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COURTS AND INTERNATIONAL LEGAL ORDER: INTERNATIONAL RULE OF LAW AND TRANSNATIONAL JUDICIAL DIALOGUE

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This article focuses on the concept of transnational judicial dialogue as an important part of contemporary discussions on the role of domestic and international courts in promoting international rule of law. By using methods of conceptual and comparative research, the article analyses major works of influential scholars of international law on judicial dialogue among courts. Interdisciplinary perspective of the article enabled to elaborate on consequences of global and regional political trends on functioning of courts. The article concludes by articulating the importance of the concept of transnational judicial dialogue for scholars of international law in Central Asia. Courts have become strategic actors by playing influential role in implementation of international law. Judicialization of domestic politics and legalization of international politics explain increased importance of courts in international legal order. Scholars have proposed to propose more nuanced explanations of reactions of domestic courts to international law instead of traditional monist-dualist explanation. Universal adherence to international human rights law, strengthening of liberal conceptions of international law, increasing awareness for international rule of law, and influence of globalization on functioning of international and domestic courts are increasing the interactions between courts of different levels (national, regional, and international). Transnational judicial dialogue has emerged as an important concept to analyse these interactions. It refers to situations where courts cite in their judgments the decisions of foreign and international courts. This practice is found across many different national, regional and international courts worldwide. Despite popularity of this concept among scholars of Asia, Africa, Europe or United States, few works were published on judicial dialogue of courts in post-Soviet region or Central Asia. There is a need to address this gap by promoting concept of judicial dialogue among Central Asian scholars. It will help to generate useful debates on important topics of international law concerning Central Asia like international human rights, international development or protection of environment. It will also strengthen dialogue between global academic community and Kazakhstani/Central Asian scholars.

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Keywords: transnational judicial dialogue; national courts; international courts; international rule of law; international law; judicialization of world politics; global constitutionalism; international human rights law.

Introduction

At the turn of 21st century, adjudicative powers of courts on both domestic and international levels have expanded to reach hitherto unseen extents: fate of presidential elections, responsibility of individuals for violation of international law, responsibility of governments towards their own citizens are among matters which are now settled in courts while it was difficult to accept such scenario few decades ago. In this context, courts are transforming into important players at the intersection of international and domestic legal orders playing decisive roles in articulating societal responses to the most pressing issues of our world.[1] This article will elaborate on three important threads of global legal scholarship which combined together shed light on evolving role of courts in international legal order: international rule of law; domestic courts and international law; and transnational judicial dialogue.

Major provisions

Modern interpretations of international law which claim to continue Grotian tradition in international law position the concept of international rule of law at the centre of our discipline. According to Hersch Lauterpacht, understanding Grotian legacy as an effort to transform international law to a true system of law both in its legal and in its ethical content as well as articulating clearly major features and objectives of this tradition was important to sustain the mission of international law. Subjecting totality of international relations to the rule of law, peace, idealism and progress were among such features as articulated by Lauterpacht in his famous article 'Grotian tradition in international law' published in the aftermath of World War II in 1946.[2] Since then, the international rule of law has become one of guiding principles shaping both the discourse and practice of international law.

This article situates the idea of international rule of law as an influential factor behind more recent legal scholarship analysing the increasing role of domestic and international courts in giving effect to international law. Proliferation of international and regional courts, increasing involvement of domestic judges in matters related to international law, material and procedural expansion of international law's implementation are usually seen as natural outcomes and also signs of legal globalization. Transnational judicial dialogue emerged as innovative and influential concept generating meaningful images of interactions between legal orders and judicial actors of different orders in this complex legalized world. After identifying the idea of international rule of law as a major force behind recent global judicial dynamics, this article will continue by elaborating on the

[1]Following articles traces in detail this phenomenon: Kahraman F., Kalyanpur N., Newman A.L. Domestic courts, transnational law, and international order // European Journal of International Relations. 2020. Vol. 26(1_suppl). – Pp. 184-208; Goldstein J., Kahler M., Keohane R.O., Slaughter A.M. Introduction: Legalization and world politics // International organization. 2000. Vol. 54(3) – Pp. 385-399; Hirschl R. The Judicialization of Politics // In: Caldeira G.A., Kelemen R.D., Whittington K.E. (eds). The Oxford Handbook of Law and Politics, 2008; online ed., Oxford Academic, 2009. https://doi.org/10.1093/oxfordhb/9780199208425.003.0008.

[2]Lauterpacht H. The Grotian tradition in international law. Brit. Yearbook of International Law. 1946.

role of domestic courts in implementing international law and on the content and uses of transnational judicial concept. The article will conclude by articulating the importance of the concept of transnational judicial dialogue for scholars of international law in Central Asia.

Materials and methods

A recent volume on concepts for international law called for attentive analysis of major concepts of international law because, according to editors, they represent 'key entry points for an analysis of the discipline and because they were the joints and hooks for multiple ways of arguing within international law'.[3] Inspired by this call, this article represents an effort to understand pressing debates about the function and goal of international law through an elaborate focus on the concepts of international rule of law and transnational judicial dialogue. The author analysed emergence, historical evolution, and uses of these two concepts in global legal doctrine as expressed in influential works of leading international law scholars and practitioners. Comparative method was used to analyse works of representatives of different national and regional in articulating meanings and uses of the concept of judicial dialogue. Interdisciplinary perspective of the article enabled to elaborate on consequences of global and regional political trends on functioning of courts.

Main part: Results of the research

1. International rule of law: elusive goal of modern international law

The quest to establish international rule of law is among the most fundamental goals of contemporary international law. H. Lauterpacht identifies international rule of law as a main feature of Grotian tradition of international law.[4] He elaborates on the concept of an international rule of law by defending the idea behind the League of Nations as a world federation, and by lecturing on 'legal organization of peace', which M. Koskenniemi describes as "a system of Rule of Law writ large".[5] I. Brownlie also identifies the promotion of the Rule of Law in international relations as the moral purpose of the United Nations.[6] M. Delmas Marty's recent works are marked by a search for "*communauté de droit à l'echelle mondiale*" (community of law on global level).[7] M. Weller sees the advancement of international rule of law as part of larger phenomenon of international constitutionalism which makes part of contemporary international law :

"These developments consist of the consolidation of international core values, the move away from the principle of strict consent in the creation of international legal rules with universal ambition, the increasingly complex variety of international actors, and the management of compliance with international legal obligations. Taken together, it is

[3]d'Aspremont J., Singh S. (eds.). Concepts for international law: contributions to disciplinary thought. Edward Elgar Publishing, 2019. P. 13.

[4]Lauterpacht H. Op. cit. See, also: Parry J.T. What is the Grotian Tradition in International Law? // University of Pennsylvania Journal of International Law, 2013. – Pp. 299-377.

[5]Koskenniemi M. The gentle civilizer of nations: the rise and fall of international law 1870–1960. Cambridge University Press, 2001. P. 355.

[6]Brownlie I. International Law at the fiftieth anniversary of the United Nations. General course on International Public Law. RCADI, 1995. P. 21.

[7]Delmas-Marty M. Vers une communauté de valeurs Les Forces imaginantes du droit 4. Paris: Le Seuil, 2011.

argued by a steadily increasing number of legal scholars that we are heading towards an international constitutional system based on common core values, the international rule of law and mechanisms for law enforcement (albeit largely decentralized ones).”[8]

Road toward international rule of law is not straightforward and it doesn’t either follow a linear logic. As exposed in Martti Koskenniemi’s seminal work, there are contending models of international law and liberal vision of international law is just one of them. While tragic experiences of 20th century increased awareness for necessity of international rule of law and paved way for real breakthroughs in international institutional and normative development, there are frequently setbacks and reactionary pushbacks against liberal interpretations of international law.[9] In this context, major works about international rule of law and international constitutionalism highlights three principal propositions which are advanced in the context of frictions between liberal and traditional models of international law:

1) A full-fledged international rule of law remains the object of a quest rather than an established fact. In this context, the international rule of law is best described as a process than an end result. International community should keep trying to establish international rule of law.

2) The principal reason for this state of affairs is continuing tension between two models of legitimacy – the traditional sovereignist model and the universalist model; M. Weller describes contemporary international law as existing in two parallel universes: one is where unilateralism is on the rise and international law is subject to fragmentation; second is where we witness emergence and consolidation of the phenomenon of international constitutionalism. It is difficult to claim that one model will definitively prevail over the other in the foreseeable future. [10]

3) This continuing tension between the two models is leading scholars of international law to look for alternative and innovative ways to conceptualize and to imagine the progress of international law and of international community.

Literature on the role of domestic courts in enforcing international law as well as on transnational judicial dialogue can be seen as part of these trends in international law which effort to advance an internationalist legal agenda under permanent constraint from the sovereignist model. A. Nollkaemper’s shift of focus from an international rule of law to a “world under law” can be read as an example of this search for compromise. It aims at developing international rule of law without disentangling traditional sovereignty principles. This approach entails co-opting national institutions in the process of realization of objectives of a “world under law”. For Nollkaemper, “domestic judicial powers are relatively acceptable way of creating a ‘world under law’, without creating inter- or supranational institutions that states would find to restrict their sovereignty unduly.” [11] The next section of the article will elaborate on this increasingly important role of national courts in the implementation of international law.

