Iwona Galewska

Treaty politics : sources of law and historical development

The Copernicus Journal of Political Studies nr 2 (4), 106-127

2013

Iwona Galewska
Opole University, Poland

TREATY POLITICS – SOURCES OF LAW AND HISTORICAL DEVELOPMENT

ABSTRACT

Initially, treaty politics based on the law of treaties was created exclusively of customary norms. During the process of superseding custom with international agreements, treaties and other documents that contain norms based on treaty authorisation also started to be viewed as the sources of international law. In the political and legal doctrine, the notion of a treaty was interpreted in various manners, due to, among others, the reduced objective scope of treaties. A significant input into the understanding of treaty politics was made by the Vienna Convention on the Law of Treaties of March 25, 1969, which caused that the place and meaning of custom in the international law ceased to be questioned. An element essential for the development of custom is practice, which should be long enough; however, it is difficult to pinpoint the precise length of the required period. It is possible to unambiguously state that customary law may function alongside treaty law of the same content.

Key words

treaty politics, custom, treaty, codification, customary law, treaty law

1. Introduction

Over the centuries, the international community evolved, and it was mirrored by the content and form relations between its members. States-parties strived to secure their political, economic, trade, and other interests; in this manner, the interests of the entire international community or its particular entities were realised. International treaties regulated more and more fields, thus allowing the treaties to develop beyond general regulations. Multilateral treaties established international organizations or international relations in order to "safeguard these norms and undertake ventures, which are best realised by a group of

states"[1]. Along with an increase in the importance of treaty regulations in the contemporary practice of states, questions about the beginnings of the development of the treaty politics arose.

The aim of this article is to present the results of an analysis of the historical development of treaty policies in the political and legal doctrine together with its meaning today. Works of law theoreticians specialising in the position and role of custom and treaty in the international law constitutes the research material. Moreover, the article contains also the opinions of the leading experts of international law. The author tried to present all periods from the Middle Ages to the contemporary times, however, she devoted most of her interest to the periods which were particularly focussed on custom and treaties in international law.

This study is in the field of political science, and it is enriched with an analysis of the Vienna Convention on the Law of Treaties. This allows not only to examine the development of the treaty politics, but also to isolate particular elements which had a significant impact on the development of treaty politics throughout history.

A number of questions arose at the beginning of the analysis:

1. What were the elements that affected the development of the treaty politics?
2. In what way custom affected the understanding of treaty significance in the doctrine?
3. To what extent did the codification of the treaty law clarify the position of treaties among the sources of international law?

The article is divided into four parts. The first part deals with the position of custom in the political and legal doctrine, including the changes that took place with the development of international relations and international law. The second part is devoted to treaties as the highest form of regulation of relations between states. The third presents examples of codification of the law of treaties, and the fourth describes the relations between custom, treaties, and codification.

2. The Place of Custom in Treaty Politics

Before commencing the analysis of the historical development of the treaty politics, it is necessary to define the very notion of a treaty policy. It is vital, since the development of treaty policies occurred alongside the development of

[1] L. Ehrlich, *Prawo międzynarodowe* [International Law], Warsaw 1958, p. 66.

international relations and the development of the international law, which is applied to those sides which mutually recognise each other as entities belonging to the international community[2]. Undoubtedly, this process was connected with entering into different relations between political entities, which led to the creation of laws. Józef Kukułka formulated a definition of "treaty politics" in his work *Traktaty sąsiedzkie Polski odrodzonej* [Treaties of Good Neighbourship of Poland Reborn]; he understood it as a purposefully organised process of creating and entering into agreements with the help of international relations mechanisms, and, thus, as a part of the foreign policy of a state in the field of its bilateral and multilateral relations with other states[3]. The development of international relations and international law causes that today this definition is incomplete, since, by treaty politics one should understand not only the goals of a state in relation to changes in the geopolitics of that state, but also a change of goals in relation to the creation of a new international order. Moreover, treaty politics include not only relations between states, but also between states and international organisations and between those organisations. Treaty politics differs from foreign policy in the fact that treaty politics does not collide with the interests of other states, since, by very definition, it overlaps, or, most often, it mirrors the foreign policies of other side(s) to a treaty.

In addition, crucial is the fact that one should not confuse the definition of "treaty politics" with the notion of "the law of treaties," which is related to the rules and procedures concerning the legal and international principles of entering into agreements; this definition will be of use when determining the sources of the law of treaties. Alfons Klafkowski states that the treaty law, i.e. the group of norms that concern entering into and withdrawing from international agreements, as well as the issue of their binding, used to be a customary law[4]. Therefore, in literature, it is emphasised that it is possible to perceive the relation of the treaty law to the customary law in a few dimensions:

– creation of customary norms leads to codification of laws,

[2] Józef Kukułka emphasises that the beginnings of international relations were established when the ancient tribes reached beyond their cities and states. See J. Kukułka, *Teoria stosunków międzynarodowych* [Theory of International Relations], Warsaw 2000, p. 13 et seq.

[3] J. Kukułka, *Traktaty sąsiedzkie Polski odrodzonej* [Treaties of Good Neighbourship of Poland Reborn], Cracow 1998, p. 5.

[4] A. Klafkowski, *Prawo międzynarodowe publiczne* [Public International Law], Warsaw 1981, p. 95.

- in spite of the codification of custom in the form of laws, custom can still bind the states that are not parties to the Convention (the Vienna Convention on the Law of Treaties),
- creation of customary norms can lead to changes in the treaty law,
- an international agreement can serve as evidence for the existence of a uniform practice,
- in case of collision of a treaty norm with a customary norm, the following principles are applied: *lex posterior derogat legi priori* (later norms suppress earlier norms) and *lex specialis derogat legi generali* (particular norms suppress general norms), etc[5].

"In the ancient times, the first source of legal norms were the customary norms, that is a code of conduct, which developed uncontrollably during the actual social experience"[6]. Along with the fall of the tribal society and the formation of states, customs transformed into norms of customary law. According to the evidence found in ancient Mesopotamia, the oldest agreements are dated back to the years 5200–4800 BC[7]. During the period of the development of the classical Roman law[8] the oldest known treaty was created (as an instrument of execution of the state tasks) in the form of a stone stele from the end of the 4th century BC[9]. It was a border treaty concluded between the ruler of the Lagash and

[5] J. Barcik, T. Srogosz, *Prawo międzynarodowe publiczne* [Public International Law], Warsaw 2007, p. 114; See J. Sozański, *Relacje zwyczaju i umów międzynarodowych w relacjach prawa traktatów – zarys problemu* [Relations of Custom and International Agreements in Treaty Law – An Outline], "Zeszyty Naukowe WSHiP" [Lazarski University Academic Journal] 2003, No. 7, pp. 14–20.

