International Council for Advocates and Barristers

2014 World Bar Conference

Queenstown, New Zealand

4th September 2014

Barbarians at the Gate - Challenges of Globalisation to the Rule of Law

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Outline

Who are the barbarians and where and what is the gate? It is, perhaps, displaying a lawyer's mind to always seek to define the question with some degree of precision. But it seems to me that the issue of the challenges for the rule of law posed by globalisation does need, at its starting point, a little definition.

Perhaps we all feel that we have an idea as to who the barbarians might be. There are quite a significant number of players (personal, sovereign and corporate) in the world today who, by virtue of globalisation, might be considered by many to be immune to effective control. But where is the gate? Or, perhaps, more accurately, what is the wall through which the gate allows access?

It seems to me that these are more than mere pedantic questions. They perhaps bring into focus the need to revisit the parameters of what we consider to be the rule of law in the context of a globalised world.

The rule of law has always been seen to be concerned with ensuring that the powerful cannot, by virtue of the strength which they possess (whether economic or physical), exercise uncontrolled power. In the past this may have been concerned with controlling the power of kings and emperors or local princes and lords. Those for whose benefit the rule of law may have actually applied might also, sometimes, have been a little more restricted than we might like to think. When King John signed Magna Carta at Runnymede, it is at least open to question as to whether the control to which he thereby submitted was for the benefit of all his subjects or just, or at least principally, for the benefit of his major barons. The rule of law may be one thing but the law itself, which might be said to rule, can strike a whole range of balances between the various actors involved be they sovereigns, those possessing major political or physical power or, increasingly, those who control major economic interests.

But the key issue which arises with globalisation is the internationalisation of the problem. It is in that context that, perhaps, the definition of the wall and the gate comes into greatest focus. In the traditional nation state or the more ancient monarchy or empire, the rule of law might have been seen to be the means by which the sovereign of that state, or its major players, were required to abide by an established set of rules. But the problem which globalisation brings into true focus is the potential for unregulated action by those outside the borders of a state to affect the rights of those within it. To continue with the imagery of the title of this session the problem, perhaps, with globalisation is that the barbarians do not need to be at the gate in order to inflict damage and terror to those within the city walls. Rather, many holding significant power can, either deliberately or as a by-product, by acting in an unregulated way, inflict significant damage on people and places far away.

It may, at least in theory, be reasonably easy for a modern nation state to respect the rule of law and ensure that its own institutions exercise whatever power they may have (whether formal legal power or physical or economic power) in a way which is regulated by established rules and enforced by courts which have the capacity to ensure, in the main, that their decisions and orders are obeyed. But how does that work in respect of those who may significantly influence events within a nation state but who are not part of it and who are, at best, only theoretically subject to its laws?

The virtual barbarians at the virtual gate are, perhaps, potentially, an even greater threat than the tribes who, from time to time, spilled over the borders into the northern regions of the Roman Empire in the early centuries of the Christian era. It seems to me to follow that the real question which we need to address is as to how the rule of law can apply in a world where information is ubiquitously available through the internet, where economic actions have a global reach and global consequences and where the authority of national courts, while theoretically strong, may, in practise, fall a long way short of being able to effectively enforce the rule of law in practice. An individual country might well have a theoretically sound constitution, well made laws and effective courts. However, if those laws are not, in fact, effective, then it would be very hard to say that the rule of law is truly respected. The rule of law is about practical reality rather than theory.

But the same applies at an international level. Unless there is some practical reality to the ability to enforce international norms, then those who operate in the virtual world of global affairs may, whatever the position in theory, be largely immune to legal control or regulation or at least may be able to place themselves in a position where the extent to which there may be practical control over their actions is very limited. It seems to me that the key and vital issue which our topic today requires us to address is as to how we ensure that those operating in that international space are, to the greatest extent possible, and in practical and real, as opposed to theoretical terms, subject to legitimate regulation. Subject to the rule of law in reality. If they are not, then, in one sense, it does not really matter in the modern globalised world as to whether the barbarians are inside or outside the gate for they will not be subject to control anyway. Where then stands international regulation to require that those who operate at an international level and with a transnational reach are subject to the rule of law not only in what might loosely be called their own jurisdiction (if they have one in any real sense) but also in those other parts of the globe where they exert direct or indirect influence.

Perhaps the most obvious area of concern arises in respect of international finance. Given that Chief Justice Menon has comprehensively addressed this topic, I will only briefly touch on one aspect. Ireland has been painfully aware, over the last six or seven years, of the consequences of failing to adequately regulate our financial services sector. Strictly speaking, of course, the rule of law applied. Most financial institutions operated within the rules. The problem was that a deliberate decision to adopt a very "light touch"

regulatory regime meant that compliance did not guarantee appropriate or sensible banking practice.

