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Abstract
[extract] The problems that really impede the legislative process are mainly two. Firstly there is a lack of consensus on vital issues that ought to be regulated by legal rules. This is a reflection of the prevailing political and economic climate and of the absence of any acceptance of a common 'community interest' on these issues. The remedy for this obviously lies outside the law or legal techniques. But if this consensus is to emerge this will most likely be through the plenary assemblies, so that the existing legal machinery or techniques will certainly aid the development of such a consensus. Secondly, and most importantly, international society, even in areas where rules have been agreed, lacks machinery for making these rules truly effective.

Keywords
International Law, International Societies, Legislation, Process

THE LEGISLATIVE PROCESS IN INTERNATIONAL LAW: A GENERAL COMMENT

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While there has been much debate about what constitutes the true nature or character of 'Law' or what it really is or what can be its proper definition or, even, what it is not, there are no great philosophical conundrums about its function. Law has indeed many functions to perform in all modern human societies. But, its main function is nearly always directed predominantly towards the establishment and maintenance of an orderly regime of human relations. This it seeks to achieve in various ways, eg, first of all, by defining, establishing, creating, codifying, re-stating, reiterating, proclaiming and/or declaring the so-called 'legal' rules, and, secondly, by upholding or supporting those rules with the assistance of the organised community, ie the administrative and enforcement agencies at the disposal of the organised community, if and when the 'legal' rules are flouted or breached by any non-conforming, dissentient, disgruntled, maledictory, malevolent, or even unfairly wronged, members. But, then, from among the numerous significant functions referred to above, the apparatus of law has not only to establish or create new rules but also to coalesce diverse, disparate and differing rules, norms and standards existing within a given society from time to time, into a logically articulated and a juridically coherent system and in that process to discard or amend those rules which are found obsolete or illogical, whether with reference to the changed or changing circumstances or with reference to the developing patterns of newer needs, values, goals and objectives of the society. This is often characterised as the law-making or 'legislative' function. Clearly, this function can be performed either by a centralised legislative body or through several bodies, each entrusted with only a specific aspect or part of the total law-making or law-creating function. As a rule, the application or enforcement of 'legal' rules is a very different matter, which is quite often outside the province of functions of the legislative bodies. These differing functions can certainly be entrusted to only one organ but this is usually not done for a large number of practical reasons, in most, if not all, modern human societies. In short, the main point to be emphasised is the it is very much the overall character and needs of the society in question which determine whether the law-making and law-administering functions should be entrusted to one and the same institution or to different institutions or is to be tackled through several different institutions, entities, institutional processes and mechanisms.

The Structure of Contemporary 'International' Society

Unlike national societies, which are characteristically highly organised, compact and unified units, international society does not exist as a unitary society. It is well known that States in practice form 'societies' both at the global and regional levels for many different purposes. Thus, when compared with national societies, international society is more a conglomeration of several international societies, which are interrelated in the same manner as intersecting circles, with the result that in international society there is no single centre of power and no one source of legislative action.

But once the essential differences between the so-called 'international' society of States and the national society within a State are accepted, there is a distinct advantage in comparing the institutions and processes of the international society with those of the more stable and well organised State societies, because such a comparison serves to supply a standard by which the efficacy and even the utility of the developing techniques of the international society can be judged. Indeed, the two systems are best regarded as complementary rather than competitive. To view the two systems as complementary, rather than to view the national system as subordinate to the international system, or *vice versa*, is perhaps the only realistic approach presently possible. It is no part of this short comment to establish the existence of a supra-national legal order, even less of a legislature, where none exist, nor does it attempt to find a 'statute' or a 'quasi-statute' where none exists. What it seeks to do is to point out that there does exist a 'process' by means of which rules of international law are *consciously* created, that this process is properly termed a 'legislative' process[1] and that there are legal instruments which can rightly be called the 'legislative instruments' of contemporary international law.

