of means of the mechanism for the implementation of international norms in the national legal system, the place of international law norms in domestic legal systems, as well as their direct application in national courts. In addition, at present, it is impossible to elucidate all aspects of the process of interaction between international and national law within the known theories of the relationship between international and national law (monism and dualism), since this process is not limited only to the relationship between the norms of international and national law, but covers legal systems as a whole and affects, in particular, such aspects as law-making and interpretation, legal awareness and legal culture, the implementation of the provisions contained in the sources of international law, including judicial decisions.

Scientific research into the issues of interaction between domestic and international law is necessary to solve complex problems, especially the reform and improvement of domestic legislation, their unification in accordance with the international legal obligations of states. The study of this issue is very relevant for the further process of legal reforms in Ukraine, in particular on the issues of harmonization of national legislations with the country's international obligations, which should be a priority in the direction of reforms, because the legal mechanism for ensuring the operation of international legal norms in the legal system of Ukraine is not clearly formulated and needs to be updated and improved. Accelerating the integration of Ukraine in the world community as an equal partner and the formation of Ukraine as one of the EU states depends on this.

International public law, as is known, establishes uniform standards for states in many respects, especially in the field of human rights and freedoms, the implementation of which should be carried out mainly at the domestic level. Consequently, the effective application of international norms both in the field of protecting human rights and freedoms and in other areas directly depends on the close interaction of international and domestic law, and largely depends on the degree of perfection of domestic legislation. In turn, the inclusion of international norms and their implementation at the national level is an important and constant factor in the development of domestic law, since under its influence shortcomings of the current legislation are revealed, the decisions taken are tested and, on their basis, the necessary additions, changes, or annulment of obsolete norms are made domestic legal system. Under the influence of international treaties concluded over the past decades, the legislation of many states, including Ukraine, has changed dramatically [1]. On the basis of international treaties, the unification of a number of branches of domestic law is also taking place, that is, bringing to the unity of legal norms operating within various states and state entities, which cover both public law and private law interests.

In the practice of international relations and in the internal law of individual states, there are various ways to resolve the issue of the forms of interaction between international and domestic legislation. For a long time, monistic and dualistic theories influenced the law-making and law enforcement practice of states. The dualistic concept is reduced to the recognition that international and domestic law are two independent systems of law related to different legal orders, not in subordination, but closely interacting with each other. The monistic concept boils down to the recognition that international and domestic law is essentially one legal system, in which the norms of international law (the concept of the primacy of international law) or the norms of domestic law (the concept of the primacy of norms of domestic law) play the leading role. At present, in practice and in the theory of law, the most real reflection of the behavior of national and international bodies from the existing teachings on the relationship between international and domestic law is a doctrine based on a combination of theories of dualism, interdependence and the primacy of international law.

Methodological framework. In the study of this topic, general scientific and particular scientific methods of cognition were used, which include the dialectical method, a systematic approach, structural and functional analysis, comparative legal, cultural and other methods of scientific cognition, the use of which allows us to explore modern problems of interaction between international and domestic law. With the help of these methods, the properties of structural and functional relations of the international legal and domestic systems, legal regulation, subject matter, essential aspects of interaction and mutual influence of the international legal and domestic systems were revealed.

Results and discussion. International and domestic law, although they have a single social nature, have a number of properties of a similar nature and act as an internal unity of a higher system - law as a social phenomenon. But functionally, they act as two relatively independent and closely interacting, interdependent systems of law.

International law is a system of norms governing international relations and domestic relations of an international character (of international significance).

In the system of international law, the central position, according to most scientists, is occupied by two types of norms. The first type is formed by the basic principles of international law, the task of which is to determine the basic rights and obligations of states, that is, the legal status of the main subjects of international law. The second type is formed by generally recognized principles and norms of human rights. They determine the fundamental rights and freedoms of the individual and also have the highest imperative force. Both types form the basis of international public order.

In turn, national (domestic law) is a system of obligatory norms governing social relations in a particular country, they influence the formation of norms and principles of international law, but cannot regulate international relations. However, international law without interaction with domestic law would not be able to fulfill its regulatory function.

The relationship between international and national law is predetermined by the fact that both are created by the will of states and are due to the relationship between the foreign and domestic policies of the state and objective domestic and international factors. In this case, states occupy an exclusive place in international and domestic lawmaking, being full participants in both international and domestic political processes and performing an intermediary function between these processes. At the same time, international law occupies a supranational position, not belonging to the legal system of specific states, although it is part of all legal systems.