[6] K. Sójka-Zielińska, *Historia prawa* [History of Law], Warsaw 2011, p. 18 et seq. The author emphasies that it is important to pay attention to the sources of law creation (*fontes ius oriundi*) – i.e. factors influencing law creation and the sources of law (*fontes iuris cognoscendi*) – momuments of the past, i.e. the results of law-creating activity.

[7] See M. Stępień, *Kodeks Hammurabiego* [Hammurabi's Code], Warsaw 2000, p. 63 et seq.

[8] "Due to the fact that the Roman legislation, after establishing *Lex duodecim tabularum* in the middle of the fifth century, very rarely entered the sphere of the private law, it was the only remaining way for further legal development." See I. Koschembahr-Łyskowski, *Uwzględnienie przez sędziego zwyczajów obrotu w prawie klasycznym rzymskiem* [Taking into Consideration Turover Customs by a Judge in the Classical Roman Law], Lviv 1936, p. 3.

[9] The book *Prawo międzynarodowe publiczne* [Public International Law] by J. Barcik and T. Srogosz speaks of the period approx. 2100 BC.

the residents of the land of Umma, which regulated the obligation to respect the ditch and the border stone under the penalty of exposing oneself to the wrath of the Sumerian gods[10]. Other known treaty relics are the clay plates with fragments of Tell el Marna and Tell Mukkajar agreements from the second millennium BC. In literature, however, the most often quoted is the treaty agreement of 1292 BC between the ruler of Egypt Ramses II and the King of Hittites on establishing perpetual peace and brotherhood[11], which was the first agreement regulating relations between two sides of the contemporary entities of "international relations".

In the period of the Middle Ages an essential development took place, but it pertained only to sea customs. Alongside the birth of a new legislation ideology in the 13th century, there was a process of proceeding from customary law to national legislation. Katarzyna Sójka-Zielińska distinguishes three stages of this process:

- the creation of private lists of customary law in the form of scripts that gathered the customs of a certain territory (*consuetudines in scripts redactae*);
- the need for validation of customary law;
- the phase of intensive royal legislation, the aim of which was not limited to approval of the existing legal status, but which also included establishing new legal norms[12].

In the feudal period of the Middle Ages, as a result of the fight of the Slavic states for independence, these states concluded numerous treaties of alliance and peace, which led to the development of a treaty law based on feudal law[13]. The appearance of the doctrine of natural law and an increased interest in custom, led to an attempt to place custom in the framework of international law, and to notic-

[10] See J. Sozański, *Prawo traktatów: zarys współczesny* [Treaty Law: Contemporary Outline], Warsaw–Poznań 2008, p. 19; A. Nussbaum, *Law of Nations*, op.cit., pp. 1–2.

[11] J. Sozański, op.cit., p. 20; M. Frankowska, *Prawo traktatów* [Treaty Law], Warsaw 1997, p. 13; R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne* [Public International Law], Warsaw 2007, p. 33. In literature also the year 1284 BC is given, see J. Barcik, T. Srogosz, op.cit., p. 17.

[12] K. Sójka-Zielińska, op.cit., p. 36.

[13] "International treaties from that period formulate (in accordance to the regulations in oath of fealty templates) a duty to obey them, the binding force of a treaty was often confirmed by pledges or oaths similar to oaths of fealty." *Zarys prawa międzynarodowego publicznego. Tom I* [Outline of Public International Law. Volume I], M. Muszkat (ed.), Warsaw 1955, pp. 55–57.

ing the role of treaties[14]. The author of doctrine of the natural law, Hugo Grotius (1583–1645), whose contemporaries often called him the father of international law, in his work *De jure belli ac pacis libri tres* [*On the Law of War and Peace*] put forward his theses concerning the natural law and the laws of nations, which later became the foundation of the public international law[15]. Simultaneously, he created a classification of legal norms[16], dividing them into natural norms (*ius naturae*) and positive norms (*ius voluntarium*)[17]. To the natural norms he included primary natural norms (*primarium*) and secondary natural norms (secundarium), similar in scope to the law referred to as *ius gentium*. Subsequently, *ius gentium* was divided in natural laws of nations (*ius gentium naturae*) and positive law of nations (*ius gentium voluntarium*) that encompassed both the customary law (*mores*, *usus*) and contract law (*contractus*)[18].

After the introduction of the concept of natural law, there was a schism in the approach to custom in the international law, as a result of which two different schools emerged: naturalist and positivist. Samuel Pufendorf (1632–1694), a representative of the school of natural law claimed that natural law is a moralistic system, and thus incorrectly understood the direction of the development of the contemporary international law, negating the rightness of norms pertaining to customs[19]. Simultaneously, he refused to acknowledge treaties as bearing any importance for the discussion on the foundations of the international law; he even stated that in order to maintain the legal force of treaties concluded by states, it is not possible to call them laws and acts. Therefore, S. Pufendorf regarded treaties as regular contracts ignoring customary law. Representatives of the positivist school (who recognised the possibility of the existence of treaty law – parallel to

[14] Baltazar de Ayala (1548–1584) in his work *De iure et officiis bellicis et disciplina military* [*On the Law of War and Military Discipline*] of 1582, which consisted of three parts, described treaties in relation to laws of armed conflict.

[15] H. Grotius, *De jure belli ac pacis libri tres* [On the Law of War and Peace], Someren 1701.

[16] The source and criterion of classification were either the opinion or the will of the lawgiver.

[17] Positive law encompassed human law (*humanum*) and God's law (*divinum*). Human law is predominantly made of civil law (*ius civile*) and the narrower field of *ius rectorium*.

[18] R. Wojtyszyn, *Szkoła prawa natury – od Hugona Grocjusza do Johna Locke'a* [The School of Natural Law – from Hugo Grotius to John Locke], Biblioteka Cyfrowa Uniwersytetu Wrocławskiego, http://www.bibliotekacyfrowa.pl [Access date: 1.03.2012].

