Missouri Law Review

Volume 73
Issue 4 *Fall 2008*

Article 14

Fall 2008

Federalism and Horizontality in International Human Rights

Margaret E. McGuinness

Follow this and additional works at: https://scholarship.law.missouri.edu/mlr

Part of the Law Commons

Recommended Citation

Margaret E. McGuinness, *Federalism and Horizontality in International Human Rights* , 73 Mo. L. Rev. (2008)
Available at: https://scholarship.law.missouri.edu/mlr/vol73/iss4/14

This Conference is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Federalism and Horizontality in International Human Rights

Margaret E. McGuinness[1]

The advent of the international human rights system is one of the many changes to international law since the time *Missouri v. Holland*[2] was decided. As other contributions to this symposium note, one of the challenging federalism questions raised by *Holland* in this new era is the effect of international human rights treaties and emerging customary international human rights law on U.S. states.[3] And just as the creation of the international human rights regime has affected domestic analysis of federalism, the international human rights system has itself adjusted to the processes of federalism.

The human rights regime is largely structured as a vertical process. States sign on to international human rights obligations, which are then integrated into domestic law. If a national government fails to implement its obligations internally, international courts and other institutions are designed to serve as supranational enforcement mechanisms.[4] The system has not always worked as planned. For its part, the United States has chosen to remain outside the human rights treaty regimes, or, where it has signed onto a treaty, has applied reservations, understandings and declarations to its commitments, which serve to limit the domestic effect of the treaty obligation. In part as a reaction to the failures of vertical enforcement, and in part as a reaction to U.S. human rights exceptionalism, the international human rights system has developed strong features of horizontality. This has been particularly true of efforts by states, NGOs and other actors to bring about changes to human rights behavior in the United States. Federalism itself, which only a few decades ago was viewed as a constraint to changing human rights behavior in the United States, has increasingly been exploited by advocates to promote international human rights standards and norms.[5] This essay explores the potential pitfalls of this expansion of horizontality and embrace of federalism for the broader project of international human rights.

---

1. Associate Professor, University of Missouri Law School. Many thanks to Matt Feldhaus, Kelsey Whitt and all the editors of the Missouri Law Review for their hard work on this symposium edition.

2. 252 U.S. 416 (1920).

3. *See* Carlos Manuel Vázquez, Missouri v. Holland's *Second Holding,* 73 MO. L. REV. 939 (2008).

4. For a discussion of verticality in international human rights, see HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 1087-155 (3d ed. 2008).

5. *See, e.g.*, Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006).

I. INTERSYSTEMIC GOVERNANCE AND PLURALISM: HORIZONTALITY TRUMPING VERTICALITY

In American federalism jurisprudence, the term horizontal federalism is used to describe the way in which law is created between and among the U.S. states in the absence of national law or federal enforcement mechanisms to coerce a uniform regulation or legal result.[6] In the international system, horizontality in lawmaking – or convergence across states around a particular norm – arises between nation-states acting as sovereign equals. Horizontality in human rights describes the ways in which human rights norms are transmitted, enforced and promoted across and between nation-states without the active intervention of the vertical institutions. For example, national judicial efforts to adjudicate human rights violations in other nation-states (as with prosecution of foreign war crimes in national courts under a theory of universal jurisdiction or an award of civil remedies for violations of human rights under the Alien Tort Statute in the United States) are said to be horizontal processes.[7] Different from vertical processes, horizontal processes help human rights norms that the United States has not signed onto nonetheless find traction in the U.S. legal system through actions by local, state and non-governmental actors. Some cases may look more "diagonal" than purely horizontal or vertical, as they often involve a combination of vertical and horizontal processes.

Doctrinal approaches to *Missouri v. Holland* generally focus on the vertical intersection of national treaty power and the 10th Amendment powers reserved to the states as a way of understanding multiple and overlapping systems of law. That is, they are concerned with whether and when the Constitution permits or prohibits U.S. states to act independently of the national government, and likewise whether and when the Constitution permits or prohibits the national government to bind the states to international commitments.[8] The contributions to this symposium by Professors Judith Resnik,[9] Robert Ahdieh,[10] and Paul Berman[11] offer alternative frameworks for thinking about the role of American federalism in the process of international or transnational lawmaking that encompass horizontality without rejecting the

---

6. *See, e.g.*, Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. (forthcoming 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1263682.

