

Teaching for Trans-national Lawyering

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There are three aspects of this topic which I want to address: the skills taught, methods used to teach them, and the 'global classroom.'

I. Legal skills

My first argument is that trans-national lawyering requires a wider array of skills than the traditional, logical, analytical skills which law schools teach. Law schools thus need to expand their repertoire of skills focused on if they are to produce successful trans-national lawyers. I am certainly not suggesting that the importance of analytical skills be downplayed in legal education – they form the backbone of much of what many lawyers do and are valued for so doing. But there are more that need to be covered. Examples of such skills are:

(a) international law skills – public and private

Many trans-national transactions are governed by international law, yet many students do not take international law courses and, even where they do, some focus more on doctrinal analysis and cases than skills which are seen as less familiar to legal work. In addition to traditional legal analysis, students should be familiar with treaty interpretation and analysis, which requires familiarity with treaty formation (through political negotiation). I suggest that this requires more attention being paid to the political issues involved than is normally paid in domestic law courses. This will require skills in interdisciplinary analysis of the relevant issues, alongside the legal analysis.¹

The proliferation of international laws generally has entailed many lawyers working in fields that require the domestic incorporation and application of such international laws. Students should be familiar with the skills required to undertake such tasks. Examples include: the compliance with international conventions -- how to tell whether a country is complying or not (eg, where and how to research this) and how to report on it (eg, to international bodies); how to implement an international convention in domestic law – what kinds of options might be available to meet the requirements of the convention while meeting domestic political and/or social needs. The kinds of thinking required typically involve wider problem-solving approaches than the logical, linear approach. For example, international laws are typically expressed in general terms in order to achieve agreement among a wide range of states parties, and are much better understood and approached through a different lens.

[There are no doubt many other such skills that participants could also come up with.²]

¹ An example of how to incorporate inter-disciplinary perspectives into a law course (with footnotes to the literature in the area) is provided by Kim D Connolly, "Promoting Justice Through Interdisciplinary Teaching, Practice and Scholarship – Elucidating the Elephant: Interdisciplinary Law School Classes," 11 Washington University Journal of Law and Policy 11 (2003).

²For example, Alan M Lerner argues that "the heart of what lawyers do is the exercise of critical judgement." While he has written his paper from the perspective of primarily domestic lawyering, the skills he identifies – including those for lawyering in "today's multi-cultural 'global village'" -- are

(b) thinking and communication skills

Anyone involved in trans-national communications needs to be aware of their own cultural mindset and patterns of communication. It also helps to study other cultures' mindsets and patterns, but I am suggesting that law students first need self-awareness. This is key to so many other methods of thinking and problem-solving that it should be taught as foundational to trans-national lawyering.³

I suggest that different methods of problem-solving should be explicitly taught. For example, there are various methods of creative problem-solving taught domestically – and even taught in law schools for the purposes of legal problem-solving⁴ -- which could be used for teaching trans-national lawyering skills.⁵

(c) adaptation skills

We are constantly reminded that the only certainty is change and that people need to be educated to better handle change in their lives. Law students are no exception and the need to handle change in their work is most evident in lawyering trans-nationally – changes across boundaries are additional to changes occurring within one's own country. Explicit emphasis should be placed on the ability of the individual to adapt and learn new things on their own. I suggest that this has two related aspects: self-reliance in anticipating and dealing with the unfamiliar, and in handling uncertainty in the law (domestic or international). While the need to deal with uncertainty is not specific to trans-national lawyering, it is necessary and should be explicitly addressed in legal education.⁶

II. Teaching these legal skills

There are two aspects to teaching the skills mentioned: the substantive material (the 'lesson') and the method used to teach it. It is extremely easy to incorporate readings on the above topics into normal law school classes and discuss them in the usual manner. They could be incorporated into existing classes, alongside the regular course material (for example, readings on dealing with uncertainty), or introduced in their own classes (such as a course on problem-solving methods). What I think more critical to consider is the method used for teaching such skills.

relevant to the development of independence of thought, including in the context of trans-national lawyering. "Law and Lawyering in the Work Place: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem Solvers," 32 Akron L Rev 107 (1999).

³ See, e.g., Richard E Nisbett, *The Geography of Thought: How Asians and Westerners Think Differently and why* (2003).

⁴ A leader in this area is California Western School of Law. A mission of the law school is to educate creative problem-solvers and it has established the McGill Centre for Creative Problem-Solving. See, 34:2 California Western Law Review, Symposium: Conceiving the Lawyer as Creative Problem Solver.

