

BARBADOS BAR ASSOCIATION A.G.M

June 4, 2005

“The Globalisation of Law and Justice” - Some Reflections.

Written by

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Introduction

I consider it an honour to have been asked to address you this morning and I should wish to thank you for bestowing it. I must let you know that when I was asked by your Secretary (as he then was) to deliver this address, I readily accepted after trying without much force, or success, to say no. Then I spent a few restless nights trying to come up with a suitable topic. I did not want to discuss any specific academic area, I am sure that many of you are only now getting over the painful exposure to Contracts II and I would not want for you to relive that experience. So “*Recent Developments in Contract Law*” was out. Nor did I want it to be too lightweight. So “*Laughter is the Best Advice*” was a no-no too. I needed to find some thing that would stimulate your collective mind, that would be comparatively general in nature and that would be of current interest. On Sunday last, I settled on the globalisation of law and justice, an emerging phenomenon that entails the governance of a universal, supranational law which purports to enable a

mutually agreed concept of justice and, moreover, claims to override the sovereign legal prescriptions of individual jurisdictions, where these are in conflict, so as to ensure the observance of state-contracted entitlements. In other words, a universal “natural” law sourced from the treaty obligations freely undertaken by sovereign States. If this sounds much like some jurisprudential or even international law concept, I do apologise, but it is of current and practical application as you shall soon hear. I had informed Alrick of my topic and set about preparing it when, *mirabile dictu*, the very issue arose in a judgement of a distinguished and learned panel of the local Court Appeal on Tuesday. I have not been able as yet to read the judgement of their Lordships which is, perhaps, A Very Good Thing, since it would be presumptuous, I think, to comment at this stage, given the possibility of an appeal onwards by the State. But that judgement in which, it is reported, their Lordships held that a citizen could acquire enforceable rights by virtue of their State’s accession to a treaty which accorded such individual rights (even if her State’s Constitution did not, I presume) fits neatly into today’s theme. No doubt this raises some serious jurisprudential issues - *Quo vadis* the principle of monism/dualism in international law theory? Is the supremacy of the Constitution now a severely qualified and maybe hollow boast even? And to what extent is parliamentary sovereignty impugned by an executive act of treaty accession? Is

there thusly a nice issue for the doctrine of separation or division of powers? Is there to be a legitimate expectation on the part of the citizen that the competent authority will seek to provide the individual entitlements agreed to by the State in the relevant instrument? Would it be unethical of the State not to do so while praying in aid a provision in the national law which is either to the contrary or silent on the point? Is it unconstitutional for the State to enter into treaty arrangements where these conflict with the supreme law? And, last, if there is to be a remedy for such conduct by the State, is it to be a juridical one or a political one? The nature of the recent Court of Appeal decision raises an even more visceral issue - if there should be any juridical doubt on this issue in a matter involving the most fundamental of the fundamental rights, (the right to life) how should that doubt be resolved by the Courts?

Typical of a law lecturer to ask questions that even he cannot answer, isn't it? But these are issues that must be resolved. The Caribbean Court of Justice has been the victim, to date, of a difficult birth. Clearly, in light of the issues isolated above, the judges of that regional institution are in for a rough time equally.

As a matter of what, I suppose, is of lesser interest, I am compelled to observe that this very issue arises in contexts far removed from the courts. The present coach of the West Indies cricket team is Australian - as also, I might add,

are the coaches of India, Sri Lanka, Bangladesh and Australia itself. We often hear assertions that there are still among us some of those players who helped to ensure a decade or more of West Indian supremacy and that we should use them to achieve top billing status again. So there is no need for a foreign coach. Reasonable men and women may, and do, differ on this. But does being a member of a winning team guarantee a monopoly of cricketing wisdom? Obversely, is everything from outside better? Or is the source irrelevant and the substance everything? These questions are equally germane to justice and fairness. Is there now a global construct of the same? Or is it all merely relative so that is the best of all what the political arm of the State decides is best for one?

