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ARTICLE: GLOBALIZATION OF JUDGMENT: TRANSJUDICIALISM AND THE FIVE FACES OF INTERNATIONAL LAW IN DOMESTIC COURTS

NAME: Reem Bahdi*

BIO: * Director, Women's Human Rights Resources Project at the University of Toronto, Faculty of Law. An earlier version of this Article was presented in Rebecca Cook's seminar on international women's human rights law at the University of Toronto, Faculty of Law. The author would like to thank Rebecca Cook and the seminar participants for their comments and suggestions. Thanks are also owed to Ed Morgan for his helpful observations.

LEXISNEXIS SUMMARY:

... The rising use of international law in domestic courts across jurisdictions constitutes both symptom and cause of this globalization. ... The New Zealand Court of Appeal in Tavita v. Minister of Immigration, referred to the state's obligation not to separate children from their parents as a universal human right. ... A more positivistic approach to the CEDAW, reflective of the rule of law rationale, would have found these reservations significant because international law recognizes that they exempt India from particular provisions of the CEDAW assuming the reservations do not defeat the Convention's object and purpose. ... The Botswana court also referenced decisions by courts in England and New Zealand for confirmation that international law represents a legitimate interpretive aid in construing domestic legislation. ... Second, one national court's interpretation of a particular international norm can be taken into consideration by another court as, for example, the Canadian Supreme Court in Baker brought the interpretations of the Convention on the Rights of the Child rendered by the Australian and New Zealand courts to bear on their own reading of the treaty. ... " In this way transjudicialism and the domestic application of international law can help promote the conviction that international human rights law belongs to everyone. ...

TEXT:
[*555]

I. Introduction

Globalization has infiltrated judicial decision making. The rising use of international law in

domestic courts across jurisdictions constitutes both symptom and cause of this globalization. [n1] As Michael **[*556]** Kirby, Justice of the High Court of Australia, recently noted, "once we saw issues and problems through the prism of a village or nation-state, especially if we were lawyers. Now we see the challenges of our time through the world's eye." [n2] Still, judicial reliance on international law invariably generates controversy. The judges of the Supreme Court of the United States have proven themselves largely resistant to arguments based on international human rights law. Judges in other jurisdictions have also been critical of the trend towards globalization in judgment. Accordingly, judges who invoke international law in national courts seek to alleviate the anxiety of their critics by providing a justification for their reliance on international law.

This Article identifies and explores the justifications or rationales offered by national court judges in support of their references to international human rights law. It does not analyze the extent to which judges invoke international law; rather, it examines the reasons offered by judges to explain their references to international law. The focus is on leading decisions rendered by higher courts in the United States and Commonwealth jurisdictions where the international norms do not bind decision-makers because they have not been made part of domestic law through an act of incorporation, the relevant treaty has not been ratified, or the ratifying state has filed a reservation limiting a treaty's domestic effect. [n3] Analysis of these cases reveals that judges invoke international law for five interdependent yet discrete reasons: (1) concern for the rule of law; (2) desire to promote universal values; (3) reliance on **[*557]** international law to help uncover values inherent within the domestic regime; (4) willingness to invoke the logic of judges in other jurisdictions; and (5) concern to avoid negative assessments from the international community. These rationales are not universal in that they are not cited by all judges all of the time; however, they also are not unique to a particular jurisdiction and can be found in the case law across jurisdictions.

An examination of the case law in this manner has value for several reasons. First, no similar transjurisdictional analysis has been undertaken despite the academic interest in the domestic use of international law. The existing scholarship tends to focus on a single jurisdiction rather than bringing a transnational approach to the inquiry. Analysts appear hindered by the doctrinal diversity that marks the use of international law in domestic courts. The emphasis on the rationales or justifications invoked by judges in support of their reliance on international law removes this hindrance; the rationales are not specific to a particular doctrinal context because they are intended to justify the doctrine, and, hence, appeal to logic rather than established legal precedent. Accordingly, an examination of the rationales can point to the common elements used by judges across jurisdictions in their decision-making and identifies the complex and subtle ways in which international and domestic law interact. Such an analysis proves timely for women's rights advocacy because advocates and scholars have increasingly come to regard international law as a source of hope for the women's rights agenda. [n4] An examination of the rationales invoked by judges in support of their reliance on international law can thus support creative advocacy strategies and ground assessments of whether the international regime can live up to the expectations of scholars and advocates who have high hopes for vindicating women's rights through international law.

II. Transjudicialism

Ann Marie Slaughter's analysis of transjudicial communication focused academic interest on the judicial use of extrajurisdictional sources. [n5] Slaughter advances a simple yet salient insight: "Courts are ... talking to one another," all over the world as national and transnational courts and tribunals increasingly reference each **[*558]** other's decisions. [n6] Slaughter observed that this cross-fertilization of ideas takes place even when "neither the speaking nor the listening court is bound by a treaty structure or any other direct and formal links." [n7] Slaughter concludes that national courts cite foreign sources as a form of persuasive authority; the appeal of a foreign "judgment derives from its intrinsic rationality rather than from an 'argument' of authority." [n8] In other words, courts speak to each other across jurisdictions not because they have to but because they want to. According to Slaughter, transjudicialism will inevitably lead national and supranational courts to increasingly conceive of themselves as members of a larger judicial community, one that transcends national boundaries and that encompasses a commitment to human rights. [n9]

Extrajudicial factors have undoubtedly spurred the growing judicial reliance on international human rights law in national courts. Judges meet with increasing frequency at judicial colloquia where they share experiences in using international law and receive training on its application. [n10] Judges also meet through judicial exchange programs; for example, several justices of the U.S. Supreme Court recently met with their counterparts on the European Court of Human Rights. [n11] The agenda included discussions **[*559]** about the status of women's human rights. [n12] Further, the Internet has advanced international law's status within scholarship and decision making in ways that have yet to be fully explained or explored. At the very least, the Internet has facilitated access to information and connected groups across the world who advocate at the national level with reference to international legal standards. [n13] Whereas international resources have historically been difficult to locate, [n14] particularly in countries that lack access to expensive law libraries, these sources can now be found readily over the Internet. [n15] A number of legal clinics and advocacy centers across jurisdictions, moreover, have dedicated themselves to using international law and supporting lawyers who wish to incorporate international sources into their arguments before domestic courts. [n16] Formal and informal e-mail networks permit advocates to exchange opinions and strategies with colleagues in other nations. [n17] The exchange amongst advocates inevitably finds its way into arguments made before national courts and thus feeds the development of transjudicialism.

Transjudicialism has the potential to transform the women's international human rights movement. It can help facilitate the internationalization of human rights norms through the mutually enforcing processes of internal persuasion and international pressure. [n18] **[*560]** Before one can consider transjudicialism's potential for women's human rights, however, one must first examine the various ways in which judges invoke international law. How does international law operate in judicial decision-making? When and why do judges invoke international norms? Examination of leading cases across jurisdictions reveals that international and domestic law share a complex and

multifaceted relationship. In any given case, judges who invoke international law offer one or more of five possible rationales in support of their adjudicative method.

III. The Five Faces of International Law in Domestic Courts

A. The Rule of Law Imperative

Judges across jurisdictions express the opinion that the ratification of a treaty constitutes a legally significant act, and that domestic courts should strive to hold national governments accountable to their legal commitments. This rationale can be termed the "rule of law imperative." Although the phrase "rule of law" has various meanings within legal philosophy, under this rationale it is understood as a method of promoting certainty and respect for the law. F.A. Hayek's definition captures the intended connotation under this rationale:

> Stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand - rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge. [n19]

Despite international law's status as law from another realm, judges working under this rationale emphasize that the state must be held accountable for its promises.

Courts, according to this rationale, must promote respect for the rule of law and help guard against hypocrisy by fulfilling international commitments. Accordingly, the rule of law imperative focuses the judge's attention on whether the national government **[*561]** has ratified an international treaty or is bound by a rule of customary international law. [n20]

Judges across the Commonwealth countries demonstrate a commitment to the rule of law rationale. The Court of Appeal of New Zealand in Tavita v. Minister of Immigration dismissed as "unattractive" the argument that immigration officers are entitled to ignore international obligations in determining whether individuals could be deported despite the impact on family members, particularly children. [n21] The court refused to accept that "New Zealand's adherence to international instruments has been at least partly window-dressing." [n22] In R. v. Poumako, the same court took the occasion to "affirm New Zealand's commitment to the International Covenant on Civil and Political Rights." [n23] This case involved legislation passed to stiffen penalties for murders committed in the course of home invasions. [n24] The legislation was motivated by the public outrage that resulted when the accused invaded a woman's home, sexually assaulted, and then killed her. [n25] The question before the court was whether the accused could be sentenced under the new legislation given that it was enacted subsequent to the appellant's criminal conduct. [n26] Although it sympathized with the

impulse that gave rise to the legislation, the court nonetheless concluded that retroactive legislation would put New Zealand in violation of its international obligations. [n27]

Judges in other jurisdictions share New Zealand's commitment to guarding against hypocrisy. [n28] In Muojekwu v. Ejikeme, the Nigerian Court of Appeal determined the legitimacy of a custom called **[*562]** "Nrachi." [n29] Nrachi entitles a man who has no male heirs to keep one of his daughters at home so that she can bear sons and raise them for him; consequently, the daughter cannot marry. [n30] As compensation, she symbolically assumes the status of a son and stands to inherit her father's estate, a privilege that would otherwise have been denied to a woman. [n31] In denouncing this custom, Justice Tobi provided an analysis of international law. Stressing that Nigeria had ratified the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), [n32] Justice Tobi concluded that Nigeria must live up to its international obligations. [n33] He stated:

> Virginia has protection under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). By the Article, State Parties condemn discrimination against women in all of its forms and agree to a policy of eliminating discrimination against women ... . In view of the fact that Nigeria is a party to the Convention, courts of law should give or provide teeth to its provisions. [n34]

Justice Tobi's contention that national courts offer a forum for the enforcement of international instruments finds its echo in other national courts.

Also animated by the conviction that courts should give "teeth" to international provisions, the Supreme Court of India leads many national courts in its commitment to giving effect to international law. Apparel Export Promotion Council v. Chopra involved the question of whether an employer who had unsuccessfully attempted to sexually molest an employee was nonetheless guilty of sexual harassment. [n35] Condemning the employer's behavior, the Indian Supreme Court observed that India was a party to the CEDAW and related international instruments. Therefore, India must give effect to international law because ratification creates expectations. [n36] The court stressed that "these international instruments cast an obligation on the Indian state to gender sensitise its laws and the Courts are under an obligation to see that the message of the international **[*563]** instruments is not allowed to be drowned." [n37] The court cited several of its previous decisions that also reinforced the court's duty to give effect to international law where possible. [n38]

Vishaka v. State of Rajasthan, a widely celebrated decision of the Indian Supreme Court, also invoked the rule of law imperative. [n39] Vishaka came before the Indian Supreme Court in the form of a public interest class action, filed by social activists and nongovernmental organizations

("NGOs") to prevent sexual harassment in the workplace. [n40] The case followed the brutal gang rape of a social worker while on duty. [n41] The applicants argued that while women suffer sexual harassment on a daily basis in the workplace, neither the executive nor the legislature took any appropriate action to protect women from such harm; hence, it was incumbent upon the court to act. [n42] In a stunning move by any legal standards, the Indian Supreme Court drafted a law relating to sexual harassment in the workplace and declared it the law of the land, unless Parliament were to abrogate it by with its own sexual harassment legislation. [n43]

In drafting its legislation, the Indian Supreme Court turned to India's international legal obligations for guidance. [n44] It observed that the government of India had made international legal commitments concerning women's equality and that the court should ensure that India's promises are realized:

> The Government of India ratified the [Women's Convention] ... with some reservations which are not material in the present context. At the Fourth World Conference on Women in Beijing, the Government of India also made an official commitment, inter alia, to formulate and operationalise a national policy on women which will continuously guide and inform action at every level and in every sector; to set up a Commission for Women's Rights to act as a public defender of women's human rights; and **[*564]** to institutionalise a national level mechanism to monitor the implementation of the Platform for Action. We have, therefore, no hesitation in placing reliance on the above for the purpose of construing the nature and ambit of the constitutional guarantee of gender equality in our Constitution. [n45]

Like its counterparts in other countries, the Indian Court indicated its intention to rely on the promises made by the Indian state to the international community.

In Unity Dow v. Attorney General of Botswana, the Court of Appeal of Botswana considered whether citizenship laws that permitted male citizens to pass on their citizenship to their children, but prohibited women from doing the same, constituted sex discrimination. [n46] Finding that the legislation was discriminatory, the court observed that Botswana seeks to avoid violating international law where possible:

> If it has merely been signed but not incorporated into domestic law, a domestic court must accept the position that the legislature or the executive will not act contrary to the undertaken given on behalf of the country by the executive ... . In this regard, I am bound to accept the position that this country will not deliberately enact laws in contravention of its international undertakings and

obligations under those regimes. [n47]

The court thus projected its concern for keeping the promises of the legislature, to which it attributed a desire to uphold international law.

