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Teaching Problem-Solving and Preventive Law Skills through International Labour and Employment Law

Ruben J. GARCIA*

This essay describes how well problem-solving and preventive law principles apply in the teaching of international labour and employment law. This is because the subject itself crosses disciplinary and geographical boundaries. Students are taught about the importance of the lawyer's role as counselor, rather than simply as litigator, which is at the centre of the model of the lawyer as a problem solver.

1. INTRODUCTION

The practice of law is changing as rapidly as the world is globalizing.¹ For this reason, law schools are responding by paying greater attention to the area of international law.² Labour and employment law is no different than these other fields, and indeed with the growth of trade agreements and migration throughout the world, the issues are becoming more important to Work Law. At the same time, the lawyer's role as counselor in preventing and solving disputes between parties is becoming more common. The Carnegie Report on Legal Education recognized this orientation in 2007, but the methodologies of problem solving and prevention have been explored in a number of ways for decades.³

In this essay, I discuss how my class in International Labour and Employment Law is informed by preventive law and problem-solving techniques.⁴ Across the United States,

* Associate Professor, California Western School of Law, San Diego. Thanks to all the participants and organizers in the Global Workplace Conference, held at Thomas Jefferson School of Law in San Diego on 15-16 Feb. 2008, and in particular Susan Bisom-Rapp for her tireless efforts for the Conference and this Symposium.

¹ L. S. Terry, 'U.S. Legal Ethics: The Coming of Age of Global and Comparative Perspectives', *WASH. U. GLOBAL STUD. L. REV.* 4 (2005): 463; L. S. Terry, A "'How To'" Guide For Incorporating Global And Comparative Perspectives Into The Required Professional Responsibility Course', *ST. LOUIS. U. L.J.* 51 (2007): 1135; Program of the Association of American Law Schools, Globalization of Law, Annual Meeting, January 2003, 'Legal Education Engages the World', available at <www.aals.org/am2003/index.html>.

² Program of the Association of American Law Schools, Globalization of Law, Annual Meeting, January 2003, 'Legal Education Engages the World', available at <www.aals.org/am2003/index.html>.

³ *Report of the Carnegie Foundation for the Advancement of Teaching, Educating Lawyers: Preparation for the Profession of Law* (2007).

T. D. Barton, 'Practicing Law Preventively and Proactively', *Eurolawyer* 23 (2005): 12; T. D. Barton, 'Preventive Law for Three-Dimensional Lawyers', *Preventive Law Reporter* 19 (2001): 29; See also Program of the Problem Solving Conference at California Western, 4-6 Mar. 2004, available at <www.cwsl.edu/content/creative_problem_solving/agenda.pdf>.

⁴ I have taught International Labour and Employment Law at UC-Davis and three times at California Western School of Law, where I have taught since 2003. California Western maintains a Centre for Creative Problem Solving and a number of its faculty participate.

international labour and employment law is becoming a popular subject in many law schools, and several excellent casebooks have been published on the subject.⁵ Non-governmental organizations have also become more active in litigation over international labour rights, such as the International Labour Rights Fund.⁶ Law firms increasingly have international labour and employment practices and partners.⁷

As a law school course, International Labour and Employment Law is part of a growing trend. More law schools are beginning to offer this class.⁸ In a typical law school course, students are trained how to maneuver and manipulate bodies of law in a litigation setting. Although litigation can be a part of international labour practice, the nascent field lends itself much more to counselling clients about the ramifications, legal or otherwise, about various transactions. For this reason, it is a good testing ground for principles of creative problem solving and preventative law. In this essay, I will discuss my teaching methods in International Labour and Employment Law and how they fit into changing paradigms of problem solving and preventive lawyering practice.

In Part I of this essay, I describe the status of International Labour and Employment Law in law curricula and practice. In Part II, I describe the lessons of preventive law and problem solving techniques. In Part III, I outline how the lessons of preventive law and problem solving can be applied in the teaching and practice of international labour and employment law, which many more students will be practicing in the years to come.

2. THE STATE OF INTERNATIONAL LABOUR AND EMPLOYMENT LAW

As in other areas of law, international issues are becoming an important part of the practice of labour and employment law. As a consequence, law schools and casebook publishers are taking note by introducing courses in the subject and new books. As more employers adopt corporate codes of conduct and unions establish international labour law rights, the need for lawyers with knowledge of international human rights will continue to mushroom. Thus, questions arise about whether legal education provides the training needed for lawyers in the new global economy, but also in a post-litigation future.

There are many interesting debates going on in the international arena about the differences between hard law and soft law in international labour and employment law. Hard law remedies are generally thought of as judgment, injunction and collection.

⁵ R. Blanpain, S. Bisom-Rapp, W. Corbett, H. K. Josephs, M. K. Zimmer, *The Global Workplace: International and Comparative Employment Law, Cases and Materials* (2007); James Atleson, et al, *International Labor Law* (2008).

⁶ For more information, see <www.laborrights.org>.

⁷ S. Bisom-Rapp, 'Exceeding Our Boundaries: Transnational Employment Law Practice and the Export of American Lawyering Styles to the Global Worksite', *COMP. LAB. L. & POL'Y J.* 25 (2004): 257 (describing how Littler Mendelson's global practice group counseled global clients); D. L. Dowling, 'The Practice of International Labor and Employment Law: Escort your Labor/Employment Clients Into the Global Millennium', *LAB. LAW* 17 (2001): 1.

⁸ *International Labor Law* (J. Atleson, L. Compa, K. Rittich, C. W. Sharpe, M. S. Weiss) (West Publishing 2007).

R. Blanpain, S. Bisom-Rapp, W. Corbett, M. Zimmer, H. K. Josephs, *The Global Workplace: Cases and Materials on International and Comparative Employment Law* (2007); L. Compa & S. F. Diamond, H. Rights, 'Labor Rights and International Trade (1996); R. J. Garcia, Transnationalism as a Social Movement Strategy', *U.C. DAVIS. J. INT'L L. & POL'Y* 10 (2004): 1.

Soft law remedies are generally thought of as negotiation, public pressure and voluntary standards.⁹

As I will discuss further below, the chasm between soft law and hard law may be a false one, as there are many aspects of hard law that can end up being rather soft, and sometimes soft law can be more effective. The point that I make in class is that there is a great deal of overlap between hard and soft law.

3. PREVENTIVE LAW AND PROBLEM SOLVING SKILLS

Preventive law and problem-solving skills have been an area of growing popularity in legal education. Much of this is related to the increasingly popularity of alternative dispute resolution. Problem solving as it applies to legal problems attempts to deal with client problems in a multidimensional way. Scholars have attempted to develop schematics for addressing problems that include (1) broadly defining the problem; (2) identifying any barriers to creative solutions, including cultural barriers; and (3) brainstorming solutions; and then recommending and implementing solutions.

Preventive law is simply the notion that lawyers, rather than simply being hired guns implementing their clients' wishes, can actually take steps to prevent problems. Preventive law comes at an opportune time as lawyers' practices are coming under greater scrutiny both by profession and society. Observers in and out of the legal profession have questioned the 'hired gun' mentality that has dominated lawyers' practices for so many years to be more of an advisor to clients.¹⁰ The American Bar Association Model Rules of Professional Conduct have also embraced a vision of the lawyer as counselor. Model Rule 2.1 allows lawyers to offer advice to clients on 'moral economic, political and social matters'.¹¹ The rule does not *require* the lawyer to counsel the client on matters outside the narrow confines of traditional legal advice, but the rules do not make non-traditional advice a matter of discipline.

The preventive and problem-solving approach to law posits that lawyers must see problems as multidimensional. In order to prevent problems for clients, lawyers should have a mentality that addresses problems from a variety of different angles and applies a methodology as follows. First, students should broadly identify the problem. Second, they should brainstorm solutions. Third, they should identify preconceived notions they have about the parties or the issues. Fourth, they should identify barriers to creativity, whether they are organizational, institutional or personal.¹²

⁹ See, e.g., A. Blackett, 'Codes of Corporate Conduct and the Labor Regulatory State in Developing Countries', in *Hard Choices, Soft Law: Voluntary Choices in Global Trade, Environment and Social Governance*, eds J.J. Kirton & M.J. Trebilcock (Brookfield, VT: Ashgate, 2007), 122; C. S.V. Ranam & A. Verma, 'Hard Law or Soft Law: India and International Labour Standards', in *Global Trade, Environment and Social Governance*, eds J.J. Kirton & M.J. Trebilcock (Brookfield, VT: Ashgate, 2007), 153.

¹⁰ R. W. Gordon, 'A New Role for Lawyers', *CONN. L. REV.* 35 (2003): 1185; Milton Regan, 'Ethics, Lawyers and Regulation', *ME. L. REV.* 55 (2003): 363.

¹¹ ABA Model R. Prof'l Conduct. 2.1.

¹² K. Rosenberry, 'Organizational Barriers to Creativity in Law Schools and the Legal Profession', *Cal. W. L. Rev.* 41 (2005): 423.