Of course, there is much more to the notion of the globalisation of law and justice than can be possibly broached here. The ways in which law is practiced, taught and organised are fast becoming influenced by global values and concerns as well as the typologies of criminal conduct, the content of legislation, methods of adjudication and forms of dispute resolution. But, to paraphrase, Lil Rick, I can't [discuss them] all. I have restricted any disquisition to two interwoven areas of inquiry - industrial justice and human rights.

Industrial Justice

Barbados became a member of the International Labour Organisation (ILO) in 1967. In consequence, it agreed to abide by the Constitution of that body. As you are doubtless aware, the ILO is an organisation comprising workers' organisations, employers' organisations and Governments and its instruments, principally Conventions and Recommendations are a distillation of the views of these three constituent elements. Given the composition of this social partnership, it may be argued that there is much moral legitimacy in its utterances in whatever form these may be manifested. The principal instruments are a product of lengthy discussion, compromise and drafting and ultimately communicated to all members for their voluntary ratification - no compulsion at all to do so. It is a sovereign act.

However, by the ILO Constitution in Article 19(5)(b) - each of the Members (of the ILO) undertakes to bring the Convention arrived at before Parliament no later than 18 months after the Conference for the enactment of legislation or other action. The measures taken to do so are to be reported to the Director-General as well as any action taken. If the Parliament agrees that the State should ratify the Convention, then the State will formally do so and is obligated to "take such action as may be necessary to give effect to the provisions of the Convention". Once there has been ratification of the Instrument, the Member State will be bound to

make a periodic report to the International Labour Office on the measures which it has taken to give effect to the provisions of the Convention. All well and good and in accordance with international treaty obligation.

The crunch comes however in that even if the Convention is not ratified, the Member State must still report periodically to the Director-General of the Office the state of its law and practice in regard to the matters dealt with in the Convention “showing the extent to which effect has been given, or is proposed to be given to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention.”

In other words, having participated in the creation of the Convention, the Member State is not allowed to rest on its laurels, so to speak, but is obliged to act on the provisions of the instrument, either by enacting it into law or saying why it has not done and what steps it is taking to do so. Moreover, the mechanisms and machinery established to deal with the various allegations, representations and complaints against Member states such as the Committee on Freedom of Association (for Trade Union purposes) and the Committee of Experts place subtle pressure on a Government to conform to its treaty undertakings. The details of these procedures are best left for another time and place, but the ILO context

evinces one circumstance where statal sovereignty is a weak excuse for non-compliance with a supranational/global law.

But it does not end there. It is one thing to be censured by an international organisation where much of the effect of that censure depends on geopolitical clout. As is undeniable, in the international sphere, some states are more equal than others. However, if the municipal courts are unable or unwilling to recognise these obligations as imposing duties on the part of the State within the jurisdiction then it lends some credence to the charge that international law is not law. And that all this international travel and treaty ratification are nothing but photo ops, shopping trips or the accumulation of air passenger miles. Maybe we can afford to underwrite these “phenomena”, but if the essence of the matter, the treaty, is to impact on the existence of those on whose behalf it was acceded to, then the legal system must be sedulous to ensure that the Executive reports back to the people’s representatives in Parliament as to the possible effect of the international obligation - it may be asking too much to expect that MP’s will pass this information on to their constituents -, that Parliament be prompt to take legislative measures to ensure the operation of the instrument’s provisions in local law and that the third power, the judiciary, interpret the law in accordance with the spirit of the treaty’s stipulation. I shall return to this last in a brief while, but it bears remarking at this

stage that a sovereign jurisdiction is free not to ratify any undertaking that ex facie conflicts with its volkgeist, culture or supreme law or to abjure its membership in any international organisation if that should become necessary. Political correctness, in this context, either in the form of ratifying treaties because it is the thing to do, or remaining in an organisation and failing to integrate its principles into the jurisdiction, tantamounts to running with the hare and simultaneously hunting with the hounds, if you will forgive the acultural analogy. I am prepared to concede that the judicial role to which I referred earlier may indeed be problematic. Is a judge competent (i) to use the provisions of an unenacted treaty/convention to interpret local laws and (ii), even more problematic, to determine what *is* the local law.

