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RULE OF LAW IN GLOBAL LAW-MAKING: THE CASE OF INTELLIGENT DESIGN

In the last decade approximation approach to the cooperation in the rule of law development has become increasingly popular. Unlike the majority of scientific investigations in the rule of law field, this paper discusses the principle's possibility to become substantially enriched via the supranational process of legal norm generating. Against this background, the author makes some methodological delineation between international and global law-making, stressing on the fact that the latter has a broader scope and is not boundary-limited. Having made this, it is emphasized that global law-making as a gnostic value has its own internal and external purposes. Namely, the last one unifies axiological parameters that are valuable for the synergies between different levels of legal systems. The article concludes with an exploration of the two dimensions within which the rule of law principle might be reflected in the context of global law-making.
Keywords: rule of law, legal principle, law-making, global law-making, international legal system, convergence of municipal legal systems.

The proliferation of international organizations and new legal regimes has been recognized to play a significant role in the international law-making process. While rule of law theoretical characteristics received abundant attention over the last several decades, it is less known about its immanent parameters in relation to the particular legal phenomenon – international law-making. This type of law-making activity increases the importance for cooperation of the countries as participants in international legal relations, especially in the area of approximation of national legal systems, unification and harmonization of their legal frameworks.

Although there is no single methodological toolkit to reveal theoretically-legal characteristics of the international law-making, in this article I suggest the most suitable for current topic approaches employed to describe it.

Specifically, in 1981, in one of the narrower definitions, W. M. Reisman explained international law-making as the process in which certain policies that self-described as law are made. In contrast, broad understanding of this concept represents it as "the aggregate of processes in the [international] community by which political representatives at varying levels of consciousness are shaped and changed". The international law-making, in this sense, is a ***process of communication*** and all subjects involved in this processes, form the so-called "communications networks". In Reisman's opinion, being a complex communicative process, the international law-making has its own phases:

• First phase, in which all actors of international affairs (both national and international officials, governmental and non-governmental organizations) acquire the status of communicators.

• Second phase, where all these actors are authorized as the participants of international law-making; this stage presupposes the identification of particular communicators as well as their expectations and demands for certain social values to be materialized in law-making results.

• Third phase: various points of view and ideas regarding international policy-making shall be agreed upon all subjects of communication process.

• Fourth phase presupposes evidence-gathering by all communicators necessary to justify certain law-making policy.

• Fifth phase includes activities related to the search of various communicative modalities and law-making strategies.

• Sixth phase: the outcomes of such communication are matched with the appropriate behavior models[1].

[1] Reisman, M. (1981). International Law-making: A Process of Communication. *Yale Faculty Scholarship Series*, 101-120. <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1719&context=fss_papers> (2019, February, 19).

Although legal thinker rightly provides us with the immanent characteristic of the international law-making – its communicative nature, he focuses almost exclusively on its procedural aspect. Reisman's considerations are largely confined to the processes of policies harmonization between international law actors, rather than to the normative effect that occurs within this process. His reflections on significance of international policy coherence are undoubtedly impressive work of legal theory, but its teleological potential is virtually absent. His explicit concern with linking all "communication networks" together treats established international law-making practices as a highly politically-sensitive process. In the broader outlook, while we do not deny the legitimacy of the issue raised, we believe that more space and greater emphasis should have been given to the development of rule of law standards, particularly, their dynamics within the convergence of the legal orders.

Y. Radi and C. Brölmann in their *Research Handbook on the Theory and Practice of International Lawmaking* used idiosyncratic methodological technique which centers on certain structural components of the research definition. Drawing on Chinkin's and Schachter's findings, legal thinkers offer to divide the definition of "international law-making" into three parts (segments):

1. 'law', which in its statically sense, is considered as a body of rules; visually, this segment shows all possible ways and methods for law creation;

2. 'making' as a marker to denote the process within which law is made; semantically, this means that when we combine 'law' with 'making', it means that the former can be made in quite different ways;

3. 'international' as attributive highlights normative authority determining subjects of this law-making and emphasizing on its limit-free scope[1].

As should become clear, my sympathies lie with an approach that understands international law-making fairly broadly. Within this perspective, some representatives of the Western scholarship suggest to consider international law-making as the model of international cooperation aimed at the creation a new legal framework for certain area of human activity. In my opinion, the reasons for such long-term thinking, primarily lies in the existence of two competing approaches – natural and positive law doctrine. Particularly, international law theorists Rudiger Wolfrum and Volker Röben recognize that: "Natural lawyers have concentrated on the deliberative, consensual process by which referred policy is clarified, while positivists have focused on organized political power as the distinguishing feature of legislation"[2]. However, it should be argued that as a flexible form of international cooperation activity, the law-making by its very nature should be shaped within normative content and reflect community expectations in a certain area of social life.

It is therefore not surprising that many English-language authors suggest quite different terms (instead of well-known "international law-making") used to denote this process. Particularly, such field-oriented literature is rich in following expressions: "transnational lawmaking"[3], "international norm generating process"[4], "global law-making"[5], etc. Since the scope of this research does not focused on deliberative linguistic issues, nevertheless it is necessary to make some methodological clarification.

I strongly believe that the term "international law-making" should be substituted by another one – "global law-making". Simply, there is one strong reason for this. The characteristics "international" and "transnational" intrinsically are much narrower in their scope than the attribute as "global". That is, while the scope of the former is restricted to the relations between States or cross-border relations between non-state actors, the latter includes world-wide transboundary interactions not only between wide range of actors, but also at the different policy levels.

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[1] Brölmann, C., Radi, Y. (2016). *Research handbook on the theory and practice of international lawmaking*. Cheltenham, UK: Edward Elgar Publishing.

[2] Wolfrum, R. (2005). *Developments of international law in treaty making*. Berlin: Springer.

[3] See, for example, scientific investigation conducted by Dennis Paterson "Transnational Lawmaking" in Brölmann, C., Radi, Y. (2016). *Research handbook on the theory and practice of international lawmaking*. Cheltenham, UK: Edward Elgar Publishing.; or Quack, S. (2007). Legal Professionals and Transnational Law-Making: A Case of Distributed Agency. *Organization, 14*(5), 643-666.; or DAspremont, J. (2016). *Epistemic forces in international law foundational doctrines and techniques of international legal argumentation.* Cheltenham, UK; Northhampton, MA: Edward Elgar Publishing.

[4] Andreassen, B.A., Sano, H., McInerney-Lankford, S.A. (2018). *Research methods in human rights: A handbook.* Cheltenham, UK: Edward Elgar Publishing.

[5] Block-Lieb, S., Halliday, T.C. (2006). Legitimation and Global Lawmaking. *SSRN Electronic Journal*.; Vanessa Mak, 'Mak, V. (2012). Normative Standards and Global Law-Making. *Reflections on Global Law*, *17(2),* 109-117.

In its turn, this aspect of the research derives from the fact that all global law-making products reproduce the results of collective identity. Therefore, this activity relates to the conscious need to achieve goals defined by global community. Among other things, such goals may have quite different normative value, offering in its content the instruments of both soft and hard law. Within the global law-making, the concept of the rule of law has gained a special importance among those national legal orders engaged in substantial socio-political and economic reformation processes.

This means that global-law making might be represented as a complex process of materialization of objective social needs via the legal standards which are maintained at different levels of managerial and organizational level. In this regard, the doctrine of global law-making shall be aimed at: a) universal harmonization of generally accepted standards on legal regulation of relevant public relations; b) regulation of certain political and legal situation. As the focal point of the present article is the rule of law concept within global law-making perspective, I consider the first aspect as a more theoretically tangible that the second one for several reasons.

First and foremost, global lawmaking relates primarily to the ***product of intellectual and proactively willful activity***. In turn, the product of such activity is determined by the importance for the international law subjects to achieve specific public goal(s). Secondly, the essence of global law-making can be revealed through teleological reasons for the ***development of national legal systems***, as the international legal norm is a materialized model of a certain socially significant value or idea. Ontologically, this has led to a worldwide shift of the implementation of global legal standards into municipal legislation. Notably, the need in consistent legal standards (developed at the global level) is emphasized in particular for domestic legal systems that have gone through the process of governance crisis and prolonged political conflict as these are considered to be unsustainable and those which pose obstacles for successful globalization.

