

Rule of Law Concept in International Law discourse: Discussion over its Validity

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Abstract

Preliminary remarks. It is a wellknown fact the Rule of Law (hereinaf ter — RoL) is a superordinate category, actively invoked by scientists, political leaders, representatives of various international organizations and human rights activists. As the outstanding RoL researcher J. Waldron had rightly emphasized: «The Rule of Law is one of the most important political ideals of our time. It is one of a cluster of ideals constitutive of modern political morality, the others being human rights, democracy, and perhaps also the principles of free market economy. Open any newspaper and you will see the Rule of Law cited and deployed — usually as a matter of reproach, occasionally as an affirmative aspiration, and almost always as

a benchmark of political legitimacy» [1, p. 3]. But now, in the period of active globalization processes, one should not only talk about the RoL as a universal legal principle, but also about the RoL as a common legal value and heritage for the whole international community.

Despite the existence of huge quantity of multifaceted scientific researches, the analysis of the world practice related to the RoL promotion reveals several prob lematic aspects concerning its overall impact (particularly, impact on international legal system development). For instance, among such aspects is the problem of RoL relevance at the international level, its capability to function beyond the bounds of domestic legal system.

The problematization (and, in some cases, vilification in using this concept as the promising political slogan) of the wellestablished system of ideas about the international RoL (hereinafter — IRoL) occurs not only under the influence of the existing situation in the law-making field, but mainly due to the lack of a stable IRoL conceptual scheme.

As a result, conceptual assumptions reveal inaccuracies, contradictions that determine the need to re-construct IRoL theoretically in order to «ontologize» its new rational framework. Therefore, the development of such generic scheme will allow scientists to gain theoretical under standing about IRoL as multidimensional and integrative concept. The purpose of

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RULE OF LAW CONCEPT

IN INTERNATIONAL LAW DISCOURSE:

DISCUSSION OVER ITS VALIDITY

Reminska Yu. Yu. Rule of Law Concept in International Law Discourse: Discussion over Its Validity Abstract. This article is an author's attempt to clarify one of the most important questions in modern scholarship: can the universal idea of the Rule of Law functioning at the international level? This research encourages debates about the relevance of the international Rule of Law operating in the context of international affairs. The author concludes with her observations about outlined issue and suggests a systematized complex of essential Rule of Law preconditions, which allows this concept exist in international legal reality.

Key words: Rule of Law, international legal order, international Rule of Law, legal standards enforcement, legal values, common interest, essential Rule of Law preconditions.

conceptualizing the IRoL is to create an ideational system that will reflect a certain way of understanding, interpreting this political and legal phenomenon. Such purpose will be materialized in the suggested by author preliminary requirements, necessary for the RoL functioning at the level of international affairs.

Thus, while there seems to be a consensus on the principal characteristics of the RoL, some disagreement persists regarding its applicability in international law environment. From this perspective, abovementioned question is not relatively new, but the issue of formation and systematization of the necessary preconditions for the RoL operation at the national level was not previously discussed on the pages of contemporary legal researches.

Thuswise, the author raises a traditional for legal theory question: the viability of the RoL in the international legal reality. On the ground of authoritative academics' positions, the issue of the essential prerequisites necessary for the RoL functioning at the international level is addressed.

Main material presentation. With an aim to consider in detail previously outlined issue, one essential methodological observation should be made. Foreign legal science is quite remarkable in its pluralism of approaches, with the aid of which IRoL notion can be defined. The author believes, there are two levels of RoL operation in the scope of international law. At the first level, RoL acts as the principal of structural and institutional organization of international legal order. Conversely, at the second level RoL functions as the common social value, recognized by international community. Thus, in this context, RoL is the principle of structural and institutional organization of domestic legal systems. Suggested theoretical differentiation will serve as the focal point and basis for the further scientific argumentation. Broadly speaking, there is an ongoing discussion among contemporary legal and political theorists about the possibility of the RoL existence at the international level. Undoubtedly, there are certain principal challenges faced by the RoL at this level.

Specifically, among them are:

- 1) the absence of centralized governance;
- 2) fragmented character of international law, which often manifests itself in the existence of a multitude of various legal regimes;
- 3) the absence of a clear normative hierarchy of international law sources;
- 4) the dual role of international law

subjects: they are subject to the law that they in fact have created. First aspect literary means: in the international law framework there is a decentralized government organization, which does not provide a unified government as it's understood in traditional sense (in national administrative law doctrine). Instead of this, not only States, but also a wide range of international organizations (both inter-governmental and non-governmental) as well as other international institutions are viewed as the full-fledged participants in the governance of modern international legal system. The same situation exists in the international law-making field, namely the issue whether there is a «consolidated» law-maker [2, p. 4–9]. The second -

and problematic aspect is the fragmentation of international law, which in most general terms presumes expansion and diversification of international law resulting in emergence of various new legal regimes. Such phenomenon might have an adverse effect on the public relations regulation [3].