[19] Other representatives are Christina Wolff (1676–1756) and Jean Bareyrac (1674––1744).

natural and customary laws of nations), including Richard Zouche[20] (1590–1660) regarded international custom as the source of laws of nations[21], which in international relations allowed the possibility of constituted law based on treaties[22]. Furthemore, Georg Friedrich von Martens (1756–1821) became famous as the publisher of the most famous collection of treaties entitled *Recueil des traites* published in 1761[23]. "Positivists regarded provisions of law as the sign of the resolve of a state, and in consequence, international agreements and custom as sources of the international law"[24]. In turn, Cornelius van Bynkershoek (1673–1743), a representative of the positivist school, placed great significance on customs and treaties as the foundations of the international order[25].

A representative of the 17th century eternal positivist thought – Thomas Hobbes (1588–1679) – stated that custom becomes law only when the sovereign accepts it; such a custom shall be in force from the moment of its announcement and its contents should be clear and understandable[26]. In this period more and more collections of treaties appear, for example, The Code of the Law of

[20] His book *Iuris et iudicii fecialis sive iris inter gentes et quaestionum de eodem explication* (1650) was entirely devoted to international law.

[21] Such an opinion was shared by the remaining representatives of the positivist school, e.g. Samuel Rachel (1628–1691), John Jacob Moser (1701–1785). See J. Gilas, *Prawo międzynarodowe publiczne* [Public International Law], Toruń 1977, p. 64.

[22] See L. Ehrlich, op.cit., p. 54.

[23] His work was continued by the international law experts in Göttingen. The first three volumes appeared in 1791 and included the period from 1761 up to the publication date. In 1801 subsequent five volumes were published. The total number of volumes amounted to one hundred twenty six published in five series. See Habenicht, *Georg Friedrich von Martens*, pp. 62–66; M. Koskenniemi, *Into Positivism: Georg Friedrich von Martens (1756–1821) and Modern International Law*, University of Helsinki, http://www.helsinki.fi/eci/Publications/Koskenniemi/Constellations_2008.pdf [Access date: 26.05.2013]. This collection includes both treaties and mediatory adjudications.

[24] R. Bierzanek, J. Symonides, op.cit., p. 49.

[25] M. Lachs, *Rzecz o nauce prawa międzynarodowego* [On the Discipline of International Law], Wrocław 1986, p. 70. See *De foro legatorum* (1721); *De dominio maris* (1702); *Quaestionum iuris publici libri duo* (1737); *De rebus bellicis* (Leiden 1737); *De dominio maris dissertation* (Washington 1923).

[26] T. Hobbes, *Lewiatan, czyli materia, forma i władza państwa kościelnego i świeckiego* [*Leviathan or The Matter, Forme and Power of a Common Wealth Ecclesiasticall and Civil*, 1651], Warsaw 1954, p. 110; P. Wewiór, *Nauka polityczna Thomasa Hobbesa jako technologia władzy* [Political Science of Thomas Hobbes as the Technology of Power], "Studia z Historii Filozofii" [History and Philosophy Studies] 2010, No. 1, pp. 161–179.

the Peoples (*Codex Juris Gentium Diplomaticus*), written by Leibniz[27], or the ones compiled by Leonardo[28], Dumont, Mably, Dietrich Heinrich Ludwig von Omptedy (1765–1815), Georg Friedrich von Martens (1756–1822)[29], and others[30].

In the 17th century there was a view that a treaty is the most important, the highest and the most general form of "contractual recapitulation of particular actions, deliberations and discussions of political and diplomatic entities of international relations"[31]. Alongside the appearance of the German historical school in scholarship, there arose a well-known dispute between the representatives of the German historical school (Friedrich Carl von Savigny and Georg Friedrich Puchta) and the representatives of the romantic school (Rudolf von Ihering); the main reason for the discord was the social significance of customary law. The emergence of the historical school and the program of Savigny (1779–1861) were related to the social, economic, and political situation of Germany at the beginning of the 19th century, which, in comparison to revolutionary France, was regarded as backward[32]. Savigny stated that "the development of law is a spontaneous process, unconscious in a way, organically linked with other processes that occur in the society; legislation itself is subordinate to customary law"[33]. In advanced countries, according to Savigny, alongside the customary law, there exists the "legal law".

---

[27] *Codex iuris pentium diplomaticus*, 1693.

[28] A collection of French treaties since 1435.

[29] *Supplément au Recueil des Principaux Traités* contains the history of the treaty collection up to the end of the eighteenth century. In 1802 it noticed that Poland in spite of the partition, had more treaties than the partitioners altogether.

[30] *Zarys prawa międzynarodowego…*, op.cit.

[31] J. Kukułka, *Traktaty sąsiedzkie Polski…*, op.cit., p. 9.

[32] C. Savigny, *O powołaniu naszych czasów do ustawodawstwa i nauki prawa* [*Of the Vocation of Our Age for Legislation and Jurisprudence*, 1814], Warsaw 1964, p. 23. "The 18th century Germany is dominated, on the one hand, by the formalistic and detached from reality natural law, showing in the school of Christian Wolff (1679–1754) and Daniel Nettelbladt (1719–1791) a clear decline compared to the times of Samuel von Puffendorff (1632–1694); on the other hand, the antiquarian-erudite school, both of which were lacking any connection to legal practice".

[33] M. Maneli, *Historia doktryn polityczno-prawnych XIX w. Część II* [The History of Political and Legal Doctrines, Part II], Warsaw 1966, p. 13. According to Savigny, law was initially part of the general national awareness, "and later it became more complicated, allowing to single out two elements: firstly, (…) related to the life of the entire nation, and, secondly, those in the awareness of jurists as a separate state, taking the role of the representative of a state in its 'legal function'". See C. von Savigny, op.cit., p. 30.

Georg Fryderyk Puchta (1798–1846), another representative of the German historical school, was the one who devoted the most thought to customary law. A pupil of Savigny, he undertook an attempt to codify the entire doctrine of the historical school; in doing so he developed short and not very accurate opinions on Savigny. In his works *Customary Law* (1828) and the *Course of the Institutions* (1841) Puchta stated that a nation is the source of customary law[34]. By customary law he understood "law that emerged directly from the awareness of a nation, manifesting itself in universal principles of behaviour"[35]. He thought that "custom does not create law; on the contrary, law creates custom, in particular, a conviction that a given norm is law leads to its universal practicing"[36]. In his approach he differed from Savigny in that he maintained that "statutory law always reflects custom, as it can also reflect opinions of lawyers"[37]. Historical school "strenghtened the authority of customary law, while simultaneously elevating it to the mystical pedestal of the spirit of a nation"[38].

