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American Exception

U.S. Court Is Now Guiding Fewer Nations

By ADAM LIPTAK

WASHINGTON — Judges around the world have long looked to the decisions of the United States Supreme Court for guidance, citing and often following them in hundreds of their own rulings since the Second World War.

But now American legal influence is waning. Even as a debate continues in the court over whether its decisions should ever cite foreign law, a diminishing number of foreign courts seem to pay attention to the writings of American justices.

"One of our great exports used to be constitutional law," said Anne-Marie Slaughter, the dean of the Woodrow Wilson School of Public and International Affairs at Princeton. "We are losing one of the greatest bully pulpits we have ever had."

From 1990 through 2002, for instance, the Canadian Supreme Court cited decisions of the United States Supreme Court about a dozen times a year, an analysis by The New York Times found. In the six years since, the annual citation rate has fallen by half, to about six.

Australian state supreme courts cited American decisions 208 times in 1995, according to a recent study by Russell Smyth, an Australian economist. By 2005, the number had fallen to 72.

The story is similar around the globe, legal experts say, particularly in cases involving human rights. These days, foreign courts in developed democracies often cite the rulings of the European Court of Human Rights in cases concerning equality, liberty and prohibitions against cruel treatment, said Harold Hongju Koh, the dean of the Yale Law School. In those areas, Dean Koh said, "they tend not to look to the rulings of the U.S. Supreme Court."

The rise of new and sophisticated constitutional courts elsewhere is one reason for the Supreme Court's fading influence, legal experts said. The new courts are, moreover, generally more liberal than the Rehnquist and Roberts courts and for that reason more inclined to cite one another.

Another reason is the diminished reputation of the United States in some parts of the world, which experts here and abroad said is in part a consequence of the Bush administration's unpopularity around the world. Foreign courts are less apt to justify their decisions with citations to cases from a nation unpopular with their domestic audience.

"It's not surprising, given our foreign policy in the last decade or so, that American influence should be declining," said Thomas Ginsburg, who teaches comparative and international law at the University of Chicago.

Aversion to Foreign Law

The adamant opposition of some Supreme Court justices to the citation of foreign law in their own opinions also plays a role, some foreign judges say.

“Most justices of the United States Supreme Court do not cite foreign case law in their judgments,” Aharon Barak, then the chief justice of the Supreme Court of Israel, wrote in the Harvard Law Review in 2002. “They fail to make use of an important source of inspiration, one that enriches legal thinking, makes law more creative, and strengthens the democratic ties and foundations of different legal systems.”

Partly as a consequence, Chief Justice Barak wrote, the United States Supreme Court “is losing the central role it once had among courts in modern democracies.”

Justice Michael Kirby of the High Court of Australia said that his court no longer confined itself to considering English, Canadian and American law. “Now we will take information from the Supreme Court of India, or the Court of Appeal of New Zealand, or the Constitutional Court of South Africa,” he said in an interview published in 2001 in The Green Bag, a legal journal. “America” he added, “is in danger of becoming something of a legal backwater.”

The signature innovations of the American legal system — a written Constitution, a Bill of Rights protecting individual freedoms and an independent judiciary with the power to strike down legislation — have been consciously emulated in much of the world. And American constitutional law has been cited and discussed in countless decisions of courts in Australia, Canada, Germany, India, Israel, Japan, New Zealand, South Africa and elsewhere.

In a 1996 decision striking down a law that made it a crime to possess pornography, for instance, the Constitutional Court of South Africa conducted a broad survey of American First Amendment jurisprudence, citing some 40 decisions of the United States Supreme Court. That same year, the High Court of Australia followed a 1989 decision of the Supreme Court in a separation-of-powers case, ruling that a judge was permitted to prepare a report for a government minister about threats to aboriginal areas because the assignment did not undermine the integrity of the judicial branch.

Sending American ideas about the rule of law abroad has long been a source of pride. “The United States Supreme Court is the oldest constitutional court in the world — the most respected, the most legitimate,” said Charles Fried, a law professor at Harvard who served as solicitor general in the Reagan administration.

But there is an intense and growing debate about whether that influence should be a one-way street.

Justice Sandra Day O’Connor, in a speech before her retirement from the Supreme Court, advocated taking as well as giving.

“I suspect that with time we will rely increasingly on international and foreign law in resolving what now appear to be domestic issues,” Justice O’Connor said. “Doing so may not only enrich our own country’s decisions; it will create that all-important good impression. When U.S. courts are seen to be cognizant of other judicial systems, our ability to act as a rule-of-law model for other nations will be enhanced.”

But many judges and legal scholars in this country say that consideration of foreign legal precedents in American judicial decisions is illegitimate, and that there can be no transnational dialogue about the meaning of the United States Constitution.

The Constitution should be interpreted according to its original meaning, said John O. McGinnis, a law professor at Northwestern, and recent rulings, whether foreign or domestic, cannot aid in that enterprise. Moreover, Professor McGinnis said, decisions applying foreign law to foreign circumstances are not instructive here.

“It may be good in their nation,” he said. “There is no reason to believe necessarily that it’s good in our nation.”