But there is also a significant international lesson from the Irish experience. Dublin has developed as a significant financial services centre which is even, in some sectors such as aircraft leasing, close to being a world leader. Many types of fund management are also conducted in the IFSC and are subject to Irish regulation. The German tax payer, through having to bail out the major German institution, Hypo Bank, has learned to his cost that it is necessary to be concerned not only with the rule of law in his own jurisdiction but also the laws which rule outside his borders. That simple example demonstrates that even between countries where the rule of law is respected, problems of interconnectivity can be substantial. If similar globalised financial issues arise in relation to jurisdictions where one might be less confident about the operation of the rule of law at all, the problems can only be worse.

But the challenge which globalisation poses to the rule of law extends well beyond the financial sector. Many examples could be given, but I have chosen three. When citizens of a walled town gathered for safety with their gates closed, it was not, of course, only barbarians who might be outside but also the well trained armies of a neighbouring foe. But at least that foe or those barbarians were likely to have come from a reasonably proximate area and did actually have to travel to pose a threat.

The problem today posed by either lawless areas in which there is no law at all, or rogue states where the rule of law does not apply, is of much greater reach, in a globalised era, than would have been the case in classical times. Proxy action, cyber crime and terrorism and the like mean that the actions of those based in lawless territories or in rogue states can truly have a global reach. Indeed, to rogue states might be added jurisdictions which, to a greater or lesser extent, condone such activity. The problem today is that the barbarians, or indeed, the well trained armies of a hostile state, do not need to be at or near the gate to inflict harm and induce fear.

A second example comes from the environment. Even at a relatively localised level, we all know that environmental disasters do not respect national borders. While Ireland, like New Zealand, is surrounded by sea, the understandable fear which news of any

difficulties with the not insignificant number of nuclear power plants located on the west coast of the United Kingdom causes in Ireland, is a simple example. But at a much broader level the problems of global warming demonstrate that environmental action or inaction operates with global reach. That raises an important question. Doubtless, much of the activity which has caused global warming was broadly lawful in terms of the laws of the jurisdiction in which it occurred. Those jurisdictions are, by and large, in the developed, or almost developed, world. But all of the evidence suggests that the worst consequences of global warming will be suffered by those living in marginal low lying countries at the other end of the economic spectrum.

A third problem arises in the area of the taxation of international entities. There has been much controversy in recent times about the measures taken by major multinational companies to exploit differences in the taxation regimes between countries to deliver extraordinarily low effective rates of taxation. While it might not historically have been seen to have been a central part of the operation of the rule of law, there is a strong case to be made that an equitable and reasonable effective taxation system is an important part of the operation of the rule of law within any state. If the powerful can avoid paying their fair share and if, therefore, the burden of supporting the State falls disproportionately on the rest, then that is every bit as much a failure of the rule of law as an inability to prevent, by effective means, those same powerful interests in abusing any other aspect of the interests of citizens. But that surely applies equally at an international level. If a globalised international order allows persons and corporations to do business on a worldwide basis and structure their affairs with little limitation in a manner which allows them to pay only miniscule tax then that too surely is a risk to the rule of law. It is, of course, part of the sovereign right of any nation to define its own tax regime and to determine the policy behind the level of, and way in which, tax is levied. The fact that some countries may have lower rates than others is not, in itself, the real issue. The problem lies in the fact that it is possible to structure the organisation of businesses in a way that much of their profits do not attract any tax in any country. Each of the areas on which I have touched raise, perhaps, a fundamental question.

It is to ask as to whose law is to rule? For if we cannot answer that question it may well be that there is, in practice, no law to rule. In an age when the consequences of many actions, both public and private, have the potential to affect right around the globe, then

the question must be faced as to whether mere compliance with the laws of one country, balanced as those laws of that country are likely to be to meet its own interests, is enough to generate a world order which is truly based on the rule of law.

That leads to my final point. And it is perhaps fitting that it is a point that is made at an ICAB conference. A few of you may know the story about where the genesis of the idea for an international body to represent the interests of the independent referral bars came from. You may not be shocked to learn that it started in a bar in Berlin in a conversation between Andrew (later Lord) Hardie, then Dean of Faculty and head of the Scots Bar and later, until his recent retirement, a judge of the Inner House of Session which is, of course, in substance the Supreme Court of Scotland, Malcolm Wallis, then Chair of the General Council of the Bar of South Africa and now a judge of the Supreme Court of Appeal of South Africa, and myself, then Chair of the Irish Bar. We were in Berlin at a council meeting of the IBA and were bemoaning the fact that the focus, at least at that time, seemed to lie too much in the direction of the needs of international transactional lawyers. However, another important part of our thinking was the fact that we all seemed to be facing similar problems and were, to a large extent, trying separately to reinvent the wheel in our own jurisdictions. We also acknowledged that what happened in one jurisdiction had real potential to impact on others. Our barbarians were much the same and our gate design needed coordination.

