American University International Law Review

Volume 21 | Issue 3 Article 2

2006

Using International Law to Interpret National Constitutions-Conceptual Problems: Reflections on Justice Kirby's Advocacy of International Law in Domestic Constitutional Jurisprudence

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USING INTERNATIONAL LAW TO INTERPRET NATIONAL CONSTITUTIONS—CONCEPTUAL PROBLEMS: REFLECTIONS ON JUSTICE KIRBY'S ADVOCACY OF INTERNATIONAL LAW IN DOMESTIC CONSTITUTIONAL JURISPRUDENCE*

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INTRODUCTION

Justice Kirby's paper is wide-ranging and most provocative. I am very grateful to have the opportunity to respond to it, and hope that I can justify the confidence of the organizers of the Grotius Lecture in giving me this responsibility. In the space I have, I cannot respond to the lecture in detail. I hope, however, that I can make clear at least some of my reasons for my inability to agree completely with Justice Kirby's arguments. My difficulties with his approach fall under three headings. First, it seems to me that some of the objectives one might hope to achieve through reliance on international law in construing

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* Delivered to the Annual Meeting of the American Society of International Law, Seventh Annual Grotius Lecture Series, Washington, DC, March 29, 2005.

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domestic constitutions are of doubtful legitimacy. Second, I am troubled by the degree of authority Justice Kirby would allot to judges. Finally, I believe that difficulties of determining the content of international law are greater than does Justice Kirby. I will discuss these points in turn.

I. THE PURPOSE TO BE SERVED

As Justice Kirby notes, a judge of a domestic court might examine international and foreign sources to get a better understanding of a problem before her—to gain perspective on a question by learning how it was answered somewhere else and with what result, or to facilitate resolving a problem by considering solutions that have occurred to others but not, in the first instance, to the judge.[1] In such a case, however, foreign and international materials play a role that could equally be played by law review articles, political science texts, or for that matter by novels or poetry—anything, in short, that could trigger in the judge a train of thought that might help her deal with a matter. It would seem to me that there is little controversy about the use of foreign materials in such circumstances, but I also doubt that Justice Kirby would confine international materials to so modest a role.

If a domestic judge finds herself obliged to construe a legal instrument which has earlier been construed by some other court somewhere else, one would certainly expect the domestic judge to pay particular attention to the other court's work. However, I do not understand Justice Kirby to argue that different constitutions, no matter how similar, are in some sense the same document.

What I understand Justice Kirby to say, however, is that different constitutions might embody identical legal principles. In such cases, he suggests, it would be useful for judges to borrow from one another, to take advantage of one another's expertise, and to take part in a dialogue concerning these principles.[2]

On this point, I question Justice Kirby's premise—that is, I wonder whether it is accurate to assert that different constitutions, or

1. *See* Michael Kirby, *International Law—The Impact on National Constitutions*, 21 AM. U. INT'L L. REV. 327, 337 (2006).

2. *Id.* at 348.

constitutions and international treaties, assert "identical" principles. Even when the wording of constitutional or treaty provisions is identical—and that is not the case with respect to a number of important instruments[3]—they are susceptible to different interpretations. Here, I do not mean to make the point that the interpretation of language is not an exact science, in that reasonable persons can differ as to the meaning of a particular phrase or sentence. Rather, my point is that similar language can embody quite different values.

Consider concepts of freedom of speech. As Professor Schauer has noted in a recent paper, the United States extends constitutional protection to speech which, in other States, may be prohibited as hate speech; likewise, restrictions on defamation claims are much tighter in the United States than in, for example, Europe.[4] He suggests that this phenomenon may be explained by the greater weight Americans place on libertarian/individualistic values as opposed to values of civility and equality, on American distrust of government, and on the fact that, in the United States, protection of free speech has traditionally been seen as an important element of the more liberal current in American political thought.[5] In any event, however, it is clear that Americans mean something different when they refer to

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3. *Compare* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ."), *with* International Covenant on Civil and Political Rights, G.A. Res. 2200, art. 19, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc A/6316 (Dec. 16, 1966) ("1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.").

