THE NATURE AND SOURCES OF INTERNATIONAL DEVELOPMENT LAW

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Contents

Summary

This topic concerns the 'nature' and 'sources' of international development law. The first part, 'nature', addresses a number of issues. Two principal questions to be answered relate to the use of the term 'international development law', the very title of the theme, and to its ideological bases. The second part, 'sources', identifies and examines the various sources of international development law, traditional and contemporary, and the entities and agencies responsible for the formulation of international legal rules governing the development of nations. It also assesses the significance of the part played by these bodies in the progressive development and evolution of the law under consideration.

1. The Nature of International Development Law

In order to be able to determine with reasonable precision the applicable and evolving body of rules of international development law, it is primarily necessary and useful to study first the 'nature' and then the 'sources' of the current theme : 'International Development Law.'

1.1 Definitional Problems

A basic concept and understanding of what constitutes the 'nature' of international development law appears eminently vital. Without an agreed definition of 'international development law', it would be confusing and even futile to begin any introduction or meaningful discussion of the 'nature' of the corpus of this law.

To define with a reasonable measure of general agreement among lawyers and jurists engaged in the search of actual and ideal principles of international development law requires a thorough appreciation of a generally accepted definition of international law or

public international law. This prerequisite seems predominant. Of no less fundamental to an accurate appreciation of the notion of international law, however, is a proper understanding of a concept of law itself. The present study must therefore begin at the very beginning: how to define law.

1.1.1 Definition of Law

For the purpose of this study, the concept of law is used and understood in the light of past experience and the history of attempts to find an agreed version of the definition of law. As the result of years and centuries or indeed millennia of human endeavours, many schools of jurisprudence have emerged with varying definitions of law. To mention a few, the analytical schools of jurisprudence, including John Austin, have defined law according to its composite elements. Law could be viewed analytically as a command from a political superior to members of a given society with a sanction attached. Other analytical schools are more democratic in as much as law is defined as a body of rules recognized as binding for the community, within the community, and upon all its members.

On the other hand, the sociological schools and historical schools tend to define law as a reflection of human society, so that law must change and evolve with time and with the needs and wants of society in which it is to apply. Sir Paul Vinogradorf and Sir Henry Maine, for instance, explained about legal developments in terms of comparative social, linguistic and cultural affinities of different ethnic communities, including customs, usages and tribal traditions and laws.

Yet, a third group of schools of jurisprudence, known as the teleological schools, look to the end results or the purpose of law which is destined to uphold the welfare of the people. Thus, 'socialist legality' presents law as an instrument of class struggle to ensure the dictatorship of the proletariat.

There is also a fourth group of definition of law attributing law and reason to nature. According to natural law theories, even without positive enactment, law is by nature already in existence, governing human and other creatures alike, almost in the same manner as scientific laws and laws of mathematics, physics and mechanics. Natural law theories are known from time immemorial, attributable at times to divinity as is apparent from the Institutes of Justinian and in classical Roman Law.

The philosophy of law also was popular among the Greek stoics, Aristotle, Plato, Socrates and even poet Homer were conversant with legal thinking. They founded the philosophical school of jurisprudence followed by Kant and Hegel. Hans Kelsen may be said to have advocated the pure science theory of law. All legal norms are based on and traceable back to the irreducible content of the grundtnorm : *Pacta sunt servanda.*

Last but not least is the American School of Realism which tends to define law as the body of rules interpreted and applied by the judges. Oliver Holme and Roscoe Pound have been credited with co-founding the American school of jurisprudence.

It is from the above variety of definitions of law according to the different schools of jurisprudence that a choice has to be made in order to accommodate the study on which the

present enquiry is about to embark.

