

Reconceptualization of the International Rule of Law (theoretical research)

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Publication: Конституціоналіст · 2017

Publication date: 2020-10-27

Permanent URL: <https://constitutionalist.com.ua/reconceptualization-of-the-international-rule-of-law-theoretical-research/>

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Abstract

RECONCEPTUALIZATION OF THE INTERNATIONAL RULE OF LAW

(THEORETICAL RESEARCH)

Reminska Yuhvuhf mha student, Theory of Law and State Department, Taras Schevchenko National University of Kyiv The article gives description of main approaches to the international rule of law definition and its role in global civil societyh The author analyses different rule of law definitionsf suggested by foreign scholarsh The main focus is placed on the international version of the rule of law concepth Special attention is given to the interrelation between domestic and international manifestations of the researched phenomenonh It is concludg HG that the idea of the international rule of law is quite challengingf because it is represented by a system of various characteristics options Key words

theoretical conceptf rule of lawf international rule of lawf systemicgstructural approachh В статье дается описание основных подходов к определению международного верховенства права и его роли в глобальном гражданском обществе. Автор анализирует различные определения верховенства права, предложенные иностранными учеными. При этом основной акцент поставлен на международную версию концепции. Также особое внимание уделено взаимосвязи между национальным и международным проявлениями исследуемого явления. Сделан вывод о том, что идея международного верховенства права является довольно комплексной, поскольку она представлена в виде системы различных характеристик параметров .

Ключевые слова теоретическая концепция, верховенство права, международное верховенство права, системно-структурный подход. Ремінська Ю.Ю. РЕКОНЦЕПТУАЛІЗАЦІЯ МІЖНАРОДНОГО ВЕРХОВЕНСТВА ПРАВА

ТЕОРЕТИЧНЕ ДОСЛІДЖЕННЯ

У статті досліджено основні підходи до визначення міжнародного верховенства права та його ролі в глобальному громадянському суспільстві. Автор аналізує різні визначення верховенства права, запропоновані зарубіжними вченими. При цьому основний акцент зроблений на міжнародній версії цієї концепції. Також особливу увагу приділено взаємозв'язку між національним і міжнародним проявами досліджуваного явища. Зроблено висновок про те, що ідея міжнародного верховенства права є досить комплексною, оскільки вона представлена у вигляді системи різних характеристик параметрів .

Ключові слова

теоретична концепція, верховенство права, міжнародне верховенство права, системно-структурний підхід. Problem statement and its relation to important scientific and practical tasks. In NVVNI Professor of Law of Ohio State University John Quigley wrote about the prospects for the international rule of law. He noted: "The rule of law

is a key element in the reduction of international conflicts and the promotion of a harmonious society” xrf p. mljzh It is necessary to agree with this thesis and point out that the functional tasks of the Rule of Law have not lost their relevance, but rather, their list has considerably been expanded. Taking into account various globalization processes and unification of

the legal knowledge, there is a qualitatively new level of the Rule of Law operating – international arena. In this respect, those are rightly heralded as major definitional and practical challenges, caused by the researched concept.

eh mh Aust in his academic work “Complicity and the Law of State Responsibility” has correctly observed that being a concept without clearly defined content, there is a wide range of approaches to the rule of law definition, particularly in its international dimension: “they range from reaffirmations of the protection of the individual by human rights over the rule of law as a benchmark for good governance to understandings which equate the rule of law simply with the idea that there be law in international relations xkf p. omzh Reviewing existing literature on the current subject. While agreeing with the precious statement, in should be noted that the international Rule of Law (hereinafter – fooic was

explored from different angles. Among most prominent scholars, who undertook their studies in fooi field are: eh mh Aust, fh Hurd, jh Kenatake, A. Nollkaemper, ih Pech, gh Waldron, A. Watts and others. However, despite the existence of sufficient literature on the fooi issue, there are still important questions which remain unresolved in modern legal theory. Among them, particularly are definitional issue of the concept and the problem of its functioning at the international level. At the same time, there is no systematized scientific research related to the relevance of fooi existing and its correlation with the particular domestic model.

