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Резюме

Пиртко М. С. **Соціально-політичні передумови формування централізованої держави в Австрії (IX–XVII ст.).**
У статті проаналізовано соціально-політичні передумови формування централізованої держави в Австрії (IX–XVII ст.). Зазначено особливості формування централізованої держави в Австрії у досліджуваний період. Автор акцентує увагу на тому, що до XVII ст. австрійський правлячий дім досяг незначних успіхів у державному будівництві: політична єдність розрізнених земель залишалася хиткою, а спроби централізації впиралися у спротив станів окремих земель (Чехія, Угорщина).
Ключові слова: централізована держава, державне будівництво, імперія, Габсбурги, Австрія.

Резюме

Пиртко М. С. **Социально-политические предпосылки формирования централизованного государства в Австрии (IX–XVII вв.)**
В статье проанализированы социально-политические предпосылки формирования централизованного государства в Австрии (IX–XVII вв.). Указано на особенности формирования централизованного государства в Австрии в исследуемый период. Автор акцентирует внимание на том, что в XVII в. австрийский правящий дом достиг незначительных успехов в государственном строительстве: политическое единство разрозненных земель оставалась неустойчивым, а попытки централизации упирались в сопротивление состояний отдельных земель (Чехия, Венгрия).
Ключевые слова: централизованное государство, государственное строительство, империя, Габсбурги, Австрия.

Summary

Pyrtko M. **Socio-political preconditions for the formation of a centralized state in Austria (IX–XVIII centuries).**
The article analyzes the socio-political preconditions of the formation of a centralized state in Austria (IX–XVIII centuries). The peculiarities of the formation of a centralized state in Austria in the investigated period are noted. The author emphasizes the fact that until the XVII century. The Austrian ruling house achieved little progress in public construction: the political unity of the fragmented lands remained shaky, and attempts at centralization resisted the resistance of the states of certain lands (Czech Republic, Hungary).
Key words: centralized state, state building, empire, Habsburg, Austria.

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SOME METHODOLOGICAL REMARKS REGARDING THE CONCEPT OF INTERNATIONAL LAWMAKING (OUTSIDE THEORETICAL PERSPECTIVE)

Problem statement. Modern civilized society cannot be imagined without appropriate rules of behavior, designed to regulate everyday relationships. This is precisely why issues related to the lawmaking activity remain relevant and require continuous evaluation of new situations and opportunities for establishing an adequate legal regulation of particular public relations. Thus, the ***relevance*** of the current article is resulted primarily from the intensification of international legal relations and particular need of modern nations in cooperation and coordination of their legal policies.

Reviewing existing literature on the current subject. There is a rapidly growing literature on international lawmaking. Different aspects of this phenomenon were discussed and outlined in researches of both Ukrainian and

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foreign legal scholars. Particularly, among national scientists are O. O. Nigreeva and O. I. Chapliuk. Also certain issues concerning international lawmaking process were represented in works written by such foreign legal experts as C. Brölmann, H. H. Koh, J. K. Levit, Y. Radi, W. M. Reisman, B. K. Woodward. At the same time, instead of complex theoretical review, overwhelming majority of legal scientists examines questions about so-called "informal international lawmaking" (for example, J. Pauwelyn, R. A. Wessel, J. Wouters). But the lack of academic evaluation of general lawmaking practice matters a great deal: without appropriate theoretical foundations, there will be legal lacunas in international legal practice that in its turn will have a negative effect on cooperation between States and other international institutions.

Based on problem definition, the main ***aim*** of the current article is to show in outlined way what exactly international lawmaking is, what attributes it possesses and what unique features it has.

Abovementioned has resulted in specific ***structure of the research***, intentionally selected by the author in order to revitalize the doctrine of international lawmaking in its general theoretical dimension. *Paragraph I* predominantly focused on important features of lawmaking, which enabled author to draw a distinction between this and other related processes. *Paragraph II* provides with necessary methodological background, in terms of which all issues related to the international lawmaking purposefulness are assessed. *Paragraph III* aims at examining existed in scientific literature approaches to the international lawmaking definition. And, finally, in *Conclusions*, the author suggests original system of international lawmaking attributes that constitute its theoretical model. On this basis, a unique definition of international lawmaking is also offered.

