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The Impact of Domestic Law on International Law

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Abstract: The birth of international law falls behind domestic law, therefore as a developing legal system, international law is naturally influenced by the more mature domestic law system, both in terms of domestic public law and domestic private law. Modern international law is essentially international law with a sense of domestic private law, but the increasingly frequent and complex international interactions required the establishment of a hierarchical and centralized structure shown in domestic public law. The development of international law by drawing on domestic public law faces certain obstacles and poses risks that should be given due attention. This study starts with the theoretical foundation of domestic law influencing international law, in both private and public sense, followed by analyses of real-world practice, and concluded with the major issues such as the different interpretations of equality in domestic and international laws. This article concludes that international law was first developed based on domestic private law with a focus on equality, and then shifted towards domestic public law by emphasizing hierarchy and centralization. International constitutionalism is also discussed in this study using some judgements made by the International Court of Justice.

Keywords: International Law, Domestic Law, Equality, Hierarchy, Centralization.

1. Introduction

As a recently formulated legal order, international law is inevitably influenced by domestic laws in the process of its formation and development. The first influence on international law is domestic private law. In his book Private Law Sources and Analogies of International Law, Hersch Lauterpacht claimed that there is little to no attention received on private law and its analogy with public international law [1]. Recently, however, domestic public law has become increasingly influential in the development of international law. This article intends to make a preliminary study of this important phenomenon, and will help bridge two different field of legal studies in finding common connections and characteristics.

2. Theoretical Foundations of Domestic Law Influencing International Law

Historically, most early international laws were influenced by domestic private laws. While there is significant value in domestic private law, there are also shortcomings. In order to remedy these deficiencies, international society realized the necessity to accept and promote domestic public law in the formation of international law and thus develop international law in the public law sense.

Scholars of international law generally acknowledge that private law has influenced international law in one form of another. Some scholars have even argued that what is called public international

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law is actually private in nature, or “a higher form of private law” [1]. Many international jurists, such as Cassese also consider international law to be distinctly individualistic in character [2]. This modern international law, strongly influenced by domestic private law, may be called “international law in the sense of private law”.

The influence of private domestic law on international law is indeed of great value. The spirit of equality has contributed to the establishment of the principle of sovereign equality of states in the regulation of international relations, thus providing an important legal guarantee for international peace and security. However, the risk of domestic private law influencing international law arises in two ways. First, international law constructed in the spirit of equality is hardly sustainable and effective in guaranteeing the needs of sovereign states for peace and security. The movement toward the publicization of domestic private law shows that, as social relations become larger and more complex, the strong individualistic character of private law tends to alienate it into an instrument of coercion. In the case of the state, although the rationality of the highly organized state is superior to that of the individual, it cannot exclude the individualistic tendencies of state action. The history of the birth of modern international law, which brought peace to the European continent for less than two hundred years shows that international law in the private law sense cannot sustainably and effectively guarantee the needs of sovereign states for peace and security. Second, the impact of the monopoly of domestic private law on international law simplifies the reality of complex international relations, which is not only embodied in international relations, but increasingly also in relations between states and private individuals or organizations. The latter two types of relations are often regulated according to private law principles, and conflicts are solved based on the principle of private parties enjoying the same legal status as state parties [3]. Recently, many international law scholars have realized that the system ignores the significant differences between states and private parties since the former are the defenders of the public interest [4].

In the view of the obvious shortcomings of international law in the private law sense, international law should consist of international law in both the private law sense and the public law sense. The former is based on the traditional principle of sovereign equality, while the latter is based on a certain hierarchical and centralized structure. Both are inseparable from each other and are equally important. International law in the sense of private law is still of great value at present. This is because although international society has become increasingly organized since World War II, international relations are still the most important organizational part of it. This determines that private law still plays an important role in maintaining international peace and security and realizing the international rule of law. On top of that, against the background of the expansion of international relations, the diversification of subjects and the complexity of contents, private law can hardly achieve the needs of sovereign states for peace and security in a sustainable and effective manner. The new reality requires the establishment of some form of hierarchical and centralized structure, and thus the development of international law in the sense of public law. For example, St. Pierre saw the establishment of a unified European confederation as a way to achieve permanent peace, while some international jurists have also recognized the importance of a certain centralized structure, such as Kelsen, who pointed out that centralization is a means of ensuring peace [5,6].

In short, international law in the sense of private law and international law in the sense of public law are two inseparable parts that are irreplaceable and indispensable for the maintenance of international peace and security and the realization of the international rule of law. However, in recent years, domestic public law is more heavily influential.