In any event, said Eric Posner, a law professor at the University of Chicago, many Americans are deeply suspicious of foreign law.

“We are used to encouraging other countries to adopt American constitutional norms,” he wrote in an essay last month, “but we have never accepted the idea that we should adopt theirs.”

“It’s American exceptionalism,” Professor Posner added in an interview. “The view going back 200 years is that we’ve figured it out and people should follow our lead.”

Fiery Debate

Yet citations to foreign and international law in recent Supreme Court decisions ignited an enormous furor in Congress and in the popular consciousness.

“The opinion of the world community,” Justice Anthony M. Kennedy wrote for the majority in Roper v. Simmons, the 2005 decision that struck down the death penalty for juvenile offenders, “while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.” Justice Kennedy cited, among other things, the United Nations Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, and the Criminal Justice Act from the United Kingdom.

In Lawrence v. Texas, the 2003 decision striking down a Texas law making homosexual sex a crime, Justice Kennedy cited three decisions of the European Court of Human Rights, noting that homosexual conduct was accepted as “an integral part of human freedom” in many countries.

Justice Antonin Scalia, dissenting in Roper v. Simmons, fired back. “The basic premise of the court’s argument — that American law should conform to the laws of the rest of the world — ought to be rejected out of hand,” he wrote.

The issue has rankled Justice Kennedy. “There’s kind of a know-nothing quality to the debate, it seems to me, of being suspicious of foreign things,” he said in remarks at a judicial conference in July.

At their confirmation hearings, Chief Justice John G. Roberts Jr. and Justice Samuel A. Alito Jr. indicated that they were opposed to the citation of foreign law in constitutional cases. Chief Justice Roberts noted that foreign judges were not accountable to the American people and said that allowing the use of foreign precedent expanded judicial discretion.

“Foreign law, you can find anything you want,” Chief Justice Roberts said. “Looking at foreign law for support is like looking out over a crowd and picking out your friends.”

The controversy over the citation of foreign law in American courts is freighted with misconceptions. One is that the practice is somehow new or unusual. The other is that to cite such a decision is to be bound by it.

Even conservative scholars acknowledge that American judges have long cited decisions by foreign courts in their rulings. “The Supreme Court has been doing it for basically all of our history, and with some degree of gusto,” said Steven G. Calabresi, a law professor at Northwestern and a founder of the Federalist Society, a conservative legal group. Professor Calabresi said he generally opposed the citation of foreign law in constitutional cases.

Judicial citation or discussion of a foreign ruling does not, moreover, convert it into binding precedent.

Chief Justice John Marshall, sitting as a circuit court judge, discussed the question in 1811. “It has been said that the decisions of British courts, made since the Revolution, are not authority in this country,” he said. “I admit it — but they are entitled to that respect which is due to the opinions of wise men who have maturely studied the subject they decide.”

Indeed, American judges cite all sorts of things in their decisions — law review articles, song lyrics, television programs. State supreme courts cite decisions from other states, though a decision from Wisconsin is no more binding in Oregon than is one from Italy.

“Foreign opinions are not authoritative; they set no binding precedent for the U.S. judge,” Justice Ruth Bader Ginsburg said in a 2006 address to the Constitutional Court of South Africa. “But they can add to the story of knowledge relevant to the solution of trying questions.”

But Professor Fried said the area was a minefield. “Courts have been citing foreign law forever, but sparingly, for very good reason,” he said. “It is an invitation to bolster conclusions reached on other grounds. It leads to more impressionistic, undisciplined adjudication.”

The trend abroad, moreover, is toward decisions of a distinctly liberal sort in areas like the death penalty and gay rights. “What we have had in the last 20 or 30 years,” Professor Fried said, “is an enormous coup d’état on the part of judiciaries everywhere — the European Court of Human Rights, Canada, South Africa, Israel.” In terms of judicial activism, he said, “they’ve lapped us.”

American Foundations

The rightward shift of the Supreme Court may partly account for its diminished influence. Twenty years ago, said Anthony Lester, a British barrister, the landmark decisions of the court were "studied with as much attention in New Delhi or Strasbourg as they are in Washington, D.C."

That is partly because the foundational legal documents of many of the world's leading democracies are of quite recent vintage. The Indian Constitution was adopted in 1949, the Canadian Charter of Rights and Freedoms in 1982, the New Zealand Bill of Rights in 1990 and the South African Constitution in 1996. All drew on American constitutional principles.

Particularly at first, courts in those nations relied on the constitutional jurisprudence of the United States Supreme Court, both because it was relevant and because it was the essentially the only game in town. But as constitutional courts around the world developed their own bodies of precedent and started an international judicial conversation, American influence has dropped.

Judge Guido Calabresi of the federal appeals court in New York, a former dean of Yale Law School, has advocated continued participation in that international judicial conversation.

"Since World War II, many countries have adopted forms of judicial review, which — though different from ours in many particulars — unmistakably draw their origin and inspiration from American constitutional theory and practice," he wrote in a 1995 concurrence that cited the German and Italian constitutional courts.

