



# BOSTON COLLEGE

BOISI CENTER  
FOR RELIGION AND AMERICAN PUBLIC LIFE

## The Limits of International Human Rights Law in the U.S. Constitution

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OWENS: As they relate to American courts, what are the distinctions between the domestic laws of foreign nations, international law, and the treaties that the U.S. government signs and ratifies?

NAKAZATO: Constitutionally speaking, they each have a different status. Treaties, understood as anything the U.S. formally agrees to, fall under the supremacy clause of the Constitution, on par with the Constitution and other federal statutes. International law is understood to be “customary international law”: the rules of the game, so to speak, that govern the conduct between states. International law is binding on the United States (although, as I will discuss in my lecture, there is a huge debate about whether this is the correct interpretation of how customary international law should work). Lastly, foreign international law refers to laws made between countries. For example, NAFTA is a foreign law for Japan; it is a treaty law and would have no effect on Japan.

The issue we are going to talk about today is the extent to which foreign laws made by domestic courts for their domestic purposes should have influence as a source of advice. Again, there is a huge debate about the propriety of that.

OWENS: Is human rights law more or less developed than other areas of international law, like commercial law, criminal law, maritime law, etc.?

NAKAZATO: It is probably the least developed in several ways. International lawyers talk about hard law and soft law, and quite often, international human rights law is soft in the sense that it is aspirational, i.e. we agree these are good things. A lot of states do mention that, while they support international human rights law in principle, they do not have the economic ability to provide for it. For example, Barbados, in signing the Convention on Civil and Political Rights, said “we agree to the point that free legal services should be given. We just can't afford that.” This sort of thing happens. So it is developed, but not as fully as some other fields of international law.

OWENS: If the task of American courts is to interpret and apply American law, why should American jurists care about foreign law? Isn't it outside of their purview?

NAKAZATO: This is exactly the debate that is going on, with a good example being the recent hearings for the nomination of Justice Kagan. Senator after senator asked: “why would you go abroad [in searching for precedents on which to make domestic legal decisions]?” The answer that has been given by scholars, and by some judges, is that it doesn't hurt to see what others have done. American courts have no monopoly on wisdom; you have to look at different circumstances.

OWENS: Are the arguments for the merits of consideration of foreign law predicated on a broad view of the liberal aims of courts, as opposed to a technical role that judges might play in interpreting the particular passages in a text?

NAKAZATO: There is that assumption, given that the advanced democracies of the world are all liberal democracies. Using foreign law in domestic courts is not an attempt to actually synchronize the findings, but rather, it is acknowledging we all face the same problems. In looking at how foreign courts have approached similar problems, we can ask questions like: How have you done it? Is it appropriate for you? Should we do the same? The label of “activists” is used in these situations, as opposed to that of “originalists,” to use the terms of the domestic debate we have here at home.

OWENS: What are the concerns of people who argue against using foreign and international law as a model in domestic courts?

NAKAZATO: The general argument comes to sovereignty. If we are a sovereign nation, why should the insights or views of other peoples concern us at all? The usual argument is that using foreign law somehow detracts from who we are, that our judges would deign to look at other countries. I think that point relies on a very romantic sense of state sovereignty that's never existed. We appoint judge—they are unelected—and then ask them to interpret laws that none of us has had a say making. They are either precedents or rulings that other courts have made. For example, a federal court may make up rules and state judge has no choice but to

comply. But this argument does seem to resonate with people. This is a terrible thing that happened.

OWENS: How does this question of sovereignty relate to the recent brouhaha in Oklahoma over Sharia law and the proposed amendments that are being considered in Texas and Wyoming?

NAKAZATO: I think, collectively, these statutory amendments and the Constitutional amendments that all these states are proposing feed back into the overall movement that. After the Berger and Warren courts, there has been a shift back towards conservatism. The Rehnquist court was quite a bit more conservative. More recently, the trend has picked up in the sense that we should prohibit using Sharia law. The discussion about international law is peculiar. Generally that is understood not to mean treaty law. I have looked at all the bills, and they understand that if it is a treaty it is ipso-facto federal law that must apply. But international law in this context is customary international law, and opponents have no desire to have that happen. Why? I am not yet sure. The idea of American Exceptionalism probably plays a role.

