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International Norms in Constitutional Law

Michael Wells
University of Georgia School of Law, mwells@uga.edu

INTERNATIONAL NORMS IN CONSTITUTIONAL LAW

*Michael Wells**

Whether the Supreme Court should look to international law in deciding constitutional issues depends largely on what is meant by "looking to" international law.[1] Some international norms are legally binding on American courts, either because we have agreed to follow them by adopting treaties or because they form part of the federal common law. I certainly agree that the Supreme Court, like the rest of us, ought to obey these aspects of international law. But the role of international norms in American courts has recently attracted attention for a different reason. In *Lawrence v. Texas*[2] the Supreme Court, overruling *Bowers v. Hardwick*,[3] struck down a statute that prohibited anal and oral sex between members of the same sex, on the ground that the statute violated the due process clause of the Fourteenth Amendment. In the course of the opinion, the Court cited a number of authorities, including a ruling by the European Court of Human Rights, in *Dudgeon v. United Kingdom*,[4] that had invalidated similar laws. Other recent Supreme Court cases have made reference to decisions by international tribunals and other international norms, and Supreme Court justices, in their extracurricular writings, have championed the practice.[5] Since nobody asserts that these rulings are legally binding on American courts, the Court's recent practice raises the question of why we should pay any attention to them.

I.

A partial answer is that an international court may come up with a convincing argument that helps our judges to resolve a thorny issue. One

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* J. Alton Hosch Professor of Law, University of Georgia, School of Law. B.A., J.D., University of Virginia.

[1] So far as I can tell, Chief Justice Rehnquist deserves the blame for giving prominence to this ambiguous phrase. *See* William H. Rehnquist, *Constitutional Courts-Comparative Remarks* (1989), *in* GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE-A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993).

[2] 123 S. Ct. 2472 (2003).

[3] 478 U.S. 186 (1986).

[4] 45 Eur. Ct. H.R. (1981) & ¶ 52.

[5] See Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1 (2003) and sources cited therein.

could hardly maintain that American judges should deprive themselves of reasons, arguments, distinctions, rhetoric, and other helpful tools just because they find them in international materials. The basic structure and substance of our constitutional system derives from European thinkers like John Locke, Adam Smith, and Michel de Montesquieu. Nor should the justices overlook law review articles, newspaper stories, state court opinions, and the briefs of counsel. It may be that the justices who favor resorting to international materials intend to say only that they contain persuasive arguments. In that event, there is nothing in the practice that is worth arguing about.

There may be pragmatic reasons for following an international norm. For example, under the Supreme Court's decision in *Stanford v. Kentucky*, states may execute juveniles who commit murder.[6] Though international norms forbid the practice, the Court, in upholding the practice, "emphasiz[ed] that it is *American* conceptions of decency that are dispositive."[7] Even skeptics of deference to international norms concede that the ruling has attracted much criticism.[8] Indeed, the Supreme Court recently agreed to reconsider its doctrine on the topic.[9] Now, suppose *Stanford* is unassailable in its reasoning that the American precedents and other legal materials favor the execution of juveniles, yet the practice engenders persistent and growing distrust from abroad. All things considered, the benefits of clinging to our rule may be greater than the costs. In that event, it would make sense to abandon the execution of juveniles, just because of the international consensus against it.

Another distinction will help to clarify the issue of whether American courts should look to international law in constitutional cases. One of the *Lawrence* Court's citations to *Dudgeon* takes place in the course of describing "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[10] The Court documented this emerging awareness mainly by reference to changes in American law over the past fifty years. Later in the opinion, the Court stressed that constitutional interpretation must take account of changing times. Thus, "those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment . . . knew times can blind us

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[6] 492 U.S. 361 (1989).

[7] *Id.* at 369 n.1.

[8] *See* Jack Goldsmith, *Should International Human Rights Law Trump U.S. Domestic Law?*, 1 CHI. J. INT'L L. 327, 335 (2000).

[9] Roper v. Simmons, No. 03-633, *cert. granted*, 124 S. Ct. 1171 (2004) N.Y. TIMES, Jan. 27, 2004, at 1.

[10] 123 S. Ct. at 2480.

to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress."[11] The core of the argument here is not that American courts ought to look to international law, but that the content of constitutional doctrine ought to respond to changes in society and widely held values over time. The role of international materials is merely to help document the change.

II.

Yet none of these reasons for paying attention to international norms seems to account fully for the Court's practice. When the *Lawrence* Court cited the ruling of the European Court of Human Rights in *Dudgeon*, it seemed to envision a more ambitious, or at least a different, role for international law. The Court did not claim that international law was binding. It did not suggest that the law had to fall for pragmatic reasons, because continuing to allow the states to criminalize would cause too much friction with other nations. It referred to *Dudgeon* not only to illustrate changing attitudes, but also to bolster its substantive judgment that "the reasoning and holding of *Bowers* have been rejected elsewhere."[12] But it did not then go on to examine or rely on the reasoning of *Dudgeon*. The Court merely cited the case as it might cite any other precedent. Justice Kennedy's opinion for the court seemed to proceed from the premise that the *Dudgeon* case deserved weight *independent* of the persuasive force of its reasoning and of any pragmatic reasons for following it.[13] In other words, it appears that the Court believes it owes some *deference* to the international norm.

