Fairness, Globalization, and Public Institutions

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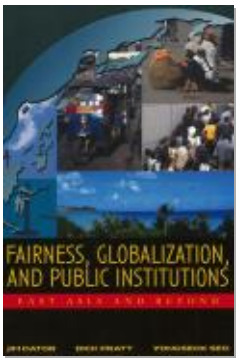

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CHAPTER 12

Globalization and the Law

Emerging "Global Common Law"

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Global Challenges to Public Institutions and Emerging Local Legal Responses

Law inevitably embraces the dynamic changes and accommodations of public institutions caused by the flowing influences of globalization. Stripping terminology to its essentials, "globalization," "public institutions," and "fairness" still invite lively discussion as to their meaning, and each variation brings with it different legal implications, whether under foreign, international, local, or "global common law." Gaining insight on desired future choices for public institutions in the East Asia region may be assisted by some familiarity with the law as it relates to issues of globalization. This chapter examines the legal aspects of the individual and multiple impacts of globalization and the responses of national and global institutions, which often come in the form of legal regulations and consequent legal interpretations. Also discussed is how at times global influences bring legal changes—as if there were a "global common law"—both creating legal obligations and, at other times, restricting these local legal changes.

Global Influences and Fashioning Local Legal Responses

Though international trade, investment, travel, and cultural exchanges have been ongoing for centuries, in recent times cross-border contacts, dependency, and impacts increasingly occur without choice and with greater intensity. While globalization itself is a neutral term, it quickly acquires connotations in the areas of health, safety, welfare, economics, and politics. The impacts and ripple effects of such phenomena as failing financial markets, SARS, anti-terrorism, music, or the Internet reverberate across the globe, regardless of borders, and local public institutions must grapple with finding appropriate responses.

A question can arise as to what is a "local" response. While many govern-

ment institutions are clearly identifiable, in recent years hybrid variations of government-related organizations have proliferated and are to some degree distinguishable from the "state." Moving still farther from that center core are intergovernmental organizations (IGOs), nongovernmental organizations (NGOs), and domestic and international organizations (United Nations [UN], World Bank Organization [WBO], and interest-group associations). In current times, private entities also undertake some functions historically reserved for governments, ranging from environmental protection to cross-border communications regulation.

The actions or responses undertaken by these various legal entities have clearly different legal legitimacies and priorities. Sorting out appropriate jurisdictional terrain and the reach and limits of state sovereignty is an ongoing task of public institutions, whether or not it is they who respond to the initial or the residual impacts of globalization.

Laws often incorporate "fairness" into the regulations. It is a term embraced by lawyers and politicians, as it says "everything but nothing"; it is a slippery concept, relative to changing situations and perspectives. In cold form, it can be described as an appropriate form of balance, in search of the dynamic, yet proper, standard to serve as the fulcrum of competing interests. Even current clarity gives way to shifting perspectives, as illustrated by the legality of slavery in the US changing under constitutional interpretation from property interests to a human rights issue under equality standards. Fairness in the future global environment likely will evolve through similar metamorphoses, as the views of Third World and industrialized states mix. It is likely that the law will help in sorting out what is "fair" and in deciding whose standards are appropriate.

One can easily find illustrations and categories of how societies are touched by "globalization," which is certainly more than "commercialization" and "internationalization." It is the phenomenon associated with the oncoming irrelevancy of state borders and the increasing impotence of single-state solutions in dealing with a growing and limitless number of issues involving aspects of health, safety, welfare, finances, economics, politics, education, and so forth, as illustrated below.

Social Policy

Increasingly, issues arise locally that cannot be resolved locally either because they raise a global concern—for example, SARS—or because the local issue is incapable of resolution except by international or global solutions—for example, cross-border pollution. Such issues require local social-policy responses, but perhaps more important, they may necessitate global legal responses.

Health

Pollution grows, flows, and blows cross-border, particularly in the East Asian region, as economic development interests have driven decisions on whether to erect "barriers" of environmental protection laws.