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3. Manifestations of Domestic Public Law Affecting International Law

At the theoretical level, the rise of international constitutional thinking has stimulated the influence of domestic public law on international law. For Cassese, there are two different legal models in the international community: The Grotius model based on statism and the Kantian model based on cosmopolitanism [2]. According to the previous understanding of the natural constitution of international law, the Grotius model actually refers to international law in the sense of private law, while the Kantian model actually refers to international law in the sense of public law.

From the point of view of the history of philosophy, the Kantian model has never ceased to shine; from the point of new of the international practice, it was the Grotius model that dominated the development of modern international law, so much so that in 1926. Exactly three hundred years after the Law of War and Peace, Verdross used the term "constitution", for the first time by an international law scholar. For Verdross, the constitution of international law refers to the norms that regulate the basic order of the community, such as its structure and organization [7]. In a classic work published in 1964, Friedmann included "international constitution" as one of the new areas of international law. In particular, he emphasized that the study of international constitutional law should not be limited to the analysis of legal texts, but should be carried out in the context of practice [8].

Nevertheless, until the end of the Cold War, the issue of international constitutionalism did not attract widespread attention from international law scholars, and the few scholars who did focus on it held relatively moderate views. A prominent example is Mosler's view that the principle of state consent is a fundamental principle in the creation and development of any legal system, including the international legal system, and that the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, adopted by the United Nations General Assembly in 1970, constitutes the most important element of international constitutionalism [9]. This view of state consent as a fundamental principle in the construction of international constitutionalism is clearly quite modest compared to the current trend of increasing emphasis on state responsibility. Bogdandy argues that it was the Cold War that led Mosler to take a pessimistic approach to international constitutionalism [10].

Since the end of the Cold War, international constitutionalism has become one of the most fashionable topics of discourse and research in Western international jurisprudence. Currently, Western scholars understand "constitution" in international law at two levels: formally, those rules that are above the "general" rules; and substantively, those rules that regulate the basic rules of community life [7].

From the viewpoint of the object of research, Western scholars have been most interested in the study of constitutionalism in relation to the WTO and the United Nations. This phenomenon is not difficult to understand. In the former case, the WTO, the "economic United Nations", has an influence that is unparalleled by most international organizations. With the establishment of a dispute settlement mechanism with compulsory jurisdiction, the WTO is considered to have brought the dawn of international constitutionalism, and has become an analogous example for some Western scholars to study international constitutionalism [11]. For the latter, the issue of how to control the actions of the Security Council has become the focus of attention for many scholars and even politicians. Western scholars generally agree that there should be a judicial review of the Council's actions, but they have not yet been able to come up with a comprehensive proposal [7]. Limiting power and protecting human rights are the logical starting point and consist of the institutional value of domestic constitutional theory. In the choice of topics for international constitutional studies, Western scholars are clearly influenced by domestic constitutional theory and practice. Since the limitation of power is based on the premise of effective checks and balances of power, how to improve the constitutional law of international organizations has become an important issue of concern for many Western

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scholars. At the same time, many Western scholars have linked the protection of human rights to the operation of certain international organizations whose purpose is not to protect human rights, and severely criticized international organizations such as WTO, IMF and World Bank, which have a great influence on the international economic system and general public interests, for ignoring or violating human rights, and believed that human rights should be included in the agenda of international economic decision-making [12].

Other prominent Western scholars are not convinced by the recent rise of international constitutionalism. For example, according to Gaetano Arangio-Ruiz, international law scholars have gone to great lengths to apply to their discipline theories that have been well developed in domestic public law in order to help them justify the actions of UN agencies [13]. However, international constitutionalism has indeed become an inescapable discourse in international jurisprudence today. The academic debate over international constitutionalism is not about whether it should be, but about how it should be practiced, and thus whether and how the international constitutionalism enterprise can draw on the theoretical and practical experience of domestic constitutionalism.

Recently, constitutional elements have increasingly appeared in decisions made by international organizations or judgments/rulings by international dispute settlement bodies. For example, the WTO Dispute Settlement Body (DSB) has the power to judicial review the trade policies of its members, and its scope and standards of review have been profoundly influenced by domestic judicial review systems, particularly the U.S. judicial review system. However, not all international organizations have been as fortunate as the WTO in establishing judicial review systems, and the controversy over whether and how the International Court of Justice can exercise judicial review of UNSC actions in fact illustrates the difficulties international organizations face in drawing on domestic constitutional practice.

