

Towards A Conceptualization of Cosmopolitan Courts

by

Sheldon Bernard Lyke*

* PhD candidate, Department of Sociology, University of Chicago. JD, Northwestern University School of Law. This is a work in progress for presentation at 8th Annual Globalization Conference: The Rights of Others sponsored by the Workshop on the Sociology and Cultures of Globalization at the University of Chicago.

I. A Working Definition of Cosmopolitan Courts

This paper seeks to understand—from a social perspective—a growing trend among national high courts and supranational courts to become more global and cosmopolitan rather than provincially domestic in scope. I use the terms cosmopolitan, global, and transnational somewhat interchangeably. Therefore a definition of globalization is important when conceptualizing cosmopolitan courts. While there are a number of different scholarly definitions of globalization,¹ there is some overlap and agreement regarding the essence of its meaning.

For many scholars, globalization is a set of social processes that:

- (1) creates and multiplies existing social networks that overcome political, economic, cultural, and geographic boundaries,
- (2) expands and stretches social networks and interdependencies
- (3) intensifies and accelerates social exchanges and activities and,
- (4) fosters in people a growing subjective awareness of deepening connections between the local and the distant/global.²

Cosmopolitan courts are courts shaped by social processes and whose members (judges, lawyers, and clerks) are engaged with networks that overcome geographic boundaries in the administration of justice. The social processes that expand and stretch the social networks of the cosmopolitan court affects how its judges interpret laws. These social processes also change judges' (and possibly citizen's) awareness of the connection between their local and global imaginations.

Distinguishing International from Transnational

Note that this paper is not about international courts per se. Unlike international courts and tribunals, cosmopolitan courts are not necessarily formed to deal with specific events of international importance, nor are they necessarily formed to deal with regional human rights disputes. Also, a cosmopolitan court does not simply pay greater attention to international law.

¹ Scholte suggests that no definitions of globalization can be completely unambiguous or objective, since every definition reflects a particular context in which the social scientist sits. Jan Aart Scholte. *Globalization: A Critical Introduction*. (2000). p. 42. We should recognize this limitation, yet still strive for a definition that can focus our inquiry.

² This definition draws largely from Manfred B. Steger, *Globalization: A Very Short Introduction*. Oxford Press. 2003. pp. 9-13.

While cosmopolitan courts may work to settle international issues, resolve regional disputes, or interpret international law—what makes them cosmopolitan is that they conceptualize law transnationally and participate in transnational legal processes.³ We should be careful not to equate transnational law (or transnational legal processes) with international law. Jeremy Bentham coined the term “international” in the 1780s to explain the rise of nation-states and cross-border transactions between them.⁴ Traditionally, international legal processes refer to state-to-state interactions. According to Black’s Law Dictionary, international law comprises the “rules and principles of general application dealing with the conduct of nations and of international organizations and with their relations *inter se* [between themselves], as well as with some of their relations with persons.”⁵ This definition illustrates the primacy of the nation-state in international law. While international law imposes certain duties on nations with respect to individuals, individuals can rarely (in the absence of a specific agreement) bring a complaint. Usually, only states can complain of violations against their nationals before international tribunals. A nation-state is not always obligated to bring complaints, and may choose to abstain.⁶

While international law regulates the role of nation-states, transnational legal processes or transnational law “transcends” national boundaries. The nation-state is not necessarily central to understandings of transnational law. Transnational law can occur between individuals and in situations where physical geography is less important.

Transnational is not a synonym for international. Neither is it a synonym for universality, homogeneity, or diffusion.⁷ Borrowing from Scholte’s conceptualization of globalization—we should reject the use of redundant concepts that are usually conflated with the term transnational.

³ For a discussion of transnational legal processes, see Harold Hongju Koh, “Transnational Legal Process.” *Nebraska Law Review* v. 75, p.181. .Koh defines the transnational legal process as “the theory and practice of how public and private actors—nation-states, international organization, multinational enterprises, non-governmental organizations, and private individuals internalize rules of transnational law.” p. 183. First, he states that the transnational legal process is nontraditional in that it breaks down the dichotomies between domestic & international law, and public & private law. Secondly, he is careful to note that the actors in the process are not limited to (nor are primarily) nation-states. Next, he claims that the process mutates, and moves through the domestic & international and the public & private. Finally, he says that the process is normative, in that when new rules emerge, they are interpreted, internalized and enforced.

⁴ Scholte, at 43.

⁵ Black’s Law Dictionary, abridged 6th edition p. 565.

