Sovereignty and International Law in the Age of the Internet

For centuries the concept of state sovereignty has remained central to international relations. In international law it is embodied in one of its fundamental principles – the principle of sovereign equality of states which became the basis of international order after World War II.

At first the sovereignty was viewed as a supreme unlimited power of the monarch, but later the development of political thought and action contributed to strengthening understanding of the nation as a sovereign entity and sovereignty as an inherent characteristic of the state. In the 20th century the ideas of democracy and human rights exerted a significant influence on considering sovereignty, which resulted in evolution of the concept of popular sovereignty, known as far back as the 17th century, in international law. However, its practical implementation is problematic due to different ideological approaches across the world.

Considerable transformations of social institutions in the era of globalization as well as the spread of information technology affect the position of international actors, and therefore have to do with the scope of state sovereignty. As a result, we are discussing either the issues of the erosion of sovereignty by private entities and international organizations or the obsolescence and inadequacy of the concept. These positions are supported by the growing influence of transnational corporations in the realm of international policy, the emergence of supranational authorities, and, in general, by the inability of states to control global processes. This list of factors should also be supplemented with the development of the Internet and its growing impact on political, economic, and cultural processes.
On the other hand, the interpretation of state sovereignty as a fundamental principle of international law enshrined in the UN Charter has changed little since its adoption. Despite all the changes and technologies, state sovereignty continues to play a major role in relations between states and the territorial borders as boundaries of legal jurisdictions still matter greatly. This inclines us to the view that a well-known equation „more Internet equals less sovereignty” over-simplifies reality or is completely incorrect.

Our task is to comprehend what state sovereignty means in the age of the Internet and what its prospects are in the near future. For this we should consider the ways in which the Internet influences state policy and international relations that are usually seen as threatening to national sovereignty. Then I shall try to prove that the observance of sovereignty principle together with international cooperation between sovereign states are prerequisites for the rule of law on the Internet based on a fair balance of rights and interests between all stakeholders. Besides, it is important to examine the arguments in favour of liberal belief that the effective exercise of sovereign powers and the existence of a free Internet can successfully complement each other.

The idea that sovereignty is threatened by the Internet is based on one of its essential characteristics – the ability to cross the borders. Similar anxieties are not new and have already been expressed concerning other means of disseminating information invented by man since the time of the spreading of the printing press. However, the discussions of the issue at the international level began in connection with the possibility of radio broadcasting on the territory of other states without their consent. The launch into space of the first communication satellite as well as the global spread of Western mass culture caused in the 1960-70s the debate at the UN and its specialized agencies on the need to respect so-called information sovereignty and establish a „new world information and security”.

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communication order”. Developing countries, considering sovereignty in its broadest sense as the ability to exercise control over economic, cultural, political, and other spheres, insisted on their right to control the information flow including media broadcasting for their population, to prevent propaganda and cultural imperialism. Developed nations instead emphasized on guaranteeing the freedom of expression and providing the free flow of information. Consequently, the opposition between the concepts of information sovereignty and protection of freedom became obvious almost half a century ago.

Decisions of international organizations, adopted at that time, included the provisions providing both national sovereignty and freedom of information, still the states could interpret the combination of them quite differently. The provisions of the UNESCO Declaration of Guiding Principles on the Use of Satellite Broadcasting for the Free Flow of Information, the Spread of Education and Greater Cultural Exchange were also the result of an uneasy compromise. Among other things, they declared the respect of the sovereignty and equality of all states and the right of each country to decide on the content of educational programs broadcast by satellite to its people. However, further technological innovations undermined the expectations of the possibility to combine effective government’s control on information with ensuring democratic freedoms. In this context, it is worth recalling Marshall McLuhan’s consideration of technological extension’s main characteristic to amplify or accelerate existing processes irrespective of “how it is used” by human. Regarding the electrical media their real message is to erase boundaries, abolish distances, and contract the world into a global village. Nowadays we can confidently say that the Internet has justified this forecast and, if

not completely made the government’s ability to control the information sphere impossible, at least has considerably complicated the task. Taking into account the probable launching of a network of satellites to provide global high-speed internet access in the nearest future, the prospects of government control in this field are getting more and more elusive.

Today, authorities of the state are faced with the following internet-relating problems that affect sovereign rights: the distribution of shared resources, the control of economic activity and tax collection, combating Internet crime (including the abuse of freedom of expression and the infringement of intellectual property rights) and hostile propaganda or other undesirable influence. Most of these problems can be effectively solved through international cooperation and legal instruments in terms of involvement of the vast majority of the world’s countries. But it would be wrong to assert that the state has lost the possibility to regulate these matters in its territory itself. First of all, it can use its force against Internet corporations violating the national law, which have a local presence or local property. Such a threat is likely to have some effect, at least if a country’s market is important enough for the corporation. However, not all private entities operating on the Internet have a local presence under the jurisdiction of authorities of a particular state.