Justice Horwitz of the High Court of Botswana expressed this same desire to uphold international commitments when the Unity Dow case was before him prior to being appealed to the Court of Appeal. [n48] Noting that Botswana "adheres to" [n49] the International Covenant on Civil and Political Rights, Justice Horwitz concluded: "It is difficult if not impossible to accept that Botswana would deliberately discriminate against women in its legislations whilst at the **[*565]** same time internationally support nondiscrimination against females or a section of them." [n50]

Within the rule of law framework, international law represents the positivistic expression of state consent: A state does not have to adhere to international norms, but once it indicates its intent to do so by ratifying a particular human rights instrument, it should be held to its commitment. Ratification, on this view, remains central to the court's analysis. The implication is that courts cannot invoke unratified treaties in decision making. The primary objective is to promote the legality, or observance, of accepted and recognized legal rules wherever possible. The judge's role in this view is tied to promoting fundamental legality, or observance, of the law. The language adopted by courts reflects this concern, as judges employ words like "obligation," "undertaking," "commitment," and "observance" to underscore the legal significance of ratification and denounce suggestions that ratification need not be undertaken with any sincerity.

Sir Anthony Mason, former Chief Justice of the Australian High Court, encapsulated the concern for preventing double standards and hypocrisy as follows:

So, when an Australian convention ratification is announced, they may dance with joy in the Halmaheras, while here in Australia, we, the citizens of Australia, must meekly await a signal from the legislature, a signal which may never come. Of course, this concept of ratification involving only a statement to the international community but no statement to the national community, is quite insupportable. [n51]

Partly driven by this concern for promoting the rule of law, the Australian High Court determined in Minister of State for Immigration and Ethnic Affairs v. Ah Him Teoh that the ratification of a treaty by Australian officials gives rise to a legitimate expectation that Australian decision makers will act in accordance with the treaty. [n52] This case revealed the extent to which the Australian bench sought to guard against hypocrisy. The High Court Justices expressed considerable

frustration with the government's argument that ratification could be ignored. [n53] Justice Deane's line of questioning reflects **[*566]** the aggravation of his judicial colleagues: "What was being put to you was that there was an obvious policy and in that context I was putting to you that it is surely relevant that the executive has committed the Australian nation to that obvious policy." [n54]

Similarly, in Slaight Communications v. Davidson, the Supreme Court of Canada stressed that international obligations, both customary and conventional, can be used to determine the content of constitutional rights and also to assess the importance of the legislation's objective in assessing its validity under the Canadian Charter of Rights and Freedoms. [n55] Writing for the majority of the Supreme Court in that decision, Chief Justice Dickson looks to the International Covenant on Economic, Social, and Cultural Rights [n56] to define the duty owed to an employee by an employer seeking to terminate an employment contract. [n57] While the rule of law imperative is less obvious in this judgment than others, it is nonetheless evident in the care taken by the Chief Justice to include only Canada's international legal obligations within the scope of the interpretive presumption. [n58] The emphasis on ratified treaties reinforces that the rule of law imperative aims at giving effect to those obligations to which the state itself has consented. The rule of law imperative invoked by courts to justify their reliance on international law thus represents a corollary to the classical liberal premise that law is binding because its subjects have consented to be bound. [n59]

Madam Justice L'Heureux-Dube and Mr. Justice Gonthier of the Canadian Supreme Court relied on Slaight Communications in applying **[*567]** international law to the question of violence against women in R. v. Ewanchuk. [n60] The accused in that case was charged with sexual assault after making sexual advances towards a woman who repeatedly asked him to stop but otherwise made no move to leave or end the advances. [n61] The trial judge found that the woman's manner of dress and failure to leave constituted implied consent, and he dismissed the sexual assault charges. [n62] On appeal, the Canadian Supreme Court, however, ruled that fear prevented the victim from fully rejecting the sexual advances. [n63] The court noted that the victim indicated that the accused should stop; consent could not be assumed under the circumstances. [n64] In a separate concurring opinion, Justices L'Heureux-Dube and Gonthier turned to international law to underscore that Canadian authorities have an obligation to prevent violence against women. [n65] The Justices' reasoning implicitly suggests that avenues must be fashioned to bring international law home even where legislatures have not explicitly made international law part of the domestic law. In particular L'Heureux-Dube and Gonthier characterized the Canadian Charter of Rights and Freedoms as "the primary vehicle through which international human rights achieve a domestic effect." [n66]

In Grootboom v. Oostenberg Municipality, the High Court of South Africa raised the rule of law imperative to another level. [n67] The decision reflects the Court's willingness to traverse international sources by considering not only the text of the relevant international treaty, but also the meaning attached to the treaty by international authorities. Grootboom v. Oostenberg Municipality involved the question of whether certain South African municipalities should be ordered to provide shelter and other social services to the 390 adult and 510 child applicants. [n68] The applicants were squatters who had been evicted from their lands and had no place to live. [n69] The court undertook a rather

detailed analysis of international conventions and related documents in finding that the municipalities had a duty to provide shelter, but not to house, the **[*568]** children. [n70] The court concluded that parents cannot lay a claim to shelter in their own right; however, they can reap the benefits of their children's rights because the principle of the best interest of the child, as recognized under international law, mandates that children should remain in the company and care of their parents. [n71]

In delineating the scope of South Africa's obligations under international law, the court referenced the General Comments of the Committee on Economic, Social, and Cultural Rights. [n72] This is significant because it marks a serious desire to understand the full extent of South Africa's legal obligations as defined by the international body authorized with monitoring compliance with those obligations. The rule of law imperative in the Grootboom decision extends not only to showing respect and recognition for the substance of international law, but also for the institutions that comprise the international system.

The rule of law rationale stresses that international law imposes an obligation upon decision makers to render decisions in accordance with international norms. This obligation arises from the fact of ratification rather than out of a conviction that the norms themselves are worthy of special consideration. The nature of the promise is irrelevant; the binding nature of the obligation derives from the bare fact that a legal promise was made. The "rule of law" as envisioned under this rationale gives high priority to engendering respect for law, irrespective of its content, as a means of promoting certainty in decision making and thereby guarding against discretionary decision making.

B. The Universalist Impulse

In addition to concerns about the rule of law and the duty to keep a legal commitment, judges across jurisdictions also consider what can be termed "the universalist impulse" rationale. [n73] International law, when viewed under this lens, identifies those modes of conduct that respect fundamental characteristics of the human condition. The assumption is that these norms are relevant across time, space, and culture. The judge, in this view, is mandated to **[*569]** recognize and promote the inherent dignity and equal worth of all individuals. The importance of the task justifies bringing external values into the domestic realm through the domestic application of international law. Ratification proves irrelevant under this rationale because international law is regarded as a statement of universal norms necessary to the inherent dignity of each individual. Courts can thus invoke international norms, including those contained in unratified treaties, in their decisions when these norms encapsulate universal rights.

In Basu v. State of W.B., the Indian Supreme Court considered whether the death of an inmate through torture was compensable under either public law or the private law of torts. [n74] In rendering its affirmative decision, the court linked the violation of individual rights in this circumstance to the defacing of all humanity. [n75] It reasoned that the prohibition on torture is so vital to the moral fiber of all societies that its violation in one instance amounts to an attack on humanity at large. [n76] In the

words of the court:

No violation of any one of the human rights has been the subject of so many Conventions and Declarations as 'torture' - all aiming at total banning of it in all its forms ... 'custodial torture' is a naked violation of human dignity ... . Whenever human dignity is wounded, civilization takes a step backward - flag of humanity must on each such occasion fly half-mast. [n77]

Similarly, in Valsamma Paul v. Cochin University, the Indian Supreme Court stressed that "all forms of discrimination on grounds of gender [are] violative of fundamental freedoms and human rights." [n78] Valsamma Paul was born into one of India's higher castes, a "forward class," and married into a lower caste, a "backward class." [n79] Her lawyers argued that she was a member of the "backward class" by virtue of marriage; hence, a position at a university reserved for candidates of the "backward class" should be available to her. [n80] The Supreme Court, however, ruled that voluntary assumption of a disadvantage constitutes an insufficient basis for entitlement to the reserved university post. [n81] The judges found that Paul retained the privileges of her birth caste because she had received and accrued social benefits prior to marriage, including a **[*570]** quality education. [n82] The court dedicated a significant part of its commentary to international law, characterizing international treaties as an expression of the, "dignity and worth inherent in the human person." [n83] The court observed, for example, that:

Human rights and fundamental freedoms have been reiterated in the Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedom are inter-dependent and have mutual reinforcement. The human rights for women, including [the] girl child are, therefore, inalienable, integral and indivisible part of universal human rights ... . Fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development, social and family stability and growth - cultural, social and economic. [n84]

International norms, including those relating to gender equality, thus prove comparable to universal and inalienable rights that attach to the individual by virtue of personhood.

In reviewing the custom of allowing women to inherit their father's estates only after undergoing the Nrachi custom, the Nigerian Court of Appeal also looked to the CEDAW to identify those practices that violate natural law. [n85] Justice Tobi of the Nigerian Court concluded that the Nrachi

practice of preventing a woman from marrying so that she can raise sons for her father proves "repugnant to natural justice, equity and good conscience." [n86] He implicitly equated the international with the universal throughout his analysis. Labeling Nrachi an "uncouth custom [that is] not only against the laws of Nigeria but also against nature," Justice Tobi concluded that Nrachi represents one of those customs that international law seeks to eradicate. [n87]

Justice Tobi came closer than any of his judicial collegues to invoking the term "natural law." Generally, judges shy away from the phrase, probably because such language sounds too mystical and appears to garb the judge with some transcendental authority. Natural law theory, however, acts implicitly within their decisions as judges invoke words and concepts like "human dignity," "fundamental **[*571]** freedoms," and "inherent equality" to ground their analyses. Rarely are these terms defined or analyzed; rather, courts assume that their meanings are self-evident and their manifestations instantly recognizable. Hence, judges tend to assert that a given norm reflects natural law and generally offer little analysis to justify their choices. [n88] The New Zealand Court of Appeal in Tavita v. Minister of Immigration, referred to the state's obligation not to separate children from their parents as a universal human right. [n89] The court did not indicate why the child's right not to be separated from a parent constituted a universal norm; instead, it substituted reference to the Convention on the Rights of the Child [n90] in the place of detailed analysis. [n91] The Namibian High Court also looks to international law for guidance on the meaning of dignity and equality of persons. [n92] The court invokes the Universal Declaration of Human Rights [n93] and the African Charter of Human and People's Rights [n94] for guidance in determining how a society emerging from apartheid should promote the dignity and equality of all its citizens. [n95] The court does not explain, however, why the Universal Declaration or the African Charter embodied universal values. [n96]

Judges enlist several techniques to buttress the claim that international norms represent universal rights. First, they point to widespread commitment to international norms by members of the international community as evidence of the norm's natural law status. S. v. Williams, a 1995 decision of the Constitutional Court of South Africa, illustrates the point. [n97] This case involved the question **[*572]** of whether whipping juveniles as punishment for a criminal offense constitutes cruel and unusual treatment. [n98] In holding that whipping does violate the prohibition on cruel and unusual punishment, the Court recognized that international treaties prohibit corporal punishment as a violation of the inherent right to dignity that attaches to personhood. [n99] According to the court "the deliberate infliction of physical pain on the person of the accused ... offends society's notions of decency and is a direct invasion of the right which every person has to human dignity." [n100] It noted that the prohibition on cruel and unusual treatment "found expression through the courts and legislatures of various countries and through international instruments." [n101] The court surveyed a number of international instruments and decisions of other national courts on the concept of "cruel and unusual punishment." [n102] It found that "the common thread running through the assessment of each phrase is the identification and acknowledgement of society's concept of decency and human dignity." [n103] Placing heavy emphasis on international treaties and national legislation from various jurisdictions prohibiting cruel and unusual punishment, the court regarded this widespread commitment to eliminating such punishment as proof that its prohibition represents a dictate of

justice. [n104]

In Newcrest Mining v. The Commonwealth, the High Court of Australia addressed whether the expropriation of land from a mining company for conversion into a national park violates the constitution. [n105] The majority held that the expropriation did not offend constitutional norms. [n106] In a dissenting judgment, however, Chief Justice Brennan concluded that because property is protected under international law, Australian law should do the same. [n107] Citing previous jurisprudence of the court, he stressed that international law represents "a legitimate and important influence on the development of the common law and constitutional law, especially when international law declares the existence of universal and fundamental **[*573]** rights." [n108] Chief Justice Brennan focused on the Universal Declaration of Human Rights. [n109] Recognizing that the Declaration is not, properly speaking, a treaty, he nonetheless emphasized that it "expresses an essential idea which is both basic and virtually uniform in civilized legal systems." [n110] He traced the origin of property rights back to the Magna Carta and the French Declaration on the Rights and Duties of Man and of the Citizen. [n111] These references to the Magna Carta, the French Declaration, and the Universal Declaration of Human Rights bolster the message that the right to hold property exists across space and time. Its universal appeal thus lays testament to its status as natural law. Significantly, Chief Justice Brennan's dissent names a host of decisions from other national and international courts to reinforce that the right to hold property represents a universal value. [n112]