I. Lawmaking: essential characteristics and related concepts

Without any qualms, among most interesting and "hard-hitting" issues is the question about ***lawmaking definition***. As the authors of "Handbook on the Theory and Practice of International Lawmaking" Y. Radi and C. Brölmann noted: "Linguistic instability is one sign of a changing world, and the word 'lawmaking' is indeed used with various and divergent meanings – depending on one's premises… This makes the term limited in theoretical vigor but flexible enough to describe the multifaceted normative practice that is observed by policy-makers and lawyers today"[1]. It is fair to say, however, that such "linguistic instability" particularly refers to the issue of demarcation of "lawmaking" from other similar (to some extent) concepts.

Today, unfortunately, there is no interdisciplinary experience in foreign legal science that would combine the methodology of legal research with the basic ideas and categorical apparatus of linguistics. Without getting into specifics, consistent with the key tenets of **legal linguistics**, it is pertinent to suggest the unique delineation of processes aimed at the creation various forms of rules of conduct. In view of this, "***delineation scheme***" can be constructed as follows:

1) **Law-formation** – relatively lengthy multidimensional process covering various forms and methods of the law materialization, its existence, harmonization and further development; inherently, this concept is the most extensive in scope, because includes a wide range of social, economic and cultural factors influencing the need for the emergence of law (in its objective sense); this process begins with the society needs in the regulation of certain legal relations.

2) **Lawmaking** in most general sense can be defined as a creative intellectual process associated with the activities of authorized representatives (actors) (states, intergovernmental and non-governmental international organizations, local self-government bodies, different public and civic organizations etc.) aimed at creating, alteration or abolishing the legal norm (as a rule of conduct).

3) **Legislative drafting** – concept, which is substantively narrower in its content than the previous one; the materialized result of this process is the piece of legislation; according to this, legislative drafting serves as a type of law-making and denotes the process of creation, changing or repealing of normative legal acts of the higher legal force.

4) **Rulemaking** – is one of the key categories in legal techniques; considering rulemaking in a narrow legal and technical sense, it can be defined as a formal process of creating a legal prescription; from this angle, the aim of rulemaking is to identify reasons for adopting regulatory act as well as necessary technical instruments for its further functioning (it refers to the special technique used in the process of creation and structuring regulatory legal acts).

The proposed demarcation can serve as an appropriate methodological framework for the present scientific research. Suggested "delineation scheme" will help to address one of the crucial questions about international lawmaking – a question about its purposefulness.

II. Law-making on the global level: the relevance of existence

Scientific discourse has always been characterized by a pluralism of opinions about a certain phenomenon. The concept of international lawmaking is not an exception. In scholar's world, all the doubts about relevance of international lawmaking are de facto limited to the following ***three major premises***:

1) *decentralized and unsystematic arrangement of international law functioning*; this includes two main aspects: first one related to the fact that the system of international law has not classic triangular separation of powers; continuing in this direction, the absence of unified legislator should be taken into account; consequently, all of this leads to the further academic debates concerning the question about contemporary system of international law sources, precisely that is the question about hard and soft international law; another quite challenging question is the question about different legal regimes operating under the international law; such is denoted by a so-called "fragmentation of international law" – process emerging as a result of diversification and expansion of international law[2];

2) *overriding importance of the consent in international law*; as A. Guzman aptly remarked: "The importance of consent is built into the DNA of international law scholars"; it is believed, the concept of consent in international law is designed to protect the State interests and support their sovereign equality; it is recognized that since States act on behalf of their populations; hence, every State in its politics seeks to ensure respect for domestic interests; so, any rule of international law made without consent cannot be regarded as legitimate; that is exactly why the **consent-based theory** is considered one of the scientific most formidable challenges in general theory of (international) law; furthermore idea about the need for state consent is intertwined enough with concept of national interest prevalence and state interest-based theory (see information given in the next premise)[3];

3) *nationalist critique of international law*, which is reflected in following statements: a) only national interests are "the sole means to "suppress the chaotic and dangerous aspirations of governments in the international field" and b) globalization itself "has thrust the "sovereign" into a zero-sum power grab with international regimes"; in this context, all critic discussions are dominated by the ***concept of national interest prevalence***; conversely, this is reflected in ***state interest-based theory***, which means that from the nationalists' point of view, international law represents a number of rules which reflect or/and coincide with "state interest" and to a large extent are "executive interests"; in case where international law "interrupts" or otherwise restricts will of state authority to gain "state interests", governmental authority would simply bypass or even disregard such norms[4].