⁶ Legal Information Institute. “International Law: an overview.” <http://www.law.cornell.edu/topics/international.html>.

⁷ See Alfred Aman, Jr. “Introduction” *Indiana Journal of Global Legal Studies* 1:1.

These include internationalization (increased interaction and interdependence between different countries), liberalization (lack of regulatory barriers), universalization/diffusion (spread of phenomenon around the globe), and westernization/modernization (homogenization toward western, modern, and/or American ideals).⁸

The distinctive concept of transnationalism is deterritorialization—or the growth in supraterritorial relations between people.⁹ The utility of the term transnational is to describe situations where territorial space is substantially transcended, or where social geography is no longer entirely linked to the territorial.¹⁰ Non-legal examples where social connections are substantially detached from territory include telephone calls, electronic finance and the depletion of ozone.

I argue that transnational law, or transnational legal processes, describes the phenomenon whereby the creation and enforcement of law is also detached from territory. The study of transnational law transcends international law, and is not limited to the study of how nation-states conduct themselves alone and in relation to one another. Transnational legal scholars study laws effect on how individuals, corporations, and non-government organizations behave themselves similarly (or differently) even when they don't share the same territory. The study of transnational legal processes examines how law (whether formal as codified by nation-states or informal as conceived in the mind of a single citizen) is formulated and spread across territories—whether it be through social movements, telecommunication technologies, or cultural artifacts (like popular television shows).

Transnational legal scholars are not just interested in this diffusion. They also want to understand what happens when the diffused law “touches down” on territory and localizes. For example, a declaration to protect the right to equal protection under the law may manifest differently in Brazil than in Botswana due to the varying social, cultural and historical contexts of the countries.

⁸ Jan Aart Scholte. *Globalization: A Critical Introduction*. (2000). pp. 44-46.

⁹ Scholte at p. 46.

¹⁰ Scholte writes that until recently, social geography across the world had a territorialist character. Indeed even today many people use the terms ‘geography’ and ‘territory’ interchangeably, as if to exclude the possibility that space could be non-territorial. *Id.* at pp. 46-49.

Distinguishing International and Foreign Law

Much of the literature seems to conflate international law and foreign law. This is an important distinction, because the many national constitutions (including the United States) state clearly that some international law is part of domestic law. One can imagine cases where the interpretation of a treaty or international law is not an actual exercise in cosmopolitanism. In order to understand fully cosmopolitanism and courts, we must be clear not to confuse acts of using foreign law, with acts using international law. Therefore, we must give some thought to differentiating the two.

Justice Ginsburg notes the distinction between international and foreign law in the context of the United States:

Now, I should make a distinction between international law, which you mentioned and law of another system. International law is part of our law, it's the laws and treaties of the United States. International law is very much part of the law of the United States. That has been recognized ever since, at least since Chief Justice Marshall and probably Chief Justice John Jay. So international law is part of our law.¹¹

The US Constitution supports Justice Ginsburg's contention that international law constitutes US law. Article VI of the US Constitution reads, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and Thing in the Constitution of Laws of any State to the Contrary notwithstanding." Therefore treaties and international agreements entered under the authority of the US government comprises US law and according to the US Constitution is not foreign.

Foreign law, it seems, are rules that lie outside of the domestic sphere. I borrow the definition of foreign law used by Congress in the 2004 hearings on House Resolution 568, where congressmen defined foreign law as including judgments, laws, or pronouncements of foreign institutions. This does not, however, include pronouncements that inform an understanding of the

¹¹ United States Supreme Court Justice Ruth Bader Ginsburg. UCLA Law School. January 27, 2006. (transcribed by Sheldon Bernard Lyke, can be found at: <http://www.law.ucla.edu/stream/?file=ginsburg/ginsburg3.wmv>)

original meaning of the laws of the United States.¹²

II. Features of Cosmopolitan Courts

Becoming more transnational has led courts to more cosmopolitan interpretations and enforcement of individuals' civil and human rights.¹³ Being cosmopolitan has manifested itself in the form of courts exercising universal jurisdiction, courts citing (and being cited as) foreign references (i.e. transjudicial communications), and judges conceptualizing their work as no longer solely domestic, but part of a larger global reality.

