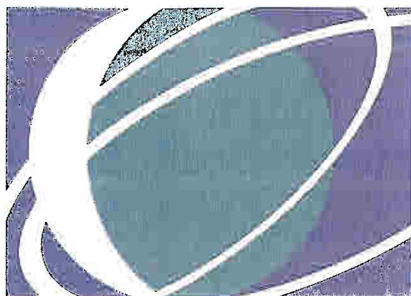
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INTERNATIONAL LAW NEWS

SUMMER 2007 VOL. 36 NO. 3

SECTION OF INTERNATIONAL LAW AMERICAN BAR ASSOCIATION

SPECIAL FOCUS ISSUE

using international & foreign law

Using Foreign and International Law in U.S. Courts

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When should U.S. courts cite foreign and international law in a domestic court decision? The question has generated much controversy in recent years, touching not only upon the fundamental right of judges to decide cases as they see fit, but also the relationship of U.S. law to the jurisprudence of other common law and civil law nations. The issue is not an academic one, but one in which judges, lawyers, politicians, and news media have actively participated. The issue is raised in a variety of forums, including confirmation hearings for federal judges. U.S. Supreme Court Associate Justice Stephen Breyer also spoke extensively on the issue of citing foreign and international law sources when he accompanied leaders of the ABA Section of International Law (ABA International) on an International Legal Exchange (ILEX) delegation visit to London and Paris in 2005.

Much of the debate mischaracterizes what judges are actually doing when they cite foreign and international law. Some have argued that

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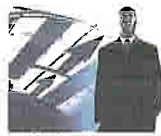

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U.S. judges should never cite foreign or international sources under any circumstances, but such arguments ignore the plethora of cases that involve application of a treaty as a critical issue (such as the UN Convention on Contracts for the International Sale of Goods) or a substantive issue of foreign law (such as a contract dispute that includes a foreign choice of law clause). In these cases, foreign and international law is central to the issues that the court must decide, and citing foreign and international sources is essential.

Arguments that judges should never cite an international treaty to which the United States is a party also ignore Article VI of the U.S. Constitution, which makes these treaties "supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

But controversy has arisen when foreign and international sources are not essential to a judicial decision but are included as additional authority, similar to a court's citing a law review article, restatement, or other secondary source of law. A judge may want to show, for example, that a result in a court decision is consistent with the jurisprudence of other democratic, common law nations that have previously considered the same or a similar legal issue, or, perhaps, that many other nations hold the same view as that which the court is adopting or affirming.

Some critics have argued that U.S. judges cite foreign and international law sources to interpret the U.S. Constitution, but close analysis shows this is not the case. When foreign and international law sources are cited in constitutional decisions, they are cited in support of a conclusion reached under U.S. domestic law. The additional citations are added to show that the result is consistent with international norms; the results of the case, however, are grounded in U.S. law.

Because some of the more visible cases citing foreign and international law sources have been socially controversial, involving issues such as race, sexual orientation, and specific applications of the death penalty, some conservative critics introduced federal legislation to limit the sources of law that U.S. judges could cite in federal court decisions. Proponents of this legislation said that they are not opposed to judges' reading foreign and international sources on their own but that they are opposed to having judges cite these sources in federal court decisions. Opponents of this legislation argued that judges should be able to cite the sources that have influenced their decision-making process and that disclosing these sources to lawyers could better help shape future advocacy. If a judge relied on something to reach a decision, the judge should include a citation to that source in the decision.

Most disturbing, however, and largely unknown to many lawyers, is that death threats were posted on the Internet against federal judges who have cited foreign and international law sources, including U.S. Supreme Court Associate Justices Sandra Day O'Connor and Ruth Bader Ginsburg. The issue is one of serious concern and one that should compel lawyers (and particularly members of ABA International) to better inform themselves on the debate over what judges are doing when they cite foreign and international law sources.

