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Session 3B: *Social Justice in International Law: Building Coherent Solutions in Crisis*
Friday, November 4, 2016
11:15-12:45

Chair
Prof. Janelle Diller, University of Windsor

Speakers
Assoc. Prof. Reem Bahdi, University of Windsor
Assoc. Prof. Pascale Chapdelaine, University of Windsor
Assoc. Prof. Jaye Ellis, McGill University
Prof. Colin Grey, University of Québec à Montréal
Prof. Maureen Irish, University of Windsor

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Report by Leonor Vulpe Albari

Introduction

Prof. Janelle Diller began the discussion by explaining that social justice, or rather, injustice is at the root of many crises and cycles of conflict. These crises can arise from repression or negligence on the part of state and non-state actors in society. She noted forms of repression such as slavery, torture, forced labour, and war crimes. She also noted that the way in which public or market institutions operate can create social injustices leaving people hungry, homeless, or without healthcare or social security. Diller continued and stated that social justice also includes positive rights, such as having the opportunity and access to meaningful work in a safe environment, or having access to primary education.

According to Diller, in principle and in international legal terms, there is already a floor of social justice that ensures rights, freedoms, opportunities, and resources. This floor of social justice can be found in internationally recognized human rights, and in multilateral treaties that deal with issues like the environment or trade. Diller pointed specifically to the UN's initiative, the Sustainable Development Goals (SDGs), which demonstrates a willingness on the part of many states to strive for sustainable development and implement the legal commitments they have in the area of social justice. Diller explained that law and international law cannot be seen as a solution for all of society's social problems, but there can be some connections made between social justice and international law.

Contributing factors to social injustices and crises

Diller asked the panelists to describe some of the factors that contribute to social injustices and crises in their areas of research, and to identify the human cost of these crises. Prof. Jaye Ellis, who conducts research in the area of public international environment law, among other areas, explained that social justice creates a useful framework for looking at the problem of environmental degradation, for example, as it allows one to see the complexity of the problem. According to Ellis, by looking at environmental degradation through a social justice lens, we are able to see aspects of the problem that we would miss if we looked at the problem only through an economic lens, or only through an environmental lens. However, in diagnosing any problem,

certain aspects of a problem are brought to the forefront, and others are pushed aside. Thus, when one starts to understand a problem, one already starts to decide what solutions should be used to fix the problem. Even looking at climate change through a broad, social justice lens will highlight certain issues over others. There is the risk of, for example, using this lens and ignoring the economic aspects tied to this environmental problem. According to Ellis, it is necessary to look at economics, and not only social justice, when diagnosing and finding solutions to environmental problems.

Prof. Colin Grey explained that he conducts research on legal and political theory and immigration law, and specifically on justice in respect to refugee flows. He examines (1) justice when refugees make claims against their own state (for persecution, for example) and (2) justice when refugees make claims to a state of asylum. Regarding the first claim, tensions arise out of international wars, civil wars, and other conflicts. Regarding the second claim, tensions arise because the traditional powers that states have is limited by refugee law. There is also a third tension between these two claims; refugees face many injustices when immigrating from one state to another, and this is often due to private actors. Grey stated that it is important to keep this third injustice in mind when examining the two other claims and the injustices that arise from them.

Prof. Maureen Irish, who conducts research on the problem of poverty, began by discussing the disparities between rich and poor states. Irish explained that, of the 164 member states of the WTO, the majority are labelled as "developing" and, of these, the UN considers 36 "least developed countries". She stated that these disparities between rich and poor states are a concern for global social justice policy. The WTO, the successor to the GATT, was established in 1995 and recognizes the need for sustainable development in its preamble. Irish explained that the preamble also states the need to "protect and preserve the environment", to respect states that are at different stages of development, and the need for "positive efforts" to ensure that developing states "share in the growth in international trade commensurate with the needs of their economic development".[1] Irish stated that, though there have been some preferential rules and tariffs created for developing states since the 1970s, the levels of development aid have never been sufficient and the disparities between poor and rich states persist. The focus of her research is how an organization like the WTO can meet its objective and ensure that developing states participate in the growth of international trade and meet their economic needs. Irish identified a tension between, on the one hand, having reciprocity and equality between states, and, on the other hand, giving preferential treatment to developing states in order for them to grow economically.