TRANSJUDICIAL COMMUNICATION

Anne-Marie Slaughter writes that "courts are talking to one another all over the world."¹⁴ "The European Court of Justice," she adds, "and the European Court of Human Rights [ECHR] cite one another's decisions; the Inter-American Court of Human Rights looks frequently to the European Court's case law."¹⁵ Mary Ann Glendon notes that judges engage in a "brisk international traffic in ideas about rights."¹⁶ She added that in countries like Europe, Australia, Canada, and New Zealand, "national law is increasingly caught up in a process of cross-fertilization among legal systems."¹⁷ L'Heureux-Dubé argues that while many scholars discuss how society lives in a world of globalizing law, scholars give little attention to how globalization is affecting the judicial decisions of the top appellate courts in the world. She writes that, especially on human rights issues, courts are increasingly looking to the judgments of other jurisdictions.¹⁸

¹² Surprisingly, there is an incredible amount of agreement in the United States that there are foreign laws that judges should be able to use. Many opponents of the broad use of foreign law accept the notion that judges can use foreign laws when (1) interpreting treaties or understandings between different nation-states, (2) when the foreign laws inform the legislative intent for a congressionally-enacted statute (i.e. if Congress looked to Cuba as a model for its health care system), and (3) foreign laws that illuminate the original meaning of the US Constitution or US piece of legislation. See Congressman Feeney, HR Resolution Hearings March 25, 2004.

¹³ Please note that this project focuses on human rights laws and issues that deal with individual liberty. I do not examine the use of international and foreign laws in the interpretation of other domestic constitutional law or commercial law issues.

¹⁴ Anne-Marie Slaughter. "A Typology of Transjudicial Communication." *University of Richmond Law Review* vol. 29, p. 99.

¹⁵ *Id.* at 99-100.

¹⁶ Mary A. Glendon, *Rights Talk: The Impoverishment of Political Discourse* p. 158 (1991).

¹⁷ *Id.*

¹⁸ Claire L'Heureux-Dubé "The Importance of Dialogue: Globalization and the International Impact of the

Slaughter coined the term transjudicial communication to describe this phenomenon. Transjudicial communication is “communication among courts—whether national or supranational—across borders. They vary enormously, however, in form, function, and degree of reciprocal engagement.”¹⁹ Slaughter identifies three forms of transjudicial communication: horizontal, vertical, and mixed vertical-horizontal. Horizontal communication occurs between courts of the same status across national borders (i.e. communication between the US Supreme Court and the Supreme Court of India).

Slaughter categorizes interaction between national and supranational courts as vertical communication. She writes that “the most developed form of such communication has emerged within the framework of a treaty establishing a supranational tribunal with a specialized jurisdiction that overlaps the jurisdiction of national courts.”²⁰ Thomas Buergenthal illustrates vertical communication with the example of a British Privy Council case interpreting the Jamaican Constitution with respect to the death penalty. In this case, the Privy Council cited opinions of the Inter-American Commission on Human Rights (IACHR) and to the United Nations Human Rights Committee (UNHRC)²¹ in reaching its opinion that lengthy death-row periods amount to cruel and unusual punishment.²² While there isn’t much empirical evidence to support this claim, at this point in history vertical communications are likely to be in the direction from supranational courts to national courts.

Finally, transjudicial communication that combines elements of the horizontal and vertical are mixed. Slaughter gives the example that “among states party to the European Convention on Human Rights...national legal rules and principles are spreading through the medium of ECHR [European Court on Human Rights] decisions.”²³ In this case, a supranational tribunal transmits horizontal communications.

Rehnquist Court” 34 *Tulsa L. J.* 15, p. 16.

¹⁹ Slaughter, p. 101.

²⁰ *Id.* at 107.

²¹ Jamaica ratified the American Convention on Human Rights and the International Covenant on Civil and Political Rights, and the Optional Protocol to Covenant. These instruments gave jurisdiction to the UNHRC and the IACHR over Jamaican human rights disputes.

²² Thomas Buergenthal “International Tribunals and National Courts: The Internationalization of Domestic Adjudication”, in *Recht Zwischen Umbruch und Bewahrung* 687, 694-95 (1995).

²³ Slaughter, p. 111.

Transjudicial communications can take a number of forms, but the most common example occurs when courts cite or reference another court's decision or opinion. L'Heureux-Dubé recounts a history of judicial influence when the United States was seen as one of the most influential sources of foreign authority in the fields of human rights and constitutional principles. She describes this as a phase of reception, where some courts are seen as givers and others as receivers. She argues, however, that this world-wide process has shifted from one of reception to dialogue. L'Heureux-Dubé writes that

Judges no longer simply receive the cases of other jurisdictions. Rather, cross-pollination and dialogue between jurisdiction is increasingly occurring....Judges around the world look to each other for persuasive authority, rather than some judges being 'givers' of law while others are 'receivers.' Reception is turning to dialogue.²⁴

L'Heureux-Dubé correctly limits her claim that the change from reception to dialogue is incomplete. She highlights the fact that while the Canadian Supreme Court frequently looks to foreign jurisdictions for guidance on human rights issues, "it [the Canadian Supreme Court] is cited by courts like those in Zimbabwe, South Africa, and Israel far more often than it refers to their cases."²⁵ Therefore it appears that we have not fully moved from a phase of reception to dialogue—as much as we have entered a phase where a few powerful courts—have become more cosmopolitan--and have entered into dialogue.