International law, like any system of law, is implemented through the following forms: compliance, execution, use and application of its norms and principles. Consequently, in order to fulfill its purpose - the regulation of cooperation between states, the implementation of the norms of international law must be ensured, on the one hand, in international relations, on the other hand, in the states participating in such legal relations.

The application of the norms of international law at the international level is carried out by international institutions that are created in accordance with international law.

The implementation of the norms of international law by states is ensured by their inclusion in the national legal system, as well as by the application of decisions and positions of international bodies and organizations in national judicial practice. The task of domestic law in this case is to ensure the operation of international law in the national legal system. The role of domestic law in ensuring the functioning of international law, as an integral part of domestic legal systems, is manifested in two forms:

In the first case, we are talking about when international norms are intended to regulate interstate relations (for example, when regulating issues of economic or cultural cooperation between states). Since the norms of international law always oblige the state as a whole, and not its bodies separately, the main task of national law here will be to determine the normative basis for the functioning of the structures responsible for ensuring the implementation of international legal prescriptions.

In the second case, when international legal norms are aimed at regulating not interstate, but transnational relations (going beyond state borders) between subjects of national law of one or several states (for example, when regulating issues of the procedure for concluding and executing foreign economic transactions, etc.) or intrastate relations of international importance (for example, in the regulation of human rights issues). The task of domestic law in this case is to determine the possibility and conditions, as well as with the help of other legal means of the national legal system, to ensure the necessary procedure for the implementation of international legal norms within the country.

National legal systems, for their part, also have a significant impact on the international legal system. However, such an impact is manifested mainly at the stage of creation of international legal norms. Firstly, by predetermining the essence and content of the norms and principles of international law. Secondly, by influencing domestic law on the process of creating and implementing the norms of international law, since it is on the basis of domestic law that the question of which state bodies have the right to speak on its behalf in the international arena and what powers they have. National law also determines the mechanism of operation of international legal norms in the territory of the respective country. In this context, it must be emphasized that in the context of strengthening the processes of global integration and international interdependence of states, international law has an increasing influence on the domestic legal systems of all states.

In the opinion of many authors, the solution of new tasks that have arisen before states will require from states, as subjects of international law, a broad coordination of actions in those areas where only domestic law was previously envisaged. In private international law, national legislation is gradually losing its leading

role in regulating international private law relations and directly links globalization and internationalization of both the “life” of states and their national legal systems. “In the context of globalization,” writes the American professor P. Spiro, “there is hardly any area of law that can be fully understood without a more or less complete understanding of international law” [2]. The boundaries of the spheres of international and domestic law, public and private law are becoming less and less clear, and more mobile. Increasingly, international law is directly applied by individuals and legal entities, public authorities (subjects of domestic law) in relations with each other. Therefore, the problem of resolving conflicts between international and domestic law is of great practical importance.

In the theory of law and in judicial practice, it has been proven that the development and effective implementation of law is achieved only when there is internal consistency of its constituent elements, including, and above all, the rules of law themselves.

In legal science, it is generally recognized that the inconsistency and inconsistency of legal norms leads to a violation of the systemic nature of legal regulation, and thereby reduces its effectiveness both on a national scale and in the international legal order. In domestic law, it is necessary that all rules of law comply with the constitution [3, p.102-105]. And this system of legal norms must be proportionate, internally consistent and consistent for their existence and successful functioning. Without such a coordinated system, it is impossible to successfully implement the functions of law, to ensure the regulatory impact of its norms on social relations. This provision, according to most scientists, is common to all domestic legal systems and the international legal system, most of the norms of which are implemented in the domestic sphere.

According to many scientists, the successful legal regulation of domestic relations at the present time, in the context of the internationalization of public life in all areas, is becoming increasingly dependent on the consistency of national law with international law.

The harmonization of international and domestic law must be ensured in several ways. International law does not prescribe how a state will carry out the implementation of its obligations - each state decides independently, unless the rules of an international treaty themselves determine the method of their application. The main requirement is strict adherence to the goals and content of international norms.