[8]Weller M. The struggle for an international constitutional order // In: Armstrong D. (ed.) The Routledge Handbook of International Law. Routledge, 2009. – Pp. 179-194.

[9]Following works give detailed account of the rise, evolution and decadence of liberal international legal and political order: Kennedy D. The move to institutions. Cardozo Law Review. 1987. Vol. 8(5). – Pp. 841-988; Koskenniemi M. The gentle civilizer of nations: the rise and fall of international law 1870–1960. Cambridge University Press, 2001; Mearsheimer J. The great delusion: Liberal dreams and international realities. Yale University Press, 2018.

[10]Weller M. Op. cit.

[11]Nollkaemper A. National courts and the international rule of law. Oxford University Press, 2011. P. 8-9.

2. Legalization of world politics and transformation of the structure of international obligations

Evolution of international law and global governance starting in the second half of 20th century has transformed the traditional relationships between international law and domestic legal orders. These changes reflects the evolution of relationships between national societies and the international community. International Organization, one of the most prominent journals of international affairs, published a special issue with title 'Legalization of world politics' in 2000 which later has become a major concept that denotes a proliferation of binding legal structures regulating interactions between states worldwide. For editors of this special issue, at the turn of 21st century the world was experiencing 'a move to law'. This move to law was characterised by proliferation of international courts with ever expanding adjudicative powers including trial of individuals in international judicial fora and of international treaties creating binding commitments in many different areas including such sensitive sectors like environment, arms trade or nuclear weapons.[12] S. Besson argued that it is now possible to refer to emergence of 'objective, universal and imperative international law'.[13] Legalization of world politics which introduces judicial reasoning into matters of traditional high politics can also be seen as a parallel evolution to 'judicialization of politics' which denotes the transfer to courts of contentious issues of outright political nature and significance (issues of pure politics). Courts are increasingly involved in articulation of societal answers to core moral predicaments, public policy questions and political controversies.[14] For Filiz Karaman et al., domestic courts are endogenous sites of international political change and as such they should be seen as co-creators of international order.[15]

A. Tzanakopoulos, in his report submitted to the International Law Association in 2016, identifies evolution of the structure of international structures as the main reason for deepening of interactions between domestic courts and international law. For him, interactions between states and international law used to follow 'bilateralist performance structure of international obligations' in the past. In this web of relationships, State's international legal obligations derived mostly from *traité-contrat* and they were mainly meant to produce effect on international plane. International legal obligations were subjected to logic of reciprocity and bilateralism. Treaties usually created outward-looking obligations. In such context, there was limited rationale and space for domestic courts to interfere with the process of realization of these obligations. In globalized world, bilateralist performance structure of international obligations is being eroded under pressure from modern international treaty-making practices and evolution of the nature of international legal obligations. International law-making practices go well beyond traditional logic of reciprocity and bilateralism identified with the model of *traité-contrat*. States are increasingly part of multilateral regimes or frameworks based on obligations deriving from *traité-loi* in the form of multilateral treaties. States' capacity to shield themselves from these obligations using the principle of reciprocity is reduced. International legal obligations of States created by these treaties are *inward-looking* which contributes to

[12]Goldstein J., Kahler M., Keohane R.O., Slaughter A.M. Op. cit.

[13]Besson S. Theorizing sources of international law // In: Besson S., Tasioulas J. The Philosophy of International Law. Oxford University Press, 2010. P. 166.

[14]Hirschl R. Op. cit.

[15]Kahraman F., Kalyanpur N., Newman A.L. Op. cit.

further entanglement of domestic legal orders with international legal order. Once they are part of these regimes, States are enjoined, to undertake certain conduct within their own domestic legal order.[16]

3. Changing role of domestic courts as important actors of international legal order

Universal acceptance of international human rights law, development of regional integration laws, and growing penetration of international norms into different sectors of domestic legal orders turning domestic courts into important players at the intersection of international law with domestic legal orders. Domestic courts hold substantial potential to contribute to the advancement of international rule of law from within their domestic legal orders. Even if it is very difficult to classify and measure the engagement of domestic courts with international law because there is an 'infinite variety of engagements', some scholars have tried to create a typology of interactions between domestic courts and international law as an analytic tool. A. Nollkaemper identifies four roles that national courts can play regarding international law: substitution, implementation, contestation and normative development. For him:

"*[1- Substitution is when national courts] perform functions that in other situations can be fulfilled by international courts. Legal significance of decisions of national courts on questions of international law may then transcend the domestic legal order. (…) [2- We can speak about implementation function, when] a national court could play a role in securing compensation for violation of a human right where that has been determined by international court. (…) [3- Contestation] A third function of national courts in relation to international courts is the opposite of "implementation": national courts may contest international interpretations or decisions; that is to reject an international decision. (…) [4- Normative development] A fourth function of national courts in relation to international courts is that they can support the contribution that international courts make to interpretation and development of international law, and thereby to the stabilization of normative expectations*."[17]

In a similar vein, Tzanakopoulos describes three strategies that domestic courts may adopt in their engagement with international law: (a) avoidance, where domestic courts decide to avoid implementation of international law even in situations when the latter is applicable; (b) alignment, where domestic courts strive to align or harmonize domestic legislation with international law; and (c) contestation, where domestic courts rely on domestic laws to contest international norms.[18] Hence, the role of domestic courts may be either as agents of development or as agents of decay in relation to international norms.[19] While legal

[16]Tzanakpoulos A. Final report of the study group on principles on the engagement of domestic courts with the international law. International Law Association, 2016. For a detailed account on inward-looking obligations, see Tzanakopoulos A. Domestic Courts in International Law: The International Judicial Function of National Courts // Loyola International and Comparative Law Review. 2011. Vol. 34(1). – Pp. 133-168. Tzanakopolous argues that "inward-looking norms, or inward-looking aspects of norms, may demand (i) that the State undertake, or refrain from, certain conduct within its domestic jurisdiction; (ii) that certain limits be imposed on previously unregulated State conduct within its jurisdiction; or (iii) that the State prohibit, regulate, or permit certain conduct by natural persons and legal entities within its jurisdiction."

[17]See Nollkaemper A. Conversations among courts // In: Romano A., Shany Y. (eds.). The Oxford Handbook of International Adjudication. Oxford University Press, 2013. – P. 523-549. See, also: Nollkaemper A. National courts and the international rule of law. Oxford University Press, 2011.

[18]Tzanakpoulos A. 2013. Op. cit. P. 16.

[19]Ibid. P. 26.

doctrine and practice increasingly refer to international community, universal values and general interests of humankind, the practice of domestic courts may be motivated by a protection of domestic interests or national values at the expense of international rule of law.[20]

4. Transnational judicial dialogue as an important concept to understand interactions between domestic and international legal orders

Transformation of the role of domestic courts in the context of realization of international rule of law and increasing entanglement of international and domestic legal orders have led to increasing interactions between courts of domestic, regional, and international levels. Consciousness of a shared objective – the international rule of law – sets a foundation for solidarity among these courts in reaching that objective. This, in turn, leads to more engagement between international law and domestic courts, as well as increased interaction and reciprocal influencing between courts of different orders belonging to different national/international legal orders. For scholars, transnational interactions among courts are real and substantial.[21] In 1994, Anne-Marie Slaughter noted that "courts are talking to one another all over the world".[22] From her perspective, we were already witnessing increasingly reciprocal engagement between courts in different parts of the world in the form of judicial dialogue that she describes as "transjudicial communication – communication among courts, whether national or supranational – across borders".[23]

This process of transjudicial communication is commonly referred to as "judicial dialogue". This concept was used in legal scholarship mainly in two meanings. First, judicial dialogue can refer to real life meetings between judges of domestic and international courts. National and international judges frequently come together at different annual meetings, conferences or workshops. For example, the European Court of Human Rights regularly organizes seminars attended by judges from different countries at the occasion of the opening of judiciary year. There are also different networks bringing together judges from different jurisdictions such as International Hague Network of Judges. Second meaning of judicial dialogue refers to the practice of referring by courts to decisional law of other international and foreign courts in their judgments. Hereafter, we follow this second meaning of the term. As one scholar puts it "one of the ways 'judicial dialogue' is most often being used is when judges refer to foreign case-law in constitutional interpretation".[24] A recent and one of the most substantial works on transnational judicial dialogue in terms of geographical and material scope, defines the judicial dialogue as "the use of

[20]Palombino F.M. (ed.) Duelling for Supremacy: International Law Vs. National Fundamental Principles. Cambridge University Press, 2019.

[21]See, i.e., Tate N., Vallinder T. (eds.). The Global Expansion of Judicial Power. New York University Press, 1995; Slaughter A.M. Judicial Globalization // Vanderbilt Journal of International Law. 2000. Vol. 40. – Pp. 1103-1124; Schwartz O. Changing the Rules of the (International) Game: How International Law is Turning National Courts into International Political Actors // Washington International Law Journal. 2015. Vol. 24. – Pp. 90-134; Tzanakopoulos A. Judicial dialogue as a mean of interpretation // In: Aust H.P., Nolte G. (eds.). The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence. Oxford University Press, 2016. – Pp.72-95.