In a global legal phase of reception, where transjudicial communications are one-way, some courts are sites of production, while others are sites of consumption. Courts that engage in two-way interactions can be classified as hybrid sites that perform both functions of production and consumption. Consumption sites²⁶ take transjudicial communications from production sites, where the transmission may stop or be re-transmitted (and perhaps processed to a slightly altered form) and received at another site.²⁷

²⁴ L'Heureux-Dubé, p. 17.

²⁵ Id. at 27.

²⁶ Other non-judicial bodies may serve as consumption sites. These include other non-judicial government (or non-government) organizations, like a legislative body or news media.

²⁷ I am skeptical to use language like "sent" or "flows of information" as this connotes that the national courts that produce decisions are taking an active role in sending this information to other national courts. On the contrary, transjudicial communications are more passive on the part of producer sites. Sites of production produce the decisions and make them available, but other consumptive national courts (sites of

All courts can participate in transjudicial communications. Any court can survey the world's judicial legal landscape for decisions to use to help interpret cases. This would appear to be a primary element of a cosmopolitan court. Yet, another element of becoming cosmopolitan may be that the court doesn't simply listen and receive transjudicial communications (acting as a site of consumption), but that the court's decisions are heard—thereby simultaneously acting as a site of production.

There are a few courts that serve simultaneously as sites of production and consumption. These cosmopolitan courts are the courts often cited and have emerged as powerhouses that have created a majority of the cited foreign law produced.

These flows of social change decisions move not only through space, but also time. As years pass and flows change, the nature of a site may change. A site that begins as a site of consumption can become a hybrid site involved in more dialogue between other national courts. L'Heureux-Dubé gives the example of the Canadian Supreme Court which began as a site only consuming the civil and human rights jurisprudence of the US Supreme Court.²⁸ Through time, the Canadian Supreme Court has become involved in more dialogue and is now seen as a hybrid site with a number of foreign jurisdictions referencing its decisions and vice versa.²⁹

JUDGES' AWARENESS

One of the features of a cosmopolitan court is to have member judges conceptualize their work as part of a larger global reality and not only as a domestic endeavor. As previously mentioned, globalization is not only a set social processes that expand and intensify objective social networks that accelerate interactions and overcome boundaries. Transnational processes also can effect the subjective and stimulate individuals' awareness of the global.

Even on the US Supreme Court, thought by a number of foreign judges and lawyers as being parochial in its refusal to analyze international and foreign law, there are current and former members of the court exhibit global awareness with respect to legal interpretation. For example,

consumption) usually must look for the decision and receive it. This is unless there is an intermediating actor like the media that has publicized a court decision world-wide.

²⁸ L'Heureux-Dubé, at 18-19.

²⁹ L'Heureux-Dubé, at 22, 27.

Justice Ruth Bader Ginsburg in a speech discussed how the world is changing with respect to perceptions of distance and borders. She said,

We are part of an ever shrinking world. We're no longer divided by vast seas as we once were. You can get in touch with somebody in a very distant land with a click on a computer. So, if we don't take account of what the rest of the world is doing, I think we are first missing an opportunity to learn something, and we are also losing our own position as a country whose judicial systems were respected, were given careful consideration by other countries. We can't be hurt by looking at foreign law.³⁰

Justice Ginsburg, along with Justice Stephen Breyer, and former Justice Sandra Day O'Connor have articulated an understanding of law as part of a globalized world. In March 2002, Justice O'Connor expressed the opinion that international law is important to domestic courts because in a globalized world, no institution of government can isolate itself from the world. She said, "[a]lthough international law and the law of other nations are rarely binding upon our decisions in U.S. Courts, conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts."³¹

Justice Breyer shares O'Connor's view that international rulings should persuade the Supreme Court. He has stated that there are an increasing number of domestic legal questions that involve international law. He believes that when making decisions, foreign courts can help a domestic court by offering points of comparison on a number of different issues. Justice Breyer believes that a globalization of law is responsible for this phenomenon. He writes:

This change reflects the "globalization" of human rights...Judges in different countries increasingly apply somewhat similar legal phrases to somewhat similar circumstances...Thus it is not surprising to find that European Court of Human Rights has issued decisions involving, for example, campaign finance laws and free expression or that the Supreme Court of India has written extensively about "affirmative action."³²

³⁰ United States Supreme Court Justice Ruth Bader Ginsburg. UCLA Law School. January 27, 2006. (transcribed by Sheldon Bernard Lyke, can be found at: <http://www.law.ucla.edu/stream/?file=ginsburg/ginsburg3.wmv>)

³¹ Sandra Day O'Connor, Keynote Address. Proceedings of the Ninety-Sixth Annual Meeting of the American Society of International Law. 96 Am. Soc'y Int'l L. Proc. 348, 350.

³² Stephen Breyer. Associate Justice of the Supreme Court of the United States. "The Supreme Court and the New International Law." The American Society of International Law, 97th Annual Meeting. April 4, 2003. http://www.supremecourtus.gov/publicinfo/speeches/sp_04-04-03.html.

Not only does Breyer make attribution to the influence of international rulings, he is also able, to some degree, to articulate the process in which he and his fellow justices could be involved.

In August 2003, in a speech before the American Constitution Society, Justice Ginsburg noted that Supreme Court is beginning to examine law beyond the borders of the US in deciding human rights cases like the death penalty and gay rights.³³ She announced that that some judges on the Supreme Court “are becoming more open to comparative and international law perspectives.”³⁴ In the past, Ginsburg has said that “comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups.”³⁵

In addition to the words of the justices, we can also look to their actions as indicators of an awareness of a global world. Justices Breyer and O’Connor have both served as keynote speakers before the American Society of International Law. Justice O’Connor has also accepted an assignment to lead a conference on Middle East judicial reform in Bahrain.³⁶

UNIVERSAL JURISDICTION

When the lay person thinks of a *global* court, they usually think about the court’s reach. If you perform an Internet web search on Google.com for “global courts”, then you will find a plethora of references to supranational courts that prosecute international crimes—specifically the International Criminal Court (ICC). The ICC is a permanent tribunal set up when the Rome Statute entered into force on July 1, 2002.³⁷ The function of the ICC is to prosecute individuals accused of committing war crimes, genocide, and crimes against humanity. The ICC is a court of last resort, meaning that it can exert its jurisdiction only when national courts are unable or unwilling to prosecute criminals.

³³ Gina Holland. “Ginsburg: Int’l Law Shaped Court Rulings.” Associated Press. August 2, 2003.

³⁴ Id.

³⁵ Stephen Breyer. Associate Justice of the Supreme Court of the United States. “The Supreme Court and the New International Law.” The American Society of International Law, 97th Annual Meeting. April 4, 2003. http://www.supremecourt.us/publicinfo/speeches/sp_04-04-03.html

³⁶ Tony Mauro. Foreign Matters. July 8, 2003. http://www.law.com/jsp/newswire_article.jsp?id=1056139949802

³⁷ For a very brief introduction to the ICC and the Rome Statute see, International Criminal Court: About the Court <<http://www.icc-cpi.int/about.html>> visited April 12, 2006.

One of the main reasons why people may see the ICC as a global court is because it holds universal jurisdiction. Universal jurisdiction is the principle that a court can claim authority and administer justice over individuals regardless of the present location or nationality of the alleged criminal, or where the crimes were allegedly committed. Holding universal jurisdiction, the ICC has extraterritorial reach—meaning that it can arrest and prosecute an alleged criminal of Australian nationality who is sunbathing on the French Riviera for a war crime she committed in Bolivia.

Unfortunately, extraterritoriality has become synonymous with popular media representations of “global courts.” There is a popular fear—especially in the United States—of the ICC reaching into nations and arresting and prosecuting national citizens and infringing national sovereignty. The United States...

