2004

Agora: the United States Constitution and International Law Editors' Introduction

Lori Fisler Damrosh

Bernard Oxman
University of Miami School of Law, bhoxman@law.miami.edu

AGORA: THE UNITED STATES CONSTITUTION AND INTERNATIONAL LAW

EDITORS' INTRODUCTION

*By Lori Fisler Damrosch and Bernard H. Oxman**

On the docket of the United States Supreme Court in 2004 is a substantial cluster of cases at the intersection of constitutional and international law. In the previous two Supreme Court Terms, the Court had adverted to sources of law and practice outside the United States, in its treatment of constitutional claims involving the death penalty and same-sex relationships.[1] The apparent willingness of the Court to consider international and foreign authorities in reaching its conclusions on contested issues of constitutional law has raised to new prominence the debate over the relationship between constitutional and international law. It is not yet clear whether the new (or newly rediscovered) interest of the Court in international sources presages a long-term trend toward a more cosmopolitan constitutional jurisprudence. On the assumption that this represents more than a passing fad, advocates before the Court in the current Term—for example, in the cases involving the "enemy combatant" detainees at Guantánamo Bay[2]—have vigorously pressed arguments concerning international and foreign law in connection with the constitutional issues at stake. The Court's acceptance of quite a few cases raising a mixture of international and constitutional questions for decision in 2004[3] may signal that the Court is preparing for a new era of engagement with legal developments external to the United States, or, alternatively, that it seeks to limit (or in any event to delimit) the relevance of such developments for the U.S. legal system.

The present Agora offers an opportunity for proponents of the uses of international jurisprudence in constitutional adjudication, and for critics of such methodologies, to advance the debate on this controversy. *Harold Hongju Koh*, who has been at the vanguard of the movement to encourage U.S. courts to pay more attention to international trends, traces a trajectory from the founding of the United States to the twenty-first century. He contends that U.S. willingness to uphold international law and to participate in a transnational legal process correlates with the ability of the United States to protect and promote human rights both at home and abroad. *Roger P. Alford*, by contrast, criticizes judicial resort to international sources in constitutional interpretation, on the grounds of incompatibility with democratic values

* Editors in Chief.

[1] Atkins v. Virginia, 536 U.S. 304 (2002) (international consensus against execution of mentally retarded persons); Lawrence v. Texas, 123 S.Ct. 2472 (2003) (European jurisprudence and practice on privacy of consensual same-sex relationships).

[2] Rasul v. Bush, *cert. granted*, 124 S.Ct. 534 (Nov. 10, 2003) (No. 03-334); Al Odah v. Bush, *cert. granted*, 124 S.Ct. 534 (Nov. 10, 2003) (No. 03-343).

[3] These include, in addition to the Guantánamo petitions, cases involving two U.S. citizens detained as "enemy combatants" under military authority in the United States; a petition calling into question the use of the Alien Tort Claims Act in the context of transborder abduction; a case involving prolonged detention of an alien found ineligible to remain in the United States but who cannot be deported to his country of origin (Cuba); a case in which a foreign sovereign defendant (Austria) has been sued on a Holocaust-related claim; and the latest in the series of efforts to clarify the constitutionality of the juvenile death penalty in light of the international consensus against this practice.

and the proper role of courts in a constitutional system. He also perceives a significant risk that an internationalist approach to constitutional adjudication could result in undermining rather than enhancing the American approach to constitutional rights. *Michael D. Ramsey* continues the critique by calling for those who would apply international sources to accept rigorous discipline in their use, involving (1) articulation of the theory of relevance of such materials; (2) acceptance of outcomes that might not necessarily support the rights-enhancing preferences of most internationalists; (3) attention to the full factual picture of international practice; and (4) avoidance of the uncritical assumption that the views of selected human rights tribunals and UN agencies represent a global consensus.

Gerald L. Neuman offers both a justification for turning to international law and practice as one available resource for constitutional interpretation, and a method for how to do so. He analyzes the relationship between international human rights law and constitutional interpretation in terms of their consensual, suprapositive, and institutional characteristics, so that a serious inquiry into international sources can inform a domestic court as it strives for the most complete understanding of complex problems that recur in democratic societies around the world. Finally, *T. Alexander Aleinikoff* seeks to move beyond the existing debates on the place of international law in the U.S. legal system, by advocating congressional enactment of a new "Incompatibility Statute" modeled on the British Human Rights Act, which would allow for judicial determinations of inconsistencies between U.S. federal law and international law and facilitate efforts to ensure compliance with the international obligations of the United States.

Our hope is that the viewpoints expressed in this forum not only will contribute to the ongoing dialogue in this country about the relevance of international sources to domestic legal questions, but also will help our foreign readership reach a fuller understanding of the complex interactions of international law and constitutional law in the United States.

INTERNATIONAL LAW AS PART OF OUR LAW

By Harold Hongju Koh[*]

What did the United States Supreme Court mean when it famously said, "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination"?[1] Perhaps the Court was suggesting that, in an interdependent world,

[*] Of the Board of Editors. The author served as Counsel of Record for Mary Robinson, et al., Amici Curiae, in *Lawrence v. Texas* (arguing that statutes criminalizing same-sex sodomy violate the concept of "ordered liberty" in Due Process and Equal Protection clauses), and for U.S. Diplomats Morton Abramowitz, et al., Amici Curiae, in *McCarver v. North Carolina*, No. 00-8727 (U.S. cert. dismissed Sept. 25, 2001), and in *Atkins v. Virginia* (arguing that execution of those with mental retardation violates Eighth Amendment's cruel and unusual punishments clause). Special thanks to Gerald Neuman, for his insight; to Kenji Yoshino, Ryan Goodman, Robert Wintemute, and an extraordinary group of Yale Law students who worked with me on those amicus briefs; and to Allon Kedem for his fine research assistance.

[1] The Paquete Habana, 175 U.S. 677, 700 (1900). Five years earlier, in *Hilton v. Guyot*, 159 U.S. 113 (1895), Justice Gray explained in more detail:

> International law, in its widest and most comprehensive sense—including not only questions of right between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation—is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination.

Id. at 163.