Development and Democracy from a Viewpoint of International Law

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Introduction

The main objectives of this International Symposium entitled "the role of law in development" seems to consider what was, and what should be, the role of law in the promotion of development and the realization of democracy in various countries (especially developing countries), in terms of straightening out their legal system. By contrast to this, in this report, the role of law in development and democracy will be considered in terms of international law. In the following, will be introduced successively "international law of development", "right to development" and "sustainable development", which all constitute an important contribution to contemporary international law concerning development and democracy.

1. International law of development / droit international du développement

History of international law of development

International Law of Development is a theory of international law which tries to reduce disparity of development between developed and developing countries, or to realize economic independance of developing countries. It is an approach of international law to the North-South problem. André Philip, French representative to the first UNCTAD in 1964 used for the first time this term and insisted that developed countries should cooperate with developing countries for the purpose of modernization of their economies. After that, mainly francophone scholars such as Michel Virally, Maurice Flory, Alain Pellet, Guy Feuer and Hervé Cassan made respectively great effort to systemize this new branch of international law.

The characteristics of this law can be summarized as follows. First, *objective -oriented law* (droit orienté) in the sens that this law intends to transform actual international economic system which is not in favor of developing countries, or to promote effective realization of each development program. Second, *composite law* (droit composite) in the sense that this law consists of international law, municipal law and transnational law. Third, *contested law* (droit contesté) because having a tendency to intervene in favor of developing countries, this law is susceptible of objection on the part of developed countries which persist in liberal model of economic relations.

Three principles support international law of development : Sovereingty, Equality and Solidarity. Economic aspect of sovereignty is emphasized for the purpose of establishing autonomous economy of developing countries (for example, permanet sovereignty for natural ressources and economic activities). As to equality, not only traditional equality (equal participation to economic decision-making for example), but especially substantive equality which gives differential favorable treatments to developing countries has a great importance.

And solidarity means cooperation of all countries but particularly of developed countries, indispensable to assure such sovereignty and equality for developing countries. We can easily note that the idea to establish law and institutions favorable to developing countries exists coherently throughout these principles.

As examples of implementation of international law of development, we can enumerate Part IV of GATT, Generalized System of Preference, Regime of deep sea-bed elaborated in the United Nations Convention of Law of the Sea. But in general, we cannot say that objectives of this law, such as reduction of North-South disparity or establishing autonomous economy of developing countries have been achieved. With the end of the Cold War, market economy or free trade tendency has been à la mode, and in consequence vivacity of this law has weakened. Not a little of norms of this law remained in fact lex ferenda, not becoming lex lata, positive rules of international law.

However, the signification of international law of development is not small. By breaking away formalistic and abstractive character of traditional international law, recognizing realities often contradictory to this formality and orienting protection of weaker countries, international law of development introduced certainly new approach to contemporary international law. The idea of this law is succeeded in the "special and differential treatment" of the WTO agreements, and "Common but differential responsibility" principle of the international law of environment.

Key concept of international law of development : substantive equality

We said that substantive equality which gives differentiated favorable treatments to developing countries has a great importance. This is a concept to ensure the equal result in the law-application level, by taking into consideration the inequality of development which exists between developed and developing countries and, consequently, by admitting a favorable treatment for developing countries.

The real movement requiring substantive equality began in 1960s, when developing countries born after decolonization sought their economic independence and reduction of North-South disparity. Traditional, formal equality principle ignores de facto difference between countries and treats them the same, which works more or less to protect the sovereignty of smaller and weaker countries. But this principle does not consider realization of equal result of law-application. Therefore, if this principle is applied directly to the relation between developed and developing countries, it will not at all assure equal result but paradoxically enlarge existing inequality between them. That is why developing countries require with perseverance this substantive equality in their relationship with developed countries.

According to the theory of international law of development, substantive equality realizes itself by differential treatment in favor of relatively weak countries which can be regarded as a kind of compensation of inequal development. First, countries are classified into two categories, developed/developing countries and rights and obligations in favor of developing countries as relatively weak ones are created and applied (for example non-reciprocity instead of reciprocity, preferencial treatment instead of most-favor-nation treatment). This is the « duality of norms ». Second, within the category of developing countries, various sub-catetgories are established (least developed country, land-locked country, island country, regime-changing country, for example), and rights and obligations are created and applied in favor of

relatively weak countries belonging to these sub-categories. This is the « plurality of norms ».

