

Educating Lawyers for Transnational Challenges – The Globalization of Legal Regulation

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At the recent World Economic Forum in Davos (January 2004), United Nations Secretary-General Kofi Annan reminded the audience of the message he had given at the same conference some 5 years earlier about the challenges arising from the seemingly inevitable path of globalization. Not long after that 1999 speech, the world witnessed the protests in Seattle, which scuppered the World Trade Organization meeting and provided a strong reminder that the development of legal change and regulation must be managed in such a manner as to take into account the needs of all stakeholders. Similar, more recent protests in Trieste, Cancun and elsewhere have reinforced (if that were needed) these concerns.

At the same time, the past few years have witnessed the emergence of other very significant transnational challenges, which potentially threaten not only economic interests but also perhaps the very nature of world order itself. The September 11 attacks in the United States, and the many subsequent actions worldwide intended to combat a resurgence of random and indiscriminate acts of terror, have again highlighted the need for cooperative and multilateral approaches to address issues of ‘global’ concern. Moreover, questions related to human rights, the environment, global governance and the need for an effective regime of ‘international’ justice have become important themes for many Governmental and Non-Governmental Organizations and Agencies alike.

It is in this context that the focus of this conference is extremely timely. It has become apparent that no one State is capable of alone addressing some of the twenty-first century challenges that face us as lawyers and as human beings. With the increased inter-dependence of States, an imperative arises to develop co-operative and multilateral solutions to these issues. Areas such as human rights, international trade, the environment, international criminal justice, natural resources, the common heritage of mankind and indigenous rights all require a global approach. Inevitably,

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this also impacts on domestic laws. No longer can the lawyer disregard international law principles in the context of domestic disputes.

In a recent address in Melbourne,² Justice Michael Kirby of the High Court of Australia referred to the 2002 decision of the United States Supreme Court in *Atkins v Virginia*³, where unlike its previous jurisprudence, the court considered international legal norms in order to determine the requirements of the United States Constitution. As the judge noted, this is another example of ‘the utilisation of universal human rights law in constitutional elaboration’, an approach that can also be found in many other domestic law jurisdictions. This is an irreversible process and there can be no doubt that domestic law will be increasingly influenced by international legal norms.

As a corollary, domestic law principles and procedures are also increasingly relevant in the development of these international processes. A global approach inevitably leads to convergence of certain components from the many domestic legal systems of the world, in order to establish appropriate supranational regulatory bodies, tribunals and courts. There are already important examples of this legal harmonisation on a regional basis – the EU, NAFTA, ASEAN – where States have jointly agreed (with varying degrees of success) to adhere to particular legal standards in the conduct of their affairs.

This process is extending towards a more global standardisation in a number of areas such as international criminal law, international trade law and international environmental law and has perhaps been most evident in the emergence of (almost) universally accepted norms of human rights law that have been ‘imposed’ on States from above – ie through the international law route.

Naturally this is by no means an easy process. The international legal order has historically been founded on the notion of the sovereign State – recognised since the time of the Treaty of Westphalia and encapsulated in the terms of the United Nations Charter. Any movement towards a formalised multilateral legal regime inevitably

² ‘Talking about death: the High Court of Australia and the death penalty’, address to the Criminal Law Association (Victoria) and Reprieve Australia on 6 October 2003.

³ 536 US 304 (2002)

challenges these notions. However, while States will resist what they perceive to be any unacceptable infringement of their sovereignty, it seems clear that the next generation of lawyers will need to operate within the context of increasingly multilateral legal regulation, even over areas of law that have traditionally been regarded as within the exclusive domain of the sovereign State.

