

THE CONCEPT OF INTERNATIONAL DEVELOPMENT LAW

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Summary

The first section considers the attempt of newly independent developing countries to reconstruct a new international economic order in the 1960s and 1970s in accordance with the principles of the sovereign equality of states and the economic self-determination of peoples. It outlines the rejection this attempt by Western states, which continued to insist upon the single legal principle of freedom of contract, *pacta sunt servanda*. In the course of the 1980s and 1990s the economic and social situation of the developing countries deteriorated, with declining terms of trade in natural resources, the liberalization of currency exchange controls and the prevalence of a neo-liberal so-called “Washington consensus”. This has never been formally ratified freely by all states.

The second section considers the immediate implications of the absence of an international economic and social order. The alternative to civil war whether at a national or an international level, is democratically agreed social change. However, since the 1970s the language of a law of development has evaporated. The symptoms of global disorder receive a response through state and private violence. What is needed is a new international law of development as a social democratic constitutional vision of global society.

The third section considers the conditions necessary for a true international development law as part of an international economic constitution. It must reconcile the principles of economic freedom with those of social welfare and cohesion, through the establishment of appropriate global democratic deliberative processes which does not exist at the moment. The weight of industrial and military power remains with the West. However, demographic balance favors developing countries and a gradual shift of economic power

back to China, India, Brazil and other developing countries does indicate an increasing possibility of compelling a balancing of an international constitution around a compromise between the need for security and the need for constructive socio-economic measures.

The fourth section sets out the fundamental principles of international development law necessary to meet the present situation. The first principle is that all rules have validity, as well as legitimacy and efficacy, only if based on the common consent of substantially all the states in the international community. This means also democratization of economic institutions, democratic state consent to particular international economic obligations, recognition of the state right to impose monetary exchange controls, the right to substantive human rights based not on a consumerist, methodological individualism, but on participation in family, social cultural and religious communities, which have to be safeguarded. These standards have to be developed through political organs such as UN conferences but, as a first priority there should be a judicial, deliberative body, the International Social Welfare Tribunal, to test the legality of all decisions and rules of international economic institutions, economic treaties and private international economic transactions against a minimum *ius cogens* of socio-economic principles and rights.

1. The Definition of the Subject and the Range of its Problems.

The concept of international development law should mark out the scope and aims for the discipline. It must have guiding principles and structures. These, in turn, must be systematically related to the whole discipline of public international law. In other words, as a branch of a legal order, international development law must, above all, insist upon the integrity of its, as of any other, legal order. There are minimum conditions that must prevail before one can speak of any legal order. The branch of the law must cover all relevant aspects of the subject-matter to be regulated and be based upon clear principles which express and defend the sense of the legal order.

If international development law were to mean the law concerned with international development, what exists at present, in the usual sense of positive law (see later for definitions) has none of the characteristics outlined above.

Most of all there is not a legal order that rests upon the consent of its subjects. As part of general international law, international development law should require that all of the legal principles and rules affecting development receive the assent of the sovereign and equal states that make up the international legal order. For a time in the 1960s it seemed that such a principle might receive due recognition by the recalcitrant Western states. It was argued with some force that classical general customary law, enshrining “acquired rights” etc. of Western property in developing countries, did not automatically bind the latter upon reaching independence. However, Western lawyers persisted in the view that recognition of independent statehood meant submission to already existing rules of law. This view prevailed, particularly through ensuring that developing countries signed investment protection treaties.

Economic self-determination of peoples, enshrined in both the principal UN Human Rights Covenants in the 1960s, should have become the lynch-pin of a fair international

economic order which the newly achieved sovereignty of developing countries would guarantee to the populations of the poorest three quarters of the world's population. Freedom to nationalize foreign ownership of natural resources; freedom to renegotiate or rescind old international economic contracts; (between governments and large private companies), these propositions were eventually focused around article 2 of the aborted 1974 Charter of Economic Rights and Duties of States, a UN General Assembly resolution which was vetoed by virtually all Western states. Instead, the opposing principle of *pacta sunt servanda* was espoused unequivocally by the West. This was to come to mean that all international economic transactions should be considered valid if they received the formal consent of the parties. There was not to be the addition of the requirement, usual for Western legal systems that contracts had to be considered part of a legal order which affirmed a substantive doctrine of public order and good morals.