The developments which ultimately led to the formation of ICAB and the organisation of these biennial conferences were a recognition that we were unlikely to be able to properly represent the interests of our members by standing alone.

It is sometimes felt comforting by those who fear, often legitimately, the adverse consequences of international action, to imagine a retreat to a time when each country exercised a large degree of control over what happened within its own borders and its citizens felt a reasonable degree of ownership over the laws which were to rule within those borders. Whether a hankering for that past involves a significant degree of looking through rose tinted glasses, I leave to others to decide. But the image of the walled city safe against attacks, whether by barbarians or well trained foes, has a certain comfort.

But in my view, in this globalised age, it is a false comfort. The globalisation genie is out of the bottle and cannot be put back in. The international reach of rogue states, poorly regulated financial institutions, loose environmental regulation and a host of other measures means that we cannot realistically hope to build the warm and cuddly walled city that makes us immune from the consequences of international action. It is just too easy for the virtual barbarian to penetrate even the strongest walls and the most heavily fortified gates.

It is, of course, the case that some countries are, perhaps, big enough that they can exercise quite a degree of practical control about the extent to which their interest can be affected by those outside their borders. However, the whole point of the rule of law is that the rules are for everyone and bind in particular the strong. But also, as the fact that the loudest complaints about the international corporate taxation system emanate from the United States demonstrates, even the most powerful of states have problems of enforcement in the globalised age. It is also true that collective international action (whether at the highly formalised level of conglomerates of states such as the European Union or, at the opt-in level of recommended practices put forward by bodies such as UNCITRAL or the OECD, have a mixed record and, perhaps, identify some of the real problems which emerge in attempting to establish effective international norms.

But if the problem is international, it seems to me that we must accept that the solution must also be international. But creating international solutions is much easier said than done.

My final thoughts and questions stem from the real problems which emerge in seeking to craft such international solutions. The problems are many. International rules without adequate means of practical enforcement may be of little value. Even the starting point of building a sufficient level of consensus as to what measures are needed is likely to be highly problematic. In some sectors, such as international finance, perhaps the necessity borne of recent disasters has proved the mother of invention. Many countries have learned the very painful lesson that the advantages of easy transnational finance carry with them a real risk deriving from the regulation of the financial institutions doing such business being left significantly in the hands of foreign regulators governed by codes and practices which may be driven by their own policy considerations and reflecting their

own interests. In addition it does need to be said that the real test of the new world of international financial regulation is likely to come when a significant conflict of interest emerges between the interests of a strong nation and compliance with those regulations particularly if it happens at a time when memories of the recent crisis have begun to fade and compliance with international norms of regulation might be perceived (from a short-sighted perspective) to be unduly burdensome.

But there are also questions about building a broad state of trust in such international rules. The long standing suspicion which the individual member states of the United States often show to Washington is now mirrored in concerns within Europe over what are sometimes called "faceless bureaucrats in Brussels". And yet, in the real world of modern globalisation, some form of overarching international regulation is, in my view, the only long term solution. The challenge is in devising methods designed to ensure that local populations feel a sufficient degree of ownership of that international regulation so as to minimise the risk of them being alienated from it.

The experience of the European Union is, perhaps, illustrative of many of the problems. Many citizens of the member states regard at least some aspects of the common regulation introduced at EU level as an excessive interference in their internal affairs. Sometimes they may well be right. Institutions have an unfortunate tendency to always seek more power and control. Often the control exercised may, in practice, go well beyond what may be needed. While the European Union has enshrined in its treaties the principle of subsidiarity (by which all decisions are meant to be taken at the lowest level consistent with the achievement of the legitimate aims of those treaties) there is considerable doubt as to how far that principle operates in practice and it is a striking feature of the EU legal order that no single EU measure has ever been struck down on the basis of a breach of the principle of subsidiarity.

But there is another side to the coin. Most countries are quite good at devising ways within existing rules to achieve their national self-interest. If rules do not permit tariffs then similar results can be achieved by skewed health and safety measures. The experience of western products being sold into Russia in recent times is a very clear case in point. Rules through which a whole coach and four can easily be driven may not achieve very much. But the sort of comprehensive international rules which make it

more difficult for subscribing nations to ignore run the real risk of giving the impression of excessive outside interference.

Building an international legal order which is both effective but also commands at least a sufficient level of trust in, and ownership by, local populations is no easy task. But in my view it is the only answer.

For the rule of law to survive and be effective in a globalised age it must be a rule, at least in part, of globalised law. The barbarians no longer have to be at the gate, they can be anywhere on the planet. It is a big ask to try and devise international norms which will have the trust of those inside each separate set of walls but which will also be effective to control the barbarians wherever they might be found. But in an age when real damage can be inflicted across the globe by virtual action, there is, in my view, no other real answer. In truth, the wall must surround us all and have no gate - the barbarians must be brought inside and be subjected to a rule of law to which we all subscribe.