At the same time, gnostic value of the global law-making category lies principally in the fact that its existence is predetermined by certain internal and external purposes. ***Internal purposes*** encapsulate the values that in their entirety shape the international legal order (for example, the development and adoption of a law-making act aimed at overcoming international terrorism or supporting the right of certain nation to self-determination). In contrast, the ***external purposes*** are only those values that have an integrative importance for the interaction between international legal system and its domestic analogues (in particular, the legal integration of national legal orders, the implementation of certain international legal standards in State's legislation, etc.). Since a detailed analysis of the global law-making's internal purposes goes beyond the scope of current research tasks, I am of the opinion that the theoretical and legal focus should be shifted precisely to the external purposes of abovementioned phenomenon.

At the same time, while the rule of law appraisal at the level of States' political coordination is not controversial and is relatively well understood, the idea that the rule of law standards are the logical product of global law-making has survived up to the present day. Beaulac, for example, is keenly interested in "externalisation of the rule of law values", thus transposing its essential components (principle of legal normativity, adequate creation and equal application of legal norms, adjudicative enforcement of normativity) to supranational level[1]. A relevant part of the rule of literature has centered in the dichotomy between its national and international versions[2]. However, attempts to use the achievements in theoretically-legal research in addressing the question of the rule of law place within global law-making activities, demonstrate for the most part quite limited results. Thus, for example, almost the only work devoted to the outlined research field is a scientific article written by S. Duquet in collaboration with

[1] See, Stéphane Beaulac's paper "The Rule of Law in International Law Today" in Palombella, G., & Walker, N. (2009). *Relocating the rule of law*. Oxford: Hart.

[2] Neate, F. W., Agbakoba, O. (2009). *The rule of law: Perspectives from around the globe*. London: LexisNexis.; Kanetake, M. (n.d.). The Interfaces Between the National and International Rule of Law: A Framework Paper. *The Rule of Law at the National and International Levels: Contestations and Deference*.; Waldron, J. (2009). Are Sovereigns Entitled to the Benefit of the International Rule of Law? *SSRN Electronic Journal*, *1-35.*; Owada, H. (2009). The Rule of Law in a Globalizing World – An Asian Perspective. *Washington University Global Studies Law Review*, *8(2),* 187-205. <https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1072&context=law_globalstudies>. (2019, February, 19).; Wouters, J., Burnay, M. (2013). The International Rule of Law: European and Asian Perspectives. *Revue Belge De Droit International*, *2*, 299-306. <http://fr.bruylant.larciergroup.com/resource/extra/9782802746447/RBDI_N_13_2_web intro.pdf>. (2019, February, 19).

J. Pauwelyn, R. A. Wessel and J. Wouters[1]. Cited study, nevertheless, is aimed rather at a theoretically-legal determination of the rule of law impact on the effectiveness of informal international law-making. However, the issue becomes more complicated as the law-making potential of relevant international acts is almost locked today for many post-Soviet States (namely, Ukraine). As a result, the level of law enforcement practice in the rule of law implementation is quite low (as evidenced by the World Justice Project annual reports[2]).

Considering the increasing importance of international legal instruments, one is inclined to ask why there have been so few attempts to ***theorize linear developments in the rule of law modification*** at the international level. Thus, as current scientific discourse has directly moved on, the following part of information deals specifically with the rule of law materialization in global law-making activity and contains mostly personal thoughts.

As has been noted elsewhere in the present text, global law-making activity has its own axiological determinants, which can simultaneously serve as its external purposes. Logically, one of these values is the rule of law. This principle, being in an 'interaction vacuum' between two types of legal systems – international and municipal, – is actively enshrined in acts of law-making activity, the ultimate goal of which is to fix generally accepted standards of legal behavior and their further unification from implementation in States' legal practices.

Basically, from our perspective, in addressing the issue regarding the rule of law role in global law-making, the following methodological explication should be taken into account. With reference to the legal norm generating, rule of law principle can be translated into action as: a) an instrument or b) its ultimate goal.

As the ***instrument of global law-making***, the rule of law principle "molds" certain formal requirements for law-making acts. That is, it establishes clear frameworks for their development and adoption. In fact, the rule of law is a *sui generis* axiological guideline in the legal drafting methodology necessary for the proper development of such law-making acts.