However, the views of Rudolf von Ihering (1818–1892) are defined as legal formalism and his *The Struggle for Law* was a reply to the views of the historical school, as well as a criticism of the theory of the origin of law presented by Savigny and Puchta[39]. According to Ihering, law evolved in the course of rapid development – a continuous struggle; the struggle for law is a never-ending struggle for justice, "a similar struggle accompanied the creation of customary law in previous periods"[40]. Moreover, he also criticised Puchta for misunderstanding the significance of custom in the theory of customary law[41].

---

[34] J. Justyński, *Historia doktryn polityczno-prawnych* [History of Political and Legal Doctrines], Toruń 2004, p. 295.

[35] S. Sylwestrzak, *Historia doktryn politycznych i prawnych* [History of Political and Legal Doctrines], Warsaw 2011, p. 229.

[36] F. Studnicki, *Różnice między zwyczajem a prawem zwyczajowym* [Differences Between Custom and Customary Law] [in:] *Elementy socjologii prawa. Tom 5: prawo zwyczajowe* [Elements of Law Sociology. Volume 5: Customary Law], A. Kojdera, E. Łojko, W. Staśkiewicz, A. Turska (eds.), Warsaw 1993, p. 80.

[37] L. Dubel, *Historia doktryn politycznych i prawnych do schyłku XX wieku* [History of Political and Legal Doctrines up to the End of the 20th Century], Warsaw 2005, p. 321.

[38] M. Manieli, op.cit., pp. 80–81.

[39] R. von Ihering, *Walka o prawo* [*The Struggle for Law*], Petersburg 1894.

[40] K. Chojnicka, H. Olszewski, *Historia doktryn politycznych i prawnych* [History of Political and Legal Doctrines], Poznań 2004, pp. 236–237.

[41] "Custom to Puchta is nothing but a mere mode of discovering the conviction as to what is legally right: but that this very conviction is first formed through the agency of its own action, that through this action it first demonstrates its power and its calling to

In the 18th century, Emer de Vattel in his work emphasised that contractual law of nations is not universal, but only particular, since treaties bind only those sides which concluded it, and therefore, a new type of law of nations, called the law of treaties or contractual law, emerged in order to create the general rules that the nations should follow in relation to the treaties concluded by them[42]. However, Stefan Odrowąż-Wysocki "criticised identifying the notion of international public law with the law of nations; he argued that there is virtually no place for such regulations in the domain of the international law and that they cannot be subordinated to the notion of 'the law of nations' in the meaning of *droit de gens* and *Völkerrecht*; there should be a separate sub-division of the international public law, separating it into the law of nations and the international administrative law"[43].

The period of shaping custom in international relations up to the second-half of the 19th century seems like a rather slow process. It is possible to find the causes for such a state in the difficulties in international relations. Bilateral relations between states have often been secret, and one should add that communication in that period was very slow. However, as Ludwik Ehrlich emphasises, the positivist period in the law of nations encompasses the period from the Congress of Vienna (1815) up to the end of World War I (1918) – it is a period of the development of the international law mainly through treaty regulations and it is the so-called "adaptation period" of the provisions of the previous periods to the conditions created by the development of the treaty policies[44].

3. The Growth in Importance of Treaties as Sources of the International Law

At the turn of the 19th and 20th century, in literature on the subject, there appeared a view that it is possible to rank treaties among the sources of international law only in case of the so-called law making treaties, which supersede the existing

govern life; in short that the principle: the law is an idea which involves force – to this the eyes of this great mind were entirely closed." See R. von Ihering, op.cit., pp. 17–18.

[42] E. de Vattel, *Prawo narodów czyli zasady prawa naturalnego zastosowanie do postępowania i spraw narodów i monarchów* [*The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, 1758], Warsaw 1958, pp. 65–66.

[43] S. Odroważ-Wysocki, *Międzynarodowe stosunki prawne Polski* [International Polish Legal Relationsś, Cracow–Warsaw 1939, p. 5.

[44] L. Ehrlich, op.cit., s. 27.

international custom[45]. "At first, only treaties were regarded as sources of the international law, but then also, custom in a kind of silent or implied agreement, started to be accepted, with a strong accent on the *opinio iuris* as the legally binding element of custom"[46]. The process of creating new customary norms on the execution of tasks of the state in international relations, including, among others, human rights and protection of the natural environment, gained momentum as late as at the turn of the 20th and 21st century. Cezary Berezowski explains that "the development of the sources of international law shows that agreements are superseding custom"[47]. Juliusz Wisłocki emphasised that in the practice of applying customary law in the period of the People's Republic of Poland, the evaluation of the usefulness of customary law depends on the political system of a given state[48]. Wiktor Leśniewski, on the other hand, put forward his own theory of customary law, which he understood as a law not established by an act (or by a state) that is kept in reality, or one which is manifested in a permanent and uniform adherence to a certain way of conduct[49]. Jules Basdevant (1877–1968) also proposes an interesting definition of customary law, which he understands as something changeable and adapting to the needs of the "international life"[50].

During the age of great codifications, a process of incorporating the norms of the customary law into the international agreements was initiated. L. Ehrlich maintained that "since we divide the norms of the international law into constituted norms (originating from treaties and regulations) and common legal norms (established by custom or deduced by court and scholars from the fundamental principles of the law of nations) in the formal meaning, among the sources of international law there are:

---

[45] J. Makowski, *Prawo międzynarodowe* [International Law], Warsaw 1918, p. 43.

[46] M.N. Shaw, *Prawo międzynarodowe* [*International Law*, Cambridge 2008], Warszawa 2011, p. 48.

[47] C. Berezowski, *W sprawie istoty umowy międzynarodowej* [The Essence of International Agreements], Cracow 1935, pp. 241–242.

[48] J. Wisłocki, *Problematyka badań nad współczesnym prawem zwyczajowym polskich środowisk wiejskich i ze wsi pochodnych* [Research Issues of the Contemporary Customary Law of The Polish Rural Circles and People Coming from the Country], "Lud" [People] 1967, No. 2, pp. 393–395.