OWENS: Among the people debating such things, is there a distinction articulated between religious law and international law?

NAKAZATO: I think they have conflated the two together as evils that contaminate our own jurisprudence. The proposed legislation from Arizona goes as far as to outlaw Canon Law and even Halacha and Karma. I did not realize that Karma was a law. They make an exception for a rather foreign source of law, which is Christianity. Christianity, they say, is part of the Anglo-American tradition and in this way it has slid under the door. There is no distinction made between these religious laws, and customary law. They are seen as just as undesirable.

OWENS: Are the concerns about the diminished sovereignty and religious encroachment valid?

NAKAZATO: Some of the authors of these various bills were asked [to give evidence for their positions], and they could not come up with a single case of diminished sovereignty or religious encroachment. The comments often explain that these laws are a pre-emptive strike. That's what it comes down to: we want to stop it before it happens. I think that this feeds into the fears among conservatives [about President Obama's connection to Muslims]. A recent poll shows that a large number of conservatives (35%) believe that Obama was not born the United States. The fear is that President Obama is in bed with a Muslim conspiracy.

OWENS: Can you provide some recent examples in the Supreme Court or other federal jurisdictions in which foreign law had some role to play, especially in the human rights areas?

NAKAZATO: The three that come up most recently were *Atkins v. Virginia*, *Lawrence v. Texas*, and *Roper v. Simmons*. In each case, the deciding courts looked to what was done abroad not for precedent, but for examples of plausible reasoning. Scalia and Thomas were very clearly against, arguing: “We shouldn't be doing this. Why are we looking to other countries?”

OWENS: Now each of those cases you mentioned (*Atkins* on the execution of mentally handicapped persons, *Roper* on the juvenile death penalty, and *Lawrence* on sodomy) could be understood as progressive decisions. Are there any examples of international legal advice in which the law or debate under consideration had a different tenor, perhaps with regard to abortion or religious freedom?

NAKAZATO: The dialogue across states is interesting. Just because other countries have made a decision one way does not mean that another country looking at the case will necessarily follow that decision. In Canada, in the hate speech case *R. v. Keegstra*, they looked explicitly at what the United States had done and said “we can't do that, speech is not an absolute right.” The U.S. rights to free speech are much more than say, those in Germany. You cannot speak about the Holocaust or the Nazi regime in Germany. It becomes a question of perspective. In some ways, the three cases that I just mentioned are all progressive. But there are also cases that you could argue go backward.

OWENS: When did this start? Do you have a sense of when the Supreme Court first took international law into account?

NAKAZATO: If by international law, you mean customary international law, then the court is always taking it into account. That is the debate that you will see in the law journals. The revisionist camp holds this position and is a rather new phenomenon, occurring in the last 20 years at the best. The internationalist camp, also called traditionalists, argue that we have always incorporated international customary law into our own. Insofar as we view treaties as our law as well, we have always looked to what other countries do.

It is interesting that we are signatories to a lot of treaties. Of the ones we have ratified, we have generally gutted out the international strength of them through a process called RUD: reservations, understandings, and declarations. Through RUD, we state that we are signing the treaty, but that a lot of the clauses do not apply. This is all more or less the Rehnquist court on it. In some ways, I think all of this is the post Warren and Burger court era. Politicians, judges, and legal scholars have said we have got to draw a line in the sand.

OWENS: So what was it during those prior courts that led to reactionary movement?

NAKAZATO: A lot of the previous work was driven domestically. The courts continually found rights that people did not think existed in the Constitution, or having been given positive rights, the courts were fine to let the governments provide health care support, legal, public education, all these things. The originalist camp, if that is the word to use, asked “what are some other sources for these expansions? Because the Constitution is being pushed as hard as it can be.”

International law came up as an obvious source, because there are many liberal democracies across the ocean that in many ways are much more progressive in their universal healthcare, their cradle to grave approach. Insofar as these were second generation, third generation human rights, they were things that [those in the originalist camp] wanted to avoid. This resulted in the reaction against looking to international law, so we signed the international treaties, but through RUDs, said we are not going to apply them. I do think on some level it is sort of the follow-effect. The Warren and Burger courts I think were a wake-up call to a certain group of people wary of looking outside of domestic law.

OWENS: Terrific. Thank you very much, and thanks for your time talking with me.