

McLachlan: the assault on international adjudication

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Campbell McLachlan QC

*Delivering the 2019 Lalive Lecture, New Zealand arbitrator **Campbell McLachlan QC** examined the important role that international lawyers, scholars and states have to play in defending international adjudication against the recent backlash it has faced. **Augustin Barrier** and **Lea Murphy** of Lalive report*

McLachlan, professor at Victoria University of Wellington and a prominent arbitrator in investor-state disputes, opened the lecture with a quotation from Aeschylus' *Oresteia* to illustrate the importance of adjudication in the peaceful settlement of disputes:

Chorus: Where will it end? When will it all be lulled back into sleep, and cease, the bloody hatred, the destruction?

To which, the goddess Athena gave this revolutionary answer: I'll choose a panel of judges to preside at ... trials like this, and put them under oath, and so set up a court to last forever.

Now call your witnesses, prepare your proofs, bring forth whatever evidence you have that best supports your case. Meanwhile, I'll pick my ablest citizens, and then return to deal with this matter fairly, once and for all.

He referred to arbitrators **Pierre** and **Jean-Flavien Lalive** and how to them the world of international disputes was one where the interactions between the spheres of public and private international law, on the one hand, and the national realm of states and national law on the other had to be meticulously analysed, and the role of international dispute settlement hard won through careful legal argument.

McLachlan explained the paradox in state withdrawal from international adjudication. Although at first glance the current criticisms of international adjudication and the arguments in favour of withdrawal appeared couched as a reassertion of popular democracy, these arguments may in fact serve as a cloak for the exercise of unrestrained executive power by states.

He wondered whether the current attack on international adjudication could prove historian **Isabel Hull** right that “[t]here is no inevitable march of progress in history or law. Everything that has been achieved can be rescinded, forgotten, tossed away ...”.

McLachlan began by turning to the evidence of withdrawal from international adjudication. Brexit and the UK’s consequent withdrawal from the European Court of Justice, the criticisms faced by the European Court of Human Rights in the UK and elsewhere, the movement to withdraw from the International Criminal Court, as well as the growing opposition towards investment arbitration and the termination of bilateral investment treaties are all evidence of the trend towards withdrawal from international adjudication.

He then explored the main criticisms made of international adjudication, identifying four broad strands.

First, in what he called the “burdens of enlargement”, he acknowledged the growing opposition of states against international adjudication because of the proliferation of decisions setting more and clearer boundaries to their sovereign powers. According to McLachlan, however, states should not be heard to renege on their previous ambitions to create an international legal system because it produces the results that should have been expected of it.

Second, he considered the allegation of the democratic deficit of international adjudication, on the ground that international judges not elected by or held accountable to national societies affected by their decisions, are thereby unable to assess public policy choices relevant to these societies. Here, McLachlan referred to **Baroness O’Neill** and the German Constitutional Court in aid of the idea that democracy needs to be combined with international adjudication to protect the rule of law and the common interests of both individuals and states at an international level.

Third, concerning the argument that international adjudication should not apply when the vital interests of the state in the maintenance of its sovereignty are at stake, McLachlan acknowledged that states must take this into consideration before consenting to international adjudication. States must, however, take on the fact that they do not exist in splendid isolation and that the decision to submit to international adjudication is an act of sovereignty, rather than a derogation from it.

Fourth, as to the argument of excess of judicial power, McLachlan considered that the existing system was built to ensure that any excess of a tribunal’s mandate be effectively sanctioned by their decision being set aside for excess of power. On the other hand, a system where judges would refrain from exercising their power because it might be politically inconvenient would equally constitute an excess of power.

McLachlan then pursued his analysis by considering the interplay between modern international law and withdrawal from treaties. Provisions on termination and withdrawal can be found in section 3 of part IV of the Vienna Convention on the Law of Treaties (VCLT), and in particular articles 54 and 56.

The majority of treaties include provisions for withdrawal, but their operation is not necessarily simple, as the UK’s experience with article 50 of the Treaty on the European Union (TEU) illustrates.

Regarding implied rights of withdrawal, which is a more difficult case, article 56 VCLT sets the objective and subjective substantive conditions to consider that withdrawal may be implied in a treaty and provides for the obligation on the state purporting to withdraw to give a 12-month advance notice of its intention.

McLachlan considers that this provision reflects the idea that withdrawal is not a unilateral act and produces consequences for other state parties, who must in good faith be given the opportunity to engage with the state proposing withdrawal.

On whether treaties providing for binding judicial settlement imply by their nature a right to withdrawal, McLachlan recalled that the International Law Commission took the prescient view that such unilateral right may be subject to abuse. He considers that an implied right of withdrawal from international adjudication is

not supported, be it in state practice or otherwise. This suggests that an automatic right of withdrawal can never be presumed. In any event, the VCLT wisely provides for a rather detailed set of procedures meant to ensure notification to and consultation with the other state parties. In that sense, the presumption is to the contrary: a binding treaty obligation to settle disputes by third party adjudication cannot, once assumed, be rescinded without the consent of other parties.

Finally, McLachlan advanced four propositions in response to the assault on international adjudication.

First, he reasoned that the argument raised by governments for restricting the jurisdiction of international courts should not always be taken at face value. The function of international jurisdictions is to ensure compliance of the executive branch of the states with the rule of law. While it is understandable that this proposition will not garner popularity among state officials whose conduct is under review, this control is necessary to ensure the protection of individual rights. McLachlan noted in this respect that those decisions of the European Court of Human Rights that sparked most controversy were in relation to the protection of the rights of marginalised groups in society to take their part in the democratic process.

Second, he posited that the primary defenders of international adjudication bodies are the states themselves, who endowed them with their mandate acting as a collectivity. Collective support is thus key to ensuring the emergence of a common political goal going beyond the individual interest of each state party.

Third, McLachlan emphasised the importance of national courts in support of international adjudication. He relied on, among others, the example of the UK Supreme Court, which decided that the British Constitution required that the executive could not take the decision to withdraw from the TEU without the authority of an Act of Parliament.

McLachlan's fourth proposition was a call to bear in mind that international courts and tribunals remain human constructs, subject to changes and design improvement which did not necessarily evidence a wider failure of international adjudication. Indeed, he noted that, despite the backlash against them, very few of these institutions have actually disappeared from the map.

This led to his conclusion that withdrawing from a process of compulsory settlement of international disputes has wide implications for international law. Relying on Lauterpacht's position that no international dispute may be deemed to fall outside the scope of international adjudication, regardless of its political implications, McLachlan warned international lawyers that they should be prepared to defend international adjudication against a tide of withdrawals by states who assert national self-determination as a ground for denunciation. Scholars and lawyers have a particular responsibility in recalling the principle that international adjudication is here to protect individuals and other states against the arbitrary exercise of state power. He concluded by stating that the submission by states to international adjudication is not incidental, but rather central to the operation of international law. Withdrawal cannot be unilateral as it has implications, beyond the withdrawing party, on other states but even at the domestic levels. States should thus not only live by their commitments, but also ensure that other states do.

*The 13th annual Lalive Lecture was held on 2 May 2019 at the Graduate Institute of International and Development Studies in Geneva. McLachlan was introduced by **Vincent Chetail**, professor of international law and head of the international law department at the Institute.*

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