In addition to emphasizing a widespread commitment to the norm as evidence of its universal status, judges also draw analogies between the right in question and those already regarded as universal. Justice Aguda of Botswana's Court of Appeal, for example, equated gender discrimination with slavery to buttress his conclusion that courts cannot uphold laws that discriminate against women. In Unity Dow, Justice Aguda stated:

> It appears to me now that, now more than ever before, the whole world has realized that discrimination on grounds of sex, like that institution which was in times gone by permissible both by most religions and the conscience of men of those times, namely, slavery, can no longer be permitted or even tolerated, more so by the law. [n113]

> He then identified the relevant provisions of the CEDAW, highlighting the wide definition of discrimination contained in Article 1, the right to an effective remedy set out in Article 2, and the requirement to take steps to eliminate gender discrimination in economic and social life contained in Article 3. [n114]

Judges also seek to impress their readers with the magnitude of the right which they are considering by characterizing that right - and sometimes the rights claimants themselves - in such

sympathetic terms as to make it difficult to deny the natural and universal **[*574]** nature of their rights claims. The U.S. Supreme Court masterfully employed this technique in The Paquete Habana. [n115] The court considered whether a fishing vessel could be confiscated as a prize of war upon being captured by the U.S. Navy in the blockade of Cuba by the United States during the Spanish-American War of 1898. A majority of the court ruled that those engaged in the "eminently peaceful" industry of coastal fishing are exempt from confiscation by U.S. authorities because to decide otherwise would violate the dictates of equity and humanity. [n116] The majority characterized the industry in a wonderfully sympathetic manner. Noting that the coastal fishing industry was "bestowed from heaven to allay the hunger of the poor," [n117] the court observed that "it would [be] too hard to snatch from poor fishermen the means of earning their bread," [n118] and determined that the ships cannot be subject to seizure because of the "considerations of humanity to a poor and industrious order of men ... unarmed ... and honestly pursuing their peaceful calling of catching and bringing in fresh fish." [n119] Having elicited compassion for the fisherman's plight by describing the men and their work in pastoral terms, the majority had no trouble holding that U.S. courts are obliged to give effect to relevant international norms prohibiting the capture of coastal schooners. [n120]

Courts operating under the natural law impulse rationale aim to ensure the realization of the right under consideration. Accordingly, they tend to ignore rules of international law that render the right nonjusticiable. The Indian Supreme Court, for example, dismissed the significance of India's reservations to the CEDAW. The court declared that "they bear little consequence" in light of the fundamental rights at issue. [n121] A more positivistic approach to the CEDAW, reflective of the rule of law rationale, would have found these reservations significant because international law recognizes that they exempt India from particular provisions of the CEDAW assuming the reservations do not defeat the Convention's object and purpose. [n122] Having determined that the issues at stake involve **[*575]** the dignity and worth inherent in the human person, however, the court set the stage for dismissing the reservations. [n123]

Once it has been anointed with the "natural law" label, the norm need not persuade a judge of its efficacy in the circumstance; it need only present itself. The conclusion that the norm in question defines the essence of humanity drives away any notion that the judge has a choice in whether or not to vindicate it. The norm is necessary, universal, and natural; it need not argue for its application. In the parlance of international law, the norm is nonderogable. The duty to apply the norm, however, is not grounded in the fact of ratification. It arises out of the conviction that international human rights law embodies universal norms expressive of natural law and inherent within the concept of humanity.

C. International Law As Introspection

International law also operates like a rhetorical literary device, such as satire or simile, by forcing national values out in the open. It offers judges a powerful tool to stimulate self-reflection and introspection. According to this rationale, the role of the judge is to find the values inherent within

the national order. When international law operates under this rationale, it thus facilitates a process of introspection and self-discovery, but does not bring new values into the domestic legal order. Rather, it acts as a mirror that helps reflect the values already inherent, though not altogether obvious, in the domestic order.

[*576] Madam Justice L'Heureux-Dube of the Canadian Supreme Court appealed to international law's capacity to uncover a "golden nugget" within national laws when she applied the Convention on the Rights of the Child to limit the seemingly wide discretion granted to the Minister of Citizenship and Immigration under Canada's immigration laws. She observed that the principles of the Convention on the Rights of the Child and other international instruments place special importance on protection for children and childhood, and on consideration of their particular interests, needs, and rights. [n124] The principles of the Convention on the Rights of the Child help "show the values" that are central to Canada's legislation, including provisions of Canada's immigration law that grant the Minister discretion in determining whether an individual can remain in Canada for humanitarian and compassionate reasons. [n125]

Similarly, Justice Kirby of Australia argues that international law, because of its contemporary status, proves more valuable to judges in developing the common law than recognized national precedents. In Jago v. District Court of New South Wales Justice Kirby declared his unwillingness to:

> attempt to find and declare the common law of this State in 1988 by raking over the coals of English legal procedure of hundreds of years ago. A more relevant source of guidance in the statement of the common law of this State may be the modern statement of human rights found in international instruments, prepared by experts, adopted by organs of the United Nations, ratified by Australia and now part of international law. [n126]

Like Madam Justice L'Heureux-Dube, Justice Kirby finds international law a persuasive source of authority whose connections and relevance to contemporary law prove more directly to judicial decision-making than the laws of a by-gone era.

The British House of Lords saga in Pinochet also illustrates that international law can assist judges in the task of sorting through and prioritizing existing national laws. The Lords considered whether England could extradite General Augusto Pinochet to Spain to face charges relating to torture and other violations of **[*577]** international law committed while he was president of Chile. [n127] A majority of the Lords ruled that Spain could seek General Pinochet's extradition. However, the Lords abandoned the decision and reheard the case because connections between one of the presiding judges and an intervener group raised an apprehension of bias. [n128] Another panel of

judges ultimately reaffirmed the decision that General Pinochet could be extradited, but the second panel relied almost exclusively on English common law principles to make its determination. [n129] Although they were not explicit on this point, the House of Lords arguably did not refer to international law at the rehearing because international law had fulfilled its function before the first panel of judges by helping them identify the relevant national norms at stake. The second panel therefore reverted to national legal principles to resolve the matter. [n130]

As with the naturalist impulse rationale, courts offer very little analysis to support the conclusion that the international norm under consideration merely reflects national values; rather, they present the conclusion as self-evident. For example, Justice Gaudron of the Australian High Court asked the Australian government's counsel at the hearing of the Teoh case, "Are we not dealing in essence with something which is so obvious really that you just go the treaty to confirm your first suspicion, namely that a statutory discretion would not likely be exercised to the disadvantage of Australian children?" [n131]

Courts that invoke the introspection rationale generally refrain from a close reading of the texts of international treaties. They do not look for specific provisions or rules of international law that dictate a particular result. Rather, they adopt a purposive approach to interpretation with the aim of identifying the principles that animate the treaty and then establishing a correspondence between the national and international level based on a mutual recognition of these principles. [n132] The majority of the Canadian Supreme **[*578]** Court in Baker v. Canada, for example, did not undertake an analysis of whether the Convention on the Rights of the Child specifically covers situations where the state sought to deport the parent of a child citizen. [n133] The court instead emphasized that the Convention, in general terms, promoted the best interest of the child and that Canada accepts the importance of such a principle. [n134] The correspondence between the Convention's underlying philosophy and Canadian values thus justifies reliance on the Convention.

The South African Constitutional Court also adopted a purposive approach to interpretation in Khalfan Khamis Mohamed v. President of the Republic of South Africa. [n135] This case raised the question of whether the removal from South Africa of Khalfan Khamis Mohamed and Abdurahman Dalvie, suspects in the bombings of the U.S. embassies in Nairobi and Dar es Salaam, constituted cruel and unusual treatment. [n136] South African authorities had arrested the two men and handed them over to FBI agents to stand trial in the United States. [n137] The two appellants faced the death penalty if they were found guilty in the United States; however, South Africa did not have the death penalty. [n138] The South African authorities argued that since the applicants were deported to the United States they could not claim the procedural rights that would otherwise be available under an extradition regime. [n139]

In dismissing the government's argument, the Court characterized the removal as cruel treatment. Turning to international law, the court noted that Article 3 of the Convention Against Torture and Other Forms of Cruel and Unusual Treatment (Convention Against Torture) [n140] prohibits a state from sending an individual to torture both in extradition and deportation cases. [n141]

The court's reliance on Article 3 of the Convention Against Torture proves curious because this provision prevents states from drawing distinctions **[*579]** between extradition and deportation in cases of torture. [n142] The provision does not speak to cruel and unusual treatment. [n143] Such textual details, however, do not trouble the court because it seeks guidance from the Convention only on the level of general principles. The court confidently extended the protection against removal to include circumstances that raise the spectre of cruel treatment.

South African courts adopt this purposive approach to interpretation in other decisions as well. In S. v. Williams the court looked to international instruments to identify whether juvenile whipping comports with South Africa's values of decency and desire to promote human dignity. [n144] The court did not require that international law speak directly on the question of judicial whipping before determining that international law was relevant to its decision making. [n145]

By relying on international law to help reveal national values, the court side-stepped one of the most troubling questions concerning obligations and interpretation at the international level. In the Lotus case, the International Court of Justice stressed that "restrictions upon the independence of States cannot be presumed," and that international law leaves to States "a wide measure of discretion which is only limited in certain cases by prohibitive rules." [n146] International bodies including the International Court of Justice and the various treaty bodies have been struggling with the positivistic dictum of the Lotus case for decades. [n147] The national courts working under the introspection rationale, however, avoid the dilemma of the Lotus rule because they conceive of themselves as working under the dictates of national laws. International law serves as a source of persuasive rather than binding authority; hence, the precise rules and requirements of international law do not prove directly relevant.

[*580] Unlike the rule of law imperative, the introspection rationale adopts an ambiguous attitude towards ratification. On the one hand, the state's ratification of a treaty might suggest that the norms contained in the treaty reflect national values. Ratification thus serves as evidence that the values contained in international treaties also animate the internal legal order. The introspection rationale, however, also attaches significance to unratified treaties if the court finds that they reflect values inherent within national laws. The Botswana Court of Appeal, for example, indicated in its celebrated Unity Dow decision that it will look to those treaties ratified by Botswana as well as unratified treaties in its decision making. [n148] The Botswana court noted with approval the judgment of Justice Barker of New Zealand in Bird's Galore Ltd. v. A.G., where he held that "an international treaty, even one not acceded to by New Zealand, can be looked at by this court on the basis that in the absence of express words Parliament would not have wanted a decision-maker to act contrary to such a treaty." [n149]

As with comparative law, the differences between international law and domestic law can be just as instructive as the commonalities in helping define the values inherent within the domestic order. The introspection rationale thus does not require that national law be brought into line with international law. Indeed, some judges interpret an advocate's reference to international law as

confirmation that the sought-after relief cannot be found in domestic law. Justice Thomas, for example, in a separate concurring opinion in the U.S. Supreme Court decision judgment in Knight v. Florida, explicitly rejected international law's application to the facts before him. [n150] The petitioners in Knight asked the court to consider whether the execution of prisoners who had spent approximately twenty years on death row because of exceptionally long delays in their legal battles constituted cruel and unusual punishment. [n151] The petitioners cited international norms in support of their claims. [n152] Justice Thomas rejected their claim, indicating:

> I write only to point out that I am unaware of any support in the [U.S.] constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed. Indeed, were there any such support **[*581]** in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council. [n153]

> Rather than providing guidance or persuasion, international law becomes the mark of desperation.