The approach of this « plurality of norms » are introduced in generalized system of preference, special and differencial principles in WTO agreements, common but differencial responsibility of the international law of environment, and is now an indispensable method to regulate the North-South legal relationship.

2. Right to development / droit au développement

Insufficiency of international law of development

We can point out two insufficiency of international law of development. First, it lacks consideration of linkage between national inequality and international inequality. Indeed, there is a linkage between democratization of international order and democratization of national regime. But the declaration of the New International Economic Order, which reflects profoundly the idea of international law of development, did not have a clear-cut mention about importance of democratization of internal order or equitable distribution of national ressources. The reason is probably that the Third-world political leaders, who require the new international economic order, avoided intentionally reference to internal power structure, because saying this problem would have destabilized their own foundation of powers. This situation can be justified in the level of international law by respect of state sovereignty and non-intervention in internal affairs of other state. So in international law of development, the power structure of developing countries is almost neglected or analysed very optimistically. Its world power image relies on simply dichotomous Center/Periphery model, It does not look at internal situation of periphery where exists also center/periphery and consequently domination/subordination phenomenon.

Second insufficiency concerns the function of « plurality of norms ». It attenuates various obligations of relatively weak parties on the one hand, and strengthens at the same time obligations of relatively strong parties in the sphere of financing or technical cooperations on the other hand. The attenuation of obligation would favor certainly developing countries in a short term, but it damages the objectives of each treaty such as protection of global environment or protection of worker's rights. So, from a view-point of objectives of treaties, the elimination of this type of « plurality of norms » (= attenuation of obligations of relatively weaker parties) through financing or technological cooperation is desirable. « Plurality of norms » is not all mighty. There is limits derived from the difference between individual as beneficiary and states as actor of implementation of treaties.

Characteristics of right to development

Right to development is an attempt to surmount these insufficiency. The term « development » in this right does not mean only economic aspect such as economic growth. It contains political, social, cultural aspects. Therefore it is a comprehensive concept and concerns the total process of realization of human potentiality. Right to development is a new right. It was adopted in resolution by General Assembly of the United Nations in 1986. This adoption signifies that request to this process was authorized as an objective of international community as a whole.

There are three characteristics of this right. First, right to development is an ensemble of human rights. It reconstitutes various human rights from the view-point of human development

and aims to assure effectively these human rights. Second, this right should be implemented not only by individual states but also through the cooperation of international community as a whole. So we can call this right « right of solidarity ». Third, in the center of this right, there exists participation of individuals and people to the decision-making. By this participation, all human rights are harmonized, development policies ameliorated and democratizations of internal/international social/economic/political regimes promoted.

However, this right to development is a right in formation. Actors and contents of this right and those of corresponding obligations are not yet sufficiently clear. Nevertheless, this right suggests a possibility to surmount the insufficiency of international law of development derived from its character of inter-state agreement. In this sense, this right is very important potential future.

3. Sustainable development / développement durable

The attempt to coordinate development and protection of environment leads to the concept of sustainable development. This concept is also very comprehensive one. Among components of this concept, there are : sustainable use and preservation of natural resources, equity inter/intra generations, common but differential responsibility, good governance, precautionary principle etc. These components are incorporated in various international documents such as Rio Declaration, Agenda 21, Convention of Biodiversity, Framework Convention of Climate Change etc. But about contents of these components and their legal characters, consents of countries are not yet precisely established. We can say that the concept of sustainable development became a legal principle, but its range and effectiveness are largely unknown. So we must await accumulation of international/internal practices in this regard. Nevertheless, the concept of sustainable development is used frequently in various international documents and adopted as criteria of judgment or opinion, in international dispute-settlement organizations (ICJ, WTO, ITLOS etc).

In another aspect, this concept is very ethical one, in the sense that : (1) it takes into consideration the quality of life of not only existing human being, but also human being in future. (2) on the one hand, it insists the necessity of development and good governance for poor people in South who are deprived of main means of subsistence ; (3) on the other hand, it demands the change of life-style for rich people of North not yet abandoning their wasteful way of life. Sustainable development is a comprehensive concept which synthesizes environmental protection, development and democracy. Contemporary international law is expected to enrich this important concept through collaboration with other disciplines, and make it gradually positive rules.

International lawyer is required to collaborate with other lawyers in the important work of straightening out the legal system in developing countries. In this work, I hope above-mentioned international aspects of development and democracy should be taken into consideration.

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