To assist Section members in understanding this debate, the ABA International Spring Meeting included special panels to focus on how U.S. and foreign courts handle the issue of citing foreign and international law. Panelists included law professors (Kenneth Anderson, Nathan Brown, James Feinerman, Roger Goebel, Vicki Jackson, Robert Lutz II, and Robert Stein), judges (Jose Ramon Cossio Diaz and Patricia M. Wald), practitioners (Tim Bugg and Darrell Prescott), and government representatives (John Bellinger III and Ambassador Edward Moore).

What Is the Debate About?

The controversy in the United States seems particularly focused on the U.S. Supreme Court's use of foreign and international law in decisions that involve constitutional law. While the debate has occasionally spilled into other realms, it has remained centered on the use of comparative materials in constitutional adjudication. The debate is not abstract. In recent years, the U.S. Supreme Court has cited foreign and international law as persuasive

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authority in highly contentious and visible cases. This practice has sparked and fueled the debate among legal commentators, judges, and practitioners. Three controversial cases illustrate specific applications of the debate in overturning a state sodomy law, using race in determining admission to law school, and applying the death penalty against mentally retarded people.

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court found that the Texas sodomy statute criminalizing consensual sex between two people of the same sex was a violation of the Due Process Clause of the U.S. Constitution. In so doing, the Court overruled the 1986 decision of *Bowers v. Hardwick*, which affirmed a Georgia sodomy statute (which the Georgia Supreme Court later found violated the Georgia State Constitution). In a concurring opinion in *Bowers*, Chief Justice Warren Burger made sweeping references to the history of Western civilization and to Judeo-Christian moral and ethical standards against homosexuality.

As part of the decision to reverse *Bowers*, the majority in *Lawrence* noted that Burger had ignored the Wolfenden Report, which in 1957 recommended that the British Parliament repeal the British sodomy laws. The *Lawrence* majority also noted that in his sweeping statements about Western civilization, Burger had ignored decisions of the European Court of Human Rights, which five years before *Bowers* had ruled that the sodomy laws were a violation of human rights. (Interestingly, none of the briefs or amicus briefs in *Bowers* cited the 1981 decision from the European Court of Human Rights.)

But the *Lawrence* majority did not rely on these foreign sources to find that the Texas sodomy statute violated the Due Process Clause of the U.S. Constitution. The *Lawrence* majority cited these decisions to refute Burger's concurring opinion on how Western civilization had treated the issue of homosexuality.

In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the U.S. Supreme Court held that the University of Michigan Law School's narrowly tailored use of race in admissions decisions did not violate the Equal Protection Clause. In her concurring opinion, Justice Ruth Bader Ginsburg noted that the majority's observation that "race-conscious programs 'must have a logical end point,' . . . accords with the international understanding of the office of affirmative action." She then cited the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which the United States ratified in 2004.

Ginsburg did not say that the result in *Grutter* was compelled by CERD, only that the observation was in accord with a treaty that the United States had ratified. In a "see also" citation, she cited the Convention on the Elimination of All Forms of Discrimination against Women, which the United States has not ratified. She also cited a number of additional sources in the opinion. All of these citations were in a concurring opinion, and one of the two "international" citations was for a treaty that the United States had ratified.

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the U.S. Supreme Court held that applying the death penalty to mentally retarded people violated the Eighth Amendment to the U.S. Constitution. After reviewing state legislative developments since 1986 to prohibit such executions, and noting the reluctance of even those states that did not legislatively prohibit such executions, the majority decision noted (in a footnote) that the state's legislative judgments against executing the mentally retarded were supported by organizations such as the American Psychological Association and representatives of widely diverse religious communities in the United States.

Continuing in that footnote, Justice John Paul Stevens stated: "Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." He also noted polling data within the United States that showed "widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong." Summarizing all of these various views cited in footnote 21, Stevens noted that none were "dispositive" but that "their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue." In dissent, the late Chief Justice William Rehnquist and Justice Antonin Scalia stated that "the viewpoints of other countries simply are not relevant" and that international "notions of justice are (thankfully) not always those of our people."

