

Access to the law in emerging countries - The connectivity project on mutual legal assistance to Member States of the Organization of American States

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[1] Canada is rediscovering the Americas at a time when the information and communications technologies (ICT) are making national borders obsolete. At the same time, Canadian Justice is examining the role that it can play in matters involving international cooperation in the field of justice.

[2] The 3rd Summit of the Americas, held in Quebec City in April 2001, gave the Department of Justice Canada the opportunity to propose an innovative project on connectivity in matters relating to mutual legal assistance. In the final declaration, the heads of state and government of the Americas specifically drew attention to the importance of connectivity to the equitable development of the region:

We are convinced that the promotion of a Connectivity Agenda for the Americas will facilitate the beneficial integration of the hemisphere into an increasingly knowledge-based society. We share the goal of providing all citizens of the Americas with the opportunity to develop the tools to access and share knowledge that will allow them to fully seize opportunities to strengthen democracy, create prosperity and realize their human potential. Connectivity will open new opportunities to our society in all areas, for which equal access and appropriate training are necessary.

[3] Were it not for the dynamism and foresight of a few jurists and other legal practitioners, this declaration would have gone unnoticed for the law. Justice, with the exception of human rights, is too often ignored as a key component of development in the information age.

The project

[4] At the 3rd meeting of Justice Ministers of the Americas held in Costa Rica in June 2000, the OAS (Organization of American States) proposed to Member States that they find new tools to facilitate the exchange of information relating to criminal justice. At this meeting, Canada's Department of Justice made a commitment, albeit a somewhat vague one, to study the feasibility of such a project.

[5] A working group, coordinated by the Department of Justice Canada and composed of Argentina, The Bahamas, El Salvador and the OAS's Secretariat Legal for Cooperation, held a number of meetings. After numerous discussions and exchanges, we presented a pilot project whose central focus is the creation of a criminal justice information exchange network.

[6] On the project site, there is, for the time being, a general description of the legal

systems of the four countries that make up the working group. Also posted on this site are the laws of these countries and the bilateral and multilateral agreements in force concerning mutual legal assistance in criminal matters. This information is available in French, English, Spanish and Portuguese. The headings are in all four languages to facilitate research and comparisons.[2]

[7] This project has since been endorsed by the Ministers of Justice at the IVth meeting of the Ministers of Justice held in Trinidad and Tobago in March 2002 and by the heads of state and government at the General Assembly of the OAS held in Barbados in June 2002. They all indicated that this site would be of inestimable value for the law and democracy. These benefits are real and this document summarizes them. On the other hand, this project also overcomes many obstacles that are in some cases specific to this initiative and in others of a more general nature. We have therefore seen fit to use the connectivity project involving cooperation in criminal matters in the Americas (MLA) as the backdrop against which to compare the new information and communication technologies and the internationalization of law, while demonstrating the challenges that such a project poses and the benefits that the emerging countries or Canada can derive from it.

The Benefits

[8] The benefits are numerous, but we must first examine the context in which the project is being implemented.

[9] The emerging democracies [3] need the more developed States to support their initiatives. Moreover, a number of past experiences, reinforced somewhat by the events of September 11, 2001, demonstrate that technical assistance must be provided in a context of mutual assistance that works better in a multilateral relationship.

[10] The law, in this context, must necessarily develop in a context of multilateral interaction. It is stating the obvious to say that intellect, whether it comes from Montreal, Bogota, Port-au-Prince or Washington, has the same value! In this regard, for the vast majority of stakeholders, neo-colonialism is, at least in theory, dead. In many respects, the events of September 11 have caused us to re-examine our approach to international relations. The Canadian Sherpa for the Summit of the Americas, Mr. Marc Lortie, pointed out the following a year after the Summit of the Americas held in Quebec City and in the wake of the events of September 11, 2001: "Suddenly old enemies became friends; what was taken for granted had to be reconsidered; key priorities were relegated overnight to a position of secondary importance." [4] Today, a number of States, acting within the framework of a multilateral institution, are making use of law enforcement mechanisms (the corruption audit in the Inter-American Convention Against Corruption is a good example [5]). Different types of laws, some more developed than others, are emerging: protection of information; access to information; criminal law through its anti-corruption and anti-terrorist agreements, through the notions of the transparency of government; intellectual property; and privacy.

