INTERNATIONAL LAWMAKING SUBJECTS IN A CHANGING WORLD

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Summary

The article is dedicated to the issue of international law subjects in general and international lawmaking subjects in particular. The author describes the problem of recognizing different entities as international law subjects in the context of the international lawmaking. In the paper some historical aspects of international law personality development are considered. The international law making capacity of the «classical» lawmaking subjects (states, international governmental organizations) is stressed. The question of international lawmaking characteristic of national liberation movements, individuals, quasi-states and the Holy See is touched as well.

Key words: international lawmaking, international law subject, international lawmaking subject, international personality.

Аннотация

Статья посвящена субъектам международного права в целом и субъектам международного правотворчества в частности. Автор описывает проблему признания различных лиц в качестве субъектов международного права в контексте международного правотворчества. В статье рассмотрены некоторые исторические аспекты развития международной правосубъектности; подчеркнута способность к созданию норм международного права так называемых «классических» правотворческих субъектов (государств, международных межправительственных организаций); затронут вопрос о правотворчестве национальных освободительных движений, индивидов, квазигосударств и Святого Престола.

Ключевые слова: международное правотворчество, субъект международного права, субъект международного правотворчества, международная правосубъектность.

Problem statement. There always were many debatable issues and uncertain points in different aspects of international relations' legal regulations. It's needed to mention that the existing disputes often concern not only some traits, but essential fundamental characteristics of the international law system. Among such disputes the uncertain one and this way topical for research issue is an issue of a number of international law subjects in general and an issue of a number of international lawmaking subjects in particular. Obviously these issues are related to some other important theoretical and practical questions of international law. Among them there is a question of international lawmaking notion, its stages and methods, a question about international law sources range and even a question about international law normativity.

Actuality of the research. As we see it the mentioned-above questions cannot be resolved without a solution of the international law subjects question because it's very important to understand who can be considered international law subject and who can create international law norms. In this context it's necessary to comprehend if the lawmaking capacity is a required characteristic of international law subject as long as recently appeared theories which expand the international law subjects' range include to it the subjects without the classical lawmaking capacity. Such reflections make the research the topical and interesting one.

State of the research. The works of many famous scientists and specialists in this sphere are dedicated to different aspects of international lawmaking. They are Anzilotti, Brownlie, D'Amato, Kelsen, Martens, Butkevich, Kolosov, Levin, Lukashuk, Merezhko, Tunkin and others. Some authors, for example, D'Amato, Danilenko, Merezhko, Shokin, conducted the conceptional studies on international treaty and international custom making. But unfortunately there are no enough specific scientific studies on the full international lawmaking process in which context the international lawmaking subjects question would be considered.

Purpose of the research. Given the research topicality the paper purpose is to analyze the international law subjects' range and to find in it the international lawmaking subjects. Also we would like to touch the issue of emergence of new international lawmaking subjects.

Main part of the research paper. The scientific research of list of international law subjects appeared and developed simultaneously to appearance and development of the science of international law itself. We must underline that during the Ancient times and the Middle Ages they didn't consider the states but their sovereigns as the subjects of international relations. Many representatives of the international law science suppose that only with the 1648 Peace of Westphalia having been concluded the international personality of states was recognized. Obviously the unique international lawmaking subject at the time was a state (the lawmaking capacity of the Holy See and some orders of knighthood can be in question though).

In time the realities of international life and mostly the development of international cooperation in such stable form, as an international organization is, provoked thoughts about necessity of enlargement of the international law subjects' list. Despite the appearance of the first international organizations in the XIX century their personality was definitely recognized only in 1949 in the Advisory Opinion of the International Court of Justice in so called «case of Bernadotte».

In 1948 the Swedish count Folke Bernadotte and the French colonel Andre Serot, carrying out the duties of employees of the United Nations Organization on the Israel territory, were murdered. This tragic event provoked the justiciable dispute about the legitimate subject having the right for the reparations of injury. On the one hand the citizenship states of the murdered laid claims to it, on the other hand the United Nations Organization itself was the dispute party. The International Court of Justice considered the case and reached a decision in favor of the United Nations Organization, definitely recognized that the UNO «is an international person that can have

international rights and obligations and has capacity to bring international claim for defense of its rights [4, p. 85]».