In this regard, the overall aim of the study is to create an appropriate basis for scholars to try to deconstruct contemporary fooi definition, to expand its meaning and to show that this concept have not only theoretical connotation, but also practical application.

Main material presentation. In the domestic general state and law theory there are very few studies devoted to the international rule of law in its categorical and conceptual aspects.

30 Сер“я Юридинч“ науки Випуск QK Том NK 2017 This is due to the fact that there is a general prejudice about international manifestation of the rule of law and its investigation only within the framework of international public law.

However, foreign researches in this field of legal science do not follow a unified framework and some hard-hitting rule of law issues are not analyzed at all. As a result: “Yet the rule of law is more easily invoked than understood.

While its fundamental importance is acknowledged and usually taken for granted, it is not a concept with any readily identifiable content...” xsf p. kozh Thus, in this context for the modern legal theorist it is necessary to develop and suggest (for further practical use) the normatively-theoretical construction of the rule of law, taking into account the dynamic development of the international legal system.

In the field of international law, where the rule of law is widely used by various international organizations, the methodological role of the law theory can be expressed in the following terms. First of all, general law theory, having its own methodological tools, can identify those areas of legal matter, where the rule of law is less effective. This, in turn will allow us to reconsider existing in international law positions about the role and significance of the researched idea in the world community development. Along with this, legal theory can help in interpretation of many terms related to the rule of law functioning (for example, such terms as “authority”, “law principle”, “legal order”, “abuse of law”, “arbi-

trary power”, “quality of law” etchch Secondly, legal theory, performing methodological functions towards other legal sciences (especially constitutional and administrative lawcf is able to determine features of the fooi that in future can be adapted and implemented into national legal systems. And, finally, legal theory is able to develop indicators and criteria for the effective implementation of the Rule of Law by States – members of international community.

Having analyzed a sufficient number of special academic researches, there is a less then rhetorical question: whether any fooi exists in practice or it is just an idea fixed at the doctrinal level? Certainly and without any doubt, at the present moment among foreign rule of law researchers there are quite different views on how to understand this

phenomenon in the international framework. In the most general terms, there are only two visions of the *fooi* a) this concept cannot and does not exist at the international level; b) rule of law in its international version actively operates in several dimensions, in other words, it can be expressed in various ways (as a common heritage and legal value, as

a tool to promote human rights etc). In the first case, the *fooi* opponents believe this doctrine could not exist in international law context because there is no centralized authority as well as a uniform law-maker, so the Rule of Law at this level unable to perform its essential tasks. *fooi* proponents, on the other hand, are convinced that this concept is universal and flexible, and at the international level reaches its higher level of abstraction in order to complete all tasks that are set out for the global community. In this study, we believe that it would be inappropriate to dwell on those points, related to the controversial issues of the *fooi* existence, considering that the main purpose of this article is an at-

tempt to systematize all approaches to the definition and as a result – to deconstruct the whole concept, refresh its understanding. The controversy about the status and legal nature of the Rule of Law shows that this category is dynamic enough. Therefore, there are many opinions on how it should be defined.

However, the list of approaches is not comprehensive. A very thoughtful analysis made it possible to distinguish following key approaches to the *fooi* definition: ENF approach, according to which the rule of law is examined in terms of legal relations, which it is supposed to regulate; the rule of law regulates relations between key actors of international law as well as it is a relations of dual character; among such actors of international law are national governments (national entities) private entities, international organizations (governmental and non-governmental) and other international institutions (for example, Jh Kanetake). *xmzu* EOF instrumental approach considers the rule of law to be a set of resources, tools that gov-

ernments and others use to explain, legitimate and understand their policies *bfn* Hurd) *xlzu* EPF approach, which defines the rule of law as a “meta-principle”, as a constitutional foundation for international organizations; examples of the former approach can be found in analytical literature, in which the rule of law has emerged as a legal value, common for both international organization and its member states *bih* Pech) *xqzh* To deal with the definitional issue, *eh mh* Aust represented an interesting idea: in most general terms, *fooi* has two meanings: in first case it refers to the international standards which applies to States and which States have to respect in their dealings with their citizens; in second case –

