рования следует выбрать обязательное проведение специального исследования с использованием элементов их методического регулирования (методик, положений (национальных стандартов) с соблюдением установленной процедуры и отображением результатов в конечном документе.

Список использованной литературы:

1. Цивільний процесуальний кодекс України від 1 липня 2004 року № 1952-IV [Електронний ресурс] // Режим доступу : http://zakon2.rada.gov.ua/laws/show/1618-15.

2. Фурса С.Я., Фурса Є.І. Цивільний процес. Академічний курс [Текст]. – К. : видавець Фурса С.Я.: КНТ, 2009. – с. 356-361, 386-388; Гончаренко В.Г., Бергер В.Є., Булига Л.П. Експертизи у судовій практиці. – К. : Либідь, 1993. – С. 9.

3. Сахнова Т.В. Судебная экспертиза. // Т.В. Сахнова / М. : Городец, 2000. – 368 с. – С. 26. ISBN 5-89391-052-4; Орлов Ю.К. Производство экспертизы в уголовном процессе. // Ю.К. Орлов / С. 4–5; Жуков Ю.М. Судебная экспертиза в советском гражданском процессе. – С. 10.

4. Закон України «Про судову експертизу» від 25 лютого 1994 року № 4038-XII (із змінами та доповненнями) [Електронний ресурс] // Режим доступу : http://zakon2.rada.gov.ua/laws/show/%D0%BF%D1%80%D0%BE%20%D1%81%D1%83%D0%B4%D0%BE%D0%B2%D1%83%20%D0%B5%D0%BA%D1%81%D0%BF%D0%B5%D1%80%D1%82%D0%B8%D0%B7%D1%83.

5. «Про оцінку майна, майнових прав та професійну оціночну діяльність в Україні» від 12.07.2001 № 2658-III [Електронний ресурс] // Режим доступу : http://zakon4.rada.gov.ua/laws/show/2658-14/print1389010616589612.

6. Інструкція про призначення та проведення судових експертиз та експертних досліджень та Науково-методичні рекомендації з питань підготовки та призначення судових експертиз та експертних досліджень, затверджені наказом від 08.10.98 № 53/5 [Електронний ресурс] // Режим доступу : http://zakon2.rada.gov.ua/laws/show/z0705-98.

7. Сахнова Т.В. Судебная экспертиза. // Т.В. Сахнова / М. : Городец, 2000. – 368 с. – С. 8. ISBN 5-89391-052-4.

8. Сахнова Т.В. Судебная экспертиза. // Т.В. Сахнова / М. : Городец, 2000. – 368 с. – С. 15. ISBN 5-89391-052-4.

FUNDAMENTAL PRINCIPLES OF INTERNATIONAL LAW: ASPECTS OF NATURAL LAW

Olha LABYAK,
post-graduate student
Ivan Franko National University of Lviv

Summary

The article deals with the system of fundamental principles of international law through the prism of jus naturale. Analysis of the legal nature of the fundamental principles has been conducted and their legal characteristics have been singled out. The article examines the influence of jus naturale on the development of fundamental principles of international law and examines the impact of jus naturale and positivism in their formation.The article describes the axiological component of the fundamental principles of international law.

Key words: theory of international law, jus naturale, positivism, fundamental principles of international law, axiology, jus cogens.

Аннотация

Исследуется система основных принципов международного права сквозь призму юснатурализма. Осуществлен анализ юридической природы основных принципов, и выделены их юридическит свойства. В статье анализируется влияние юснатурализма на развитие фундаментальных принципов международного права, и рассматривается влияние юснатурализма и позитивизма в их формировании. В статье характеризуется аксиологический компонент основополагающих принципов международного права.

Ключевые слова: теория международного права, юснатурализм, позитивизм, основные принципы международного права, аксиология, jus cogens.

Modern international law may be characterized as a system of law having its specific subjects, particular sources, corresponding object and regulatory methods. On the other hand, science has not always viewed international law from this particular angle, i.e. through corresponding positivism-oriented theoretical structures. It is characteristic, however, that from the beginnings of international law (during pre-state and ancient periods) and during its further development a particular importance was given to the ideas of jus naturale.