From a domestic law perspective, it is common for courts to exercise judicial review of the actions of administrative bodies. In international law, however, neither the UN Charter nor the Statute of the ICJ directly addresses judicial review of Security Council actions, and the founders of the UN refused to give the ICJ this power [14]. During the Cold War, the ICJ never made its position on judicial review known in litigation; after the Cold War, it became clear that the frequent and serious challenges to the legitimacy of Security Council actions affected the Court's understanding of the power of judicial review, prompting the Court to make its position known in litigation. This change was first seen in the case of Libya v. United States [15]. In that case, although the ICJ rejected Libya's claim on the grounds that its obligations under Article 193 of the Charter prevailed over other treaty obligations, many judges, however, believed that the Court had not only the right but also the duty to consider the legality of Security Council resolutions. Judge Oda went so far as to hold that the Court might exercise its power of judicial review if a State claimed that its sovereign rights had been violated under general international law [15].

The International Court of Justice has also taken a more active approach to the power of judicial review in cases of advisory jurisdiction. On July 9, 2004, the Court issued an advisory opinion on the legality of Israel's "security wall" in the Occupied Palestinian Territory [16]. The Court found that there had been no armed attack against Israel and that Article 51 of the Charter could not constitute a legal basis for Israel's construction of the Wall. Some scholars have been critical of the ICJ's advisory opinion in the Security Wall case. They have argued that the Security Council is superior to the Court in the application of Article 51 of the Charter, both in terms of the democratic nature of the institution and in terms of sensitivity to State practice [14].

In conclusion, although the influence of domestic public law on international law has developed beyond the academic level to the practical level, this influence is still preliminary, and its further deepening depends on the theoretical clarification or dissolution of certain issues. Some of the major issues related to this issue are discussed below.

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4. Major Issue in the Process of Domestic Law Influencing International Law

As it is well known that domestic public law is inseparable from hierarchy and centralization, the influence of domestic public law on international law necessarily touches upon one of the fundamental principles of international law, namely, the sovereign equality of States.

The sovereign equality of states has been almost self-evident since the emergence of modern international law. The Charter of the United Nations and the Declaration of Principles of International Law are two of the most important international legal documents affirming the sovereign equality of states, with particular emphasis on the sovereign equality of states in the emerging developing countries after World War II. The sovereign equality of states is a result of international law scholars and even state practice adopting the natural law school's claim that people are equal in the state of nature. For example, Pufendorf argues that all persons in the state of nature are equal, and as states are persons in international law, they are also equal [17].

The question is whether equality in the state of nature is fully reflected in the state of reality for domestic private law, which is the source of the state's sovereign equality regime. The answer is no. Although equality is a basic principle common to all countries' civil laws, they also provide de facto inequality among individuals such as protection of properties. As the division of labor deepens and the law responds to it, the principle of civil equality continues to erode. In fact, the main significance of the natural law school's assumption of equality between people in the natural state and its endorsement by domestic private law is that ensuring equality of civil subjects of law is a principle, not an exception, for which the public authorities must provide sufficient justification when attempting to deny such equality. An overview of the history of the development of private law reveals that national private law focuses on the equality of two types of rights: first, certain fundamental rights considered to be of special importance; and second, equal remedies for violations of rights.

Many international law scholars have also questioned the absolute sovereign equality of states. Brierly, for example, argues that it is factually incorrect to interpret the equality of states as meaning that all states have equal rights under the law. The correct understanding is that the equality of states means that they have equal access to legal protection [18]. The fact that the UN Charter allows some states to enjoy special status in law does not prevent the principle of equality between large and small states. In fact, sovereign equality is not an ultimate goal of states, but a means for them to ensure peace and security for themselves and the international community, and to achieve the rule of law, and advocating absolute sovereign equality is not conducive to these ultimate goals.

From the perspective of international law practice, it is not new that different countries have different rights under international law. While only the five permanent members have veto power in the Security Council's decision-making mechanism, the weighted voting system used by many international organizations has given more power to certain countries. Although it is true that some of the arrangements of state rights are the result of political compromise and even pressure, insisting on absolute sovereign equality is not the mainstream of the current international community.