The Declining Significance of State Sovereignty and the Growing Power of the Organised International Society/ Societies

Today it would be wrong to assume that States are 'sovereign' in the same old sense in which they could be said to have been a century ago. Thus, although in the old sense of 'arbitrary' or 'unrestrained' power of States, the term 'sovereignty' is an unfortunate term to use, it has not completely outlived its utility. In its ordinary sense the term refers to a reservoir of political power within a society. In this context, the term, if properly understood, refers to that competence or power which is independent of any superior control within a society or in relation to any territorially organised human activities and which is capable of expressing itself authoritatively so far as that society or organised human actions are concerned. In this sense the national State no doubt still enjoys an unrestricted power so far as 'domestic' questions are concerned (even that power is now being challenged both in State practice and in legal writings) *vis-a-vis* its subjects and other States. But so far as

1 See Singh, The existence of Legislation and a legislative process in International Law Malaya LR (1971) vol 13, pp 178-192.

international questions are concerned the national State has now only a limited sovereignty, ie to the extent that its general competence has not been delimited by the norms of international law or by its commitment to contribute effectively to organised international co-operation or by the decisions of the organs of international organisations. Further, to the extent that its general competence has been limited by the norms of international law or by its delegation of power to international organisations there now exists within the international sphere the power of the organised international community/communities over that of the national State.

The Relevance of Theories Concerning the Source/Basis of Obligation

Not least of the difficulties inherent in a description of the legislative process is the lack of a commonly-accepted conceptual framework for identifying those rules which have normative character. At what stage do the rules of international law acquire their legal or binding character? What makes them legal or binding? And why? What is the role of treaties or resolutions in creating particular or general norms of international law?

Clearly, answers to such questions are necessary for a proper appreciation of the role of international organisations, their organs, their procedures and techniques.

Here, in this connection, one must first distinguish between normative and contractual obligations. But, whether it is a normative or a contractual obligation, the answers to most of our international legal problems clearly lie either in the concept of 'common consent' or the 'consent' of the contracting States. In keeping with the learned writings on the subject, whether in the context of classical or traditional international law, it is only the theory of 'common consent' which provides a reasonably satisfactory explanation of the validity or legitimacy of normative obligations under international law. But, then, the concept of common consent must necessarily mean the consent of the organised community or the consent of an overwhelmingly large majority in the organised community. Thus, custom is binding because it represents the practice of an overwhelming majority of members of a given community. Similarly a treaty or a declaration, subscribed to by an overwhelmingly large majority of States, acquires a legislative character not after its rules grow into custom (when that happens legislative character of the treaty is clearly attributable to the inherent quality or the mystique of custom) but because of the community support behind it; clearly apart from the element of community support reflected in custom there is in fact no special quality which could be attached to custom.

The Existence of a Legislative Process in International Law

The very idea that the system of international law requires further additions to its rules or the amendment of its existing rules through conscious legislative efforts, in contra-distinction to the gradual growth

of custom or the elaboration of law *via* the judicial process, is of a recent origin. It is only since 1815 that rules of international law have been consciously created in the same sense in which legislation is enacted within national States. The reasons for this are obvious; transnational relationships were increasing and the international society was beginning to be organised on a truly *international* scale. Moreover, custom could no longer provide the rules necessary for governing the expanding international activities and, there being no international court in existence, there was no possibility of substantial additions to law *via* the judicial process. In other words, the evolution of a legislative process was inevitable. But once the technique of conscious law-making was learnt, it has not been forgotten. Rather, the technique has been constantly improved upon and today it compares well with the technique of law-making employed within the national legal systems. The belief in the existence of law-creating and law-amending process within the international legal order and similar to the legislative processes obtaining within the State societies is held not as a mere jural hypothesis, but as a matter of deduction from the actual practice of States—a belief which is shared by a majority of writers in international law. Even a cursory survey of the legislative activity of public international unions and the legislative processes of modern international organisations would readily reveal the enormously increasing sphere of modern international legislation over the years since 1815. Problems which impinge upon inter-State relationships tend, sooner or later, to be tackled by resolutions or law-making decisions or to be regulated by treaty-law. Even problems like the banning of nuclear tests or the control of the proliferation of nuclear arms, at one time defying solution, have been successfully regulated by treaties. A few decades ago who had ever heard of international space law or international environmental law or international wildlife law? In this context it is not very surprising that the material content of international law, chiefly because of this 'legislative process', has become far different from what it was at the beginning of the nineteenth century. It is certainly no longer a law governing the conduct of States only. Moreover, law-making decisions of the organs of the European Communities of ECSC, EEC and EURATOM even lay down 'supra-national' norms directly executable within the national sphere. It is also no longer a purely 'State-made' law. This tendency of international law to develop rules governing more than purely inter-State relations is amply reflected in the writings of those who have characterised modern international law as the 'common law of mankind' or even as 'transnational law'.