[22]Slaughter A.M. A typology of transjudicial communication // University of Richmond Law Review. 1994. – Pp. 99-137. See also: L'Heureux-Dube C. The importance of dialogue: globalization and the international impact of the Rehnquist court // Tulsa Law Journal. 1998. Vol. 34 (1). – Pp. 15-26.

[23]Ibid. P. 100.

[24]Zoethout C. On the Different Meanings of "Judicial Dialogue" // European Constitutional Law Review. 2014. Vol. 10(1). P. 175. See also Halmai G. The Use of Foreign Law in Constitutional Interpretation // In: Rosenfeld M., Sajo A. (eds.). The Oxford Handbook of Comparative Constitutional Law. Oxford University Press, 2012. – Pp. 1328-1349.

external judicial decisions by courts as an element of influence (even if very limited) in interpretation and application of the law".[25] In earlier period, conceptual framework of judicial dialogue was mostly developed by American and European legal scholars. In particular, American debates on judicial dialogue evolved around the question of necessity for such tool in judicial reasoning of American courts[26] whereas European literature on judicial dialogue focused on constant interactions between national courts in Europe and European supranational courts (ECJ and ECHR).[27] Over the past decades, literature on judicial dialogue has expanded in content and scope.[28]

5. Typology and logics of transnational judicial dialogue

Transnational judicial dialogue can take different forms. A.M. Slaughter identified three types of transnational judicial conversation: horizontal, vertical, and mixed. Horizontal judicial dialogue takes place between the courts of the same status when courts willingly cite decisions of foreign courts in their judgments. Vertical dialogue describes judicial dialogue between national and supranational courts. Dialogue between courts of EU member states and the European Court of Justice or national courts and the ECtHR are examples of such vertical judicial dialogue. Mixed dialogue, or mixed vertical-horizontal communication occurs, for example, when supranational courts initiate horizontal dialogue among national courts.[29] In the decision *State v. Makwanyane* of South African Constititonal Court in 1995 which declared the unconstitutionality of death penalty, the Court cited, among others, decisions of courts of Canada, Hungary, India and United States. The South African court cited these external legal sources to demonstrate that it was possible to identify a general trend toward limiting the use of death penalty worldwide in the second halft of 20th century.[30] W. Saindholtz's study of judicial citations of regional human rights courts found that InterAmerican Court of Human Rights and African Court of Human Rights frequently cited European Court of Human Rights in their decisions while European Court of Human Rights also occasionally referred to decisions of two above-mentioned courts. All three regional human rights courts regularly cited UN Human Rights Committee.[31]

Question of why courts engage in judicial dialogue has generated substantial debate among international legal scholars. Their arguments can fall under one of the following categories: normative, pragmatic, and strategic. According to normative arguments, courts should engage in transnational judicial dialogue due to belongingness to global community of courts driven by the shared goal of establishing an international rule of law. According to Eduardo Ferrer Mac-Gregor, former Judge and Vice-President of Inter-

[25]Muller A., Kjos H.E. (eds). Judicial dialogue and human rights. Cambridge University Press, 2017.

[26]Waldron J. Foreign law and the modern ius gentium // Harvard Law Review. 2005. Vol. 119(1). – Pp. 129-147.

[27]Decaux E. France // In: Shelton D. (ed.). International law and domestic legal systems: Incorporation, Transformation and Persuasion. Oxford University Press, 2015. – Pp. 292-406.

[28]Qoraboyev I., Turkut E. International law in the Turkish legal order: Transnational judicial dialogue and the Turkish Constitutional Court // The Italian Yearbook of International Law Online. 2017. Vol. 26(1). – Pp. 41-62.

[29]Slaughter A.M. 1994. Op. cit. Pp. 112-113.

[30]Grove T.L. The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation. 2001. Faculty Publications. 1226. // URL: https://scholarship.law.wm.edu/facpubs/1226.

[31]Sandholtz W. Human rights courts and global constitutionalism: Coordination through judicial dialogue // Global Constitutionalism. 2021. Vol. 10(3). – Pp. 439-464.

