



CODIFICATION OF INTERNATIONAL LAW

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Abstract

The foundation of International Law in academics begins with a discussions on a question 'whether International Law is true law'. When most of scholars find themselves in between, the suggestions for improvements in International law as a seed find its place in thoughts of them. One of the important suggestion that always suggested is that International law should be properly codified. Now what actually codification means and in perspectives of International law how it is different, is part of discussions. The definitions of codification that applies to law of individual country as 'the reduction of its unwritten or case law into form of enacted law' does not apply in perspective of International law. Unlike Municipal laws, International laws operates in a purely decentralized system. Therefore the major success in development of International law in this respect came very long with charter of UN and the formation of International Law Commission. Today there are large number of specialized intergovernmental organisation and bodies, in which the process of codification of International Law is carried out. However still a long way to go in the process of codification and progressive development may urgently demand it.

Keywords: Foundation, True law, Improvement, Codification, Unwritten laws, Decentralized, International Law commission, Intergovernmental organization

1. Meaning and Definition of Codification

In a narrow sense the term codification ordinarily means the process reducing the whole body of law into code into the form of enacted law and in other words it generally connotes a systematic arrangement of the rules of law which are already in existence. Whereas in wider sense codification may also mean modifications of the existing rules of law. The adoption of narrow or strict definition actually defeat the very ends for which the machinery is made and in this references DR. SK Kapoor founds:

Codification means any systematic statement of the whole or part of the law in written form, and that it does not necessarily imply a process which leaves the main substance of law unchanged, even though this may be true of some cases. In other words, codification properly conceived is itself a method of progressive development of law. The two processes – progressive development and codification, far from being mutually exclusive, in fact merge. [KAPoor 2017: 99]

Also in the matter of International law the meaning of codification as 'the reduction of its unwritten or case law to statutory form' doesn't apply because no authority is empowered to enact statutes to cover it. Statutory enactments is general acceptance by states under treaty and process consists of two parts i.e. the scientific determination of law as it is and should be; and the public universal acceptance of that law as it shall be and then each states consents to be bound.¹ Now let's discuss more in this context how codification play a significant role any legal system.

2. Significance of Codifications: lack in perspective of International law



There is usually no any difficulty in a process of ascertaining of law on any given points in domestic legal orders as there is definite method of discovering what the laws is. In any municipal legal system there are number of necessary mechanism to resolve any disputes and is being possible by taking a look at Act of parliament or law reports or statutory provisions or court cases as precedents, may be in sequential manner. But that exactly is not the case with International law because most of areas do not have qualified laws rather they are based on customary practices. Laws are unqualified in the sense that there are numerous gaps and lack of uniformity and confusion in these laws. This is primarily because International law lacks legislature, executives and structures of courts and there is no single body able to create laws internationally binding upon everyone. There is no any proper system of courts with comprehensive and compulsory jurisdiction to interpret and extend the laws and therefore one is faced the problem of discovering where the laws is to be found and how one can tell whether a particular proposition amounts to a legal rule. [SHAW 2017: 52]

However it doesn't mean that there are no sources available from which the rules may be extracted and analysed rather there are international conventions, international customs, the general principles of law and judicial decisions. Then what is the problems with these sources are that the system have very less number of codified laws binding upon every states and international law is not clear as domestic law in listing the order of constitutional authority.ⁱⁱ Unlike Municipal laws, International laws operates in a purely decentralized system and it cannot be denied that the International legislative machinery

operating mainly through law- making conventions is weak as compared to the legislative machinery of States because States enter into treaties and conventions on the basis of equality. [KAPOOR 2017: 44] Even on accepting International law as weak, its sanctions are effective and it is rightly remarked by Prof. Hart that it is law because states regard it as law. International law is rather more than law as it deals with such matters, *inter alia*, upon which survival of mankind depends and its significance and efficacy are constantly increasing. [Kapoor 2017: 39] The codifications is however necessary for removing greater uncertainty and producing a binding effects, backed by it, on the nation-states as a whole which is actually lacking in large number of issue. There are several factors for this but before that we need to have a look upon how far we have reached in the codification process.