The global impacts of pollution on the health of citizens are well documented, and its effects on a particular society vary. Pollution caused by neighboring countries causes local public institutions to seek legal recourse to stop the pollution—locally by environmental laws and internationally by treaty, by finding compensable liability, by various cooperative measures, or possibly by a military show of force.

Diseases such as SARS do not stop at the border for a visa. The impact of this health threat caused China to reassess the state of its health-care institutions and abilities and its reporting mechanisms, a true reform of public institutions brought by global threat. Most important, it brought about a governmental reassessment of its place in a global community and a decision to be cooperative with the World Health Organization (WHO) and to be more transparent in that undertaking. It also brought about a spate of new legislation designed to curb the spread of the disease.

Safety

Criminal activities at times seem to cross borders with impunity, with criminals ducking back into "safe harbors" out of simple reach by the security forces in the border left behind. Likewise, global labor, including illegal aliens, flows from certain areas in the East Asian region to destinations in industrialized countries.

The effect of this lawlessness has caused government security institutions to join forces cross-border in informal and formal arrangements ranging from reciprocal practices to full-blown treaties, working together to stem criminal activities. For example, FBI agents are working in China in cooperation with government officials, yet there is still no formal extradition treaty.

Finance

Financial impacts of shifting world markets are self-evident, having caused considerable hardship in more than one country. Typically, regional and internationally coordinated responses, rather than a single state response, are required to undo the effects caused by, for example, the recent Asian financial crisis. Sometimes, solutions compel sovereign states to accede to mandates of international organizations, such as the International Monetary Fund (IMF), resulting in significant reforms in public institutions and regulatory legislation in areas such as banking and securities practices.

Economic

East Asian government policies for economic development all have embraced foreign direct investment and trade. Looking at Japan, South Korea, and China, the resulting effects are society changing. The economies developed, legal regulation dramatically increased to cope with the developing needs of increasingly sophisticated commercial transactions, and the average citizen's standard of living rose. Foreign expertise, currency, and culture were also introduced and to some extent absorbed, though with "local characteristics."

A side effect of the above has included claims of the "McDonaldization" of local cultures and a "race to the bottom" as foreign investors competitively seek low-wage countries for their investment. This has brought about nonbinding International Labor Organization (ILO) global labor standards. Likewise, there are foreign competitive interests in lower standards of protection for the environment, health, and safety (at least in the early years of investment) whose protections are often subordinated to decisions favoring economic growth and development.

Education

The effects of economic development and momentum toward world community integration created great needs not only for cheap labor jobs, but also increasingly for more sophisticated, skilled, technical, and professional jobs. Schools for each of these areas of education developed, some with foreign flavor (including joint degrees), and increasing numbers of college students chose overseas educational training.

Societal/cultural mores

Impacted by foreign investment, products, and culture, none had more impact than the phenomenon of communication bombardment of foreign ways of doing things—delivered in the home by television and more and more by the digital transmission of the Internet and e-mail. This phenomenon affects society by creating instant communication by NGOs, by citizens, and by government, all of which present East Asian governments and public institutions with their own set of legal challenges, ranging from Falun Gong to e-business.

Political

Global impacts on East Asian governments and their public institutions are easily chronicled in that they often caused the development of new or reformed institutions in order to deal with the changes in status quo—for example, foreign direct investment, banking reforms, transportation needs, communication development and control, safety, health, and crime.

Some of these reforms were responsive to perceived needs and some were

"directive," brought about by the "carrot-and-stick" requirements of foreign or international funding sources (e.g., IMF, World Bank) that carried with them agreed-upon objectives. Other reforms undertaken were more independently deemed necessary and in the national interest, such as changes to conform to World Trade Organization (WTO) membership. Issues of national sovereignty persist in these areas in a search for limits of "outside interference" with national interests. However, as discussed above, many of the local changes are locally initiated responses to global influences, rather than outside "mandates."

Globalization of the Law

Developments in the globalization of the law are increasingly observable. These include reform of public institutions that are grounded in legislation and regulations, as opposed to mere policy directives, and patterns of "global common law," clustering around international standards, albeit with "local characteristics" and standards of assessment.