Thinking of universal jurisdiction or extraterritoriality as the defining feature of a global court or the globalization of courts is conceptually problematic however. First, while *universal* jurisdiction is a relatively new concept—courts have exercised extraterritorial jurisdiction, or administered justice beyond their national borders for some time. This is not an entirely novel concept. Even US courts have exercised a form of non-criminal universal jurisdiction, allowing civil suit against non-citizens for human rights abuses committed outside the US.³⁸

Secondly, and more importantly, focusing largely on universal jurisdiction and extraterritoriality ignores the *social processes* that have transformed many courts into more cosmopolitan institutions. In understanding the globalization of courts, one must be aware of the social processes affecting courts and not simply focus on the resulting conditions (i.e. universal jurisdiction).³⁹ In other words, universal jurisdiction is a result, and not the reason *why* courts are

³⁸ The first case to establish this precedent was *Filártiga v. Peña-Iral*, 630 F.2d 876 (C.A.2. 1980) ruled that the Alien Tort Claims Act (ATCA) allowed civil suit for non-domestic violations of international law. Over twenty years later, in 2004, the Supreme Court of the United States finally addressed the issue of whether the ATCA could be used to sue for overseas human rights abuses. In 2004, the court decided *Sosa v. Alvarez-Machain*, 542 US 692 (2004) and arguably affirmed the *Filártiga* ruling. For a discussion of *Sosa* and its affirmation of *Filártiga* see Naomi Norberg, “The US Supreme Court Affirms the *Filartiga* Paradigm”, *Journal of International Criminal Justice* 3 (2005).

³⁹ Manfred B. Steger offers an excellent review and critique stating that many have conflated the term globalization to refer to processes, conditions, systems, and forces. In order to provide more explanatory power he separates process from condition. He distinguishes globalization as a set of social processes that create “globality,” a “social condition characterized by the existence of global economic, political, cultural, and environmental interconnections and flows that make many of the currently existing borders and

more cosmopolitan and global. The ICC is not global because it has universal jurisdiction. Instead, the ICC has global elements because of the existing social networks between 120 nation-states that came together on the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court to overcome political and geographic boundaries to create the Rome Statute of the International Criminal Court. Nation-states (as opposed to courts or the ICC) participate in activities through their social networks, and work together to deterritorialize physical space so that the ICC can exercise universal jurisdiction with respect to crime against humanity.

Because courts, or specifically the ICC, have a very limited role in the creation of universal jurisdiction, I argue that while it is an element that can make a court cosmopolitan—it is by far not dispositive. It is not the most cosmopolitan activity of the court.

III. Why now?

Why are we witnessing increased cosmopolitanism of national and supranational courts? There are a number of political, sociological and structural reasons that can help explain this increase. One of the common reasons offered for the increase in cosmopolitanism is the rise of globalization.⁴⁰ Globalization, as mentioned at the beginning of this paper is a set of processes. Therefore, offering globalization as a reason, without identifying the specific social processes or events at work does little to explain increased cosmopolitanism.

The events and processes outlined below can explain the rise in the use of foreign decisions in most courts. They include: (1) similar issues, (2) international nature of human rights, (3) advances in technology, (4) personal contact among judges, and (5) the proliferation of non-governmental organizations.

1. Similar Issues

boundaries irrelevant.” Manfred B. Steger, *Globalization: A Very Short Introduction*. Oxford Press. 2003. p. 7.

⁴⁰ See Sarah H. Cleveland, “Our International Constitution” *Yale Journal of International Law*. Volume 31, p.5.

There are a number of national constitutional courts that are deciding similar issues.⁴¹ L’Heureux-Dubé states that social issues like abortion, hate speech, and homosexual rights are facing many courts throughout the world at approximately at the same time. She speculates that “[a]s social debates and discussions around the world become more and more similar, so, of course, do the equivalent legal debates.”⁴² She cites technological advances in news coverage that alert potential litigants about social justice victories around the world, thus encouraging them to bring claims in their own countries.⁴³ What also makes the current period of globalization different from the past is that judges and citizens (potential litigants) are now *aware* that they have similar issues. This occurred in the *Lawrence* sodomy case. The Supreme Court looked at an issue (homosexual rights) that had been recently litigated in Europe, and is currently being litigated in other countries around the world.

2. International nature of human rights

L’Heureux-Dubé states that after the Second World War, nations began to emphasize human rights as demonstrated by the passage of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights. Collectively these documents are known as the International Bill of Rights (IBR). Many nations drew on the IBR when drafting their national constitutions and human rights instruments. There was little or no domestic law to guide these nations in interpreting these new documents. As a result, these countries turned to foreign decisions to help them develop their own human rights jurisprudence.⁴⁴

3. Advances in technology

⁴¹ William H. Rehnquist, *Constitutional Courts—Comparative Remarks* (1989), in *Germany and Its Basic Law: Past Present and Future—A German-American Symposium* (Paul Kirchof and Donald P. Kommers eds., 1993) p. 412. Ruth Bader Ginsburg, *Remarks for the American Constitution Society, Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication* (Aug. 2, 2003).