A recent example may serve to illustrate the fluid nature of this process. In a speech two years ago, French President Jacques Chirac referred to the Brazilian rainforests as 'the common heritage of mankind'. As many at this conference will know, this concept has historically been used in treaties and negotiations that have dealt only with areas that are quite clearly beyond the jurisdiction of any State – such as the high seas and the moon. Mr Chirac's assertion, despite obviously being imbued with political overtones and not (yet) justified on a legal basis, does throw open the door to a new way of approaching legal regulation and one that many States, understandably, will find threatening. It suggests that a State may in the future no longer be able to act without accountability, even in relation to its own 'assets'. This is not to say that the rest of the world is currently in a position to impose legal restrictions on the way Brazil chooses to utilise its natural resources: after all it is clear that under contemporary customary international law these resources remain the 'sovereignty' of the host State.

Yet, my own view is that over time we will need to accept this more 'holistic' and less State-centric view of law and legal regulation. States cannot on the one hand seek to participate and benefit from the globalization of trade and industry without also accepting other aspects of this globalization process. Indeed, standards of global governance will be necessary to ensure that the benefits of globalization do not bypass many of the world's developing countries. The WTO protests illustrate quite clearly that this is a difficult transformation – but one that must be made given the erosion of borders by technology, market forces and humankind's ingenuity. What the protests also tell us is that the globalized legal regimes that do evolve must be developed on the basis of international cooperation and sustainability (already accepted international norms though their definitions are controversial) as well as a notion of global equity, another difficult but crucial requirement. Claims such as those made by Mr Chirac may, over time, serve to reinforce and eventually crystallise these and

other new and emerging international law principles. International law is, after all, an evolving concept that, by definition, reflects the (changing) ways in which States act in practice. We have seen this in other areas – human rights being a prime example – and there is no reason (or in my opinion justification) for this not to continue into other areas that impact on the future wellbeing of humankind.

Of course, even if these landmark changes do not eventuate in their entirety, there is no doubt that the globalization process will still encompass further elements of legal regulation. This will have important ramifications for tomorrow's lawyers, particularly (but not exclusively) those who choose to engage in the transnational arena. It is clear that the practice of law within this context will require a better understanding of the complex range of variables that impact upon, and are affected by the process of this globalization of legal regulation. As a result, lawyers will need to become even more multi-disciplinary and flexible in their training – no longer will the practice of law, particularly in a transnational context, depend solely on discreet and seemingly immovable legal notions, if indeed it ever really did.

If I may provide but a few examples, tomorrow's lawyers will, in my opinion, need to be conversant with the following principles:

1. the fundamentals of other important disciplines – politics, commerce, financial markets and capital, cultural values, indigenous rights
2. the ways in which these disciplines impact upon, and are affected by the law
3. the ways in which international law norms develop
4. the ways in which these norms will and/or should impact on domestic regulatory regimes and vice versa
5. the evolving internationalisation of human activity and its impact on law – for example, the internationalisation of crime, the utilisation of the 'global commons', our increasing adventures into Outer Space, the notion of humanitarian intervention

6. the differences and similarities between the diverse systems of law, particularly in view of the increasing convergence of procedural and substantive legal norms
7. the formulation of appropriate transnational dispute resolution mechanisms
8. the changing nature and dynamics of international political and economic forces and their interaction with sustainable development and economic cycles
9. the culture and focus of multilateralism, even in the face of tensions arising from the privatisation of important global public services
10. the strengths and weaknesses of, and the lessons to be learnt from current multilateral regulation, including, of course, proposed reforms of the United Nations system itself

No doubt this is a daunting task, particularly since this is by no means an exhaustive list. Yet tomorrow's lawyers cannot afford to be seduced by the apparent 'simplicity' of globalization. Indeed in a parallel to technological advances, as the world becomes 'smaller' it becomes more complex. The current debate about the 'outsourcing' of American white-collar jobs to countries such as India provides a clear example of this. In order for lawyers to play their proper part in designing and implementing appropriate legal norms for the changing geopolitical and economic environment, they must be cognizant of the broad spectrum of issues that this encompasses.

So how do we address these demands on the next generation of lawyers? As the theme of this conference indicates, a large part of the solution will depend on the educative process. The nature of this process, the experience and expertise of the educators, the makeup of the teaching curriculum and the prerequisite requirements for law school students must be adapted to reflect these challenges. Since other participants at this conference will discuss these areas in detail, I will only offer some very brief comments on each of these factors:

1. The Educative Process

'Traditional' teaching through a lecture / seminar system may not be sufficient to serve the needs of tomorrow's lawyers. Of course some components of instruction are appropriate but it will become necessary to include greater practical elements as part of a law course. Simulations, compulsory advocacy exercises and placements with 'real world' organisations will help the student to become accustomed to the evolving nature of the legal process. Coupled with this, exchanges – preferably with overseas academic and non-academic institutions so as to allow for exposure to different legal systems and approaches to the legal process as well as cross-cultural perspectives - will also be desirable.

No doubt many universities and colleges represented at this conference already facilitate some of these activities; however I believe that the emphasis will need to shift further. This must be done, however, without in any way compromising the academic integrity of a law degree.

2. The Educators

Law schools must recognise the need to engage as Faculty members professionals from a diverse range of background experience. It is important that students receive instruction and guidance from educators who approach contemporary legal issues from different perspectives. This will help to enhance an understanding of the interaction between law and other disciplines. I know, for example, of a lecturer at an Australian law school who was previously a Science Professor at a leading University in the United States. For myself, I have found that my many years as an investment banker have allowed me to present students with a different perspective to international law than some of my colleagues. I am sure that this combination of perspectives is of benefit to students.

3. The Curriculum

This is the area where perhaps the most significant changes can be made. When my daughter started school, I recall the Principal saying that many of the 5 year-old girls would end up in professions that did not even exist at that time. Without being overly dramatic, it is crucial that law school curricula are constantly assessed and revised so

that students are offered relevant and contemporary units of study. Just as the law itself must constantly adapt to changes in technology, politics, market forces and socio-economic developments, so must the areas of study undertaken by future lawyers be influenced by the demands of globalization (in the broader sense). In Australia, for example, we have seen in recent years new 'cutting edge' units of study being offered at law schools – international advocacy, space law, biomedical law and bioethics, quantitative methods in law and environmental management law to name but a few. I would also suggest that courses in international and comparative law be compulsory in the standard law degree. Our students are, in many cases, at the forefront of this emerging process of the globalization of legal regulation, and it is incumbent on academic institutions to equip them appropriately to actively participate in these ongoing developments.

4. The Students

Law Schools have traditionally chosen their students based on examination results. In Australia, for example, the oldest Law School in the country set a benchmark of 99.60 (out of 100) in the school leaving examination for entry into the class of 2004. Other law schools were not far below this mark. Naturally academic capability is a very important requirement for the lawyer of tomorrow. Yet, at least in Australia and I suspect elsewhere as well, this encourages some students to enter law school for no other reason than that they have achieved the requisite score, even though their interests and expertise may lie elsewhere. Moreover, leaving aside the whole question as to whether examination results are a true reflection of a person's potential, I suggest that academic capability is not in itself sufficient. We should seek to encourage people from diverse backgrounds – both professionally and culturally – to enter law school. Our students must possess an interest in other disciplines, must be interested and concerned with current affairs and must, above all, be able to think and adapt to changing circumstances. In this area I am confident that we have also made great strides forward but it does raise questions as to the whole selection process. I note that most medical schools in Australia require students who have achieved the requisite score to undertake a rigorous interview process before they are accepted into the course. This may be a useful (though admittedly labour-intensive) additional procedure that law schools may need to undertake in the future.

Conclusion

The challenges of the twenty-first century are daunting for humankind as a whole. Rapid developments in technology, changes in the geopolitical climate and the recognition of issues of global concern, among other things, will demand that the legal processes respond in an appropriate manner. Despite the many problems associated with globalization, I believe that it is a trend that is irreversible. This will, in turn require more effective and sensitive multilateral legal regulation in many areas. As a result it is important to put into place an educative process that will best equip the lawyers of tomorrow to operate effectively in this changing environment and allow them to preserve the important and relevant role of law in the conduct of contemporary transnational relations.