

5-1-2006

Why Do We Care about Transnational Law

Elizabeth Rindskopf Parker

Follow this and additional works at: <http://elibrary.law.psu.edu/psilr>

Recommended Citation

Parker, Elizabeth Rindskopf (2006) "Why Do We Care about Transnational Law," *Penn State International Law Review*: Vol. 24: No. 4, Article 5.

Available at: <http://elibrary.law.psu.edu/psilr/vol24/iss4/5>

This Article is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Penn State International Law Review by an authorized administrator of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

Why Do We Care About Transnational Law?

Elizabeth Rindskopf Parker*

Dean Koh has shared a wonderful vision with us, one to which I fully subscribe. Unfortunately, he has also made my prepared remarks somewhat redundant! Although I am tempted to limit my comments to “me too,” instead, I have decided to change course in midstream and offer a more personal perspective on why globalizing the law school curriculum is so important.

To begin, this is an exciting moment for all of us here today who care so deeply about making international material more accessible to our students. I will confess that this is why, after a 30-year career in practice, I chose to become a law school dean. It seemed to me, judged by my own law school reunions and occasional visits to other law schools, that legal education was missing something very important. I know you agree. Obviously, we all care deeply about the topic of Globalizing the Law School Curriculum.

Yet there is a worry that, at a workshop like today’s, we are speaking only to the converted, when what is more important is to persuade the “unconverted.” Among our colleagues, are there some who do not share our belief that there is a body of transnational law that our students must be prepared to address? I believe there are. As a related question, one might also ask why even we—the believers, if you will—have been so slow to realize the importance of transnational law. For in fact, transnational law, or perhaps more accurately “blended law,” has been evolving for some time.

As evidence of the slow rate at which we have recognized that the world is changing around us, I offer my own experience on the University of Michigan’s Board of Advisors for the Center on Comparative and International Law. You will be surprised to learn that the University of Michigan, historically one of the powerhouse

* Dean, University of the Pacific, McGeorge School of Law; formerly Principal Deputy Legal Adviser, U.S. Department of State and General Counsel at both the CIA and NSA. JD and BA, University of Michigan.

international law schools, needed advisory board advice in 1996-97 on whether to require a transnational law course in the first year of law school. The answer seemed so obvious; why even ask the question? Even more surprising, however, was the explanation; no American law school yet had such a requirement.

Indeed, the legal academy has been slow to realize the necessity of including transnational legal material in the law school curriculum. Perhaps the explanation is that we are, by design, conservative bodies. The tendency to place heavy focus on case law may also be relevant here. After all, by the time issues reach the Supreme Court, major changes are likely to already be underway. And so, where developments in transnational law are concerned, we should have been looking at what is actually happening in the world. In fact, our colleagues at Michigan reported that the faculty most supportive of their curriculum initiative were the clinical professors who confronted global issues daily in their work.

Still, there is some good news to report. The AALS, and certainly those in this room, as well as others, have awakened to this need and made remarkable strides in the short time that I have been a dean. For example, a 2004 conference on educating lawyers on transnational challenges brought together a remarkably diverse collection of law professors in Hawaii to discuss creating a transnational legal curriculum. This was a remarkable logistical and substantive feat. That meeting was followed by a second AALS event in 2005 that brought United States and Chinese deans together to discuss exchanges. These are extraordinary examples which demonstrate that the academy is beginning to understand the global world. They serve as the source of great solace for me, as I listen to the disturbing policy debates all around us about whether or not we should even mention international law in court decisions. If this is to be the focus of the current Supreme Court confirmation hearings, I for one believe that we are looking backwards rather than forwards.

Of course, there is a challenge in figuring out how we might best include transnational material in the basic American law school curriculum. One question to think about today is how to make incorporating transnational material as easy as possible for our colleagues. Our colleagues may be interested in the idea of including transnational material in basic law school curriculum courses, but may not feel adequately prepared as international lawyers to do so. To this end, law professors from 31 schools met this past summer at Lake Tahoe. They discussed how we might create curricular material to enable every law professor, whether an international expert or not, to include international material in basic law school courses. Two wonderful things

resulted. First, we persuaded West Publishing that it was a good idea to create case book supplements with international material. Eight of these books are now underway. Many of those who attended the Lake Tahoe conference have been offered contracts for several different supplements to their traditional casebook series. The report from this conference is available, if you are interested. And so, with these books now underway, help is on the way—and not a minute too soon.

This type of initiative and meetings like today's matter greatly. We know that facts are the foundation of any legal system, and the facts today are increasingly and inevitably becoming more and more transnational in all respects. Facts and their associated legal problems no longer observe borders, especially after the dissolution of the Soviet Union. Goods and people move with increasing speed across all borders. These transnational exchanges are further accelerating thanks to the explosive growth of information technology. Indeed, one would struggle hard to find an area of domestic law today where international fact patterns are not present. As the Michigan clinical faculty recognized, when we look at the world around us, the answers to the questions, what is transnational law and why does it matter, become obvious.

The need to encourage colleagues who may not yet be persuaded remains. In fact, I too, was personally slow to realize the importance of the global world and the relevance of international law. I would like to think that the experiences that changed my viewpoint might be useful in encouraging others to recognize the importance of introducing transnational legal issues to our law students. In any event, this is how I justify indulging myself in personal reflections while others offer more substantive observations. Of course, there is a second motivation for these personal musings. It is to pay penance, to apologize, for my foolish law student declaration that "there is no international law—it serves only to indulge those who speak a foreign language and enjoy travel." After 30 years of practice, I now see my error. I hope that the lessons of my experience may yet persuade colleagues who still share my earlier views.

One early such experience, occurred while representing matters before the Iran-United States Claims Tribunal. It was an amazing opportunity to resolve disputes in an international setting before a panel of multinational judges against opponents from profoundly different social and political realities. Later, as General Counsel of the National Security Agency, my appreciation deepened for the distinction between domestic and international security, in terms both of practical and legal considerations. I learned lessons about security inside and outside the United States. Suddenly, I realized how different and important the distinctions created by our physical border were for both policy and legal considerations. Arriving at the State Department in 1989 as the Berlin

Wall fell down, the United States invaded Panama, and the nations of Eastern Europe separated from the Soviet Union and sought recognition, I wished I had taken international law. Later as General Counsel at the CIA, consultations with representatives of emerging democracies introduced me to the importance of rule of law considerations around the world. The interest of these nations in creating stable democracies and national security structures which responded to the rule of law, introduced me to the importance of helping law and culture intertwine the nations of the world into a harmonious global structure. For the first time, I saw that the way in which individual nations governed themselves was an important element of global security. Stated otherwise, if we cared about international security, it had become vitally important to understand and support workable domestic legal systems properly calibrated to local needs.

Of course, for much of this period we saw the United States as leading the world in its commitment to, and support of, a rule of law based world. Initially there was little to learn outside our domestic law. It could be fairly argued that our way was best and that it would ultimately be the approach adopted by all other nations. Now, somewhat painfully, activities on the world stage force us to question whether the United States still leads the way. Most of us here grew up in an age when the United States legal system dominated in civil rights and civil liberties. The United States model was the principal source of law on those two themes, and it mattered little what other nations might be doing. We had nothing to learn from them. In marked contrast, if you look today at the European Union, you might wonder whether Europe might not have jumped ahead of the United States. I believe it is possible to argue this when the work of the European Union in the area of human rights alone is considered. And so suddenly, another reality comes into play. It is that “*lex Americana*,” with which we have grown up, may no longer be the dominant or even the sole, legal system in the future. Soon, we may not be talking so much about transnational law but really thinking about an international “blended” legal system that seems to be developing even as we speak.

Spending any amount of time in China will persuade you of this point. China, as you know, has been hard at work reviving its legal system since the early 1980's. I learned this when, on my first trip, a very senior diplomat welcomed me with the words, “help us by bringing lawyers to China.” Little did I know that this greeting was not in jest. Today, by government decree, a fixed percentage of their law school courses must be given in English and they have traveled the world to review and copy the finest laws available. Now, they must begin to learn how to actually implement those laws. Here, I am particularly proud to

mention that we at Pacific McGeorge introduced such a practical program last summer—a simulation of a corporate deal for mixed teams of Chinese and Americans—at the University of Suzhou Kenneth Wang School of Law. The students, both Americans and Chinese, gained a remarkable experience by working with counterparts from a different culture on a common solution to a commercial problem. Shouldn't all of our students have that experience?

China's interest in practical experience has reached its' practicing bar as well. At a recent meeting with the Beijing Law Association, we were surprised to learn that their greatest interest for continuing legal education was a seminar in products liability! Yet on reflection, doesn't this make perfect sense? Look at anything that you can hold in your hand; it was probably made in China. The door to a huge wave of dispute resolution, following on the heels of an increasingly large volume of commercial transactions, has begun to open. Will our students be prepared to play a leading role in this development, or will they be sidelined for want of proper preparation?

Not only in China, but elsewhere too, the increasing importance of third world economies will inevitably influence the development and application of global law. The growing economic power of these third world countries will impact our own legal systems. It is likely that we will confront a world where the United States legal system will be less dominant and we may, as I have mentioned, need to think about a new form of "blended law." In short, the time is coming when we may have to begin taking into account what other nations' legal systems require of us. Will our students be prepared to anticipate such needs?

Perhaps my most important experience, as I catalogue these personal moments of recognition, occurred in the late '90's. One day, after shuttling weekly between St. Louis and Washington, D.C., I suddenly realized that on most flights I had been seated next to a businessman returning from Asia. Here was the practical evidence of statistics showing that an increasing part of GNP of the United States, then over 30%, was based on export revenues. The facts of today's economy demonstrate the inevitability of a transnational world and, thus, a transnational legal system. Whether we like it or not, this trend will only grow if our nation is to thrive.

This evolution will matter greatly for our students, as well as for those of us who are deans, or who will become deans in future decades. When current graduates return for their twentieth reunion, we will want them to report that we provided them with the legal education that allowed them to succeed. I believe that their judgment will depend on whether they were educated for the world in which they will compete. That includes preparing our students to compete with other lawyers, to

compete for clients, and to be the finest possible lawyers.

There is another reason why exposure to transnational legal issues is of great value to the legal education we provide, both for our students and for our faculties. Not only do we gain an appreciation for other legal systems, but our understanding and appreciation for our own system deepens and matures through such exposure. We heard Jack describe how this happened to him in his media law practice. I experienced the same phenomenon as the CIA General Counsel, while working with my counterpart in the British Secret Service. Understanding Britain's legal foundations for the sensitive function of intelligence collection introduced me to important differences between our two nations. The comparisons in constitutional frameworks and approaches to balancing individual rights and national security were fascinating. Even more, this experience deepened my understanding and appreciation for the strengths and limitations in the United States approach to national security. In a time when response to cross-border terrorist threats by non-state actors dominates our national security dialogue, this experience has been of profound value to my own areas of academic interest.

Thus we see that learning about different legal systems opens our eyes to our own system. Recently, at Pacific McGeorge we learned this lesson in a different setting, while providing training in the United States adversarial process to Chilean prosecutors and defenders. We understood why the Chilean government wanted to move from the civil law's inquisitional system of criminal justice to the common law adversarial model. They wanted transparency and the opportunity to challenge governmental facts to insure fairness. What I did not understand was the important connection they saw between this new approach and the United States Socratic method of teaching. They responded to our questions by explaining the obvious. "It is the Socratic method that best prepares lawyers and ultimately judges for receiving and testing evidence that is presented orally." This was a revelation. There are profound differences between a legal system based on oral evidence and one based on the receipt of evidence only in written form. Their challenge was to train lawyers and judges in how to receive evidence through live testimony. This conversation with a Chilean law professor opened my eyes to the profound connection between the Socratic method of instruction and the United States legal system, something that, regrettably, I had not previously considered.

My final point about the importance of transnational legal education relates to the role in our society of law schools, of law professors, and of deans. What purpose do our law schools serve? Fundamentally, of course, we are educating this nation's leadership. As we know, this nation has a remarkable system of higher educational institutions, some

3,000 in number. This system is both large and widely admired throughout the world for its great diversity, quality and the opportunity it offers to a broad group of citizens. Now consider for a moment what the most significant part of that higher education system may be. Let me suggest that it is a tiny group, less than 200 schools, each of relatively small size judged against their peers. I refer to the group of ABA approved law schools. This relatively small group of schools has a disproportionate impact on the future of our nation.

Why do I say this? It is because all of our judges, a vast majority of our nation's elected leaders at the federal, state and local levels, four of the last seven presidents, and many leaders of both the corporate and the non-profit world are products of these law schools. What if this group could be influenced to include transnational material in the curriculums? Not just at the great schools like those I'm honored to join on this panel today, but at every ABA law school in the country, no matter how small or where located. What if every law school was producing the kind of graduates we are talking about here? Would we have the types of debates about the role of international law that we are hearing today on the national level? I think not.

My final reason for saying that transnational material is vitally important to the law school curriculum is because we must be dedicated to the work of preparing this country's leadership. If, in this century, that leadership is not profoundly well versed in the ways of the world legally, if they do not understand the principles of transnational law that we have been talking about this morning, our nation will be at a great disadvantage. And, so, for all of these reasons, I think that each of us is doing something very important in spending today with colleagues to explore the specifics of introducing transnational material in a meaningful way to our colleagues and to our students. Thank you.