Justice Brennan of the Australian High Court recognized in Mabo v. Queensland that international law does not bind courts although it holds persuasive value. He stressed that "the common law does not necessarily conform with international law." [n154] While Brennan proves open to the influence of international law in this instance, judges sometimes regard the differences between international law and domestic law as a reason to refuse international norms. [n155] Accordingly, numerous courts have declined to interpret national laws in conformity with international norms on the claim that the national and international prove irreconcilably different. [n156]

The Supreme Court of Nepal, for example, refused to overturn a law which provides that a daughter may inherit part of her father's estate on the condition that she reach thirty-five years of age and remain unmarried. [n157] The court observed that several international instruments prescribe that men and women are equal before the law and are to be accorded the same legal capacity. [n158] The court, however, determined that the international convention were out of step with Nepal's "patriarchal society." [n159] It refused to strike down the legislation in question even though the Nepali Treaties Act renders international instruments tantamount to the national laws of **[*582]** Nepal. [n160] The court instead ordered consultations to take place to consider the impact of the impugned legislation on the equal rights of both men and women. [n161]

The Australian Federal Court also points to differences between international and national norms as a reason to ignore international law in some contexts. In Nulyarimma v. Thompson, the

Federal Court refused to recognize genocide as a common law crime even though it acknowledged that the prohibition on genocide constituted a jus cogens international norm. [n162] The applicants in this case argued that Australia's Aborginal laws and policies promoted genocide. [n163] They contended that the courts could take jurisdiction over the matter even in the absence of relevant national legislation because the prohibition on genocide constitutes jus cogens, and therefore forms part of the common law in Australia. [n164]

While the court endorsed the claim that the Aboriginal people of Australia had been subject to genocidal policies, it refused to take jurisdiction over the issues because it could not reconcile this result with various entrenched aspects of Australian law. [n165] Justice Wilcox, for example, pointed to "the strong presumption nullum crimen sine lege (there is no crime unless expressly created by law)." [n166] He noted that international and national laws differ because international law lacks the details of national legislation; thus, it is impossible for courts to translate international law to the domestic context in the absence of legislation. [n167] Justice Wilcox further noted that:

In the case of criminal conduct, ground rules are needed. Which courts are to have jurisdiction to try the accused person? What procedures will govern the trial? What punishment may be imposed? These matters need to be resolved before a person is put on trial for an offence as horrendous as genocide. [n168]

Justice Whitlam determined that the claim ran up against "formidable statutory obstacles" as the Criminal Code abolished common law criminal offences. [n169]

[*583] Where national and international law prove complimentary, judges adopt what can be called a "self-referential interpretive technique." Not only is international human rights law used to interpret national laws but also national perspectives are brought to bear in the interpretation of the same international norms that are invoked to resolve the meaning of the national laws. International law thus operates as both the vehicle and object of interpretation: as a vehicle of interpretation, it lends meaning and scope to national law; as an object of interpretation, it is itself understood in light of national legal principles. [n170]

In Baker v. Canada, for example, the Supreme Court of Canada used international law to reinforce the conclusion that immigration officers must have regard for the best interest of the child principle when deciding on whether to deport a noncitizen parent. [n171] International law plays an obvious role in the court's approach to statutory interpretation. The Convention on the Rights of the Child [n172] does not clearly extend to situations where a deportation order is directed at a parent rather than the child. Article 3 of the Convention dictates that the best interest of the child shall be a primary consideration in all matters concerning the child. [n173] The Canadian Federal Court of Appeal, however, had determined that the term "concerning" restricted the application of Article 3 to cases where the child was the subject of the deportation order, not the parent. [n174] The court reached this conclusion by noting that Article 9, which explicitly dealt with the separation of parent and a child, employs the term "affecting" rather than "concerning." [n175] The court therefore reasoned

that the best interest of the child principle contained in Article 3 of the Convention does not apply to the deporation of a parent because this was a matter "affecting" but not "concerning" the child. [n176] Moreover, the court noted that Article 10, which deals with separation upon deportation, simply providing that the child should be told of the parent's **[*584]** whereabouts - there is no indication that the state owes any other duty to the child. [n177]

The majority of the Canadian Supreme Court, however, dismissed the Federal Court's formalistic interpretative approach because it did not reflect the primacy placed on children's rights and interests in the Canadian context. [n178] Unlike the Federal Court, the Supreme Court interprets the Convention on the Rights of the Child as encompassing the deportation of a parent. [n179] Significantly, the Supreme Court does not rely on any particular provision of the Convention. Rather, it focuses on the treaty's overarching concern for promoting children's rights. [n180] In rejecting a narrow, formalistic reading of the Convention, the court has confirmed - some would claim, the court has created - that children have a right under international law to be considered when a parent is subject to deportation. [n181]

The introspection rationale ignores the question of whether international law should be binding because a state has freely ratified an international convention or because it encapsulates natural law. Indeed, this model tends to do away with the notion of international law as binding law. The judge refers to international norms because they reflect domestic norms and not because they oblige the nation in any way. Whereas the rule of law imperative and the natural law rationale suggest an obligation to give effect to international norms, this rationale creates spaces for judicial freedom. It requires decision makers to focus on the substance of the norm and consider its significance for national laws rather than inquire into its formal status as binding law. Accordingly, the judge remains free to accept or reject an international norm depending on its ability to promote coherence within the domestic legal regime.

D. Judicial World-Traveling

Judges also look to the decisions of other national courts to lend weight to their own use of international norms, a rationale that can be termed "judicial world-traveling." It mirrors the feminist world- **[*585]** traveling technique. Some feminists promote world-traveling as an analytical tool. [n182] They argue that a heightened understanding of how other cultures approach a given issue can only lead to more informed, sensitive, and, hence, effective advocacy or decision making in all arenas. [n183] Judicial world-traveling operates in two ways. First, judges look to the decisions of others to emphasize that international law represents a legitimate decision-making source. The reliance on international law by courts in other jurisdictions adds weight to the domestic court's own decision to employ international law. In Newcrest Mining, for example, the dissenting opinion of Chief Justice Brennan of the High Court of Australia referred to the recognition "by this court and by other courts of high authority [that] the inter-relationship of national and international law, including in relation to fundamental rights, is undergoing evolution." [n184] Similarly, in rendering the Vishaka decision, the Indian Supreme Court pointed to the example of the Australian High Court

and its invocation of international norms. [n185]

In Unity Dow, Botswana's Court of Appeal cited speeches delivered at the judicial colloquium in Bangalore, India by Justice Michael Kirby of Australia and Chief Justice Muhammad Heleen of Pakistan. The Botswana court also referenced decisions by courts in England and New Zealand for confirmation that international law represents a legitimate interpretive aid in construing domestic legislation. Justice Aguda concluded: "I am prepared to accept and embrace the views of these two great judges and hold them as the light guiding my feet through the dark path to the ultimate construction of the provisions of our Constitution now in dispute." [n186] In the same way, the Supreme Court of Canada invokes the Australian and Indian Court's growing reliance on international law to support its own reference to the Convention on the Rights of the Child in analyzing the limits of a decision maker's discretion in the immigration context. [n187]

[*586] Judges also look to decisions from other jurisdictions to buttress their particular reading of an international treaty and not simply to support their reliance on international law as a general matter. In such instances judges invoke international and comparative legal sources as a package; they bundle together legally binding sources such as ratified treaties with sources that cannot give rise to legal obligations such as the national constitutions of other states and instruments from regional systems that do not apply to the state in question. The U.S. Supreme Court thus dedicated a significant amount of space in The Paquete Habana delineating the development of the international norm prohibiting the seizure of coastal fishing schooners as prizes of war. [n188] Noting that the rule prohibiting seizure was established "by ancient usage among civilized nations, beginning centuries ago," the court identified the genesis of the norm in orders issued by Henry IV in 1403 and 1406 and mapped out its gradual but ultimate acceptance "throughout the civilized world." [n189]

Writing in dissent, Justice Breyer of the U.S. Supreme Court also made extensive use of the judicial world-traveling technique in Knight v. Florida. Observing that the U.S. Supreme Court "has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances," [n190] Justice Breyer reviewed the jurisprudence of the Privy Council, the Indian Supreme Court, the European Court of Human Rights, the Supreme Court of Canada, and the United Nations Human Rights Committee in concluding that imposing the death penalty on individuals left in death row for almost twenty years or more would constitute cruel and unusual punishment. Noting that views from foreign jurisdictions do not create obligations for U.S. courts that are entrusted with interpreting a "constitution for the United States," [n191] Justice Breyer concluded nonetheless that "their views are useful even though not binding." [n192]

Similarly, South Africa's Constitutional Court looks to various jurisdictions to identify a common thread or theme in the definition of "cruel and unusual punishment." [n193] The Court surveys other jurisdictions to reinforce its own conclusion that whipping **[*587]** juveniles as a form of criminal sentencing violates the standards of humanity.

Whether one speaks of "cruel and unusual punishment" as in the Eighth Amendment of the U.S. Constitution and in Article 12 of the Canadian Charter, or "inhuman and degrading punishment," as in the European Convention and the Constitution of Zimbabwe, or "cruel, inhuman or degrading punishment," as in the Universal Declaration of Human Rights, the ICCPR or the Constitution of Namibia, the common thread running through the assessment of each phrase is the identification and acknowledgement of society's concept of decency and human dignity. [n194]

By linking the notion of cruel and unusual punishment across jurisdictions to "decency and human dignity," the Court brings the weight of judicial reasoning from around the world to bear on the persuasive authority of its own argument. [n195]

Namibia's High Court also invokes the judicial world-travelling rationale in support of its reliance on international norms. In Kauesa v. Minister of Home Affairs, Namibia's High Court considered whether comments made to the media by Elvis Kauesa, a black police officer, constituted hate speech. [n196] Kauesa expressed a belief that the white command structure of the Namibian Police Force sought to undermine the government's policy of national reconciliation through corruption and other improper acts. [n197] In deciding the case, the High Court referred to provisions of various international and regional instruments to reinforce its conclusion that Officer Kauesa's comments constitute hate speech. [n198] The court cited treaties ratified by Namibia alongside various sources that clearly did not bind Namibia. [n199] These sources include the American Convention on Human Rights [n200] and decisions of several higher-level courts in other jurisdictions with emphasis on the decisions of the Supreme Court of Canada. [n201]

[*588] New Zealand's Court of Appeal also references provisions of international and regional treaties as well as constitutions of other jurisdictions to illustrate that the international community condemns retrospective sentencing. [n202] The court makes no distinction between national constitutions and international treaties, collectively referring to documents such as the Canadian Charter of Rights and Freedoms, [n203] the Constitution of India, [n204] the French Declaration on the Rights of Man and of the Citizen, [n205] and the Universal Declaration of Human Rights as "international instruments" or "treaties." [n206]

South Africa's Constitutional Court also bundles together international and comparative sources in determining whether whipping should be permitted as punishment for juveniles, saying that:

There is unmistakenly a growing consensus in the international community that judicial whipping, involving as it does the deliberate infliction of physical pain on the person of the accused, offends

society's notions of decency and is a direct invasion of the right which every person has to human dignity. This consensus has found expression through Courts and Legislatures of various countries and through international instruments. It is a clear trend which has been established. [n207]

The failure to distinguish between international and comparative law stems from the fact that judges look to these sources for their persuasive value and not out of a misguided conviction that the norms in question are binding. In short the norm's authority derives from its popularity, not its pedigree.

Judicial world-traveling holds an obvious appeal in countries emerging from turbulent race relations. The individual histories of commonwealth countries like Fiji, South Africa, and Namibia "have driven these states to look at 'neutral' sources beyond the nation state to provide guidance in resolving internal divisions." [n208] Cases from these countries link the use of international law to the national project of moving beyond the iniquities of the past. In this context, reliance on international law and participation in the norms of the international community signals a movement towards **[*589]** better judgment that is untainted by the politics of the past. [n209] South African and Namibian judges express the opinion that law can move their society away from its tainted past towards a more egalitarian future. The South African Constitutional Court declared in Grootboom:

The purpose of our new constitution and democratic order is the establishment of a society in which all human beings will be accorded equal dignity & respect ... achievement of such a society within which the context of our deeply inegalitarian past will not be easy but that this is the goal of the Constitution should not be forgotten. [n210]

Similarly, the High Court of Nambia stresses that it operates in the shadow of Namibia's colonial and apartheid past. It thus looks to international law to lay the foundation of a new legal order. [n211]

Judicial world-traveling occasionally overlaps with the naturalist impulse rationale in that judges seek support for their own conclusions by pointing to similar conclusions from other courts. Under the natural law impulse, evidence of decisions from other jurisdictions lends weight to the conclusion that a particular norm represents a universal value inherent within the human condition. Communitarian considerations rather than the strictures of natural law, however, animate the judicial world-traveling rationale. The popularity of the norm, not its internal logic, renders the norm judicially desirable because, in the words of Botswana's Court of Appeal, courts "cannot afford to be immune from the progressive movements going on" around them. [n212]

Like the introspection rationale, judicial world-traveling recognizes that judges have the

freedom to accept or reject international norms. On occasion, judges reject the approach of other members of the international community out of a conviction that the approach does not sit well with the legal or political climate of their own country. [n213] At root, however, judicial world-traveling **[*590]** reflects a judicial desire to participate in a larger global community of judgment. [n214] Judges who look to other jurisdictions to discern the meaning assigned to international conventions recognize that they can learn from the struggles of other judges who are increasingly confronted with the same issues. As Madam Justice L'Heureux-Dube of the Canadian Supreme Court explains, "as social debates and discussions around the world become more and more similar, so of course, do the equivalent legal debates." [n215]

E. Globalized Self-Awareness

Judges across jurisdictions also invoke what can be termed the "globalized self-awareness" rationale in support of their reliance on international legal norms. Like the judicial world-traveling rationale, communitarian considerations motivate globalized self-awareness. Globalized self-awareness, however, is characterized by self-consciousness, or a realization that the world is watching, rather than the quest to seek inspiration from the logic of others as in the world-traveling rationale. The overriding concern is to avoid feeling ashamed before members of the international community. In Tavita v. Minister of Immigration, for example, the New Zealand Court of Appeal observed that individuals in New Zealand have the right to appeal to the Human Rights Committee when national courts fail to provide an effective remedy for violations of the International Covenant on Civil and Political Rights. [n216] The court concluded that:

[a] failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could extend to the New Zealand Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them. [n217]

Significantly, the court proves anxious to avoid international criticism directed at the judiciary of New Zealand and not at the state **[*591]** in general terms. The court, through its judgment, bestows itself with an international legal personality.