The question of how the legal technique of incorporating the norms of international law into the national legal system is debatable. In the doctrine of international law there is no single terminology that defines the ways and forms of implementation of the norms of international law in national legislation. However, most scholars prefer to use the term implementation. Among researchers, there is also no unity of views on the definition of the concept of «realization». Realization - from the English implementation, means «performance» [4, p.330; 5, p.61-88; 6]. In international law, implementation is understood as the realization of international obligations at the domestic level by incorporating international legal norms into the national legal system. The concept of “implementation” has become widely used in international law due to the fact that, as law professor Antonio Cassese said, “starting from the second half of the twentieth century, national legal systems began to treat universal human values with greater understanding and openness, and states are more willing to obey international law.” [7, p. 168]. In Western literature, the point of view prevails that implementation in the general sense of the word is understood as a process during which “national legal systems bring international law into action” [7, p. 166; 8, p. 15; 9, p. 4].

Harmonization of national law with international law is not only a right, but an obligation of every state. All states, regardless of whether they adhere to the theory of monism or dualism, are obliged in their foreign and domestic policies to fulfill their international obligations.

The legal obligation of the state power to harmonize its national legislation with international law is enshrined in many bilateral and multilateral international legal acts [10, p. 34]. In addition, this obligation stems from the rule of international law and its basic principles [11].

The preamble to the 1945 UN Charter specifically emphasizes that states have committed themselves to «create conditions under which justice and respect for the obligations arising from treaties and other sources of international law may be observed.» The Vienna Convention on the Law of Treaties of 1969, following the UN Charter, confirmed in Art. 26 «*Pacta Sunt Servanda*» the provision that «every contract in force is binding on its participants and must be performed by them in good faith.» This rule is generally recognized, and should be considered in close connection with Art. 27 of the Vienna Convention, which prohibits a state from “relying on a provision of its internal law as justification for the performance of a treaty”. An exception is made only for cases where the State’s consent to be bound by the treaty was expressed in violation of the provision of domestic law concerning the competence to conclude treaties. In this case, the violation must

clearly relate to rules of domestic law of particular importance. The State may in this case invoke the ground of invalidity of its consent (Article 46 of the Convention).

The very existence of norms of internal legislation, especially in the conditions of international interdependence of states that violate international obligations, poses a serious threat to the world legal order. Collisions between the norms of international and domestic law often arise not because of the bad faith execution of international treaties, but because of the technical inconsistency between the prescriptions of domestic laws and international law, and in certain cases it can also be evidence of the inability (unwillingness) of the state government to find a compromise in the collision of international and national interests [12].

The conflict of international and domestic law, caused not by technical issues, but by a clash of interests, is more problematic. The principle of *pacta sunt servanda* enshrined in the Vienna Convention means recognition of the primacy of international law in world politics and at the national level. This principle applies not only to international treaties, but also to all international obligations arising from agreements between states, from decisions of international organizations and bodies that are binding.

As many scientists correctly emphasize, the principle of *pacta sunt servanda* is now understood not only in the sense of compliance with international treaties, but also in a broader sense: all international obligations must be observed [13, p. 140]. In this context, it must be emphasized that many of the norms fixed in international law by treaty or customary means acquire the character of *jus cogens* and are therefore binding on all states, regardless of ratification or accession to certain treaties or agreements.

In this context, it must be emphasized that when it comes to harmonizing domestic law with international law, it must be borne in mind that this harmonization can be different in terms of types of sources of law. Those in domestic law, all branches of law, including constitutions and judicial acts, can be the subject of coordination with international law.

In a state that has assumed the obligation to conscientiously comply with international treaties, all national legal acts must be consistent with international legal regulations. At the same time, the legislator should strive to ensure that the prescriptions of national legal acts do not contradict the prescriptions of international law. In addition, the legislator must also take into account the fact that amendments and additions are made to international treaties, outdated treaties are updated, additional agreements are adopted in the development of treaties. All this must be taken into account, since the construction of an effective and modern legal system focused on the perception of the norms established by the international community depends on the qualitative implementation of the norms of international law, including through their inclusion in national legislation. At the same time, it is also necessary to take into account that if an international norm loses its international legal connection as a result of annulment at the international level, then it can continue to operate if it does not contradict other international obligations of the state at the national level, but not as an international one, but as a national one. legal norm, i.e. transformed into national law.

The main role in harmonizing national law with international law is assigned to special bodies. These bodies include:

- Legislative authorities with the right of legislative initiative.
- Subjects of legislative initiative authorized to issue domestic legal acts.