American Court of Human Rights, incorporation of international human rights laws into domestic legal orders have led to emergence of a shared normative and functional identity of national and international judges. They all have the same goal of advancing the protection of human rights even if they are operating on different levels and legal bases. Recourse to judicial dialogue is necessary to ensure coherent implementation of international human rights norms across different jurisdictions.[32] Dialogue can help courts in the interpretation and application of norms relevant for the protection of human rights, to solve a concrete dispute and to find common solutions to current human rights problems.[33] Another argument for obligatory recourse to judicial dialogue is articulated by A. Tzanakopoulos for whom international law obliges judges to engage in judicial dialogue. Judicial decisions of international and domestic courts may represent subsequent State practice in implementing treaties or evidence to the existence and content of international custom. Consequently, whenever domestic courts adjudicate an issue pertaining to international law, they should scrutinize practice of relevant foreign and international courts.[34]

Pragmatic arguments see judicial dialogue as a useful tool to improve the quality of judicial decisions. In a globalized world, courts of different countries face similar issues and most of the time they also have to implement similar international norms. In some ways, they are acting as participants of global community of courts.[35] In this context, courts may pay attention to judgments of other courts to use them in articulating the reasoning and decisions in their own cases. They may also look at the jurisprudence of foreign courts to see impact and consequences of judicial decisions taken in similar cases. This will help them to improve the design of their judgments. Taking into account global jurisprudence in articulating their own decisions will also help domestic legal orders to avoid legal friction with the world.[36] Claire L'Heureux-Dube, judge of Supreme Court of Canada, explained how consideration of US Supreme Court's decisions on issues related to abortion, hate speech or judicial transparency were helpful in articulating approach of Canadian Supreme Court to similar issues.[37]

Strategic arguments analyse judicial dialogue as an attempt by judges to increase legitimacy of their court and judgments. This is especially true when courts are invited to rule on sensitive issues or when their decisions go against public opinion. Citations to foreign and international judicial decisions supporting their own decisions will confer legitimacy in the face of possible public backlash. Domestic courts cite foreign law for strategic purposes in order to persuade and convince other domestic actors of the necessity of aligning with international rule of law goals. A. Muller and H.E. Koje's comprehensive study on judicial dialogue in human rights found that judges deliberately used transnational judicial dialogue in socially, politically or culturally challenging cases to 'add authority' to their decisions by showing their audiences that others have come to

[32]Mac-Gregor E.F. What do we mean when we talk about judicial dialogue: reflections of a Judge of the Inter-American Court of Human Rights // Harvard Human Rights Journal. 2017. Vol. 30. – Pp. 89-127.

[33]Muller A., Kjos H.E. (eds). Op. cit. P. 4.

[34]Tzanakopoulos A. Judicial dialogue as a mean of interpretation // In: Aust H.P., Nolte G. (eds.). The Interpretation of International Law by Domestic Courts: Uniformity, Divesity, Convergence. Oxford University Press, 2016. P. 73.

[35]Slaughter A. A Global Community of Courts // Harvard International Law Journal. 2003. Vol. 44(1). – Pp. 191-221.

[36] Bodansky D. The use of international sources in constitutional opinion // Georgia Journal of International and Comparative Law. 2004. Vol. 32. – Pp. 422-428.

[37]L'Heureux-Dube C. Op. cit.

similar conclusions in similar cases.[38] C. Dupre studied how the Hungarian Constitutional Court played an important role in developing the rule of law in post-Soviet Hungary. The Hungarian Court deliberately engaged in importing foreign law into the Hungarian legal order by using specific methods of legal transplantation and transjudicial communication.[39] Courts can also rely on judicial dialogue to shield domestic democratic systems from corrosive forces of globalization.[40]

Bodansky's discussion on the use of international and foreign law, including judicial decisions, by judges of the United States Supreme Court to interpret the Constitution represents well this mixture of normative, pragmatic, and strategic reasons for courts to engage in judicial dialogue: "First, […] international law has a venerable history in constitutional interpretation. Second, […] American courts and foreign courts are engaged in a common legal enterprise and could learn from one another. Third, […] the text of certain constitutional provisions invites the use of international materials. Finally, […] taking international opinion into account has strong pragmatic justifications".[41]

Discussion and conclusions

Discussions around the concept of transnational judicial dialogue point to increasingly strategic role of domestic and international courts in the evolution of international law. They are frequently brought to have decisive impact on the implementation or non-implementation of international norms. Parallel developments of legalization of world politics and judicialization of politics caused by universal adherence to international human rights law, transformation of the nature of international law, increasing awareness for international rule of law, and influence of globalization on functioning of international and domestic courts necessitate increased focus on interactions among courts. Judicial dialogue has emerged as an important conceptual framework to understand nature and logics of interactions among domestic and international courts. Impressive geographical and material scope of literature on judicial dialogue proves its acceptance by and usefulness for global community of legal scholars. However, there are few works which adopted judicial dialogue framework in post-Soviet region and Central Asia. Limited number of such works are almost all published by Russian scholars and practitioners. In 2011, Valerie Zorkin, President of Russian Constitutional Court, published an article outlining dialogue between the European Court of Human Rights and the Constitutional Court of Russia. For him, judicial dialogue between these two courts was necessary and unavoidable. Though, he argued that this dialogue should be conditioned to ultimate respect for national sovereignty.[42] V. Tolstykh's study on the jurisprudence of the Court of Eurasian Economic Union included analysis of instances where the Court engaged injudicial dialogue with European Court of Justice.[43] From scholarly perspective, judicial dialogue is

[38]Muller A., Kjos H.E. (eds). Op. cit. P. 513.

