МІЖНАРОДНЕ ПРАВО

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DILEMMA OF JURIDICAL ACTIVISM IN INTERNATIONAL JUSTICE

The article analyzes the nature and the concept of "judicial activism", which denotes the whole doctrine of the justice administration. It is noted that the problem of "judicial activism" in international justice has its own peculiarities. The interpretation of the international treaty is considered to be a judicial activity, which is closely linked to the text of the treaty itself. An international judge must, at his own discretion, interpret the treaty but at the same time not forget about the general principles of treaty intrerpretation. Such requirements include a fair interpretation of the text of the international treaty. The article states that it is inappropriate to use the notion (and generally the concept) of "judicial activism" only negatively, since its non-recognition may lead to a situation where an international judge cannot properly interpret an agreement that results in non-fulfillment of an international treaty.

Key words: *judicial activism, judicial activity, interpretation of an international treaty, jurisdiction, international courts, ECHR, CJEU.*

Formulation of the problem. An active study of the international justice problem caused the interest of researchers to the newly created term "judicial activism", which today has entered the research-categorical apparatus of researchers of international and European law. The term "judicial activism" was first used by A.M. Schlesinger Jr. in the Fortune magazine article in 1947 to characterize the respective positions of nine judges of the Federal Supreme Court of the United States of America [1, p. 73]. The author categorized the Supreme Court judges into two groups: supporters of judicial activity and supporters of judicial restriction. The first ones believed that politics played an important role in making each legal decision; they acknowledged that the purpose of the legal is to get a maximum possible social benefit, rejecting doubts about the positives or the negatives of judicial activity [2].

The term "judicial activism" was not created to have a negative description; he was used to analyze the role or function of the judiciary. Today this term has different meanings. Commonly it is used to criticize judges who do not simply interpret or apply the legal text in an active way, but who solve cases, without taking into account the rule of law that they need to apply. It is also used to blame judges who do not adhere to the principle of integrity in making decisions. It should be noted that the problem of judicial activism in domestic research is not developed due to both objective and subjective reasons.

Analysis of recent research and publications. In Western science, the issues of judicial activism and judicial discretion have been actively discussed during the 20th century, but particularly sharp discussions have begun since the 90s. It is worth to highlight recent research conducted by such authors as A. Ninet, E. Spitzer, A.M. Schlesinger Jr., S. Sherry, W. Marshall, G. Green, K. Kmiec, F. Zarbiyev.

In national science, the situation is different: specialists approach this topic with caution. The research papers of A. Berniuk, V. Begun, N. Guralenko, O. Yevseyev, M. Savenko, M. Savchyn, S. Shevchuk, etc. are focused on different aspects of the chosen problem, in particular on the issues of judicial activism, judge's discretion and judicial restriction, and the peculiarities of judicial enforcement. The issue of the relationship between judicial activism and the judge's discretion, the advantages and the negative characteristics of this phenomenon, and most importantly the prospects for its further functioning remain unresolved.

The Purpose of article. The purpose of the article is to examine the dilemmas of the "judicial activism"

phenomenon in international justice, as well as its functioning peculiarities.

Presentation of the basic material of research. In general, the term "judicial activism" denotes the whole doctrine of the justice administration, which came to the European and international courts from the US. G. Green argues that the judicial activism doctrine reflects the various aspects of the justice administration, including the political role of judges who decide, when power is either ineffective, or adopts laws that violate fundamental constitutional values [3]. G. Green in his article "An Intellectual History of Legal Activism" analyzes the use of A.M. Schlesinger Jr's term, emphasizing that the author does not give a definitive definition of judicial activism [3].

W. Marshall highlights the following signs of judicial activism: 1) the refusal of the courts to comply with the law; 2) the refusal of the courts to follow existing precedents; 3) the refusal of the courts to follow the established limits of their jurisdiction; 4) the creation of new doctrines and rights; 5) use of the judiciary to establish new responsibilities for other branches of government; 6) use of the judiciary to promote their own interests [4].

From the very beginning of the study of the judicial activity phenomenon, the problem of judicial activism immediately declared itself to be debatable, especially in the context of a possible existence in the continental legal system. In particular, Antoni Ninet, the professor at the Center for Comparative and European Constitutional Studies at the University of Copenhagen (Danmark), notes that judicial activity is an American concept, created and thought out for the US legal tradition. Therefore, the application of this concept in the continental system is not at all unambiguous and simple. By comparing the phenomenon of judicial activity in the Spanish legal system with the American one, Antoni Ninet emphasizes that the judge in the continental legal system performs exclusively legal functions, which are in accordance with the principle of functional separation of powers. And, since the notion of judicial activism for this system is fuzzy, its semantic uncertainty should be limited to a competent legal interpretation. The author emphasizes that judges are not politicians, therefore judge sentences should be based solely on the interpretation of the law and collected pieces of evidence. Similarly, international courts must apply the current law, and not seek (or create) a new one. In other words, the Antoni Ninet filed a lawsuit in the form of a simple syllogism: P-Q, where P stands for facts, and Q stands for legal consequences. He argues that the judge cannot change this logical structure in order not to interpret the facts and establish the specific legal consequences of Q. The author argues that the "heart of activism" is not an outcome but an interpretation and argument [5].