Actually nowadays the international lawmaking capacity of states and international governmental organizations is out of question, being directly recognized by the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

Nevertheless in the international law science states and international organizations aren't the only subjects with some volume of international personality. We can come to such a conclusion analyzing the text of the 1969 Vienna Convention on the Law of Treaties where alongside states «others subjects of international law» are mentioned. At the same time their list isn't legally determined.

Paying attention to the Ukrainian and Russian scientists' works, it turns out that the conception of subject's division into primaries and derivatives is the most widely spread one. They attribute states itself to the former ones, international organizations and «others entities that got certain amount of international personality from states…, for example, quasi-states» [9, p. 97] – to the latter ones. Others researchers also see «nationalities and nations, including such of them that fight for their national liberation and creation of their national state» [7, p. 114] as primary subjects of international law.

It's worth to mention that at the latest time the conception of quasi-state as an international law subject attracts considerable criticism as far as the main distinctive criteria of states and so called quasi-states weren't made. What concerns nations and nationalities, their definitive recognition as subjects of international law seems generally incorrect. As we see it, nations and nationalities living on the territory of a certain state and not trying to create their own state are represented in the international arena by this state that in particular was established with such a purpose.

The legal status of nations and nationalities fighting for their freedom can be seen the other way. Staying on the territory of the state that doesn't give them the sufficient possibility to realize their right of self-determination, such nations and nationalities can't be adequately (to their interests and needs) presented in the international relations. Coming from this assumption we can say that at the time of them fighting for their own state creation and exceptionally till the moment of its creation such nations and nationalities can be considered as temporary independent subjects of international law.

Talking about their lawmaking capacity it seems quite strait because of their temporal international status. As the same time being international law subjects they can stipulate some kinds of international treaties, for example, the 1993 Declaration of Principles on Interim Self-Government Arrangements (agreement signed between Israel and the Palestine Liberation Organization) and the 1994 Agreement on the Gaza Strip and the Jericho Area. We need to mention that some researchers consider the international personality of national liberation movements apart from the international personality of nations and nationalities fighting for their freedom. But the general nowadays tendency is to consider they as equal [9, p. 38].

The issue of international personality of individuals also provokes many discussions. Appealing to the Ukrainian and Russian science of international law, we can come to the conclusion of non-recognition of individuals as international law subjects of full value, but attributing to them «some traits of international personality» [10, p. 107]. They substantiate such a conclusion with the next thought: only state is empowered to transfer some traits of international personality to some entities. According to the opinion of followers of such a theory there is no international act giving grounds to suppose that at the moment the international community (states) attributes individuals with this characteristic.

The individual not considered as an international person of full value by our scientists can't be also completely deprived by them of its capacity to participate in certain aspects of international relations. As a result they still underline so called special or fragmental international personality of the individual [7, p. 126].

The international law science of western countries isn't so unanimous in the approach to the issue of international status of the individual. Nevertheless it's possible to ascertain a strong trend to its spreading recognition as an international law subject. It reflects even in the structure of new manuals on the international law where next to the paragraphs concerned with the legal status of states and international organizations as organic components of the international system there is a separate paragraph dedicated to the individual as an independent subject of international law [2, p. 437–439]. Supporters of such a position reason it with next affirmations:

1) the individual is a participant of relations aimed at defense of human rights;

2) the individual is entitled to initiate international judicial procedures;

3) the individual can be considered responsible and this way be accused for grave international crimes.

On the contrary opponents of the recognition theory of individuals' international personality reasonably remark that on the international level there is no a strict system of individual rights guaranties apart from some regional mechanisms (for example, it talks about the European Court of Human Rights). What's more, recently despite the sufficient development of international criminal law the realization in practice of individuals' criminal prosecution for international crimes' commitment remains yet a very difficult scope to be achieved as far as it encounters contractions of national jurisdictions in the sphere [4, p. 117–119].