[39]Dupre C. Importing the law in post-communist transitions. Hart Publishing, 2003. P. 53.

[40]Benvenisti E. Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts // The American Journal of International Law. 2008. Vol. 102. – Pp. 241-274.

[41]Bodansky D. Op. cit. P. 421.

[42]Зорькин В. Диалог Конституционного Суда Российской Федерации и Европейского Суда по правам человека в контексте конституционного порядка // Сравнительное Конституционное Обозрение. 2011. № 80 (1). – С. 105-114.

[43]Tolstykh V. Between a 'heavenly' life and an 'earthly' life: Jurisprudence of the Court of the EAEU from 2012-2019 // Russian Law Journal. 2019. № 7(3). – Pp. 194-219.

characterised as part of modern doctrines for analysing interactions between domestic and international courts.[44] Under the light of recent developments where Russia has openly violated modern spirit of international law and its fundamental principles, this limited dialogue between Russian and European/international courts will further be reduced or even disappear.

There is a need for scholars from Central Asian countries to adopt judicial dialogue as an important conceptual framework to generate reflections on interactions between their realities and global trends of international legal scholarship. It was noted that concepts enable meaningful analysis and discussions about the state of affairs of the discipline of international law and to participate in global conversations around most pressing issues related to national and international rule of law. Conceptual framework of judicial dialogue has been used to elaborate on matters directly related for national development of countries of Central Asia like global constitutionalism[45]; Belt and Road Initiative of China[46]; or, protection of environment.[47] These examples show the relevance of judicial dialogue for analysing issues and challenges faced by Central Asian countries where we see trends to transform constitutional practices or to strengthen participation in international development initiatives like Belt and Road. Focusing on empirical developments related to judicial processes in Central Asia will also be helpful to see how these global processes affecting role of domestic and regional/international courts are unfolding in Central Asian context. Judicial dialogue will also be useful for developing conceptual and methodological toolboxes of judges from the region in construing national responses to international norms. Most importantly, judicial dialogue represents a shared conceptual framework through which Central Asian scholars and practitioners could articulate and promote their national and regional visions on global scale related to matters of high importance for both Central Asia and international community. It will also help to initiate and promote dialogue and mutual learning among courts of Central Asian countries and scholars studying them.

И. Қорабоев, PhD, М.С. Нәрікбаев атындағы КАЗГЮУ Университетінің Халықаралық экономика мектебінің Associate Professor-ы (Астана, Қазақстан), БҰҰ-ның Салыстырмалы аймақтық интеграцияны зерттеу институтының ғылыми қызметкері (Брюгге, Бельгия): **Соттар және халықаралық-құқықтық тәртіп: халықаралық құқық үстемдігі және трансұлттық сот диалогы.**

Бұл мақала халықаралық құқық үстемдігін қамтамасыз етудегі ұлттық және халықаралық соттардың рөлі туралы заманауи пікірталастың маңызды бөлігі ретінде трансұлттық сот диалогы тұжырымдамасы қарастырылады. Мақалада концептуалды және салыстырмалы зерттеу әдістерімен халықаралық құқық саласындағы көрнекті ғалымдардың сот диалогы мен өзара әрекеттестігі туралы негізгі еңбектері талданады. Мақаланың пәнаралық тақырыбы жаһандық және аймақтық

[44]Умнова-Конюхова И.А. Национальное правосудие и международное правосудие: современные доктрины взаимодействия // Правосудие. 2021. № 4. – С. 116-139.

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[46]Cai C., Wang Y. Transnational judicial dialogue in the rise of China: how the Chinese judiciary enhances the Belt and Road Initiative // Asia Pacific Law Review. 2021. Vol. 29(1). – Pp. 149-166.

[47]Bogojević S. Judicial dialogue unpacked: Twenty years of preliminary references on environmental matters initiated by the Swedish judiciary // Journal of Environmental Law. 2017. Vol. 29(2). – Pp. 263-283.

