

Towards A New Legal Order

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The discussions on the 'Law of the Sea', and other negotiations on International Law are expected to have a profound effect on Sri Lanka's economic future. The following article which is edited from a presentation at the inaugural session of the Colombo seminar on the 'The New International Economic Order and U.N.C.T.A.D. IV' discusses some of the major issues.

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The problem that I shall deal with may be stated as follows: if the U.N. Declaration of a New Economic Order, signals a radical alteration of existing international economic relations what impact would this Declaration have on the fundamental tenets of International Law? Or to phrase it differently would a new International Economic Order lead to a new global legal order? If so, what would such a legal order look like?

We should begin our analysis by reviewing the origins of international law, with a view to understanding the underlying operative values of most international norms and institutions. Most classical commentators of international law tend to romanticise its history, as a history of ideas, from the *Jus gentium* of ancient Rome, to the writings of contemporary publicists. A 'revisionist history' of international law, explicating its basic methodological and ideological assumptions, remains to be completed. It is however possible to make some generalization on the political and economic assumptions of International Law. In its early formative period, international relations and law were the relations and law of Europe. It reflected their legal traditions, and their economic ideologies such as "protectionism" and *laissez faire* liberalism. The rules of international law were primarily designed to rationalize

and legitimize the economic and trading interests of European nation states and their trading companies.

It is no accident that one of the earliest classics of modern international law, 'De Jure Praedia' written by Hugo Grotius in 1604, was a partisan brief prepared for the Dutch East India Company. Students of International Law have been instructed for generations, that natural law principles, such as 'pacta sunt servanda', the sanctity of private property, the reparation of damage caused by one's fault, provided the building blocks for the system of modern international law. Brierly in "The Law of Nations", 6 edition, has summed up that the grandest function of the law of nature lay in giving birth to the modern law of nations. A more careful inquiry into the content of what have been called the principles of natural law, would lead to a more cynical view of this thesis. It is significant that at a time when the Dutch were the first maritime nation, Hugo Grotius, a Dutchman, stipulated that the freedom of the seas was a principle of natural law. On the other hand an Englishman Selden, sought to demonstrate that it was natural law that permitted public and private dominance over the seas.

This perspective on the nature of International Law is most eloquently expressed by Walter Rodney in his recent book on 'How Europe Underdeveloped Africa'. Rodney points out "the so-called international law which governed the conduct of nations on the high seas was nothing else but European law. Africans did not participate in its making. In many instances, African people were simply the victims for the law recognised them only as transportable merchandise. If an African slave was thrown overboard at sea the only legal problem that arose was whether or not the slaveship could claim compensation from the Insurers".

I do not wish to labour this point, but would add that throughout the period of European industrialization international legal mechanisms were used in a variety of situations to help establish the ideology and structures of the market economy dominated from Europe.

Factors compelling a critical appraisal

Two factors, however, in recent years compelled a critical appraisal of the future of International Law and a questioning of its legitimacy. The first is the Russian Revolution and the emergence of a political and legal ideology which posed a challenge to classical liberal thought which had dominated Western culture since the 17th century. To what extent has decades of Soviet international legal theory and practice contributed towards the development of radical perceptions of International Law? This is a controversial question on which sharply different opinions have been expressed. Soviet commentators have on the one hand drawn attention to the fact that Soviet theorists have made a major contribution, by questioning the paramountcy of customary rules of international organisations. They also contend that Soviet theory has contributed towards the creative development of international law on a wide range of topics such as the principle of state succession and compliance with treaty obligations, peaceful co-existence, the pacific settlement of disputes, international trade law, and legal agreements relating to disarmament and arms limitations. Special significance is attached to the articulation of legal concepts relating to self determination.

Others have tended to take a more pessimistic view of the Soviet record in the history of international law. It has been argued that the initial period of doctrinal fervour which led to radical thinking on international legal issues, coincided with a low point in Russia's exercise of global power and authority. Consequently when the global power and influence of the Soviet Union had expanded, the ideological fervour was lost and the focus shifted to political compromise and economic accommodation. George Ginsbergs of the New School of Social Research recently concluded that although Soviet experience had left an "imprint on the prevailing mood, the vocabulary and sundry technical details of international law, it did not cause a transcendental change in the operative legal values of the international community". Under the banner of peaceful co-existence

and 'detente' the prospects for challenging the established legal order appear more remote.

We may next consider whether the Chinese approach to, International Law differed significantly from that of the Soviets' and if so, what impact it had on international legal theory? Although this is an area in which there is little concrete data, it is possible to broadly identify two basic periods. Initially in the first decade of the People's Republic of China, in international as in domestic legal matters, the tenets of Soviet legal doctrines were closely followed.

During this period Soviet books and articles on international law were translated into Chinese, and Soviet experts were involved in the effort to provide instructions in this subject in Chinese institutions. In the second decade there has been an explicit rejection of Soviet pre-eminence and a corresponding decline of Soviet legal influence. The Chinese outlook however remains more orthodox Marxist-Leninist. While for instance the USSR has recently been disposed to recognising international organisations as subjects of international law, the Chinese adhere to the original Soviet position that only States are subject of International Law.

The Chinese have also shown a disposition to take independent legal positions on the delimitation of territorial seas, on the problems of States succession, and on the rights and immunities of State agencies. Perhaps the most radical departure from Soviet theory, is the refusal of the Chinese to recognise international law as a universalistic system binding both the socialist and capitalistic worlds. This view, as we shall note later, has important implications for the future of the universalistic theory of international law. One must however conclude that the totality of Chinese impact in the sphere of international legal relations is even less significant than that of the Soviet Union.