If "looking to" international law means deferring to it, even by giving it an iota of weight (independent of the considerations discussed in Part I), then the Court's practice deserves careful scrutiny. I do not want to exaggerate the importance of the issue by insisting that the Court's citation to *Dudgeon* signals deference. This and other references to international materials in recent decisions may well be nothing more than window-dressing for rulings that turn solely on other considerations that are well-rooted in American law.

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[11] *Id.* at 2484.

[12] *Id.* at 2483.

[13] See also *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002), where the Court, in forbidding the execution of mentally retarded persons, noted that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved," without relying on, or even examining the reasoning behind international disapproval.

Nonetheless, the possibility that the Court means to defer in some measure to international norms deserves to be taken seriously. For the sake of pursuing the point further, I will assume that the Court means, in some measure, to defer to international norms. The hard question raised by *Lawrence* is just this: Should the Supreme Court give *any* weight to international law as a source of American constitutional doctrine, *just because it exists*?

III.

Contrary to what I take to be the view of the *Lawrence* majority, and contrary to Professor Bodansky, it seems to me the better answer is that it should not. In the first place, deference to international norms upsets the balance between majority rule and anti-majoritarian constraints in our constitutional system. Broadly speaking, we hold that majorities ought to have their way on matters. To that end, they elect executive officers and representatives who formulate and carry out the ends government will pursue. But the majority may not do just what it pleases. The Bill of Rights, the post-Civil War amendments, and some other constitutional provisions place limits on the ends government may pursue and the means it may employ. Exercising the power of judicial review, judges see to it that the majoritarian branches of government respect these limits. At the same time, there are majoritarian constraints on the judges themselves. In the state systems, they are often elected. Federal judges are appointed by the president with the advice and consent of the Senate, and political considerations virtually always have some bearing on their selection. In addition, Congress regulates the jurisdiction of the federal courts. Over time, these majoritarian influences on the composition and jurisdiction of the courts help to see to it that the courts are accountable for what they do.

This division of authority between the courts, the legislature, and the executive helps to assure that constitutional law will reflect both majoritarian values and the anti-majoritarian constraints reflected in guarantees of individual rights. When an American court defers to an international norm, it imports a rule that has not withstood the scrutiny to which our rules are ordinarily subjected. In the case of the most prominent source of international human rights law, the International Covenant of Civil and Political Rights (ICCPR), the content of the norms depend largely on the writings of "legal academics, human rights activists, and international institutions like the ICCPR's Human Rights Committee." As Professor Jack Goldsmith points out,

"[t]hese are not groups whose democratic pedigrees inspire confidence."[14] Absent good reasons for confidence in the judgments of these bodies, the case for deference to them lacks force.

The problem is not just that one may doubt the competence or wisdom of the international institutions that produce these norms. It is that, in any event, international courts, committees, and other groups are not at all accountable to the American electorate for the norms they generate. At the same time, an American court that defers to an international norm may deflect criticism for the choice it has made by hiding behind the authority of the international body that promulgated the rule in the first place. As a result, critics may find it difficult to hold anyone responsible for international norms that find their way into American constitutional law.

The problem here is roughly analogous to one that may come up when a state court, in the course of resolving an issue, cites federal constitutional precedents as well as state law. The Supreme Court may review such a case only if the federal ground is necessary to the decision, but not if the state ruling rests on an adequate state ground. When the state court opinion is ambiguous as to its grounds, the Supreme Court may be reluctant to review the case, reasoning that the decision may well rest entirely on state grounds. In that event, the state court may escape any accountability for its reasoning. Having avoided Supreme Court review because of its references to state grounds, it may avoid scrutiny by state lawmakers as well, for they may suppose that the decision rests on federal grounds that they cannot overturn. As a result, the state court ruling may evade scrutiny altogether. In order to avoid this problem, the Supreme Court has ruled that ambiguous state court opinions will be subject to review, on the presumption that they rest on federal grounds.[15] Of course, that kind of solution to the accountability problem is not available when American courts cite international norms. Again, it is one thing to find in international materials an illuminating argument or insight and adopt it as one's own. It is quite another to cite international materials as authority, as though they deserved deference independent of their persuasive force.

IV.

Lack of accountability is a symptom of a conceptual problem with deference to international norms. Partisans of deference seem to conceive of

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[14] Goldsmith, *supra* note 8, at 333.