Statement of the problem. International law at its current stage of development to a certain extent combines principles of positivism and jus naturale which shall be fundamental for research of its legal nature and other specific features. Thus, study of various strata of international law solely by means of positivist theory is not always successful.

Analysis of recent research. Fundamental principles of international law as a real category of positive international law embody the fundamental ideas and principles of natural law theory. The science of international law has an established opinion on this subject.

Most scholars recognize the particular role that these principles have for characterization of axiological aspects of international law [1]. In this respect the fundamental principles are treated through the prism of legal entrenchment of universal values [2].In ukrainian science of international law main principles were analyzed in the papers of B. Butkevych, A. Merezhko, Y. Shchokin etc.

The relevance of the chosen direction of scientific research due to the fact that the theory of international law, there is an objective need for continuing scientific debate on natural law theory in its application to international law. However, in this context, the significance of positivism , with all its advantages and disadvantages is not diminished , but rather is used to determine the scientific truth.

The purpose of the paper is the scientific study of the basic principles of international law jus naturale position and synthesis of theoretical propositions

At the same time, theoretical sources are reasonable to claim that the fundamental principles are the principles of positive international law and have no direct roots in natural law [3]. It is obvious that jus naturale is only indirectly

present in the fundamental principles of international law as the main instrument of positivation of the values of natural law within the framework of international law. One of the existing approaches to the study of the fundamental principles consists in viewing them both as legal and moral elements of international legal regulation.

Statement of the article. Legal classification of the fundamental principles calls for singling out characteristics that logically stem from their legal nature. Among these characteristics we generally point to their universal and common nature [4] which in its turn gives the fundamental principles a special status among other norms of international law. Apart from that, we shall pay special attention to universality which in our opinion may be regarded as the common feature both of the fundamental principles and natural law.

Fundamental principles as universal norms are different in their conclusiveness and binding nature [5] of their regulatory prescriptions. It is characteristic that the provisions of the UN Charter confirm the said feature of international legal obligations foreseen by the charter including those that originate from the fundamental principles of international law. To be more specific, Article 103 expressly states that obligations of the UN-members under the UN Charter should they contradict any other international legal obligations will take precedence over the latter [6].

Universal character of the fundamental principles lies in their application to any and all subjects of international law without any exceptions that may exist in relation to them (for instance, consent on the part of the state). Besides it is important that these particular universal norms such as the fundamental principles of international law characterize the content, social and universal value of international law [7].

The legal way to ensure universal application of international law is the UN Charter, provisions of which were in fact the first to incorporate the system of fundamental principles on the international level. Since universal values, ideals and principles, according to many scholars, are typically reflected in international legal acts with the participation of practically all countries [8], then the UN Charter, ratified by 193 countries as of today, certainly falls into the category of an international agreement.

Another aspect of the universal character of the fundamental principles is manifested in the erga omnes character (i.e. applicable to and directed at any member of the international community) of the international legal obligations that are foreseen by their regulatory content [9].

We should mention, however, that in theory of international law the erga omnes character of obligations is by no means recognized by all fundamental principles. The least objectionable in this respect is the principle of equal rights and self-determination of peoples. At the same time the doctrine has yet to reach a consensus concerning the correlation between other fundamental principles and the erga omnes obligations.

The theoretical and legal foundation of the fundamental principles in the said understanding allows for them to be interpreted as ideological and regulatory basis of modern international law [10]. As a matter of fact, the fundamental principles perform a double function in the mechanism of international legal regulation. Firstly, they are the reflection of a complex of universal values which simultaneously serves as ideological foundation for the operation and development of international law [11]. Despite the fact that the principles are historically changeable in their content and quantity [12], the values (equality, morality, justice) that they are based on, remain a constant in international law.

For a more profound understanding of the fundamental principles, it is suffice to say that they serve vital interests of the members of international community.