The practice of international labour and employment law lends itself well to the view that a well-rounded lawyer offers advice on the wide range of dimensions that exist in international labour and employment problems. For example, the lawyer may question a client's investment in a politically or socially unstable country, as to whether it would harm the client's goals and interests.¹³ Or, the lawyer could question the moral ramifications of doing business in a certain country. In the age of financial scandals involving Enron and KPMG, more commentators are questioning whether it is enough for the lawyer to simply sign off on actions that are legal, but morally or financially questionable.¹⁴

In the practice of international labour and employment law, one example that poses such quandaries is child labour. Child labour laws vary widely from country to country. In the United States, most labour by children is banned until the age of 16, but in some countries the legal age can be 14 and for certain jobs as low as 12. A lawyer may personally feel that 14 is too young to be doing industrial work, but in certain countries children as young as 14 may be allowed to work. The lawyer must then confront whether or not that feeling is based upon their own cultural position, and whether they should leave such matters to the decisions of sovereign nations, with varying degrees of success. The preventive lawyer in this situation might discuss with the client the problems that might result from even the legal use of child labour in foreign countries. While the client probably has already given thought to the public image that its action might project, and the lawyer's expertise is not necessarily going to be in public relations, the preventive lawyer tries to anticipate a whole range of problems that might result even from actions that are legal.

4. TEACHING MULTIDIMENSIONAL INTERNATIONAL LABOUR AND EMPLOYMENT LAW

I try to bring this multilayered lawyering approach to my international labour and employment law course. My class is run as a seminar in which students get a sense of the field through the readings. In this regard, the textbook that I use – *The Global Workplace: International and Comparative Employment Law: Cases and Materials* – is particularly good at providing a number of interdisciplinary approaches to different problems. The students generally write scholarly articles, except for those students who decide to do other kinds of writing, including amicus briefs, communications between counsel and union officials or corporate executives, or even draft sample corporate codes of conduct. Thus, much of the class is self-directed, but one of the underlying themes that ties the diverse subjects

¹³ See *Doe v. Unocal*, 394 F.3d 932 (9th Cir. 2002).

¹⁴ W. H. Simon, *The Market for Bad Legal Advice*, __ STAN L. REV. __ (New York: Foundation Press, 2008); T. Rostain, 'Travails in Tax: The KPMG Tax Controversy', in *Legal Ethics Stories* eds David J. Luban & Deborah Rhode et al. (2007), 89; D. L. Colbert, 'Professional Responsibility in Crisis', *How. L.J.* 51 (2008): 677 (decrying the legal community's lack of attention to ethical responsibilities).

that the students pursue together is the transmission of the skills to be holistic lawyers in the emerging global society.

I try to give the students a taste of the multilateral nature of what they traditionally think of as binary plaintiff-defendant litigation. To do this, I simulate a settlement exercise that aims to show the complexities of international labour and employment claims. *Roe v. Firestone* is a good case to do this, in which rubber tappers in Liberia sued the Firestone Tire Company for several labour rights violations under the Alien Tort Claims Act.¹⁵ The plaintiffs in this case alleged various forms of child labour and child slavery because of the high quotas that were required of them by rubber tapper contractors of the Firestone Company.

I divide the class into groups not organized around the traditional plaintiff-defendant dichotomies, although two students do role-play the plaintiffs and defendants, but I also put students in the roles of other stakeholders that might have an interest in the settlement of this lawsuit. One group of students served as members of a non-governmental organization called *Stop Firestone*. Another group of students represents the defendants. While there is technically no union involved, the Steelworkers Union was one of the players who could exert leverage on the players in the negotiation. Indeed, the International Labour Rights Fund, which brought the lawsuit, is heavily funded by labour unions.

The problem-solving approach also informs the orientation of the class to the problem of regulating labour in a globalized labour market. The class looks at various approaches to regulating labour in the global economy. One approach is trade agreements, which has been one of the main ways to regulate international labour but has not been the most successful.¹⁶ Then, we move on to other problem-solving mechanisms in the global economy. We look at the International Labour Organization as a problem-solving mechanism.¹⁷

We also look at the ways that litigation can sometimes be a problem-solving mechanism.¹⁸ More than most classes, international human rights litigation problematizes litigation as a problem-solving mechanism. First, the difficulties American lawyers have had in managing international litigation have been well documented in the literature.¹⁹ There are often cultural issues that are lost in translation. In the *Castro Alfaro* case, the students were able to see the difficulties inherent in representing clients in different languages. There are language barriers and there are also cultural issues. In *The Pico Case*, the plaintiffs were union members in South Korea suing the American parent company

¹⁵ 28 U.S.C. § 1360; Complaint on file with the author.