Anyway even the most courageous supporters of individuals' international personality don't go so far to attribute international lawmaking capacity to the individual. But it can be seen in another way in connection with the representatives of so called «scientific doctrine» that being inherently individuals can have a relevant influence on the international lawmaking. What's more recent studies emphasize the importance of «emerging modes of international legal engagement, such as what … «diplomatic law-talk,» layered cooperation and hybrid public-private arrangements [3]» where the role of a single scientist or a single lawyer significantly increases.

Another controversial issue of attributing the international personality to some entities is a question of the Holy See as an international law subject. Its

legal status has been recognized, both in state practice and in the writing of modern legal scholars of the catholic countries, as a subject of public international law, with rights and duties analogous to those of states. At the same time they sometimes speak about Vatican as a subject with limited international personality in the native science of international law [7, p. 137].

The Holy See, as distinct from the Vatican City State, does not fulfill the long-established criteria in international law of statehood. But its possession of full legal personality in international law Public international law concerns the structure and conduct of sovereign states, analogous entities, such as the Holy See, and intergovernmental organizations. To a lesser degree, international law also may affect multinational corporations and individuals, an impact increasingly evolving beyond is proved by the fact that it maintains diplomatic relations with 177 states, that it is a member-state in various intergovernmental international organizations. This peculiar character of the Holy See in international law, as a non-territorial entity with a legal personality akin to that of states, has lead professor Brownlie Professor Sir Ian Brownlie, CBE, QC, FBA is a British jurist, specializing in international law. He was called to the Bar in 1958 to define it as a «sui generis entity» [8, p. 114].

Moreover, the Holy See itself, while claiming international legal personality, does not claim to be a state. Cardinal Jean-Louis Tauran, former «Foreign Minister» of the Holy See, has underlined that we must avoid the temptation of assimilating the Holy See and its international action with that of a state, with their thirst for power. For him, the Holy See is unquestionably a sovereign subject of international law but of a predominantly religious nature [5].

For some authors, the current legal personality of the Holy See is a remnant of its preeminent role in the medieval politics. Thus Arangio-Ruiz noted that the Holy See has been an actor in the evolution of international law since before the creation of strong nation states, and that it has maintained international personality since [1, p. 355].

For others, the international personality of the Holy See arises solely from its recognition by other states. In this sense, Brownlie Professor Sir Ian Brownlie, CBE, QC, FBA is a British jurist, specialising in international law. He was called to the Bar in 1958 argues that the personality of the Holy See «as a religious organ apart from its territorial base in the Vatican City» arises from the «principle of effectiveness [8, p. 115]», that is, from the fact that other states voluntarily recognize the Holy See, acquiesce having bilateral relations with it, and in fact do so, in a situation where no rule of ius cogens is breached. For him, though, the international personality thus conferred is effective only towards those states prepared to enter into diplomatic relations with it.

For a third group of authors, the international legal personality of the Holy See is based mostly, but not only, on its unique spiritual role. Araujo notes, for instance, that «it is generally understood that the Holy See's international personality emerges from its religious, moral and spiritual authority and mission in the world as opposed to a claim over purely temporal matters. This is an incomplete understanding, however, of the grounds on which its claim as a subject of international law can be justified», since, in his view, the Holy See's claim to international personality can also be justified by the fact that it is recognized by other states as a full subject of international law [1, p. 366]. The Lateran Treaty itself seems to support this view. In article 2, Italy recognized «the sovereinty of the Holy See in the international domain as an attribute inherent in its nature, in accordance with its tradition and with the requirements of its mission in the world» [5].

For a further group, the legal personality of the Holy See in international law arises from the Lateran Treaty, which, in their view, conferred international standing to the central government of the Catholic Church. In this sense, the previously controversial international position of the Holy See was clarified as the result of the Treaty of 11 February 1929, between the Holy See and Italy – the so called Lateran Treaty. The Lateran Treaty marks the resumption of the formal membership, interrupted in 1871, of the Holy See in the society of states.

Howbeit the wide practice of international treaties stipulation of the Holy See proves the existence of its international lawmaking capacity although the latest 2009 Monetary Agreement between the European Union and the Vatican City State provokes a new stage of the theoretical discussion on the Vatican and the Holy See.