The Benefits for Democracy

[11] A multilateral forum, like the Web site established, allows all democracies to propose and be consulted. This is an important political tool where the inherent value of all documents, such as bilateral agreements and all e-mails, is recognized and where they all have their place. They are part of the emerging democratization process and the Internet is a major tool in this process.

[12] In this context, the MLA project is very timely because it is more than a place to post documents. It gives jurists in the Americas the opportunity to find out what is being done elsewhere and to negotiate agreements with full knowledge of the facts. The MLA project is more than a statement of the law. What in fact it communicates is a concrete idea of

what the law is in each Member State. The law that is posted is pooled by subject, with footnotes, corresponding treaties and doctrines, annotations and rules of procedure, as well as instructions on the procedure to follow and the acceptable evidence on the targeted question of mutual legal assistance in criminal matters. This allows users not only to learn about the law of each Member State, but also to compare it and ultimately to influence or critically analyse it almost instantaneously. The law of a Member State is placed side by side with the law of other Member States and it allows the democracies of the Americas to inform users of their respective legal systems, thereby giving the smaller countries, when they come on line and begin to actively participate, the opportunity to make suggestions. Thanks to the Internet and the new communications technologies, the law is undergoing a "quiet revolution".

[13] Moreover, participation in this network produces dividends, if only through the standardization of the structure, the size of the pages on the Web and the type of information desired. Together we determine the parameters of the Web, the destination of privileged information or the type of information to be shared and with whom: police services, universities? The same procedure would be followed were it necessary to broaden the scope of the subjects presented. Should we add drug trafficking and the extradition of traffickers? The Web enables a group to influence mutual legal assistance in criminal matters in the Americas. We seem to underestimate the importance of this reality. However, were this site to become fully operational, as we hope and believe it will, it will give the working group the opportunity to influence the law of the Americas. For example, this resource could make it possible to eliminate certain consultative steps in the procedure, thereby enabling the working group to clear the way for reorganizing this procedure. Even though mutual legal assistance is the rationale for this information exchange network, efficiency may dictate that certain steps or inquiries be eliminated to expedite the procedure, because time is often of the essence in apprehending criminals.

The benefits to Canada - a new role for Justice Canada

[14] For a long time, the making of international law has been left to diplomats, without clearly defining the roles of jurists. Canada now has a new generation of diplomats, somewhat like those in England and Germany, who want the so-called technical or specialized departments to play an important role in decision making and the development of international projects. While this revolution is still not complete or widespread, it nevertheless has the strong support of a number of senior Canadian diplomats.

[15] DOJ is essentially a content or substance department, as people like to call it. It excels at meeting the legal needs of the other departments. In recent years, counsel from the Department have played an active role in negotiating trade agreements (WTO/NAFTA), intellectual property agreements (TRIPS), human rights agreements (Convention on the Rights of the Child), agreements relating to CEDAW (Convention on the Elimination of All Forms of Discrimination against Women), international agreements in the field of criminal law (cybercrime, drug trafficking, trafficking of persons), environmental agreements (Kyoto Protocol, Protocol on Biosafety) and various international private law agreements (through UNCITRAL, UNIDROIT and the Hague Conference). However, international negotiations of this type are managed through the client department. Environmental agreements are managed by the Department of the Environment, international trade agreements by the Department of Foreign Affairs and International Trade, and so on. There are, of course, many exceptions and in recent years we have seen CIDA (Canadian International Development Agency) support, fund and evaluate projects in conjunction with DOJ.

[16] Human rights and criminal law are clearly DOJ's responsibility. Some will say that DOJ has been very active in this field; others will argue the contrary. It is not up to me to judge. However, based on our evaluation, and particularly the new international context, we now believe that the expert departments inevitably will participate directly in

international development jointly and in connection with matters within their field of expertise. These matters will be dealt with not merely in the context of development, but also from the perspective of the development of the law. The law in fact no longer develops solely within national borders and its focus is no longer development per se. The Internet gives us a new option of using our knowledge to create a universal and multilateral structure that relies even more on the expertise of the departments.

