LEGAL ETHICS IN AN AGE OF EVOLVING TECHNOLOGY

Sir David Baragwanath*

Legal ethics are set for legal professionals, including arbitrators and judges, by legal professionals, including arbitrators and judges. But the purpose of such ethics is to protect others, predominantly lay people, whose lives across almost every conceivable activity and place are affected by how legal professionals handle their disputes. Last year's New York Conference of PRIME Finance Foundation considered "Ethics for counsel and arbitrators in complex disputes".[1] *The present topic is – in an age of ever-evolving technology, what is required of those who create and are bound by legal ethics?*

Le respect des règles de déontologie juridique, qui par son aspect sanctionnateur dépasse la simple éthique, s'impose à l'ensemble des professionnels du droit et ce y compris les arbitres et les juges. Cependant, à l'analyse l'objectif premier de ces règles est de protéger tant dans leur vie que dans l'exercice de leurs activités, les tiers non professionnels des conséquences négatives de la manière dont les professionnels du droit traitent leurs litiges. L'année dernière, la conférence de New York s'est intéressée à "L'éthique des avocats et des arbitres dans les litiges complexes" avec au cœur des discussions, la problématique de la difficile détermination, à l'ère d'une technologie en constante évolution, de ce que l'on est fondé d'attendre de celles et de ceux qui façonnent ces règles de déontologie et d'éthique.

A decade ago the ABA's Commission on Ethics 20/20 had been tasked with revisiting the ABA's Model Rules of Professional Conduct in light of globalisation and developments in technology. Professor Golden pointed out to his fellow Commissioners that the word "technology" did not appear anywhere in the Model Rules as they then were. To correct this, the comment to Model Rule 1.1 Competence now states:

* Appellate Judge and former President of the Special Tribunal for Lebanon.

1 David Baragwanath (2019) 25 Comparative Law Journal of the Pacific 5.

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with *relevant technology,* engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.
>
> [Emphasis added]

The thought is that, while professional ethics does not necessarily require a lawyer (or judge) to be expert in evolving new technologies, competence requires an effort to be aware of changes in this regard, at least to the extent of the benefits and risks these might pose for legal practice.

It is suggested there are four major aspects: learning; responding; educating; and adapting.

I LEARNING

Legal professionals are regularly called on to respond to technology evolving and even emerging at an ever-increasing rate. How are legal ethics to keep pace? A valuable lead was recently given by Roberts CJ in *Carpenter v United States* 585 US __ (2018) (22 June). The Government acquired cell-site records of the appellant, giving the Government near perfect surveillance and allowing it to travel back in time to retrace his whereabouts. There was invasion of a legitimate expectation of privacy. The legislative authority relied on did not apply the exacting standard of the Fourth Amendment, which requires for such intrusion a warrant supported by probable cause. There was "unreasonable search and seizure".

He held for the majority:

> the rule the Court adopts "must take account of more sophisticated systems that are already in use or in development … . In mechanically applying the third-party doctrine to this case the Government fails to appreciate the lack of comparable limitations on the revealing nature of [the new technology]".

To comply with this standard the decision-maker must properly understand the new systems. A highlight for me was a dinner/conversation to which the Canadian ambassador invited half a dozen internet experts attending a conference in in The Hague, including one of its inventors, to meet three judges from different courts/tribunals, for cross-disciplinary discussion. Both sides learned from the experience. The range, scope and pace of new directions of e-development requires the law to evolve in an informed manner. Judges, arbitrators and other decision-makers can require education beyond the evidence, submissions and oral arguments of counsel. So in the UK, with the consent of the parties, the final court organised a

series of *in camera* pre-hearing seminars in biochemistry by an Oxford professor in a patents appeal turning on DNA technology. It was said:[2]

> The work Professor Yudkin did by means of these carefully prepared seminars enabled all those involved to concentrate on the issues of law involved in the appeal without having to spend a good deal of extra time in the course of the hearing on learning about the technology. This had the result of shortening the length of the hearing by several days …. there was no dispute about the technology. I suggest that it is a course which might usefully be adopted in the future in cases of this kind, where the technology is complex and the parties are willing to consent to it.

Likewise the UK Privy Council and the Trial Chamber of the Special Tribunal for Lebanon have permitted the use by counsel of video technology and of a scene model respectively to help communicate undisputed historical and geographical complexity to the court.

