
INTERNATIONAL LAWYERING: A LOOK AT GLOBAL OPPORTUNITIES

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ABSTRACT

As countries, global organizations, and private donors have invested strongly in the rule of law and human rights over the past two centuries, attorneys have achieved prominence in transnational law and institution reform initiatives. As the U.S. legal profession moves into this worldwide field, we should pause to consider the ethical issues posed by "worldwide lawyering" practices.

To answer the first question, I draw on the ethical doctrine of cosmopolitanism, as well as the obligations of the U.S. legal profession to the rule of law and reforming justice, to conclude that there are powerful ethical grounds for promoting global justice. However, these reasons do not by any means warrant promotion. While morally justified in theory, the cosmopolitan project of global justice introduces ethical questions in practice. In the final chapter of the Article, I recommend that, in order to prevent ethical concerns, global justice attorneys must dismiss an "import" approach to law in which foreign legislation and institutions are transplanted into new settings in favour of a normative approach to the procedures of law making.

The protection and promotion of the universal values of the rule of law, human rights and democracy are ends in themselves. They are also essential for a world of justice, opportunity and stability- Kofi Annan, Secretary General, United Nations.¹

¹ The Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights for All, 128, delivered to the General Assembly, U.N. Doc. A/59/2005 (Mar. 21, 2005).

I. INTRODUCTION

Law-reforming activities aimed at promoting the rule of law, human rights, and democracy have expanded to more regions of the world as private donors, Western states, and international institutions have "poured hundreds of millions of dollars into the rule of law reform," especially over the past two decades. The American Bar Association (ABA) has extended its global rule of law initiative significantly; what started as the Central and Eastern European Law Initiative of the ABA has evolved into the rule of law initiative with employees and programs in nations around the globe. Like big networks of activists and non-governmental organisations (NGOs), various U.S. governmental entities also promote comparable programs globally.

These practices are not new; they are the complex products of historical trends, including the law and development movement of the 1960s and the emergence of an international human rights system after World War II. In the 1980s, law played a critical role in the dominant vision of economic development grounded in market economies. In reaction to worries about this neoliberal view of law and development, in the 1990s, goals moved to a focus on "good governance," a model that aims to moderate open markets with the "rule of legislation" in the form of legal regulation, enforcement of freedoms, and political accountability. At the same time, human rights activists mobilized more and more across borders, seeking to implement a global vision of social justice by asserting international claims to human rights in domestic and international fora. Today, in word and deed, the virtues of the rule of law and human rights are praised by Western states and international institutions as guarantors of democracy, stability and economic growth.

This strategy to world justice and stability is inherently legal in nature by emphasizing the rule of law and human rights. In brief, the law of public interest is becoming increasingly global. While I conclude that there are strong ethical reasons for promoting global justice, there is no way to justify these reasons. This is the cosmopolitan lawyer's dilemma: while morally justified in theory, the cosmopolitan project of global justice presents ethical questions in practice.

With this article, I hope to start a conversation and recognize that I cannot properly explore the nuances of all the questions and problems raised when covering a lot of floor. My strategy is based on scholarships from various fields, including moral philosophy, legal ethics, socio-legal research, and theory of law and politics.

II. JUSTICE ABROAD: THE PRACTICES OF GLOBAL JUSTICE LAWYERING

a) Rule-of-Law Reform

The rule of law is a notion which is notoriously open and disputed. It is described and used in such diverse ways in the history of political and legal thought that we might conclude that it is an empty vessel devoid of any enduring content. Despite this conceptual history, international aid agencies typically subscribe to a version of the rule of law that includes not only procedural elements, but also substantive human rights standards.

The Rule of Law refers to a principle of governance in which all government and private individuals, organizations and entities, including the State itself, are responsible for legislation which are publicly enacted, similarly enforced and separately adjudicated and which comply with global human rights standards and standards. It also needs steps to guarantee compliance with the principles of law supremacy, equality before the law, accountability to the law, fairness in law enforcement, separation of powers, involvement in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

The U.S. International Development Agency (USAID) quoted the U.N. Definition as consistent with its knowledge of the rule of law, stressing, moreover, that the rule of law is a universal principle that transcends social and cultural distinctions. The purpose of the rule-of-law reform is not to "create global replacements for national structures, but to assist create capacity for domestic justice". Like definitions of rule of law, the U.N. definition of "justice" is both broad and universal in aspiration:

Justice means consideration of the rights of the accused, the interests of the perpetrators and the welfare of society as a whole.

Therefore, global justice attorneys are involved in a project to build legislation and political institutions that instantiate a specific concept of justice, a concept that includes a concept of the rule of law that is "dense" or substantive.

As stated above, government and private donors have spent hundreds of millions of dollars on help under the rule of law because of a firm belief that reform of the rule of law is essential if transitional countries are to become stable democracies capable of engaging in the worldwide market economy.