⁴² *Id.* at p. 23.

⁴³ *Id.*

⁴⁴ L’Heureux-Dubé, at p. 24.

The third factor leading to the globalization of judicial decisions is advances in communications technology. Computers, electronic databases and the Internet increase global access to decisions from a range of different countries. Justice Ginsburg has noted the importance of the Internet with respect to access to international judicial decisions. She said “that the Internet is making decisions of courts in other countries more readily available in America, and they should not be ignored.”⁴⁵ L’Heureux-Dubé writes:

For example, anyone with a connection to the World Wide Web can obtain recent decisions of the Canadian Supreme Court, free of charge, as soon as they are released. Decisions of other courts worldwide are diffused electronically, while numerous internet [sic] sites consolidate access to banks of case law, statutes, and other materials from various jurisdictions.⁴⁶

The Internet is bringing greater access to judicial decisions. This access is likely to be uneven, however, due to the global digital divide.⁴⁷ From the view of production, developed nations (like Canada and the US) are more likely to have government judicial web sites that have access to court rulings than developing nations (i.e. Cuba and Tanzania). If one looks from the point of view of consumers, judges (and the lawyers who argue before them) in developed nations are more likely to have access to the Internet and the rulings when crafting their arguments.⁴⁸ If reliance on the Internet grows for select national courts, the global digital divide may stifle dialogue, and promote a system where some courts are producers of decisions while others remain receptors.

4. Personal contact among judges

One of the transnational legal processes that may attribute to the emergence of foreign law in domestic social change rulings could deal with the flow and exchange of ideas and information through micro level personal contact among judges. L’Heureux-Dubé states that

⁴⁵ See Holland. AP article.

⁴⁶ *Id.* at p. 25.

⁴⁷ A digital divide is the lack of access to information technology to certain populations. The digital divide is recognized as an international issue since high income OECD (Organization for Economic Co-operation and Development) countries comprise three quarters of the world’s Internet users. See Lisa J. Servon Bridging the Digital Divide: Technology, Community, and Public Policy. (2002) p. 1.

⁴⁸ There is likely to be more parity on the consumption side, as lawyers and judges even though they are in developing countries are part of a social elite, that may have some access to the Internet.

methods that foster these exchanges are international travel to judges' conference, the use of electronic mail, and conversations on the telephone. L'Heureux-Dubé, a justice on the Canadian Supreme Court, writes from personal experience saying:

I know that the friendships I have developed with judges from countries like the United States, Zimbabwe, South Africa, and Israel, to name just a few, have enabled me to discuss and correspond with them about decisions of our court and theirs, and about issues that cross national boundaries. I believe that attending conferences...helps to improve the decisions we make, as well as our reasoning, through contact with the ideas and insights of colleagues from all over the world.⁴⁹

Similarly, a number of legal scholars argue that the Supreme Court "justices' interest in international law has probably been influenced by meetings with fellow jurists on their frequent visits abroad."⁵⁰ International law scholar Harold Koh argues that not only do current Court justices travel more than they once did, but that they engage in dialogue with international jurists that helps them locate their jurisprudence on a global scale.⁵¹ Scholar Michael Dorf labels this micro level exchange the "Strasbourg Effect," after Strasbourg, France, home of the European Court of Human Rights (ECHR).⁵² Dorf writes that "[i]n recent years, justices have attended numerous international conferences with their counterparts from the ECHR, the European Court of Justice (the judicial body of the European Union), and members of constitutional courts from other nations."⁵³

In order to understand this argument fully, it is necessary to unpack it from a sociological standpoint. Two things are necessary: technology and dialogue. The technological transportation must exist to carry the justices overseas. But the trip itself is not where the law is created. The transnational legal process begins to create flows of information when the jurists engage one another and share information about their respective national constitutions at conferences. At these conferences, world judges have criticized the American justice system for being out of

⁴⁹ L'Heureux-Dubé, at p. 26

⁵⁰ Lane, at p. A13.

⁵¹ *Id.*

⁵² Dorf, Michael C. THE HIDDEN INTERNATIONAL INFLUENCE IN THE SUPREME COURT DECISION BARRING EXECUTIONS OF THE MENTALLY RETARDED. June 26, 2002. <http://writ.findlaw.com/dorf/20020626.html>.

⁵³ *Id.*

touch with world standards.⁵⁴ The justices learn that the problems they face are not isolated to the US, and that they can learn from foreign courts that are dealing with (or have dealt with) the same issues. This international dialogue is likely to change the lens through which justices view subsequent cases.