Similarly, in Van Gorken v. Attorney-General, New Zealand's Supreme Court noted that the international community has expectations of its members and that these expectations figure in the determination of individual rights at the national level even in relation to seemingly insignificant matters. [n218] Van Gorken raised the question of whether a regulation that granted more generous moving expenses to male teachers over female teachers constituted discrimination on the basis of

gender. [n219] Observing that various international instruments prohibit such discriminatory treatment, the court noted that international treaties do not concern themselves with relatively minor details such as moving expenses. [n220] Nonetheless, these treaties remain relevant to all aspects of life because they "represent goals towards which members of the United Nations are expected to work." [n221]

Globalized self-awareness reflects a judicial desire to be accepted by an international community. This desire for acceptance betrays itself most clearly when judges invoke the notion of "civilization." Judgments across jurisdictions proclaim the desire to be part of a "civilized" world of judgment. The concept of civilization remains, of course, inherently value laden and relational - one is not "civilized" in isolation of others. Rather, the notion of being "civilized" requires one to live up to certain standards that are external to one's self; it signals a desire for participation in and acceptance by a community that has the power to define the standards of acceptance. It involves judgment of others in relation to one's self and judgment of one's self in relation to others. In Newcrest Mining, [n222] Chief Justice Brennan of the Australian Court of Appeal explicitly tied the notion of civilization to the gaze of the international community. He observed that the Universal Declaration of Human Rights [n223] protects the right to property that "is both basic and virtually uniform in civilized legal systems." [n224] He noted that: "The Constitution not only speaks to the people of Australia who made it and accept it for their governance. It also speaks to the international community as the basic law of the Australian nation which is **[*592]** a member of that community." [n225] This passage sends the message that it is entirely legitimate, appropriate, and acceptable for the international community to pass judgment on Australia's constitution and the court's interpretation of that document. Australia runs the risk of being deemed "uncivilized" by the international community if it repudiates international norms in defining itself.

South Africa's constitutional court displays the same anxiety to be regarded as civilized by participating in international norms. In S. v. Williams, for example, the Constitutional Court emphasized that the values of the civilized world should inform the South African Constitution, stating: [n226]

> In common with many of the rights entrenched in the Constitution, the wording of this section conforms to a large extent with most international human rights instruments ... . The interpretation of the concepts contained in section 11(2) of the Constitution involves the making of a value judgment which: "requires objectively to be articulated and identified, regard being had to contemporary norms, aspirations, expectations and sensitivities of the ... people as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in the civilised international community ... ." [n227]

Similarly, the High Court of Tanzania expressed its intent to enforce "standards below which any civilized nation will be ashamed to fall." [n228] Justice Amissah of Botswana, writing for the majority in Unity Dow, maintained:

Botswana is a member of the community of civilized States which has undertaken to abide by certain standards of conduct, and unless it is impossible to do otherwise, it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken. [n229]

Botswana's Court of Appeal explicitly linked respect for international human rights treaties with Botswanian liberal democracy and contrasts Botswana's development with the lack of such positive movements in other parts of Africa. [n230] The court began a relatively lengthy analysis of international law's place in national courts by taking judicial notice of Botswana's democratic tradition. [n231] **[*593]** Indeed, it emphasized that "Botswana's reputation as a liberal democracy is known the world over." [n232]

Other courts betray a similar self-consciousness and awareness of being watched - and hence judged - by the international community without explicitly invoking the concept of civilization. In Vishaka, the Supreme Court of India turned to international standards about the quality of judging and stressed that judges belong to a larger global community as justification for its reliance on international conventions in drafting of sexual harassment legislation. [n233] The Vishaka decision thus illustrates a rising judicial desire not to disappoint international expectations and a growing willingness on the part of national court judges to submit themselves to international judgment.

Globalized self-awareness represents the apex of transjudicialism. It suggests that some national court judges regard themselves as "juridical citizens of the world." [n234] It is difficult to determine the factors that must exist before globalized self-awareness makes its way into the judicial culture of a nation or even into a given case. Factors like the nature of the norm under consideration and the level of interaction between the national level judges with their international peers must play a role; [n235] however, these factors may not be sufficient to give rise to the globalized self-awareness rationale. Judges remain aware that members of their own domestic judicial community may be critical of references to international law and may regard it as an illegitimate form of judicial activism. Concern for the opinions of the international community may thus be trumped by domestic legal opinion. The extralegal history of Baker v. Canada illustrates this point.

A few months before the Supreme Court of Canada heard the Baker case, Madam Justice L'Heureux-Dube and Justice Beverly McLachlin (as she was then known) attended a colloquium of the International Women Judges Association. [n236] At that gathering, Sally Brown, a judge of the

Family Court of Australia presented a speech in defense of the Australian High Court's decision in Teoh **[*594]** v. Minister of State for Immigration and Ethnic Affairs. [n237] The proceedings at that colloquium indicate that the speech was given with the specific knowledge that the Supreme Court of Canada was seized of two similar cases. [n238] Judge Brown explained the controversy that the Teoh case engendered, particularly with respect to the finding that Australia's ratification of the Convention on the Rights of the Child gave rise to a legitimate expectation that the Convention would be considered by the administrative decision maker when determining whether Mr. Teoh should be deported. [n239]

The two justices of the Supreme Court of Canada must have been aware that at least some members of the global judicial community would be anticipating its decision in Baker; nonetheless, globalized self-awareness did not arise in the Baker judgment. How can one explain its absence? It is difficult to know for certain. Significantly, two of the seven Canadian Supreme Court judges who heard the Baker case dissented from the majority judgment because of its reliance on international law. The dissenting judges regarded international law as a threat to legislative sovereignty. This suggests that judges will not invoke the globalized self-awareness in a legal culture that regards nonlegislative sources in decision making as suspect. Globalized self-awareness, after all, acknowledges the role of non-national forces in the shaping of judicial opinion. The extralegal history of Baker v. Canada indicates that the Canadian Supreme Court, despite its links to other national courts and even to international bodies, [n240] remains unwilling to adopt transjudicialism to the extent suggested by globalized self-awareness.

Globalized self-awareness recognizes that transjudicialism involves more than persuasion and exposes judges to more than alternative modes of reasoning. Globalized self-awareness recognizes **[*595]** that international law can function as a form of legal constraint on those judges who are concerned about international juridical opinion. Various observers of the national legal scene have noted that judges, as an empirical matter, are constrained by the reactions they anticipate from their audiences. "What a given judge will do in a case depends on what she thinks will 'fly' as 'good legal argument' in the minds of others, as well as on what she herself thinks about the matter." [n241]

The globalized self-awareness rationale recognizes that transjudicialism extends judicial concern for the opinion of others beyond national borders. Increasingly, judges want to belong not simply to a domestic community of judges but also to an international juridical community. Greater interaction between judges in both real and virtual space both reflects and promotes this judicial desire to belong to a transnational community of their peers. Yet, globalized self-awareness recognizes that the desire to belong does not necessarily bring freedom from constraint but can itself prove constraining because it operates as a form of judicial peer pressure, albeit subtle and still in nascent form.

IV. Reflections on Transjudicialism and Women's Rights

A. Transjudicialism's Promise

Transjudicialism holds some promise for the women's human rights movement. First, and perhaps most obviously, the domestic application of international law in domestic courts can help remedy the lack of enforcement mechanisms available to women's rights advocates at the international level. CEDAW has few resources at its disposal to effect state compliance with the Women's Convention. While the Optional Protocol to the Women's Convention allows individuals living within the jurisdiction of a ratifying state to submit a petition to CEDAW alleging a violation of a treaty right, there is no reason to believe that CEDAW's record in obtaining compliance with its decision in respect of a petition will be any better than that of other treaty bodies. Various treaty bodies have been able to secure changes in state behavior; however, the record is far from perfect and states have proven themselves willing to ignore international obligations of the most serious nature when it proves politically expedient. Moreover, institutions that draft and monitor women's rights at the international level tend to be notoriously under-funded and do not **[*596]** have the resources to undertake the diplomacy and monitoring efforts needed to promote state compliance with the Women's Convention. In part for this reason, some feminists consider the Women's Convention responsible for the marginalization of women's human rights law. [n242] Thus, transjudicialism offers women's rights advocates the opportunity to pursue their agenda in domestic courts that have a better history and means of effecting compliance with their judgments. That judges look to international law as a source of persuasive authority, as evidenced by the natural law, introspection, and judicial world-traveling rationales in particular, also means that they can reference treaties that have not been ratified in addition to ratified ones.

Second, transjudicialism can inspire greater respect for human rights across jurisdictions as judges increasingly share their human rights wisdom. [n243] As Helfer and Slaughter put it, transjudicialism has the capacity to entrench:

> the concept of a global community of law, constituted not by a world court but rather by overlapping networks of national, regional and global tribunals. By communicating with one another in a form of collective deliberation about common legal questions, these tribunals can reinforce each other's legitimacy and independence from political interference. They can also promote a global conception of the rule of law, acknowledging its multiple historically and culturally contingent manifestations but affirming a core of common meaning. [n244]

Judges who come from a legal culture that recognizes and respects women's rights can influence the approach of judges in other jurisdictions where such recognition and respect remains in nascent form.

Even where international human rights law cannot override national norms to the contrary, it

still has a role to play in the development of a human rights agenda through its ability to force a political debate. Transjudicialism and references to international standards help judges to engage in a dialogue with other national institutions in a way that may ultimately be rights enhancing. For example, judges can uphold a law that discriminates against same-sex partners while still pointing out that such a law violates international treaties ratified by the state (the rule of law imperative) and the norm of nondiscrimination as recognized under customary **[*597]** international law (the universalist impulse). As David Dyzenhaus and Evans Fox-Decent conclude, "The rule of law depends in the first instance on the ability of the legal order to bring the excesses of politics to the surface, and force those who wish to violate fundamental democratic values to be explicit about it." n245 International law can trigger a crisis in an unsatisfactory national order and help challenge prevailing cultural or political assumptions about women's rights even where it cannot, as a legal proposition, trump those assumptions in court.

B. Transjudicialism as Judicial Imperialism?

Yet transjudicialism raises concerns in light of the debate over international law's imperialistic impulse. Transjudicialism and the domestic use of international law suggests not only that international treaties and norms that have a universal status should play a role in judicial decision making, but that the interpretations and approaches of other countries can also be brought to bear on judicial decision making. Transjudicialism thus appears to impose foreign influences in two ways. First, external values make their way into national law through the claims of international human rights treaties and norms of customary international law to governance. These express themselves under the rule of law imperative and the universalist impulse rationales. Second, one national court's interpretation of a particular international norm can be taken into consideration by another court as, for example, the Canadian Supreme Court in Baker brought the interpretations of the Convention on the Rights of the Child rendered by the Australian and New Zealand courts to bear on their own reading of the treaty. Transjudicialism thus renders judges who invoke international law susceptible to the charge that they are bringing foreign influences to bear on domestic decision making. Such charges can prove particularly troubling for judges working within cultures that are struggling to free themselves from the yoke of imperialism.

Experiences of women's rights advocates reveal that the acceptance of the international norm does not follow from the establishment of local representatives or advocates for the norm. **[*598]** Indigenous women's rights groups do not necessarily gain acceptance in a local culture when they invoke international law simply because they are local. On the contrary, critics of foreign influences sometimes reject the local representatives and condemn them for becoming tainted by foreign values. Lama Abu Odeh, for example, has observed that women's rights advocates in Egypt have been placed in a position of defending themselves against charges that their goals are un-Islamic:

The claim of the un-Islamicity of these feminists demands was typically, neatly and conveniently

packaged by the same religious adversary with another equally powerful claim, namely that they were agents of the "West." The frequency and consistency of this twin package of critique suggests that the two charges are often experienced by the proponents of the critique as implicit in each other. Feminists may be charged with advocacy of Western culture, or of sexual promiscuity that is uniquely Western, or of a Western style of feminist male hating; or charged with intent to destroy the Muslim family just as happened in the West, or a blindness to the actual difference of the religious East from the materialist West, or, paradoxically, an attempt to impose the norms of the Christian West on those of the Muslim East. [n246]

Others have made similar observations in different contexts. [n247]

Rejection of the "other" plays an important identity-building role for those communities that consider their cultural survival threatened. Rejection becomes intimately linked with the task of decolonization and the purging of self from an imposed identity. [n248] In this context even human rights advocates may regard international human rights law, with its purported Western origins, as an instrument of imperialism. Women engaged in family law reform in Egypt over the last century, for example, have found themselves engaged on two fronts, simultaneously criticizing Islam and **[*599]** defending it against its Western detractors. "Western detractors of Islam often appeared to these feminists to be in 'bad faith' ... using such critique to assert cultural superiority and to rationalize projects of unwanted intervention in the Islamic world." [n249]

Some might argue that rejection of the "other" represents a convenient excuse to avoid human rights obligations rather than an authentic attempt at identity building. This is no doubt true in some cases. Interestingly, however, the process of asserting self through rejection of the other was also undertaken by colonizing nations who defined themselves through a process of "ostensive self-definition by negation." Colonizing nations claimed cultural superiority by pointing to other nations and concluding, "We are most certainly not like that!" [n250] To deny the role of rejection in identity building is to deny colonialization as a historical fact and to ignore that at least some advocates and scholars engage in international human rights law with the express purpose of transforming the other into their own image. At the very least, one must understand the psychological and emotional appeal of rejection even if one does not agree with the rejectionist's campaign to secure the local against the influence of "other." What does this mean for women's rights advocacy and scholarship? Can transjudicialism assist in the process of rendering international human rights law more acceptable in jurisdictions that have traditionally rejected international human rights, women's rights or both as foreign influences?