In fact, a differentiated arrangement for the rights of States does not mean that the interests of States that have not been granted specific rights under international law cannot be equally expressed and protected. In the case of Security Council reform, for example, although not all countries can become members of the Council, especially permanent members, reforming the Council's deliberative system can effectively safeguard the interests of non-Council members and achieve substantial participation of non-Council members in the Council's decision-making. For example, the enhanced consultation with non-members of the Council in decision-making and the establishment of a transparent decision-making mechanism.

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It is evident that, regardless of the development of domestic law as a source of sovereign equality of states, or from the perspective of international law theory and practice, the principle of sovereign equality of states does not, and should not, become an obstacle to international law drawing on domestic public law. Of course, the fact that domestic public law influences international law in no way implies that state sovereignty, and the sovereign equality of states, is unimportant. First, international relations have so far been manifested primarily in interstate relations, and thus the principle of the sovereign equality of states remains of fundamental importance, while differential state rights arrangements can only be exceptional. Second, the legitimacy of differentiated rights arrangements is based primarily on de facto inequality. Since de facto inequality is not static, but rather dynamic, differentiated rights arrangements should not be static, but dynamic as well. In straightforward terms, any country can, through its own development, change de facto inequality and thus assert legal equality in more ways than one.

5. Conclusion

In order to better maintain international peace and security and achieve the rule of law, international law should include international law in the sense of private law and international law in the sense of public law. Therefore, although the claim that international law is a “higher private law” reveals the international community's pursuit of the basic spirit of international law in a specific historical period, and this pursuit is still of great relevance at present, it does not reflect all the contemporary international community's expectations of international law, nor does it correspond to the objective reality of international law.

As a later emerged legal order, it is natural for international law to draw on more mature domestic laws in the process of development. However, since the emergence of public law in the modern sense was predicated on a highly developed hierarchical and centralized political system, there is inevitably a tension between the development of international law in the sense of public law and international law in the sense of private law. A proper understanding of this tension is not only relevant for the legitimacy of domestic law to influence international law, but also for the shape of the future international community. In particular, it is worth noting that since the political system on which public law is based is itself a superstructure, there are many important differences in the legal values and institutional norms of public law among countries, which raises the question of fairness in the participation of different countries in the development of international law in the public law sense, and this fairness is particularly vulnerable to disregard and impairment in today's world where power politics is a frequent phenomenon. With the growing complexity of international relations and the increasingly prominent role of international hierarchies and centralized structures, there is an urgent need to develop international law in the public law sense in order to maintain international peace and security and to achieve international rule of law, as well as to maintain international law in the private law sense.

References

[1] *Lauterpacht, H. (1927). Private Law Sources and Analogies of International Law. London: Longmans.*
[2] *Cassese, A. (2005). International Law, 2nd edition. Oxford: Oxford University Press.*
[3] *Toope, S. J. (1990). Mixed International Arbitration. Cambridge: Grotius Publication Limited.*
[4] *Van Harten, G. (2005). Investment Treaty Arbitration and Public Law. Oxford: Oxford University Press.*
[5] *Hont, I. (2005). Jealousy of trade: international competition and the nation-state in historical perspective. Cambridge: Harvard University Press.*
[6] *Kelsen, H.(1942). Laws and Peace in International Relations. Cambridge: Harvard University Press.*
[7] *Simma, B. (1994). From Bilateralism to Community Interest in International Law. The Hague: Recueil des Cours.*
[8] *Friedmann, W. (1964). The Changing Structure of International Law. New York: Columbia University Press.*
[9] *Mosler, H. (1974). The International Society as a Legal Community. The Hague: Recueil des Cours.*

DOI: 10.54254/2753-7048/3/2022579

[10] Von Bogdandy, A. (2006). Constitutionalism in International Law Comment on a Proposal from Germany. Harv. Int'l LJ, 47, 223.
[11] Helfer, L. R. (2003). Constitutional analogies in the international legal system. Loy. LAL Rev., 37, 193.
[12] Cottier, T., et al. (2005). Human Rights and International Trade. Oxford: Oxford University Press.
[13] Arangio-Ruiz, G. (1997). The federal analogy and UN charter interpretation: A crucial issue. Eur. J. Int'l L., 8, 1.
[14] Cronin-Furman, K. R. (2006). The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship. COLuM. L. REv., 106, 435.
[15] Libya v. United States Case, 1992 ICJ Reports.
[16] International Court of Justice (2004). Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinon.
[17] Anand, R. P. (1986). Sovereign Equality of States in International Law. The Hague: Rescueil des Cours.
[18] Brierly, J. L. (1942). The Law of Nations. Oxford: Oxford University Press.