What Is the Debate Not About?

The debate about using international law in U.S. courts has often been misinterpreted. As John Bellinger III, legal adviser to the U.S. Department of State, emphatically stated during the ABA Spring Meeting, the debate is neither about the lack of respect of U.S. courts for international law, nor about the use of comparative law as an

authoritative source of law or controlling precedent in purely domestic cases.

There is indeed consensus that international law should be used when interpreting treaties or in cases of admiralty law. Foreign law is often used when resolving international private commercial disputes, especially when the contract includes a choice of law provision. In addition, foreign and international law is also frequently cited in cases dealing with the Alien Tort Claims Act and in appeals of asylum petitions. Lastly, disputes dealing with antitrust or anti-corruption law can only be resolved effectively through common interpretation among various countries. Therefore, the debate about using foreign international law in U.S. courts is actually narrower than many people realize.

But even though the debate may be a narrow one, it has been provocative. A congressional resolution was introduced (but not passed) stating that "judicial determinations regarding the meaning of the laws of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions." H.R. Res. 568, 108th Cong. (2004). The sponsor of that resolution suggested that a judge's failure to comply with the resolution might be grounds for impeachment.

Separately, several senators sponsored the proposal of a bill, called the Constitution Restoration Act of 2004, stating that in interpreting the U.S. Constitution, courts cannot rely on "any constitution, law, administrative rule, Executive Order, directive, policy, judicial decision or any other action of any foreign state or international organization or agency, other than English constitutional and common law." S. 2323, 108th Cong. (2004).

Other debates have taken place in academia and among members of the judiciary. Justices Breyer and Scalia debated the issue at the American University Washington College of Law. Justices O'Connor, Breyer, and Scalia addressed the issue at annual meetings of the American Society of International Law. Federal circuit judges also have written and spoken on the issue, including Judges Richard Posner, Diarmuid O'Scannlain, J. Harvie Wilkinson III, Shirley Abrahamson, and Patricia M. Wald. Judges from other countries have noted the U.S. debate with interest, including Justice Michael Kirby of the High Court of Australia and Justice Claire L'Heureux-Dubé of the Supreme Court of Canada. Justices John Roberts and Samuel Alito also faced aggressive questioning about the issue in their nomination hearings, and it would not be surprising to see the issue raised in the hearings of future judicial nominees.

When a court should cite a foreign or international source is not an issue that will be easily resolved. The issue has raised emotional and imaginative arguments. The debate also deals with the fundamental question whether Congress can limit the sources that an independent judiciary can consult when reaching decisions. We live in a world where advances in information technology make it easy to find a great number of foreign and international sources, and—as with any other secondary source—there may always be a danger that the judge is seeking out only those foreign and international sources that support the decision reached under U.S. law.

The debate should be more than an all-or-nothing proposition. Practitioners may be well served if they focus their attention on how to use foreign materials appropriately:

- If a clear answer can be found in domestic jurisprudence, there is likely no need to look outside our national boundaries. If foreign and international sources are cited in these cases, it should be clear that they are being cited as additional authority to show U.S. law is consistent with international norms.
- When citing treaties, the practitioner must state whether the United States is a party to the treaty. If the United States made any reservations to the treaty when ratifying it, those reservations must be disclosed to the court.
- When citing foreign law, practitioners should provide the court with details surrounding the decision and the court that rendered the decision. The court should be informed whether the decision was made as a result of a developed factual background or was just an advisory opinion.

It is incumbent upon practitioners to give the court all the necessary information to make an informed decision.

At the ABA Spring Meeting, the question was also posed whether the current debate about the use of foreign and international law reflects a tragic loss of comparative legal studies in the United States. Regardless on what side of the controversy one may be, there should be no debate that raising awareness of other countries' jurisprudence and practice should be part of U.S. law school curricula. Globalism has reached every corner of the legal world in which our clients operate, and U.S. law students must increase their understanding of how to read, cite, and locate foreign and international law materials.