In seeking to promote a greater acceptance for women's rights within a given jurisdiction, commentators tend to focus on changes that must be made within that particular jurisdiction. Focusing exclusively on the legal or political changes required within a particular jurisdiction, however, may actually impede solutions and reinforce convictions that international law represents

a form of imperialism. If transjudicialism is to lead to a greater acceptance of women's rights and international law across jurisdictions, judges in all jurisdictions must be willing to engage in an expanded dialogue with courts that work within markedly different legal cultures. For example, courts in the West might consider the decisions of courts from non-Western cultures. This sends the message that international **[*600]** human rights law constitutes a shared enterprise. [n251] It counters the objection that international human rights law represents Western values and Western history. As Charles Taylor has noted, "due recognition is not just a courtesy we owe people." [n252] In this way transjudicialism and the domestic application of international law can help promote the conviction that international human rights law belongs to everyone. If international law belongs to everyone, the claim that international law represents an imperialistic enterprise starts to ring hollow.

There are, of course, very real practical barriers to this expanded judicial dialogue. How, for example, is the U.S. Supreme Court supposed to take into considerations legal developments in Egypt when courts in that country publish their decisions in Arabic and when library collections in only a few schools include reporters from non-Western countries? Language differences and difficulties in obtaining the legal decisions of courts in some jurisdictions may impede the quest to adopt a more expansive approach to transjudicialism. Nonetheless, viable avenues remain unpursued.

Courts across the commonwealth publish their decisions in English; thus, while the decisions of Egyptian courts may not be available to U.S. courts in English, decisions from diverse jurisdictions like Nigeria and Botswana are available. Moreover, these decisions are increasingly available across the Internet. [n253] Even in jurisdictions that work in languages other than English, various commentators have published summaries and analyses in English. These too are increasingly available through the Internet. [n254] While **[*601]** judges are increasingly taking advantage of the Internet, they do not appear to make full use of its potential as their judgments tend to focus on comparative sources that emanate from familiar legal terrains. While there are barriers to an expanded analysis, there are also unexplored avenues such as the Internet that can create greater judicial awareness of perspectives and possibilities that transcend one's own legal tradition.

Of course courts in the West should accept the wisdom of courts from other jurisdictions simply because they are different or simply to encourage dialogue. Rather, national courts should seek out decisions of other courts where they reflect decisions and reasons that are valuable. Value can come from diversity. Canadian courts, for example, might look to the decision of the Botswana Court of Appeal in Unity Dow for its approach to children's rights that recognizes the interdependence between the rights of the child and the rights of parents. While the Unity Dow case involved discriminatory laws directed at children's citizen rights, the court was not blind to the link between the violation of the children's rights and their mother's rights. [n255] Accordingly, Unity Dow herself remained front and center of the judicial gaze in Botswana. By contrast, the Supreme Court of Canada in Baker v. Canada all but ignored Mavis Baker in assessing the actions of Canada's immigration officials. The Canadian Supreme Court instead focused on the violations of her children's rights even though evidence of prejudice against Mavis Baker abounded. [n256]

Indeed, some high level judges have come to the realization that "no longer is it appropriate to speak of the impact or influence of certain courts in other countries, but rather of the place of all courts in the global dialogue on human rights and other common legal questions." [n257] To date, however, court decisions involving international human rights appear more as soliloquy than dialogue. Judges tend to refer only to a few other jurisdictions and tend to limit themselves to those that are familiar. Moreover, even those judges and commentators who are committed to both human rights and a diversity of perspective sometimes assume that international human rights law will largely serve to help export their values to other nations. There is little if any recognition that **[*602]** they can learn something from other cultures. [n258] This lack of recognition of the other is unfortunate in part because it reinforces divides between the so-called West and other nations. It serves to entrench "spheres of judicial dialogue" rather than promote true judicial exchange. Moreover, judicial failures to speak across differences deprives participants in the dialogue of the perspectives of dissimilar legal traditions that can serve as a critical lens through which familiar legal traditions and cultures can be examined and evaluated.

V. Conclusion

Advocates and legal analysts concerned with the domestic application of international human rights law have focused significant energy on identifying the doctrinal underpinnings that justify judicial reliance on international norms. In the process, however, they have tended to ignore developments in transjudicialism. Judges look not only out towards the international sphere for sources of obligation but also across at other national jurisdictions for inspiration and guidance on the meaning and application of international norms. Hence, one cannot fully understand the domestic application of international human rights law without also considering the larger transnational context in which that application is taking place. An examination of the domestic use of international law through the lens of transjudicialism reveals that neither national policies nor international law maintain an exclusive hold on progressive human rights norms. Women's rights will only progress within a framework that admits the interdependence between the national and international. The challenge for women's rights advocates and scholars in the era of transjudicialism will be to develop a set of principles that frames the relationship between the national and international in a way that promotes women's rights and facilitates a widespread ownership of international human **[*603]** rights norms. International law applied in the era of transjudicialism can prove a positive development in the quest to bring international law home. It has the potential, however, to further divide the women's rights movement, particularly if indigenous opposition proves able to isolate as imperialistic those judges who invoke international norms. Hence, transjudicialism creates avenues for creative advocacy strategies but it also generates anxiety for our doctrinal future. Transjudicialism will not prove a panacea for women's rights. On the contrary, it demonstrates that hope and uncertainty continue to co-exist within the international women's human rights movement.

Legal Topics:

For related research and practice materials, see the following legal topics:
International LawDispute ResolutionTribunalsInternational LawSovereign States & IndividualsHuman RightsGeneral OverviewInternational LawTreaty FormationRatifications

FOOTNOTES:

n1. Numerous authors have analyzed cases from these diverse jurisdictions. See, e.g., Martha Davis, International Human Rights Law And United States Law: Predictions Of A Court Watcher, 64 Alb. L. Rev. 417 (2000) (discussing the position of the United States Supreme Court with respect to looking to international human rights law in domestic civil rights cases); The Int'l Ctr. For the Legal Prot. of Human Rights (Interights), International Human Rights Law in the Commonwealth Caribbean (Angela D. Byre & Beverley Y. Byfield eds., 1991) (reproducing articles from the 1987 regional Workshop on the International Protection of Human Rights which discuss, inter alia, the effects if human rights law in different jurisdictions); Monika Erikson & Andrew Byrnes, Hong Kong and the Convention on the Elimination of All Forms of Discrimination Against Women, 29 H.K.L.J. 350 (1999) (discussing the experience of Hong Kong in reporting under the Convention on the Elimination of All Forms of Discrimination Against Women, with a focus on the role that institutions of civil society play in the procedure); Yuji Iwasawa, International Law, Human Rights, and Japanese Law: The Impact of International Law on Japanese Law (1999) (analyzing the relationship between international law and national law in a Japanese context and demonstrating the impact international law has had on Japanese law); Benedetto Conforti, International Law and the Role of Domestic Legal Systems (1993) (arguing that international law must evolve under the guidance of all state organs charged with applying the law); International Studies in Human Rights: Enforcing International Human Rights in Domestic Courts (Benedetto Conforti & Francesco Francioni eds., 1997) (exploring the ways in which domestic courts are dealing with international human rights issues in their respective jurisdictions); Donna E. Artz, The Application of International of International Human Rights Law in Islamic States, 12 Hum. Rts. Q. 202 (1990) (analyzing the relationship between traditional Islamic law, contemporary international law, and the modern domestic law of Arab states in the filed of human rights); Li Zhaojie, Effects of Treaties in Domestic Law: Practice of the People's Republic of China, 16 Dalhousie L.J. 62 (1993) (discussing the effect of treaties in China's domestic legal system); Georges J. Assaf, The Application of International Human Rights Instruments by the Judiciary in Lebanon, in The Role of the Judiciary in the Protection of Human Rights 81 (Eugene Cotran & Adel Omar Sherif eds., 1997) (discussing, inter alia, the incorporation of international human rights conventions into the national legal system of Lebanon); Hazel Fox, The Pinochet Case No. 3, 48 Int'l & Comp. L.Q. 687 (1999) (discussing the impact of the Pinochet case on the law of the United Kingdom); Michael Kirby, The Australian Use of International Human Rights Norms from Bangalore to Balliol:

A View to Antipodes, 16 Univ. New S. Wales L.J. 363 (1992) (arguing that the Australian high court should sanction the use of international human rights norms in the work of the Australian courts); Nordic Human Rights Publ'ns, International Human Rights Norms in the Nordic and Baltic Countries (Martin Scheinin ed., 1996) (discussing the incorporation of international human rights norms in the courts of Northern European countries); Roger S. Clark, How International Human Rights Law Affects Domestic Law, in Human Rights: New Perspectives, New Realities 185 (Adamantia Pollis & Peter Schwab eds., 2000) (discussing the adaptation of various international human rights treaties into domestic law); Stephen Donaghue, Balancing Sovereignty and International law: The Domestic Application of International Law in Australia, 17 Adel. L. Rev. 213 (1995) (providing an overview of the relationship between international law and domestic law in Australia by analyzing the historic common law position on the issue, the impact that the Australian constitution has had on that position, and the underlying rationale for the law as it currently exists).

n2. Michael Kirby, Through the World's Eye (2000).

n3. Cases involving international norms that have been formally internalized or made part of the domestic law are generally not included because judges tend not to provide justifications for their reliance on international law in such circumstances.

n4. See, e.g., Kate Millet, What Is To Be Done? 75 Chi-Kent L. Rev. 659, 664 (2000).

n5. See Ann-Marie Slaughter, A Typology of Transjudicial Communication, 29 U. Rich L. Rev. 99 (1994).

n6. Id. at 100.

n7. Id. at 118.

n8. Laurence R. Helfer & Ann-Marie Slaughter, Toward a Theory of Effective Supranational Adjudication, 107 Yale L.J. 273, 321 (1997) (quoting Francois Ost, The Original Canons of Interpretation of the European Court of Human Rights, in The European Convention for the Protection of Human Rights 284 (Mireille Delmas-Marty & Christine Chodkiewicz eds., 1992)).

n9. See Slaughter, supra note 5, at 137.

n10. See, e.g., Int'l Assoc. of Women Judges, A New Vision For a Non-Violent World: Justice For Each Child: Proceedings of the 4th Biennial International Conference of the International Association of Women Judges (1999); United Nations Div. for the Advancement of Women, Judicial Colloquium on the Application of International Human Rights Law at the Domestic Level: Programme of Work (1999), available at http://www.un.org/womenwatch/daw/cedaw/cedaw20/judprogramme.html. (last visited Feb. 28, 2002). The most famous of these judicial colloquia is the one held at Bangalore, India, which gave rise to the Bangalore Principles. See Commonwealth Secretariat, Developing Human Rights Jurisprudence: The Domestic Application of International Human Rights Norms v. (1988). The Bangalore Principles were drawn up and endorsed at a judicial colloquium convened by the Commonwealth Secretariat in 1988 and attended by a distinguished international group of judges who sat or were to soon sit on the highest courts of their nations. See id. The Commonwealth Secretariat has organized a number of follow-up colloquia. See generally Gender Equality and the Judiciary: Using International Human Rights to Promote the Human Rights of Women and the Girl-Child at the National Level (Kirstine Adams & Andrew Byrnes eds., 1999) (a collection of papers and statements from the

1997 Carribean Regional Judicial Colloquium).

n11. See Davis, supra note 1.

n12. See id. at 430.

n13. See Reem Bahdi, Analyzing Women's Use of the Internet Through the Rights Debate, 75 Chi.-Kent L. Rev. 869, 885-86 (2000) ("For example, UNIFEM coordinated a televideo conference on March 8, 1999, which linked the United Nations General Assembly in New York with a global audience, including sites in Nairobi, New Delhi, Mexico City and the European Parliament in Strasbourg. The conference... was preceded by an on-line discussion involving more than a [thousand] women and men around the world who shared similar stories, experiences and strategies."); see also Claire L'Heureux-Dube, The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court, 34 Tulsa L. J. 15 (1998).

n14. See Earl Moulton, Domestic Application of International Human Rights, 54 Sask. L. Rev. 31, 32-33 (1990) ("The first difficulty facing a practising lawyer is in locating the relevant instrument and thereafter finding any decisions which may have an impact on the meaning of its provisions."). This should no longer be the case, at least for those lawyers with access to the Internet.

n15. See, e.g., The Diana Project, at http://www.law-lib.utoronto.ca/diana/ (last visited Feb. 28 2002) (the Diana Projects at the Universities of Toronto, Minnesota, Cincinnati and Yale

University dedicate themselves to making international legal resources available to scholars, advocates, activists and decision-makers). The Diana Project at the University of Toronto's law library website is dedicated to women's rights and has links to the other Diana sites. See id.