Prof. Pascale Chapdelaine's research focuses on the link between intellectual property law and social justice. At an international level, intellectual property laws have been very copyright centric, and have been so since the Berne Convention of 1886. She explained that the rhetoric of crisis has been used successfully to create stronger copyright laws, especially at the international level. In a digital area, with a new set of threats, there was a need for stricter copyright laws. However, according to Chapdelaine, this crisis and the stronger copyright laws that were created may have created a new crisis: "the crisis of the legitimacy of copyright law". Though copyright laws are stronger, user rights have not been addressed. Users might need access to works without permission, for example, to have access to data regarding pharmaceuticals, or to have access to a work in order to criticize the work. Generally, user rights are only dealt with and protected when states make exceptions to the exclusive rights of copyright holders. Chapdelaine explained that the

[1] 'Marrakesh Agreement Establishing the World Trade Organization' (Marrakesh, 15 April 1994), Preamble

only exception to this landscape of weak user rights protections at an international level is the Marrakesh Treaty, which allows works to be transferred into a format that is readable for persons who are visually impaired or print disabled in some way. The rights of users are, therefore, protected in this treaty but in a very limited way.

Prof. Reem Bahdi's work focuses on the human rights claims of Arabs in Canada, and on human dignity in Arab countries. She began by explaining that, even though each panelist is discussing different areas of law, from environmental law to intellectual property law, there is a coherence between these areas. Bahdi stated that there seems to be a conflict or tension inherent to all these systems, and that the way in which questions and problems are defined puts some issues at the forefront and pushes others aside, as Ellis pointed out earlier. Bahdi explained that she does not look at international law as a system of substantive norms, but rather she focuses on how mechanisms created mostly by donor agencies in the global north are used to build systems in international development and international aid that help build social justice in the global south. From her experiences with project management, she was able to identify a tension between the management tools that are adopted in the global north, and the actual results that "we say we want to achieve" in the global south. In fact, according to Bahdi, often the tools adopted serve to undermine the results desired.

Actors, perceptions and assumptions that contribute to social injustices

Diller asked the panelists to identify some of the actors, perceptions or assumptions that are responsible for the way in which international rules and institutions might be contributing to social injustices. Ellis focused on the perceptions and assumptions that contribute to environmental problems. She explained that there is a lack of harmonization between different areas in international law. It was hoped that using a sustainable development approach would help harmonize some of these different areas, especially between the economy and the environment. According to Ellis, what has begun to happen in environmental law specifically can be summed up by the term "managerialism": a decrease of attention to public international law, and an increase of attention to the law *of* human rights, trade, sustainable development, and so on. In the 1960s and 1970s, attempts were made to use public international law to deal with environmental issues, but this approach did not catch on, and elaborate specialized regimes were developed instead. Specialized regimes have been developed for the environment generally, but also for specific environmental problems, such as biodiversity and climate change. Ellis stated that these specialized environmental law regimes have tensions not only with other areas of law, but also amongst themselves. According to Ellis, it is important to recognize that resources and a broad framework for addressing problems are lost when international law is separated into many specialized areas of law.

Grey also discussed managerialism, but in the context of refugee law. He explained that refugee law is supposed to be a "pocket of justice" against the discourse and trend based on the notion that we need to *manage* migration flows. With this in mind, it is necessary to examine if refugee law is in fact just. Grey stated that his prognosis is that refugee claim adjudication is done in part through reason, and in part through sentiment. According to Adam Smith, there are four corruptions that afflict our judgment and that are always present: (1) contempt for the lowly, (2) love of domination, (3) national prejudice, and (4) self-deceit. Grey explained that refugees present themselves to the state where they seek asylum as the most desperate of migrants, and refugee adjudicators are very susceptible to these four corruptions when they adjudicate refugee claims. Therefore, according to Grey, the main source of refugee law, which is supposed to push against

this trend to need to *manage* migration flows, is subject to these four corruptions or biases. Thus, refugee law may not be successfully pushing back and correcting the injustice caused by the desire to *manage* the flow of migrants.