[15] Michigan v. Long, 463 U.S. 1032 (1983).

law, or at least of "human rights" law, as a body of timeless and immutable principles, or, as the Supreme Court put it in *Erie R. Co. v. Tompkins*, "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute."[16] For example, they rely on early nineteenth century cases and scholarship that accorded a broad role for international norms in adjudication on the premise that at least some parts of the law are the same everywhere and courts can learn from the efforts of jurists elsewhere to find it.[17] There is a hint of this in *Lawrence*, when the Court declares that "[t]o the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere."[18] This, of course, is the "natural law" conception of law, though Professor Bodansky resists the characterization. His reluctance to identify his view with natural law is understandable. The doctrine has its defenders in odd corners of the legal academy, but our legal system has squarely rejected it. The Court in *Erie* signaled the triumph of positivism, pointing out that "law in the sense in which courts speak of it today does not exist without some definite authority behind it."[19]

The *Lawrence* Court, Professor Bodansky, and others who favor deference face an insoluble dilemma. On the one hand, they may begin from the natural law premise that law exists apart from a lawmaker who "posits" it, in which case they can coherently argue that American courts should defer to legal norms identified by international tribunals. But in that event, they have to sacrifice adherence to the positivist premises of our federal system, as reflected in *Erie* and its rejection of "general" common law rules. Or they can endorse *Erie* and its holding that every legal rule comes from an authoritative source. But then they are hard-pressed to explain why an American court ought ever to give any weight to international norms that are not part of our law by treaty or by way of federal common law. Keep in mind here the crucial distinction between deference and the arguments based on persuasive force, evidence of consensus, and pragmatic considerations discussed in Part I.

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[16] Erie R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) (quotation marks and citations omitted).
[17] *See, e.g.*, Ginsburg, *supra* note 5.
[18] 123 S. Ct. at 2483.
[19] 304 U.S. at 79.

V.

If it is true that partisans of deference misconceive the nature of law, the problem is not just conceptual. There will likely be practical consequences as well. The natural lawyer sees the task of adjudication as an effort to identify principles of morality that underlie and shape legal rules in all times and places.[20] An alternative available to judges who are not enamored of natural law is to focus on the history, culture, and values of the society in which they act and to view adjudication as a matter of identifying the rule that best suits the society, all things considered. Under this approach to adjudication, the making and application of law is not a matter of identifying and implementing moral principles, but one coping with clashes among competing interests and values. The resolution of any issue will be heavily influenced by the culture that produced it.

Consider, for example, the issue of whether the state may engage in affirmative action to improve the lot of minority racial groups who have suffered discrimination in the past. Most Americans approve of or at least accept the practice, if we may judge by the actions of democratically accountable legislatures, city councils, and other bodies. In France, recall the recent proposal by Interior Minister Nicolas Sarkozy to institute a program of affirmative action for Arab immigrants.[21] The idea was broadly greeted with indifference, not merely from the conservatives of Sarkozy's party, but all across the political spectrum. The difference between the two polities on this issue rests largely on history and culture. An extended account of how they differ cannot be attempted here. For present purposes, it is sufficient to point out that Americans feel the need to make up for a long history of slavery and oppression, keeping after African-Americans as slaves for 200 years and then denying them equal citizenship for at least a century after that. By contrast, in France, a major theme of the Revolution, and of the struggle against the old order that went on for another hundred years, was the elimination of differences based on status.[22] Thus,

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[20] *See* Brian Bix, *Natural Law Theory*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 223-40 (Dennis Patterson ed., 1996).

[21] Elaine Sciolino, *French Official Looks in His Mirror and Sees Future President*, N.Y. TIMES, Nov. 22, 2003, at A3.

[22] *See* FRANCOIS FURET & MONA OZOUF, A CRITICAL DICTIONARY OF THE FRENCH REVOLUTION 107, 669 (Arthur Goldhammer trans., 1989).

> The night of Tuesday, August 4, 1789, is the most famous date in French parliamentary history: it marks the moment when a juridical and social order, forged over centuries, composed of a hierarchy of separate orders, corps, and communities, and defined by privileges, somehow *evaporated*, leaving in its place a social world conceived in a new way as a collection of free and equal individuals subject to the universal authority of the law.[23]

Following the Revolution, "[t]he principal occupation of the nineteenth century would be to bring the reality of equality into line with its revolutionary proclamation."[24] Viewed in the light of this history, it is easy to understand the French reluctance to draw distinctions based on ethnicity.

My view is that it is better for courts and other lawmakers to focus on resolving conflicts by paying close attention to the history and culture of the society in which they act, rather than to try to identify and apply trans-cultural principles of morality. I suspect that, whatever they may say, this is what they actually do most of the time in any event. If this is so, then it seems at best pointless, and at worst destructive, to give weight to decisions reached by international tribunals that, by their very nature, cannot give due regard to differences among cultures.

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[23] *Id.* at 107.
[24] *Id.* at 683.