Interests of humanity are satisfied with the help of fundamental principles which serve not only as an ideological basis of international law but to a certain extent as its «constitution» [13]. This is stipulated by the regulatory character of the fundamental principles which is exercised through corresponding rights and obligations of the subjects of international law. Not least because of this, the fundamental principles are interpreted by the scholars as the basis of international law [14].

On the whole, the idea of recognizing the «constitutional character» of the fundamental principles or their classification as a «constitution» in the meaning of a relevant system of interrelated norms is not new. Representatives of the doctrine of international law have drawn attention to this fact on numerous occasions [15]. As a result, there arises a new discussion concerning a gradual replacement of the decentralized horizontal system of international relations with a vertical hierarchy of corresponding elements where the fundamental principles are placed.

The regulatory content of the fundamental principles determines the most important rights and obligations of the subjects of international law, i.e. analyzes their behavior through the prism of compliance with legal prescriptions. From this perspective, the fundamental principles seem to establish legal parameters for a desired, appropriate model of behavior of subjects [16] and hence their compliance with those idealistic mindsets and values that are encoded in the fundamental principles. This means that on the one hand, the fundamental principles establish the normative limits for lawful mode of behavior of the countries, and on the other hand, they compare this mode of behavior with the idealistic elements reflected in the principles. It is through reflection of the qualitative specifics and governing principles of international law in the fundamental principles that the idea of self-preservation of states, peace maintenance and co-operation is being established as the general objective of the international community. In other words, the fundamental principles exhibit an absolute correlation of the said ideas which are always the same both for individual countries and for the international community as a collective formation.

According to its origin the contemporary system of fundamental principles may to a certain extent be regarded as the extension of the natural law concept on the fundamental rights of states.

Ideological content of this concept is based on the fact that the fundamental principles of international law (right to life, right to independence, right to equality, right to take part in international relations) derive from the very nature or essence of state [17]. According to O. Merezhko,

emergence of the concept of fundamental rights of states is conditioned by placing a correspondent concept of fundamental (natural) rights known since the adoption of the United States Declaration of Independence 1776 and the Declaration of the Rights of Man and Citizen 1789 onto the footing of international law [17]. Thus, there are reasonable grounds to claim that in this particular case there is a causal relation between natural and international law. This relation may be shown schematically as follows: *fundamental (natural) human rights – fundamental rights of a nation-fundamental (natural) rights of a state – fundamental principles of international law.*

Interpretation of O. Eichelman suggests that fundamental rights constitute indispensable postulates for peaceful existence of independent countries, a minimum of norms necessary for regulation of relations between the subjects of law. As an example of fundamental rights the scholar names the principle of legal liability for a breach – pacta sunt servanda [18] which today as a principle of performance of international obligations in good faith is a part of a system of fundamental principles of international law.

According to V. Koretskyi the theory of fundamental rights of a state contains the following rights: right to life and self-preservation, right to independence, right to equality, right to respect for one's dignity etc. [19]. Thus, it is reasonable to try and draw parallels between the said rights and specific principles of international law, namely, the principle of sovereign equality of states, principle of international cooperation, principle of prohibition of interference in internal affairs. Accordingly, for international relations at their current stage of development fundamental principles of international law serve as an extension of the concept of natural human rights and the concept of fundamental rights of a state in natural law tradition.

The ideas of natural law do not exist outside their relation to the norms of international law, its main principles included. This is what Ukrainian international law scholar Yu. Schokin aptly commented on the matter: «*universal moral and ethical norms-principles that serve as the basis for modern concepts of natural rights and are reflected in the fundamental principles of international law are so deeply rooted in the collective social mind that we have started to perceive them as undeniable values that do not need proof of social practice*» [20].

