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The historical context in which the problem of the 'right' to economic development has become acute was the mass influx of newly independent developing countries into international society and into the United Nations in the early 1960's. Before that the task of fostering the economic development of underdeveloped areas of the third world had been the responsibility of colonial governments almost everywhere, except in Latin America which had enjoyed political, though not always economic independence, since the early nineteenth century.

In the 1960's the problem of international economic equality became the responsibility of international society as a whole, and its international economic institutions in particular, against the background of a growing chorus of dissatisfaction on the part of the developing countries now commanding an impressive numerical preponderance in the General Assembly of the United Nations.

The Genesis of a Right

A right in any system of law has to be both felt and articulated before it can be expressed in the form of legal claims, and the system of international law is no exception. When we think of a 'right', moreover, we tend to associate it with the two notions of justice and equity. While justice is a general notion, equity has acquired a well established technical meaning in the English, as in other legal systems, in which it may be regarded as a legal device for redressing injustices arising from the rigidities of applied law.

However, though not a downright stranger, the notion of equity is a relative newcomer in international law, for it is only in recent years that it has acquired some significance in international economic relations. An early, timid attempt at defining the concept of equity was made by the Permanent Court of Arbitration in the case of the Norwegian Shipowners Claims in 1922, in which equity was described in a somewhat evasive fashion as a "general principle of justice...distinguished from any particular system of jurisprudence or the municipal law of any State."[1] Fifteen years later, by way of stark contrast, Judge Hudson of the same Court attempted a rather bold and controversial definition when he stated, somewhat magisterially, in the case of the Diversion of the Waters of the River Meuse in 1937 that "equity (was) part of the law and as such had meant 'equality'".[2]

It was only from 1969 onwards that judicial reluctance to accept the

notion of equity seemed to have been overcome when the World Court in the case of the North Sea Continental Shelf saw in it a convenient instrument for apportioning the space of that continental shelf among a number of claimants.[3] It has since become increasingly plain that the principle of equity may be usefully applied on the highest level of international law, whenever and wherever economic resources have to be shared internationally.

These judicial pronouncements may suggest that there are certain affinities in present day international law between the concept of international equity on the one hand, and that of international economic equality on the other hand. Not surprisingly, the developing countries have tended to stress the latter aspect, whereas the developed ones have preferred to interpret equity in the manner in which it has been traditionally employed in their own systems of municipal law.

The Right to Economic Development on the Level of International Practice

So far we have dealt with the right to economic development only as reflected in the sphere of jurisprudence. One might conceivably obtain a clearer idea of its implications by asking whether the existence of such a right can be deduced from international legal practice within the United Nations. In particular one would want to know whether a right of this sort is still in the process of evolution.

The three Development Decades of the United Nations, as formulated in Resolutions of the General Assembly, even though they carry moral, rather than fully binding weight, may give us some clues, as each of those Decades has taken the process of conceptual clarification a step further.

(i) The First U.N. Development Decade (1961-1971)

During that Decade heavy emphasis was placed on the need for economic growth. Three assumptions, largely drawn from Walt Rostow's theory of The Stages of Economic Growth,[4] underlay the conception of that Development Decade. In the first place, it was assumed that if only determined measures were taken to stimulate economic growth all round, this would trigger off the so-called 'trickle-down' effect whereby, even though considerable international economic inequalities would remain, the poor countries would benefit eventually. In the second place, the 'trickle-down' process would culminate in a so-called 'take-off' into self-sustaining economic growth. To help the process along, a target of 5 percent growth was posited for the Decade, but no legal obligations were attached to the attainment of that target. Finally, Walt Rostow's theory assumed that the benefits from economic growth all round would spread across existing international political frontiers on a universal canvas.

(ii) The Second Development Decade (1971-1981)

By and large, those assumptions turned out to be fallacious, as it was being realised that benefits were failing to trickle down to the lowest layers of the international economic scale, and that, moreover, rates of economic growth were lowest in the poorest countries. The question therefore arose what measures should be taken during the Second Development Decade to remedy those deficiencies.

However, equal opportunities would not arrive unaided, and the key question had therefore to be asked whether the better off States should have to assume a positive duty to implement economic development not only within their own political frontiers, but also on an international scale. It was in this way that the debate on the right to economic development was extended from the municipal into the international sphere where it produced important legal consequences by enabling the developing countries to make claims which were measurable by strict international legal, instead of just general technical standards.

Thus, beyond raising the target of economic growth for the impending Decade from 5 to 6 percent, the General Assembly for the first time decided in 1971 to set a definite target of international aid to the developing countries at the rate of 0.7 per cent of the Gross National Product of developed countries. An attempt by the developing countries to make the fulfilment of that target legally binding, however, failed. Nonetheless, a new trend was initiated which, taken to its logical conclusion, would ultimately amount to no less than the imposition of an international transfer tax.

Since most of the sanguine expectations of the First Development Decade had been disappointed, and since a percentage point had been set for international aid, the United Nations had to provide clear quantitative indicators of what represented a developing country, and put into legal terms that meant identifying the bearers of rights and duties with some precision in that context.

