

Responsibility, Fraternity, and Sustainability in Law

A Symposium in honour of Charles D. Gonthier

Making Law Fraternally

Friday May 20, 10:45-12:30, New Chancellor Day hall, room 102

Chair: Justice Joel E. Fichaud, Nova Scotia Court of Appeal, Halifax

Summary

This session was led by Justice Joel E. Fichaud of the Nova Scotia Court of Appeal and vice president of the Canadian Institute for the Administration of Justice. Professor Duncan French began the workshop by considering the role of international law in developmental opportunities and lives of people and analyzing larger themes with which laws should operate. Professor Markus Gehring discussed the social dimension of sustainable development and specifically considered solidarity and fraternity as demonstrated in the constitution of the European Union. Mr. Neshan Gunasekera spoke about education toward sustainable development and discussed the way in which the framework of international sustainable development can be practically implemented in a Sri Lankan context. Ms. Arezou Farivar ended the workshop with a discussion about fraternity and the evolution of the European Union.

Purpose and Agenda of the Session

The workshop focused on defining “fraternity” and examining relevant examples of solidarity in the law. Having existed within the discourse for a significant period, solidarity is gaining recognition and importance as a structural principle of international law. The function of international law in supporting development opportunities and inherent challenges were discussed. Specifically, the session investigated the European Union’s work in reinforcing the broader idea of a world community of interdependent states. It also considered how to educate and train young leaders to working fraternally in achieving sustainable development.



...Where Angels Fear to Tread: Idealising an International Law of the Ordinary

Professor Duncan French, Faculty of Law, University of Sheffield, Sheffield, UK

Professor French sought to consider the role and function of international law in supporting the developmental opportunities of developing States and improving the life-chances of peoples of such countries. Prof French was quick to express his intention to consider broader themes with which international laws should operate, rather than engaging with the detail and minutiae of international

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law. He acknowledged the tendency of specialism in international law to result in fragmentation, opting instead to discuss “international law of the ordinary.” While it is clearly not descriptive of a readily definable area of law, it has undoubtedly a strong moral component. This specialism has led to the failure of international law to engage positively, proactively and systematically with the concerns of the global majority. As a result, the concerns of the vast majority of the world’s population, from systemic poverty to extreme deprivation to poor health and education to inadequate opportunities to succeed, are often ignored.

Although international law has become increasingly sophisticated in various areas since the early 1990s, it remains inadequate on the issue of development. Prof French asserts that the dominant actors in the international legal community continue to marginalize the voices and concerns of the majority, with its lack of focus, lack of urgency and lack of substantive content. Furthermore, international law has been inadequate in both failing to adopt positive rules of law to support development and failing to ameliorate the negative development externalities generated by pre-existing rules of international law. Even though currently weak international coordination of development financing and ineffective foreign direct investment rules is mostly due to a general lack of political will, Professor French argued that this does not excuse international lawyers of their obligation to bring law to these areas of international activity. Two fundamental principles reflect a more positive view of the role of law in the international economic sphere: 1) the affirmation of the rule of law in the conduct of international economic relations and 2) the principle of substantive equality. These principles provide an overarching framework for governing state behavior and can be used proactively as a mechanism to promote real change within the international system.

Professor French questioned the extent to which international law should seek to achieve fairness, when doing so would jeopardize international law’s essential normative attributes. He quoted Charles Gonthier’s belief that fraternity within a community cannot occur without cooperation in pursuing common interests by combining resources and redistributing wealth. While fraternity has its limits, we should follow Charles’ Gonthier’s urge to do all that we can to support those seeking to promote harmony.

Solidarity, Sustainable Development and the European Constitution

Professor Markus Gehring, CISDL, Faculty of Law (Civil Law), University of Ottawa, Ottawa, & Faculty of Law, Cambridge University

Professor Gehring spoke first about the European Constitution, followed by solidarity in the EU constitutional order and finally sustainable development in the EU constitutional order. He drew parallels between Justice Gonthier’s synthesis of fraternity with sustainable development with art. 1 of the Universal Declaration of Human Rights, the 1804 Civil Code, and *Commission 2008*.

Prof. Gehring discussed the history of the establishment of the European Constitution. Though constitutional discussions began quite early, the Constitutional Convention was not launched until 2000, after the adoption of the Nice Charter of Fundamental Rights. Despite the rejection of the

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Treaty establishing a Constitution for Europe (TCE), a reform treaty adopted as the Treaty of Lisbon was created in 2008 and entered into force on December 1, 2009.

Dr. Gehring pointed out numerous references to solidarity found in the Treaty of European Union (TEU) and Treaty on the Functioning of the European Union (TFEU). For example, the new solidarity clause of the TCE (Article 222) specifies that any member state which falls victim to a terrorist attack or any other disaster will receive assistance from other member states, if it so requests. Strong solidarity references have also been made in recent citizenship case law, such as *Bidar* (Case C-209/03 *The Queen (on the application of Dany Bidar) v. London Borough of Ealing, Secretary of State for Education and Skills* [2005] ECR I-2119) in which the concept of financial solidarity was discussed in the context of the economic risk conditions laid down within UK residency directives. Moreover, Art 37 (Title Solidarity) requires the integration of environmental protection and improvement of the quality of the environment into the policies of the Union, in accordance with the principle of sustainable development.

Sustainable development was introduced as an objective of the EU Community in the Treaty of Amsterdam, and was quickly defined and established as a goal of the Lisbon TEU. While little case law has been generated, arguments have been made based on the sustainable development objective. To date, a few judgments have been made in which the European Court of Justice has relied on sustainable development (e.g. Cartagena Protocol Opinion and Small Arms Judgment), which illustrate the Union's competence to act on such matters.

While Prof. Gehring focused on the EU Constitution in his illustration of fraternity in the law, he stressed that solidarity extends to States and citizens in all parts of the world. Sustainable development, as defined, requires solidarity between generations and within generations. Both sustainable development and solidarity require environmental protection, social cohesion and economic fairness. The EU constitutional order is based on these norms and has developed closely defined principles to achieve them.

Education toward Sustainable Development: Building Trusteeship Values in Sri Lanka

Mr. Neshan Gunasekera, Director, Weeramantry International Center for Peace Education and Research (WICPER), Colombo, Sri Lanka

In examining the building of trusteeship values in Sri Lanka, Mr. Neshan Gunasekera illustrated the evolution of international law from a disjointed haphazard law to one that is more concise and dedicated to fraternity. During the 17th century, international law developed independently of world religions and customs. The integration of such observed traditions did not occur until the 20th century.

According to Mr. Gunasekera, the end of the civil war marks Sri Lanka's preparedness to commit to sustainable peace and justice. Following UNESCO's adoption of resolution 57/254 to put in place a

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United Nations Decade of Education for Sustainable Development spanning from 2005 to 2014, Sri Lanka established a national Sustainable Development authority.

Mr. Gunasekera discussed some of the generational challenges faced by Sri Lanka thus far in establishing fraternity in the law. He specifically referenced the *Singerasa* judgment of the Supreme Court (*Nallaratnam Sinharasa v Attorney General and others*, S.C. Spl. (LA) No.182/99, S.C.M. 15.09.2006), which declared retrogressively that the Optional Protocol procedure of the ICCPR was of no force or effect within Sri Lanka. Despite such challenges, however, there have been many success stories of partnerships. One in particular is a cross-disciplinary initiative that began four years ago through a discussion forum establishment of a center in Sri Lanka with a mandate to build a sustainable future. Including international experts, such as the CISDL, in training young leaders in futuristic policy making strategies is important for the future of Sri Lanka.