саяси тенденциялардың соттардың қызметіне ықпал ету салдарын толығырақ қарастыруға мүмкіндік берді. Мақаланың қорытынды бөлімінде Орталық Азиядағы халықаралық заңгерлер үшін трансұлттық сот диалогы тұжырымдамасының маңыздылығына ерекше назар аударылады. Соттар халықаралық құқық нормаларының орындалуына әсер ету арқылы стратегиялық рөл атқара бастады. Ішкі саясаттағы сот құрылымдарының рөлін күшейту («судебизация», «judicialization»), сондай-ақ халықаралық саясаттағы құқықтық және соттық элементтердің күшеюі (legalization of international politics) халықаралық құқықтық тәртіптегі соттардың маңызды рөлін айқындайды. Ғалымдар дәстүрлі монистік-дуалистік көзқарастың орнына ұлттық соттардың халықаралық құқыққа әсерінің неғұрлым нақты түсіндірмелерін ұсынады. Халықаралық адам құқықтарының жалпыға ортақ ұстанымы, халықаралық құқықтың либералды тұжырымдамаларының күшеюі, халықаралық құқық үстемдігі туралы хабардарлықтың артуы және жаһанданудың халықаралық және ұлттық соттардың қызметіне әсері әртүрлі деңгейдегі (ұлттық, аймақтық және халықаралық) соттар арасындағы өзара іс-қимылды күшейтеді. Трансұлттық сот диалогы осы өзара әрекеттесуді, яғни, соттар өз шешімдерінде шетелдік және халықаралық соттардың шешімдеріне сүйенетін жағдайларды талдау үшін тұжырымдама ретінде қалыптасты. Бұл тәжірибе дүние жүзіндегі көптеген ұлттық, аймақтық және халықаралық соттар арасында кең таралған. Бұл тұжырымдаманың Азия, Африка, Еуропа және АҚШ ғалымдарының ортасында танымал болғанына қарамастан, осы тақырып бойынша посткеңестік кеңістікте немесе Орталық Азияда еңбектер аз. Бұл айырмашылықты Орталық Азия ғалымдары арасында сот диалогы тұжырымдамасын кеңінен насихаттау арқылы жою керек. Сонымен қатар, Орталық Азияға қатысты халықаралық құқықтың халықаралық адам құқықтары, халықаралық даму немесе қоршаған ортаны қорғау сияқты маңызды мәселелерін талқылауға ықпал етеді. Ол сондай-ақ әлемдік және қазақ/Орталық Азия академиялық қауымдастықтары арасындағы диалогты нығайтады.

Тірек сөздер: трансұлттық сот диалогы; ұлттық соттар; халықаралық соттар; халықаралық құқық үстемдігі; халықаралық құқық; әлемдік саясаттағы сот құрылымдарының күшеюі; жаһандық конституционализм; халықаралық адам құқықтары.

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В настоящей статье рассматривается концепция транснационального судебного диалога как важной части современной дискуссии о роли национальных и международных судов в обеспечении верховенства международного права. При помощи методов концептуального и сравнительного исследования в статье анализируются основные работы выдающихся ученых в области международного права о судебном диалоге и взаимодействии. Междисциплинарный аспект статьи позволил более подробно рассмотреть последствия влияния глобальных и региональных политических тенденций на деятельность судов. В заключении статьи особое внимание уделяется важности концепции транснационального судебного диалога для юристов-международников в Средней Азии. Суды стали играть стратегическую роль, влияя на реали-

зацию международного права. Усиление роли судебных структур («судебизация», «judicialization») внутренней политики, а также укрепление правовых аспектов внешней объясняют возросшую важную роль судов в международном правопорядке. Вместо традиционного монистическо-дуалистического подхода ученые предлагают более уточненное объяснение реакции национальных судов на международное право. Всеобщая приверженность международному праву прав человека, укрепление либеральных концепций международного права, повышение осведомленности о верховенстве международного права и влияние глобализации на деятельность международных и национальных судов усиливают взаимодействие между судами разных уровней (национальных, региональных и международных). Транснациональный судебный диалог появился в качестве концепции для анализа такого взаимодействия. Речь идет о тех ситуациях, где суды в своих решениях ссылаются на решения иностранных и международных судов. Такая практика распространена среди многих национальных, региональных и международных судов по всему миру. Несмотря на известность данной концепции в кругах ученых из Азии, Африки, Европы и США, на эту тему было опубликовано достаточно мало работ на постсоветском пространстве или в Средней Азии. Необходимо восполнить этот пробел путем популяризации концепции судебного диалога среди ученых Средней Азии. Это поспособствует появлению полезной дискуссии о таких важных вопросах международного права относительно Средней Азии, как международные права человека, международное развитие или защита окружающей среды. Это также укрепит диалог между мировым и казахстанским/среднеазиатским академическими сообществами.

Ключевые слова: транснациональный судебный диалог; национальные суды; международные суды; верховенство международного права; международное право; усиление роли судебных структур в мировой политике; глобальный конституционализм; международное право прав человека.

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