One more way to regulate the Internet is to place restrictions on the free flow of information by creating special units, using special technical means, and imposing significant obligations on Internet providers. The experience of authoritarian states shows that, if desired, sovereign power can quickly become a dominant player in the field of information dissemination. On the other hand, to ensure that such restrictive measures are really effective, considerable efforts and resources should be devoted. And with the development of technology these costs will only grow. Besides, the maintenance of such regime is highly dependent on the consent and support

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from the population\textsuperscript{10}. Restrictive measures may create unfavourable conditions for doing business and adversely affect the economy. For example, the Russian offices of some IT companies were closed in response to changes in legislation on personal data\textsuperscript{11}. Given the fact that economic prosperity has virtually become the central priority of state policy\textsuperscript{12}, it is natural that most governments are not inclined to impose significant restrictions on the Internet. Moreover, states are usually interested in the activities of multinational corporations within their boundaries in order to ensure stable economic growth and foreign investments\textsuperscript{13}.

Finally, the state could hypothetically disconnect itself from the global Internet and develop its own information network. However, the laws of balancing human rights and public interests show that the greater the degree of detriment to one right or principle (in our case – to the human rights related to the freedom of the Internet), the greater must be the importance of satisfying the other principle\textsuperscript{14}. In case of country’s decision to disconnect its population from the Internet, any rational weighing of interests clearly demonstrates the unreasonableness of such a measure. Furthermore, the negative consequences of this step repeatedly outweigh the potential positive results.

As for the concept of informational sovereignty, it has not been widely recognized at the international level as the development of the principle of sovereignty and it is not accidental. This concept envisages that the state authorities have the right to exercise full control over information flows on their territory. But, as the history shows, in order to gain such control the state tends to expand its actual

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level of supply of knowledge in an attempt to achieve total awareness” and define some kind of information „as the only kind of knowledge that is legitimate or relevant”\(^\text{15}\). This „distortion of reality” cannot be in favour of national sovereignty if we consider it as derived from the sovereignty of the people. On the contrary, autocratic regimes often use the concept of information sovereignty to preserve their own power and to prevent the democratization of the nation. Thus, information sovereignty means that the state authorities function as a kind of filter between citizens and the world of information. Such a scheme does not meet the objective tendencies of development of both information technologies and international relations. Besides, it reduces the competitiveness of the country in a globalized world. So it is not surprising that current autocratic regimes, being aware of the weakness of this concept, are trying to convince people about the impossibility of objective journalism and truth, thereby denying the idea of the freedom of expression, as a value opposing state control over information flows\(^\text{16}\).

However, unsubstantiated claims on information sovereignty do not necessarily mean the erosion of the fundamental principle of national sovereignty. Sovereignty in international law as the main characteristic of the state results in a number of sovereign rights, which should not be confused with real powers and abilities of state authorities in specific circumstances. In many areas inequalities between states in today’s world are obvious and, moreover, they have always been substantial. At different time the ability of governments to control certain economic and social processes has varied tremendously\(^\text{17}\). In order to improve their position states begin to cooperate with each other, creating legal instruments and international organizations, including those with supranational powers\(^\text{18}\). On the one hand, such cooperation is possible due to the existence

17 E. Cohen, op. cit., p. 81.
of the principle of sovereignty, and on the other – it helps the states to realize their sovereign rights. Therefore, the complexity of national governance of the Internet or the existence of influential non-sovereign entities is not the same as undermining sovereignty\(^\text{19}\). Nevertheless, these issues require appropriate response and action from the states. The widest possible international cooperation is the key to the effectiveness of such a response, but the governments have also the right to introduce unilateral regulation. The only limiting factor for them concerning such a regulation is the compliance with the principles and norms of international law. Consequently, we should not consider the principle of sovereignty in isolation, only in conjunction with other fundamental principles of international law\(^\text{20}\).

Thus, at present there are many Internet-related problems which given the nonterritorial nature of the Internet and other mentioned factors cannot be managed by states alone. There are also two ways of solving them either by using the potential of current international law based on national sovereignty, or by rejecting the sovereignty and establishing new structures of global governance. The latter option, in spite of its probable effectiveness, has many shortcomings and is unlikely to be realized in the near future. Despite various predictions, globalization has not yet led to a comprehensive global order. In current circumstances states are creating new institutions and delegating significant powers to them, but territorial borders and sovereign rights still matter greatly\(^\text{21}\). Among other things, it is also caused by the positive goods that sovereignty realizes, namely: 1) locality of taking important decisions in order to preserve one’s own values, identity and the way of life, 2) collectivity in public resources management and producing public goods to meet the needs of society, as opposed to the global market, 3) true democracy based on social solidarity and citizens’ participation\(^\text{22}\). The shortcomings of the system of global governance, which are difficult to avoid, include further departure from representative democracy, the increasing

\(^{19}\) H. Perrit, *op. cit.*, p. 432.