Fraternity and the Evolution of the European Union

Ms. Arezou Farivar, McCarthy Tetrault, Toronto

Ms. Farivar organized her talk in two parts, initially considering the principle of fraternity and the evolution of the EU, followed by examples of fraternity in action in the EU. Fraternity in governance recognizes the need to work together. As a Wainwright Research Student to Dr. Charles Gonthier, Ms. Arezou Farivar affirmed Justice Gonthier's commitment to solidarity.

The concept of solidarity seemed attractive after World War 1, when the Council of Europe operated on a more individual basis. As communities with common interests emerged, an institutional framework was established to regulate those interests for the common good. Before the Lisbon reform, the EU shared a commitment to the common goals of member states as its own legal personality. Not only did the Lisbon TEU establish the three pillars for the sustainable development of Europe, but it also makes it easier to bring actions and receive lump sum penalties, in the interest of remedying breaches as quickly as possible. The Preamble of the Lisbon TEU, along with Articles 2 and 3, also promote solidarity. Art 80 is concerned with solidarity in judicial matters, while the newly added Solidarity Clause - Art 222, requires members to act fraternally and offer support in the face of terrorist attacks or other disasters.

Art 43 of the Treaty on European Union and of the Treaty Establishing the European Community contains provisions on enhanced cooperation among member states to act in a manner that facilitates the achievement of tasks and refrains from activities that will obstruct the common goal. The positive and negative obligations imposed on states allow goals to be achieved easily. Where there is any discrepancy with the law, there is a common understanding that EU law prevails.

Greece's financial crisis is a good illustration of solidarity displayed among EU member states. When it was apparent that Greece would not be able to independently achieve expectations, the council of EU temporarily used Art 122 of the TEU to allow the Council to intervene to assist Greece. While Art 122 (TFEU) stipulates that the Council should act in a 'spirit of solidarity' to assist a member

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state suffering a severe shortage in the supply of essential products (notably resulting from energy crises or severe difficulties like natural disasters), Greece's financial crisis was 'read in' on the basis of solidarity. The fact that Art 122 is not being amended, demonstrates the EU's continued acceptance of responsibility leading to voluntary obligations. Solidarity, although lacking a clear definition, is a consistent theme of the EU.

Conclusions

If solidarity is understood as the common recognition of a goal, individual states should be expected to act, as Justice Gonthier suggested, in a way that protects the community and works towards promoting harmony. International law, however, has so far failed to implement a sufficiently inclusive understanding of "fraternity" or "solidarity" within the international legal system. Dominant actors in the international legal community continue to marginalize the voices and concerns of the majority, with its lack of focus, lack of urgency and lack of substantive content. As a result, the vast majority of the world's population facing issues such as systemic poverty, extreme deprivation, poor health and education, and inadequate opportunities to succeed, are often ignored.

The fundamental principles of international law should not be excluded, however, as they provide an overarching framework for governing state behavior and can be used proactively to promote global change. These principles include the affirmation of the rule of law in the conduct of international economic relations and the principle of substantive equality. By following such fundamental principles, we can avoid replicating judgments such as the *Singerasa* case of the Supreme Court of Sri Lanka. We should move towards cross-disciplinary initiatives as established in Sri Lanka with a mandate to building a sustainable future and educating leaders of tomorrow in futuristic policy making.

The European Union provides a good illustration of fraternity in the law. The Lisbon TEU of December 2009 marked great development, establishing the three pillars for the sustainable development of Europe. The Preamble of the Lisbon TEU, along with Articles 2 and 3, promote solidarity. Art 80 is concerned with solidarity in judicial matters, while the newly added Solidarity Clause - Art 222, requires members to act fraternally and offer support in the face of terrorist attacks or other disasters.

Though treaties of the EU do not require member states to bail out countries in financial hardship, leaders of the EU decided to assist Greece in a "spirit of solidarity." The fact that Art 122 is not being amended, demonstrates the EU's continued acceptance of responsibility leading to voluntary obligations. Solidarity, although lacking a clear definition, is a consistent theme of the EU. The possibilities inherent in the idea of solidarity and fraternity suggest the way in which we can strive towards Justice Gonthier's vision of a global community working together.

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