While one could glibly conclude that sovereign governments merely respond to the bidding of global influences, it is far more accurate to acknowledge that national decisions reflect many interests and needs, including domestic and global influences and patterns. Ad hoc responses of governments in the East Asian region are myriad. As stated, public institutions must grow with their country's developments, whether it be with stock markets or intellectual property protection. Typically, new laws and policies (and sometimes new institutions) are promulgated to deal with developing situations, whether they be financial crises, banking reforms, health crises (such as SARS), health and information reforms, communication needs, or limits and regulation of Internet use.

International organizations like the WHO and WTO have widespread effects on creating comparable and compatible responses by governments on agenda items of global concern with local impacts. A clear illustration occurred in 2003 with SARS in East Asia and how governments dealt with it and with the WHO, illustrating the power of global influences on local public institutions, at least regarding certain issues. China was initially prepared to "go it alone," protect its national interests, and deal with SARS in its own way. It quickly became apparent that global cooperation and some integration with "outside" bodies were required to meaningfully deal with the health threat. Public institutions were rapidly transformed and plugged into WHO standards and personnel. China's penchant for nondisclosure was replaced by transparency of its public institutions and practices in dealing with SARS. Government policies and new legislation were quickly put into place to curb the threat.

Joining the WTO is another example illustrating the generation of domestic reforms pursuant to global influences—a case in point, China. Laws, public

institutions, and past practices were all locally reformed in order to meet the mandatory standards of the global organization. Interestingly, by joining the WTO, members submit to a "mini supreme court" to resolve international trade disputes. Such resolutions have required states to change protective laws to keep the nation in compliance with WTO requirements. Thus global responses are made to be compatible with global requirements.

Another approach in the global influence and legalization process is exemplified by several US laws that seek to regulate citizens, businesses, and employment opportunities in overseas locations. The Foreign Corrupt Practices Act follows businesspeople, limiting their conduct, and the Civil Rights Act limits employment discrimination on foreign soil under circumscribed situations. This long-arm, extraterritorial approach of the US government also attempts global influence on the human-rights practices of foreign countries under the Foreign Trade Act by limiting loans and other guarantees to US citizens, depending on the state of human rights and labor conditions in the foreign country. This attempted influence takes place at the political level, though at times it can spill over into practical agreements, such as when the practices of US companies in China precipitated an agreement between the American and Chinese governments to ban the export of prison-labor-made goods into the United States. It also is seen by Asian countries' adoption of UN covenants on civil, political, economic, social, and cultural rights.

Another method of global influence, alluded to earlier, is the carrot-and-stick approach of certain funding entities, such as the World Bank or IMF, that requires agreement to bring about reforms in order to receive financial assistance in those projects. While it certainly is a joint project, with domestic needs being met, one can hardly miss the global influence and the local response. Churning up after the waves of global influences and challenges and responses to crises (e.g., SARS), funded projects (e.g., WBO), foreign influences (foreign direct investment), and domestic economic needs, there is observable progress in the establishment of public legal institutions and processes. Legislation, prosecution, and administrative and judicial enforcement have all taken a turn for the better. While debate continues, as expected, on whether the East Asian countries have a "rule of law," a reliably functioning judiciary, or consistent nonpolitical prosecution, it can be clearly seen that legal institutions are dynamically responding to global influences and local needs.

"Global Common Law" Precipitating Local Legal Changes

The concept of "global common law" could be discussed in the context of "customary" international law, yet there is in the idea of global common law likely to be a more meaningful international enforcement mechanism than is often

used in international law. In a sense, one can look comparatively at East Asian legal developments and find patterns of response by local as well as supranational public legal institutions to international standards and events that, with some literary license, allow one to observe a developing "common law" collection of responses. These responses ultimately could lead to emerging consensus or clarity on legal and policy issues that could be the basis for further uniform global standards or local legislation. The challenge to public institutions, as always, is to determine which global approaches to incorporate into local responses, as well as which global common-law decisions restrict those choices.