It may be said the third aspect is linked with the abovementioned. «Normatively hierarchical» model of legal acts system could be described as some kind of an «amorphous» one. That is there is no hierarchy of sources or rules in international law. International law rules have specific legal nature: in relation to national version their content are more general as they have a broader subject matter [4, p. 278]. In this regard, all rules of international law are

Eurasian Academic Research Journal 2018. № 8 (26) not always at the same level in terms of their legal force. This level does not depend on the form in which they are expressed. Both treaty rules and rules contained in acts of international organizations have the same legal force in case they stipulate the equivalent interests and needs. Taking it into account, the above mentioned peculiarity may be «fatal» to some extent, if we are talking about one of the requirements to the good law — its clarity. And finally, the last fourth aspect is that there is a dichotomy in a status of international actors: on the one hand, they are bound by the law (it is a fact beyond a dispute), but on the other — this law is

made by them. In this context there is a question whether the law corresponds to the public interests. However, despite all potential problematic issues, it is theoretically and practically impossible to equate two versions of the RoL. This does not mean they are not transposable with each other, but both IRoL and its national dimension have their unique characteristics, operationally necessary for international and national legal systems. It is for these reasons that IRoL has a slightly different goal in public relationships regulation. So, in this study, we believe that it would be inappropriate to dwell on those points, related to the controversial issues of the IRoL existence, considering that the main purpose of this

article is an attempt to systematize all approaches to the definition and as a result — to deconstruct the whole concept, refresh its understanding. Furthermore, M. Kanetake, among others, concludes that even if international community has no centralized government body, the growth of number of international institutions and their revitalization contribute to the creation of the necessary doctrinal and practical basis for the Rule of Law operation at the international level [5, p. 8].

We are strongly convinced that IRoL notions accumulate historical, legal and socio-cultural peculiarities of international organizations law as well as certain features of national law traditions. At the same time, political theory has also developed relevant concepts that take different views on the IRoL status. In view of the foregoing, an internationally renowned scientist B. S. Chimni believes every political concept has its own unique understanding of how and to what extent the IRoL should be applied in international affairs. For instance, legal realism, based on the fundamentalist and pessimistic view of the human nature, argues that the RoL cannot have a predominant significance at the international level, since the

essence of international politics lies primarily in concentration and accumulation of power. Hence, general reference is made to the thesis «legal obligations should be in line with national interests». The very idea if the IRoL is not denied, but the representatives of this legal thought are convinced this concept can exist only in case of an effective mechanism which will be able to monitor and manages cases of international law violations. According to the second, liberal theory, it is assumed that international law contributes to the establishment of the IRoL idea. It is believed that the development of democratic governance and human rights standards have been strengthened IRoL through the linkages with its

domestic analogue and modifying the principle of sovereignty. Against this background, IRoL serves as an instrument of international law to create conditions for further growth of the international community's welfare. Criticizing legal realists, the proponents of liberal theory are of the view that international law plays not only important role in supporting global legal order, but also helps to make an «overall response» to the challenges of whole international community [6, p. 290–291]. As seen from the above, both main philosophical and political-social movements do not call into a question the relevance of the RoL operating at the international lev-

el. The emphasis is shifted only to its essential tasks in regulation international relations and prior «spheres of influence». Therefore, when considering the IRoL doctrine, conditions of its functioning should serve as a starting point. It is noteworthy in Rule of Law literature only hard-hitting aspects of its definition are often perceived. Instead,

the author is of opinion that designing a set of IRoL conditions is one of the most clear methodological ways to assess this category pragmatically. From this perspective, conditions for the Rule of Law at the international level can be defined as the necessary prerequisites for its effective functioning and full implementation in international legal system with an aim to ensure law and order. Particularly, such conditions could include the following prerequisites.

1. The existence of actors that have

international legal personality (that is, the ability of particular subject of international law to be a party to international legal relations, notably to conclude and implement international treaties); this prerequisite envisages following: a) ability to hold rights and to be subject to obligations as well as to be responsible in case of violations of international law norms; b) ability to defend one's rights by making claims in case of violation such rights; in this vein, it is a question of the possibility of bringing international law subjects to justice; there is a quite well-developed concept of international legal personality, the researchers of which offer various characteristic features of it [for example, 7, p. 7–12].

2. A common interest of international

community to act within the framework of generally accepted rules of conduct; here should be made three important and related clarifications; first of all, under «generally accepted rules of conduct» it should be understood not only ethical standards and moral attitudes of the world community, but also generally accepted rules of international law, which are defined as the legal source «which either requires certain conduct from subjects of international law as the result of wide spread and consistent practice of States regarding some generally accepted values (e. g., absolute protection of physical integrity, prohibition of genocide, slavery and racial discrimination) or relies on some principles which are to be applied in

the absence of more specific rules. These principles are derived from the rules widely accepted by all or majority of modern democratic legal systems» [8, p. 12]; secondly, it is assumed that the concept of «common interest» is framed by the law (particularly, international law); despite its abstract character, in most general terms, the common interest (from the global point of view) can be defined as protected through international law and expressed in general principles or reflected *ius cogens*/ obligations *erga omnes* universal goods (values), which are formed at the intersection of the ideal with real and are important for the world society proper functioning [9, p. 22];

and finally, to act within a framework of generally accepted legal rules primarily presupposes the compliance by States with the principle of international sovereignty [10, p. 53].

3. Purposeful development of interna-

tional law; it should be stressed, we are not talking about the systemic nature and the necessity of codifying all sources of international law; it is about the goal-oriented determination of the whole international legislation, the orientation of its development and functioning; in other words, its norms should be developed and established taking into account challenges that faced modern society; based on general trends of contemporary law unification, purposeful development of international law can be defined as the process by which international law rules are changed or created with an aim to regulate qualitatively new legal relationships in order to meet the public needs [11, p. 16].

4. Prevalence of general instruments

to regulate processes related to the adapta-

Eurasian Academic Research Journal 2018. № 8 (26) tion of international law standards to the national legal systems; at the same time, taking into account effects of globalization, we should think of «breakdown of boundaries between international law and national laws as they applied in practice.

Whether in private practice or as government official the lawyer usually meets international law questions intermixed with the domestic law of one or more countries» [12, p. 553–554].

5. Well-functioned system of interna-

tional institutions (particularly those, which are able to resolve international disputes); in this framework, the formulation «well-functioned system» does not mean centralized, such an organization primarily requires from international agencies to conduct their activity within the law and to perform the functions stipulated in their charters; in its turn, abovementioned characteristic largely contributes to the faithful interpretation of concrete public relations.

6. Viable mechanism for the enforce -

ment of sanctions against all subjects of international law that have break its rules; such mechanism should be applied to all subjects without any exceptions based on the principles of legal responsibility [13, p. 14–42].

Conclusions. Looking at the IRoL as

a multidimensional category leads to several important statements. Firstly, although there are dozens of approaches to the IRoL it is among most well-known categories, which in foreign legal literature denotes either the international standard in relations between states as international law full-fledged subjects, or political and legal instrument of international cooperation between all international law subjects in order to achieve specific strategic goals (namely, ensuring security, peace or resolving international conflicts through the use of legal methods).

Secondly, in most general terms, today, within the bounds of legal science, there is lively discussion among contemporary researchers about the fully operational potential of the RoL concept at the international level. At the same time, it should be noted there are some features, which can make the IRoL operating more complicated. Thus, among such principal moments are: 1) the absence of centralized government and unified legislator (in its traditional sense); 2) the fragmentation of international law, which manifests itself in the emergence and existence of great number of various legal regimes; 3) the absence of a clear normative hierarchy of international law sources; 4) the dual role of international law subjects: in their activ-

ity they are guided by the legal norms they created. Nevertheless, modern legal practice and international law doctrine show the IRoL is an integral part of present day global legal order. And, finally, IRoL has its unique structural and organizational peculiarities:

a) characterizes the quality of the international legal system as an environment for the political interaction between states as independent subjects of international law; b) such governmental interactions are based on the principle of sovereign equality of states; c) materializes legal instruments de-signed to resolve legal conflicts between states; d) considered as an embodiment of balance between international and national interests; e) has dual purpose: on the one hand, acts as a legally guaranteed prerequisite for the state's independence; on the other — serves as one of the «pillars» of ensuring the rights and freedoms of human and citizen; f) based on the interaction of different legal re-

gimes; g) has its own purposefulness of legal regulation: ideal developed by the international community for its functioning within a unified system of international law norms; h) the mechanism for the concept implementation involves the ratification by states as participants of international relations the certain international legal acts, which mostly referred to a so-called «hard law».

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