Bahdi, like Ellis and Grey, discussed management. She explained that she is interested in the consequences that occur when certain processes and certain management tools are chosen. When planning solutions, it is decided that a certain set of activities will lead to short term results, then to long term results, and then to the ultimate goal. From a legal perspective this would mean, for example, educating judges so that they make decisions in conformity with human rights principles. It is presumed that this will push certain people to act differently, and then in turn push more people to act differently, which will then lead to more human rights protection. The problem with this approach, Bahdi explained, is that there is a set of assumptions that we have about change and how it comes about that are not questioned. There are two main assumptions about change that Bahdi deconstructs. First, people will not change their behaviour only through education and access to information. Change is a complex process that involves a person's thoughts, but also his or her environment. Second, there is a connection between law and social change, but there is no direct cause and effect link between the two. In fact, according to Bahdi, law is often not a driver of social change. For example, when she was working with the Palestinian judiciary, judges were educated about sexual harassment of women in the workplace, and how it violates not only a woman's honour, but also her freedom to work, her right to be economically independent, and so on. The judges made decisions in light of this approach to sexual harassment, but the harassment did not get better, and it even got worse. In short, there are assumptions about change and how change comes about that need to be scrutinized so that we can create the proper solutions to social problems.

Irish identified mercantilism as problematic in trade law. This is the idea that governments negotiate trade, goods and services in order to benefit their merchants, producers, exporters, and so on, and that they are "successful" when they negotiate agreements that allow huge exports and few imports. This belief, that exports are good and imports are bad, is not a logical base for a system, according to Irish. She also explained that this arrangement leaves out potential local buyers, as well as developing states who do not have much market access to offer. In addition, maintaining this rhetoric that exports are good and imports are bad encourages isolationism and makes it easy to blame foreigners for domestic economic problems. According to Irish, it is also concerning that we think it is legitimate for the government to only represent one part of domestic society when negotiating economic agreements, where governments should be representing all parts of society, from exporters to importers and buyers. The government should also represent all the views of domestic society, which include social justice concerns. Irish explained that the negotiators of the GATT had identified some common purposes in the preamble, such as ensuring full employment, and raising standards of living. It was believed that creating economic prosperity would help rebuild states after the war and promote lasting peace. However, mercantilism makes it difficult for state and non-state actors to have and pursue common purposes at the WTO. Irish explained, if we are to pursue common goals, the rhetoric needs to change in order to recognize complexity and recognize the possibility for "global communitarian views of justice".

Chapdelaine focused on the actors who are responsible for the set of norms in intellectual property law that primarily protect the rights of copyright holders. She explained that there is clearly a predominance of corporate interests, such as producers of film, music, and computer software, that have lobbied for stronger copyright laws. As well, the way in which norms are adopted is significant. Canada, for example, was behind in copyright laws until the U.S. pressured

the Canadian government to create better protection for copyright holders. In a similar way, states pressure developing states to have stronger copyright laws. Chapdelaine stated that another reason for the imbalance in intellectual property law between copyright protection and user rights is that there is a lack of diversity and representativeness in the discussion on copyright. There has also been difficulty mobilizing different interests. However, Chapdelaine explained, civil society has recently become more successful at promoting user rights. In addition, corporate interests (for example, the interests of Google) can be supportive of the interests of users, and can support civil society movements that are trying to promote user rights.

How to mobilize change and remedy social injustices

Adding onto what Chapdelaine mentioned about the power of social movements, Diller asked the panelists to describe what might be used to mobilize change in their various areas of law. She also asked the panelists to describe reforms that would encourage change. Law, though not a panacea for all social ills, may be a useful tool for change.