As the ***ultimate goal***, this principle directly becomes the target of global law-making activity. Within the framework of international legal relations, it acquires new manifestations, i.e. its content is substantially enriched by certain international institutions (both international organizations of global and regional importance, and international judicial bodies).

The scope of the present research limits me to the second rule of law parameter. Being manifested at the level of international affairs, rule of law reflects itself also as the topic for global policy-making, specifically, with an aim to incorporate its results into the State's internal policies. Changes in global legal order are equally kaleidoscopic. As it was argued previously, international law sources (namely, soft law instruments) have become important means for ***convergence of municipal legal systems*** and their approximation with the legal system of supranational level. In the era of cross-border cooperation, international law needs to reflect socio-political values that are commonly held in all States. For this very reason, every viable community (local, regional) endeavors to "extract" such values and enshrine them into their legislation. Therefore, the rule of law quality to serve as the ***normative basis for the interaction between municipal legal systems*** is the logical result of the dialectic synergies between two levels of legal orders (supranational and national). This is primarily objectified in "international law-making acts" (in this sense, the attribute "international" denotes that law-making act is developed within the framework of international affairs). We did not find any definition of this term, thus, it is appropriate to suggest own. Thus, ***international law-making act*** can be understood as the exercise of the will of authorized international law subjects aimed at establishing, modifying or renewal particular normative prescription resulted in a written document, which contains relevant legal regulations on the promotion of certain socio-political values.

This is precisely why, acts of global law-making, where the rule of law is the key subject, are of particular importance for the development of domestic legal norms. In this, such international legal standards can be classified as ***non-traditional sources of international law*** as their normative construction does not create any commitments (in contrast to international law treaties) to its potential recipients.

[1] Duquet, S., Pauwelyn, J., Wessel, R. A., Wouters, J. (2014). Upholding the Rule of Law in Informal International Lawmaking Processes. *Hague Journal on the Rule of Law*, *6(01)*, 75-95.

[2] World Justice Project. Report on Rule of Law Index 2017-2018. <https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf>. (2019, February, 19).

Moreover, these sources are quite essential for national legal practice for several reasons. Firstly, at the law-making level, national legislator should take into account and use relevant rule of law international standards as a target determinant. In this case, rule of law serves as the factor of law creation. Secondly, in order to regulate public relations, international standards of the rule of law can act as a factor of the law enforcement, if there are legislative gaps in the country's municipal law. This aspect is clearly reflected at the level of judicial law-making, where the rule of law principle is the immediate normative condition (basis) to take a decision on a specific legal case.

The above trend is based primarily from the direct interest of the global community in the facilitation to the promotion of such standards through the development of various forms of international cooperation. This produces tangible results – creation of soft law norms, subject to the existence of appropriate mechanisms for determination the implementation feasibility. In this case, I strongly believe that instruments of soft law are no less effective that a certain norm of the hard law.

Hence, within the framework of global law-making, the rule of law reflects in itself two crucial ***teleological characteristics***. The first one is that the rule of law, being a common heritage for the local societies, is extended to the international level and borrowed by specific organization (namely, regional) with an aim to modify and improve it substantially. The second one is that there are actions specifically centered on the incorporation of these rule of law modified standards back into the municipal legal systems. These characteristics can thus be seen as:

1) the rule of law standards modification via interaction between legal system of a higher level with its municipal analogues; or

2) the implementation of the modified rule of law standards into domestic legal systems taking into account special needs and interests of certain community.

Having made these methodological remarks, our ***central research argument*** is that the rule of law standards are best developed at the international level (within various international law actors) and then materialized in instruments of soft law with an aim to streamline the process of reception such-like standards into the national legislation (both primary and secondary). Along with this, markedly new rule of law standards that are objectified in the soft international law instruments, may impact on national legislator in **two ways**. First, it acts as the assessment criteria of domestic legislation to be treated as effective and appropriate. And, secondly, the duality of the rule of law paradox presupposes that rule of law standards by themselves are the product of the global law-making, but at the same time they serve as the empirical basis for the national law-making activity.

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