Conclusions. To sum up it's needed to say that the list of subjects mentioned above isn't a comprehensive one and there are another subjects with controversial international status. Some scientists try to attribute the international personality to multinational corporations, international religious societies etc. It seems that at the moment so considerable spreading of circle of international law subjects is an untimely one. At the same time it's important to understand that international relations aren't stable and immutable. With their development and transformation future changes of their subjects also become possible.

The practice shows absence of the international subject's criteria that's why we can't talk about an indispensible lawmaking capacity of such a person.

Speaking about international lawmaking subjects their circle is much straiter that the international law subjects' range but in this aspect we also can see the tendency to expansion. Given that fact it seems necessary to elaborate a clearer conception of the international law making process in general and its subjects in particular as long as its absence can lead to the structural functioning breakdowns in the classic international law system.

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К ВОПРОСУ О ТРУДОВОЙ ЧЕСТИ РАБОТНИКА

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Summary

The article examines the legal nature and content of the right to labor honor of the worker under the legislation of Ukraine. Analysis of the opinions of leading scientists who have been studying this issue. Studied their approaches to solving problems related to the forms and mechanisms of implementing the employee of the right to defense «labor honor». The result of this study, the author defines the notion «labor honor of the employee». Also substantiates the necessity of development of effective special (branch) of a mechanism to ensure a worker's right to protection of his labor of honor, which will create for a worker safe and favorable working conditions.

Key words: honour, moral rights, labor honor worker, aspects, ways of protection, right to labor honor, forms and methods of protection.

Аннотация

В статье исследуется юридическая природа и содержание права на трудовую честь работника по законодательству Украины. Проанализированы мнения ведущих ученых, которые занимались изучением данного вопроса. Изучены их подходы к решению проблем, связанных с формами и механизмами реализации работником права на защиту «трудовой чести». В результате данного исследования, автором определяется понятие «трудовая честь работника». Также обосновывается необходимость разработки эффективного специального (отраслевого) механизма обеспечения права работника на защиту его трудовой чести, что позволит создать для работника безопасные и более благоприятные условия труда.

Ключевые слова: честь, неимущественные права, трудовая честь работника, аспекты, способы защиты, право на трудовую честь, формы и способы защиты.

Постановка проблемы. Современный этап развития украинского государства характеризуется реформированием трудового законодательства, основой которого является концепция обеспечения прав человека в сфере труда. Как справедливо отмечает И.В. Лагутина, обеспечение благоприятной психологической обстановки на работе – это направление правового регулирования труда, в настоящее время только формируется и находит отражение в нормативно-правовых актах, актах социального диалога и локальных нормативно-правовых актах [1, с. 80]. Не последнюю роль в этом процессе занимают вопросы, направленные на защиту чести и достоинства работника.

Актуальность темы исследования. В соответствии со ст. 3 Конституции Украины человек, его жизнь и здоровье, честь и достоинство, неприкосновенность и безопасность признаются в Украине наивысшей социальной ценностью [2, с. 3]. В то же время, Проект Трудового кодекса Украины в п. 3 ст. 21 к основным трудовым правам работника относит «право на уважение его достоинства и чести и её защиту» [3]. Анализируя данную норму, Л.В. Котова отмечает, что закрепление такого права является достаточно инновационным, однако вполне оправданным подходом [4, с. 512]. Однако ни в Проекте Трудового Кодекса Украины, ни в каких-либо других действующих нормативно-правовых актах, которые регулируют вопросы труда, не содержится специальных правовых механизмов, которые способствуют защите работником его чести и достоинства. Также законодатель не определяет, что следует понимать под «трудовой честью работника».

Состояние исследования. Вопросами, касающимися определения понятия трудовой чести, права на трудовую честь, а также механизмами её защиты занимались такие ученые, как: М.И. Бару [5], С.Н. Братусь [6], Н.П. Зарубина [7], Б.И. Зеленко [8], Р.З. Лившиц [9], А.М. Лушников, М.В. Лушникова [10], М.Н. Малеина [11], Н.С. Малеин [12] , В.И. Мархотина [13], И.И. Припхан [14], М.Г. Пронина [15], А.А. Церковная [16] и многие другие.

Целью исследования является анализ юридической природы права работника на трудовую честь как одного из