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The Supreme Court And The New International Law

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Nearly a century ago twenty-four Members of the Mohonk Conference on International Arbitration founded the American Society of International Law. Elihu Root was the Society's first President. Its vice presidents included three members of the Supreme Court - Chief Justice Fuller and Justices Brewer and Day - as well as William Howard Taft, who would later become both President, and then Chief Justice, of the United States. Their participation then made clear that the Court's members understood the importance of international law and its direct relation to their work. Many members of the Supreme Court continue to hold that view - a view that now extends beyond public international law to embrace foreign law and legal institutions as well.

Justice O'Connor, for example, has said that she thinks that "American judges and lawyers can benefit from broadening our horizons" and that her own experience on the Court has suggested that "we often have a lot to learn from other jurisdictions." Just last year at this meeting she suggested that "conclusions reached by other countries and by the international community should at times constitute persuasive authority." Similarly, Justice Ginsburg has explained that, in her view, "comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups. For irrational prejudice and rank discrimination are infectious in our world." Justice Stevens and Justice Souter have referred to comparative foreign experience in several important recent opinions. And I have tried to explain, both in opinions and public remarks, why I believe foreign experience is often important to our work.

This afternoon I should like to continue to explain why so many of us have taken this position. It is neither that we are, in any political sense, "internationalists," nor are we trying to move the law in a particular substantive direction. Rather, our perception of need and of usefulness arises out of our daily experience - experience of the following kinds:

First, we face an increasing number of domestic legal questions that directly implicate foreign or international law. We recently had to decide whether the Constitution permitted Congress to extend the term of copyright from the life of the author plus fifty years to life plus seventy years. The briefs discussed European experience extensively, as did our opinions. Why? Because Congress's legislative purposes included harmonization of European and American laws. Obviously we had to understand the European system in order to evaluate that American objective. The same is true when we interpret American jurisdictional provisions designed with foreign, state-owned, corporations in mind. The growing number of such statutes reflects the commercial, technological, and political changes that we often use the cliché "globalization" to describe.

Second, we find an increasing number of issues, including constitutional issues, where the decisions of foreign courts help by offering points of comparison. This change reflects the "globalization" of human rights, a phrase that refers to the ever-stronger consensus (now near world-wide) as to the importance of protecting basic human rights, the embodiment of that consensus in legal documents, such as national constitutions and international treaties, and the related decision to enlist judges - i.e., independent judiciaries - as instruments to help make that protection effective in practice. Judges in different countries increasingly apply somewhat similar legal phrases to somewhat similar circumstances, for example in respect to multi-racial populations, growing immigration, economic demands, environmental concerns, modern technologies, and instantaneous media communication. Thus, it is not surprising to find that the European Court of Human Rights has issued decisions involving, for example, campaign finance laws and free expression or that the Supreme Court of India has written extensively about "affirmative action."

Several years ago a professor asked me to name one instance in which a constitutional cross-country comparison had proved useful. After thinking about it, I eventually mentioned a French example involving state schools and the wearing of the Muslim chador. Today I would not have to hesitate. One or more of the current Justices has considered comparative experience in Eighth Amendment death penalty cases, in federalism cases, in cases involving right to die statutes, in such technical matters as the "ancient title" of Massachusetts to Nantucket Sound, and various others.

I recognize that some of my colleagues believe that comparative analysis is "inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one." But comparative use of foreign constitutional decisions will not lead us blindly to follow the foreign court. As I have said before - "[o]f course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem;" for example, in a federalism case, "the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity." Ultimately, I believe the "comparativist" view that several of us have enunciated will carry the day - simply because of the enormous value in any discipline of trying to learn from the similar experience of others.

Third, I would not limit comparative materials to formal court decisions. We, for example, are not the only democracy to face a terrorist threat that will likely require courts to decide

just when a constitutional phrase, protective of basic human liberty, authorizes a restriction designed for reasons of security. It may well be valuable to determine how other democracies have responded in similar circumstances. And relevant descriptions and analysis may be found in documents readily available on the internet. The Council of Europe, for example, has published guidelines describing application of European Court precedent in such circumstances. That document does not bind the United States, but it may help courts, or others, to understand the relevant problems.