In other words, rule-of-law aid is driven by a specific vision of worldwide justice – of a peacefully cooperating international society of liberal constitutional democracies in a mutually beneficial financial system. In addition, the attitude to applying this vision of justice is legalistic: the rule of law reform focuses on establishing domestic laws and institutions familiar with liberal democracy. So it is not surprising that reformers of the rule of law often try to replicate familiar legal institutions in the Western style.

b) Human Rights Advocacy

Advocacy for human rights is also inextricably linked to normative judicial visions. The Universal Declaration of Human Rights starts by claiming that "the recognition of the intrinsic dignity and equal and inalienable rights of all members of the human community is the basis of the world's liberty, justice and peace." While lawyers involved in advocating for human rights often devote their time to a subset of human rights (e.g., women's rights), they share a commitment to realizing human rights as a necessary condition for a just society—just as the rule of law is understood as a necessary condition for a just society.

In fact, advocacy for human rights is no different from reforming the rule of law; rule of law initiatives assert human rights as a required end. I address this individually only to highlight a specific human rights advocacy strategy: legal attempts to enforce state-level human rights standards through national legal institutions, such as legislatures and courts. While the rule of law reform is mainly concentrated on constructing political organizations and drafting new legislation, some advocacy for human rights aims to implement or enforce human rights standards at the local level by promoting legal reform in established legislatures or challenging current legislation and regulatory procedures in established courts. The search for social change by litigation is a practice familiar to U.S. lawyers have been involved in the exercise as social movements ranging from women's rights to the conservative religious movement.

International human rights proponents intended training sessions for local judges, attorneys and prosecutors to inform them on numerous global human rights regulations integrated into the constitution of the state. In addition to teaching respondents about the content of multiple human rights treaties and regulations, human rights proponents urged respondents "to include arguments about human rights and to quote the treaties in their court briefs."

Human rights activists, of course, also use a variety of other ways to carry out legal and political reform. They participate in traditional "shaming" methods, writing shadow reports on human rights, and conducting press campaigns, for instance. They also lobby their own governments to assert diplomatic pressure and impose sanctions on governments that violate human-rights norms." And they operate at global level, affecting global organizations and bringing allegations to global and regional courts, such as the European Court of Human Rights.

However, activists and attorneys operate within a legal or political system in most of these circumstances, of which they are probably a component. In such cases, the objection of "imperialism" has less force because advocates do not act outside of a political system that recognizes them as participants; that is, they are less vulnerable to the charge that they impose their moral values on another society. But like reformers of the rule of law, transnational human rights attorneys who advocate legal change through national legal channels in the name of global justice reject traditional social and political limits. A transnational cause-law strategy to human rights advocacy, like rule-of-law reform, thus raises fears that U.S. attorneys are involved in a type of imperialism. We need to appeal to an ethical theory of worldwide aspects to justify their involvement overseas.

III. THE ETHICAL FOUNDATIONS OF GLOBAL JUSTICE LAWYERING: COSMOPOLITAN COMMITMENTS TO JUSTICE:

While the worldwide procedures outlined above may occur in the wake of military, financial, and political sanctions, they usually do not motivate forceful action and sanctions. The following assessment is based on the premise that intervention in the form of advocacy and persuasion does not raise legal, political and ethical issues, such as presentation of humanitarian intervention. That said, while transnational attorneys do not use militaristic means, these attorneys still intervene in other societies' social and political procedures to support specific values. Therefore, they are charged with imposing on others their own moral and political views. But as I clarify below, this particular objection is based on concepts of moral relativism and subjectivism that are ultimately not very persuasive. Furthermore, if we reject relativism as an absolute bar to engaging in the lives of those outsider cultural and political communities, we can define powerful moral reasons-based on the ethical doctrine of cosmopolitanism and the obligations of the U.S. legal profession to the rule of law and social justice-that justify the attempts of attorneys to promote political justice worldwide.

a) Moral Arguments for Non-interference in Other Societies

The argument that we should not intervene in other communities or cultures is connected with multiple types of moral relativism, which argue that we can only answer normative questions about ethics (i.e., what we should do) by referring to something else, such as a religious or cultural perspective of the globe. This perspective of morality is appealing because-contrary, for instance, to baseball or chess-the notion of morality seems to lack a set of built-in laws and norms to which we can appeal to answer questions. Given that morality is indeterminate, relativism seems to support the old adages "live and let live" and "to each his own" and to endorse the view that we should not judge other societies according to our moral views, which are, after all, no more "correct" than other moral views. Following this logic, for example, although we may adjudge it wrong to exclude women from political office in our society. But as moral philosophers have shown, moral relativism does not mandate "tolerance" or limit our moral judgments. Even if morality is contingent on social context, it does not logically follow that we cannot judge others according to our moral standards; when we make a moral judgment we necessarily make a judgment concerning what people ought or ought not to do.