3. Legislative History of Codification in Modern International Law

Every society has created for itself a framework of principles within which to develop and certain of the concepts of International law can be discerned in political relationships thousands of years ago.ⁱⁱⁱ In this reference JL Brierly have ascertained, in his book 'Laws of Nations' that:

Rules which may be described as rules of International Law are to be found in the history both of ancient and medieval worlds; for ever since men began to organize their common life in political communities they have felt the need of some system of rules, however rudimentary, to regulate their inter-community relations. (Quoted in SK Kapoor 'International Law and Human Rights')

There are several evidence found in the history from ancient times like solemn



treaty^{iv}, treaty between Rameses II of Egypt and the king of the Hittites^v and in India also in the work of Kautilya^{vi} and study of Ramayana^{vii}. There are contributions of the number of civilized states in the development of international law in which Jews, Greeks, Romans, Hindus and Muslims have prominent role. Rules of behaviour in primitive society, developed subconsciously, within the group are not in the early stages written down or codified^{viii} and these rules can be deduced from the practice and behaviour of states. The earliest expressions of international law were the rules of war and diplomatic relations but the predominant approach of ancient civilisations was geographically and culturally restricted and therefore there was no conception of International community of states co-existing within a defined framework. Thus the notion of universal community with its ideal of world order was not in evidence.^{ix} [SHAW 2017: 12]

It is generally traced that the history of codification dates back to the end of 18th century in ideas of Jeremy Bentham and others. However the development of the Law of Nations by means of conscious efforts of Governments may be said to have originated at the Conference of Vienna^x in 1815, in which the peace agreement negotiated included several embryonic efforts at codifying the rules of international law generally, in relation to international rivers, the abolition of slave trade, and the recognition of diplomatic envoys.^{xi} Another most remarkable events in the early stages of the process of formulating rules of international law at international conferences was the Declaration of Paris^{xii} of 16 April 1856 which was signed by seven Powers^{xiii}

assembled and laid down principles related to –

(a) abolition of Privateering; (b) non capture of neutral goods except contraband of war, under enemy flags; (c) Blockade to be binding must be effective; and (d) except contraband of war, enemy goods cannot be captured under neutral flags. [KAPOOR 2017: 100]

Another great milestones in the field of codification of International law was result of 1st Hague conference, which was convened by Emperor Nicholas II of Russia in 1899 resulted in adoption of two conventions in the form of a code: (a) Convention on the public Settlement of International disputes; and (b) Convention on the laws and Customs of War on land. The second Hague conference in 1907 has produced as many as 13 conventions relating to warfare and neutrality in war on land and sea, the status of enemy merchantmen at the outbreak of war. [KAPOOR 2017: 100] It was found that before First World War between 1864 and 1914 the development of written international law through the restatement of principles of existing law or through the formulation of new law was pursued at over 100 international conferences or congresses held which resulted in over 250 international instruments.^{xiv}

After the First World War the work of codification of International Law received a great impetus under the League of Nations as it was most important legacy of the 1919 peace treaty from the point of view of international relations.^{xv} This laid to the failure of old anarchic system and it was left to the League of Nations to come in a systematic manner the problem of



codification properly called. [KAPOOR 2017: 100] The Committee formed under it reported seven subjects^{xvi} for codification and further in 1928 reported two more subjects^{xvii} for codification. The League of Nation however failed to maintain the International order^{xviii} but even then in its short existence it has achieved useful groundwork and helped to consolidate the United Nations later on. [SHAW 2017: 22] The Hague Codification Conference was the first global attempt at codifying entire fields of international law more generally, rather than addressing specific legal problems^{xix} and out of three topics^{xx} selected in it, no general agreement could be reached in the two topics. Finally with the adoption of the Charter of the United Nations, in 1945, the codification movement came into its own and also the League was succeeded in 1946 by the United Nations Organisation. During the 1919 to 1946, over 700 multipartite agreements were concluded of which the prevalent majority entered into force and out of these some conventions became binding upon as many as seventy states, e.g., the Universal Postal Conventions were ratified or adhered to by seventy-two states.^{xxi}

Now one of the major success in development of International law came with charter of UN itself and that is because the aim to codify international law also found its place in the fundamental document establishing the United Nations.

