

Human Rights on the Judicial Front

Litigating Protection in U.S. Courts



Where, after all, do universal human rights begin?
In small places, close to home ...
Unless these rights have meaning there,
they have little or no meaning anywhere.
Without concerted citizen action to uphold them
close to home, we shall look in vain for progress
in the larger world.

—Eleanor Roosevelt, 1953

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Since the Universal Declaration of Human Rights (UDHR or “the Declaration”) was adopted in 1948, the international community has codified and developed an extensive body of human rights protections covering the full gamut of civil and political rights as well as social, economic and cultural rights—from the right of everyone to be free from torture and inhumane treatment, to the right to health and education. The U.S. Constitution and laws reflect some of these rights and, in some respects, afford us greater protection. However, in a growing number of areas, international standards offer more comprehensive protection than our domestic laws. The international pro-

hibition against “cruel, inhuman or degrading treatment or punishment,” for instance, proscribes more conduct than its domestic equivalent—the Eighth Amendment’s prohibition against “cruel and unusual punishment.”

U.S. laws incorporate some international human rights standards. For example, the United States has signed and ratified three important human rights treaties: the International Covenant on Civil and Political Rights, the Convention against Torture and the International Convention on the Elimination of All Forms of Racial Discrimination. In ratifying these instruments, the U.S. government assumed binding international legal obligations and sig-

naled its commitment to abide by the standards that these treaties enshrine. Following ratification, under the U.S. Constitution, these treaties become the “supreme law of the land” on par with an Act of Congress and superior to conflicting state laws. U.S. courts, including the Supreme Court, have long recognized this fact, as well as the validity of customary international law. This body of law refers to general and consistent practices adhered to by the international community out of a sense of legal obligation. The Supreme Court has repeatedly held that these laws form part of U.S. law, and more specifically, federal common law. Although integral to the U.S. legal system, violations of these international guarantees regularly occur in the United States, and there is no obvious mechanism for enforcement. But attorneys can use the U.S. court system as a means to enforce these protections and U.S. legal principles recognize this possibility.

U.S. courts have a mandate to consider both treaty-based and customary international law claims when they are presented. The Supremacy Clause of the U.S. Constitution provides that treaties are supreme law and Article III that federal courts can hear cases arising under international law. Lawyers

sion—or indirectly: by informing the court’s decision in a persuasive manner, i.e., to use international standards as a rule *for* decision.

Apart from the few instances where Congress passed legislation af-

law, requires that courts interpret state and federal law so that it does not conflict with international law. The principle is applicable both to treaties and customary international law. For some judges, using treaties in this manner is

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fording individuals a right to sue based on human rights standards, options available to lawyers seeking to rely directly on treaty-based claims are rather limited. This is primarily due to the fact that the three human rights treaties to which the United States is a party are “non-self-executing”, a judicially created doctrine that precludes individuals from relying directly upon violations of treaty-based rights as a cause of action in federal or state courts unless legislation specifically provides for such a right. Because of this doctrine, U.S. courts have repeatedly expressed unwillingness to apply international human rights treaties as binding law.

Despite their non-self-executing nature, human rights treaties are not

much less controversial than using international law as the rule of decision because they can avoid acknowledging any formal obligation to abide by international law.

This approach is not new. U.S. courts at all levels have shown receptivity to this indirect approach to help clarify the meaning of vague or unsettled domestic laws. In 1949, for example, the Supreme Court referenced article 20(2) of the Declaration, which states that “[n]o one may be compelled to belong to an association” in order to uphold as constitutional an amendment in Arizona’s constitution that prohibited closed-shop union arrangements. In recent years, the Supreme Court has continued to apply this principle, referencing international rights standards and jurisprudence as well as foreign laws and practices in their opinions with increasing regularity. In its last seven terms, the Court found it persuasive to cite human rights treaties prohibiting race and sex discrimination, as well as a decision of the European Court of Human Rights on sodomy laws in the United Kingdom and their negative impact on the right to privacy and family life, international practices with respect to the death penalty, and customary international law. These references were used in deciding important cases addressing affirmative action,

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therefore have a legal basis for raising international standards in litigation. They can raise the standards directly—by requesting the court to apply international standards as the rule *of* deci-

tionally without value in U.S. litigation. These treaties may be utilized by lawyers indirectly, in a persuasive manner, for their interpretative value. This principle, rooted in Supreme Court case

same-sex conduct, execution of the mentally retarded and juveniles, the rights of men detained at Guantánamo, and the validity of claims under customary international law brought under the Alien Tort Claims Act of 1789.