[49] L. Petrażycki, *Teoria prawa i państwa w związku z teorią moralności* [Theory of Law and State in Regard to Morality Theory] [in:] W. Leśniewski (ed.), Warsaw 1960, pp. 353–361.

[50] RCADI 1936, p. 641 et seq.

– treaties and sets of norms based on treaties;
– documents allowing to confirm the existence of common legal norms"[51].

Krzysztof Skubiszewski went further in his deliberations; among the sources of international law he counted custom, treaties, and resolutions of organisations; regarding codification treaties he stated that their importance lies not in the fact that they are a source of the law, but in the fact that they serve as evidence of the existence of customary law[52]. Such a position was presented as early as in the 18th century, when Jacob Moser (1701–1785) stated that treaties and other diplomatic documents were the source of international law[53]. This period witnessed many questions on the approach to treaties as sources of law and regulating the principles of treaty drafting.

The term "treaty", which was defined in very diverse ways until the Vienna Convention, nevertheless was used only in the context of international relations. "In the early Middle Ages, international treaties most often were a result of warfare; rarely their purpose was to prevent conflicts. Only as a result of a universal condemnation of military actions as methods of settling disputes, a system of alliances was established with the aim of protecting its participants from wars"[54]. Medieval treaties were concluded between seniors and vassals and they differed from the latter treaties in that they were concluded by unequal sides[55].

The initial problem with the definition of treaties resulted from a limited objective scope of treaties. Treaties either dealt with peace or alliance. A peace treaty was most often a ground for concluding an alliance treaty. "Concluding an alliance treaty was usually preceded by negotiations, and its purpose was a cooperation against a common enemy (of course, most of these documents do

[51] L. Ehrlich, op.cit., p. 21.

[52] K. Skubiszewski, *Prawo PRL a traktaty* [Law of the People's Republic of Poland and Treaties], "Ruch Prawniczy, Ekonomiczny i Socjologiczny" [Legal, Economic, and Sociological Movement] 1972, No. 3, pp. 1–2.

[53] J.J. Moser, *Versuch des neuesten Europäischen Völker-Rechts in Friedens- und Kriegszeiten, vornehmlich aus denen Staatshandlungen der europäischen Mächte, auch anderen Begebenheiten, so sich seit dem Tode Kaiser Karls VI im Jahr 1740 zugetragen haben, 12 Theile, erschienen in 10 Bänden, teils Stuttgart, teils Frankfurt a. M. 1777–1780, Grundsätze des jetzt üblichen Europäischen Völkerrechts in Friedenszeiten*, Hanau 1750, *Grundsätze des jetzt üblichen Europäischen Völkerrechts in Kriegszeiten*, Tübingen 1752.

[54] S. Szczur, *Traktaty międzypaństwowe Polski piastowskiej* [International Treaties of the Piast Poland], Cracow 1990, p. 9.

[55] See K. Koranyi, *Ze studiów nad międzynarodowymi traktatami w średniowieczu* [Studies on International Treaties in the Middle Ages], Lviv 1936, pp. 11–48.

not state whom the alliance was directed against). As a rule, political alliances were guaranteed by dynastic marriages, preceded by an appropriate marital arrangement, which constituted a guarantee of permanence of the alliance; these arrangements were also accompanied with trade treaties concluded when the opportunity arose"[56]. Oswald Balzer claimed that treaty documents regulated only the external relations, without influencing internal affairs of a country; he also emphasized that the contents of a treaty could not decide whether a given document is considered a treaty or not[57].

Treaties concluded over the next centuries were usually peace treaties that ended great wars, such as the Augsburg Settlement, or the Peace of Westphalia. In the period of the Second Polish Republic, on March 18, 1921 a peace treaty was signed that finished a two-year long war between Poland and the alliance of Russia and Ukraine; the treaty announced establishing diplomatic relations and delimited borders[58]. "In the period of absolutism, there was born a custom that treaties were ratified by the ruler"[59]. However, in the period of the peak development of colonialism, European powers divided the world into areas of influence, as a result of which unequal treaties were concluded (e.g. the British-Chinese Treaty of Nanking from 1842). The interwar period, however, "was characterised by a revisionist approach of the states defeated in World War I (mainly Germany), who wanted to challenge the system created by the Treaty of Versailles (including the treaties concluded in Saint-Germain, Trianon, and Neuilly, etc.)"[60]. Not only peace treaties are concluded; there was also a treaty for Renunciation of War, known as the Kellogg–Briand Pact, signed on August 27, 1928, initially by fifteen states and later also by the USSR[61]. The pact was an example of how a customary

[56] See a division of the Medieval treaties; W. Heinemeyer, *Studien zur diplomatik mittelalterlicher Verträge vornemlich des 13. Jahrunderts*, "Archiv für Urkundenforschung" 1935, p. 323 et seq.; O. Stolz, *Die Staatsvertrage der österreichischen Ladesbursten im. 13. und 14. Jahrhundert*, "MIOG" 1950, Vol. 58, pp. 579–588.

[57] See O. Balzer, *Corpus iuris polonici medii aevi*, KH 1891, No. 5, p. 61.

[58] For the text of the treaty see J. Dąbski, Pokój ryski [Peace of Riga], Warsaw 1931; J. Kumaniecki, *Pokój polsko-radziecki 1921. Geneza, Rokowania. Traktat. Komisje mieszane* [Polish-Russian Peace of 1921. Origin, Negotiations, Treaty. Mixed Committees], Warsaw 1985.

[59] J. Sozański, op.cit., p. 20.

[60] J. Barcik, T. Srogosz, op.cit., p. 25.

[61] Zob. L. Gelberg, *Pakt Paryski z 27 sierpnia 1928 r.* [Pact of Paris of August 27, 1928], "Zeszyty Naukowe SGSZ" [SGSZ Academic Journal] 1955, No. 1, pp. 81–96.

norm on resorting to war, modified in the Covenant of the League of Nations of 1919, was overruled by a treaty norm.