The Article 13(1) (a) of the U.N. Charter lays down that the General Assembly shall initiate studies and make recommendations for the purpose of 'promoting international cooperation in the political field and encouraging the progressive development of International Law and its codification.

Finally for encouraging the progressive development of International law and its codification the formation of International law Commission took place which was turning point in codification movement.

4. Further Development and International Law Commission (ILC)

The Article 1 of statute of ILC states that Commission shall have for its object the promotion of the progressive development of international law and its codification and it is provided that the commission shall survey the whole field of International law with a view of selecting topics for codification having in mind existing drafts whether governmental or not and when it considers that the codification of a particular topic is necessary or desirable it shall submit its recommendations to the General Assembly. [KAPOOR 2017: 101] It is provided under Article 18 that commission shall give top priority to requests to General Assembly to deal with any question and further Article 24 provides that the commission shall consider ways and means for making the evidence of customary international law more readily available, such as, the collection and publication of documents concerning state practice and of the decisions of national and international courts on question of international law, and shall make a report to General Assembly on this matter. Thus the movement for the systematic presentation of international law finds its place through the commission when it starts working from 1949.

The major contribution of commission are in international conventions like Law of seas in 1958, Diplomatic relations in 1961, Consular relations in 1963, Special mission in 1969 and the Law of treaties in 1969 and apart from that the commission also issues reports



and studies as it has formulated such documents as the Draft Declaration on Rights and Duties of States of 1949 and the Principles of International law recognized in the charter of the Nuremberg Trial and in the judgment of the Tribunal of 1950. [SHAW 2017: 89] However today there are large number of specialized intergovernmental organisation and bodies, in which the process of codification of International Law is carried out. The UNCITRAL UNCTAD, ILO, UNESCO are some of the bodies^{xxiii}, which are constantly developing in their respective spheres.

5. What next? Whether progressive development demands codification?

The advantages of codification in any legal system, generally, overshadow the disadvantages of it as it make law certain, clear, simple, intelligible and above all easily accessible. It further fills the existing gaps, brings uniformity, most importantly it is easier and convenient to amend the codified law to keep pace with time. The development in International law has tried to confirm the similar truth as the role of 'codification and progressive development' assumes profound significance because of complex nature of growing international relations.^{xxiii} The most important function of law is to help in solving the problem of the society in which it exists and thus the first essential ingredient of codification is furnished by the aspect relating to progressive development. It is rightly remarked by Prof. Quinsy Wright that "Stability with change, solidarity with variety, peace with justice, international law with national independence these difficult conciliations, it is the task of international law to effect. [KAPOOR 2017: 17] Therefore International law must keep pace with the

accelerated rhythm of change to develop a 'Common law of mankind' or 'Universal International Law' to succeed the quest of human^{xxiv} and other such considerations. Thus the need to change the law has come by formulation of new one and that progressive development have to remain in pith of the theme of codification as the legislative function has to be performed for the international community so essential for maintenance of world public order.

CONCLUSION

So, the discussion of 'whether International Law true law' have not much importance as the several evidence of history have proved its long existence (also as state regards it as law) and in modern world International law has become more than a law as it deals upon survival of mankind. However the suggestion for codification of International law has its relevance and significance as lack of codified law have problem from finding of law to application of law. It is primarily because International law lacks legislature, executives and structures of courts and there is no single body able to create laws internationally binding upon everyone. There were similar situation in ancient times as notion of universal community with its ideal of world order was not in evidence. But the modern situation has changed and thus International law must keep pace with the accelerated rhythm of change to develop. When any law codified in any legal system it doesn't mean that that it is not open to amend rather the amendment would be much easier than the un-codified one. Therefore to move towards Common law of Mankind the codification and progressive development in fact have to merge.



ⁱ Theodore S. Woolsey Practical Codification of International Law, The American Journal of International Law, Vol. 16, No. 3 (Jul., 1922), pp. 423-425, <https://www.jstor.org/stable/2188179>

ⁱⁱ Malcom N. Shaw, International Law, 8th edition, 2017, Cambridge University press pg. 91-92

ⁱⁱⁱ Ibid. at pg. 10

^{iv} Ibid at pg. 10...It was signed between rulers of Lagash and Umma, the city-states situated in the area known to historians as Mesopotamia. It was inscribed on a stone block and concerned the establishment of a defined boundary to be respected by both sides under pain of alienating a number of Sumerian gods.