n16. See, e.g., Interights, at http://www.interights.org (last visited Feb. 28, 2002) (supporting such advocacy across jurisdictions).

n17. See Bahdi, supra, note 13.

n18. See generally Harold Hongju Koh, The 1998 Frankel Lecture: Bringing International Law Home, 35 Hous. L. Rev. 623, 679 (1998) ("participation in transnational legal process creates an internalizing, normative and constitutive dynamic, which closely integrates international and domestic law.").

n19. Friedrich A. Hayek, The Road To Serfdom 72 (1944).

n20. The debate about international law's relationship to domestic law differs depending on whether one is referring to a treaty right or a norm of customary international law. At least some commentators and judges accept that customary international law is part of domestic law because it is the equivalent of international common law. Treaties, because they represent an act of the Executive branch of government, in Commonwealth countries, must be made part of the domestic law through an act of incorporation. Treaties ratified by the United States are self-executing and ratification requires legislative approval. Hence, Commonwealth

countries tend to ratify more treaties than the United States, but these treaties are not formally part of the domestic law upon ratification. When the United States does ratify a treaty, it tends to include reservations or declarations that limit the treaty's domestic effect.

n21. See Tavita v. Minister of Immigration, [1994] 2 N.Z.L.R. 257, 265-66.

n22. Id. at 266.

n23. R. v. Poumako, [2000] 2 N.Z.L.R. 695, 717.

n24. R. v. Poumako, [2000] 2 N.Z.L.R. 695.

n25. See id. at 698.

n26. See id. at 695.

n27. See id. at 720.

n28. See, e.g., Muojekwu v. Ejikeme, [2000] 5 N.W.L.R. 402.

n29. See id.

n30. See id.

n31. See id.

n32. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981[hereinafter CEDAW].

n33. See Muojekwu, [2000] 5 N.W.L.R., at 411.

n34. Id.

n35. See Apparel Export Promotion Council v. A. K. Chopra 1999 A.I.R. 625, 627 (1999).

n36. See id. at 634.

n37. Id.

n38. See id. at 634-635.

n39. See Vishaka v. State of Rajasthan, (1999) Butterworths H.R.C. 261.

n40. See id.

n41. See id.

n42. See id. at 266.

n43. See id. at 266-67. The sexual harassment guidelines were drafted through a noteworthy process. The Solicitor General, in his capacity as representative of the State, gave official consent to the drafting of the national guidelines. They were developed in a series of hearings, as a collaborative effort between the women's NGO lawyers, the Solicitor General, and the panel of Supreme Court judges who heard the case. See Unifem, Bringing Equality Home: Implementing The Convention on the Elimination of All Forms of Discrimination Against Women, available at http://www.unifem.undp.org/cedaw/ indexen.htm (last visited Apr. 25, 2002).

n44. See Vishaka, (1999) Butterworths H.R.C. 261, at 266.

n45. Id. at 266.

n46. See Unity Dow v. Attorney-General of Botswana [1992] L. Rep. Commonwealth, 623.

n47. Id. at 673.

n48. See Dow v. Attorney General of Botswana, [1991] L. Rep. Commonwealth, 574.

n49. Marsha A. Freeman points out that the reference to international instruments was highly problematic in this case because Botswana had not ratified any of the international human

rights instruments other than the African Charter of Human and People's Rights. See Marsha A. Freeman, Women, Law and Land at the Local Level: Claiming Women's Human Rights in Domestic Legal Systems, 16 Hum, Rts. Q. 559, 569 (1994).The court negotiated this difficulty by invoking the incorporation provision of the African Charter preamble and Botswana's signature of the Declaration on the Elimination of All Forms of Discrimination Against Women, the precursor to the Women's Convention. See id.

n50. Unity Dow v. Attorney General [1991] L. Rep. Commonwealth, at 587.

n51. Anthony Mason, The Influence of International Law and Transnational Law on the Australian Municipal Law, 7 Pub. L. Rev. 20, 23 (1996). The Halmaheras are a group of islands that form parts of Indonesia.

n52. See Transcript of Proceedings, Minister of State For Immigration and Ethnic Affairs v. Teoh, Perth (Oct. 24, 1994), available at www.law-lib.utoronto.ca/diana/fulltext/teohpart1.doc. [hereinafter Teoh transcripts].

n53. See id.

n54. Id at 32.

n55. See Slaight Communications v. Davidson, [1989] 1 S.C.R. 1038.

n56. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966)

n57. See Slaight Communications, [1989] 1 S.C.R., at 1056 ("As was said in Oakes... among the underlying values essential to our free and democratic society are 'the inherent dignity of the human person' and 'commitment to social justice and equality'. Especially in light of Canada's ratification of the International Covenant on Economic, Social and Cultural Rights... and commitment therein to protect, inter alia, the right to work in its various dimensions found in Article 6 of that treaty, it cannot be doubted that the objective in this case is a very important one.").

n58. See id. at 1056-1057 ("The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the 'full benefit of the Charter's protection'. I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified."

n59. This notion manifests itself at the national level in social contract theories and at the international level in the rhetoric of state consent as the prevailing paradigm of international law. See Martii Koskenniemi, From Apology to Utopia: The Structure of International Legal Arguments 52-73 (1989).

n60. See R. v. Ewanchuk, [1999] 1 S.C.R. 330, 365 (Canada).

n61. See Ewanchuk, [1999] 1 S.C.R. 330.

n62. See id..

n63. See id.

n64. See id.

n65. See id. at 364.

n66. See id. at 365.

n67. See Grootboom v. Oostenberg Municipality, 2000 (3) BCLR 277 (CC) (S. Afr.).

n68. See id.

n69. See id.

n70. See id.

n71. See id.

n72. See id. at 285.

n73. Alan Brudner, Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework 219 (1985) (arguing that the authoritativeness of international human rights law principles rest on their reliability as insights of "the purest moral consciousness of an epoch." Id. at 243).

n74. See Basu v. State of W.B., A.I.R. 1997 S.C. 611, 624.

n75. See id. at 616.

n76. See id.

n77. Id at 615.

n78. Paul v. Cochin University, A.I.R 1996 S.C.1011, 1020.

n79. Id. at 1013.

n80. Id.

n81. See id at 1012.

n82. See id. at 1023.

n83. Id. at 1020; see also discussion supra Part III.A.

n84. Id. at 1020. The Court then identified the relevant provisions of the CEDAW that applied in this case, focusing on the wide definition of discrimination contained in Article 1, the right to an effective remedy set out in Article 2, the specific mention of legal remedy contained in Article 3, and the requirement to take steps to eliminate gender discrimination in economic and social life contained in Article 13.

n85. See Muojekwu v. Ejikeme, [2000] 5 N.W.L.R. 402.

n86. Id. at 411.

n87. Id.

n88. See, e.g., Tavita v. Minister of Immigration, [1994] 2 N.Z.L.R. 257.

n89. See id. at 266.

n90. Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990 available at www. unesco.org/education/information/nfunesco/pdf/CHILD E.PDF (last visited Mar. 25, 2002).

n91. Tavita, [1994] 2 N.Z.L.R. 257, 266 (also referencing "the duty of the judiciary to interpret and apply national constitutions, ordinary legislation and the common law in light of the universality of human rights."). The court also observes that "universal human rights and international obligations are involved." Id.

n92. See, e.g., Kauesa v. Minister of Home Affairs, 1995 (1) S.A.L.R. 51 (CC), 1995 SACLR LEXIS 273.

n93. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., Pt.1, U.N. Doc. A/810 (1948), available at www.unhchr.ch/udhr/lang/eng.pdf (last visited Mar. 25, 2002).

n94. African Charter of Human Rights and Peoples' Rights, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev.5 (1986), available at www.afrikainfo.com/1013/oua/achpr.pdf (last visited Mar. 25, 2002).

n95. See Kauesa, 1 S.A.L.R. 51, 86-87 (1995).

n96. See id.

n97. S. v. Williams, 1995 (7) BCLR 861 (CC), 1995 SACLR LEXIS 249.

n98. See id.

n99. See id.

n100. Id. at 42.

n101. Id.

n102. See id. at 32-39.

n103. Id. at 39.

n104. See Williams, 1995 SACLR LEXIS 249.

n105. Newcrest Mining (WA) Ltd v. The Commonwealth (1997) 190 C.L.R. 513.

n106. See id.

n107. See id. at 657, 660.

n108. Id. at 657 (citing Mabo v. Queensland (1992) 175 Commonwealth L.Rep. 42).

n109. Id. at 658.

n110. Id. at 659.

n111. See id.

n112. See generally id. at 489-506 (referencing decisions and legal commentary from New Zealand, Canada, India, United States, South Africa, and Malaysia).

n113. Unity Dow, [1992] L. Rep. Commonwealth at 671.

n114. See id. at 672.

n115. See The Paquete Habana, 175 U.S. 677 (1900).

n116. See id.

n117. Id. at 688.

n118. Id. at 704.

n119. Id. at 708.

n120. See id. at 714.

n121. Basu, (1997) 1 S.C.C. at 438.

n122. See Rebecca J. Cook, Reservations to the Convention on the Elimination of all Forms of Discrimination Against Women, 30 Va. J. Int'l L. 643 (1990). The reservations issue is a complex and interesting one that goes to the heart of the nature of the international treaty system.

n123. Moreover, various national courts have come closer than international treaty bodies in applying international norms in adjudicating disputes between private litigants. Consequently, the international law requirement that human rights norms apply only to state actors is not relevant in domestic courts. See, e.g., Muojekwu, [2000] 5 N.W.L.R. 402. While the general rule that international law mediates the conduct of states remains largely intact, international human rights law has evolved over the years to provide greater protection in the private sphere. For example, the CEDAW has indicated in its General Recommendation No. 19 that it considers states responsible for violence against women even though the Convention does not explicitly provide such protections. The Committee has found that women cannot enjoy the rights contained in the CEDAW if they are subject to violence; thus the eradication of violence against women is a prerequisite to the full enjoyment of women's human rights as provided under international law. Domestic courts do not seem concerned with the public-private distinction in the same way as international tribunals. See generally, Committee on the Elimination of Discrimination against Women, General Recommendation 19, Violence Against Women, (Eleventh Session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI GEN 1 Rev.1 at 84 (1994), available at http://eir.library. utoronto.ca/whrr/display documents.cfm?ID=26&sister=utl.

n124. See Baker v. Canada (Minister of Citizenship and Immigration), No. 25823, 1999 Can. Sup. Ct. LEXIS 44 at 78-79.

n125. See id.; see also Unity Dow, [1992] L. Rep. Commonwealth at 655 (noting that the "Universal Declaration of Human Rights, 'formed the backdrop of aspirations and desires,' against which the framers of the Constitution of Botswana formulated its provisions.").

n126. Jago v. District of New South Wales, (1988) 12 NSWLR 558, reprinted in Stephen Donaghue, Balancing Sovereignty and International Law: The Domestic Impact of International Law in Australia, 17 Adel. L.R. 213, 245 (1995).

n127. See Regina v. Bartle, and Regina v. Evans, both of which are pending appeal and are available at http://www.parliament.the-stationery-office.co.uk (last visited April 15, 2002).

n128. See id.

n129. See id.

n130. Of course it might just be that the House of Lords was simply exhausted and wary of international law at this point.

n131. Teoh Transcripts, supra note 52, at 29.

n132. See, e.g., Michael Kirby, The Australian Use of International Human Rights Norms: From Bangalore to Balliol - A View From the Antipodes, 18 Commonwealth L. Bull. 1306, 1312 (1992) (Justice Kirby of Australia noting, that in cases of ambiguity, "a judge may seek guidance in the general principles of international law.").

n133. See Baker, 1999 Can. Sup. Ct. LEXIS 44.

n134. See id. at 76-77.

n135. See Khalfan Khamis Mohamed, (2001) 7 B.C.L.R. 685 (CC), available at http://www.lrc.org/za/3News/Judgments/Khalfan%20Khamis%20Mohamed.pdf (last visited Mar. 25, 2002).

n136. See id. P 3.

n137. See id. P 2.

n138. See id. P 4.

n139. See id. P 49.

n140. Convention Against Torture and Other Forms of Cruel and Unusual Treatment, GA Res. 39/46, U.N. Doc. A/RES/39/46 (1984).

n141. See Khalfan Khamis Mohamed, (2001) 7 B.C.L.R. 665 (CC), P 59.

n142. See Convention Against Torture, supra note 140.

n143. See id.

n144. See S. v. Williams, 1995 SACLR LEXIS 249.

n145. See id. The court focused on the prohibition of cruel and unusual treatment as a general matter.

n146. See Case of the SS Lotus, PCIJ Series A, No. 10 (1927); see also Daniel Bodansky, Non Liquet and the Incompleteness of International Law, in International Law, The International Court of Justice and Nuclear Weapons 153 (Laurence Boisson de Chazournes & Phillippe Sands eds., 1999).

n147. Of course, one's attitude towards the positivistic dictates of the Lotus case reveals a significant amount about one's philosophy of international human rights law in particular and law more generally.

n148. See Unity Dow, [1992] L. Rep. Commonwealth at 673.

n149. See id.