¹⁶ J. Hirsch, 'Employee Action in a Global Economy', in *Encyclopedia of Labor and Employment Law and Economics*, eds Kenneth Dau-Schmidt, et al. (London: Elgar, 2008).

¹⁷ J. M. Cooper, 'Creative Problem Solving and the Castro Conundrum', *CAL. W. INT'L L. J.* 28 (1998): 391.

¹⁸ J. M. Cooper, 'Toward a New Architecture: Creative Problem Solving and the Law', *CAL. W. L. REV.* 34 (1998): 297.

¹⁹ E. Yozell, 'The Castro Alfaro Case: Convenience and Justice—Lessons for Lawyers in Transcultural Litigation', in *Human Rights, Labor Rights and International Trade*, eds L. Compa & S. Diamond (Philadelphia: University of Pennsylvania Press, 2003), 273; F. E. Deale, 'The Pico Case: Testing International Labor Rights in U.S. Courts', in *Human Rights, Labor Rights and International Trade*, eds L. Compa & S. Diamond (Philadelphia, PA: University of Pennsylvania Press, 2003), 251.

of their employer in United States courts. They were suing to redress a breach of their collective bargaining agreement by US parent company Pico Products. They sued under US labour law, arguing that the US parent had interfered with the contract between the Korean union and their subsidiary. The union brought a variety of claims under federal labour law and New York state law. Sometime before the trial in US district court, the parties tried to settle the case, but the Korean union members were not willing to settle the case even though their attorneys recommended that the workers take the settlement as it represented 75% of the plaintiff's damages. The workers saw the settlement as capitulation.²⁰ These readings show the students that even though resolving disputes is difficult in our culture, when problem solving is done across cultures it becomes even more difficult. Even though the case actually went to trial, students are introduced to the place of apology in legal culture.²¹

The settlement exercise also helps students see that many disputes are not merely binary. Often there are a number of parties with interests in the lawsuit that are not represented in the negotiation of the agreement between the plaintiff and the defendant. The Stop Firestone NGO, for example, could continue the boycott and publicity against Firestone well after the lawsuit is settled. The Steelworkers Union might have other interests besides the four corners of the lawsuit before them, such as a bargaining session in the United States in which the union hopes to get leverage through the lawsuit. Shareholders, customers, and contractors are all potentially interested parties in the settlement.

International labour and employment law also provides the opportunity for students to see potential cultural issues. I have had guest speakers in class to tell the students about how they achieve cultural competency. Students brainstorm ways in which they can better step into the shoes of their clients. With international clients, such techniques may include travel to the countries where clients live, and becoming immersed in the clients' culture and language. In this way, as one guest speaker pointed out, the lawyer can get an idea about unstated cues that are important to clients. Are face-to-face meetings important to clients? Can the same thing be accomplished by a conference call? When travel or client visits are not possible, the internet and other technologies can provide important information about clients where they live. These are important techniques to breaking down conceptual blocks to problem solving.

Like most courses in which students write papers, the course allows students to see difficult problems from multiple interdisciplinary perspectives. Students have to address problems dealing with forced labour, child labour, and collective bargaining. They do not lend themselves easily to binary legal solutions of winners and losers. Instead, the course allows students to take an interdisciplinary approach to somewhat intractable problems. They are able to use the methodologies of history, political science and sociology in

²⁰ Deale, *supra* n. at 267.

²¹ See also E. A. Dauer, 'Apology in the Aftermath of Injury: Colorado's I'm Sorry Law', *COLORADO LAWYER* 34 (2005): 17.

order to achieve creative solutions to the problems and opportunities presented by globalization.²²

5. CONCLUSION

As with the globalizing world, the legal profession is changing. New techniques will be needed for lawyers to deal with the problems of the future.²³ Law school curricula must continue to adapt to the call of globalization and new forms of dispute resolution. Courses such as International Labour and Employment Law, in its many forms, can serve an important role in meeting the twin goals of training multidimensional lawyers and studying the ways that law continues to cross national borders and disciplinary boundaries as well.

²² See J. Cooper, 'Creative Problem Solving and Human Rights', in *The Essentials of Human Rights*, eds C. van den Anker & R. Smith (London: Hodder Arnold, 2005), 73-75.

²³ H. S. Fogler & S. E. Leblanc, *Strategies for Creative Problem Solving* (Upper Saddle River, NJ: PTR Prentice Hall, 1995). See also, J. Adams, *Conceptual Blockbusting: A Guide to Better Ideas* (Cambridge, MA: Perseus Publishing, 2001).