The Role of Consensus in the Legislative Process

The role of general or 'common' consent especially in the law-making processes of organised human communities has become such a fundamental trait of modern human societies that it cannot be either easily ignored or flippantly questioned in the foreseeable future. Thus, given sufficient consensus, all human societies, including the functional international societies, can legislate and codify. This has been amply demonstrated both by the action of the General Assembly of the United Nations in promoting the progressive development of international law and its

codification and the 'standard-setting functions' of the general international conferences and permanent assemblies of international organisations.

The Modern International Conference and the Parliamentary Assemblies

Whilst the General Assembly is perhaps unique in the breadth of its competence, it is by no means unique in its legislative function.

In modern times the growing importance of the 'permanent assembly' for legislative purposes is particularly striking. It provides a machinery through which international legislation can be initiated with comparative ease and facility (especially in comparison with the *ad hoc* conference method of the nineteenth century). In actual practice the assemblies of international organisations exercise enormous influence on the policies and legislation of national States. They can criticise the actions of States and even attack their domestic policies. But even more important than this are their functions of reminder, insistence and persuasion of a recalcitrant minority, and this becomes of particular relevance to their legislative role in inducing ratification, adoption and implementation by national legislation of treaties drafted and concluded under the auspices of their organisations. The techniques of the ILO have become a model in this respect. States may still, in general, have the power to accept or reject the decisions and recommendations of international assemblies, but they do not have the power to completely ignore international opinion which in many cases finds powerful expression through the resolutions of such international organs.

Compared with the early diplomatic gatherings or congresses of the early nineteenth century, both the *ad hoc* conferences and the permanent assemblies conduct their business in a true parliamentary spirit and fashion. At the celebrated and well known Congress of Westphalia (1648), where the negotiations were conducted simultaneously at two different places—30 miles apart from each other—there were no presiding officers and there were no rules of procedure, no committees, no reports, no votes. But, today, the situation is different. Both the *ad hoc* conferences and the international assemblies are as a rule well organised; moreover, their contribution in sponsoring the conclusion and adoption of numerous legislative conventions has been almost spectacular.

Leaving aside their final acceptance as a separate issue, these conventions have generally been formulated and adopted on the basis of majority votes. And in this particular context, it is significant to note that 'majority rule' has become the *normal* voting rule in the modern international conferences and assemblies, which, when compared with the nineteenth century practice, further shows the declining importance of the role of 'consent' as opposed to 'common consent' in the elaboration of the rules of international law. No doubt States cannot still be forced to accept a convention or treaty against their will, but certainly considerable international pressure is exerted against those States who for no strong and valid reason refuse to follow the action of the majority. Their continued refusal to abide by the rules laid down and followed by a majority of States tends to become less and less feasible in practice.

The Formative Process of International Legislation

The main asset of the contemporary assembly is not simply that it has this power of bringing world opinion to bear upon States so as to bring their conduct into conformity with the pattern or rules laid down in resolutions, declarations or conventions. A considerable part of its asset lies in the elaborate procedure whereby a project is initiated, drafted, commented upon, and, finally, embodied in the appropriate vehicle of resolution, declaration or convention. The mechanics of the operations through which a project is actually drafted by the International Law Commission or other international organs before being adopted by a conference of plenipotentiaries are matters which ought not to be brushed aside or ignored in any sensible discussion of the legislative process (or legislative instruments) in international law. These are designed to lead to eventual codification or legislation of an 'international character', a character bearing the imprint of the views of many different States, non-governmental organisations and, in some cases, even individuals which was never possible in the nineteenth century when a 'host' State could convene a conference, submit its own draft, and limit the number of participants. Clearly the formative process is no longer confined to States. Compared with the practice of the nineteenth century, individuals, as members of the International Law Commission, as members of ILO Conference (representing the employers and the employees) or again, as members of the Commission of the European Communities, are now being formally and actively associated with the actual formulation of law. Further, the most important non-governmental organisations have been brought into consultative relationship with the international organisations. The NGOs, apart from emphasising the need for some regulation and giving technical help in the preparation and drafting of international conventions, are sometimes also effective in persuading national governments to ratify and apply the conventions and treaties adopted by the latter at international conferences.