Beijing presented another dimension of complexity. I had the privilege of judging moots about cyber warfare, argued brilliantly by students who lacked my access to the three books on the topic held by the Peace Palace library. There and later in Geneva we discussed Peter Margulies' essay "Sovereignty and cyberattacks: technology's challenge to the law of State responsibility".[3] Its thesis is that cyber threats pose fresh challenges to sovereignty and to international law. It points out that in addressing kinetic attacks – using physical force, like Guy Gibson's famous bombing raid on the German dams – international law defines state responsibility narrowly. The leading cases are those of the International Court of Justice in *Nicaragua v United States* [1986] ICJ Rep 14 and of the International Court for the former Yugoslavia in *Prosecutor v Tadic* (Appeals Chamber Case No IT-94-1-A, 15 July 199 paras [131] and [145]), discussed by the International Law Commission's *Draft Articles on Responsibility for Internationally Wrongful Acts* and in the *Tallin Manual on the International Law Applicable to Cyber Warfare.* Margulies identified the fact that cyber attacks do not entail the physical force historically implicit in its prohibition by art 2(4) of the Charter of the United Nations; other experts advise "the consensus is that Article 2(4) prohibits only armed force" – while cyber-attacks may violate the customary norm of non-intervention or a related international law norm, that does not necessarily mean that armed force may be used in response.[4]

---

2 *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2004] UKHL 46, [2005] 1 All ER 667, 703 para 135 (HL) per Lord Hope.

3 (2013) 14 Melbourne Journal of International Law 1-24.

4 According to Hathaway & ors "The Law of Cyber-Attack" (2012) 100 California Law Review 817, 842-843.

So if Guy Gibson had stayed in England and manipulated electronic controls to open the gates of the Möhne, Edersee and Sorpe dams in the Ruhr, with the same results as the bouncing bombs dropped from his Lancaster bombers, what would the law have said? There are arguments for abandoning history in favour of consequences.[5] But clarity is better.

II RESPONDING

Having understood the new systems the decision-maker must then characterise them, either by deciding what existing principles should apply or by adapting those principles to bring them up to date. Some issues of response were underlined in a *New York Times* report of August 28.[6] It recorded a secret cyberattack against Iran on 20 June which wiped out a critical database used by Iran's paramilitary to plot attacks against oil tankers in the Persian Gulf. That was said to have provided in response to a drone attack a proportionate measure calibrated to stay well below the threshold of war.

III EDUCATING

In a recent essay a French writer described the need for economists to break out of the narrow mindsets and vocabulary of their specialism and to communicate with members of the community affected by economic considerations in terms they can understand. She chose the title "Vulgariser n'est pas vulgaire".[7] The same need exists in law.

IV ADAPTING

In 1889 in a preface to his *Treatise on International Law* William Hall wrote:[8]

> Looking back over the last couple of centuries we see International Law at the close of each fifty years in a more solid position that that which it occupied at the beginning of the period … it has more and more dared to grapple in detail with the fundamental facts in the relations of states….

The modern position is well expressed by President Yusuf of the International Court of Justice, describing the need of decision-makers to:[9]

---

5 Above n 4 at 848.

6 <https://www.nytimes.com/2019/08/28/us/politics/us-iran-cyber-attack.html>.

7 *Le Monde* 18-19 August 2019 27.

8 Eighth Edition Oxford 1924, xxiv.

9 <http://cassese-initiative.org/2017/09/fifth-antonio-cassese-lecture-the-role-of-international-lawyers-between-theory-and-practice/>.

> … recognise the ephemeral nature of legal rules … recognise that the rules exist only because and for the benefit of the society that they serve … recognise that rules evolve, grow, fall into desuetude because of the changing needs of society. Most importantly … recognise that it is their job to identify, propose, and effect these changes in practice ….

Do we need to amend the language of the UN Charter to deal with non-violent but unauthorised remote opening of dam gates?

Some examples

The introduction to this session refers to artificial intelligence, blockchain, smart contracts and e-discovery.

Each of us has been, or has the potential in our work to be, exposed to these and other innovations beyond our prior experience. How are we to decide what ethical criteria to impose on ourselves or others?

In The Hague I have been faced with defence appeals against the Prosecution's acquisition and proposed use to identify accused of some 7½ years' worth of the metadata created by every cellphone call and every text made, sent or received in Lebanon. The topic has been the subject of leading cases in the European Court of Justice, the European Court of Human Rights, and many senior domestic courts.

In New Zealand I was called on to determine applications for discovery in proceedings brought under a mutual tax agreement by a foreign government in respect of records seized by tax authorities which if printed would have stood several miles high.

A recent application for discovery in that jurisdiction concerned access by one party to Sherman Act equivalent jurisdiction against a competitor in the context described by the High Court of Australia:

> … the object of [the legislation] is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end. Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to "injure" each other in this way.

Approaches to discovery vary. The former Victorian principle, appropriate in an age where every document was handwritten or typed, required each party to discover whatever might, not must, lead to a train of enquiry that might, not must help or hinder either party. Sometimes in arbitration discovery may be abandoned; sometimes as in the case I've mentioned a judge will be called upon to state specific principles to be applied by counsel in accordance with their ethical duties;

sometimes, as discussed by Campbell McLachlan in his *Lis Pendens in International Arbitration* (2009) arbitrators will be faced with opposing counsel with significantly different ethical criteria.