An immanent characteristic of the fundamental principles is their higher political, moral and legal authority [21] which undoubtedly stems from their fundamental character within the regulatory system of international law. A special legal nature of the fundamental principles of international law that is manifested in their recognition as the higher legal, political and moral norms [22] in no case provides for any hierarchical relations between them. We may claim, however, that within the regulatory system of international law the other norms are subordinate to the fundamental principles. In this respect it is not a coincidence that any norm that contradicts the requirements for regulatory content of fundamental principles shall be deemed as invalid. The theory of international law corroborates this opinion in the sense that fundamental principles, as the most important universal norms, are simultaneously a criterion of lawfulness for all the other norms. Probably, the link between the fundamental principles and values explains why the former may possess this feature.

A number of aspects concerning the legal nature, peremptory character, regulatory content, interpretation and finally the number of the fundamental principles themselves are disputable and often contradictory. Suffice to remember the identification of the fundamental principles with the general principles of law in context of the Art. 38 of the Statute of the International Court of Justice which is typical for positivism-oriented trends; the idea of peremptory character of the fundamental principles in the meaning of jus cogens; and the urge to expand the existing system of fundamental principles and to specify their regulatory content.

It becomes obvious that the analysis of the fundamental principles solely from the perspective of positivism or jus naturale may result in their idealization. Apparently, fundamental principles of international law cannot always find their proper validation only by the concepts of natural or positive law. For instance, the man-made character of the fundamental principles of international law despite a number of natural law elements presumes that they have a mixed nature and are built on the grounds of duality of positivism and jus naturale as indispensable elements of a single legal reality.

The conclusion. Consequently, under such circumstances there remains space for academic discussion and further development of the concept of fundamental principles.

To conclude the above said, the following statements can be made. Fragmental manifestations of natural law concepts in the fundamental principles of international law are morality, equality, freedom and justice as its fundamental values. The Fundamental principles of international law directly originate from a number of natural law theories (theory of fundamental human rights, theory of fundamental rights of a state) adjusted to the reality of modern international relations. Positivist nature of the fundamental principles may be traced in their consensuality while the natural law elements are manifested in their regulatory content.

List of reference links:

1. Antselevych G. International law / Antselevych G.O. – K. : Alerta, 2003. – 410 p.
2. Butkevych O. International law of the Middle Ages / O. Butkevych. – K. : Edition of humanit . literature , 2008. – 672 p.
3. Butkevych V.H, Mytsyk V.V., Zadorozhna O. International law. Basic theory : a textbook / V.G. Butkevych , V. Mytsyk , O. Zadorozhniy. – K. : Lybed, 2002. – 608 p.
4. Vasilenko, V.A. Fundamentals of the theory of international law / V.A. Vasilenko . – K. : Vyshcha Shkola, 1988. – 288 p.
5. Unabriged Dictionary of Law / J.S Shemchushenko . – K. : Legal Opinion, 2007. – 992 p.
6. Herdehen M. International Law / M. Herdehen . – K. : CBS, 2011. – 516 p.
7. Graf W. International law. Translated from the German. / B. Graf. – M. : Infotropik Media, 2011. – 992 p.
8. Levin D.B History of International Law / D.B Levin. – M., 1962. – 136 p.
9. Lukashuk I.I International law. Overview : the textbook / I.I Lukashuk. – Moscow : Wolters Kluwer, 2005. – 432 p.

10. International law : the textbook / Ed . G.V. Ignatenko. O.I Tiunov. – Moscow : Norma, 2005. – 624 p .

11. International law : the textbook / Ed .V.I. Kuznetsov. – M. : Yurist 2001. – 672 p.

12. International law : the textbook / Ed V.I Kuznetsov, B.R Tuzmukhamedov. – M. : Norma, 2007. – 944 p.

13. International law : the textbook / Ed E.T. Usenko, G.G. Shinkaretskaya. – M. : Yurist, 2005. – 495 p.

14. Merezhko O.O The theory of international public and private law / O. Merezhko. – K. : Justinian, 2010. – 320 p.

15. Mikhailov A.M The Genesis of Continental legal dogma : monograph / A.M. Mikhailov. – M. : Yurlitinform 2012. – 496 p.

