

## NORMATIVE PROBLEMS OF A NEW INTERNATIONAL ECONOMIC ORDER\*

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### I. *Introduction*: NIEO as a Challenge for Legal Theory

Various UN-resolutions have designed the concept of a “New International Economic Order” (NIEO) which should help developing countries (DCs) to obtain larger shares in world markets and income and to fight hunger and despair more effectively. Ongoing international negotiations to shape the details and mechanics of such a new order include the formulation of international codes of conduct. The international efforts to transform the NIEO concept into a workable normative order<sup>1</sup> pose a challenge for legal theory and sociology of the law. The NIEO exercise implies the formulation and recognition (implementation) of ethical and legal norms on an international level in the context of difficult economic and political realities. Legal theory can help in this difficult process through an analysis of the basic normative problems of NIEO. Such an analysis can show possible antinomies in the NIEO concept and possible ways to overcome or avoid them.

### II. *Goals and concepts*

#### 1. Economic goals: Independence and redistribution of wealth

NIEO reflects the main political claims of LDs in the postdecolonization era: Economic independence as a corollary of political inde-

\* The following text is a summary of a more detailed study, which, due to the space limits applicable to Congress papers, will soon be published in a law journal in the USA.

<sup>1</sup> Various normative aspects of NIEO are analyzed in: Kamal Hossain (ed.), *Legal Problems of a New International Economic Order*, London/New York 1980; Norbert Horn (ed.), *Legal Problems of Codes of Conduct for Multinational Enterprises*, Deventer 1980.

pendence. Moreover, NIEO implies a redistribution of resources and income in favour of LDs. The international discussion on the ways and means towards these goals include the demand for non-reciprocal preferential treatment in favour of LDs on one hand, and on the other hand, the establishment of international agencies and bureaucracies as redistribution mechanisms.

The principle of non reciprocal preferential treatment does not only meet considerable political obstacles but may also conflict with the principle of sovereign equality of all states as proclaimed in NIEO instruments. The idea of new international redistribution mechanisms, on the other hand, may conflict with the idea of economic independence, as a new economic dependence of beneficiary states might be established.

## 2. Economic concepts: Planned economy and market economy

The concept of NIEO includes many elements of a planned economy on an international level. Concepts of planned economy traditionally have the fascination of *iustitia distributiva*. Market concepts are less glamorous. Their economic effectiveness, however, may be the only way to create the wealth needed for any subsequent redistribution.

At present, market rules coordinate the larger part of international exchange of goods, capital and technology. Also states with a planned economy act as market participants in the worldmarkets. International commerce as the promoter of international economic cooperation is essentially based on market mechanisms. International economic bureaucracy with political decision power would be less effective, more expensive, and create more external effects.

On the other hand, legal science now agrees that many international economic problems like the international monetary system, supply of raw materials and energy etc. require additional controls and regulations. There is no doubt, that, to a certain degree, international planning and cooperation is necessary. Any such initiatives should, however, observe the principle of preference of market concepts over planning and of decentralized planning over centralized planning.

## 3. Sovereignty and international law

NIEO implies three modifications of the traditional concept of sovereignty. First, the extension to the idea of economic sovereignty

which render a legal definition of sovereignty more difficult. Second, there is an open question how the demand for international agencies and bureaucracies can be reconciled with the principle of sovereign equality of all nations. There is a third open question to what extent the NIEO concept of sovereignty should serve as a basis for reduced legal obligation of states. This leads to the crucial question whether the stability of contracts among states and, in particular, between states and foreign private enterprises could be affected by NIEO principles. After all, the demand for more rules of international law implied in NIEO may come in conflict with a more rigid concept of national sovereignty.

#### 4. Old and new law

The NIEO concept is often linked with the idea that “bad old law” should be replaced by “new good law”. This includes a general verdict of traditional legal patterns of democratic industrialized countries such as ownership, stability of contract etc. This verdict is partly based on adverse experiences in the colonial era.

Legal theory including the history of law and modern economic analysis of law can demonstrate that these basic legal concepts are perhaps not sufficient, but in any event indispensable preconditions for a free and prosperous society which is so fascinating to many developing countries. Moreover, legal theory legal history and sociology of law can help to draw a distinction between a bad historical record of misuses of traditional legal patterns and their benefits if used in a political context of social responsibility.

### III. *The Process or rulemaking*

#### 1. The role of international organizations and institutions

The traditional role of legal science as the forum for the formation of an international “*communis opinio juris*” which can be studied in the history of international law and comparative law, has been shifted increasingly to international organizations and institutions as formulating agencies for the increasing number of new concepts, rules and regulations for international cooperation. There remains an important task of legal science to advise these formulating agencies and to support and coordinate their efforts through the unofficial communication systems of legal science.

## 2. Soft law and the confusion of normative categories

In the NIEO rulemaking process, two contradicting tendencies can be observed. One is to avoid a formal lawmaking procedure, the other is to make rules and establish regulations which have effects and binding force similar to law. Neither the UN-resolutions on NIEO nor the codes of conduct are formal sources of international law. On the other hand, many states interested in the NIEO hope that new international law will emerge from these texts. An embarrassed and somewhat concerned science of public international law has termed these texts "soft law".

There is, indeed, a confusion of normative categories. Legal theory can easily show that every lawmaking process implies the differentiation of the legal norms from the context of political goals and ethical norms which helped to create them. In the case of NIEO, legal theory should help to analyse the conditions under which international norms can be formed.

## 3. International consensus on ethical norms and values

Christian humanitarian ideas and similar ideas found in other world religions as well as philosophical concepts may contribute to international solidarity towards fighting hunger, misery and fundamental disequilibrium in world economics. International consensus on more precisely defined values and principles as a basis for a workable NIEO concept is more difficult to obtain because of different cultural traditions, political concepts and obviously opposite interests in the North-South-relationship. Among the various international techniques to reach consensus, two should be named.

First, different cultural traditions make create an obstacle to the common acceptance of ethical or legal norms. The history of the reception of Western laws in the past centuries demonstrated however, that these difficulties can be reduced if the new norms are confined to matters of trade and economy. In addition, the aforementioned international formulating agencies give an opportunity to create commonly accepted international norms as opposed to the mere reception of foreign norms (sometimes termed "cultural imperialism").

Secondly, the rulemaking technique of international agencies is characterized by strict confinement to the more technical and practical questions. Consensus as to underlying values and principles is sought only as far as indispensable for practical goals of rulemaking.

#### 4. The transformation of NIEO texts into legal norms.

As the NIEO texts are no formal sources of international law, the question remains in which ways NIEO principles can be transformed into legally binding rules. This question is discussed in public international law under the label of customary law. In the sphere of transnational commercial law, a number of national and international transformation agencies –national legislators and courts, arbitrators, draftsmen of transnational contracts– may become actors of a diffuse transformation process. Legal theory must help to analyse the conditions and results of such an indirect transformation to overcome the normative confusion. The rule of law remains indispensable for any international economic cooperation.