[17] Our fields of legal specialization, such as criminal law and human rights, which have adapted to and are influenced by international law, have rarely contributed to the structure of international law and hence to the development of the international legal system. In other words, we have not grasped the fact that, by participating in a distribution network, we are participating in the development of the law that is in a state of flux and democracy that is constantly evolving, sometimes even before we have defined our own law.

[18] The international community has reached that stage and the Web enables us to seriously consider this option.

[19] The democracies want and are demonstrating their desire to adapt their system to a legal and democratic *reality check*, and to adapt their governance to a more democratic system. Not that long ago, we were developing first principles; yesterday, we were disseminating information; today, there is convergence of the law that has been disseminated and its development.

Difficulties Encountered

Access to the technologies

[20] The survey we distributed before the IVth meeting of the Ministers of Justice in Trinidad and Tobago made us aware of the fact that, in some countries, nothing is ever certain until it is a fait accompli and that some countries are still struggling to gain access to the Internet. Although this project is geared primarily to a target population, i.e., experts working in the field of mutual legal assistance in criminal matters, thus simplifying the problem of distribution and interaction, it is clear - and we sensed this during our presentation to the 34 ministers of Justice in March 2002 and to the General Assembly of the OAS in June 2002 - that the question of making the law accessible to all the peoples of the Americas on the Internet, in the four official languages, far exceeds the capacity of the information exchange network of MLA legal experts. A parallel project functioning at a slower pace will have to address the infrastructure needs of certain groups targeted by this project.[6]

The challenges of collecting information

[21] For many countries of the Americas, collecting information is in and of itself a major challenge. This is sometimes a problem even in an economically developed country. Some countries, it must be acknowledged, have experienced few, if any, of the benefits of the information technologies revolution. For them, legal documents are in most cases accessible only in paper form and the copies, which have been reproduced many times, are of very poor quality. We can therefore expect to have to reconstitute a continent-wide fund for the law. The MLA project has had to face such difficulties. Our experience has taught us that, if given the opportunity, our colleagues in countries with more limited access to the information technologies will do everything in their power to assemble the necessary documents. Numbering then is possible, thereby increasing access to the shared legal heritage of the countries of the Americas.

The challenge of the professional culture

[22] The challenge of gathering information also means working with lawyers trained in the traditional practise of law who are unaccustomed to rapid change (take, for example, precedents, which are the foundation of common law) or are still accustomed to maintaining privacy and therefore not willing to disclose information (for example, solicitor-client privilege) or who trust only paper because of the authenticity of written documents. This whole culture represents a high degree of professionalism, but must be adapted to the reality of the Web and evolve with technological developments. In other words, for some - and I would include certain lawyers - paper is still the only work tool, and exchanging documents means extra work. So the need to find a numbered copy is not a priority, and in some countries, this is the job of foreign corporations or institutions. In common law countries in particular, this raises another challenge - that of copyright.

[23] The challenge, then, in some cases was to convince our colleagues of the advantage of such a communication tool for the law and to show that, once the international or bilateral treaty is negotiated and signed, the copy, even in paper form, will no longer be locked in a vault in a certain section of a foreign department and that the only copy accessible at all times will be the copy held by the Department of Justice. The Web also has the advantage, which is not peculiar to the dissemination of the law, of allowing everyone to obtain the official copy or copies, in one of the official languages, at the desired time and place.

The challenge facing the OAS

[24] The OAS must take the lead and constantly remind Member States of the challenge of balancing efficiency with respect for the democracies and the pace at which each functions. The OAS must remind Member States that a particular tool will be successful only if it is the product of the collective work of the countries of the Americas. Another challenge facing the OAS is sustainability.

The challenge of the sustainability of the project

[25] The sustainability of the project raises questions. Apart from the technological problems we may encounter, it is clear that such a project should be self-sustaining. In this context, it is appropriate to ask whether the project will survive its implementation. Although there is a need for it, there must be a will to oversee its operation. One solution would be to establish a virtual secretariat that would be responsible for updating its content annually or biennially, somewhat along the lines of the services of the presidency of the Council of Europe. This committee would be responsible for overseeing and coordinating activities on the Web.