As James Dreier explains, "moral judgment is contrary to the judgement that artichokes taste nice, which does not commit me to the judgement that you should consume them." For instance, a moral judgment that women's political exclusion is morally incorrect commits me to a judgment that others should not do so.

b) Cosmopolitan Commitments: The "Oneness of Humanity"

Even if we conclude that cultural distinctions and moral disagreement require no interference on their own, this conclusion does little to justify or motivate interference in other cultures. Fortunately, we can do much more to justify the advocacy of global justice. In reality, as ethical cosmopolitans do, we can plausibly claim that our moral obligations do not stop at political boundaries, but extend to all humanity instead-that because every person in the globe has equal moral value, we have moral responsibilities not only to our friends, family, and co-citizens, but also to individuals we have never encountered living in locations we may never even visit. As a result, if we are morally committed to pursuing the ends of justice, we are committed to pursuing global justice.

While cosmopolitanism evokes a number of meanings-from cultural cosmopolitanism that describes a way of living in the world "to global democracy's political aspirations"-it is also an ethical doctrine that underlines "humanity's unity.

c) Professional Responsibilities for the Quality of Justice

Having suggested that certain identities-such as professional identities, such as "lawyers"-give rise to specific responsibilities, I now turn to the issue of whether, as a matter of professional ethics, the legal profession should endorse its dedication to promoting political justice overseas, in addition to the representative of the client and the legal system officer, the lawyer is a public citizen having unique accountability for the quality of justice. " This means obligations beyond those that the lawyer fulfils in the performance of his duties towards customers and the legal system, but the contours of those duties are uncertain. Even if we acknowledge that attorneys have a particular obligation to promote political justice, we can comprehend this obligation in a restricted sense, that is, as the role of the lawyer in a legal system that adds to the smooth functioning of an established political order.

On the other hand, we could comprehend this obligation in a wider context to require attorneys to encourage what is just even if it is not reflected in the established political order. In addition, in choosing whether the legal profession should support global justice obligations, we need to address another ambiguity: even if attorneys are more generally accountable for the quality of justice, it is not evident that accountability goes beyond our domestic boundaries.

IV. THE WAY FORWARD: FROM LAW TO PROCESS

We cannot and should not predict the form regulations and institutions will take, given the reality of reasonable disagreement. Therefore, in relation to leaving the inclination to think towards an end (rule of law, human rights) in terms of a specific means (i.e., legal strategy, political institution), attorneys should resist the inclination to think in terms of specific ends. After all, by what measure would we assess whether the rule of law and human rights are being respected by a society? Given the vagueness of ideas and the burdens of judgement, we would again be tempted to judge these ideals by bias and experience according to the presence or lack of specific legislation and institutions. Or, we may be tempted to bring the rule of law or human rights into line with specific circumstances or occurrences. Rule-of-law professionals, for

instance, could explore whether government authorities abide by the law. But that just informs us so much. For instance, in the United States, many would say that the law was disregarded by executive officials in authorizing "improved" interrogation techniques.

Therefore, global justice lawyers should shift their focus from specific legal means or ends to legislative processes ; instead of thinking about law in positivist terms (as a set of existing rules and institutions), lawyers should think in normative terms (i.e., as to what processes will produce law). This entails a transition from an "import" approach to law, transplanting foreign legislation and institutions into fresh settings, to a normative approach to legislative processes. In this vein, ideals of rule of law and human rights are the slender vocabulary of values from which dialog starts. These values and standards provide a shared deliberative language that shapes the result, but does not determine it. This does not mean that attorneys are unable to share their technical legal knowledge, but that technical advice and knowledge should not replace the process by which individuals choose the rules that regulate them. Transplanted regulations and institutions violate the dignity of those they are meant to govern without a significant process. An ethical commitment to this process, as we have seen, requires a commitment to understanding about agreement and a dialogue that treats the beliefs and views of others as important.

V. CONCLUSION

Long before today's global justice attorneys, Lon Fuller called on attorneys to be "architect[s] of social structure[s]." He regretted what he understood as a step in the legal profession towards "technical rationalization" of suggested guidelines and choices "in the context of accepted [legal] doctrine," arguing instead that lawyers should be concerned with the values, or the "process of order-creating [is]," which creates social institutions. Global justice attorneys are driven by a belief in "order-creating procedures" that guarantee political justice, and yet they struggle to transcend "technical rationalization" tendencies in that attorneys too often comprehend legal and political reform "in the context of [their] accepted doctrine." But to further political justice abroad, lawyers must approach their work not as legal positivists or understanding law as a pre-packaged product, but as facilitators of processes of law making and social change. Consequently, global justice lawyers, consistent with their cosmopolitan commitments, serve not as the ultimate architects of social structure, but as advocates of

political justice and social change, understanding that while acting on shared ideals and values that inspire global solidarity, they cannot dictate the particular legislation and institutions that give political expression to these shared values.