4. *See* Frederick Schauer, *The Exceptional First Amendment* 1-19 (Working paper, Feb. 15, 2005), *available at* http://ssrn.com/abstract=668543. Among others, Australia, New Zealand, Canada and the United Kingdom have rejected the American approach to defamation, "[b]elieving that the model places far too much weight on the freedom of press side of the balance, and far too little on the reputational side . . . ." *Id.* at 16.

5. *Id.* at 22-27.

freedom of speech than do citizens of a number of other States when they refer to freedom of expression.

A recent incident illustrates my point. The press has reported that in February 2005, a Swedish appeals court overturned the conviction of a Pentecostal minister for hate speech.[6] Late last year, the minister had preached a sermon harshly condemning homosexuality, which relied on the Biblical prohibition of same-sex relationships.[7] It strikes me as outrageous that such a case would have to be appealed to be thrown out, but then, as an American, I am accustomed to very strict protections both for speech and religion.

It would seem, in short, that it is by no means obvious that all constitutions, or even all constitutions of western states, can be seen as embodying the same values. On the contrary, as Professor Anderson discusses at length and with great eloquence in his recent book review, a constitution embodies the values of the particular community that has adopted it.[8]

If that is true, however, it would not make sense for an American judge to be guided in interpreting the First Amendment by, for example, interpretations of Article 19 of the International Covenant on Civil and Political Rights.[9] The two instruments, as they have come to be understood, embody fundamentally different value choices. If the two instruments differ so fundamentally, to try to see them as somehow setting out identical principles is to distort both. Likewise, for judges in one constitutional system to rely on opinions

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6. *See* Keith B. Richburg, *Swedish Hate-Speech Verdict Reversed: Sermon Condemning Homosexuals Ruled Not Covered by Law*, WASH. POST, Feb. 12, 2005, at A16.

7. *See id.* (explaining that while Sweden's hate-speech law was recently extended to homosexuals, the appeals court found that it "was never intended to stifle open discussion of homosexuality or restrict a pastor's right to preach").

8. Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks*, 118 HARV. L. REV. 1255, 1267-81 (2005) (reviewing ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004)) (endorsing *A New World Order* as correctly acknowledging "the central debate in international law and politics [as focusing] not on the comparative merits of realism versus idealism but rather on the governance dilemma and on what constitutes a defensible position on the sovereignty-global governance continuum").

9. *See supra* note 3 and accompanying text.

by judges in a different system because of their expertise seems justified only if the two systems have identical constitutions, not merely in words, but in the values they protect. If the value systems of the two constitutions differ, then a judge in one system, no matter how expert she may be in her system's constitution, would seem to have no expertise about the constitution of a different system.

This argument, however, may oversimplify Justice Kirby's point. He may be arguing not so much that different constitutions rely on identical principles, but that different constitutions *ought* to rely on identical principles. One can imagine several somewhat different rationales for this position.

One is a straight-forward reliance on natural law—that is, the idea that judges have an obligation to apply legal rules derived from some source other than human institutions. Justice Kirby rightly notes the serious disputes about the meaningfulness of claims that natural law exists or that it imposes obligations.[10] Certainly, any view of law as somehow independent of the human institutions that create it, as a "transcendental body . . . outside of any particular State but obligatory within it,"[11] or a "brooding omnipresence in the sky"[12] has been untenable in this country since *Erie Railroad Co. v. Tompkins*, decided nearly seventy years ago.[13] It is of course true, as Justice Kirby observes, that there is a growing belief among the people of the world in the importance of human rights in some general sense,[14] but it hardly follows from that fact that domestic judges are under some obligation to conform their constitutions to some single model.

A second rationale for the argument that domestic constitutions ought to embody identical values would derive from the argument that the ultimate validation for any state's legal order is the

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10. *See* Kirby, *supra* note 1, at 354 (explaining how critics view natural law as "a discredited theory, incompatible with national sovereignty").

11. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

12. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

13. Erie Ry. Co. v. Tompkins, 304 U.S. 64 (1938).

14. Kirby, *supra* note 1, at 354 ("Even if the character of human rights as 'natural' or 'innate' is disputable, the international law of human rights is already having a large impact on the values and ideals of judges, lawyers, and other citizens in many countries.").

approbation of the world community. Here, the argument is not so much based on natural law as on the argument that the values constitutions ought to embody are those about which the states of the world, or more precisely the legal elites of the world, have reached consensus.[15]

This is simply not the understanding of constitutions in the United States. As Professor Rubenfeld has observed,

> American or democratic national constitutionalism . . . regards constitutional law as the embodiment of a particular nation's democratically self-given legal and political commitments. At any particular moment, these commitments operate as checks and constraints on national democratic will. But constitutional law is emphatically not antidemocratic. Rather, it aims at democracy over time. Hence, it requires that a nation's constitutional law be made and interpreted by that nation's citizens, legislators, and judges. . . . For Americans, constitutional law cannot merely check democracy. It must answer to democracy—have its source and basis in a democratic constitutional politics and always, somehow, be part of politics, even though it can invalidate the outcomes of the democratic process at any given moment.[16]

Thus, in American thinking, the proper test for an interpretation of a constitution is not its conformity to some international consensus; rather, "a democratic nation's constitutional law is supposed to reflect that nation's fundamental legal and political commitments. Consensus in the 'international community' is not the compelling source of legal or constitutional authority that it's made out to be in the [international] perspective."[17]

Finally, the position that constitutional values ought to be identical might be justified by reference to the increasing interconnectedness of the world. Indeed, Justice Kirby states, "as technology and the

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15. *See* Jed Rubenfeld, *The Two World Orders*, WILSON Q., Autumn 2003, at 22, 30. Professor Rubenfeld argues that the European view of constitutions is one that guarantees a bundle of rights, rather than embodying populist choices. *Id.* at 26-28.

16. *Id.* at 29 (emphasis omitted).

17. *Id.* at 30.

economy are internationalized, it is both inevitable and desirable that the same development should happen in the law."[18]

That statement has some plausibility with respect to laws governing intellectual property, banking, securities transactions, and so on. Such areas of the law can be seen as performing primarily a facilitative function, instructing natural and legal persons on the proper means of achieving some objective they would like to achieve. Obviously, standardizing such areas of the law can simplify commerce. Further, to the extent that any given transaction comes under the scrutiny of the legal systems of multiple states, closer resemblance between different states' law minimizes the likelihood that participants in the transaction will find themselves facing inconsistent or even contradictory legal regimes.

But with respect to human rights differences, it is by no means obvious that any convergence is inevitable. Certainly the pressures of commercial interaction, which may drive legal convergence in the business area, play a much less important role in the area of individual rights. Questions involving such rights are, generally speaking, local. Further, to the extent that differences in understandings of rights reflect the different values of different communities, asserting inevitable convergence in these areas implies that such communities will tamely acquiesce in the replacement of their values with those reflecting some cosmopolitan consensus. It is difficult to see how such an outcome could come about unless the community pays only lip-service to democracy, or unless the citizens are too inert to insist that they be governed according to their own notions of the proper role of government, rather than someone else's notion.

In any event, it is not at all clear why such a development would be desirable. *Why* is it a good thing if constitutional values are homogenized? If Americans prefer more robust protections for free expression than, for example, Swedes, why would it be a good thing if either country were compelled to conform its law to that of the other, or even for both to attempt to split the difference? The only consequence of such an effort, it seems to me, would be that in at least one, and perhaps both countries, the people would find

18. Kirby, *supra* note 1, at 350.

themselves deprived of guarantees they considered essential. Such a development, to me, does not appear to be one deserving of applause.

II. JUDICIAL AUTHORITY

In his paper, Justice Kirby argues that adoption by judges of international values will legitimize those values domestically.[19] In other words, in cases in which ratified treaties have not been implemented domestically, depriving judges of "any role in . . . regard to evolving treaty standards represents a negation of the legitimate, but limited, lawmaking role of the courts . . . and [of] the assumption that the nation means what it says when it ratifies a treaty."[20] Furthermore, Justice Kirby argues that judges should not be "imputed oracles for the majoritarian will,"[21] but rather, in incorporating international law domestically, judges should simply engage in their normal function of "reconciling popular will and enduring values."[22] These arguments seem to share the assumption that judges have, and ought to have, a very high degree of authority in a democratic society. There is serious reason to question such arguments, however.