The challenge of democratization

[26] Following the very positive reception given the project by ministers and representatives of Member States, it would be easy to rest on our laurels and not try to improve this information exchange mechanism. There is general agreement on one thing: in order to be vital, effective and used, a site must be adapted to the needs of its target public. The other danger is that some will use it for their own ends. For example, some could use it to obtain a window on the Americas, to gather privileged information, without providing anything in return. We know, as we stated earlier, that the success of this project is tied to the image of the Web, i.e., how democratic the medium is. All those who believe in it and use it will have an impact on it. The emerging countries must play an active role in implementing this project and the democracies, for their part, must show humility. Everyone is equal and working towards the same goal: fighting crime. The Web allows us to do this.

Conclusion

[27] At a time when the world is threatened by transnational crime, in particular by the threat of terrorism, a safe way of allowing countries to exchange information in complete confidence and in a timely fashion is needed more than ever. Transnational crime is mushrooming. Criminals have access to sophisticated methods of transportation and communication that enable them to conceal their identity, avoid prosecution and hide evidence and the proceeds of crime. As criminals resort to increasingly sophisticated techniques and take advantage of national borders to avoid being brought to justice, law enforcement authorities must work together to combat this threat, no matter what it takes. And this includes the Americas. In other words, this is not a vague, theoretical project, but a practical way of adapting technology to an existing situation. Thanks to the Internet, some Member States are re-examining their intervention capabilities and others are discovering the genuine need to sign bilateral and multilateral agreements, participate in forums and appoint competent officials in order to address the problems of the law of mutual legal assistance. Finally, the Internet makes it viable to disseminate the law to all Member States and to explain their respective laws to the community of jurists in the Americas. It is not simply a matter of disseminating legal information. It involves building a vital partnership and communicating faster and more effectively in order to fight crime...

[28] We now know that connectivity involves much more than providing citizens with access to the Internet or bridging the Digital Divide. It involves a fundamental change in the way governments behave towards their citizens and the way States behave towards one another. This profound change simplifies structures and allows the emergence of a new governance model that is in harmony, we hope, with a new strategy for Justice.

[1] The views expressed in this document are those of the author and do not necessarily reflect the views of the Department of Justice.

[2] The Web site address is www.oea.org- see attachment.

[3] The term "new democracies" or "emerging democracies" is somewhat hackneyed and seems to connote a very paternalistic attitude. Clearly we would have a lot of difficulty referring to Greece or the United States as new democracies, although the American electoral process clearly contained elements of new democracies. The definition comes from the field of economics (see Jacques LAROSIERE, "Les pays émergents: chances et défis", *Conjoncture*, March 2002). It refers to developing countries that operate, in a manner of speaking, a market economy and therefore qualify for international financial assistance. Of course, this is in keeping with the movement towards globalization. For our purposes, it refers to those nations that are making the transition from a dictatorship, a governing oligarchy, a single-party state or a puppet government to a government elected by the people [in the most appropriate manner depending on the circumstances].

Emergence is largely tied to this principle of elections, the possibility of debating issues and opposing, without reprisals and within the rule of law.

[4] "Results and Lessons from the Quebec City Summit" by Marc Lortie, Assistant Deputy Minister (Americas), Department of Foreign Affairs and International Trade, Ottawa, Canada at the Wilton Park Conference 660 *Trade and Economic Integration in the Americas: Implications for the Hemisphere, Europe and Asia*.

[5] Moreover, all the countries of the Americas must respect human rights, particularly since the advent of the democratic charter adopted at the Quebec City Summit. "The

Inter-American Democratic Charter is a new political mechanism designed to address challenges to democracy." It was invoked, for the first time, on April 13, 2002, during the constitutional crisis in Venezuela. The Charter is intended to complement the "democracy clause" in the Declaration of Quebec City which establishes that "any unconstitutional alteration or interruption of the democratic order in a state of the Hemisphere constitutes an insurmountable obstacle to the participation of that state's government in the Summit of the Americas process". The definition comes from the field of economics.

[6] At the Summit of the Americas in Quebec City, Prime Minister Chrétien announced a Canadian initiative, the creation of the Institute for Connectivity in the Americas (ICA), and granted \$20 M to this end. It is designed to be the forum for hemispheric innovation in the application of information and communication technologies (ICTs) to strengthen democracy, create prosperity, and realize human potential. It will build on the success and experience of the Connecting Canadians Strategy and Canada's international development and ICT programs.