7. *See* STEINER, ALSTON & GOODMAN, *supra* note 3, at 1156-240.

8. *See, e.g.*, Michael D. Ramsey, Missouri v. Holland *and Historical Textualism*, 73 MO. L. REV. 969 (2008); Edward T. Swaine, *Putting* Missouri v. Holland *on the Map*, 73 MO. L. REV. 1007 (2008); Vázquez, *supra* note 2.

9. Judith Resnik, *The Internationalism of American Federalism: Missouri* and *Holland*, 73 MO. L. REV. 1105 (2008).

10. Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 MO. L. REV. 1185 (2008).

11. Paul Schiff Berman, *Federalism and International Law Through the Lens of Legal Pluralism*, 73 MO. L. REV. 1149 (2008).

role of vertical hierarchies. These alternative approaches view the intersection of federalism and international law not as a problem to be resolved through constitutional theory, but as part of a global phenomenon of lawmaking and social problem-solving to be systematized and understood.[12]

Thus, for Resnik, American federalism permits a multiplicity of approaches to "local-global" (or "global-local") problems of human rights, global warming and product safety. Where one level of governance fails or refuses to act to address a particular problem through law, other actors fill the regulatory void. The result in the United States has been "transnational-translocalism" in cases where the national government has refused to participate in international regimes (e.g., the Kyoto Protocol, the Convention for the Elimination of Discrimination Against Women) or where international agreement is unavailable (e.g., in the product safety area).[13] Similarly, Ahdieh argues that, rather than presenting obstacles to effective regulation, multiple and overlapping regulatory systems create efficiencies and important focal points for solving coordination problems in particular regulatory contexts. So, for example, federalism in the United States provides the opportunity for sub-national voices to participate in international lawmaking, which in turn permits inter-jurisdictional engagement (both horizontally between unconnected jurisdictions, and vertically within an international/national/sub-national hierarchy), a process which may result in coordination efficiencies and better matching between regulation and the subject to be regulated.[14]

Berman works from the theoretical premises of legal pluralism, building out from pluralist understandings of laws within a localized society to a vision of global legal pluralism. This vision accepts that lawmaking (or the creation of processes and norms that are recognized as authoritative by those subject to them) occurs simultaneously on multiple levels of formal and informal social governance. Just as an individual or social group within a state may be subject to plural influences of law, so too are individuals, social groups and local and national governments subject to plural sources of law internationally. The pluralist approach emphasizes that phenomena beyond coercive power and hierarchical authority are at work in creating norms of

---

12. Others have written on this trend from a variety of perspectives. *See, e.g.*, Randall S. Abate, *Kyoto or Not, Here We Come: The Promise and Perils of the Piecemeal Approach to Climate Change Regulation in the United States*, 15 CORNELL J.L. & PUB. POL'Y 369 (2006); Janet Koven Levit, *A Tale of International Law in the Heartland:* Torres *and the Role of State Courts in Transnational Legal Conversation*, 12 TULSA J. COMP. & INT'L L. 163 (2004); Hari M. Osofsky & Janet Koven Levit, *The Scale of Networks?: Local Climate Change Coalitions*, 8 CHI. J. INT'L L. 409 (2008).

13. Resnik, *supra* note 8, at 1106-21; *see also*, Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31 (2007).

14. Ahdieh, *supra* note 9, at 1235 ("More fundamentally, the contribution of intersystemic governance speaks to how effectively our regulatory institutions achieve whatever substantive goals are set for them.")

behavior, and which may limit traditional vertical processes of international law. Berman's self-described "controversial move" is the claim that pluralism is normatively desirable in a world of multiple authorities.[15]

We thus have a valuable description of the complexity of the local, national and international processes at work, and a normative claim that the global phenomenon of multiple sources of lawmaking – including redundancies and overlap and the structure of federalism within the United States – promotes innovation and efficiency and is a good in itself. As my own work reflects, I tend to agree with and find quite valuable the intersystemic/pluralist perspectives on international law.[16] Understanding how international law works requires understanding how international law becomes local. Correspondingly, constitutional law cannot be understood without an account of how the Constitution interacts with foreign and international law.

In sorting through the puzzle that lies at the intersection of international, national and local law, intersystemic approaches are helpful; they contribute to building an accurate description of the world as it exists. For too many years, U.S. constitutional law scholarship acted as though it operated within a hermetically sealed jurisprudential chamber: no influences were let in, no influences were let out. That has changed, as scholars have begun to better examine the ways in which U.S. legal and political engagement in the world has altered the constitutional order and the U.S. Supreme Court's approaches to questions of governmental structure and individual rights.[17]

This commentary is thus intended to challenge my own thinking and writing in the area of human rights norm integration. If it is the case, as Resnik, Berman, Ahdieh and I have all claimed, that the generation and creation of law from and through multiple portals or in and between various layers of governance and social ordering is happening and is not a threat, then why do traditionalists in both international and constitutional law see it as such? Put another way, what values are at stake in this debate? At one level is the claim of normative supremacy: internationalists see the international system as normatively legitimate and desirable (supranational regulation tempers the worst tendencies of nationalism inherent in the European post-Westphalian order)[18] and the claims of so-called sovereigntists as pernicious.[19] In

15. Berman, *supra* note 10, at 1150-52.

16. *See* Margaret E. McGuinness, *Three Narratives of* Medellín v. Texas, 31 SUFFOLK TRANSNAT'L L. REV. 227 (2008) [hereinafter McGuinness, *Three Narratives*].

17. *See, e.g.*, David Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STAN. L. REV. 1697 (2003); Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV. 1999 (2003); Neil S. Siegel, *International Delegations and the Values of Federalism*, 71 LAW & CONTEMP. PROBS. 93 (2008).

18. *See* Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971 (2004).

opposition to that claim, U.S. constitutional sovereigntists see the injection of vague and aspirational norms of international human rights law (particularly where the transmittal vehicle is non-consensual customary international law) into American jurisprudence as anti-democratic and dilutive of the important functional designs of the Constitution (including structural federalism).[20] But, as Judith Resnik notes, the claims of normative legitimacy on the part of the sovereigntists is belied by the evidence: a continuing failure of the sovereigntists' claim in the face of a robust but evolving domestic democratic order.[21]

Interestingly, the pure positivists find almost no traction in the American domestic debate, since the United States has thus far refused to consent to the full range of human rights treaties and left the compulsory jurisdiction of the International Court of Justice (ICJ) in 1985. The preservation of the ICJ or the theoretical supremacy of the international human rights commissions and courts is not high on the agenda of the U.S.-based anti-sovereigntists. To be sure, many American legal scholars would like to see the United States engage more directly with the international human rights system by signing on to more treaties, doing away with the practice of reservations, understandings and declarations, joining the International Criminal Court, and perhaps rejoining the ICJ.[22] Generally, however, U.S. scholarship reflects a pragmatic (one might even say instrumentalist) engagement with the international system that looks to outcomes. Of course, many in the international human rights community find this instrumentalist/pragmatist move in international legal scholarship a bit distressing, raising the concern that American human rights exceptionalism weakens the broader system.[23]

---

19. *See generally* PHILIPPE SANDS, LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES FROM FDR'S ATLANTIC CHARTER TO GEORGE W. BUSH'S ILLEGAL WAR (2005).

20. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997); Curtis A. Bradley & Jack L. Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 AM. J. INT'L L. 675 (1998).

21. Resnik, *supra* note 8.

22. *See, e.g.*, Harold Hongju Koh, *Restoring America's Human Rights Reputation*, 40 CORNELL INT'L L.J. 635, 655-57 (2007) (arguing for U.S. reengagement with the UN Human Rights Council and ICC); Patricia M. Wald, *Is the United States' Opposition to the ICC Intractable?*, 2 J. INT'L CRIM. JUST. 19, 21-25 (2004) (outlining a path toward U.S. participation in the ICC); Scott Horton, *Six Questions for Mary Ellen O'Connell on the Power of International Law*, HARPER'S MAG., Dec. 6, 2008, http://www.harpers.org/archive/2008/12/hbc-90003966 (arguing in favor of rejoining the VCCR optional protocol as a step towards rejoining the compulsory jurisdiction of the ICJ).

23. *See generally* SANDS, *supra* note 18. American scholars have also expressed concern on this point. *See* Harold Hongju Koh, *On American Exceptionalism*, 55

This intersystemic approach engages seriously with the revisionist/sovereigntist scholarship, but at the same time seeks out areas of compatibility and synergies with the central international law institutions. But an intersystemic approach does not treat those institutions as sacrosanct or hierarchically superior. It even questions whether one should treat international institutions as normatively superior.[24] In this way, the intersystemic approach rejects traditional nationalist perspectives and international perspectives equally: neither account can claim normative superiority.

II. DESCRIBING THE WORLD AS WE FIND IT: THE COUNTER-NARRATIVE OF *MEDELLÍN V. TEXAS*

The *Medellín v. Texas*[25] line of cases offers an illustration of both the promise and pitfalls of intersystemic analysis.[26] The norm under contestation was primarily the death sentences of dozens of foreign nationals in the United States, and only secondarily U.S. non-compliance with the notification provisions of the Vienna Convention on Consular Relations (VCCR). Indeed, despite widespread failure of notification throughout the United States, the issue of non-compliance was only first raised in a criminal case twenty years after the United States joined the treaty, a 1995 case involving a Canadian national facing the death penalty in Texas. This was not pure happenstance, but rather occurred against the backdrop of an emerging norm in international human rights abolishing the death penalty.[27] And it was this interaction between a non-human rights obligation (the VCCR notification provision) and the emerging international norm prohibiting capital punishment that provided an opportunity for advocates to contest the death sentences in state and federal proceedings.

STAN. L. REV. 1479 (2003); Margaret E. McGuinness, Sanchez-Llamas, *American Human Rights Exceptionalism and the VCCR Norm Portal*, 11 LEWIS & CLARK L. REV. 47, 64 (2007) [hereinafter McGuinness, Sanchez-Llamas].

24. In this sense, this scholarship has synergies with critical approaches to subsidiarity and federalism in the European Union. *See, e.g.*, Jean Schéré, *Subsidiarity and Federalism in the European Union*, FLETCHER FOR. WORLD AFF., Spring 2000, at 175; Edward T. Swaine, *Subsidiarity and Self-Interest: Federalism at the European Court of Justice*, 41 HARV. INT'L L.J. 1 (2000).

25. 128 S. Ct. 1346 (2008).

26. My own account of the line of Vienna Convention on Consular Relations (VCCR) death penalty cases draws on intersystemic analysis. *See* Margaret E. McGuinness, Medellín, *Norm Portals, and the Horizontal Integration of International Human Rights*, 82 NOTRE DAME L. REV. 755 (2006) [hereinafter McGuinness, Medellín]; McGuinness, Sanchez-Llamas, *supra* note 21; McGuinness, *Three Narratives*, *supra* note 15.

27. This emerging norm was codified in Optional Protocol 2 of the International Covenant on Civil and Political Rights, as well as other regional human rights treaties. *See* McGuinness, Medellín, *supra* note 24, at 783.

As I have written elsewhere, in these cases, the VCCR operated as a "norm portal" – a formal legal mechanism through which external norms on the death penalty could be imported horizontally into the U.S. legal system.[28] Where those norms may not otherwise be enforceable through traditional vertical adjudicatory processes – either because the importing state has not formally adopted the human rights obligation (as with the U.S. decision not to sign on to the International Covenant on Civil and Political Rights Optional Protocol 2 prohibition against the death penalty), or because vertical judicial structures have failed to enforce it (as with the Supreme Court's decision in *Medellín* itself not to give domestic legal effect to the ICJ's requirement of providing additional "review and reconsideration" of Medellín's conviction and sentence) – the portal permits those norms to seep into the legal system, forcing mediation between the external norm and the domestic standard. Because the VCCR cases came at a time when the death penalty was already under concerted attack by advocates within the United States, the exploitation of the VCCR norm portal has contributed to the domestic momentum toward convergence with the international abolitionist norm.[29]

Whether they are self-executing or non-self-executing under domestic law,[30] treaties themselves operate within a system of international law that is subject to contestation and elaboration by an increasing number of judicial and other authoritative interpretive bodies. The international human rights regime provides a multiplicity of international spaces; these spaces (including the Inter-American Court of Human Rights (IACtHR) and the ICJ) were exploited by states and advocates for individual defendants in the VCCR death penalty cases. In those international spaces, statehood – if not sovereignty – continues to matter a great deal, providing both the basis for espousal of claims and also the basis for potential liability. Thus, statehood can be leveraged on behalf of human rights, as well as serve as the vehicle against which human rights are enforced.

U.S. federalism played an important role in the *Medellín* cases. The structure of federalism, which permits each state authority to determine criminal procedural rules, allowed Oklahoma to take a different route from Texas.

---

28. I use the term "norm portal" to describe any horizontal gateway that allows, through a formal procedural mechanism or substantive right, the importation of external norms into a legal system. A norm portal thus represents an alternative pathway for international human rights norms to enter a legal system.

29. One indicator that shifts toward abolition having an international audience in mind is the statement by New Jersey Governor John Corzine when signing into law abolition of the death penalty in New Jersey. *See* Peggy McGuinness, *New Jersey: Global Citizen*, OPINIO JURIS, Dec. 17, 2007, http://opiniojuris.org/2007/12/17/new-jersey-global-citizen/.

30. The majority's denial of relief in *Medellín* rested in part on the conclusion that the I.C.J. decision in *Avena*, decided under jurisdiction created under the Optional Protocol of the VCCR, was non-self-executing and thus did not create binding domestic law. *Medellín*, 128 S. Ct. at 1359-60.

Rather than wait for a Supreme Court ruling on the effect of the 2004 *Avena* ruling in which the ICJ ordered the United States to provide additional review of a reconsideration of the death sentences of 51 Mexican nationals on death rows in the United States, the Oklahoma governor granted clemency in the case of one of those 51, Osvaldo Torres.[31] Texas, on the other hand, invoked federalism along with limitations on executive power as a means of blocking both the horizontal efforts at shifting normative behavior and the ability of the advocates to leverage the VCCR as a means of achieving vertical enforcement of the ICJ opinion through a federal habeas proceeding.[32]

Justice Stevens' brief concurring opinion in *Medellín* embodies the particular dilemma created by American federalism when horizontal and vertical processes intersect.[33] Texas, he noted, could not be forced to comply with an international court opinion that was not binding federal law, but it was separately required to act in a way that did not result in a breach of U.S. international obligations. Texas, not the Supreme Court, held the key to ensuring that Medellín's rights under the VCCR were afforded him. Without domestic enforcement that comes from a Supreme Court decision compelling compliance, however, Texas was essentially free to follow its own political desires, which it did when it executed Medellín in August 2008. Despite the opportunities that horizontal approaches created for some of the individuals affected by the *Avena* decision, they failed in the case of Medellín himself.

Professor Berman's analysis of *Medellín* through a pluralist lens rejects both the "hardline international law triumphalists, who argue that the violations of the [VCCR] necessarily invalidate all the various convictions, regardless of Texas law on the matter" and the "hardline sovereigntist idea that Texas should focus only on its own law and pay no attention to the [VCCR] or the pronouncement of the ICJ."[34] Under his analysis, the ICJ has no special power on the basis of jurisdiction to enforce treaties between states. Rather, the ICJ should take into account "the prerogatives and interests of other relevant communities" and should only "squelch" those communities where it can justify a need to act "jurispathically" to kill off competing views.[35] Because the ICJ was relatively modest in its *Avena* decision, requiring only "review and reconsideration" of the convictions, and not granting Mexico's request to set aside the convictions, Berman argues that the ICJ acted consistently with the restraint pluralism would require.

---

31. *See* Levit, *supra* note 11, at 172 (discussing 3-2 decision of Oklahoma Court of Criminal Appeals to stay Torres' execution and subsequent grant of clemency by Governor Henry, converting Torres' death sentence to life without parole).

32. *See* Respondent's Brief in Opposition at 16-17, 28-30, Medellín, 128 S. Ct. 1346 (No. 06-984), 2007 WL 978482; *see also Ex parte* Medellín, 223 S.W.3d 315 (Tex. Crim. App. 2006).

33. *Medellín*, 128 S. Ct. at 1373-74 (Stevens, J., concurring).

34. Berman, *supra* note 10, at 1175-76.

35. *Id.* at 1176.

Further, the ICJ appeared to take into account the unrepresented interests in reciprocal consular notification rights – Texas government officials working to comply with notification, U.S. citizens overseas and others whose interests were not formally represented.[36] The fact that federalism created a dilemma of enforcement over Texas is unimportant to Berman's analysis since "[e]nforcement of any legal decision depends on whether those who assert jurisdiction can rhetorically persuade those who possess coercive power (the police force, the military) to enforce the judgment issues."[37] That a different result was reached by Oklahoma in the *Torres* case is evidence of how a court might take a broader view of the "normative community" to which it belongs, thus encouraging an outcome that is consistent with a restrained ICJ that also takes a broad view of its "normative community."

Professor Ahdieh also points to *Medellín* as illustrative of intersystemic/pluralist legal processes. Drawing on analysis by Alexander Aleinikoff of the earlier VCCR case, *Sanchez-Llamas v. Oregon*,[38] he focuses on how the Court (and Texas) might have responded to the ICJ decision.[39] The starting point is Justice Breyer's dissent in *Sanchez-Llamas*, in which Breyer viewed the standard of "respectful consideration" accorded by the Court to ICJ opinions as requiring a much deeper engagement with the ICJ's opinion and reasoning than Chief Justice Roberts's majority opinion provided in that case[40] (which we might think of, to paraphrase the late Gerald Gunther, as "respectful in theory, fatal in fact"). Under the Breyer approach, "international law is neither binding law, nor merely fodder for string cites. It is central to the analysis, but not controlling of it."[41] This "'moderate, respectful and accommodating'" approach is appropriate to the operation of regimes of intersystemic government.[42]

III. THE LIMITS OF PLURALISM AND INTERSYSTEMIC GOVERNANCE IN INTERNATIONAL HUMAN RIGHTS

The intersystemic/pluralist framework is extraordinarily useful for framing case studies in the increasingly horizontal nature of human rights norm transmission. But it has its limits. Despite the significant descriptive value of this scholarship, one might usefully ask what impact it has – or purports to have – on the normative agenda of the international law project, i.e., the project of promoting peace and security and protecting human rights. More

---

36. *Id.* at 1177.

37. *Id.* at 1178.

38. 548 U.S. 331 (2006).

39. Ahdieh, *supra* note 9, at 1233-34 (citing T. Alexander Aleinikoff, *Transnational Spaces: Norms and Legitimacy*, 33 YALE J. INT'L L. 479 (2007)).

40. *Sanchez-Llamas*, 548 U.S. at 376-92.

41. Ahdieh, *supra* note 9, at 1234.

42. *Id.* (quoting Aleinikoff, *supra* note 37, at 482).

specifically, what are the implications of the insights of intersystemic lawmaking for the more traditional understanding of human rights enforcement and for potential institutional reform at the international level? If, as I and others have argued, international human rights norm diffusion and enforcement has become more horizontal over time and has moved away from the initial premises of vertical enforcement through international courts, commissions and committees, what does this development mean for normative commitments in the area of political and social rights? What are the implications of these trends to institution-building in human rights? Does the intersystemic/pluralist approach as applied to human rights support universality of rights, or do these frameworks create a slack in the system that systematizes cultural relativism and other attacks on universality? And, what effect might these dilutions of universality have on the future of an international human rights regime?

I place my concerns in two categories: (1) the legitimacy and effectiveness of the institutional spaces within which the contestation of norms takes place; and (2) the content of the norms that emerge. The first concerns itself with whether the transnational/intersystemic/hybrid spaces are amenable to participation of those affected by the rule or regulation that results. The second asks whether an intersystemic/pluralist account is compatible with an international human rights system that seeks to encourage compliance by states (and, increasingly, private actors) with universal norms.

The pluralist approach helps us identify and map the spaces in which the contestation of norms occurs, but does not explain how or why certain spaces or processes may be preferable. Quite the opposite: pluralism claims no normative superiority of one space or another. So, for example, in the VCCR cases, contestation of both the notification failures and the death sentences occurs in political spaces – international diplomatic discussions, appeals to governors in Texas and Oklahoma, and even direct lobbying of legislatures to shift away from the death penalty – and also in legal spaces – direct and collateral appeals in state courts, habeas challenges in federal court, a regional challenge at the Inter-American Court of Human Rights (IACtHR), and three cases before the ICJ.[43] Many of these spaces overlap and thus could be described as "hybrid" spaces.

The fact of the multiplicity or hybrid nature of these spaces does not, however, help answer the implicit and explicit critiques that one space might be preferable than the other in terms of democratic legitimacy or consistency of rule-making. In the *Medellín* case, for example, those interested in bolstering claims of local democratic rule-making – i.e., permitting Texas (and the United States) to retain the death penalty – faced a broader claim of universality of abolition and also the binding nature of international legal commitments to which that local polity felt less connected. In other rights claims, the

43. For a full discussion of these various points of contestation, *see* McGuinness, Medellín, *supra* note 24, at 808-30.

question of the appropriate jurisdictional space or source of law is currently debated, for example, with respect to the use of foreign sources of law in constitutional adjudication, the justiciability of individual rights arising under treaties, and the application of self-execution doctrines. Pluralism may be normatively desirable in that it helps us to see the multiplicity of options on the table, but it does little work to help choose the option that best answers the questions presented. Legal doctrines – preemption in U.S. constitutional law, the state responsibility doctrine in international law – only get us back to the transnational space in which the battle between the sovereigntists and internationalists is joined.

The four facets of regulatory design that Ahdieh identifies – (1) jurisdictional overlap, (2) dynamics of coordination, (3) patterns of dependence among regulatory institutions, and (4) a growing role for persuasion, rather than hierarchy – seem to contradict the central purposes of the vertical system of human rights enforcement. Yet some of these facets have shown up in international human rights norm diffusion as the central institutions and treaty systems have failed. The coordination rationale that Ahdieh presents for these designs is, however, an imperfect match to the normative rationales of the human rights system. The international human rights regime is not centrally a coordination mechanism, nor, except in a few limited areas such as refugee law and trafficking in humans, is it a cooperation mechanism. At its center it is a normative regime that sets universal standards of behavior.[44] The primary goal of the international human rights regime is not to seek innovation. Innovation occurs as norms are elaborated and expanded and new groups or individuals gain the protection of certain rights. But the system is centrally concerned with achieving universal state compliance with pre-agreed categories of political, social and economic rights.

For those who do not view the international human rights project as a universalist one, but rather as just one of many plural voices, these four facets will not appear problematic. But if the result of applying an intersystemic/pluralist analysis to human rights is an understanding of norm contestation as a neutral phenomenon – where particular claims are not privileged and outcomes merely reflect the process and participants, not the value of the underlying norms – it seems to contradict the universalist project and the role of the central human rights institutions in announcing and elaborating universalist norms. Ahdieh recognizes this problem, noting that in the human rights context, "the implicit pluralism of intersystemic governance may not be a value to be embraced, but a threat to be avoided."[45] In this sense, the universalist project of secular human rights protected by law is threatened not only by competing claims of universality or by particularized claims of cultural or constitutional exception, but by the idea of rights as just one of many compet-

44. *See* Margaret E. McGuinness, *Exploring the Limits of International Human Rights Law,* 34 GA. J. INT'L & COMP. L. 393, 401-02 (2006).

45. Ahdieh, *supra* note 9, at 1243.

ing claims of authority or legitimacy. As a descriptive matter that may be accurate. Indeed, one could say that the international human rights project is founded on the recognition that competing claims – of national security, of economic exigency, of national exceptionalism – have and will continue to undermine the cause of rights. But it is precisely because of the tendency of nation-states to contest these rights that the founders of the post-World War II order devised an international human rights system with institutions designed to enforce universal and non-derogable rights in the face of such contestation.