For convenience sake, if a selection is to be made to permit further pursuit of knowledge and research, a definition proposed by an analyst, Professor Arthur Goodhart, may be adopted for all practical purposes. Law is regarded as a body of rules recognized as binding upon a given society. Thus, law is binding whether it is enacted by decree or followed in actual practice. Whether it is adopted by a positive measure of legislation or by natural process of rationalization, law is predicated upon its recognition as such, albeit a subjective element which could be objectively determined from human conduct and behaviour of the members of a given society.

1.1.2 Definition of International Law

The definition of law thus described is almost readily adaptable to the definition of what Jeremy Bentham calls 'international law' which contains a body of rules recognized by States primarily as binding upon them, regardless of the form and content, of the use or existence of sanction as long as the subjective element of consent of States is present. Just as the definition of national or municipal law has been adopted for present purposes, the same or an adapted version of the definition of international law will be used throughout this study, so as to avoid any misconception or misinterpretation of the notion of law, of international law and ultimately of international development law.

1.1.3 Definition of International Development Law

International development law is not exclusively to be identified as the law regulating international development. 'Development' for present purposes is 'national' rather than 'international'. International development law could simply be defined as international law of development. The very key word that begs the question is 'development' in this context.

Since the meanings of 'law' and 'international law' have been clarified and their contents sufficiently defined in the preceding paragraphs, it follows that the notion of international development law flows from the two basic concepts of law and of an integral part of international law concerning development in general, and 'national development' in particular. Therefore, international development law is that part of international law which relates to the international control and regulation of various aspects of national development as well as the development of shared resources of the global community, of a region or subregion or of an area forming part of the common heritage of mankind.

The next question to be examined relates to the portions of national or international development which call for international control and regulation. It is clear that national development falls essentially within the primary if not exclusive domain of national authority. Every nation or nation State is entitled and authorized under international law to be master of its own destiny, inventor of its own ideology and planner of its own national development.

What 'national development' encompasses raises another series of queries that deserves close attention but defies imagination. By whatever yardstick adopted for the purpose, 'national development' must comprehended as a minimum 'economic development'. Other

allied notions of development have been naturally associated with 'economic development', including notably, industrial development, social and cultural development, etc.

Finance, trade and investment in terms of capital, technology and manpower are intrinsically involved in the national planning of economic development, so much so that a national economic development plan cannot omit inclusion of measures tending to enhance and coordinate social, cultural and educational aspects of development of human resources, not to mention service sectors such as telecommunications and transport, as well as the exploration and exploitation of natural resources, living and non-living resources of the land, sea and atmosphere, power and energy. All these and more are inevitably included in the notion of national development.

Through international cooperation whatever measures are conceivable for national development are also available for international or regional development.

1.1.4 International Development Law as Law

'International development law' as above defined is law with all its necessary attributes, its binding nature, its practical measures of enforcement and implementation, and its correlative obligations incumbent upon States and other subjects of international law to give effect to its normative contents.

Qualified Power of The State to Undertake National and International Development

Having circumscribed somewhat the rather evasive and ever-growing notion of national and international development, it is time to examine the role international law has assumed in the attribution and allocation of rights and duties of nation States within the international community, particularly in the process of planning and implementation of national and collective economic development. Primarily, each individual State is free and sovereign within its border, to have and to hold, to plan and to execute, its own economic development policies. In principle, such national plans could operate without endangering or adversely affecting like development plans of other nations. But without international rules and regulations, chaos could ensue if each State could adopt its national plans and policies without regard for national development aspirations and efforts of other States. A new international economic order requires a healthy and orderly adoption and implementation of carefully coordinated national and international development plans.

Hence, an international development law must be put into place with an important part to play in the globalization of national economic development, having regard to the need for adjustments in favor of equitable principles and the right to development for all nations and for every people. The absolute power of a State to undertake its own national development is necessarily limited in this context by the application of international development law. International development necessarily requires collective efforts, active cooperation and joint operation by all the parties concerned, nations and peoples alike.