Since the 19th century, there was a problem of the revision of treaties in relation to the "fundamental change in circumstances". Problems appearing during ratification or revision caused that customary norms, which constituted the basis for state regulations in international relations, became insufficient. Due to political and legal reasons, a need for the codification of the customary law and the law of treaties was noticed. "An international treaty, although known for ages as a type of a legal document, seemed to be an instrument fit only for temporary solutions of specific situations, rather than for constituting norms regulating general issues"[62].

4. Codification of the Customary Law

In the 14th century, apart from a desire for an in-depth knowledge of law, an intention to achieve a confidence of law also appeared, leading to attempts to write down the customary law. However, these had only a regional character and were often a response to the needs of individual states, which, as Marian Muszkat emphasises, limited their significance, and did not allow them to be of any consequence in relations between states[63]. In France, private lists of customary law started to appear, however, they did not have a legally binding character, but provided only some orientation.

The 16th century brought important changes to the perception of customary law. In France, customary law was unified in the districts of Paris, Orlean, Normandy, Politou, and others. Moreover, contemporary lawyers shared a thought of publishing a compilation of laws based on local customs; these included Charles Dumoulin (1500–1566), François Hotman (1524–1590), Guido Couquille (1523––1603), Jean Domat (1625–1696), and Robert Pothier (1699–1772). In the second half of the 19th century private codes with norms from the field of the law of treaties appeared. They were created by Johann Caspar Bluntschli[64], David Dudley Field, and Pasquale Flore. In the same period, numerous regional codifications

[62] S.E. Nahlik, *Wkład ONZ w kodyfikację i postępowy rozwój prawa międzynarodowego* [The Input of the UN into Codification and Progressive Development of International Law], "Sprawy Międzynarodowe" [International Issues] 1970, No. 8, p. 105.

[63] *Zarys prawa międzynarodowego publicznego…*, op.cit., p. 28.

[64] *Deutsches Privatrecht* (1853–1854); *Deutsche Slaatslehre für Gebildete* (1874); *Deutsche Staatslehre und die heutige Staatenwelt* (1880) and others.

appeared[65]. In the second half of the 19th century, numerous private codifications and collections of different treaties appeared. Muszkat emphasised that the international law lacks one codex which would contain all regulations, since a number of regulations have a customary character, new customs emerge and supersede old ones, and states cease to follow some customs[66]. The first codification on an international scale took place in 1826 during the Pan-American Congress in Panama[67]. A very important attempt of codification of the law of treaties (however of regional significance) was made during the conference of American states in Havana in 1928, when in the field of international law the approach towards the place and the role of the custom was still under discussion[68]. Thus, the treaty law underwent codification on a regional level, that is in the Havana Convention on Treaties of February 20, 1928[69]. This convention, however, bound only the American republics.

A subsequent attempt of codification was the treaty draft created by The Harward Research Team including 36 articles and extensive scientific comments. This was followed by an attempt made in the League of Nations, following the Resolution of September 22, 1924, from the initiative of Sweden, which provided for creating a permanent body called the Committee of Experts for the Progressive Codification of International Law[70]. Thus, it was the first attempt to codify and develop not only the law of treaties, but also the entire field of international law. In the League of Nations a committee of experts for the gradual codification of international law was established, and in 1930 a conference was held in the Hague, which ended in failure[71].

---

[65] J. Pieńkos, *Prawo międzynarodowe publiczne* [Public International Law], Cracow 2001, p. 89 et seq.

[66] *Zarys prawa międzynarodowego…*, pp. 27–28.

[67] It was initiated by an activist of the Simon Bolivar freedom movement.

[68] As a result of the conference, the codex of private and criminal international law, written by a Cuban lawyer Rafael de Bustamante, was adopted.

[69] *International Legislation, Vol. 4*, pp. 2378–2385.

[70] Official website of the International Law Commission, http://www.untreaty.un.org [Access date: 10.12.2012].

[71] In the result of the conference four draft agreements were prepared, i.e. one convention and three "protocols," which in time entered into force in relations between some states; the works of the commission on the topic of territorial waters did not lead to drafting a definite project of a convention, because of the disagreement regarding the width of the territorial sea, that is belt of coastal waters (and the contiguous zone); the third commission did not even manage to finish their discussion. L. Ehrlich, *Prawo międzynarodowe* [International Law], Warsaw 1958, p. 78.

5. Development of Treaty Politics as an Instrument to Regulate International Relations

In literature on the subject there is an opinion that customary law, as the earliest source of international law, was succeeded by new forms of international law creation, including treaty law[72]. It is possible to indentify the year 1949 as the beginning of codification of the law of treaties[73]; during that year the works on "promoting the progressive development of the international law and its codification"[74] were started. Following the UN Resolution of December 5, 1966[75], the Vienna Conference was held, which resulted in the creation of the Vienna Convention on the Law of Treaties[76]. Stanisław Edward Nahlik treated the entire convention as equal to the Hague codification of the law of war from 1907, and the Geneva maritime laws from 1958. However, French delegate Chris J. de Bresson during the 969th sitting of the 6th Committee of the 22nd Assembly, called this attempt of codification a "supertreaty"[77]. The Convention on the Law of Treaties of March 25, 1969, entered into force in 1980. Next, the law of

[72] See A. Cassese, *International Law*, Oxford 2005; A. Łazowski, A. Zawidzka-Łojek, *Prawo międzynarodowe publiczne* [Public International Law], Warszawa 2011.

[73] Resolution of November 21, 1947, No. 174 II.

[74] See S. Nahlik, *W przededniu kodyfikacji "prawa traktatów"* [In the Eve of Codification of the Treaty Law], "Sprawy Międzynarodowe" [International Issues] 1968, No. 4, p. 39. Art. 13 (1a) of the Charter of the United Nations (Polish J/L 1947, No. 23, item 90). Initially, "codification" was understood as including the norms, which previously functioned as customary norms, into conventions; "progressive development", however was understood as creating new norms. In practice of the Commission, these two functions are interconnected and it is difficult to differentiate between them.

[75] Resolution No. 2166 (XXI).