it is used to describe relations between States as independent subjects of international law. Moreover, there is also a view that international rule of law is very similar in its content to a so-called “Lotus principle” (or Lotus approach) according to which the freedom of Individual States to do whatever they please as long as there are no fixed limitations upon their independence *xkf pp. orgpjzh* Such scientific position should be accepted, despite of the fact, that in our view those meaning of the *fooi* are rather its substantive aspects. In addition to this, *fooi* should also be considered along with structural considerations of the international legal system, with the way its component parts interact and how international law is inter-

preted in light of this ideal. That is precisely why recently, scientists also highlight the importance of the so-called systemic-structural approach to the *fooi* nature. According to this, *fooi* is a rather complex system, which includes a number of interconnected sub-principles. In its turn, their functional features can have a significant difference between each other. A. Watts has rightly pointed out, that Rule of Law has a substantial content, but the structural characteristics made this concept quite flexible, because this content can rapidly be changed. That is what “attract[s] a wide

ауковий в “сник Херсонського державного університету” 31 range of support within international community” *xsf p. llzh* Such approach is also taken by another scholar *eh mh* Aust, who in his fundamental work considers the *fooi* along with the structural features of the international legal system. Crucially, the Rule of Law serves as a set of tools, with the aid of which the international law (its component parts and legal subjects) is interpreted. Accordingly, “[...] such an approach implies the need to subdivide the rule of law into a special set of principles, which have developed over the centuries in a domestic context, but modified in international arena” *xkf p. onzh* Having analyzed the main features of the

suggested approach, it cannot be too highly stressed that there is no common opinion among scholars regarding what components should shape an *fooih*. Another important consideration is that at the present moment there is no complete distinction between requirements and components of the Rule of Law. The range of views on this problem is not so extensive.

Quite often, the components of the rule of law are assimilated to its requirements and vice versa. For example, judge of International Court of Justice Kenneth *gh* Keith extracted from international legal practice three essential elements of the *fooit NF* the need for clarity and certainty; *OF* the principle of equality before the law;

PF compliance with the law and the availability of independent and impartial courts and tribunals with compulsory jurisdiction to resolve disputes about, and help ensure compliance with, international law *xnf p. njrzh*. At the same time, *fooi* elements have been developed in A. Watts' basic research. The scientists points out that there must be the following elements of the *fooit* – completeness and certainty of the law: the law must be capable of governing all situations which might arise within it, and that accordingly the courts must be able to decide on the basis of applicable law all cases brought before them;

– equality before the law (predominantly manifests itself in so-called “principle of sovereign equality of States”*FW* all States which come within the scope of a Rule of Law must be treated equally in the application of that rule to them without any exceptions;

– absence of arbitrary power: there should be a well-defined set of limits of areas in which international law allows a State to act at its pleasure without having to account for its actions internationally; – effective application of the law: the law has to be effectively applied; there are three different aspects of the “effective application”: a) judicial settlement – there is must an ability of a State which finds itself with a legal difference with another State to have recourse to a judicial tribunal to have that differences resolved;

b) enforcement – the ability of the international community to ensure that if a State refuses to comply with the law, the law can nevertheless be enforced against it; c) application in practice – regular application of the law by States in their day-to-day dealings with each other as part of regular pattern of their international relations *xsf pp. lqgmmzh*. In the light of the above stated, it is believed such elements refer to the qualitative characteristics of the law as the regulator of social relation, and this is only one aspect of the Rule of Law (as a general ideach. In addition to the above, some scholars take different positions regarding the balance between international and national versions of the