The Right to Development

The right to development is a third generation human right, conceived and born almost as a

twin brother of the right to a healthful environment. It belongs to every people as a collective rather than individual human right. It is not that one natural person could claim the right to development, let alone national development. Rather it is a people, not an individual, that is entitled to the right to self-determination and also to national development.

Legal problems of implementation have long been associated with the use of terms. The very word 'man' or 'human being' has given rise to undeserved difficulties. Attempts have been made by 'civilized' nations to exclude members of other 'lesser' nations as 'uncivilized' and therefore disentitled from the rights and privileges normally accorded to a fellow human being, or to exclude them altogether from the human species. That was one way of restricting the application and respect for the rights of man, by narrowly defining its scope and meaning. Today, a simple biological definition of '*Homo sapiens*' would appear to provide conclusive evidence of entitlement of human rights under the law of nations.

One remaining obstacle to the resolution of the problem of the right to development resides in the difficult and complex process of defining 'people' for the purposes of self-determination and for the right to development, partly because of its intrinsic political connotations. The time will soon come for the international community to reach consensus, once and for all, on the definition of 'people' for the collective exercise of the right to development. International development law has its part to play in the promotion, protection and preservation of this collective human right to development, a third generation of human rights that is gaining recognition in the family of freedom-loving and fair-minded nations.

The minimum contents of international development law should include not only the right to development, but also the notion of sustainable development, permanent sovereignty over natural resources, regulation of bilateral and global trade agreements, generalized system of preferences, and rescheduling of debts or write-off and nullification of odious debts, non-performing debts, and debts owed by the least developed nations howsoever induced, by fraud, corruption or otherwise in the implementation of development projects.

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Biographical Sketch

Dr. Sompong Sucharitkul is currently Associate Dean and Distinguished Professor of International and Comparative Law at Golden Gate University School of Law, San Francisco, USA. He also directs the Golden Gate Center for Advanced International Legal Studies and the LL.M. and S.J.D. International Programs.

He holds B.A. (Hons. Jur.), M.A., B.C.L., Doctor of Philosophy (D. Phil.) and Doctor of Civil Law (D.C.L.) from Oxford; Docteur en Droit (D.E.S.D.I.Pub.) from Paris; and Master of Laws (LL.M.) from Harvard. He also has a Diploma from the Hague Academy of International Law and is Barrister-at-Law of the Middle Temple, United Kingdom.

For 15 years, Dr. Sucharitkul served as Ambassador of Thailand to BENELUX, Japan and four other European countries as well as the European Economic Community and UNESCO. For nearly three decades, he has frequently been Representative of Thailand to the United Nations General Assembly, and served as Chairman of the Delegation to the Third U.N. Conference on the Law of the Sea. He served 10 years as a Member of the International Law Commission, 9 years as Special Rapporteur of the Commission and sometimes as its First Vice-Chairman and Chairman of the Drafting Committee.

Ambassador Sucharitkul has been a Member of the Permanent Court of Arbitration (Thai National Group) and is currently a Member of the Commercial Arbitration Centre at Cairo, of the Regional Arbitration Centre at Kuala Lumpur, and Member of the Panels of Arbitrators and of Conciliators of ICSID (International Centre for the Settlement of Investment Disputes), World Bank, Washington D.C. He is a Member of World Intellectual Property Organization (WIPO) Mediation and Arbitration Center, Geneva, and a Commissioner of the United Nations Compensation Commission (UNCC), Geneva. He is also serving as Commissioner of the United Nations Compensation Commission (UNCC), Geneva. He is an elected Member of the Institute of International Law (Geneva) and a Corresponding Collaborator of UNIDROIT (Rome); he is currently serving as President of the ASEAN Investment Dispute Tribunal.

As a teacher of international law, apart from at universities in Thailand, Dr. Sucharitkul has served as Fulbright Professor of International Law and World Affairs at the University of North Carolina at Charlotte, USA, as Visiting Professor of Law at the National University of Singapore, as Robert Short

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