[76] Resolution of the General Assembly of the United Nations no. 174 (II) "Establishment of an International Law Commission", New York, November 21, 1947 [UNGAR, 1947, pp. 105–110; SCDI], Art. 1 [in:] P. Łaski, I. Gawłowicz, E. Cała, *Wybór dokumentów do nauki prawa międzynarodowego publicznego, część II* [Chosen Documents of Public International Law, Part II], Szczecin 2001, p. 259 et seq. The Commission stated that a differentiation between "progressive development" and "codification" is not effective and should be eliminated during the first revision of the Statute; this opinion, however, has not resulted in any amendments. See Z. Galicki, *Organizacja Narodów Zjednoczonych i rozwój prawa międzynarodowego* [The United Nations and Development of International Law] [in:] *Organizacja Narodów Zjednoczonych* [The United Nations], J. Symonides (ed.), Warsaw 2006, pp. 368–370.

[77] S. Nahlik, *W przededniu kodyfikacji "prawa traktatów"* [In the Eve of Codification of the Treaty Law], "Sprawy Międzynarodowe" [International Issues] 1968, No. 4, p. 56.

treaties was subjected to the following codification: the Vienna Convention on Succession of States in respect of Treaties of August 22, 1978 and the Vienna Convention on Succession of States in respect of State Property, Archives and Debts of April 7, 1983. The appearance of the Vienna Convention exerted a great impact on the development of international law, as well as on the increase of interest in the law of treaties that made it one of the most popular research fields in the contemporary discipline of international law[78].

After ratifying the Vienna Convention on the Law of Treaties, the place of custom in the international law and its significance were no longer questioned. Current research focus more on the pragmatic approach, i.e. on the process of creation of customary norms. According to Gordon R. Woodman, it is possible to divide the research on customary law into four groups:

- studying customary law of ethnic groups in countries that are made exclusively of such groups (e.g. Indonesia, Sub-Saharan Africa countries);
- studying customary law of ethnic groups in countries, in which the majority of the population does not belong to such groups, e.g. researching the law of the Native Americans, the Aboriginal Australians, the Maoris in New Zealand, the Laotians in the USA;
- studying customary law of non-ethnic social groups (e.g. political, employee, criminal, sports);
- studying religious law, which admittedly is not counted among customary law, but it is nevertheless an important component of legal pluralism[79].

Pitt Cobbet emphasises that there is a dispute in the doctrine that concerns not only the place of customary law in legislation, but also the mechanisms of customary norm formation. Paul Cross describes it very vividly, comparing the process of custom creation to the creation of a path. It is hard to unambiguously indicate the precise moment when a path comes into existence and distinguish it from the moment of recognising said trail as a path[80]. Georges Renard compares the process of custom creation to a rolling snowball, which grows with

[78] Such an opinion is held by Maria Frankowska; See M. Frankowska, *Konwencja wiedeńska o prawie traktatów z perspektywy 40-lecia* [The Vienna Convention on the Law of Treaties from the Perspective of the 40th Anniversary] [in:] Z. Galicki, T. Kamiński, K. Myszona-Kostrzewa (eds.), *40 lat minęło – praktyka i perspektywy Konwencji Wiedeńskiej o prawie traktatów* [40 Years Have Passed – Practice and Perspectives of the Vienna Convention on the Law of Treaties], Warsaw 2009, p. 34.

[79] G. Woodman, *Customary Law, Modern Courts, and the Notion of Institutionalization of Norm in Ghana and Nigeria*, Bellagio 1981, p. 58.

[80] P. Cobbet, *Leading Cases on International Law*, London 1922, p. 5.

time[81]. Paul Fauchille, however, states that international custom is formed in the same manner as every other custom, that is through repeating a given action in similar circumstances[82]. Myres S. McDougal presented idiosyncrasies of the international community by creating customary norms in the field of customary maritime law[83].

According to Wojciech Góralczyk and Stefan Sawicki, a custom is an unanimous mode of proceedings of states that creates a law[84]. Customary international law includes unanimity of practice (cohesive, permanent, uniform) as the objective factor, continuity or repetitiveness over a longer time, belief that such practice is in conformity or required by the international law (*opinio iuris sive necessitatis*) as the subjective factor, and universal approval of such practice (*acquiescence*)[85]. Franciszek Studnicki singles out two crucial elements of customary law that conditioned the historical development of customary law: the factual obedience to customary norms (external element), and the belief about the rightness of observing such norms (internal element)[86].

6. Summary

In the contemporary doctrine in spite of the transparency of the relations between custom, treaties, and codification, it still hold true that "elements of customary law, practice and legal opinions require additional clarifications in international relations"[87]. It is often emphasised that state practice, which leads to the creation of customary norms, should be long enough, however, it is difficult to define the specific amour of time required for customary norm creation. Nowadays, due to the much closer cooperation of states, better communication and contact,

[81] G. Renard, *La valeur de la loi* [in:] *Introdution á la théorie générale et á la philosophie du droit*, S. du Pasquier (ed.), Neuchatel 1948, p. 49.

[82] P. Fauchille, *Traité de droit international public*, Paris 1922, p. 42.

[83] M. McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, Yale 1955, pp. 356–361.

[84] W. Góralczyk, S. Sawicki, *Prawo międzynarodowe publiczne w zarysie* [Outline of Public International Law], Warsaw 2011, p. 97.

[85] M.O. Hudson, *Special Rapporteur ILC UN: Working Paper*, "Yearbook of the International Law Commission" 1950, Vol. II. Document A/CN.4/16, p. 26.

[86] F. Studnicki, *Działania zwyczaju handlu w zakresie zobowiązań z umowy* [Trade Custom and Contractual Obligations], Cracow 1949, pp. 5–8.

[87] B. Wierzbicki, *Prawo międzynarodowe. Materiały do studiów* [International Law. Study Materials], Białystok 2004, p. 60.

and what follows – due to much more intense international relations, customary norms can come into existence much more quickly than in the previous ages[88]. Art. 38 sec. 1. point b of the Statute of the International Court of Justice states that international custom, as evidence of a general practice accepted as law, shall be applied by the Court.

"Today, in the times of the so-called historical acceleration, in particular in regard to frequent treaties between representatives of states, especially on the forum of international organizations[89], a norm of customary law can develop "in a relatively short period"[90]. "In the doctrine, apart from the view that the customary law was a scarcely used method of the development of international law in the rapidly changing world, as 'too ponderous and slow' to become a vehicle of international transformations, there is no shortage of opinions showing the advantages of customary law… [that includes] swift responding to the contemporary development and fulfilling the requirements of international community"[91].