The Treaty as a Legislative Instrument

The 'treaty' continues to provide the most important form of bringing new legislative provisions into international law. However, the treaty is no longer the *only* form in which international legislation may be enacted; there are also resolutions, model rules, unilateral declarations and law-making decisions of international organisations which lead to the creation of rules of international law. The last of the aforementioned instruments are in fact analogous to 'legislative acts' of municipal legal systems or perhaps to the 'delegated legislation' of municipal law. True enough, most of these cannot be directly applied by the courts within the municipal sphere, but they are 'legislative' in the sense that they lead to a planned growth and conscious development of the law within the international society.

The treaty, regarded as a contractual instrument and no more, could scarcely develop into a truly legislative instrument. However, this contractual concept of the treaty was not entirely accurate, even in the nineteenth century, and in the twentieth century it is clearly impossible to maintain it for many categories of treaties, especially in relation to

the general law-making treaties, treaties creating special 'international' or 'transnational' regimes and treaties producing effects *erga omnes*. However, it must be pointed out that generally, when compared with municipal statutes, treaties suffer from certain limitations; such limitations can be traced in the requirement of 'ratification' or the fact that treaties even when ratified, are not automatically applied within the municipal sphere in many States. It is only in a relatively few States that ratified treaties are given the same status as statutes. Therefore, the process of interaction between the international and the national legal orders is still somewhat defective. The European Communities have certainly gone farthest in remedying these defects, but the ultimate remedy must lie in allocating to the rules of international law—at least to treaty rules—a superior place in the whole hierarchy of legal norms.

The 'Resolutions' of International Conferences and the Organs of International Organisations (especially the representative assemblies and councils) as Quasi-Legislative Instruments of Contemporary International Law

As stated above, the treaty is clearly no longer the only legislative instrument at the disposal of the organised international community; a number of legal developments, especially since the Hague Peace Conferences of 1899 and 1907, have led to the emergence of a new kind of legal instrument in international law which is quite often referred to, for reasons of convenience, as the 'resolution'. There are, of course, considerable similarities between the 'treaty' and the 'resolution'. First of all the two terms are generic terms, since they both cover instruments carrying differing designations. Secondly, they are both terms which are used essentially for drawing attention to certain processes which lead to the adoption of various legal instruments of international law. And, thirdly, they are terms used mainly for designating, identifying, distinguishing and categorising certain legal acts or instruments of international law. Nonetheless, there are significant differences between the two. For instance, while the treaty represents a fully binding legal instrument the resolution, depending on the circumstances and the context in which it was adopted and the degree of support behind it, may or may not be a fully binding legal instrument. Secondly, while the treaty is an ancient legal instrument, the 'resolution' is, even in comparison with the multilateral treaty, a new legal instrument of modern international law. Thirdly, in comparison with the complex and cumbersome processes of treaty-making and treaty-ratification, because of the numerous formalities involved, formulation and adoption of 'resolutions' represents a much simpler and expeditious technique of consensus-gathering, consensus-farming and decision-making in the contemporary international legal system.

Mainly because the term 'resolution' is used more as a general 'label' for designating the end-products of certain legal processes, rather than as a precise description of a whole group of binding legal acts, its widespread use in recent years has created a serious controversy in modern international law. Thus, it is often said that since the 'resolution',

unlike the 'treaty', is essentially not a binding legal instrument it cannot be seen or described as being capable of constituting a direct source or as a valid legal mode for the development of international law. It is very much the emphasis on the point that the resolution is *basically* or *essentially* not a binding legal instrument and as such incapable of developing international law or new rules of international law which is largely responsible for generating a great deal of confusion about the precise or potential role of resolutions in modern international law.

Even though the resolution, unlike the treaty, does not always represent a fully binding instrument, we must bear in mind, first of all, that not *all* resolutions are, in general, or always, in the nature of non-binding instruments. Secondly that, like treaties, resolutions perform a wide variety of functions in the organised international system(s) and for that reason are adopted for achieving widely differing goals. And, thirdly, that the binding legal effects of a particular legal instrument do not by themselves alone have the capacity to endow it with any worthwhile law-making effects. A binding treaty between two States, a buyer and a supplier, for the supply of X million tons of iron ore or some other commodity, cannot in any sense, despite the bindingness of the instrument, have any ability or capacity to establish any normative standard or rules for the rest of the organised community of States. But, it is entirely possible that a non-binding resolution or recommendation, despite its ostensible non-bindingness, may, nonethelesss, quite successfully initiate, depending on the significance of the provisions embodied therein and the support behind them, the development of a new law-making or law-creating process or may even establish a series of entirely new norms in international law. The Declaration of Paris of 1856 was not a binding treaty but merely a resolution of the Conference of Paris of that year. Yet, it succeeded in establishing several rules of international law, including the new rule against 'privateering' and despite the opposition from the United States of America. Supposing if there is a provision to the effect that 'states should use all possible legal means at their disposal to recover and return from its territory all stolen icons of Lord Buddha, surreptitiously removed from a national museum of a particular country during 1986' which is embodied in a resolution of an international conference. Does it mean that this standard of desirable conduct on the part of States is not likely to be seen or respected as a normative standard simply because it is embodied in a non-binding instrument instead of a fully binding treaty? And, despite the fact that the resolution in question was openly discussed, voted upon and formally adopted in a meeting of the representatives of the so-called sovereign States? Or, again, supposing if the provision in question calls upon nation States, ie, organised human communities, to prevent certain dealers or people from carrying an on undesirable trade in any nearly-extinct species of fauna or flora embodied in a non-binding instrument? Will it acquire the required 'legal' character only if it is embodied in a binding treaty but not if it is embodied in a non-binding instrument? What will be the role of the expressed concerns of the organised community at large? That is, the fact that the organised international community wishes to see it established, as soon as possible, as a normative standard of the organised international system? Where the intention of the organised international community is clearly directed

towards the establishment of a viable and operational legal regime (eg, the establishment and continuation of UNICEF as an operational international institution under General Assembly resolutions) or the attribution of a clear-cut legislative character to its resolutions or declarations (especially those which have also been widely accepted as law-making instruments, viz the early UN resolutions on space law or the UN Declaration on the 'Common Heritage of Mankind') it would be highly artificial if we were to deny their inherently legislative character or to attribute the legal effects which these resolutions may have produced in actual state practice to the highly dubious concept of instant customary international law.

The ability of resolutions, including non-binding resolutions, to develop rules of international law, even new rules of international law, should not be underestimated simply because their legal effects cannot be easily rationalised or properly explained within the established juridical framework of traditional international law. Their increasing use, in recent years, especially by the international assemblies and other organs of international organisations is a very strong indication of their growing legal significance in the organised international system(s). More so, since they are being increasingly used not only for the purposes of reiterating, restating and redefining normative standards and principles embodied in the constituent instruments of international organisations but also for the purpose of creating new rules of international law.

The General Limitations of the Legislative Process in International Law

This is not to suggest that, equipped with the machinery referred to above, nothing prevents a rapid growth and development of international law by the United Nations and other international organisations, whether embodied with ostensible or not so clear-cut law-making functions. No system of law can afford to become divorced from general, accepted practice; and no development or codification can succeed unless there is sufficient evidence of a general consensus to permit agreement to such development or codification.

Yet, as referred to earlier, given sufficient consensus, the international system can legislate and codify. Moreover, today, the international assemblies tend to use 'resolutions' so as to create legal obligations, perhaps not immediately but in a period of time far less than needed to establish custom. Traditionally, only the treaty could bring about such an effect. Seen in this context, the point that international law is on the way to becoming the 'common law of mankind' has no doubt considerable merit, but there are still many problems to be solved before international law can really acquire the character of 'world law' or the 'law of mankind'.

The most important problem facing the international community at present is not the lack of a sovereign legislature or a legislative machinery; on the whole the legislative process in international law, despite the absence of a sovereign international parliament, is highly effective and there is no dearth of new rules of law. In a sense too much new

international law is being developed by the international assemblies and conferences.

The problems that really impede the legislative process are mainly two. Firstly there is a lack of consensus on vital issues that ought to be regulated by legal rules. This is a reflection of the prevailing political and economic climate and of the absence of any acceptance of a common 'community interest' on these issues. The remedy for this obviously lies outside the law or legal techniques. But if this consensus is to emerge this will most likely be through the plenary assemblies, so that the existing legal machinery or techniques will certainly aid the development of such a consensus. Secondly, and most importantly, international society, even in areas where rules have been agreed, lacks machinery for making these rules truly effective.

The problem of organising an effective and a proper international executive lies beyond the scope of the present comment. But whatever arrangements are made in future, it is certain that the executive authority cannot be made completely independent of the general authority of the legislative assemblies of the international community.