Is there a judicial interpretation of lawmaking? Is jurisprudence a source of law? Can a judge create a new law? These issues are at the heart of all discussions about "judicial activism", judiciary and judicial restrictions [6]. One of the answers to these questions can be found in Montesquieu, for which the judge is the mouth of law. In other words, the judge can only within the limits of his competence, interpret the provisions of the law that he applies in resolving specific disputes. Today, the term "judicial activism" means the whole doctrine, which certainly differs from the traditional perception in the "spirit" of Montesquieu. But, even today, supporters of such approach question the normative sphere of legal practice and conclude that although judicial practice plays an important role in the legal system, it can not be a source of law.

In contrast to this concept, another law school has developed a theory of free judge discretion (originates from the world-famous concepts of beginning of the XX century – the "free law" and the "living law" concepts, created by E. Ehrlich, the main thesis of which is the thesis of free judge discretion [7]. In American legal science in 1920th Ehrlich's ideas were supported by the work of the Harvard University professor Rocko Pound, who assigned judges the role of those who need to update the law in accordance with social changes [8, p. 171–172]. The judges were considered to be also "law creators" also a well-known American lawyer, the US Supreme Court Judge (1932–1938) B. Cardozo [9].

Analyzing the current understanding of judge's discretion, researchers emphasize that it represents a creative, intellectual will of the judge, in the process of which his moral position and searches for an optimal solution for a particular legal case ultimately form [10, p. 302]. There are even opinions that a judge can create laws like the legislature [6].

In most modern democratic states, there is a principle of separation of powers, which determines that the legislative, executive and judicial authorities carry out clearly defined functions. The judiciary, whose functions consist in resolving disputes, has no prerogative of legislative power. The American legal doctrine in general recognizes the right of judges to carry out judicial law-making, although critics, even at the highest administrative level, advocate limiting this right, arguing that judges, in the first place the Supreme Court's ones, can not pass laws. The words of the President of the United States George W. Bush

on nominating US Supreme Court judges may serve as an eloquent proof of such trend in society: "Every judge I appoint will be a person who clearly understands that the role of a judge is to interpret law, and not to legilaste from the bench" [11]. As an illustrative example of an activist decision of the US Supreme Court, may serve the relatively recent judgment in *Obergefell v. Hodges*, which has legalized same-sex marriages. In the Court's judgment to the *Eisenstadt v. Baird* case 405 US 438, as well as *MLB v. SLJ,* 519 US 102-121 (on the invalidation of marriage-limiting laws) states that the fundamental freedoms, protected by the Fourteenth Amendment, apply to a particular personal choice that is essential for personal dignity, including intimate choice [12]. The court emphasized that the prohibition of same-sex marriages is a demonstration of disrespect for a person and a clear violation of the principle of equality. Although in dissenting opinions of judges Scalia and Thomas J.J., it was noted that the Constitution does not allow judges to resolve marriage issues (because this is the competence of the legislative branch), the court in its decision ruled that there is no legal prohibition to conclude same-sex marriage [12].

Judicial activism cases are understood when international tribunals proceed in their decisions beyond the wording of international treaties, which define the scope and intentions of states. The discussion of the judicial activity of the international courts focuses mainly on their interpretation and law-making activity, which was not foreseen by states when creating any other international court. So, in relation to the CJEU the term "judicial activism" was first used by H. Rasmussen. Although there is no clear assessment of the CJEU among experts, it is considered to be the most "activist". From another standpoint, the judicial activity of the Court of Justice objectively assumed the role of "leader", which indicated a qualitatively new procedural path to address a number of doctrinairely confusing and virtually unresolved legal issues.

Experts point out that the phenomenon of "judicial activism" appears in several forms in relation to the activities of the European Court. For example, sharing the position of a judge of the ECHR in retirement A. Kovler [13, p. 95], O. Yevseyev notes that judicial activism takes place, firstly, when the Court has several interpretative options within the framework of its case-law, but the Court goes beyond this framework. Secondly, when the court searches for certain procedural procedures (the author points to *Janowiec and others v. Russia* [14], when the Court did not reject the complaint as not meeting the *ratione temporis* criterion and opened the proceedings) [15].