⁵ See, e.g., Isaksen, Dorval & Treffinger, *Creative Approaches to Problem-Solving: A Framework for Change* (2000); James Adams, *Conceptual Blockbusting: A Guide to Better Ideas* (2001); Hammond, Keeney and Raiffa *Smart Choices* (1999); Barry Halebuff & Ian Ayres, *Why Not? How to Use Everyday Ingenuity to Solve Problems Big and Small* (2003).

⁶ The ability of an individual to deal with and handle uncertainty is said to be determined by one's stage of psychological development. For example, most people before the ages of 25-30 (apparently) prefer fixed rules and cannot easily handle uncertainty in legal rules. Law students – the majority of whom are less than 25 – need explicit training in this if they are to handle it well in their legal practice. Paul S Ferber, "Facing Uncertainty: Helping Students Develop Judgment and Problem-Solving Ability in a Real World of Indeterminacy," conf. presentation, Cal. West. School of Law, March 5, 2004.

Legal education already focuses on the teaching of skills rather than simply the acquisition of legal knowledge, and there is large component of learning by doing rather than just reading about it (e.g., the Socratic method of learning how to analyse and argue legal decisions and then writing opinions about them). But even this is not enough in order to instill some of the necessary skills in all students, nor enough for them to learn some of the skills mentioned above for trans-national lawyering.

There is an increasing body of knowledge about students' learning styles, showing that different people have different learning styles and thus best learn the same lesson when taught in very different ways. So one of the best things we can do in terms of teaching skills is to expand our range of teaching methods, particularly if we currently rely heavily on the Socratic method.⁷

An essential first step is to explicitly address learning styles and encourage students to decide themselves how they best learn new material and skills. This is essential as a step toward self-reliance for learning, as opposed to being expected to be taught what they need to know.⁸

There is a wide range of well-documented techniques for facilitating learning (as opposed to teaching) and independence of thought. In summary, they generally involve less talking (and even control) by the teacher and more doing (and control) by the students.⁹ Ones particularly relevant to this topic include a greater use of active learning and creative problem-solving techniques.¹⁰ Even in a large class this can entail the use of games to teach skills (or substantive material), discussion of (often inter-disciplinary) material, group-work, and solution of multi-faceted problems, real or hypothetical. Note that this is not limited to the method called problem-based learning (which is becoming more popular for learning programs in medical schools but still very limited in law schools); but problem-based learning is a useful method for teaching such skills.¹¹

I am committed to active learning techniques and have taught courses in the public international law area so have both used and developed activities to facilitate the student learning of skills in this area. While I have written papers describing these activities in more detail, I will briefly mention some here.¹²

⁷ Examples of articles which apply this to legal education are: MH Sam Jacobson, "A Primer on Learning Styles: Reaching Every Student," 25 Seattle U L Rev 139 (2001); Michael Hunter Schwarz, "Teaching Law by Design: How learning Theory and Instructional Design Can Inform and Reform Law Teaching," 38 San Diego L Rev 347 (2001); Alice M Thomas, "Laying the Foundation for Better Student Learning in the Twenty-first Century: Incorporating an Integrated Theory of Legal Education into Doctrinal Pedagogy," 6 Widener L Symp J 49 (Fall 2000); Robin A Boyle & Rita Dunn, "Teaching Law Students Through Individual Learning Styles," 62 Alb L Rev 213 (1998).

⁸ Some useful articles on this specific aspect include: Robin A Boyle, "Employing Active-Learning Techniques and Metacognition in Law School: Shifting Energy from Professor to Student," 81 U Det Mercy L Rev 1 (2003); Filippa Marullo Anzalone, "It All Begins With You: Improving Law School Learning Through Professional Self-Awareness and Critical Reflection," 24 Hamline L Rev 324 (2001);

⁹ The student-centred learning approach in tertiary education built on ideas from authors such as Piaget and Dewey but is often said to have originated in modern times with Kolb's 'experiential learning approach.' DA Kolb, *Experiential Learning as the Source of Learning and Development* (1983).

¹⁰ See the papers cited above note 7.

¹¹ A useful summary of this method is provided by Myron Moskowitz, "Beyond the Case Method: It's Time to Teach with Problems," 42 J Legal Educ 241 (1992).

¹² For more detailed papers -- one on games to play in an international law class and one on the Kyoto Protocol simulation described below -- email me at catherine.iorns@vuw.ac.nz.

1. understanding treaty negotiation:

A fun game designed to understand the principle of the 'lowest common denominator principle' in international treaty negotiation is provided by the pizza game, which can be played even in classes of more than 100 students. In summary, students have to decide on toppings for a class-size pizza. The result is typically simply what provides the least disagreement, even if it is not what one would have chosen for oneself. Sometimes there is no agreement; other times there are abstentions ('I'm not that hungry') and/or reservations ('I'll pick off the toppings I don't like'). Students always comment how they'll remember the concepts involved.