The complexity of evolving technology cuts in two directions. Not only does it present challenges of understanding and application; it also tends to defy the transnational boundaries that have given lawyers of a given jurisdiction something of a monopoly of local knowhow. It has facilitated cross-border money flows to escape tax and other creditors, with use of the "Deep Web" (a relatively benign term which however includes the infamous "Dark Web"). It has also increased the ethical need for lawyers to cope with the challenges of both public and private international law.

In his book *The Court and the World: American Law and the New Global Realities*[10] Justice Breyer argues international law requires the assistance it can receive from other domestic courts:

> … the Supreme Court must increasingly consider the world beyond our national frontiers. In its growing interdependence, this world of laws offers new opportunities for the exchange of ideas, together with a host of new challenges that bear upon our job of interpreting statutes and treaties and even our Constitution … new realities give rise to legal questions affecting not just foreigners but Americans as well. There is no Supreme Court of the World to answer these questions for us … [T]he world will follow someone's example if not ours …. It is … the need to maintain a rule of law that should spur us on, jurists and citizens, at home and abroad, to understand these challenges and to work at meeting them together.

Likewise Lord Mance, a former Deputy President of the UK Supreme Court and current member of P.R.I.M.E. Finance, has written:[11]

> 148 …The role of domestic courts in developing (or … even establishing) a rule of customary international law should not be undervalued. This subject was not the object of detailed examination before us, and would merit this in any future case where the point was significant. But the intermeshing of domestic and international law issues and law has been increasingly evident in recent years. Just as States answer for domestic courts in international law, so it is possible to regard at least some domestic court decisions as elements of the practice of States, or as ways through which States may express their opinio juris regarding the rules of international law. The underlying

10 Alfred A Knopf New York, 2015, 281-4.

11 In *Al-Waheed v Ministry of Defence* [2017] UKSC 2, drawing on Lauterpacht's earlier article "Decisions of Municipal Courts as a Source of International Law" (1929) 10 British Yearbook of International Law 65-95 and later writings, especially by Sir Michael Wood.

> thinking is that domestic courts have a certain competence and role in identifying, developing and expressing principles of customary international law.

The torrent of international money flows also feature in the development of dispute resolution jurisprudence. In two recent judgments by the UK final judges in commercial litigation *Skandinaviska Enskilda Banken AB* [2019] UKPC 36 and in *AWH Fund v ZCM Asset Holding Com* [2019] UKPC 37 they clarified the liability of recipients of payments by companies close to insolvency.

How far does one take legal ethics? Should the ethical considerations to be applied by arbitrators and judges extend to the macroeconomic consequences of evolving technology upon working people? In *Jesner v Arab Bank Plc* 584 US __ 24 July 2018 the Supreme Court divided over whether a New York bank should be held liable for alleged criminal conduct claimed to be funded by its international money flows. Sotomayor J for the four dissentients adopted a trail-blazing approach to attributing liability to such a company. The majority, having indicated they would answer that issue, limited their decision to a non-liability construction of the Federal Torts Act.

New technologies are affecting our basic economy, raising rather broader ethical issues. Slavery was a major ethical issue. So was monopolising. What of economic abuse?

In his book *Capitalism in the Twenty-First Century*[12] the French economist Thomas Picketty depicted the reverse Bell curves of social inequality in Germany, France and Britain, swinging from 1910, with private capital valued at 6-700% of national income, down to, after two wars and a depression, 2-300% during the "trente glorieuses" from 1945 to 1975, then back to 600% in 2010; and with world capital/income plummeting from 500% in 1910 to 260% in 1945, rising to 440% in 2010, projected to 650% in 2090 and then continuing to rise.

To similar effect is Hettie O' Brien's essay "Aye, robots" in the *Times Literary Supplement* of 23 & 30 August 2019[13] reviewing three new books, each of which "proceed from the premiss that we're entering a second machine age".

One, it reports, indicates:

> contemporary capitalism has eroded our humanity, leaving us defenceless at a critical juncture …. The postwar settlement between capital and labour created a particular kind of person and community: industrious, proud and hopeful. The dawn of neoliberal

12 Harvard University Press, 2014, 26 and 461.

13 Pages 32-33.

> economics in the 1980s eviscerated this pact, giving rise, in communities destroyed by poverty and unemployment, to a new type of subject: someone who accepted constant insecurity; not as an aberration but as normality" ... [prepared] "to look after themselves, forget community obligations, tolerate lawlessness and participate in it".