16. Oppenheim L., International Law . Volume 1 .Semivolume I. / L. Oppenheim. – Moscow, 1948. – 408 p.

17. Repetsky V.M, Lysyk V.M. International Humanitarian Law : Textbook / V.M Repetsky, V.M Lysyk. – K. : Znannya., 2007. – 467 p.

18. Tunkin G. Theory of international law / G. Tunkin. – M. : Zerkalo, 2006. – 416 p.

19. Ushakov N.A International law : the textbook / N.A Ushakov. – M. : Yurist, 2005. – 304 p.

20. Blackman R. There is there there: defending the defenseless with procedural natural law / R. Blackman // Arizona Law Review. – № 37. – 1995. – p. 285–353.

21. O'Connell M. International law's natural normativity / M. O'Connell // American Society of International Law Proceedings. – № 103. – 2009. – p. 385–388.

СУДЕЙСКОЕ УСМОТРЕНИЕ (ТЕОРЕТИЧЕСКИЙ И ГРАЖДАНСКО-ПРОЦЕССУАЛЬНЫЙ АСПЕКТЫ)

Леонид ЛИЧМАН,
кандидат юридических наук, доцент, заслуженный юрист Украины,
председатель Малиновского районного суда г. Одессы

Summary

The article is devoted researching problem of judicial discretion, its role and value in civil procedure of Ukraine. On the basis of undertaken a study of scientific sources absence is set in general theoretic researches of single approach to this problem, and also absence of the specialized researches of select aspect of range of problems. On the basis a current civil judicial legislation and its analysis authorial set his own position about judge discretion, its borders and decision of its limits.

Key words: court law, judge discretion, limits of judge discretion, analogy of law, analogy of legislation, judicial practice.

Аннотация

Статья посвящена исследованию проблемы судебного усмотрения, его роли и значению в гражданском процессе Украины. На основании проведенного исследования научных источников установлено отсутствие в общетеоретических исследованиях единого подхода к этой проблеме, а также отсутствие специализированных исследований избранного аспекта проблематики. С учетом действующего гражданского процессуального законодательства и на основании его анализа сформулирована авторская позиция о судейском усмотрении, его границах и определении его пределов.

Ключевые слова: судебное право, судейское усмотрение, пределы судейского усмотрения, аналогия права, аналогия закона, судебная практика.

Постановка проблемы. Положения ст. 124 Конституции Украины о распространении юрисдикции суда на все правоотношения в государстве и их практическая реализация в рамках гражданского судопроизводства в украинских реалиях вызывали определенные трудности. В отличие от хозяйственного и административного судопроизводства, по правилам Гражданского процессуального кодекса Украины (далее – ГПК) рассматриваются дела, возникающие из гражданских, жилищных, земельных, семейных, трудовых отношений, а также иных правоотношений, кроме случаев, когда их рассмотрение проводится по правилам другого судопроизводства, то есть этот перечень не имеет исчерпывающего характера, что подтверждается системным толкованием статей 15 и 16 ГПК, статей 1, 2 и 12 Хозяйственного процессуального кодекса, статей 2-4, 17 Кодекса административного судопроизводства. К компетенции суда, осуществляющего судопроизводство по гражданским делам, относятся дела о защите нарушенных, непризнанных или оспариваемых прав, свобод или интересов, возникающих из частноправовых отношений. Для этих отношений характерна специфическая правосубъектность их участников, которые юридически равны между собой, свободны в своем волеизъявлении в части приобретения прав и обязанностей, а также наделены имущественной самостоятельностью относительно каждого из этих участников. Кроме того, такие лица имеют возможность в договоре, при определенных условиях, отступить от положений актов законодательства и урегулировать свои отношения на свое усмотрение (ст.ст. 6, 826 Гражданского кодекса Украины). С учетом специфики этих отношений, определяемых их предметом, методом правового регулирования и общими положениями (принципами) гражданского права, при судебной защите прав, интересов участников гражданского оборота возрастает роль судейского усмотрения.

Актуальность темы исследования. Достижение стабильности в регулировании общественных отноше-