Another game I have played is a simplified version of the prisoner's dilemma, designed to illustrate that compromising in negotiations with another party or side can often produce a result that is best for all sides, but this is often very difficult to achieve in practice. The teams which receive the highest scores have typically made an explicit agreement to compromise in order to achieve that.

A more in-depth understanding of how countries arrive at a treaty is provided by a role-play of negotiation of an actual international document. This involves students taking on roles of different states and attempting to draft the document in question. It is not an exercise in teaching negotiation skills themselves, but simply understanding how international documents may be negotiated.¹³ The key is that the students experience the process and so arrive at a better understanding of the lessons involved than could be obtained through just reading about and instruction on the topic.

2. Domestic incorporation of international law

In some classes I have assigned as a task the assessment of a country's compliance with an international law. This involves analysis of the meaning of the law itself and its application to the domestic situation, as well as then finding materials on whether the application meets the international requirements. This is an extremely useful exercise for the understanding of international law in an area, involving traditional legal analysis but in a slightly different context from that typically focused on in law school (eg, not the usual hypothetical, particularised fact situation but much more generalised).

The most significant exercise I have undertaken in this area is a full-class role-play, set for assessment in a large class (of over 100 students). In my International Environmental Law class I assigned students into teams to negotiate the adoption of domestic measures to implement the requirements of the UN Framework Convention on Climate Change and its Kyoto Protocol. Some students were members of political parties, some were their government department advisors, others were special interest groups. The students had to research their positions, provide summary statements of those positions, read others' summary statements, then spend four hours negotiating a text, involving speeches on the 'conference' floor and lobbying the political parties responsible for finalising the text. Their performance in the negotiation session was assessed (for 20% of their course mark). After the negotiation session, they had to submit their research papers on their position and suggested measures for implementation. Five weeks were set aside for teaching the segment on climate change,

¹³ For a detailed description of such a role play see Timothy LH McCormack and Gerry J Simpson, "Simulating Multilateral Treaty Making in the Teaching of International Law," 10:1 Legal Education Review 61 (1999).

which involved background international environmental laws (historical and current) and visiting experts, including top-level officials from the areas of science, foreign affairs and environment.

This simulation role-play was an extension of the international treaty-making role-plays I've run before and, like them, successful in enabling the students to take control of their own learning of the topic and the skills lessons involved.¹⁴ I was pleased with the results and will incorporate more self-learning activities in the future. Aspects I think are useful for the learning of trans-national lawyering skills include: the self-learning and thus self-reliance even in a new situation; problem-solving through negotiation; thinking outside the domestic law context, realising that lawyers even in domestic law settings increasingly have to incorporate international laws. (And, of course, all of this learning took place through student activity rather than passivity.)

3. Other skills

To encourage trans-national problem-solving skills, class activities can include the solving of trans-national problems, or other problems with similar characteristics. (For example, the creation of legislation to solve domestic legal problems can involve skills similar to those necessary for the solution of international problems.)

To encourage inter-disciplinary discussion, students from other disciplines can be admitted into the class.¹⁵

III The Global Classroom

1. Our law school has an increasing number of exchange programs with overseas law schools, for the exchange of students and/or staff. They have helped develop international linkages and promoted student consideration of other legal cultures.

2. I am currently participating in a 'global classroom' comparative law course, via video-conferencing with law teachers and students in three other countries. It is an extremely valuable way for students to discuss and ask questions about legal situations in other countries, to better understand the others' and their own. It also facilitates student interaction via web-based discussion groups outside of class times. As I see that this is being specifically addressed by other speakers I will not discuss this in more detail here. However, I note that we have done it through face-to-face video-conferencing, supplemented by web-based discussion and communication. Others have successfully taught trans-nationally using the web and CD-ROMs containing lectures in digital video.¹⁶

I am convinced that the connection between students in different nations is a crucial aspect of developing their learning of trans-national lawyering skills. Exchange programs provide valuable linkages, but technology has the ability to facilitate that to a wider number of students and more often. I am thus particularly keen to further explore the uses of technology to help educate trans-national lawyers.

¹⁴ The students were slow to take on the self-learning aspect, and kept expecting to be fed instructions on what they had to do. But when instructions were not forthcoming to the level of detail they were asking, they did just get on with the job and figure it out for themselves.

¹⁵ See Kim Connolly's paper, above note 1, for this and other suggestions for interdisciplinary work.

¹⁶ See, e.g., Michael Perlin's NYLS courses on mental health law at nyls.edu and nyls.eduprise.com.