\(^{20}\) W. Gong, *op. cit.*, p. 133.

\(^{21}\) E. Cohen, *op. cit.*, p. 93.

power of institutions of questionable legitimacy, and the disturbance of established balances of interests.

Therefore, the only acceptable solution is the creation by sovereign states of new international legal instruments in response to the threats posed by the Internet. Saving the current state of "regulatory chaos" deepens the existing problems and is not conducive to ensuring equal rights for all. In this context it is important to mention the dominant position of certain states in the Internet (especially of the USA), which "recognize no limits to their hegemony" as well as the sovereignty of others and try to extend their 'universal' legislation as far as their power extends. Usually, under such circumstances, these states are not interested in creation of international legal instruments because they are already satisfied with the current situation. Another threat is the privatization of the Internet by corporations which have become extremely influential and are capable of establishing the rules of conduct for Internet users. Unregulated relations and the possibility of escaping responsibility contribute to the crime problem, which can sometimes affect even the interests of states. Besides that, states and their associations remain the principal guarantors of human rights. Provided the reduction of their influence on global processes, it should be recognized that entities intended to replace them will not be bound by such obligations. If there is no appropriate international legal regulation of internet-related issues then political and economic power becomes crucial. Consequently, the opposition is not between sovereign states and new international actors, but between international law and non-legal regulatory mechanisms.

Having considered the necessity of creation of international legal norms concerning Internet activity it is necessary to outline the main features of international cooperation in this field. First of all, the establishment of a future international regime should start with the agreement of principles on the basis of which further norms, rules

24 O. Dahbour, op. cit., p. 118-120.
and the decision making process should be agreed\textsuperscript{26}. The principles should take into account and respect the nonterritorial nature of the Internet, that has become its main advantage. Another important challenge is to maintain and develop the system of balance of rights and interests that exists in the real world. In this regard, special attention should be paid to guaranteeing human rights on the Internet, in particular those associated with freedom and privacy. Lack of agreement on basic principles for Internet governance together with the efforts of the states to protect their own narrow interests have been the main reasons for the ineffectiveness of international dialogue including the one at the World Summit on the Information Society\textsuperscript{27}.

Over the past few decades, international law has had to respond to analogous challenges. In particular, concerning Internet regulation it is appropriate to use developments in the relatively new areas of international law, especially international environmental law. An essential common feature of the latter and international regulation of the Internet is the need to take into account the importance of non-governmental organizations which along with the states represent the public interest. Therefore, it is expedient to use framework convention as an appropriate institutional mechanism for the construction of future regime of the Internet\textsuperscript{28}. On the one hand, this regulatory technique enables the states to set the basic principles and mechanisms of cooperation, and on the other – to ensure the broadest participation of them. It is also important to provide public participation, especially in the compliance mechanisms, and to pay due attention to the factors fostering the effectiveness of international treaties. Given the peculiarities of the Internet, such regulatory regime should also involve big Internet companies, that should be directed and encouraged to take part in the development of consensus decisions.

The vast majority of world’s countries, including leaders in the field of technology, are to participate in international cooperation on Internet regulation. Only within a universal international body that


\textsuperscript{27} Ibidem, p. 239-242.

\textsuperscript{28} Ibidem, p. 251.
embraces all states, the delegation of powers without threatening sovereignty can be ensured\(^{29}\). Obviously, the most influential global powers such as the USA, as well as authoritarian regimes would unlikely be interested in the development of such new international instruments. However, it is possible to influence their position by combining the efforts of all other countries (both developed and developing ones) together with NGOs and the Internet community worldwide.

Thus, the Internet should not be considered as undermining sovereignty and existing international law, but only as a new area that requires appropriate international and national regulation. It is no secret that the Internet has a great democratic potential, which today is largely uncovered\(^{30}\). Without proper response from governments and civil society there is a danger of its loss as a result of further privatization and commercialization of the Internet as well as the growing illegitimate power of the leading world states.