All these issues have a direct impact on the methodological understanding of international lawmaking process. At the same time, it is important to recognize that social progress depends primarily on incremental changes in international legal field. In this endeavor, the interrelationships between domestic and international legal orders are undeniable. Being under intensive globalization transformations, national legal systems need to be streamlined and their lawmaking processes should be unified (in sense of standardization) with a special focus on reorientation to the new spheres of the human activity. Within this framework, some authors suggested what is euphemistically called "***cognitive landscapes***" – understood as specific factors, according to which there is an urgent need for an international law-making to exist. Strong emphasis should be made especially on the "*socio-legal landscape*" which includes following facts: a) social – the urgent need of interstate cooperation results in the growing interdependency between States (as well as other legal actors); such interdependence is caused by the will of States to cooperate with each other in order to promote their common interests; b) legal facts primarily encompass phenomenon of an increasing number of international organizations, which intrinsically "create normativity both in their relations with third parties and vis-à-vis their member states (so-called phenomenon of proliferation of international organizations); alongside with "judicialisation" of international affairs, rapid growth of such institutions shows that they can be assigned to the full-fledged subjects of international lawmaking; c) doctrinal facts presuppose that all representations about the essence and specificity of international law are dynamic and develop in accordance with the main challenges faced by the international society; more broadly speaking, this means that legal doctrine in its practical dimension plays an important role for the development of international lawmaking (for example, the notion of "legal personality" is among key concepts in contemporary international legal doctrine); in its turn, with the aid of certain legal doctrine it is possible to conceptualize new phenomena and then incorporate them into a particular set of rules (as it was with the soft law)[5].

As a matter for discussion, all the methodological aspects analyzed above can serve as a pillar for reflection an equally important theoretical issue – the question of international lawmaking definition, what will be done in the next paragraph.

III. The concept of international lawmaking in contemporary scholarly studies: the issue of definition

The situation regarding definition and comprehensive understanding of international lawmaking concept can be characterized as rudimentary. Regardless, there is no cohesive approach to the definition of international lawmaking at the present moment. In addition, there are only few researches devoted to the international lawmaking, which contain definition of the current phenomenon.

Therefore, in order to ensure systemic view, it is essential to ***subdivide approaches*** to the understanding of international lawmaking into special groups. The first group related to the Ukrainian scholar's ideas, and the second one – to the foreign.

National theory of international lawmaking. Sometimes, in domestic academic literature extended references are made to the international lawmaking as a purposeful activity of States in the development of international legal norms. Such-like point of view, in our opinion, is to some extent incorrect for two basic reasons. Firstly, defining States as only subjects of international lawmaking, there is a question of abusing of power by them and their reluctance to take into account public interests. Secondly, during the active globalization processes and world civic society transformations, among subjects of international lawmaking are also various international organizations.

However, there are more progressive visions regarding the notion of international lawmaking. For instance, O. I. Chapliuk defines international lawmaking as historically changing, creative, international initiative process, carried out by the subjects of international law in order to create norm of international law by harmonization the interests (positions) of the parties involved, which results in the adoption of an international instrument containing international legal norms[6].