Rule of Law. For instance, in *jh* Kanetake's opinion, attention should be paid to the national rule of law along with its international dimension. There is a significant quantity of studies related to the national reception of the international rule of law, whereas much less recognized is the international reception of the national rule of law practice *xmf p. mzh*. At the same time, *eh mh* Aust is convinced that domestic concepts of the Rule of Law are not easily transposable to the international level. International law will need to define its own concept of the Rule of Law *xkf p. oozh*. As can be seen from the preceding approaches, the authors do not deny the fact the there is a close relationship between international Rule

of Law and its domestic version. What is more, particular emphasis is placed on the features of transposition processes that occur in such interaction without referring to the differences between these two versions. Without any doubt, *fooi* is transposable to its national model (and vice versa)*cf* but in scientific literature was rightly pointed out that the transposition of this concept, whose origins lay essentially in Anglo-American constitutional doctrine, to the present day international system raises a number of new issues:

NF can a principle that was originally conceived to control the exercise of power within the domestic constitutional framework, be successfully duplicated in the international legal system where no central power exercises control over the community? *OF* if it can, does such a duplication require a reconceptualization of the principle itself in order to adapt it to the different legal conditions of international society?

xpf pp. krrgkrszh Taking into account the peculiarities of international law, the difference between them are actually significant enough. In the academic discourse, differences between international and national Rule of Law concepts are discussed from various perspectives. A. Watts, for example, believes among such differences are: *NF* functional lines, in which operate national and international *ooiu* *OF* different content according to the level of operation; though, it is believed national model of the *ooi* has more specific requirements that often reflect a State's particular

historical and constitutional evolution xsf p. kpzh Equally important is the position, main idea of which is that in view of the globalization process,

rule of law within its national content has transferred to a new, internationalized level. It is believed that the notion of "internationalized rule of law" was introduced into scientific discourse by A. Nollkaemper, who in his research pointed out the following. The internationalized character of the rule of law is expressed through the dichotomy between its national and international dimensions. The internationalized nature of the rule of law lies in the fact that its key element is the independent judiciary. It is exactly what distinguishes the rule of law at the international level from the internationalized rule of law. It has been contested whether independent courts are necessary ele-

32 Сер"я Юридичн" науки Випуск QK Том NK 2017 ment of the rule of law at the international level. But when international law overlaps with domestic law, the absence of independent court that can review international law-based claims is not acceptable. And therein lies the precise purpose of internationalized rule of law xof pp. qogqpzh

Conclusions. Summarizing the above-men-

tioned, we can state that the fooi has a quite multi-faceted nature. Therefore, its doctrine should be understood as an essential part of the legal system of society in its global sense; as a legal value, occurred at the international level and which has both political and legal connotations; category, which reflects the social needs of contemporary society through the creation of a specific set of requirements that must be met by every legal State.

Trying to underpin a nature of the fooi concept from the practical perspective, it is essential to note, today scholars have different approaches to the ooi definition. But much better is not to define the notion, but reveal the content of the Rule of Law. As any legal phenomenon, fooi has its own peculiar characteristics. Thus, fooi can be understood as: NF a characteristic of the relations between States as members of international community; OF founding principle of the most international organizations; PF a powerful tool not only in human rights protection but also in theirs effective promotion; QF can serve as an international standard; RF as a development strategy and SF as a tool of interpretation of international sources of law.

The concept of the fooi is a rather complex system, which includes a number of interconnected sub-principles. In its turn, their functional features can have a significant difference between each other. Prospects for the further researches. In the context of this research, among most promising and challenging rule of law directions are:

NK How the legal practice related to the fooi could help to effectively promote this concept at the national level. OK Legal methods and approaches that could be used to transpose the fooi concept into national legal systems.

PK Identification of gaps in national legal theory as well as practice in order to absorb and transform best practices in adaptation by other countries the main ideas of the fooi doctrine. QK Designing a check-list of the essential fooi structural components.

RK The conditions which have to be met by the fooi to exist. SK Dialectical interrelations between fooi and its domestic version, which would increase the efficiency of the national legal system by preventing the emergence of legal gaps in Ukrainian legislation.

TK Legal instruments that are created in the process of fooi functioning (both at international and national levelsch

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