"Customary law may function alongside treaty law with the same content, but nothing, apart from practice and collision rules, points to a disadvantage on the part of custom. What is more, custom may reinforce treaty norms and update the legal status, when treaties do match reality"[92]. The International Law Asssociation report[93] described a general conjecture that treaties codify or reflect

[88] W. Góralczyk, S. Sawicki, op.cit., p. 99. In the North Sea continental shelf cases, the ICJ ruled that "As regards the time element, although the passage of only a short period of time was not necessarily a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, it was indispensable that State practice during that period, including that of States whose interests were specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked and should have occurred in such a way as to show a general recognition that a rule of law was involved."

[89] In the period after World War II, it is possible to notice a rapid development of customary law on the continental shelf and the outer space, which, subsequently, was put in the framework of more precise international agreements.

[90] B. Wierzbicki, op.cit., p. 60.

[91] M. Perkowski, *Podmiotowość prawa międzynarodowego współczesnego uniwersalizmu w złożonym modelu klasyfikacyjnym* [International Law Subjectivity of the Contemporary Universalism in the Complex Classification Model], Białystok 2008, p. 119.

[92] Ibidem, p. 129.

[93] Prof. Karol Wolfke was the representative of Poland in the works of the ILA. In his work *Custom in Present International Law* he pointed to the diverisity and multitude of

the existing international custom[94]. It was emphasised in the commentary that treaties rarely codify uncontroversial international customs, however, they are tasked with enriching customary norms in the form of "progressive development of international law"[95]. The International Court of Justice in the ruling on the continental shelf of the North Sea between the Federal Republic of Germany and the Netherlands and between the Federal Republic of Germany and Denmark[96] stated that, among others, a harmonious execution of an agreement does not confirm the existence of a custom[97].

One may have an impression that the current international law is partly limited in mechanisms of creating new norms – either through international custom or a more direct and formal method of creating international law – through treaties. "States conclude a lot of transactions, using treaty instruments on the account of simplicity of procedures of international law in comparison to many ways, which allow to create laws and obligations within the internal legal framework of a given state. Treaties are used to settle such matters as ending as war, settling disputes, purchasing territories, determining special interests, entering into an alliances, and forming international organizations. No simpler methods of reflecting of agreed state goals exist. The form of an international convention must be sufficient for both simple bilateral agreements and complicated, multilateral declarations. Thus, the very concept of treaties and the manner of their functioning become an issue of primary importance for the development of international law"[98].

Different authors, irrespective of the theories they subscribe to, think that placing a custom among the customary law depends on the contents of the

notions that create custom, i.e. practice, precedent, international custom or international customary law. K. Wolfke, *Custom in Present International Law*, Wrocław 1964, pp. 11–19.

[94] International Law Association London Conference (2000) Committee On Formation Of Customary (General) International Law, p. 17.

[95] International Law Association London Conference (2000) Committee On Formation Of Customary (General) International Law, Art. 20 (b), p. 44.

[96] ICJ Reports 1969.

[97] J. Sozański, *Porozumienia międzynarodowe wspólnot i Unii Europejskiej w świetle norm acquis commununitaire oraz konstytucji dla Europy, z uwzględnieniem orzecznictwa Trybunału Sprawiedliwości* [International Agreements of the European Communities and the European Union in the Light of the Regulations of the Acquis Commununitaire and The Constitution for Europe, Including Court of Justice Judicature], Toruń 2007, p. 78.

[98] M. Shaw, op.cit., s. 521.

custom. At present, there are many legal associations[99] that deal with different manifestations of customary law. Commission on Legal Pluralism[100] (Commission on Law Folk and Legal Pluralism until 1978) with its registered office in the Netherlands, deals furthering knowledge and understanding of legal pluralism, including customary law, with particular attention to theoretical and practical problems resulting from the interaction of different legal systems. The Commission aims at promoting trans-regional cooperation, interdisciplinary communication, and stimulating exchange between academics. The research conducted by Professor Pieter van Vollenhoven, which was farther developed at the Leiden University, focuses on explaining how the principles of the primary customary law influence the functioning of contemporary administrative institutions. Similar research was conducted by the International Institute for the Study of Customary Law with its offices in Paris and Amsterdam. Particular attention was paid to the native law concerning property of land, ownership and its defence, as well as other fields including sexual morality and many others[101].

To sum up these deliberations, it is possible to notice that treaty politics based on the law of treaties entirely consisted of customary norms until recently[102]. There is a shared universal conjecture (present also in the sentences of the International Court of Justice) that treaties codify or reflect international custom, which does not exclude a situation, where a treaty shall include convention-based provisions alongside customary law. As it was emphasised in the Final report of the Committee on Formation of Customary Law the treaty itself may state that it has a declarative character towards custom (e.g. the Geneva Convention on the

[99] International Union of Anthropoligicial and Ethnological Sciences, International Academy of Comparative Law, The Law and Society Association, Societe Jean Bodin pour l'Histoire Comparative des Institutions, International Association of Legal Sciences, Association for Political and Legal Anthropology, and The Max Planck Institute for Social Law and Social Policy.

[100] The first symposium was held in Bellagio (Italy) in 1981; while the last one – in Cape Town (South Africa) in 2011. Other similar initiatives included: organising an interdisciplinary research team at the National Ethnographic Museum in Osaka by Yoneo Ishii in 1977 that researched customary law of the South-East Asia, as well as the multi-volume series "Publikaties over Volksrecht" published by the Dutch The Nijmegen Institute of Folk Law in 1976, http://www.commission-on-legal-pluralism.com [Access date: 2.02.2013].

[101] B. Malinowski, *Prawo, zwyczaj, zbrodnia w społecznościach dzikich* [Law, Custom, Crime in Savage Societies], Warsaw 2001, p. 16.

[102] M. Byers, *Custom Power and the Power Rules*, Cambridge 1999, p. 12 et seq.

High Seas of 1958, stating that its regulations are 'generally declarative', derived from the established principles of the international law), which does not exclude a possibility that some of the norms reflect custom; this declarative character is confirmed by a principle that third countries do not participate in the treaty[103]. Thus, treaty regulations can function alongside customary regulations on the same level, i.e. they can complement each other or exist independently. Therefore, codification of customary law and treaty regulations fills gaps in the law, in a process called the progressive development of international law.

[103] Final report of the Committee on Formation of Customary Law; See ILA, Report of the Sixty-Ninth…, part IV, pp. 754–755.