^v This treaty was concluded after almost 1000 years later after solemn treaty for establishment of eternal peace and brotherhood.

^{vi} From DR. S.K. Kapoor, International Law and Human Rights, 2017, Central Law Agency at page 86... Kautilya in the 4th century BC elaborates rules for the conduct of diplomacy, as a means of avoiding conflicts, and the reception and treatment of diplomats.

^{vii} In the Ramayana period relations of sovereign rulers were based on the definite rules of International law and these rules were recognised by all sovereign rulers.

^{viii} Malcom N. Shaw, International Law, 8th edition, 2017, Cambridge University press pg. 54

^{ix} Ibid. at pg. 12

^x United Nations Documents on the Development and Codification of International Law - Supplement to American Journal of International Law, Volume 41, No. 4, October, 1947

^{xi} Arnold N. Pronto, Codification and Progressive Development of International Law: A Legislative History of Article 13(1) (a) of the Charter of the United Nations, 13 FIU L. Rev. 1101 (2019). Available at: <https://ecollections.law.fiu.edu/lawreview/vol13/iss6/11>

^{xii} Quoted in United Nations Documents on the Development and Codification of International Law - Supplement to American Journal of International Law – (from H. "W. Malkin, "The Inner History of the Declaration of Paris," British Year Book of International Law, Vol. 8, 1927, page 2) that at the four rules of maritime law, "the Declaration of Paris was the first and remains the most important international instrument regulating the rights of belligerents and neutrals at sea which received something like universal acceptance"

^{xiii} Seven powers were Britain, France, Austria, Russia, Turkey, Prussia and Sardinia. It was signed after the end of Cremona war in 1856.

^{xiv} United Nations Documents on the Development and Codification of International Law - Supplement to American Journal of International Law, Volume 41, No. 4, October, 1947

^{xv} Malcom N. Shaw, International Law, 8th edition, 2017, Cambridge University press at pg. 22

^{xvi} The seven Subjects were

- (1) Nationality,
- (2) Territorial Waters,
- (3) State Responsibility for damage done in their territory to the persons or property of foreigners,
- (4) Diplomatic immunities and privileges,
- (5) Procedure of International Conference and Procedure for the conclusion and drafting of treaties,



(6) Exploitation of the products of the sea, and

(7) Piracy.

^{xvii} The other subjects were

(1) Law relating to functions and competence of Consuls, and

(2) The Competence of Courts regarding foreign states.

^{xviii} It failed to maintain legal order on multiple invasion Japan invaded China in 1931, Italy attacked Ethiopia, and Germany embarked unhindered upon a series of internal and external aggressions. For more refer to Malcom N. Shaw, International Law, 8th edition, 2017, Cambridge University press at page 22

^{xix} Arnold N. Pronto, Codification and Progressive Development of International Law: A Legislative History of Article 13(1) (a) of the Charter of the United Nations, 13 FIU L. Rev. 1101 (2019). Available at: <https://ecollections.law.fiu.edu/lawreview/vol13/iss6/11> at pg. 4

^{xx} Three Topics were namely a.) Nationality, b.) Territorial waters and c.) Responsibility of states for damage done to foreigners. The committee able to succeed in only one on questions relating to conflict of Nationality and Statelessness.

^{xxi} United Nations Documents on the Development and Codification of International Law - Supplement to American Journal of International Law, Volume 41, No. 4, October, 1947 at pg. 33

^{xxii} UNCITRAL - United Nation Commission on International trade law, UNCTAD – United Nations Conference on Trade and Development , ILO – International Labour Organisation, UNESCO – United Nation Educational, Scientific and Cultural Organisation

^{xxiii} DR. S.K. Kapoor, International Law and Human Rights, 2017, Central Law Agency at pg. 105

^{xxiv} According to C.W. Jenks “The whole future of man depends on his success in three quests: the quest for world peace, the quest for social justice, and the quest for personal freedom, these quests cannot succeed unless we develop a common law of mankind in an organised world community.” (quoted in DR. S.K. Kapoor, International Law and Human Rights, 2017, Central Law Agency at pg. 17)

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Documents

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