In Ukraine, the only body of legislative power is the Parliament - the Verkhovna Rada of Ukraine (Article 75 of the Constitution of Ukraine), and the adoption of laws is assigned to its powers (Article 85 of the Constitution of Ukraine).

The right of legislative initiative in the Verkhovna Rada of Ukraine belongs to the President of Ukraine, People's Deputies of Ukraine and the Cabinet of Ministers of Ukraine (Article 93 of the Constitution of Ukraine).

Coordination of domestic legal acts (norms) should be carried out with all sources of international law. First of all, this is the harmonization of national legislation with the basic principles of *jus cogens* of international law. Secondly, it is the harmonization of national legal acts with the norms of international law. At the stage of rule-making, domestic legal acts are consistent both with the normative prescriptions of the system of international law as a whole and with a specific norm or group of norms of international law. National legal acts are consistent with international treaties, with international customs, with unilateral acts if such have been declared, as well as with acts of international organizations. In turn, domestic acts (sources of law) must be consistent with the decisions of the International Courts and their jurisprudence, and other obligations of a particular state [14; 15, p. 127–139].

In this context, the Ukrainian doctrine of international law reasonably indicates the need for constitutional provisions that establish the superiority of international law over domestic law [16, p. 28; 17, p. 2; 18]. In this

regard, Professor Butkevich O.V. writes that “nevertheless, the proposals to introduce into the Constitution the provisions of the Declaration on State Sovereignty of Ukraine, which proclaims the priority of the norms of international law over the norms of domestic law, seem correct, because this is exactly what its importance for the legal system of our state requires” [19, p. 15]. Indeed, this is not only necessary for Ukrainian legislation, but for all states whose constitutions do not provide for such a norm, since constitutions are the fundamental law of the country, and the consolidation of such a norm contributes, on the one hand, to the stability of national legislation, and on the other hand, to the normal functioning of international law. In view of the fact that an international legal norm has a different legal nature than a national one, its termination cannot be regulated by national law. An international norm can be terminated only on the grounds provided for in the Vienna Convention, for example, with the consent of all parties to an international treaty (Article 54). Those *Lex posterior*: the principle of the abolition of the previous normative act by the subsequent one at the national level, has nothing to do with the existing norms of international law, which are part of the domestic legal system.

Thus, an international treaty continues to be valid until the state cancels it at the international level, and, accordingly, international norms continue to have higher force than the norms of national law, in case of their contradiction at the national level. In the considered case, one should use the constitutional mechanism of the priority application of the rules of an international treaty in relation to the rules established by law.

Conclusions. The issues of interrelation and interaction of international and national law are multidimensional and complex, theory and practice are not always homogeneous. However, the main trend is to recognize the need to comply with international obligations and recognize the primacy of international law over domestic law. The primacy of international law over domestic law is one of the most important legal guarantees for ensuring the normal cooperation of states in solving global problems of our time and ensuring human rights and freedoms.

In the context of strengthening the processes of global integration and international interdependence of states, the expansion of cooperation in order to solve international and national problems leads to an increase in the number of international treaties, most of which are implemented within the framework of national law. There are many norms enshrined in international law by treaty or conventional means. They acquire the character of *ius cogens* and are therefore binding on all states, regardless of whether they have ratified or acceded to certain treaties or customary agreements.

The fulfillment of international obligations is becoming increasingly dependent on the harmonization of domestic legal systems with the international legal system, which predetermines the need for law-making and law-enforcement actions and procedures for the implementation of international norms at the national level, and, consequently, an improved and developed mechanism for the implementation of international legal norms.

The wording in the legislation of some states that the norms of international law are part of domestic law is considered conditional, since the norms of international law are not transformed into the norms of national law, but occupy a special place in it. The norms of an international treaty that has entered into force have legal supremacy in relation to other subconstitutional acts (laws, decrees, decrees, resolutions). This position is fully consistent with the principle of good faith in relation to international law and must be applied in practice.

The concept of a conflict between the norms of an international treaty and the norms of national law and the concept of the invalidity of an international treaty are not identical concepts. They have different legal meanings and therefore should not be confused. Collisions occur only between a valid international treaty and the norms of national law. In this case, the norms of international treaties always have priority. As for the invalidity of an international treaty, it is not determined by the national law of states, but by international law (Article 65 of the Vienna Convention on the Law of Treaties).

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