Another author, O. O. Nigreyeva, has rightly observed there are only few researches made by domestic legal scientists devoted to the assessment of the international lawmaking process (especially from the theoretically-legal perspective – *added by the author*). In researcher's opinion, international lawmaking should be viewed from two tra-

ditional (for Ukrainian legal doctrine) perspectives – narrow and broad. According to the *narrow understanding*, international lawmaking is considered as the formation of new international legal norm: making a certain rule of conduct (in international relations) as a legally binding by expressing *opinio juris*. At the same time, another, *broad understanding* of the international lawmaking assumes this notion can be defined as the entire process of developing rules of international law, which includes two main stages: coherence in willingness of international law subjects regarding the certain rule of conduct and providing by them a consent to make such rule of conduct legally binding. For the author, in this case, the subjects of international lawmaking can have traditional form (for example, States or international intergovernmental organizations) or whose international legal personality is controversial (for instance, international non-governmental organizations and transnational corporation)[7]. The abovementioned approach to the understanding of the international lawmaking is undoubtedly should be commended. However, two main observations should be made. First and foremost, now, in the contemporary general law theory, there are no contentious debates about "controversial" legal personality of non-traditional international lawmaking subjects. Moreover, a review of recent academic papers suggests that at the present moment traditional international lawmaking is currently under the stagnation process. With increasing attention by the international community being given to the legal approximation, there has been a major shift in the selection of the most appropriate ways and types of lawmaking. This will create opportunities to apply qualitatively new legal instruments to public relations regulations (so-called "informal lawmaking"). Secondly, it would seem that such approach has lent a sense of "ambivalence", that is a great risk to perceive the international lawmaking simultaneously in two ways: as a preferential benefit for States and intergovernmental bodies and as a process of creating legally binding rules of conduct. Given a number of factors including enormous potential of different international organizations acts (which shall be treated as recommendatory) the scope of international lawmaking has been expanded significantly.

Foreign theory of international law-making. It is fair to say, there are cases, when the authors in theirs scientific investigations have used such expressions as "*transnational lawmaking*", "*international norm generating process*", "*world legislation*", "*global rulemaking*", "*lawmaking in international affairs*" etc. instead of well-known "international lawmaking".

Surprisingly, however, there is no common understanding of "international lawmaking" in foreign legal theory. As an example, back in 1981, Professor of Yale Law School, W. Michael Reisman, in his Lecture "International Lawmaking: A Process of Communication" rightly pointed out that "the problem of lawmaking has always been more urgent and, apparently, more complicated in international law". On the scholar's opinion, international lawmaking can be understood as the process in which certain policies that self-described as law are made. In broader sense, international lawmaking may be represented as "the aggregate of processes in the [international] community by which political representatives at varying levels of consciousness are shaped and changed". The international lawmaking, in this sense, is a ***process of communication*** and all subjects involved in this processes, form so-called "communications networks"[8].

Talking about international lawmaking definition, there is also another special methodological approach, according to which the term itself is divided into three ***segments***:

– "law", which is understood statically as a body of rules (this segment can visually show all possible ways and methods for law creation);

– "making" serves as a marker for the type of process used to make such law; this means that lawmaking by its nature can be taken in various ways; for instance, there is such-like "conscious lawmaking", which intended to create different treaties; conversely, there are also a wide range of "diffuse processes of interaction between actors and involuntary crystallization of normativity";

– "international" identifies normative authority, that determines subject of international lawmaking and emphasizes on its unlimited character (in comparison with domestic analogue)[9].

As can be seen from the information analyzed above, international lawmaking is fundamentally multifaceted concept. With an aim to make profound theoretical evaluation, following **conclusions** should be made. Essentially, there is some methodological confusion regarding the notion of international lawmaking. Foreign legal tradition makes no distinction between lawmaking and other related processes. This creates additional theoretical debates among scholars about the relevance of international lawmaking as a full-fledged process aimed at developing Law in its objective meaning. International lawmaking controversy based primarily on arguments whether or not this concept is relevant for modern international community. Beyond all doubts, national laws, international jurisprudence and doctrine are in agreement that international lawmaking establishes the appropriate framework and criteria for States and different institutions to become principal actors on the world scene. All this is done in order to comply with main obligation – promotion and protection of human rights. Within this intensely regulatory global framework, it is necessary to suggest author's own vision of "***constitutional attributes***" inherent in theoretical construction of international lawmaking:

– complex intellectual and multileveled process of communication, which is supported simultaneously by international and national authority and different levels of governance;