n150. See Knight v. Florida, 120 S.Ct. 459 (1999) (Thomas, J., concurring).

n151. See id. at 461.

n152. See id. at 459.

n153. Id.

n154. Mabo v. Queensland [No 2], 1992 WL 1290806 (HCA) 42. Mabo reversed the doctrine of terra nullius, which refused recognition to Aboriginal land title at common law. See id. Justice Brennan went on to observe that, "international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights." Id. at 42.

n155. See, e.g., Rv Keegstra [1990] 3 S.C.R 697 (McLachlin, J., dissenting) (concluding that the provisions of the Canadian Charter are uniquely Canadian and should not necessarily be interpreted in accord with international covenants).

n156. See, e.g., Kauesa, 1 S.A.L. Rep. 51 at 87 (Namibia) (the Namibian High Court interprets the meaning of equality under various international instruments as requiring equality of treatment (as opposed to equality of result). The Court reached this conclusion because it reasoned that it can only escape from the shadow of apartheid by ensuring strict equality of treatment despite the dictates of international law or the jurisprudence of other nations).

n157. See Dhungana v. Nepal, Writ No. 3392 (1993) (SC) (unreported and unofficial translation on file with journal).

n158. See id.

n159. See id. at 6.

n160. See id.

n161. See id.

n162. See Nulyarimma v. Thompson, [1999] FCA 1192, available at http://www.austlii.edu.au/au/cases/cth/federal ct/1999/1192.html PP 18-22, (last visited Jan. 16, 2002).

n163. See id.

n164. See id.

n165. See id.

n166. Id. P 26.

n167. See id.

n168. Id.

n169. Id. P 53.

n170. See generally Muojekwu, [2000] 5 N.W.L.R. 402 (Justice Tobi of the Nigerian Court of Appeal interprets the prohibition on exploitation of prostitution contained in Article 6 of the Women's Convention as prohibiting promiscuity).

n171. See Baker v. Canada (Minister of Citizenship and Immigration), 1999 Can. Sup. Ct. LEXIS 44, 77-78.

n172. Convention on the Rights of the Child (1989), available at www.unesco.org/education/information/nfunesco/pdf/CHILD E.PDF (last visited Mar. 25, 2002).

n173. See Baker, 1999 Can. Sup. Ct. LEXIS 44, 22.

n174. See Baker, 1999 Can. Sup. Ct. LEXIS 44.

n175. See id. at 22.

n176. See id.

n177. See generally, Jeffrey Wilson, A Tale of A Court That Does Not Like Children and One That Does, And How An International Convention May Make No Difference, at http://www. unhchr.ch/html/menu2/6/roupre1.htm (providing a brief overview of the Federal Court's analysis in similar cases).

n178. See Baker, 1999 Can. Sup. Ct. LEXIS 44 81-82.

n179. See id.

n180. Id. Baker, 1999 Can. Sup. Ct. LEXIS 44.

n181. See id.

n182. See, e.g., Isabelle R. Gunning, Arrogant Perception, World-Traveling and Multicultural Feminism: The Case of Female Genital Surgeries, 23 Colum. Hum. Rts. L. Rev. 189 (1992).

n183. See, e.g., Jennifer Nedelsky, Communities of Judgment and Human Rights 1(2) Theoretical Inquiries Into Law 1 (2000).

n184. Newcrest Mining, (1997) 190 CLR 513 at 657.

n185. Vishaka, (1999) Butterworths H.R.C. at 266 ("the High Court of Australia in Minister of Immigration and Ethnic Affairs v. Teoh (1995) 183 CLR 273, has recognised the concept

of legitimate expectation of its observance in the absence of a contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia.").

n186. Unity Dow, [1992] L. Rep. Commonwealth at 671.

n187. Baker, 1999 Can. Sup. Ct. LEXIS 44, 77-78.

n188. See Paquete Habana, supra note 115.

n189. Id. at 686-87.

n190. Knight v. Florida, 528 U.S. at 463.

n191. Id. at 463

n192. Id. at 464.

n193. See Williams, 1995 SACLR LEXIS 249.

n194. Id. at 39.

n195. Id at 52 ("The Constitution requires us to 'have regard' to the consensus referred to above; we are not bound to follow it but neither can we ignore it. The determinative test will be the values we find inherent in or worthy of pursuing in this society which has only recently embarked on the road to democracy. Already South Africa has lagged behind. The Constitution now offers an opportunity for South Africans to join the mainstream of a world community that is progressively moving away from punishments that place undue emphasis on retribution and vengeance rather than on correction, prevention and the recognition of human rights.").

n196. See Kauesa, 1995 SACLR LEXIS 273.

n197. See id.

n198. See id.

n199. See id.

n200. See id.

n201. See id.

n202. See R. v. Poumako [2000] 2 N.Z.L.R. 695.

n203. See id. at P 75.

n204. Id.

n205. Id.

n206. Id.

n207. Williams, 1995 SACLR LEXIS at 42.

n208. Brian R. Opeskin, Constitutional Modelling: The Domestic Effect of International Law in Commonwealth Countries - Part I, Pub. L. 607, 625 (2000).

n209. Drawing on Patricia Williams' work, Kim Robinson argues that including social and economic rights, as recognized in international law, in the South African Constitution has important rhetorical value as South Africa moves towards reconciliation and reconstruction. See Kim Robinson, False Hope or Realizable Reality? The Implementation of the Right to Shelter in South Africa Under the African National Congress' Proposed Bill of Rights For South Africa, 28 Harv. C.R.-C.L. L. Rev. 505 (1993).

n210. 2000 (3) BCLR 277, 291 (CC) (S. Afr.) (emphasis added). This regard for correcting the past is also reflected in South Africa v. Grootboom, 2000 (11) BCLR 1169 (CC).

n211. See Kauesa, 1995 SACLR LEXIS 273.

n212. Unity Dow, [1992] L. Rep. Commonwealth 670.

n213. See, e.g., Kausesa, 1995 SACLR LEXIS 273 (the Namibian High Court interprets the meaning of equality under various international instruments as requiring equality of treatment

as opposed to equality of result. The Court reached this conclusion because it reasoned that it can only escape from the shadow of apartheid by ensuring strict equality of treatment).

n214. See Craig Scott & Philip Alston, Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise, 15 S. Afr. J. Hum. Rts.206, 212-13 (2000) (concluding that, "it is probably true to say that a growing number of national judges see themselves as juridical citizens of the world.").

n215. L'Heureux-Dube, supra note 13 at 23.

n216. See Tavita, [1994] 2 N.Z.L.R. at 266.

n217. Id.

n218. See Van Gorken v. Attorney-General, [1977] 1 N.Z.L.R. 535, 542-43.

n219. See id. at 535.

n220. See id. at 543.

n221. Id.

n222. See Newcrest Mining, (1997) 190 CLR 513.

n223. See Universal Declaration of Human Rights, supra note 93.

n224. Newcrest Mining, (1997) 190 CLR at 658-59.

n225. Id. at 658.

n226. See Williams, 1995 SACLR LEXIS 249.

n227. Id. at 27-28.

n228. Ephrahim v. Pastory, 1990 L. Rep. Commonwealth 757, 763 (1990).

n229. Unity Dow, [1992] L. Rep. Commonwealth at 657 (emphasis added).

n230. See id. at 670.

n231. See id. at 670.

n232. Id. at 670.

n233. See Vishaka, (1999) Butterworths H.R.C. at 265 (citing Beijing Statement of Principles of the Independence of the Judiciary).

n234. Scott & Alston, supra note 214, at 212-213.

n235. See generally Slaughter, supra note 5.

n236. See Claire L'Heureux-Dube, The Child and Family Breakup / The Child in Need of Protection, in Justice For Each Child 357; Beverly McLachlin, The Child: A Person, in Justice For Each Child 359.

n237. Sally Brown, Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh (1994-95), 183 CLR 273: The Convention, the Case, the Controversy and the Consequences, in Justice For Each Child 81; see also Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh, 183 CLR 273.

n238. See Brown, supra note 237 ("Having been informed of the fact that the Supreme Court of Canada is presently seized with two cases in which the principles of Canadian immigration law could come into conflict with the Convention on the Rights of the Child, the speaker gave an example of a case that came before the High Court of Australia in which an immigrant married to an Australian and the father of seven children, was refused permanent resident status following a prison sentence and was ordered deported from the country.").

n239. See id.

n240. See generally, Michel Bastarache, The Centrality of Human Rights and Constitutional Interpretation by the Courts, Address Before the Canadian Jewish Law Students Association Annual Conference (January 29, 2000) (on file with journal and author) (discussing the Canadian Supreme Court's connections to other jurisdictions).

n241. Duncan Kennedy, A Critique of Adjudication: Fin De Siecle 161 (1997).

n242. See, e.g., Ursula A. O'Hare, Realizing Human Rights For Women, 21 Hum. Rts. Q. 364, 368 (1999).

n243. See Slaughter, supra note 5, at 137.

n244. Helfer and Slaughter, supra note 8, at 283.

n245. David Dyzenhaus & Evan Fox-Decent, Rethinking the Process/Substance Distinction: Baker v. Canada, 51 U. Toronto L.J. 193, 241 (2001). See also, Sujit Choudry, Globalization in Search of Justification: Towards A Theory of Comparative Constitutional Interpretation, 74 Ind. L.J. 819, 824 (1999). ("Contemporary legal theorists often argue ... that courts should legitimize public power by serving as vehicles through which legislatures and executives engage in a process of reason giving.").

N246. Lama Abu-Odeh, Modernizing Muslim Family Law: The Case of Egypt 65 (work in progress presented at Feminism and the Law Workshop, Faculty of Law, University of Toronto Friday Mar. 8, 2001, transcript on file with the author). Cited with permission of the author.

n247. See, e.g., Radhika Coomaraswamy, To Bellow Like A Cow: Women, Ethnicity, and the Discourse of Human Rights, in Human Rights of Women: National and International Perspectives 39 (Rebecca J. Cook ed., 1994).

n248. Some argue that colonialism is not dead but simply transformed from a political system to an economic one that is supported by a liberal emphasis on civil and political rights over social and economic rights. See, e.g., Peter Schwab & Adamantia Pollis, Globalization's Impact on Human Rights, in Human Rights: New Persprectives, New Realities (Peter Schwab & Adamantia Pollis eds., 2000) ("As a result, under the rubric of globalization non-Western nations are pressured to accept neoliberal principles of free trade and open markets and the universalist concept of human rights.").

n249. Lama Abu-Odeh, supra note 246.

n250. Reem Bahdi, Reflecting Russia: English Perceptions of Russia, 1812-1854 (1991) (unpublished MA thesis, University of Western Ontario) (on file with author).

n251. Indeed, at least some who object to the imperialism of the West object to the tendency of Western scholars and advocates to be ignorant of the contributions of the "East" and/or "South" to the international human rights movement. See, e.g., Africa Action, Strategic Action Issue Area: African Women's Rights, at http://www.africaaction.org/ action/women/htm (last visited Mar. 25, 2002) (quoting Bunmi Fatoye-Matory, I Am Not Just an African Woman, Christian Science Monitor Archive, (July 1, 1996), at http://www.cs monitor.com/cgi-bin/avcombosearchsecure.redesign (the "1939 Aba demonstrations by women against colonial taxation in eastern Nigeria came decades before the tide of Western feminism."); see also Brenda Cossman, Returning the GazeBack On Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial Project, 51 Utah L. Rev. 525, 544 (1997) (discussing "scattering of feminist legal theory" in the context of comparative law).

n252. Charles Taylor, The Politics of Recognition, in Multiculturalism and the Politics of Recognition 24, 25 (Amy Gutmann ed., 1992).

n253. See, e.g., The Legal Research and Resource Center for Human Rights (LRCC), Cairo, Egypt, "Verdict Regarding the Prohibition of FGM in Egypt" available at http://www.geocities.com/lrcc/FGM/circum1.htm (last visited Mar. 21, 2001).

n254. See, e.g., United Nations Development Fund for Women, Amman, Western Asia Regional Office, Report of the Round Table Workshop: CEDAW and Islam and the Human Rights of Women (1999) available at http://arabwomenconnect.org/english/ western asia/round report.html (last visited Mar. 2, 2002).

n255. See Unity Dow, [1992] L. Rep. Commonwealth 623.

n256. See Baker, 1999 Can. Sup. Ct. LEXIS 44.

n257. L'Heureux-Dube, supra note 13, at 39.

n258. Commentators who address this question almost always focus their energies on delineating the changes that the other needs to make. Even feminist scholars and critical race feminists who turn their lens on analyzing Western analysis of the other accept the premise that the other is the locus of change. Their debates with feminists in the West thus focus on whether or not the other should change. To the extent that they advocate change in the West, their prescriptions tend to be limited to demanding changes in attitude: feminists in the West must be less patronizing, less essentialist, less imperialist. Their criticism is that we do not properly understand what happens over there. We need to better understand so as to properly criticize, not that we can actually change and benefit from interaction with the other. Though the critics may be right about the need for more understanding on the part of the legal establishment, they do not fully explore whether Western legal norms may themselves change for the better by interaction with the other.

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