First, it is by no means obvious that a judge's decision to rely upon legal materials not previously considered relevant in her domestic legal system will necessarily confer domestic legitimacy on the practice. Indeed, the issue is more commonly presented as whether the judge acts legitimately when she follows such a course. Certainly, the American experience suggests that courts have great difficulty bringing about an acceptance of views that were strongly opposed by a large fraction of the community. *Dred Scott v. Sanford* did not lead those opposed to slavery to acquiesce in its spread to the territories, much less remove the slavery issue from public

19. *Id.*

20. *Id.* at 351.

21. *Id.* at 353 (recounting the sentiments of Harold Hongju Koh, *The United States Constitution and International Law: International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 55 (2004)).

22. *Id.*

discourse.[23] *Furman v. Georgia* did not lead the states of the union to abandon capital punishment; on the contrary, that decision was followed by federal and state legislative enactments imposing the death penalty for crimes and at least one popular referendum eliminating state constitutional objections to that penalty,[24] factors which played a role in the Court's decision to uphold certain death penalty statutes in *Gregg v. Georgia*.[25] *Roe v. Wade* has obviously not ended the controversy in this country over abortion.[26]

As for a judicial role in the treaty process, the short answer is that in the United States there is none. Further, to the extent the United States has made clear that it does not mean what it says when it ratifies a treaty—for example, by attaching reservations—the courts bow to the determination of the political branches. Indeed, since the Constitution assigns to the President and two-thirds of the Senate the authority to decide what treaty obligations this country will accept,[27] it is unclear what other judicial attitude could be consistent with the Constitution.

Certainly it is true that constitutional courts cannot simply sway with whatever popular winds may be blowing when the judges come to decide a case. But to justify reliance on international law in

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23. Dred Scott v. Sanford, 60 U.S. 393 (1856) (legitimizing the practice of slavery in the United States as constitutional); *see* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 415 (1998) (suggesting that the public firestorm erupting after the *Dred Scott* decision was one of the precipitating factors of the civil war).

24. Furman v. Georgia, 408 U.S. 238 (1972); *see* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 410 (1995) (asserting that the Court misinterpreted the political atmosphere of the time and by 1975 thirty-five states and the federal government had redrafted their capital punishment laws).

25. Gregg v. Georgia, 428 U.S. 153, 179-82 (1976) (Stewart, J., plurality opinion and judgment of the court).

26. Roe v. Wade, 410 U.S. 113 (1973); *e.g.*, Angela Hooton, *A Broader Vision of the Reproductive Rights Movement: Fusing Mainstream and Latina Feminism*, 13 AM. U. J. GENDER SOC. POL'Y & L. 59, 62 (2005) (observing that the *Roe* decision has brought the debate over reproductive rights to a highly-visible national level and as a result, the pro-choice movement has had to spend much of its resources on efforts to thwart the pro-life movement from eroding those rights).

27. U.S. CONST. art. II, § 2.

interpreting a constitution as simply a matter of reining in attempts by political majorities to act in a way contrary to "enduring values" assumes that the values to be guarded are those expressed in international instruments, not those deemed legitimate locally. But in the United States, as Professor Rubenfeld observes, "[t]he ideal is not to make constitutional courts responsive to popular will at any given moment, but to make sure that constitutional law remains answerable to the *nation's* project of political self-determination over time."[28]

In addition to inclining toward enhanced judicial authority, Justice Kirby further asserts the desirability of judicial participation "in an interactive dialogue . . . between the constitutional courts of many countries"[29] and stresses the risk that a court failing to participate in such an international judicial dialog will suffer "a diminished influence . . . in the world of ideas."[30] Yet the calls for international judicial dialog and warnings of waning international influence suggest that domestic judges should respond, first of all, to the views of judges of foreign and international courts in human rights matters, rather than to the domestic legal community. This is hardly obvious. Certainly professional reaction to a court's performance can be a useful corrective for judges whose interpretations of the law are wrong-headed. Further, one can imagine circumstances in which the main source of such reaction would come from other countries' courts—for example, if a domestic legal system was relatively new and its legal community small and inexperienced. But when there is a vital, active bar and legal academic community in a given country, that country's judges certainly do not deprive themselves of professional feedback if they focus primarily on the domestic reaction to their decisions.