In the context of employment/industrial relations law and human rights, there is an emerging body of precedent that would suggest a possible answer. Without being comprehensive, I crave your permission to refer to some of this material.

First, the views of scholars. In an October 1999 paper,¹ the late Sir William Douglas, *quondam* Chief Justice of Barbados and then Chairperson of the ILO Committee of Experts on the Application of Conventions and Recommendations commented on this issue. After adverting to the wealth of materials available from

the ILO enforcement mechanisms through their observations and decisions, which in his view, could “provide reference material available to courts and practitioners dealing with employment issues”, he also referred in support to the regional decision of *Fisher* [1980] AC 319, where Lord Wilberforce referred to the origins of the fundamental rights and freedoms of the individual in regional constitutions and reiterated the requirement for a generous interpretation of these provisions, thereby avoiding “the austerity of tabulated legalism”, suitable to give to individuals the full measure of the fundamental rights and freedoms ...”

Sir William concluded:

“The Fisher case is an excellent example of international law being used to interpret provisions in national legislation. On the presumption that the legislature does not intend to legislate in a manner inconsistent with international law, it seems that applying the consistency test to national legislation is perfectly permissible where the State has entered into a treaty or ratified a Convention on the same subject matter and it seems to me that the result of such a test is to clarify and render more precise the domestic legislation in issue ...”

¹“The Role of International Law in Domestic Jurisprudence and Advocacy” - Sir William Douglas (October 1999,

Of similar effect is the Arusha Declaration of Commitments on the Role of the Domestic Judge on the Application of International Human Rights law at the Domestic Level.² Here, judges and magistrates from eleven African countries considered and examined judicial development and trends in the areas of the rights of women and girls as relates to nationality, family law and violence against women and the extent to which domestic jurisdictions have incorporated international human rights law in their decisions in those named areas. They also noted that the domestic justice system is an arm of the state and, as such, and like other arms of the State, has an obligation to ensuring the observance of the State's international legal obligations, for which the State can be held accountable at the international level; AND acknowledged that "there still existed constitutions, legislation and customary, traditional and religious norms and practices which deny women and girls equal rights with men and boys. Nonetheless, they were convinced that judicial officers have opportunities to utilize international human rights treaty law to ensure that women and girls are guaranteed their rights to equality and non-discrimination and that ratification of the CEDAW Convention by a State also creates an obligation on the part of the justice system to *do all that is practically possible* to bring domestic *constitutions* (sic) and other domestic norms into conformity with the norms of the Convention. Consequently, they

Port-of-Spain).

made, among others, the following declaration of commitments and called upon other judicial officers to do the same (I have selected three of the 15).

- (i) To make the norm of equality and non-discrimination on the basis of sex the guiding and central principle in all judicial decisions ...;*
- (ii) In determining whether a rule or practice is discriminatory on the basis of sex to always look beyond the letter of the law and to consider the practical implications of the rule or practice; and*
- (iii) Whenever possible and relevant, to cite articles of the Convention ... when interpreting domestic law.*

If we consider that these sentiments are couched in the diplomatese of international relations, then it is at least arguable that these officers are calling for a radical reform of the way in which international treaty provisions should be used in domestic legal fora.

²Adopted on September 11, 2003 at Arusha, Tanzania.

Even before this, the Commonwealth Secretariat had convened in Bangalore, India³ a high level judicial colloquium on the Domestic Application of Human Rights Norms. Their distinguished Lordships found that there was an impressive body of jurisprudence, concerning the interpretation of particular human rights and freedoms and their application, which was of practical relevance and value to judges and lawyers generally. And while they recognised that in most common law countries international conventions are not directly enforceable in national courts unless their provisions have been enacted into domestic law, they also noted a growing tendency for “national courts to have regard to these international norms for the purpose of deciding cases where the domestic law - whether constitutional, statute or common law - is uncertain or incomplete. However, these officers were not as emboldened as their African brethren at Arusha since, for them “where national law is clear, and inconsistent with the international obligations of the State concerned, the national court is obliged to give effect to national law, though in such cases, the court shall draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country. This is clearly the voice of judicial restraint which pays due deference to the sovereignty of the state or, rather, the primacy of national law, since the State’s position would

³February 24-26, 1988.

be, at best, equivocal. According to the Bangalore Principles, international law does not become part of domestic law until Parliament so enacts or the judges declare that the norms thereby established are part of the domestic law.

However, writing a decade later, the Hon. Justice Michael Kirby of Australia noted the change which had come over the approach of courts in England, Australia, New Zealand and other countries of the common law.⁴

He cited a plethora of cases in which the central issue was the legitimacy of using international treaty provisions to interpret local law. Among these was a New Zealand decision *Tavita v. Minister of Immigration* which involved the consideration of the relevance of international norms to administrative decision making. The Crown had argued that the state authorities were entitled to ignore international obligations ratified by New Zealand. The New Zealand Court of Appeal would have none of it. Cooke J. dismissed the Minister's submission as:

“An unattractive argument, apparently implying that New Zealand's accession to the international instruments has been at least partly window-dressing ...”

And after making reference to the Balliol Statement 1992 - re the duty of the judiciary to interpret and apply national constitutions ordinary legislation and the

⁴“The Road from Bangalore: The First Ten Years of the *Bangalore Principles* on the Domestic Application of International Human Rights Norms - See also “The Impact of International Human Rights Norms: A Law Undergoing Evolution (1995) 25 Western Australian Law Rev. 130.

common law in light of the universality of human rights - and the Bloemfontein Statement 1993 to similar effect, he maintained that:

“A failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could extend to the New Zealand Courts if they were to accept the argument that, because a domestic statute ... does not mention international human rights norms or obligations, the executive is necessarily free to ignore them.”

Justice Kirby concludes:

“The task of reconciling the growing body of international law with the domestic legal system remains an acute and important one. In the process of reconciliation, the three branches of government have their respective functions to perform. The judicial branch can scarcely ignore the developments of international law relevant to the cases before the judges. In the matter of fundamental human rights of universal application it is inevitable ... that the influence of international law will increase and that the mutual adjustment of the two universes will continue. Each modern judge and lawyer has a duty to contribute to this process. It is the way of the future.”

There is much more that I could relate from the substantial scholarship on the issue but time will not permit it. I crave your indulgence however to quote from the final two paragraphs of General Comment No. 9 on the domestic application of the International Covenant on Economic, Social and Cultural Rights.⁵

(14) Within the limits of the appropriate exercise of their functions of judicial review, courts should take account of Covenant rights where this is necessary to ensure that the States' conduct is consistent with its obligations under the Covenant. Neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations.

(15) It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a state's international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the State in breach of the Covenant and one that would enable the State to comply with the Covenant,

⁵Nineteenth Session (1998). The ICESCR was adopted by the General Assembly of the United Nations on

international law requires the choice of the latter. Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights.”

Finally, by way of exposition, I want to refer to some cases which sought to apply international (labour) law/human rights principles in domestic matters.⁶ I'll look at four of these.

In a 2000 Supreme Court decision from Argentina, a governmental decree imposing a wage reduction for civil servants was held to be unconstitutional since the ILO Protection of Wages Convention no. 95 (1949) authorised wage reduction by law or collective bargaining only. This Convention had a supralegal value and had established a framework which attached certain constitutional guarantees to the right of remuneration.

And in *Minister for Immigration & Ethnic Affairs v. Teoh* (1994) 128 ALR 553, the High Court of Australia was called upon to decide whether Teoh could have a legitimate expectation that a public authority would act in conformity with

December 16, 1966 and entered into force on January 3, 1976 - paras. 14 & 15.

⁶Case-law: Use of International Law by National Courts - International Trading Centre, Turin, Italy (August 2001).

the UN Convention on the Rights of the Child which Australia had signed but had not yet implemented by legislation into national law. The court held that:

“... ratification of a Convention is a positive statement by the Executive Government and of this country to the world and to the Australian people that the Executive Government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary.”

In a 1993 decision of the Supreme Court of Paraguay, a Government decree was struck down as unconstitutional because it was in conflict with the ILO Convention 87 (1948) which prohibited the violation of the principle of freedom of association for trade union purposes, specifically the right to organise by seeking to establish rules and procedures for the elections of union representatives.

And in the South African case of *Modise v. Steve Spar Blackheath* 2001 (2) SA 406 (LAC) where there was a dismissal following a failure by the employee to comply with an ultimatum during a strike and where the employer had refused to permit the employee a hearing before the dismissal, the Court was of the view that, in spite of the absence of a clear answer in local law, Art. 7 of the Termination of Employment Convention No. 158 (1982) which South Africa had ratified, allowed

escape of the obligation of the employer to give a hearing only where he could not reasonably be expected to do so. The *audi alteram partem* rule was applicable in all other cases of dismissal. This, I note, raises some interesting issues for local dismissal law.

Conclusion

This phenomenon of the globalisation of law and justice, whose surface I have barely scratched, poses an intriguing question for lawyers and judges. It calls for a serious re-examination of the extent to which a State can cling to the doctrine of sovereignty to justify its non-compliance with a treaty obligation which it has ratified. A principal consideration will be the use to which the principles of the international instrument is sought to be put. While it seems clear that they may be used in situations of interpreting unclear local law, and maybe where there is no law at all, the use of these principles where the existing local law is clearly to the contrary is less clear cut. Even so, those who argue in favour of this fully globalised jurisprudence will still have to grapple with some thorny issues, among them:

- (1) Is it for the judiciary solely to determine what constitutional norms should be? Is it entitled to make law?

- (2) The language of international human rights instruments is traditionally broad allowing a judge to read into a provision “what she hopes, expects or wants to see; and
- (3) Should human rights be globalised at all or should all courts be obliged to pay respect to the local legal system created out of the democratic aspirations of a people?⁷

Similar issues as these also confront the sole superpower to the north of us. In a speech to the American University College of Law last January, Justice Scalia of the Supreme Court ventured that “judges interpreting our existing Constitution should pay no heed to how other countries interpret their own Constitutions”. Scalia’s remarks came in the wake of two recent Supreme Court decisions which both used foreign law in support of the decision:

- (1) *Atkins v. Virginia* (2002) - where it was held that the US Constitution’s prohibition of cruel and unusual punishment forbade the execution of mentally retarded individuals. Here the Court took account of the brief filed by the EU which catalogued the overwhelming repudiation of the practice by the rest of the world; and

⁷See generally Kirby, n. 6.

(2) *Lawrence v. Texas* (2003) - where the Supreme Court invalidated a state law criminalising homosexual sodomy. The majority opinion cited in support a 1967 UK Act and, more pertinent, a 1981 ruling of the ECHR which invalidated the criminalisation of sodomy between consenting adults in private. Both of these it was said, established that criminal prohibition of homosexual sodomy was not universally accepted within Western civilisation.

Conservative reaction to this has been swift, even to the point of the introduction of a bill that seeks to preclude Federal courts from relying on foreign law in interpreting the US Constitution. According to one commentator, Dorf, this clearly violates the principle of separation/division of powers.

Scalia's reservation is based on the view that, even if the meaning of the Constitution evolves (he is an originalist), "the place to look for that evolution is in the values and opinion of the American people". American public opinion, he notes, is often at odds with foreign values on issues such as the death penalty and gay rights and he queries why there is no use of foreign law in cases of abortion; the rights of criminal suspects (and freedom of speech) where foreign policies are more conservative than in the US.

Professor Dorf concludes, nevertheless, that “given globalisation, foreign law would appear destined to influence US constitutional law. After all, throughout human history, commercial and other contact with foreign peoples has invariably led to intellectual change.” Can we stand alone?