The disadvantages of "judicial activism", as a rule, include: 1) the reluctance of the courts to reckon with the will of the representative government (in cases of ignoring the legislative acts); 2) the lack of proper knowledge, experience, competence of the judges to draft legislative acts, or the adoption of managerial decisions.

In contrast to criticism of "judicial activism", we agree with the arguments of S. Sherry that "judicial activism" is in a civilized sense the property of a democratic legal system [16]. Indeed, as M. Savchin notes, speaking about the peculiarities of the domestic justice system, the judge's discretion is to choose the optimal option for solving a legal case, based on the fundamental principles of law, in particular, respect for human rights, the rule of law and democracy. The author refers to Lord Bingham's position that, in accordance with modern rules of the rule of law, judiciary discretion should be applied carefully with reasonable justification, with little freedom of choice, while judges should not be inclined to excessive innovation of law, especially in the event of new laws adoption [17].

The term "judicial activism" is also used to refer to the limits of the international treaties interpretation. The requirement not to use undesirable "judicial activity" consists in the fact that the translator of the contract must respect the text formulation, the context and its objective purpose, and can not perform law-making functions (to create a legal norm). But, at the same time, if a translator (interpreter) does not allow himself to carry out an "undesirable" judicial activity, then a certain fate of activity may not only be permissible, but also, on the contrary, "desirable", for example, in a situation where the interpreter has some formulation, which is unclear. It is important to note that "judicial activism" mainly concerns the interpretation of the rules, which govern disputes. The main problem is connected with the possible undesired (or intentional) deviation from the true interpretation of legal requirements.

The phenomenon of "judicial activism" in international legal proceedings has its own peculiarities. First, regardless of whether the interpretation can be regarded as a judicial activity, it is clearly connected with the text of the treaty itself. Secondly, when an international judge decides on a case, he must, at his discretion, interpret the treaty, but, at the same time, not depart from the general principles of interpretation of the international treaty. Thirdly, international judges should have limits on the exercise of their powers. Such requirements include a fair interpretation of the

text of the international treaty that is being applied and the reasoning for its implementation. At the same time, in the context of understanding the true nature of judge's discretion, the interpretation of international treaties should not be limited merely to the interpretation of the "letter" of the text of the treaty. The judge can (and should) use the opportunity to fill the gap in the regulation of the international agreement, if it is necessary to ensure its action. In this issue, as in any other, we need to be careful. We share Chang-fa Lo's position that it is inappropriate to use the term ("concept") of "judicial activism" only negatively, because its non-recognition may lead to a situation where an international judge can not interpret the treaty properly, as a result of which there will be a lack of fulfillment for a certain gap and, in the end, finally, non-performance of the contract. It is also undesirable to overestimate judicial activity. The overestimating makes it impossible to apply external restrictions that are important for the performance of the contract [18, p. 73–75].

Conclusions. The discussion of judicial activism of international courts mainly focuses on their interpretation and law-making activity. Speaking about the issue of "judicial activism" in international justice, it is worth summarizing that despite sharp discussions on this issue, the positive "activist" characteristics of international judicial institutions, in particular those who use the most discretion and execute judicial law-making such as the CJEU, the ECHR, can fully include extension of judicial jurisdiction and new approaches to the interpretation of treaties. In the context of modern, profound transformations in the direction of objective international justice, judicial activism as a way of realizing the fair nature of law, reflects the tendency that the Courts seeks to increase their activity in protecting fundamental rights and objectively depart from the formal (positivist) application of legal norms.

References:

1. Schlesinger A.M. Jr. The Supreme Court: 1947. Fortune. 1947. January.

2. Spitzer E. What Is Judical Activizm? Definition and Examples. URL: https://www.thoughtco.com/judicial-activism-definition-examples-4172436 (Accessed: 18.12.2018).

3. Green G. An Intellectual History of Juridical Activizm. URL: http://file///C:/Users/User/DesktopJuridical%20aktivizm.pdf (Accessed: 21.12.2018).

4. Marshall W.P. Conservatives and the Seven Sings of Juridical Activizm. URL: https://books.google.com.ua/books?k&sa=X&ved=2ah (Accessed: 21.12.2018).

5. Ninet A. L'activisme judiciaire, le prix de la transaction démocratique en Espagne. URL: file:///C:/Users/User/Downloads/22335-55358-1-SM.pdf (Accessed: 15.01.2019).

6. L'interprétation par le juge est-elle créatrice de droit? URL: https://www.etudier.com/dissertations/l'Interpr%C3%A9tation-Par-Le-Juge-Est-Elle-Cr%C3%A9atrice/45630355.html (Accessed: 15.01.2019).

