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A critical appraisal of the doctrine of obligation in international law

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In terms of politics, obligations are requirements which must be fulfilled and these are generally in the form of legal obligations, which incur a penalty for lack of fulfillment, although certain people are obliged to carry out certain actions for other reasons which may be based on traditional or social idiosyncrasies. This paper is an attempt at x-
raying the major schools of thought as well as the basis of obligation in international law.

Key words: Obligations, voluntarism, resolutions, regulations, rules of procedure.

INTRODUCTION

There is a fundamental difference between the basis of obligation in state or municipal law and the basis of obligation in international law. These different bases derive essentially from the peculiarities of municipal law and international law. Municipal law, on one hand, is an expression of the will of the state; and state law is the product of superior commanding will translating the relationship of superior to an inferior. Municipal law, thus, is primarily a law of subordination emanating from a sovereign state and addressed to subjects who are under an obligation to obey under the pain of sanction.

In international law, on the other hand, there is the absence of a sovereign law-making authority, absence of a sovereign executive authority enforcing international law and absence of a supreme tribunal with compulsory and unlimited jurisdiction. It is bereft of an international sovereign or super-state which makes the rules and obliges subject states under sanction to comply. In the words of Professor Charles Rousseau (1970, 27).

This difference in legal techniques is generally expressed by saying that international law is a law of co-ordination. What this means is that the state national society is characterized by the presence of a power, of an element of authority endowed with coercive force, whereas in the international society there does not exist, in fact, at the moment any authority which is superior to states; in consequence, new rules cannot be promulgated, pending questions cannot be settled or submitted to adjudication except with the consent of each (state), and it is precisely this necessity for voluntary assent that characterizes the diplomatic method.

Contemporary international system is predominantly characterized by numerous actors and inter-play between and amongst international organizations, all in pursuit of one national or international interest or the other. Pursuant to these interests, international organizations initiate and adopt some principles or measures which carry along with them, legal rights and obligations for their members and, at times, for non-members. The normative or “quasi-legislative” activities of these organizations which constitute a source of international law and impose obligation include; internal regulations and rules of procedure, resolutions of international organizations and member States, resolutions of international organization and non-member States.

BASIS OF OBLIGATION IN INTERNATIONAL LAW

The two dominant schools of thought on obligation in international law are the Voluntarism, also known as Positivism or Consensualism, and Objectivism, of which variant is *Jus Naturalism*.

Legal voluntarism

This school is traceable to the works of Jean-Jacques Rousseau who in his book, the social contract propounded the thesis that law is a product of the sovereign, *volonte generale*, which in no way derives from or is legitimated by the will of any arbitrary ruler.

Accordingly, therefore, legal voluntarism or positivism is grounded on the fundamental assumption that rules of law are products of the human will; they exist for this will and also by this will. Jellinek's theory of self-limitation and Triepel's theory of the common will (*vereinbarung*) are the two dominant theories propounded by Legal Voluntarism.

According to Jellinek theory since no state, in its attribute or sovereignty, is subject to any other state, it is the sovereign manifestation of state will which creates law. This, it does through the faculty of self-determination whereby the state, not only creates law for itself both in internal and external affairs, and the faculty of self-limitation whereby the state subjects itself, when it thinks it expedient to its private law, to recognize the personality of foreign states, and to bind its own will by entering into the international system. By this self-limitation in its relations with other states, the state creates international law. On this view, therefore international law is not something imposed on a state from the outside; it is merely the sum of the system of "external public law." This self-limitation is in conformity with its proper interest since, in freely submitting to international law, it merely responds to the needs of that international community of which it is also a member. Briery (1958, 14) pointed out the fallacy of self-limitation as a juridical basis of obligation, as follows.

However we may choose to define law, an essential part of the function of law must be to limit the wills of those to whom its precepts are addressed, from the wills that it limits. A self-imposed limitation is no true limitation, but a contradiction in terms; and to this objection it is no answer to point out that an individual may be said to limit his own will when he voluntarily observes a rule of the moral law, and to argue from that, that a state observing international law does not create a moral obligation for himself by the act of willing to conform to the moral rule; rather he wills to conform, because he already believes in the existence of an objectively binding rule.

Professor Triepel attempts to improve on Jellinek's theory; he admits that the will that can impose on and bind sovereign states must be "a superior will". Since the will of no single state imposes, it has to be the common will of states. This common will comes into existence through what Triepel calls a *vereinbarung* which designates "a union of wills" in which the wills of the participants seek the same common objective in unison in contradistinction to a "contract" where the contracting wills pursue different objectives. International law is borne out of the fusion of the plurality of state wills into the common will. In international law, this *vereinbarung* is realized through treaties-whether concluded by a large or few numbers of states-and custom. Thus, *vereinbarung* can be express as in treaties or tacit as in custom.

The Italian jurist rejected the view that international law rests on an external command and while describing international law as "a system of promises between

coordinated and juridically equal subjects", ascribed the juridical basis of the binding common will of states to what he called the principle of *pacta sunt servanda*; that agreements between states are to be respected. In the same vein, another Italian jurist, posited that the binding force of international law can be traced back to one supreme, fundamental principle or norm; *pacta sunt servanda*, an absolute postulate of the international legal system imposing on, and independent of the will of states, that is, it is an *a priori* assumption of the international legal system which itself cannot be proved juridically.

A major deficiency which Legal Voluntarism of the *vereinbarung* variant shares with that of self-limitation has been identified by critics: it is an inadmissible contradiction to ascribe to law the essential function of limiting the will of its subjects while at the same time claiming that this law derives its obligatory force from the will it seeks to limit. This implies that this rule of law is at the sufferance of states. Professor Rousseau dismissed this theory on grounds that the collective will on which *vereinbarung* is based are no more than the result of a momentary and accidental agreement of individual state wills which can easily collapse or be modified. By the withdrawal of any of the state wills.

Legal objectivism

This theory contends that the origin of the binding force of international law can be found outside the human will, and places it either in a fundamental norm from where all rules emanate, or in social necessities. Kelsen, leader of the Normativist theory of the Vienna school, explained the binding force of international law on the basis of what he called the "law of normativity". Drawing from his idea of law as a hierarchy of normative relations, Kelsen ascribed to the principle of *pacta sunt servanda*, the role of fundamental norm or the basic norm which imparts validity to all subordinate norms which form the legal system. In this system which is hierarchically ordered, each norm derives the binding force from a superior norm culminating in a legal pyramid.

In his own conception, Briery (1958, 65), a Neo-Naturalist, contended that "a mere juridical explanation" cannot be sufficient solution to the problem of the obligation to obey the law.

Contending that "the answer must be sought outside the law", Briery declared that the obligation to obey international law possesses a moral basis.

But too often we have been tempted to forget that the connexion between law and morals is really much more fundamental than their distinction, and that the ultimate basis of the obligation to obey the law cannot be anything but moral. Just as the problem of the obligatory character of law in general, so this, in turn, is only one aspect of the a still wider problem, the problem of obligation in general,

and this is a problem of ethics. Brierly (1963, 56) focused his search for the basis of international legal obligation on human rationality and social necessity, declaring that:

The ultimate explanation of the binding force of all law is that man, whether he is a single individual, or whether he is associated with other men in a state, is constrained in so far as he is a reasonable being, to believe that order, and not chaos, is the governing principle of the world in which he has to live.

The ultimate basis of international obligation, for sociological jurists, is the society itself. They contend that social necessities provide not only the origin, but also the basis and the validating criterion of law. One of these theorists, Professor Leon Duguit, argued, for instance; that all laws, including international law, are products of social solidarity; that the transformation of a social norm into a juridical norm occurs when the bulk of the members of the society accepts as legitimate its regular enforcement by those in power; that a rule of law obtains if the conscience of the bulk of the people desires and demands this sanction as necessary for the maintenance of social solidarity.

According to Duguit, therefore, "objective law" consists of the rules of law that in the opinion of the majority should have an organized sanction. Thus, juridical norms are a spontaneous product of mass conscience. Duguit identifies law as deriving directly from social necessities which he described as "objective law" because it is binding on all and is formed independently of the will of states; international law derives from the inter-social relationships which transcend the will of states.

The French jurist, Georges Scelle (1932, 6), while adopting Duguit's thesis, hotly contested that the respect for social solidarity is, not only the basis of law, but is also a biological necessity since no one can compromise it without harming societal life and his own life. On this basis, Scelle defined law, whether national or international, as "a social imperative translating a necessity born out of natural solidarity".

The bottom-line, however, is that law cannot be dissociated from its political, economic and social context, whether in its origin, content or sanction. This has been appropriately decided by the International Court of Justice (1980, 76), thus:

A rule of international law, customary or conventional, does not apply in vacuo; it applies in relation to facts and in the context of a body of legal rules of which it forms only a part.

Internal regulations and rules of procedure

These consist of certain decisions adopted by relevant organs of the organizations for the proper administration

of the organization and execution of its responsibilities. Every international organization is at liberty to formulate and adopt, either partially or in full, certain internal rules of procedure and law which may not be part of or enshrined in its constitutive Charter, provided these procedures are deemed indispensable for the expedient administration of the organization.

Examples of such rules relate to voting procedures, quorum requirement, conduct of debates, grant of observer status to an organization, state or entity, the accreditation of state representatives.

Resolutions of international organizations and member states

It is not unusual for international organizations to, at times, adopt resolutions which are of a quasi-legislative nature and which create rights and obligations for member states.

Taking a case-study, the United Nations is neither a "super state" nor an international legislator, implying that its resolutions do not, therefore, constitute a source of international law capable of creating rights and obligations. The General Assembly is generally not authorized to make binding decisions except in a few cases; such as the admission of new members; Article 4; suspension of the rights and privileges of member; Article 6; or budgetary questions; Article 17. That these resolutions are exhortatory is insufficient to quickly conclude that they are completely bereft of legal effect; for the legal effect of a resolution can be fully ascertained after a detailed analysis of all relevant circumstances: the nature of the resolution, the subject matter, the voting patterns, the attitude of states, and so on.

This procedure of analysis was applied by the International Court of Justice in interpreting the obligatory nature of the Security Council Resolution 276 of 1970 in the Advisory Opinion on Namibia, which affirmed the General Assembly Resolution 2144 (XXI) on the matter. The court examined the competence of the Security Council to adopt such a resolution, that is, termination of the mandate, and held that the Security Council had acted "in the interest of what it deemed to be its primary responsibility, the maintenance of peace and security"; Paragraph 109. Also, appraising the legal basis of this action, the court held that it was on the basis of Article 24 of the Charter which vests in the Security Council the necessary authority to take such action in the discharge of its responsibilities. In interpreting the weight of the resolution, the International Court of Justice (1971, 114) analyzed thus:

It has been contended that the relevant security council resolutions are couched in exhortatory rather than mandatory language and that, therefore, they do not purport to impose any legal duty on any state or to affect

legally any right of any state. The language of a resolution of the security council should be carefully analyzed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussion leading to it, the Charter provisions involved and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.

Consequent upon this analysis, the court held that the resolution in question adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24 and 25 are "consequently binding on all states-members of the United Nations which are thus under obligation to accept and carry them out. The court further declared:

When the security council adopts a decision under Article 25 in accordance with the Charter, it is for member states to comply with that decision, including those members of the security council which voted against it, and those members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter.

Although member states are not legally bound by international organizational resolutions, and may as such act in direct breach of them, the general tendency, however, is that state members prefer to comply accordingly or at least appear to do so. This position has been rationalized by Claude Jr. (1966, 373) on grounds that "collective approbation is an important asset and collective disapprobation a significant liability in international relations".

The specialized agencies of the United Nations, in the discharge of their responsibilities within their respective specialized fields of competence, make regulations which constitute a source of obligations for member states and, even sometimes, for non-member states. These Specialized agencies are often vested with a quantum of quasi-legislative competence which enables them arrive at decisions, adopt conventions, make recommendations as well as formulate regulations and international standards and principles which command obligations on member states.

In another case of the European economic community (EEC), the appropriate organs of the Community, viz. The Council, The Commission and the Court of Justice, are vested with powers to regulate the activities of the organization by adopting unilateral juristic acts which impose direct legal obligations on the member states and sometimes directly on their nationals, and these acts are variously classified; regulations, directives, decisions and recommendations. And, these regulations and others

constitute a significant body of laws which as referred to, in contemporary international law, as "Community Law", and which have become an integral source of obligation for the member states.

Resolutions of international organizations and non-member states

Although the United Nations Charter is a treaty which, in principle binds only member states, there is a provision under its Article 2 (6) to the effect that:

The organization shall ensure that states which are not members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of peace and security.

The "Reparations Case" which is illustrative of this position quickly comes to mind; the issue in contention was whether the Organization had the capacity of bringing a claim against the defendant state for purposes of recovering reparation in respect of the damage or whether, on the contrary, the state, not being a member, was justified in raising the objection that the Organization lacked the capacity to bring an international claim.

Describing the United Nations as "at present the supreme type of international organization" possessing "a large measure of international personality and the capacity to operate upon an international plane", the International Court of Justice (1949) held that:

Fifty states representing the vast majority of the members of the international community had the power, in conformity with international law, to bring into being an entity possessing objective international personality and not merely personality recognized by them alone, together with capacity to bring international claims.

Conclusion

In summary, the preponderant view is that the ultimate source of the obligation of international law situates outside the confines of the consent of sovereign states. And, as Lauterpacht (1970, 92) rightly put it:

That ultimate source is the assumption that the impersonal will of the international community-as formulated by treaties voluntarily concluded by its members, by custom created by their implied consent and by general principles of law expressive of the fact that the international legal community is a community under law- must be obeyed.

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