To draw a line between developed and developing countries proved impossible, and the only thing on which all States could agree was how to define the category of "least developed countries", and by doing so, establish an international 'poverty line'. Three criteria were to obtain: to qualify for the status of a "least developed country" it had to be shown that (i) the National Income of the country concerned was less than $100 per head per year; (ii) its manufacturing sector took up 10 per cent or less of its total industrial sector; and (iii) its degree of literacy was 20 per cent or below of its population.

This quantification proved useful in the subsequent evolution of the right to economic development, as it enabled the United Nations to elaborate the concept of 'basic needs' - which was to dominate United Nations action in this sphere throughout the 1970's - in quantitative

terms. The concept obtained some intellectual nourishment from the North American author John Rawls, whose book, A Theory of Justice, published in 1971, created a considerable general impact. In this work, Rawls attempted to link the idea of justice to the concept of economic equality on the basis of a novel scheme of priorities. Rawls proposed that where economic and social inequalities could not be avoided, they were to be arranged in such a manner as to be of the greatest benefit to the least advantaged, in order to safeguard their interests as recipients of income and wealth.

The implications of Rawls' thesis began to be felt amost immediately on the international plane, as the standard of formal legal equality between States - hitherto unquestioned - was gradually being displaced in United Nations practice by the new standard of positive discrimination in favour of the most needy States. This represented one more step in a series of steps already taken to give the concept of equity a handsome twist in the direction of international economic equality. If that conception were to be expressed in a formula, one could say that international material equality equalled formal international equality plus international equity.

It was hardly surprising, therefore, that in 1974 the General Assembly should have passed three important Resolutions calling for the creation of a New International Economic Order in which the notion of equity, in the present sense, was made robustly explicit, rather than discreetly hinted at, as had been the case previously. Claims for redistributive justice were to pervade the entire text of the Charter of Economic Rights and Duties of States - at once the most important of those three Resolutions and its climax. Stripped of technicalities and reduced to its simplest terms, the central message of that Charter appeared to be: special treatment on the basis of special needs. The point was pressed home in a General Assembly Resolution passed in 1975 which - to give further emphasis of the concept of 'basic needs' - created two new categories of States; namely (i) the "least developed, landlocked and island countries", and (ii) "those most seriously affected by economic crises and natural disasters."[5]

Nor was this trend confined to the theoretical plane of Resolutions of the General Assembly since, under the new management of Mr. Robert McNamara, the World Bank, the chief lending agency of the United Nations, was to undergo a major strategic reorientation which came to be known, with some exaggeration, as the 'McNamara Revolution'. The swiftness and energy with which McNamara acted was impressive, and it was not his fault that he did not always obtain the necessary funds to carry out the new strategy to maximum effect.

(iii) The Third Development Decade (1981-1991)

If the strategy for the Second United Nations Development Decade may be considered as positive where the elaboration of the concept of the right to economic development on the international plane was concerned, the proposals for the Third Development Decade were undistinguished, owing largely to the deterioration of the international economic climate. Thus, the target for economic growth was raised from 6 to 7 per cent, while the target for international aid of 0.7 per cent was retained, but, wherever possible, was to be reached at the halfway stage of the Decade, before 1985, or as soon as possible after that. Similarly, aid to the by now well established category of "least developed countries" was to be doubled, wherever possible. None of these provisions was novel in itself, representing merely an accentuation and amplification of principles inserted into the previous Development Decade. However, two innovations call for comment. In the first place, a specific target increase of 9 percent per annum was set for the rate of industrialisation of developing countries with the object of increasing their industrial output to 25 per cent of world industrial production by the year 2000. In the second place, the new principle of self-help was introduced, which, taken to its logical conclusions, could produce major repercussions in the outlook of developing countries in the near future. It is perhaps not altogether a coincidence that Raul Prebisch should have chosen this moment to give his vigorous endorsement to the principle of self-help. This is all the more remarkable since during the two previous Development Decades he had, if anything, put his faith in the developing countries' ability and willingness to do all in their power to integrate and assimilate the developing countries within the world liberal economic system by the pursuit of enlightened policies of financial aid and preferential commercial treatment. In 1981, by way of contrast, he was urging the developing countries to take their fate into their own hands by elaborating autonomous co-operative techniques of economic development, while leaving the developed countries to their own devices.[6]

A Critical Assessment

The developing countries' ceaseless agitation for the promotion of the right to economic development in international law has yielded some small but concrete legal gains. The most important, because the most lasting of these is the recognition in international law of developing countries as a separate juridical category, even though, by its very nature, it was bound to be transient, since countries are expected to move out of, and some very few back into the state of underdevelopment. On the whole, however, the evolution of the right to economic development in international law has not passed the point where its legitimacy can be accepted without a shadow of a doubt. There is still a long haul from legitimacy to legality. Legitimacy rests on consensus and its effect is

moral, not legal. International legality must at all times rest on consent granted by States on the basis of treaties and custom, the two principal law-creating agencies of international law.