7. Zamorska L.I, Karvatska S.B. Social Determinants of Legal Interpretation. Forum Prava. 2018. (1). P. 50–56. URL: http://forumprava.pp.ua/2018-n1.html (accessed: 16.01.2019).

8. Pound R. Interpretations of Legal History. New York, 1923. URL: https://www.jstor.org/stable/1943770?seq=1#page_scan_tab_contents (Accessed: 16.01.2019).

9. Cardozo B. Jurisprudence. Selected Writtings of Benjamin Nathan Cardozo. New York, 1947. URL: https://archive.org/stream/in.ernet.dli.2015.275703/2015.275703.Selected-Writings_djvu.txt (Accessed: 16.01.2019).

10. Гураленко Н.А. Свобода вибору як атрибутивна ознака суддівського розсуду. Науковий вісник Львівського державного університету внутрішніх справ. Львів, 2012. № 4. С. 292–304.

11. Bush G.W. Pres. Remarks Announcing Nominations for the Federal Judiciary (May, 9, 2001). Weekly Compilation of Presidental Documents. Vol. 37. № 19. P. 724–725. URL: https://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf (Accessed: 16.01.2019).

12. Obergefell v. Hodges 576 US (2015). URL: https://supreme.justia.com/cases/federal/us/576/14-556/ (Accessed: 15.01.2019).

13. Ковлер А. Сцилла и Харибда Европейского Суда: субсидиарность или правовой активизм? Сравнительное конституционное обозрение. 2010. № 6. С. 90–100.

14. Яновец и другие против Российской Федерации. URL: http://khpg.org/index.php?id=1387558439 (accessed: 16.01.2019).

15. Євсєєв О.П. Як Європейський суд «судить» історію (до питання про суддівський активізм). Проблеми законності: зб. наук. пр. Харків, 2015. Вип. 129. С. 233–241.

16. Sherry S. Why We Need More Juridical Activizm. URL: https://www.google.com/search?d=chrome&ie=UTF-8 (Accessed: 21.12.2018).

17. Савчин М. Свобода суддівського розсуду у світлі обґрунтованості рішень апеляційної та касаційної інстанцій. URL: http://yvu.com.ua/svoboda-suddivskogo-rozsudu-u-svitli-obgruntovanosti-rishen-sudiv-apelyatsijnoyi-ta-kasatsijnoyi-instantsij (дата звернення: 21.12.2018).

18. Lo Chang-fa. Treaty Interpretation under the Vienna Convention on the Law of Treaties. A new Round of Codification. Singapore: Springer, 2017. 361 p.

ДИЛЕМИ «СУДОВОГО АКТИВІЗМУ» У МІЖНАРОДНОМУ ПРАВОСУДДІ

У статті аналізується природа та поняття «судового активізму», який позначає цілу доктрину здійснення правосуддя. Зазначається, що проблема «судового активізму» у міжнародному правосудді має свої особливості. Інтерпретація міжнародного договору розглядається як судова активність, яка тісно пов'язана із самим текстом договору. Міжнародний суддя має на свій розсуд здійснити інтерпретацію договору, та водночас не відступити від загальних принципів інтерпретації міжнародного договору. Такі вимоги включають добросовісну інтерпретацію тексту міжнародного договору. У статті зазначається, що недоцільно використовувати поняття (й загалом концепцію) «судовий активізму лише негативно, оскільки його невизнання може привести до ситуації, коли міжнародний суддя не зможе належно інтерпретувати договір, наслідком чого стане невиконання міжнародного договору.

Ключові слова: *судовий активізм, суддівська активність, інтерпретація міжнародного договору, юрисдикція, міжнародні суди, ЄСПЛ.*

ДИЛЕММЫ «СУДЕБНОГО АКТИВИЗМА» В МЕЖДУНАРОДНОМ ПРАВОСУДИИ

В статье анализируются природа и понятие «судебного активизма», который обозначает целую доктрину правосудия. Отмечается, что проблема «судебного активизма» в международном правосудии имеет свои особенности. Интерпретация международного договора рассматривается как судебная активность, которая тесно связана с самим текстом договора. Международный судья должен по своему усмотрению осуществить интерпретацию договора и одновременно не отступить от общих принципов интерпретации международного договора. Такие требования включают добросовестную интерпретацию текста международного договора. В статье указывается, что нецелесообразно использовать понятие (и концепцию в целом) «судебный активизм» только негативно, поскольку его непризнание может привести к ситуации, когда международный судья не сможет должным образом интерпретировать договор, что повлечет за собой невыполнение международного договора.

Ключевые слова: *судебный активизм, судейская активность, интерпретация международного договора, юрисдикция, международные суды, ЕСПЧ.*