NATURE OF INTERNATIONAL LAW: WHETHER INTERNATIONAL LAW IS A REAL LAW OR NOT?

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ABSTRACT

One of the endless debates between the jurists of the international law is regarding the nature of international law i.e. it can be called a 'real' law or not? Thus, there exists a group of scholars who are of the view that international law is not a real law while another group of scholars on the other hand also argue that international law is real law. This article explores the concept of 'law' with its basic characteristics and then analyses the arguments on this subject by two popular schools of thoughts in international law i.e. Realism and Liberalism. Taking into consideration the reasoning of both the schools, this article then concludes with the author's opinion that international law cannot be considered as real law as it lacks the coercive power of a domestic law.

INTRODUCTION

One of the major arguments which always revolve around in the international domain and has led to endless debates among various proficient scholars and jurists of the international law is regarding the nature of international law .i.e. can it be termed or regarded as real law. Structuring the arguments in their general sense, they can be tracked back to the two important schools of thought who have been engaged in these arguments, these are liberal and realist school. Now both the schools have accordingly advanced their line of reasoning in the form of various arguments so as to back their stand with regards to this controversial topic. This paper will accordingly analyse the arguments of both the schools as well as various grounds on which they base such arguments and will lead to a conclusion in the form of author's own opinion.

Now to find an answer to the question whether international law is really a law or not? It will be a necessary step to take up most heated debatable topic in the legal history i.e. what is law? We will have to look into some basic concepts of what forms or constitutes a law which will further help in developing an understanding of the nature of international law so that an effective conclusion can be drawn from the catena of arguments already existing with regard to the controversy.

WHAT IS LAW?

One of the major reasons of this difficulty in being able to describe the true and accurate nature of international law is due to the controversial nature of the concept of law itself. Coming up with an exact, accurate and definite definition of 'law' has been a sparking controversy right since the time of advent of common law. Many scholars starting from ancient times to the modern times have defined 'law' in their different ways which has led to an impossibility of coming up with an universally accepted definition of the 'Law' or what can be considered as its crucial elements.

Starting from the school of legal positivism, which relies on social facts and equates law with positive norms. John Austin, an English jurist born in 1790 in his book "*Lectures on Jurisprudence"* or "*Philosophy of Positive Law*, defined law as "*A rule laid down for the*

guidance of an intelligent being by an intelligent being having power over him[1]".From this above definition it can be deduced that according to Austin, law is made up of various rules and principles that are derived and enforced by a sovereign and recognized authority. Another famous scholar from this school was Professor H.L.A Hart, an oxford professor of jurisprudence, who in his famous book "The Concept of Law" described law as "*a system of rules, a union of primary and secondary rules"*[2].According to Hart such rules are made to regulate the behaviour of the society or community in general This explanation of the concept of law indicates their function of regulating the behaviour of the individuals in the society so as to make them aware about various rights and actions which arise from the consequences of acting contrary to the established law.

Next we come to the school of natural law which focuses on the reasonability aspect of the law. It provides for just nature of the law. One of the most influential and well renowned jurists from this school was St Thomas Aquinas. An Italian philosopher born in 1224 defined the concept in his work "*Summa Theologiae* (Summary of Theology)", Question 90, Art. 4 as "*Nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated"*[3].Law with regards to this definition is seen as something prescribed for the common good of the society by a competent authority. It indicates the presence of a sovereign authority that formulates such laws and enforces it on the society.

Another aspect of the concept was highlighted by Max Weber .German sociologist born in 1954 defined law as "*Law…exist if it is externally guaranteed by the probability of coercion (physical or psychological) to bring about conformity or avenge violation, and is applied by a staff of people holding themselves specially ready for that purpose"*[4].Thus in totality law can be understood as recognised legitimate standards of behaviour that bind a community together. It contains various rules and principles that are to be obeyed by individuals as a member of the community which accordingly regulates the behaviour of such individual so as to achieve the goal of common good in the society which has the ability of binding the community together