It might also make sense for domestic judges to be concerned with international judicial opinion if domestic judges saw themselves as owing their primary loyalty to some sort of international judicial fraternity, rather than to the citizens who have entrusted them with the responsibility of interpreting a *national* constitution. However, it is not clear why the good opinion of other judges should be more

28. Rubenfeld, *supra* note 15, at 28 (emphasis added).

29. Kirby, *supra* note 1, at 350.

30. *Id.* at 360.

important to members of a domestic court than the views of their fellow citizens, from whom the judges derive their authority.

III. JUDGES AND INTERNATIONAL LAW

Justice Kirby rejects arguments against the use of international law that are grounded either on its ambiguity or on the difficulties domestic judges have in using it.[31] I believe, however, that these problems are greater than Justice Kirby does.

Regarding ambiguity, Justice Kirby puts forward institutional examples such as the European Court of Human Rights and the Inter-American Court of Human Rights as sources whose decisions can dispel ambiguity.[32] Certainly that is true regarding the treaties that those courts interpret. To the extent, however, that the issue is not treaty law, but customary international law, the views of those courts are necessarily less helpful. Indeed, Justice Kirby's mention of them illustrates the problem. Customary international law derives from the practice of states. While judicial opinions may provide helpful collections and interpretations of state practice, it is the practice which is the ultimate test. To focus exclusively on judicial opinions amounts to a conclusion that courts, rather than states, make customary international law, which is doubtful. But if the content of customary international law actually turns on state practice instead of judicial determinations, then questions of ambiguity and obscurity of sources become quite serious.

Of course, as Justice Kirby observes, many scholars have addressed human rights questions,[33] but that fact does not eliminate the problem. On the contrary, as Professor Kelly has observed:

> International law treatises, the writings of international scholars, and the decisions of the I.C.J. portray an international legal system blessed with a wide array of customary norms to structure behavior and resolve disputes. While these norms are termed "customary," they rarely are based on significant state practice and are devoid of concrete

31. *Id.* at 351, 354-55.

32. *Id.* at 351.

33. *Id.* at 354-55 (reasoning that judges can learn how to access the work of these scholars to take advantage of established international law).

> evidence of states' acceptance of these norms as law. The primary substantive norms in the Restatement, for example, are judge-made or scholar-declared norms, not customary norms. Advocates and scholars selectively use state practice and cite each other for the proposition that a norm has been generally accepted as law. Some are quite candid about this process of norm declaration. The inductive methodology is rarely used.[34]

The illegitimacy of reliance on such sources has been noted by at least one American Court:

> This notion—that professors of international law enjoy a special competence to prescribe the nature of customary international law wholly unmoored from legitimating territorial or national responsibilities, the interests and practices of States, or (in countries such as ours) the processes of democratic consent—may not be unique, but it is certainly without merit.
>
> Put simply, and despite protestations to the contrary by some scholars (or "publicists" or "jurists"), a statement by the most highly qualified scholars that international law is *x* cannot trump evidence that the treaty practice or customary practices of States is otherwise, much less trump a statute or constitutional provision of the United States at variance with *x*. This is only to emphasize the point that scholars do not *make* law, and that it would be profoundly inconsistent with the law-making processes within and between States for courts to permit scholars to do so by relying upon their statements, standing alone, as sources of international law. In a system governed by the rule of law, no private person—or group of men and women such as comprise the body of international law scholars—*creates* the law. Accordingly, instead of relying primarily on the works of scholars for a statement of customary international law, we look primarily to the formal lawmaking and official actions of States and only secondarily to the works of scholars as evidence of the established practice of States.[35]

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34. J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 478 (2000).

35. United States v. Yousef, 327 F.3d 56, 102-03 (2d Cir. 2003) (footnotes omitted).

In light of the temptation to rely on convenient but doubtful sources of international law that domestic judges inevitably will face, too much confidence in their ability to deal with this subject would seem unjustified.

CONCLUSION

Justice Kirby's paper brings to the fore issues which demand discussion in the American legal community. However, as I have tried to show, his position raises a number of difficulties. It assumes an identity of constitutional values which clearly does not exist, at least regarding a number of important issues. It assigns to judges a role which, at least in the American understanding, is not clearly one they should bear. And it understates the difficulties domestic judges would have in working with international materials. For all these reasons, I must respectfully disagree with Justice Kirby's conclusions.