At the time when state sovereignty is increasingly seen as derived from the sovereignty of the people, the Internet is an important factor enhancing this position. Considering internal aspects of sovereignty, the Internet facilitates public access to information, improves public administration, enhances the rule of law, can be „a giant reservoir of legal models, judicial decisions, legal practices, and advice on legal reform issues”\(^{31}\), promotes human rights advocacy and makes citizens more empowered\(^{32}\). In this context, it rather undermines the power of dictators who grant themselves sovereignty based on anachronistic notions\(^{33}\). In fact, the democratic potential of the Internet consists in strengthening the international legal order in which people can „express and effect choices about the identities

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\(^{31}\) H. Perrit, op. cit., p. 436.


and policies” of their governors\textsuperscript{34} and this is fully consonant with the concept of popular sovereignty. As regards the external aspect of sovereignty it could be argued that the involvement of civil society in global issues through the Internet facilitates the implementation of both national and popular sovereignty. If people are deprived of these benefits through censorship and other unjustified restrictions, they can become puppets in the hands of their rulers who successfully acquired techniques of propaganda or intimidation.

Considering the principle of sovereign equality of states, it is important to keep in mind that it means not only sovereign rights but also the obligation to respect the sovereignty of others. Both democratic and non-democratic states tend to forget about it and then the task of civil society is to counter the aggression of its own country. The defeat of the aggressor regime means the victory and liberation of the people as evidenced, for example, by the attitude of the Germans to the collapse of the Nazis\textsuperscript{35}. Hence the Internet is a powerful tool for the public opposing the government that violates the principles of international law. In particular, in Russia, while television and other traditional media have become the means of aggressive propaganda, the Internet remains relatively free and allows the opposition to coordinate their activity. Thus, in this sense, the Internet contributes to the strengthening of the principle of sovereignty. Yet, new information technologies in the 21st century are also widely used for the violation of sovereign rights of the states as well as fundamental human rights. That is why international law should respond to these challenges and continue to adhere to the principle of sovereign equality in conjunction with other fundamental principles.

Conclusions. Despite the impact of communication technologies and globalization, the principle of national sovereignty remains fundamental for the international legal order. Due to its nature, the sovereignty cannot belong to other international actors, and the state regulation still matters greatly. Even deprived of some political, economic, or other influence, the state may use all legal means to

\textsuperscript{34} Ibidem, p. 872.

implement its sovereignty, including Internet issues. However, other important factors and obligations make it difficult for state authorities to impose significant restrictions on the Internet, and taking into account future development of technologies, realization of this objective will get even more complicated and expensive.

The Internet-related problems are global and can be effectively managed only at the level of international law on the basis of the principle of national sovereignty. The Internet should not be considered as undermining sovereignty, but as a new area of human activity that requires appropriate international and national regulation. Without it, political and economic power of international actors becomes crucial, which is not conducive to ensuring sovereign rights of the states as well as equal human rights for all. For the construction of future regime of the Internet it is expedient to use a universal international agreement, preferably, a framework convention which includes basic principles and mechanisms of cooperation. The effectiveness of such international regulation depends on the participation of the vast majority of world’s countries, taking into account special role of non-governmental organizations, involvement of big Internet companies in cooperation as well as the creation of an advanced compliance mechanism.

The Internet has a great potential in promoting democracy and thus strengthening popular sovereignty. It can facilitate public access to information, improve public administration, enhance the rule of law, promote human rights advocacy, and ensure involvement of civil society in global governance and international communication. Besides, the Internet is a powerful tool for the public opposing the governments that violate the principle of sovereign equality of the states and other fundamental principles of international law.

Streszczenie

Suwerenność i prawo międzynarodowe w epoce Internetu

Koncepcja suwerenności państwowej jest podstawą dla współczesnego prawa międzynarodowego oraz pozostaje kluczowa dla stosunków międzynarodowych. Podczas, gdy Internet przenika
prawie wszystkie dziedziny działalności społecznej, aktualne jest pytanie o wpływ nowych technologii komunikacyjnych na proces zarządzania państwowego oraz prawa suwerenne. Ogólnie akceptowana jest pozycja, iż poszerzenia w świecie Internetu łącznie z innymi aspektami globalizacji podrywają suwerenność państwa. Z innej strony, koncepcja suwerenności wielokrotnie pokazywała zdolność adaptacji w nowych okolicznościach historycznych. W takim kontekście stwierdzono, iż poszanowanie zasady suwerenności, razem ze współpracą państw suwerennych, są warunkami obowiązkowymi zabezpieczenia porządku prawnego w Internecie na podstawie sprawiedliwego bilansu wszystkich praw oraz interesów. Oprócz tego, rozpatrywany jest wielki potencjał Internetu, dotyczący wzmocnienia demokracji i zatwierdzenia suwerenności ludowej.
Myśl polityczna
w XX i XXI wieku.
Wybrane zagadnienia

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