[1] Austin J. Lectures on Jurisprudence: Or, the Philosophy of Positive Law. J. Murray. 1875;5
[2] Hart HLA. The concept of law. OUP Oxford; 2012
[3] Thomas Aquinas ST. Summa theological: Part I-II. Trans. Fathers of the English Dominican Province. 5 vols. Westminster: Christian Classics. 1948;90.
[4] Six Form Law. What is law? 2008. Accessed 21 May 2017. Available:https://sixthformlaw.info/01_modules/other_material/law_and_morality/0_w hat_is_law.html.

so as for effective and efficient working of the society. These rules consist of various characteristics like **universal application** i.e. applies to all individuals within a particular framework without any discrimination of any kind[5], **coercive** i.e. possesses a coercive force to punish its violators[6] and **permissive** i.e. allows individuals to establish their own relationships within the prescribed framework of law.[7].With this we come to the concept and subject matter of international law

WHAT IS INTERNATIONAL LAW?

International law taking into consideration its initial stages and subject matter as a whole can be referred to as the law of nations. It can be termed as body of rules and principles that regulate the relationships among various civilised states in their dealing with one another. This above definition comes under the domain of traditional definitions of the concept and is narrow with respect to its scope[8]Reason for same is that it is highly uncertain and ambiguous to derive the 'sovereignty' of the states and to determine whether a state is civilised or not. Another issue is that it does not take into consideration the status of international organisations and non-state entities\

With the advent of international organisations in post-world war scenario and their rising as well as significant role in international affairs as well as adjudication machinery, scope of international law has widened enough to inculcate NGOs and individual persons as well. Thus modern definition of international law is "*body of rules and principles that governs the relations among States, International Governmental Organizations (IGO's), NGO's as well as individual persons in their relations among each other*"[9].

Some of the basic features of international law, firstly the subject matter of the law where primary subjects are sovereign states and secondary subjects being the IGOs, NGOs and

[5] Makodia VV. A pragmatic analysis of legalese. In Language Forum. Bahri Publications. 2009;35(1):155-161
[6] Lamond G. The coerciveness of law. Oxford Journal of Legal Studies. 2000; 20(1),39-62.
[7] Fox EM. Antitrust regulation across national borders: The united states boeing versus the european union of airbus. Brookings Review. 1998;16(1),30-33.
[8] EVILLE CM. The commodity-form theory of international law: An introduction. Leiden Journal of International Law. 2004;17,271-302.
[9] Egede E, Sutch P. The politics of international law and international justice. Edinburgh University Press; 2013

individual persons. Second distinguishing feature is with respect to its source as there is no single or official legal source of international law as compared to domestic law. Third is the absence of strong and effective enforcement machinery as there is no international regulation which overlooks the compliance of the laws and accordingly holds the individual or state liable for breach of international law as compared to domestic law which has strong coercive nature. Now that we have looked into the nature of the basic concept of law as well as have a basic understanding of what is international law. We will attempt to draw a conclusion regarding the nature of international law, taking into consideration the arguments made by two most influential schools of thought i.e. Realists and Liberals.

REALISTS/REALISM

Realist school of thought considers law as a result of social facts and accordingly does not consider international law a 'law'. One of the major reasoning from this school is that only domestic law is the real law and international law on the other hand cannot be treated as a real law. Some of the major arguments extended by this school in favour of their reasoning are-

- **National interest**

  All the states who are subject to international law serve their national interest as well. So whenever there is any dispute between national law and international law, states will choose their own national law over the international law without any hesitation. Thus states will only follow international law if it coincides with or supplements to their national interests. Realists are of the opinion that a 'real' law should supersede above all interests and ensure compliance from its subjects without any consideration of their interests, but since states only tend to incline towards their national interests so international law does not come within the criteria of real law.

- **Lacks coercive power**

  One of the major line of argument supporting the assertion is the lack of coercive power in the international law. Law in its pure sense reflects the will of the society as well as its morals and whoever does not comply with such norms has to be held liable in any form whatsoever. But when it comes to international law there is no liability which

follows from infringing such laws and there is no motivation for the state to not break it. This lack of consequences of infringement of law is the major reason why international law fails to be termed as a real law.