It has been said by some most distinguished international lawyers that a quasi-parliamentary custom is growing up in the sphere of international law-creation whereby consensus on a basis of numerical majorities may suffice to create binding rules, and Resolutions and Declarations of the General Assembly of the United Nations have been expressly mentioned in this connection.[7] Reasoning along those lines is holding a considerable appeal to spokesmen of underdeveloped countries.

However, it may also be argued a contrario that the instruments of consensus and consent ought not to be confused, and that principles of natural law ought to be kept severely separate from those of positive law. Moreover, most Resolutions of the General Assembly in this area have tended to be the outcome of uneasy compromise between the developing and developed countries wherever cardinal issues were at stake, that have solved nothing. The point is that an approach of this kind, though carrying considerable moral weight, lacks effectiveness. As Jeremy Bentham once remarked "individual natural rights have force only if recognized in conventional law; otherwise they remain merely rhetorical". It would, therefore, seem essential to the further promotion of a right to economic development in international law that the developing countries emerge as soon as possible from the murky grey-zone of consensus into the broad daylight of positive international legality by taking the final step from the abstract right to the concrete law of economic development. The multilateral convention, resorted to with ever greater frequency in the second half of the present century, suggests itself as the proper vehicle for effecting that transition in specific sectors, such as trade in commodities; regulation of liner conferences; the transfer of technology; the control of the activities of transnational corporations and others. Already the developing countries have acquired in the 'Group of 77', and its sub-group, the 'Group of Non-Aligned Countries', especially in the latter's Economic Committee, means of articulation and agitation by which their demands can be fed into the United Nations Conference on Trade and Development (UNCTAD) where they can receive further airing and debate.

The Unacceptable Face of Positivism

The chief virtue of positivism lies in its ability to ensure certainty of the law and prevent confusion between lex ferenda and lex lata. However, there is also an unacceptable face to positivism, which shows itself whenever it is used as a means for preserving an outworn status quo in the face of widespread clamour for change. Wherever that can be shown to be the case in the sphere of economic development, the developing countries could do worse than heed the words of the nineteenth

century German jurist Rudolf von Jhering, who, in true Hegelian style, regarded legal rights in the positivist sense as the by-product of historical struggles. To overcome unreasonable resistance to change, the developing countries would be well advised to club together in order to challenge an international political order which is underpinning an obsolescent international economic order, and in that fashion to do away with positivist obstruction.

An essential prerequisite for the success of such a strategy is diplomatic unity, and that may not be always easy to achieve where there are significantly diverging interests, and when there is a worldwide economic recession. However, the record on that score is not too discouraging, considering that firm diplomatic unity was maintained during the successful negotiations that have resulted in the conclusion of the two Lomé conventions - albeit at the expense of some Asian and Latin American countries; and that a fairly firm front has been maintained during the nine years of protracted negotiations that culminated in the signing of the Convention on the Law of the Sea at Montego Bay in 1982.

The chances of success for the developing countries are perhaps best where they can command substantial bargaining power. Present trends towards the formation of international producer and exporter associations of widely traded commodities are a case in point.[8] Their right to do so has so far gone unchallenged. Here is a fascinating analogy with the evolution of labour law in nineteenth century England, where trade unions had to break the law of sedition in order to secure the right of association. Two approaches have been used to achieve this end. On the continent, the unions have fought for the enactment of bills of labour rights, whilst in England they were able to extract immunities from the full rigour of available executive sanctions. The Charter of Economic Rights and Duties of States, passed in the form of a Resolution of the General Assembly of the United Nations in 1974, makes express mention of the right of developing countries to organise international associations of producers and exporters of commodities, and the phrasing used would suggest that the English, rather than the continental approach will be adopted in the form of exemptions from the normal requirements of the international law of trade, such as, for instance, the implicit prohibitions of the General Agreement on Tariffs and Trade (GATT) on measures in restraint of international trade.

The Task of International Lawyers

The active promotion of the right to economic development in international law is the task of statesmen of the developing countries and their political and legal advisers. The task of academic international lawyers is to develop suitable concepts to underpin, not a New International Economic Order, because that too is a political task,

but a jurisprudence of international economic development, with special emphasis on the refining of the principle of equity in that sphere, in addition to the traditional task of providing, on a current basis, a critical analysis of the latest developments of law making in the field.

FOOTNOTES

1. Reports on International Arbitral Awards (1922), 331.

2. PCIJ Reports (1937), Series A/13, No. 70, 77.

3. North Sea Continental Shelf cases, ICJ Reports (1969), 3.

4. Published in the United States in 1960.

5. General Assembly Resolution 2768 (XXVI), November 18, 1971.

6. See his interview with a journalist of the London based periodical South in February 1981, 29-33; see also his lecture on 'The Crisis of Capitalism and the Periphery', reprinted in UNCTAD (1982), 4 Trade and Development, 1.
   For an early practical application of the principle of self-help, see United Nations, Report on the United Nations Conference on the Least Developed Countries, (1982).

7. See, for instance, J.E.S. Fawcett, Impacts of Technology on International Law, International Law: Teaching and Practice (ed. B. Cheng, 1982), 95.

8. D.E. Pollard, Law and Policy of Producers' Associations Oxford, (1984).