Indeed, the crucial legal event of this period was the debate leading to the drafting of the Vienna Convention on the Law of Treaties. Again, it was the Western countries that managed to repel the argument that economic coercion could constitute violence which vitiated consent to an agreement. The article of the Vienna Convention concerned with vitiation of consent through the threat or use of force against a state was interpreted authoritatively to exclude the type of overwhelming economic pressure that Western states would always be in a position to impose upon developing countries. This development is crucial to a critical reflection upon the so-called positive law that actually governs most public international economic transactions that directly involve developing countries at present. They rest upon the most threadbare acquiescence and not upon a full consent negotiated among equals, as the principle of the sovereign equality of states requires. (see later)

The late 1970s was to witness an even more fundamental rejection of the very *rationale* of national economic self-determination in the Anglo-American world, gradually replicated, to varying degrees, in other parts of the developed and also the developing world. The world-wide liberation of financial exchange controls at that time meant the abandonment of national monetary sovereignty, the public control of money flows. At the same time, the social democratic principle of management of the national economy to assure social justice at a national, not to mention an international level, was also abandoned. In its place came the belief that a fully state-liberated, privatized economy with a totally flexible labor market, could best achieve a maximization of wealth. Such wealth might eventually trickle down to reach all of the supposedly dynamic, methodological (see later) individuals struggling in the market place.

Further significant developments in the 1980s were the virtual collapse of the “market value” of natural resources extracted from the territories of developing countries and the continued triumphant march of Western owned multinational companies which controlled the processing and marketing of such resources. This transnationalization was only one aspect of the globalizing of the manufacturing sectors (both light consumer products and consumer durables). While it did not always work to the advantage of Western countries, this could add nothing to the economic power of developing countries after the general disappearance of exchange controls.

The concept of an international law of development was now pushed into headlong

retreat. Indeed, the main protagonists of the 1970s New International Economic order, Algeria, Mexico, Yugoslavia and India, virtually all suffered themselves a drastic internal political fragmentation. The idea of national economic self-determination came to be politically and economically eclipsed. Indigenous industrialization, financial autonomy, national wealth maximization, none of these could be related to the national autonomy of countries that had imploded and were not able to maintain even a minimum of public order.

Instead a radically opposing legal ideology appears to have won effective hegemony over the world economy by the early 1990s. Led by the United States and Western Europe it could rely primarily on the UN Specialised Agencies, the IMF and the World Bank, to promote credit and investment flows only upon certain conditions. These were an acceptance of rolling back the state, particularly the social budget and support for industrial and agricultural production for local, national markets. An open economy based upon the stability of a rule of law to protect private law institutions of contract and property came with it. States would also be expected to sign up to investment protection treaties guarantying the security of foreign business and perhaps also the established World Bank mechanisms for the settlement of investment disputes.

All of these instruments are based upon the concept of international economic law as a contract law, enshrining *pacta sunt servanda* and virtually excluding state intervention even if the latter tries to be an attempt to balance social interest and retain social cohesion. Conceptually there could now be no separate, distinctive place for an international law of development. It became merely a minor branch of international economic law.

It has to be stressed that none of this intellectual structure rests upon formal consent of states to an international economic constitution. The evolution of western concepts of general customary law, has, in any case, become much *softer*. One simply supposes that a *consensus* arises in the air about a particular way of approaching international economic relations. It is sometimes described as the *Washington consensus*. No international conference or other political forum has ever met to agree to this. It is simply the framework of thinking that prevails in Western dominated international economic institutions, both public and private. Those third world societies wishing to be a part of or integrated into the world economy need to accept this ideology either through formal or informal agreement, again a pure matter of contract.

The one significant counter-development affecting the concept of international development law has been the growth of international social movements as a framework for grass-roots Third World resistance. These are part of civil society outside the bureaucracy of Third World states and international organizations. Peasant farmers, women's groups, producers' collectives etc. form pressure groups against either government, or foreign companies or international agencies. They also succeed in forming cross-border alliances in the context of WTO and other global economic summits to challenge a state monopoly on global economic reform. They could ground reform in a version of global law which offers "best practice" from particular local or regional bases as models for adoption in other comparable parts of the globe through their "civil society" pressure at a global level. In this sense a law of development can shape a progressive global law.

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Biographical Sketch

Anthony Carty - Professor of Public Law at the University of Aberdeen. Tony Carty graduated with an LLB from Queens University Belfast, went on to do an LLM at UCL and a PhD at Jesus College Cambridge. Thereafter he was a lecturer and then senior lecturer in international law at Edinburgh and Glasgow Universities. He went onto hold the Eversheds Chair of Law at Derby and then a Chair in Law at Westminster University, before coming to Aberdeen.

He has been a Visiting Professor at the Universities of Paris I and II, The Autonomous University of Madrid, the University of Laval, the Free University of Berlin, and to the University of Tokyo. He has frequently been a Research Fellow, either Max Planck or Alexander von Humboldt at the Max Planck Institute of International Law and of European Legal History in Heidelberg and Frankfurt. He has held consultancies with an agricultural reform agency in Scotland, the Highlands and Islands Development Board, and with the European Parliament for a training course on development law for government lawyers in the English-speaking West Indies.

He has researched and published in the area of the theory and history of international law, and in the areas of international economic and development law. He has also a strong interest in different European approaches to international law.

His main publications include *The Decay of International Law*, *Was Ireland Conquered*, *Law and Development*, *Sir Gerald Fitzmaurice and the World Crisis*, *A Legal Adviser in the Foreign Office 1932-1945* (with Richard Smith) and *Philosophy of International Law*.