I next turn to what many consider the most important development in the last few decades, namely the emergence from colonial and alien domination of a large number of new nation states. These nations had played no part in the formulation of

customary international law, and did not share the underlying legal and cultural values. As the homogeneity of interests and values which cemented the international legal order became eroded, its legitimacy was threatened.

The challenge of the newly emergent nations

It is therefore argued that the newly emergent nations of Latin America, Asia, and Africa have posed a fundamental challenge to the rules and institutions of international law. These countries have rejected the legality of colonial titles to territory and evolved new principles of self-determination. In the area of control over natural resources, nationalization and compensation, contemporary legal theory and practice have been said to bear the stamp of radical reasoning. Several developing countries have challenged the contention that international law provides a rule or standard of compensation. New principles of valuation and specifically the doctrine of excess profits, represent important innovations in this branch of the law. Several new nations claim a legal right to full compensation and reparation for the exploitation of their natural resources by colonial and neo-colonial powers. These legal trends it is argued and have anticipated and in some respect gone beyond the U.N. Declaration of a new international economic order.

But this optimism is by no means universally shared. It is argued that it would be simplistic to contend that mere constitutional independence would change the various modalities of dependence of developing countries on the existing economic and legal order.

As Saul Prochito, states in *The International Firm, International Law and the Nation State* (an unpublished paper):

"The major characteristic of the period of decolonization is the inequality of the rich and the poor both between and between states contribute towards the legitimization of these inequalities. Thus as a parallel to the myth of equality before the law in domestic

law, there is the mythology of the independence and equality of the states".

While radical perspectives on international law have found favour amongst some third world intellectuals, rarely have these nations acted upon their convictions. This is both the result of a lack of doctrinal commitment and an apprehension of economic vulnerability. Where developing countries have been so bold as to challenge prevailing norms (e.g. nationalization in Chile) western states and multinationals have tenaciously adhered to the classical legal doctrines. The retaliatory attachments of the proceeds of copper sales in Western Europe, by Kennecott and Anaconda had a clearly disruptive effect on the Chilean copper mines. The tragic history of the Allende Government is by no means unrelated, to the economic problems, which followed its confrontation with the multinationals. See Carlos Fortin, Nationalization of Natural Resources Industries and Multinational Corporations, Reflections on the Case of the Chilean copper, unpublished paper (1975). and the Chilean Nationalization and International Law, The Proceedings of the American Society of International Law 192, Vol. 66, American Journal of International Law, at p. 205, (1972). One must therefore conclude that while the New Economic Order may represent a watershed in the history of international economic relations, the corresponding changes in the legal order have hitherto been far less significant.

Probable Impact of Declaration on the New International Economic Order

Finally what impact would the U.N. Declaration have on the future of International Law. There are basically three probable lines of development. Firstly, it is contended that the fundamental differences and conflicts between nations may reach

a point, at which the existing international legal order would break-down. Proponents of the apocalyptic theory are ambivalent as to what type of legal order will take its place, but vaguely assert that an international legal order may not be necessary, since law is a secondary and totally derivative factor.

Secondly, it is argued that the universalistic character of international law would change and that one would have instead multiple systems of transnational law. In recent international negotiations multinationals have proposed that disputes arising out of concession-agreements be resolved 'in accordance with the principles of international law acceptable to western nations! See for example, the recent negotiations relating to the concession agreements on the exploitation of copper, in Bougainville Papua New Guinea. Here one finds signs of the emergence of multiple systems of transnational law.

Thirdly it argued that the present international legal order should give way to one which is more responsive to the needs and interests of Third World nations. This aspiration was expressed by Prime Minister, Gandhi, at the Annual Sessions of the International Law Association, when she called for a new legal order, based upon the "common denominator of interests between the rich and poor nations, strong and weak, and (which would) thereby become a measure of trust between nations".

This aspiration allows us to conclude in a more optimistic note. While the legal states of U.N. Declaration has been controverted, it is clear that they are at least first steps in the creation of new legal norms. One therefore hopes that the new consciousness that is represented by the Declaration on the New Economic Order would lead to the evolution of a more equitable legal order.

FOURTH SESSION OF LAW OF THE SEA CONFERENCE

The UN General Assembly on 12th December 1975 approved the convening of the Fourth Session of the Third United Nations Conference on the Law of the Sea from 15th March to 7th May 1976 at the UN Headquarters in New York. It approved a Fifth Session to be held in the same year if such a decision was taken by the Conference. The Assembly decided to accord priority to the Conference in relation to the United Nations activities, except those of bodies established by the United Nations Charter.

The Assembly adopted resolution 3483 (XXX) without a vote. Under the resolution, the Assembly recalled the decision of the Conference to accept the invitation of Venezuela to meet at Caracas at an appropriate date for the signing of the Final Act and related instruments adopted by the Conference.

Before the Assembly adopted the resolution it heard statements by Sri Lanka and Iceland.

Sri Lanka's view was that the most important achievements of the Conference occurred at the Third Session held in Geneva last spring when for the first time documents were produced on which orderly negotiations could take place. At the Fourth Session the Conference would be in a position to hold coherent and effective negotiations concentrating on a single set of texts.

The unilateral action of a few States to expand their jurisdiction over parts of the sea was unjust and provocative. It was understandable that some States had economies dependent on the seas, but there were many others where that situation did not apply and the predicament of the few should not provide excuses for others. All States had the responsibility to work for an agreement.