A Transcivilizational Perspective on Global Legal Order in the Twenty-first Century: A Way to Overcome West-centric and Judiciary-centric Deficits in International Legal Thoughts*

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1. Introduction

When we conceive of global legal order in the 21st century, we must consider two elements without which it would be impossible to conceive of the very idea of legal order. The first element is legitimacy1 or justice, and the second is power, which is often expressed as effectiveness in international law. If the order of a society is perceived as illegitimate, unfair or unjust by a large number of its members, it would be difficult for the rules underpinning such an order to be positively obeyed or observed. The order would have to be maintained by the constant threat of negative sanctions against such non-obedient members, which would be too costly for the order. Such an order would be constantly challenged by those who regard it as illegitimate by various means including violence. It would be difficult for this order to guarantee security to its society members. If the primary raison d’être of order in a society is to provide security to its members, such an order does not deserve the name of “order”.

If, on the other hand, the global order lacks support by powerful nations, such an order would remain just wishful thinking with little possibility of being realized. The so-called “New International Economic Order” in the 1970s is a good example. This “order” was vehemently advocated by developing countries and a certain number of experts, and was adopted in the form of UNGA resolutions. But it remained basically on paper. It lacked support from most developed countries, which possessed various kinds of power.

However, the power itself needs to be legitimized. Even the greatest power in the world cannot disregard the element of legitimacy or justice for a long period of time.

* This paper is based on some of my earlier works. A number of references are therefore made to my own writings. For further references, please refer to the pages of my writings indicated in the footnotes. First published in: Ronald St. John Macdonald and Douglas M. Johnston (Eds), Towards World Constitutionalism: Issues in the Legal Ordering of the World Community (Martinus Nijhoff Publishers, 2005).

1 Although international legal studies have always dealt with the problem of legitimacy in various forms and in various ways, the pioneering work dealing with the problem of legitimacy characterizing it as a core question in international law is that of Thomas Franck, The Power of Legitimacy among Nations, Oxford Univ. Press, 1990. However, the definition of legitimacy adopted in this book is so narrow that even Franck himself changed his position in his following work, Fairness in International Law and Institutions, Oxford Univ. Press, 1995. In this paper, the term “legitimacy” is used according to a general usage of the term, i.e., the state of affairs that is characterized as fair, righteous and justifiable. See also Kelly, J. P., “The Twilight of Customary International Law”, Virginia Journal of International Law, vol.40 (2000), pp. 449–543; Chigara, B., Legitimacy Deficit in Custom, Ashgate, 2001.
International law generally embodies legitimacy because of its shared perception as “law”, which is associated with the notion of justice. Behavior of a powerful nation that disregards important rules or principles of international law would be not only resisted by other nations but also checked by domestic mechanisms including criticism by voters. They may at the beginning support such “powerful” or “macho” policies. But later they change their minds, realizing that they have to pay too much if they continue disregarding legitimacy and inviting increasing resistance from other nations.

This chapter deals with this crucially important problem of legitimacy in the global legal order. It seeks to demonstrate the need for and significance of what I call a transcivilizational perspective in conceiving of and constructing the legitimate global legal order in the 21st century. Section 2 elaborates the idea of transcivilizational perspective in comparison with the predominant perspectives dealing with transboundary issues: the international perspective and the transnational perspective. Section 3 elucidates how civilizational factors have been preserved in the sovereign states system and why problems of civilizations came to be discussed vocally after the end of the Cold War. Section 4 deals with the problem of general international law, which underlies global legal order, from the viewpoint of global legitimacy. It will be shown that contemporary theory and practice of equating general international law with customary international law must be rectified in order that the global legal order may satisfy the fundamental requirements of international, transnational and transcivilizational legitimacy.

2. Transcivilizational Perspectives as Compared with International and Transnational Perspectives

2.1 Problems of the 21st Century World

The inauguration of the 21st century revealed a world characterized by great schisms and serious conflicts. These schisms and conflicts exist in various forms. The most serious ones exist between a military, economic and informational superpower with universalistic preconceptions yet little understanding of “others”, and a far greater number of those who share desperate resentment and frustrations against the existing regimes.


4 Ibid., pp. 119–120.

4 The policy of the Bush Jr administration on the Iraq War of 2003 is a good example. At first, the Bush administration started the war with little regard to the perceived legitimacy of its policy. Disregarding international law and paying little attention to the UN Security Council apparently demonstrates this attitude. However, as the US continued to face strong resistance including terrorist attacks from Iraqi people on its occupation policies, the administration suffered not only from international criticism but also domestic criticism. They thus had to change their policies and paid more regard and respect at least as a lip service to international law and the UN in order to mitigate harsh criticism due to the lack of legitimacy of their policies.

5 The term “transcivilizational” is a neology. I first used the term “intercivilizational”, which is also a neology, in 1981 when I gave a paper at the 75th anniversary convocation of the American Society of International Law. See Onuma, Y., “Remarks”, Proc. ASIL, vol. 77 (1983), pp. 163–70.