There are a number of examples of such micro level interactions that can change the perceptive lens of the Supreme Court. During a European tour in the summer of 2003, Justices Breyer, Ginsburg and O'Connor met with French President Jacques Chirac and discussed the death penalty and terrorism.⁵⁵ In July, 2003, five of the nine justices—Stephen Breyer, Ruth Bader Ginsburg, Anthony Kennedy, Sandra Day O'Connor, and Clarence Thomas—were at the Villa la Pietra in Florence, Italy for a forum with European judges and scholars to discuss the proposed new European Constitution.⁵⁶ Later that summer, many of these justices made other trips in to locations like Luxembourg, Paris, and Salzburg.⁵⁷ International travel involving the discussion of constitutional issues is not atypical for the current Supreme Court.⁵⁸

Social scientists need, however, more empirical evidence to theorize this hypothesis better, since no all international micro level interaction has led to justices incorporating foreign law into their decisions. Conservative Justice Antonin Scalia—who traveled to China, Croatia, Switzerland, and Austria in 2002—is a strong opponent to the use of international precedents.⁵⁹ In his dissent in *Lawrence*, he categorized the use of foreign views in the majority opinion as meaningless dicta. In *Atkins*, Scalia, in dissent, wrote that the practices of the world community were irrelevant. Chief Justice William Rehnquist travels and teaches in Europe during the Court's summer recess. In *Atkins*, Rehnquist wrote, "I fail to see, however, how the views of other

⁵⁴ *Id.*

⁵⁵ See Holland. AP article. It is worth noting that France abolished the death penalty in 1981. State executions remain legal in the United States.

⁵⁶ Joan Bikupic. "Supreme Court citing more foreign cases." *USA Today*.
http://www.usatoday.com/news/washington/2003-07-07-foreign-usat_x.htm.

⁵⁷ Tony Mauro. Foreign Matters. July 8, 2003.
http://www.law.com/jsp/newswire_article.jsp?id=1056139949802

⁵⁸ *Id.*

⁵⁹ *Id.*

countries regarding the punishment of their citizens provide any support for the Court's ultimate determination."⁶⁰

Clearly, international interactions are not enough to introduce international law into the Supreme Court. This essay lists these interactions as one of many transnational factors that can inject justices with the means to use foreign law in their decisions.

5. NGOs

Another mechanism leading to a rise in cosmopolitanism are non governmental organizations (NGOs). NGOs can serve as information networks to courts exposing them more worldly jurisprudence. In order for national judges to use international law, they have to be aware of it. For example, organizations like the American Society for International Law, have provided programs on aspects of international law at six federal appellate court circuits. In addition, the organization is drafting international law and international human rights overviews for distribution to interested federal judges.⁶¹ Also the International Commission of Jurists has a program to establish an Internet database of worldwide decisions on the independence of the judiciary.

Conclusion

We live in a world where courts read and use the decisions of foreign national courts. This paper has begun to theorize an anecdotal observation in the rise of national and supranational courts to act more worldly. I have categorized these globalizing institutions as cosmopolitan courts. This is but a first step. This project will continue by gathering more empirical evidence regarding the transjudicial communications of courts like the European Court of Human Rights and the supreme courts of Canada and the United States, for example.

Sociologists can help legal scholars understand the links between domestic law, international law and social justice, by providing empirical evidence (the future of this project) or analyzing already existing data. We can unpack and criticize the ideas of legal scholars to understand the hidden and often masked reasons behind the spread of international precedents.

⁶⁰ *Atkins*, at 324-35.

⁶¹ O'Connor, at 348.

Questions and claims of justices are less possible if power is masked through invisible hands.⁶²

The goal of sociology is to track power that operates below the surface. In a call for a sociology of globalization, Susan Silbey writes,

Let me be explicit. I am not suggesting that we pursue social theory because of a scholastic desire for knowledge for knowledge's sake...I suggest we pursue sociology more seriously because without that theoretically informed analysis of the social organization of power and law, without analysis that begins with the elemental dimensions of social interaction, critical questions of justice cannot be answered. In my view, sociological inquiry is the minimal prerequisite for engaged action on behalf of justice."⁶³

Understanding the operationalization of the mechanisms described in this essay is surely important for all who have an interest in promoting human rights and social justice on domestic and international fronts.

⁶² Susan Silbey. "‘Let them eat cake’: Globalization, postmodern colonialism, and the possibilities of justice." in *The Legal Geographies Reader*. (ed. By Nicholas Blonley et. al.) (2001). p. 274.

⁶³ *Id.*