"These countries are our 'constitutional offspring,' " Judge Calabresi wrote, "and how they have dealt with problems analogous to ours can be very useful to us when we face difficult constitutional issues. Wise parents do not hesitate to learn from their children." (Judge Calabresi is Professor Calabresi's uncle.)

The openness of some legal systems to foreign law is reflected in their constitutions. The South African Constitution, for instance, says that courts interpreting its bill of rights "must consider international law" and "may consider foreign law." The constitutions of India and Spain have similar provisions.

Many legal scholars singled out the Canadian Supreme Court and the Constitutional Court of South Africa as increasingly influential.

"In part, their influence may spring from the simple fact they are not American," Dean Slaughter wrote in a 2005 essay, "which renders their reasoning more politically palatable to domestic audience in an era of extraordinary U.S. military, political, economic and cultural power and accompanying resentments."

Frederick Schauer, a law professor at the University of Virginia, wrote in a 2000 essay that the Canadian Supreme Court had been particularly influential because "Canada, unlike the United

States, is seen as reflecting an emerging international consensus rather than existing as an outlier."

In New Zealand, for instance, Canadian decisions were cited far more often than those of any other nation from 1990 to 2006 in civil rights cases, according to a recent study in The Otago Law Review in Dunedin, New Zealand.

"As Canada's judges are, by most accounts, the most judicially activist in the common-law world — the most willing to second-guess the decisions of the elected legislatures — reliance on Canadian precedents will worry some and delight others," the study's authors wrote.

American precedents were cited about half as often as Canadian ones. "It is surprising," the authors wrote, "that American cases are not cited more often, since the United States Bill of Rights precedents can be found on just about any rights issue that comes up."

American popular attitudes toward the citation of foreign law, by contrast, Mark C. Rahdert wrote in the American University Law Review last year, "tap into a longstanding tradition of exceptionalism."

That tradition is rooted in a popular devotion to the Constitution unknown in the rest of the world. It is supported by aspects of the American character that were formed by the nation's initial geographic isolation and pioneer spirit, which emphasized freedom, private property and individual responsibility. That has led, for instance, to a near-absolute commitment to free speech and a particularly tough approach to crime.

In " 'A Shining City on a Hill': American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law," a 2006 article in the Boston University Law Review, Professor Calabresi concluded that the Supreme Court should be wary of citing foreign law in most constitutional cases precisely because the United States is exceptional.

"Like it or not," he wrote, "Americans really are a special people with a special ideology that sets us apart from all the other peoples."

Tom Torok and Kitty Bennett contributed reporting.

Contact Us. International Court of Justice. MUN Guide General Assembly. Introduction. Overview of this Guide. How Decisions are Made at the UN. UN at a glance.Â The seat of the Court is at the Peace Palace in The Hague (Netherlands). Of the six principal organs of the United Nations, it is the only one not located in New York (United States of America). The Courtâ€™s role is to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies. The Court decides disputes between countries, based on the voluntary participation of the States concerned. If a State agrees to participate in a proceeding, it is obligated to comply with the Courtâ€™s decision. While the United States was a founding member of the United Nations, a party to the UN Charter and indeed a leader in helping to draft the Charter, the US wasted little time in whittling away at its prohibition of unilateral military action. The US did so through the full-scale invasion of countries such as Vietnam (1961-1975) and the Dominican Republic (1965), and through covert actions to topple foreign governments. The covert US regime change in Guatemala in 1954, for example, was characterized by UN Secretary General Dag HammarskjÃ¶ld as "the most serious blow so far aimed at the [United Nations]." A constitutional court is a high court that deals primarily with constitutional law. Its main authority is to rule on whether laws that are challenged are in fact unconstitutional, i.e. whether they conflict with constitutionally established rules, rights, and freedoms, among other things.Â "U.S. Court Is Now Guiding Fewer Nations". The New York Times. Retrieved June 7, 2018.Â Please help us solve this error by emailing us at support@wikiwand.com Let us know what you've done that caused this error, what browser you're using, and whether you have any special extensions/add-ons installed. Thank you! We find little evidence to indicate that any of the leading human rights treaties now serves as a dominant model for constitutional drafters. Some noteworthy patterns of similarity between national constitutions and international legal instruments do exist: For example, the constitutions of undemocratic countries tend to exhibit greater similarity to the Universal Declaration of Human Rights, while those of common law countries manifest the opposite tendency.Â 4 Adam Liptak, U.S. Court, a Longtime Beacon, Is Now Guiding Fewer Nations, N.Y. TIMES, Sept. 17, 2008, at A1 (quoting Anne-Marie Slaughter). International Court of Justice, the principal judicial organ of the United Nations.Â The International Court of Justice , commonly known as the World Court, is the principal judicial organ of the United Nations, The seat of the ICJ is at The Hague , but sessions may be held elsewhere when the court considers it desirable to do so. The official languages of the court are French and English. The courtâ€™s primary function is to pass judgment upon disputes between sovereign states. Only states may be parties in cases before the court, and no state can be sued before the World Court unless it consents to such an action.Â Few state parties to a case before the ICJ (or before its predecessor, the PCIJ) have failed to carry out the courtâ€™s decisions.