Fourth, I have found discussions with foreign judges increasingly valuable in respect to institutional matters. In the past few months, for example, several of us have met with Members of the Supreme Court of India and discussed at some length the problem of overcrowded dockets - too many cases. Many of the Indian judges believe they can benefit from American methods for alternative dispute resolution. At the same time, I thought we might have something to learn from a mediation program I saw in Gujarat. The program, called the "womens' cell" of a legal aid clinic, puts teams of three professionals (a lawyer, a clinical psychologist, and a social worker) to work dealing with the underlying problem that likely led the woman in question to seek legal aid. Judging from the lines outside the clinic, the twenty-four hours per day work schedule, and the settlement rate, the program seemed to work well. And I could not help but wonder if we, in the United States, did not have something to learn from the cross-disciplinary, problem-based, approach.

Fifth, I have not seen many traditional public international law issues arise in the course of my daily work. But I know that there are such issues, for example, in "death penalty" cases, where international treaties and decisions of international courts may eventually prove relevant. In one recent death penalty case, for example, the Court rejected a treaty-based defense on procedural grounds, leaving open the possibility of such a defense in a case that did not involve a procedural default. The number of treaties relevant to particular domestic legal disputes seems to be growing.

The five different ways in which foreign or international law has a growing impact on my professional life lead to several more general observations. For one thing, my description blurs the differences between what my law professors used to call comparative law and public international law. That refusal to distinguish (at least for present purposes) may simply reflect reality. The commercial law of various States, for example, has become close to a single, unified body of law, in part through the work of uniform state law commissioners, in part through a pattern of similar judicial responses to similar problems, in part because of the work of intermediate judicial institutions such as federal bankruptcy courts, in part because the interstate nature of commercial contracts means that judges in different states apply each other's law. Formally speaking, state law is state law. But practically speaking, much of that law is national, if not international in scope. Analogous developments internationally, including the development of regional or specialized international legal bodies, also tend to produce cross-country results that resemble each other more and more, exhibiting common, if not universal, principles in various legal areas.

These growing institutional and substantive similarities are important, for to a degree they reflect a common aspiration. They reflect a near universal desire for judicial institutions that, through guarantees of fair treatment, help to provide the security necessary for investment and, in turn, economic prosperity. And through their respect for basic human

liberty may help to make that liberty a reality. The force of this aspiration, I hope and believe, is virtually irresistible.

For another thing, the personal experiences that I have described suggest an agenda for many in this organization. Neither I nor my law clerks can easily find relevant comparative material on our own. The lawyers must do the basic work, finding, analyzing, and referring us to, that material. I know there is a chicken and egg problem. The lawyers will do so only if they believe the courts are receptive. By now, however, it should be clear that the chicken has broken out of the egg. The demand is there. To supply that demand, the law professors, who teach the law students, who will become the lawyers, who will brief the courts, must themselves help to break down barriers - barriers that exist between disciplines, so that the criminal law professor as well as the international law professor understands the international dimension of the subject; barriers that exist between the academy and the bar; barriers that exist between the international specialist and the trial or appellate lawyer.

Neither can international institutional issues be treated as if they were exotic hot house flowers, rarely of relevance to domestic courts. Those issues, when relevant, must be briefed fully with the legal relationships between our Court, and say the International Court of Justice, comprehensively explained.

Finally, the trans-national law that is being created is not simply a product of treaty-writers, legislatures, or courts. We in America know full well that in a democracy, law, perhaps the majority of all law, is not decreed from on high, but bubbles up, out of interactions among the interested publics, affected groups, specialists, legislatures, and others, who interact through meetings, journal articles, the popular press, legislative hearings, and in many other ways. That is the democratic process in action. Legislation typically comes after this process has long been underway. And judicial decisions work best, particularly decisions from our Court, when they come last, after experience makes the consequences of legislation apparent.

As my comments indicate, I believe that there is much fundamental legal and institutional work to be done. It is important that you are undertaking that work. I encourage you to continue. And I want particularly to encourage the younger among you, including the students who are here. After all, what could be more exciting for an academic, practitioner, or judge, than the global legal enterprise that is now upon us? Wordsworth's words, written about the French Revolution, will, I hope, still ring true: