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Introduction to Sandra Day O'Connor

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Friedmann Memorial Award Addresses

Introduction to Sandra Day O'Connor

GEORGE A. BERMANN *

There are many, many reasons to honor Justice Sandra Day O'Connor—and during the course of her brief but rich stay with us here at Columbia Law School, we have touched on only some of those many reasons. There remains this afternoon one more occasion to honor Justice O'Connor—an honor that has a very special resonance at this law school. It is the conferral of the Wolfgang Friedmann Memorial Award by the Columbia Journal of Transnational Law, a recognition of contributions to international law that is deeply meaningful not only at Columbia Law School, but in international law circles generally.¹

A look at the roster of past recipients will show that the Friedmann Award gathers individuals from all the major legal arenas in which the processes of making, understanding and valorizing all forms of transnational law occurs: the academy, the professional practice of law, domestic government service, international civil service, international civil society, and of course the judiciary.² A closer look reveals that, though the judiciary has been represented among past Award recipients, never has a member of the U.S. judiciary been honored in this way. Perhaps not surprisingly, it is members of major

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1. The award is conferred in memory of the Journal's founder, Professor Wolfgang G. Friedmann. A jurist, teacher, scholar and humanist, Professor Friedmann was respected around the world for his extraordinary commitment to the practical realization of an international rule of law and his relentless advocacy of a world order based on mutual respect among nations. Although his writings reflect his authoritative knowledge of a wide spectrum of issues, it is his courageous condemnation of the unconscionable use of force during the early years of Nazi Germany that most vividly illustrates the strength of his moral conviction and compassion.

2. Past recipients include Richard N. Gardner, Louis Henkin, Daniel Patrick Moynihan, Boutros Boutros-Ghali, James A. Baker III, Hans Blix, Harold Koh and Ian Brownlie.

international judicial tribunals who have represented the judicial function among Friedmann Award recipients.

And yet we know that whether international law is understood and applied, and how it is understood and applied, depend on those on whose shoulders it falls to make good on international law within national legal orders. For it is mostly in national legal orders where what we increasingly associate with international law is realized. Furthermore, within those national orders, it is the national judiciary, perhaps above all, that establishes the framework within which and the attitude with which that realization occurs.

We should not, of course, exaggerate the role that transnational law plays in the daily life and work of the federal judiciary, though that role is incontestably growing. The diet of the Supreme Court and the federal and state judiciaries more generally, after all, is not yet saturated with treaties, customary international law, foreign and comparative law, or international conflicts of law in the way, for example, that the diet of a national court of an EU Member State is.

But neither should we underestimate the role that national judiciaries—in the cases where they do confront, or are invited to confront, foreign, comparative and international law—play in giving meaning and practical application to these bodies of law.

* * *

Justice O'Connor's tenure is nothing short of a tableau of the ways in which a United States judge can take transnational legal norms seriously—to acknowledge their relevance, honor their content, and demonstrate how they are to be responsibly woven into the fabric of the law that it remains incumbent on national judges to apply.

Sometimes it is a treaty that requires faithful interpretation, either as to its content or as to the remedies for which it expressly or impliedly calls. Sometimes it is a domestic statute that might incorporate international norms and, again, raise important and difficult questions of remedy. Sometimes it is the elaboration of a doctrine of federal law (for example, international comity, act of state, or political question) in which it is appropriate to take the needs of the international legal system into consideration.

But there is also more controversial terrain, such as the question whether, in interpreting domestic legislation and, a fortiori, domestic constitutional norms, or developing the common law, the law and legal experience developed in other countries or in international bodies may appropriately be consulted and be allowed in some measure, however slight or confirmatory, to influence a decision. Justice O'Connor has tellingly written:

There is talk today about the "internationalization of legal relations." We are already seeing this in American courts, and should see it increasingly in the future. This does not mean, of course, that our courts can or should abandon their character as domestic institutions. But conclusions reached by other countries and by the international community, although not formally binding upon our decisions, should at times constitute persuasive authority in American courts, what is sometimes called "transjudicialism." American courts have not, however, developed as robust a transnational jurisprudence as they might.³

To her own practice of this belief, Justice O'Connor has brought her characteristically careful and discriminating reasoning. Justice O'Connor concurred in both *Lawrence v. Texas*,⁴ invalidating Texas anti-sodomy statute as applied to consenting adults, and in *Atkins v. Virginia*,⁵ holding execution of persons who were mentally retarded at the time of commission of the crime to constitute cruel and unusual punishment within the meaning of the Eighth Amendment. In both of those cases, the Court cited foreign and international sources, even though it cannot be said that the outcome turned on them.⁶

On the other hand, study of foreign and international sources led Justice O'Connor to disagree with the majority in *Roper v. Simmons* that those sources supported a conclusion that the Eighth Amendment forbids the execution of persons who were under the age

3. Sandra Day O'Connor, Associate Justice, Supreme Court of the United States, Remarks at the Southern Center for International Studies, (Oct. 28, 2003), available at http://www.southerncenter.org/OConnor_transcript.pdf.

4. 539 U.S. 558 (2003).

5. 536 U.S. 304 (2002).

6. *Lawrence*, 539 U.S. at 578 (noting that European and other nations "have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct"); *Atkins*, 536 U.S. at 316–17 n.21 (noting that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved").

of eighteen at the time of the crime.⁷ Yet, in so doing she expressly distanced herself from colleagues on the Court who agreed with her in the result, but who declared the use of foreign and international law in constitutional adjudication to be off-limits. Less well known but equally important is Justice O'Connor's reliance on foreign and comparative law in *New York v. Quarles* in 1984 to help determine the proper scope of the Miranda rule and its application to the obtaining of non-testimonial evidence.⁸

The propriety of using foreign and international law in constitutional adjudication of course depends on the context, and it would be idle to suppose that we have yet arrived at a precise and consistent methodology for determining when it is responsible for courts to invoke foreign, comparative and international law, and how to do so responsibly. While this task is far from complete, conversations among several of the Justices have been critical to the debate, and Justice O'Connor has played a central role in them.

We then arrive at the most inchoate of the transnational activities of the national judge, namely his or her general openness to "conversation" (in the broadest sense of the term) with members of other judiciaries—not necessarily as part of a campaign to influence or be influenced, or to lend or to borrow, but simply to become more cosmopolitan and to appreciate the possibility of understanding our domestic law in new and different ways. In this regard, I have observed firsthand the role Justice O'Connor has played—whether in organizing seminars in Washington with visiting judicial delegations or leading colleagues on the Court to seminars and conferences with foreign high court and constitutional court justices.⁹

Finally, there is the role—unique perhaps to a justice of the Supreme Court—to leverage his or her influence to promote the idea that all legal actors in the national legal arena (not only judges but al-

7. 543 U.S. 551 (2005).

8. 467 U.S. 649 (1984).

9. See, e.g., Sandra Day O'Connor, Presentation at First Conference of Franco-American Judicial Exchange: A Conseil d'Etat for the United States?, (Sept. 5, 1989); Sandra Day O'Connor, Presentation at Joint U.S. Supreme Court- European Court Justice Symposium, European Court of Justice: A U.S. Supreme Court Justice Views on the Work of the European Court of Justice (July 5, 1998); Sandra Day O'Connor, Presentation at Second Circuit Judicial Conference: International Tribunals and United States Courts: A New Relationship for the New Millennium, (June 16, 2001); Sandra Day O'Connor, Presentation at the ABA Administrative Law and Regulatory Practice Section Fall 2003 Meeting: Introduction to the ABA Project of European Union Administrative Law, (Nov. 7, 2003).

so lawyers and legislators) would benefit from a greater cosmopolitanism of ideas. Justice O'Connor's has written prolifically on this very subject in scholarly journals and the popular press alike.¹⁰ She has addressed various federal circuit judicial conferences as well as other audiences on the same matter.¹¹ She has been personally involved in CEELI (the ABA's central and eastern European law initiative). In conjunction with the American Society of International Law, she has led an advisory "outreach" group to help educate U.S. judges in international law. Finally, closer to my own work, she personally launched several years ago the ABA Administrative Law Section's comprehensive study of rulemaking, adjudication, judicial review transparency and government oversight within the European Union, an enterprise that has helped educate the U.S. bar in important ways about European Union law.¹²

In recognition of this entire tableau of contributions—that only a member of the U.S. Supreme Court could assemble in the way she has—the board of directors, officers and staff of the Columbia Journal of Transnational Law have voted to name Justice Sandra Day O'Connor recipient of the Wolfgang Friedmann Memorial Award.

10. *See, e.g.*, Sandra Day O'Connor, *The History of the Women's Suffrage Movement*, 49 *VAND. L. REV.* 657, 673–74 (1996) (discussing women's involvement on the international legal scene).

11. *See, e.g.*, Sandra Day O'Connor, *Keynote Address at the Dedication of Georgetown University's Eric E. Hotung International Law Center Building* (Oct. 27, 2004) (transcript available at 36 *GEO. J. INT'L L.* 651); Sandra Day O'Connor, *Keynote Address at the Ninety-Sixth Annual Meeting of the American Society of International Law* (Mar. 16, 2002) (transcript available at 96 *AM. SOC'Y INT'L L. PROC.* 348).

12. *ADMINISTRATIVE LAW OF THE EUROPEAN UNION* (George A. Bermann, Charles Koch & James O'Reilly eds., ABA Publishing 2008).