> [T]he model of the unitary, independent sovereign state, acting as the complete repository of law and order, becomes increasingly inadequate as an explanation of emergent global regulation, especially because of activities that, by their nature, cannot be confined to the territorial borders of the nation-state. These activities require an understanding of cross-jurisdictional regulation such as when states try to affect regulation unilaterally through extraterritorial exercises of regulatory power, bilaterally though agreements with other states, or collectively through regional and multilateral organisations. Equally, the development of informal regulatory networks of professionals and other experts seeking solutions to cross-border problems must be taken into account.[1]

The newly emerging "global common law" is as of yet piecemeal and area specific—for example, commercial law and human rights. Its development is observable and can be described as analogous to US labor law's "federal common law" illustrated in the 1957 US Supreme Court case, *Textile Workers Union v. Lincoln Mills of Alabama*. In that case the federal court was called upon to fashion its own law by interpreting the national standard embodied in a federal statute. In creating this new common law, it was to draw upon other federal interpretations and upon state laws and interpretations, but it was not to base its decision on local state laws. Rather, it was within the court's discretion to use local rationales but make its decision independent of local regulations and base its interpretation on the federal mandate and on broader federal interests. Likewise, in "global common law," whether it be created under the broad international/supranational/transnational standard of a UN covenant, a WTO mandate, or a European Union (EU) decision, "subordinate" national interests and their sovereign interpretations often give way in certain areas to the broader global interests, where decisions form a pattern to be respected in future cases. This can be explained in various ways, including the fact that whereas earlier "internationalization" stressed cross-border economic and legal activities, the new "globalization" often includes cross-border and multiple states' economic integration. This can be accomplished by governments or multinational enterprises (MNEs) or mul-

tinational organizations (intergovernmental or nongovernmental). It is apparent that it is easier to obtain multinational or global consensus and consent on commercial interests rather than on political or cultural areas, which is reflected, as stated above, in a piecemeal global common law, and with the addition of new legal institutions to oversee the new global order. However, global codes of agreement on trade issues often result in corollary global codes of agreements in related areas such as finance and banking. Therefore, even though the law is piecemeal, the strands connecting transnational interests are often sufficient to create a binding, yet porous, web of global common law.

Sources of Global Common Law

Common-law decisions presuppose that there are in existence standards to interpret and/or at least a fertile field of common values within which a decision can be fashioned around the bonds and aims of common interests. The need for global common law arises in the commercial area from the practical needs for certainty and predictability and the usual needs for enforcement of dispute resolutions. Thus the law provides substantive guidance as well as a process within which cross-border activities are facilitated.

Sources of legal obligation and their legal oversight institutions, which bind governments and/or private parties or organizations, arise from international law (public and private), "supranational" law (e.g., the EU), and intergovernmental and nongovernmental organizations such as the WTO, ILO, and WHO. Of course these legal standards, obligations, and/or guidelines also may arise globally, regionally, or locally across two borders. What they have in common is that by consent or by economic or social reality (as described below), sovereign decisions are affected or transcended by a "beyond-national-decision interpretation" of an obligation. This results in "global common law"—for example, under the WTO, which may either create or restrict local legal decision-making authority, not only for the nation member under the global institution's dispute-resolving mechanism, but also for the other members who will be guided by that outcome in ordering their own affairs. That is because they know that they, too, could have their decisions brought in that venue.