O'Brien cites:

> … the fine-grained details of how AI is currently unfolding in real life. Cases of tech companies employing real employees to pose as artificially intelligent " chat bots" are typical of an emergent field of " ghost work" in which an invisible on-demand labour force contracted through online platforms … carry out complicated digital labour …. This dynamic has been referred to as "the paradox of automation's last mile". As computers perform increasingly tasks, human labour will need to intervene and fix the algorithms when they misfunction, creating more jobs as technology progresses. In short, it's often easier and cheaper to employ humans to behave like machines than it is to develop machines that simulate human behaviour.

She concludes that what she terms "globotics" – the remorseless international advance of robots – is not particularly novel but rather:

> an accelerated impulse of capitalism …. The outsourcing of workers and destruction of jobs amplifies [a] tendency towards the consolidation of corporate power – and uses new technologies to do so.

In its leader for 24 August 2019, focused on the G7 meeting in Paris, *Le Monde* stated:[14]

> Capitalism is sick. This diagnosis comes not from some little alternative group but from the Prime Minister of France. Speaking to the WLO in June Emmanuel Macron said that capitalism had "gone mad". We need, he said, to return to "a market based social economy where everyone has a role" rather than accepting "takeover of wealth by a few."

The newspaper cited the French Minister of the Economy, Bruno Le Maire, as saying:

> The capitalism we have known during the 20th century has led to the destruction of natural resources and the growth of inequality. It is in an impasse; we must reconstitute it.

14 Page 12.

President Macron was to receive representatives of "Business for Inclusive Growth", a coalition of 34 multinationals with receipts of more than $1,000 billion per annum.[15]

On 29 August the Nobel laureate Joseph Stiglitz writing in *The Guardian*[16] noted that:

> … [Their] statement endorsing [not just shareholder] but stakeholder capitalism, signed earlier this month by virtually all members of the US Business Roundtable, has caused quite a stir.

He expressed:

> … relief that corporate leaders … have finally seen the light and caught up with modern economics, even if it took them some 40 years to do so.

But exhibiting a degree of skepticism, he concluded:

> … we need legislative reform … so that corporations are not just allowed but actually required to consider the effects of their behaviour on other stakeholders.

Could and should an international law inhibit the present imbalance? Do we need some equivalent of the Sherman Act to meet unreasonable economic abuse, with judicial or legislative authorities drawing the kind of boundaries we saw in *F Hoffmann-La Roche v Empagram SA* 542 US 155 (2004)? What should those of us in positions of influence be saying and doing to apply for the next 50 year phase the lessons of William Hall, Peter Margulies, President Yusuf, Lord Mance and Justice Breyer?

V CONCLUSION

I finish with an ethical point related to evolving technology: it concerns counsel's obligations as to citation of authority. It is a practice of certain civil law States to apply what Roland and Boyer *Adages du Droit Français* (Litec 1999) p363 attribute to "ancienne jurisprudence" - the principle "Jura novit curia; La Cour connaît le droit" (the judge knows the law); "Avocat passez au fait, la Cour sait le droit". By contrast, under the English Common Law counsel owe an ethical obligation to inform the Court of authorities inconsistent with their argument. Judges have found it necessary to restrain the deluge of authority now facilitated by modern search engines. But does not the pace and complexity of modern science and engineering require assistance from counsel for even the most sophisticated judges or arbitrators

---

15 Above n 14.

16 <https://www.theguardian.com/business/2019/aug/29/can-we-trust-ceos-shock-conversion-tocorporate-benevolence>.

to understand in true perspective the " more sophisticated systems that are already in use or in development" of which Chief Justice Roberts spoke?

It is not for a foreigner to enter the famous debate between Justices Scalia and Breyer as to the use of foreign law in the construction of a national constitution.[17] But as a common law judge sitting with civil law judges in a final international court I find it of the greatest assistance to be informed of relevant developments elsewhere. I expect that each of us – counsel and judges alike – is ethically required (I use the language of the Victorian Promissory Oaths Act formula preserved in s18 of the New Zealand Oaths and Declarations Act 1957) to "do right to all manner of people after the laws and usages of [our country], without fear or favour, affection or ill will".

I hope that, at least in time to come in our ever-shrinking world, the exercise of the privileges and duties as counsel or judge will be regarded as including the international law with which our domestic law is presumed to conform, including the general principles recognised by nations, stated in art 38 of the Statute of the International Court of Justice. Pointing that way is an essay in the International and Comparative Law Quarterly[18] which sees rapprochement between investment treaties and human rights treaties – each expressing a value of profound international importance.

17 Sinša Rodin "Constitutional Relevance of Foreign Court Decisions" (2016) 64 The American Journal of International Law 815.

18 JH Fahner and M Happold "The Human Rights Defence in International Investment Arbitration: Exploring the Limits of Systemic Integration" (2019) 68 ICLQ 741-759.