– is based on the principle of the Rule of Law, according to which all subjects of international law are equal in their will to ensure the national interest as well as are bound by universally acknowledged rules of conduct;

– provides for the international legal personality; is carried out by authorized subjects;

– has various aspects of normativity; in this context, we are talking about different degrees of normativity and divergent legal regimes;

– has no distinct limits on the creation of law; this is probably could be linked to particular law traditions, functioning at international level;

– as one of the form of multilateral cooperation, takes place within certain legal procedures;

– depending on various types, has a wide range of outputs – legal instruments that has different legal status, intended use and objective; as a result, many types of this process should be identified: formal (traditional) and informal, consensual and non-consensual, aimed at harmonization of domestic rules worldwide or regulating a concrete situation etc.

Hence, it follows that international lawmaking should be defined as ***based on the Rule of Law principle complex intellectual and multileveled process of communication between authorized subjects that takes place within certain legal procedure and focuses on materialization of the global community needs in particular legal instrument which constitute appropriate conditions for international institutions practices related to the fostering of social and economic development***.

Prospects for the further scientific research. There is an urgent need in *unification* and *systematization* of current knowledge regarding the structural elements of the international lawmaking and its stages (phases), "biodiversity" of actors of international lawmaking process; scientific classification of international lawmaking and a host of other scientifically important issues.

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[1] *Brölmann C.* Research Handbook on the Theory and Practice of International Lawmaking / C. Brölmann, Y. Radi, 2016. – 512 p. – (Research Handbooks in International Law series). – P. 1.

[2] *see, for example*, Fragmentation of International Law: difficulties arising from the diversification and expansion of international law [Digital resource] // Report of the Study Group of the International Law Commission: Data access mode: http://repositoriocdpd.net:8080/bitstream/handle/123456789/676/Inf_KoskenniemiM_FragmentationInternationalLaw_2006.pdf?sequence=1

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[9] *Brölmann C.* Ib. – P. 2.

Резюме

Ремінська Ю. Ю. **Деякі методологічні зауваги відносно концепції міжнародної правотворчості (за межами теоретичного розуміння).**

Стаття присвячена характеристиці міжнародної правотворчості в рамках спеціальної теоретико-правової методології. Особливо наголошується на необхідності відрізняти правотворчість від інших, схожих за своєю правовою природою, процесів. Враховуючи це, автор пропонує новий підхід до вирішення вищеозначеної проблеми. З-поміж іншого, ключовими питаннями, розглянутими в поточному дослідженні є: доцільність існування правотворчості на міжнародному рівні та найбільш оптимальний підхід до визначення поняття, що позначає цей процес. Зроблено висновок, що міжнародна правотворча діяльність за своєю природою є явищем комплексним та багатогранним. Маючи у своєму складі особливі «конститутивні ознаки», міжнародна правотворчість уявляє собою складний інтелектуальний та різновекторний комунікативний процес, спрямований на якісне вдосконалення існуючих суспільних відносин за допомогою правової норми.

Ключові слова: правотворчість, міжнародна правотворчість, правоутворення, законотворчість, нормотворчість, теорія узгодження воль, норми міжнародного права, концепція національного інтересу, теорія державного інтересу.

Резюме

Реминская Ю. Ю. **Некоторые методологические замечания относительно концепции международного правотворчества (за пределами теоретического понимания).**

Статья посвящена характеристике международного правотворчества в рамках специальной теоретико-правовой методологии. Особенно подчеркивается необходимость отличать правотворчество от других подобных процессов. Учитывая это, автор предлагает новый подход к решению вышеуказанной проблемы. Среди прочего, ключевыми вопросами, рассмотренными в текущем исследовании являются: целесообразность существования правотворчества на международном уровне и наиболее оптимальный подход к определению понятия, обозначающего этот процесс. Сделан вывод о том, что международная правотворческая деятельность по своей природе является комплексным и многогранным явлением. Владея особыми «конститутивными признаками», международное правотворчество представляет собой сложный интеллектуальный и разновекторный коммуникативный процесс, направленный на качественное совершенствование существующих общественных отношений с помощью правовой нормы.