As national interests are increasingly "delocalized" and "regulated" by global standards and obligations, a new level of legal concern comes to the forefront and has

> generated fears that unaccountable private economic power possessed by MNEs, along with similarly unaccountable public power exercised by undemocratic IGOs and by informal international policy-making networks, will serve to de-

> feat the democratic process in nation-states themselves. The fear is that national constitutional orders, created to deal with issues of legitimacy and accountability at the historical stage of national economic and social integration, will be bypassed at the international level. This process may also have been enhanced by the recent trends towards privatisation of state functions, market liberalisation and deregulation that are characteristic of the New Economy state. In response, there is now a growing interest in the question of how to make these three groups of entities more accountable.[2]

For example, US concerns over the authority of the World Criminal Court and the extent to which it might interfere with national sovereignty and existing legal order is the explanation given by the United States for not joining. The many legal nuances and issues that arise from global common law are illustrated in the case of the EU, with its multilevel system of authority, interfacing with law from the international level, the EU-international level, the EU level, and the national level. Each level has its own standards and processes for dealing with the legal issues, and each creates its own level of "common law." While these legal developments are in a regional setting, they reflect the genre of legal issues involved in the developing global common law.

"Global Common Law" Restricting Local Legal Changes

In a long line of decisions in the United States, federal courts have protected the integrity of the federal government in managing the nation's foreign relations vis-à-vis states' attempts to affect it by striking down state legislation that placed risks to the United States' performance of its international obligations. A recent illustration of this was found in 2000 in *National Trade Council v. Natsios,* where the US Supreme Court struck down a Massachusetts law restricting state purchases from companies doing business in Burma (Myanmar). The law had provoked protests from other countries that subsequently challenged the measure in the WTO as being inconsistent with the US government's international obligations under the WTO Agreement on Government Procurement. Thus one can see the interplay among state, national, and global law wherein the national law preempted the state law, due to the national law's requirement to follow the global law. This type of "precedent" is thereafter used as a type of global common law not only by the United States, but also by other countries.

In several recent cases under the WTO, US laws and regulations have been found to violate that organization's global obligations. One such case was the U.S. tuna dispute involving a controversy about international trade agreements and their effect on domestic environmental legislation. Trade agreements restrict

specialized domestic legislation that can act as a disguised tariff, preventing or taxing the importation of foreign goods. In this case US legislation banned imports of tuna where the country had not practiced dolphin-safe tuna fishing. The decision found the United States in violation. A similar finding of violation occurred in 2003, when the WTO's Dispute Panel ruled that US steel tariffs violated the international trade agreements.

The WTO does not invalidate national legislation. Instead, after a series of procedures permitting member retaliation, it provides that follow-up legal issues of how to deal with the offending national legislation be left for the sovereign judgment of the violating nation.

Another field falling under global common law is human rights. An interesting case developed in Tasmania where, due to international pressures from an international organization—the UN Human Rights Commission (UNHRC), under the International Covenant on Civil and Political Rights (ICCPR)—the Tasmanian state government repealed laws that outlawed homosexual acts between consenting adults. In that case, an NGO filed before the UNHRC claiming that Tasmanian law violated Australia's obligations under the ICCPR to respect privacy and equality rights. Interestingly, as a state, Tasmania had no standing before the UNHRC, an international organization, and only the national government of Australia was a respondent.

Interesting corollary legal issues involve the potential precedential value of global common-law decisions by global legal institutions. Common-law countries with a common-law legal tradition, such as the United Kingdom and the United States, are experienced with the practice of *stare decisis,* whereby once a decision is rendered it is a binding precedent in future similar situations. By contrast, a larger number of countries fall under the civil law legal tradition that historically does not follow that practice of *stare decisis.* Therefore, the "legal reflexes" of countries may vary on how to deal with certain of the global common-law decisions.

Future Directions: Universal "Global Common Law" or Legal Pluralism?

Global common law, while certainly very significant in its influence and impact on local decision making by public institutions, is still only piecemeal and limited to certain areas, such as commercial and human rights. While these areas may develop the common-law patterns of decisions toward universal standards of global law (or "customs" of international law), other large areas of a nation's political and cultural identity may or may not succumb to global pressures. Diversity and legal pluralism will continue within nations, and any growth toward

universality will come not just from the legal compulsion and influence of global common law, but also from social, economic, and cultural global influences or by consent to global norms, based on self-interest. Global common law may well be the beacon that lays out a practical pathway on which to proceed.

Notes

1. Peter Muchlinski, "Globalisation and Legal Research," *The International Lawyer* 37 (2003): 230.

2. Ibid.