The Court's reference to international legal standards has mostly been confined to an occasional footnote or fleeting sentence; but in 2005, Justice Kennedy devoted an entire section of his opinion in *Roper v. Simmons*—a case striking down the juvenile death penalty—to international and foreign practice in this area. Justice Kennedy noted that, “[o]ur determination finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.” International law, including the Convention on the Rights of the Child, the majority found, was relevant to interpreting the Constitution's Eighth Amendment prohibition against cruel and unusual punishment. And, in 2006, relying in part upon an in-depth, detailed analysis of specific provisions of the Geneva Conventions, the Supreme Court struck down as unconstitutional the military commissions set up by the Bush administration to try men detained at Guantánamo. In addition, former Justice O'Connor and the late Chief Justice Rehnquist, as well as two of the current Court's more liberal justices, Ginsberg and Breyer, have all either spoken publicly or written about the importance of understanding international law. The use of international precedent by the Court is not without its critics. Justices Scalia and Thomas, have been two of the most vocal opponents of the Courts' increasing use of international and foreign legal standards, and have filed joint dissenting opinions in all recent cases in which the majority has referenced international precedent. Their dissents have singled out and chastised the majority's refer-

ence to international standards. For example, dissenting from the majority decision to strike down the Texas sodomy law in *Lawrence v. Texas* as unconstitutional, Scalia, joined by Thomas, dismissed the Court's discussion of “foreign views” as “meaningless dicta” Some Judges in the lower courts,

Court found that conditions at a community correctional center violated inmates' constitutional rights, because they “transgress[ed] today's broad and idealistic concepts of dignity, civilized standards, humanity, and decency.”

State courts have adopted a similar approach to their interpretation of

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notable among them Judge Richard Posner from the Seventh Circuit Court of Appeals, have expressed similar views in legal opinions, Op-Eds and law reviews.

Notwithstanding these negative views, courts at the federal and state levels have for decades routinely utilized international standards to give contextual support to their holdings. Judges have used international law as a tool to interpret provisions of federal and state constitutions, and attorneys have relied on them for persuasive authority in arguing for a more expansive view of their client's rights. For example, in *Lareau v. Manson*, the Connecticut Federal District Court looked to international standards, including the United Nations Standard Minimum Rules on Treatment of Prisoners to give fuller meaning to the Eighth Amendment. Referencing these standards, the

state laws. In *Boehm v. Superior Court*, the California Court of Appeals relied on Article 25 of the Declaration to interpret a general statutory duty by the state to support the poor. When the county reduced general assistance benefits without considering the recipients' need for clothing, transportation and medical care, the court held this to be “arbitrar[y] and capricious.” The court used the Declaration to provide support for the notion that “common sense and all notions of human dignity” require a minimum level of subsistence. In *Sterling v. Cupp*, the Oregon Supreme Court likewise referenced the Declaration—in addition to five additional treaties and other international instruments addressing the rights of prisoners—to aid in the interpretation of a vague state constitutional provision requiring that inmates not be treated with “unnecessary rigor.” Guided in

part by these international standards, the court held that a state law permitting female prison officers to supervise male prisoners was unconstitutional. The court did not apply these standards to decide the case; rather it used them to more precisely define the meaning of “unnecessary rigor” in the context of a state-run prison system.

These cases represent just a few from around the country in which international human rights standards have been raised in litigation and considered by courts in a broad and diverse range of social justice issues—from the right of same sex couples to marry, to the rights of children and prisoners. Even

though international law forms part of U.S. law, attorneys continue to dispute the utility of arguments based on international standards. They frequently contend that international law is unenforceable, will not be recognized by the judge as valid, or will damage the case. These arguments should, of course, be carefully considered, but where international standards are well defined and offer protections that are equal to, or greater than, applicable domestic law, they should be advanced in appropriate cases.

Finally, lawyers today should consider the crucial role they can perform in realizing human rights standards. If

they fail to raise these standards in litigation, judges will not be given the opportunity to consider and enforce them and the UDHR’s guarantee of human rights protections and dignity for all will remain an unfulfilled and unattainable promise. As Eleanor Roosevelt proclaimed, “[w]ithout concerted citizen action to uphold [human rights] close to home, we shall look in vain for progress in the larger world.”

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