A better understanding of the distinctions between the political ports of entry – those that Judith Resnik has so eloquently explored – and adjudicatory spaces in which legal claims pass from one system to another is needed to get at the questions of procedural legitimacy and efficiency. Granted, distinguishing between the processes through which political claims migrate and the processes through which legal claims migrate is sometimes difficult. Where we can distinguish, it is important that we do so, if only to be able to accurately assess the relative effectiveness of these institutions. It was, as Berman notes, helpful to Medellín and to his home government of Mexico to be able to avail themselves of the full panoply of diplomatic and political tools, as well as state, national, regional and international legal processes. But in the end, Medellín was executed. The question then becomes one of whether any of the adjudicatory institutions that sought, at least implicitly, to halt the execution (e.g., the ICJ, and the IACtHR) can survive these instances of non-compliance. Which institutions and actors had their legitimacy bolstered by the case?

To a legal pluralist, international law is but another system of law to be mapped and accounted for. To the extent that there are differences between the norms set out by the international system and the norms of, for example, national or local law, those differences should be worked out according to claim-making processes. In rejecting the normative superiority of international law, it also rejects any special claims on the international institutions formed to enforce the norms of international law. The central pillars of the international legal system – the prohibition of armed conflict as a means of dispute resolution, recognition and promotion of human rights and, on the economic side, a bias in favor of free trade – claim no privilege under a pluralistic view. Internationalists would rightly lament, however, that the very nature and purpose of these norms is not to create redundant layers of jurisdiction – though redundancy is a frequent side-effect of the international system – but to fundamentally alter the trajectory of the behavior of states. They are not alternative norms, but are distinctive – some might say essential and prior – norms of the system. One might agree to reject "essentializing" the categories of spaces as "local," "national" and "international" while still recognizing that participation in the international system imposes certain limits on the behavior of a host of actors – national governments, local governments and non-state actors.

IV. THE MODEST CASE FOR INTERSYSTEMIC INTERNATIONAL HUMAN RIGHTS

Notwithstanding these critiques, horizontality is not all bad. As noted earlier, horizontality arose because the structures of international human rights failed to reach effective levels of participation and enforcement. To the extent horizontality is harnessed to the normative project of human rights, it can be seen as progress toward more effective human rights promotion. The lesson of intersystemic/pluralist analysis, however, is that interaction between systems frequently resists efforts to reach a particular result, leaving open a range of outcomes. The challenge then, as Aleinikoff has noted, is to work toward a narrative of legitimacy in the intersystemic/pluralist account of transnational lawmaking.[46] At the same time, institutional reform at the international level should embrace the processes as they are, and be flexible in adapting to those legal processes that arise horizontally. This process of reform might work toward convergence with established norms and at the same time engage in experimentation with new and emerging norms. Progress will not always be linear, but can be assisted with institutional intervention in appropriate cases. In the search for a legitimacy narrative, we should be cautious in throwing out either the U.S. Constitution (and the legitimacy it has derived over time) or the international commitments to human rights that have had many fewer decades to ripen and evolve. But we should also be cautious about borrowing lessons of legitimacy from one system to apply to another.

We should therefore acknowledge the limits of viewing all transnational regulation through a purely American lens, and recognize the dangers of misapplying the experience and history of U.S. federalism, political pluralism or even American ideas of legal innovation. The complexities that can be tolerated in a more mature legal system may be inapposite in newer states struggling with the basic ideas of constitutionalism or the rule of law. Particularly in the area of human rights, we ought to be especially alert to the need for strong vertical, top-down enforcement of certain claims in certain places. This is, perhaps, one area where the darker history of American federalism lends helpful lessons. As was the case with the civil rights movement in the United States – whose progress was finally accelerated by the introduction of vertical enforcement through national law – vertical institutions and lawmaking will be important where horizontal processes find no local or national traction. And these institutions will, in turn, need the support of the nations like the United States that have longer traditions of the rule of law, and whose legal and political systems are more comfortable with the organic and occasionally *ad hoc* approach to regulation that intersystemic and plural realities permit.

46. Aleinikoff, *supra* note 37, at 489.