- **Quest of power**

  One of the major goals for every country is to increase their power in the international domain. Every country wants to make itself powerful rather than giving recognition to any form of international rules. So whenever there is a dispute, state will always choose the alternative which is in favour of their own power and position. Unless such rules do not support a state's quest of power no heed is paid to any form of international rules or principles. Since states treat international law as a mere tool to manipulate or increase their position, it fails to fall under the criteria of a so called 'real' law.

- **Lack of legislature**

  Realists argue that a 'real' law is always enacted by a lawful authority or an institution and functions as per the framework provided by that particular authority. When it comes to domestic laws, each state has a established legislature or a parliament which enacts laws for it and provides and efficient framework for its functioning. While on the other hand in the international domain there is no such institution powerful enough to draft a set of codes which can be extended or applied uniformly on all stated. Such absence of a legislative institution creates a vacuum which does not allow any rule or principle to function effectively and thus lacks the basic framework required for the functioning of a real law in the society

- **School of Liberalism/Liberals**

  According to this school of thought which rejects the role of power politics s the only possible outcome of international relations and advocates mutual relations in the international domain , international law is a real law and they have advanced various arguments in favour of their assertions.

- **Some Degree of Recognition**

  Various states have a common understanding of existence of some kind of rules or principles which govern the relations among them, various international organisations and non-state individuals. So there is certain degree of obedience given by the states to these rules. Even though there have been various instances of breach of international

law by many states, but still it is respected and acknowledged by powerful states. States always direct their governance with respect to the international conventions or treaties and follow their obligations as a consequence of ratifying them. With respect to framing guidelines and respecting human rights in their respective territories, states have ratified Universal Declaration of Human Rights on 10 December 1948.There are various conventions which are followed by state as an integrated part of their legislation system such as statutes related to Intellectual property in lieu of state's obedience towards the Berne Convention for the Protection of Literary and Artistic Works (1886).Even the powerful first world countries don't go to war without notifying the UN Security Council. One of the classic examples for this will be in 2003 when USA wanted to invade Iraq it went to Security Council first to procure the resolution to permit the invasion, which clearly states even the big and powerful sovereigns recognise the existence of international law.

- **Punishment as a consequence**

  Liberals contradict realist's argument of lack of punishment on breaching an international law by stating that there is an element of punishment which comes as consequences of acting contrary to the international law. Even though there have been instances where parties have gotten away with such act of breach, but similar instances can also be found in the cases of domestic law. According to Roger Fisher, even in the domestic setting, not all the laws are enforceable as there are powerful individuals who breach the law in one way or the other and still have their way around the law without being punished[10] In most of cases people committing international crimes are tried by international courts and in case of any obligation breached by any country, financial sanctions for the same can be imposed by various international organisations.

- **Existence of parliamentary body of law**

  Liberals state that various international bodies such as UN Security Council and General Assembly act as a legislature involved in the function of drafting the code of conduct in the international domain .These organisations accordingly draft these codes relating to a catena of subjects in international law. Draft of the rules then prepared is kept for voting on the floor in the assembly. If it qualifies with a two-third majority of

[10] Fisher R. Bringing law to bear on governments. Harv. L. Rev. 1960;74:1130.

states voting in favour of the draft code, it then becomes a law which is binding on the member states upon their ratification to the same. Thus this whole process of drafting and enforcing codes takes place in a similar parliamentary manner as followed in domestic law. This qualifies it effectively to be called a 'real' law.

CONCLUSION

Concluding this article on the nature of the international law, author is of the opinion that international law is not a real law. Siding with the arguments of realist school it can be clearly held that there is lack of a coercive element. There are no such consequences of breaching the international law as compared to the domestic law. There is no 'just' war which can be staged by the member states against defaulting state. In the 21st century where every economy is connected with each other owing to the concept of globalisation. Such a war will lead to a critical imbalance in the international domain resulting in a crash in the world economy. Another reason for such conclusion is that states do not respect international law in comparison to their own interests or obligations. Stating the above example of US-Iraq war in 2003, although US approached the Security Council for permission to invade Iraq but irrespective of the restriction invaded Iraq, openly contradicting the resolution of an international organisation like the Security Council. This clearly states that instead of acknowledging and following the international law, powerful states are using it as a mere tool or an instrument if it's in their interest or out rightly violating it if not in alignment with their interest. This defeats the whole purpose of international law being a 'real law'.