Ellis believes that there is a lack of imagination regarding law when dealing with the environment. She stated that there is such a lack of imagination in this field that there has been a trend of de-legalization in environmental international law. For example, we now have the Paris Agreement that is not truly legally binding. According to Ellis, one of the reasons that there is a lack of imagination in environmental law and a trend towards de-legalization is because in the 1990s law was considered an instrument of social regulation. When law is seen like this, certain behaviours are identified as bad, certain people are identified as doing bad, and it is believed that the state needs to tell them to behave differently in order for them to behave differently. However, people do not necessarily change their behaviour when they are told to do so; thus, the result that law had on society was disappointing.

Ellis explained that law used to be understood as a tool that could help frame objectives that were being pursued. When objectives collided, law could frame the collisions as legal disputes that could be resolved. However, today we see conflicts between different areas of law. According to Ellis, Andreas Fischer-Lescano and Gunther Teubner have a promising suggestion on how to resolve this new issue, which lies in procedural law. They believe that what is needed is a body of norms of collision: norms that govern the procedure used when different bodies of law collide. In general, Ellis explained that there needs to be more focus on procedural law. The law is very good at, for example, pushing towards more equitable decision procedures. In addition, Ellis suggested that we need to stop thinking that making something illegal will mean that the behaviour will stop. For example, making pollution illegal does not mean pollution will stop occurring. However, the law *can* be used as a framework to frame substantive disputes so that resolutions can be found.

Grey explained that he focuses on theory and on new ways to theorize refugee decision making largely because it is hard to make sense of certain facts in refugee claim adjudication. Where outcomes of refugee claims are studied, it is found that the results are almost random, or determined to a problematic extent by the identity of the refugee claim adjudicator. The facts that do not make sense need to be made sense of, and this can happen through theory. Grey stated that one of the claims within the theoretical literature trying to make sense of refugee law adjudication, and one supported by Giorgio Agamben, is that there is no normative constraint in migration governance. Migration governance is a classic example where there is a collision of norms and no norm to govern the collision of those norms. Grey believes that this theory, that no normative constraint exists in this field of law, should be resisted, and can be resisted if we study the sources of normative refugee law. By doing this, we can recognize the possibility that there is normativity

in refugee governance. However, Grey explained, it is not clear what to do with this information at the institutional level.

Irish stated that she is a bit pessimistic about the possibility that a wider rhetoric around trade will develop. The recently proposed trade facilitation agreement is a step in the right direction since it gives more agency and flexibility to developing states, and allows some commitments to be dependent on whether or not funding for capacity building is sent from developed to developing states. However, though there are some reasons for hope, Irish stated that at the moment there is not enough coherence and not a sufficiently broad view of trade.

Chapdelaine explained that one of the problems in intellectual property law is the fact that corporate interests are too dominant. However, we should not forget the role that governments have in bringing these corporate interests to the table. According to Chapdelaine, it needs to be ensured that broad interests are brought to the discussion table when intellectual property is at issue, and that there is more transparency in the negotiating process. Chapdelaine stated that treaties offer one way to advance user rights. There is already some discussion at the international level to create exceptions in copyright law for archives, libraries and educational institutions, for example. In addition, she explained, people need to know what copyright law is actually about. The role of human rights norms and social justice norms in intellectual property law are more remote than one would think. For example, states normally allow a work to be used in order to create a parody of that work. The owner of the work probably does not want the work to be parodied, and thus the right to use the work is grounded in the human right of freedom of expression. This right to parody was not recognized in Canada's Copyright Act until recently. According to Chapdelaine, we need to articulate user rights (the right to use a work for parody, for example) and make them concrete rights. Human rights and social justice rights can be used to support user rights, but user rights, as the counterpart to copyright holder rights, need to be articulated as rights on their own.

Lastly, Badhi described the silver lining in her work: tactical mapping. Instead of planning acts, and anticipating results by replicating these acts, tactical mapping requires one to plan and seek results by identifying relationships and leveraging relationships. Bahdi explained that what is really needed to remedy social injustices in her area is a different rhetoric—one that can acknowledge the complexity of social problems.