Court to Court

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The American Journal of International Law, Vol. 92, No. 4. (Oct., 1998), pp. 708-712.

Stable URL:
http://links.jstor.org/sici?sici=0002-9300%28199810%2992%3A4%3C708%3ACTC%3E2.0.CO%3B2-4

The American Journal of International Law is currently published by American Society of International Law.

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within appropriate constitutional bounds when foreign relations issues are at hand.[23] The Governor of Virginia failed to shoulder that responsibility in the *Breard* matter.

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COURT TO COURT

Leave aside the question whether the indication of provisional measures by the International Court of Justice in the *Breard* case was binding on the United States as a matter of international or domestic law. Scholars will continue to differ on this question; government decision makers will reach their own conclusions. Leave aside that the state of Virginia violated a solemn treaty obligation, a treaty that the Supreme Court is obliged to uphold as the supreme law of the land. Without denigrating the power of these arguments, a less contentious case can be made for the granting of a stay—a case based less on compulsion than on civility.

Consider the impact of the ICJ's decision as persuasive authority, or, more precisely, a request from one court to another. The indication of provisional measures can be understood to include a request from a principal judicial authority on international law to the supreme judicial authority on U.S. law to take any measures within its power to enjoin an immediate and irrevocable harm until both courts had adequate time to consider the applicable questions of law.

The Supreme Court should have honored this request as a matter of judicial comity, offering the ICJ the same respect that U.S. courts are increasingly according their counterparts around the world. Comity, of course, is a concept with almost as many meanings as sovereignty. However, U.S. courts have been developing, or perhaps simply rediscovering, the more distinctive concept of judicial comity.

Justice Antonin Scalia distinguished between "the comity of courts" and legislative comity in his dissent in the *Hartford Fire* decision, describing judicial comity as the decision by a court in one country to decline jurisdiction "over matters more appropriately adjudged elsewhere."[1] As authority for this distinction, Justice Scalia turned back to Joseph Story's *Commentaries on the Conflict of Laws,* published in 1834. Story, in turn, distinguished between "the comity of the courts," and "the comity of the nation," emphasizing that courts did not defer to foreign law as a matter of judicial courtesy, but rather on the basis of an interpretive principle requiring courts to read legislative silence regarding the effect of foreign law as the tacit adoption of such law unless repugnant to fundamental public policy.[2]

But what, then, is the comity of courts? If it is not the determination whether and under which circumstances to apply foreign law, what is left to decide? Even more fundamental questions, at least to any practicing lawyer, concern where the case shall be heard in the first instance, under what procedures, with what opportunities for discovery—in short, the entire procedural context in which the substantive legal issues are embedded.

Judicial comity is thus the lubricant of transjudicial relations. The question facing judges around the world, in the words of Judge, now Justice, Stephen Breyer, is how to

[23] *See* Bilder, *supra* note 2, at 831; *see also* Spiro, *supra* note 11, at 578.

* Of the Board of Editors.

[1] Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817 (1993). By contrast, legislative or "prescriptive comity" is "the respect sovereign nations afford each other by limiting the reach of their laws." *Id.*

[2] JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §38 (Arno Press 1972) (1834).

"help the world's legal systems work together, in harmony, rather than at cross purposes."[3] This is the traditional question posed by private international law, but given new urgency by the ever-accelerating process of globalization. A growing number of U.S. courts are grappling with the answer in a wide variety of contexts.

According to the U.S. Court of Appeals for the Second Circuit, reviewing Supreme Court precedents on the enforcement of forum selection clauses, "international comity dictates that American courts enforce these sorts of clauses out of respect for the integrity and competence of foreign tribunals."[4] The court subsequently enforced a forum selection clause specifying an English forum in a securities fraud case brought by a U.S. plaintiff—in which it was clear that neither an English court nor an English arbitrator would apply U.S. securities law. In a similar case arising under federal trademark legislation, Judge Frank Easterbrook of the Seventh Circuit argued that foreign courts could interpret such statutes as well as U.S. courts, noting that the entire *Mitsubishi* line of Supreme Court precedents "depend[s] on the belief that foreign tribunals will interpret U.S. law honestly, just as the federal courts of the United States routinely interpret the laws of the states and other nations."[5]

Other fertile sources of doctrinal developments regarding judicial comity are cases involving *forum non conveniens* dismissals, *lis alibi pendens* motions, and requests for antisuit injunctions. In *Ingersoll Milling Machine Co. v. Granger,* the Seventh Circuit affirmed the stay of an action pending before an Illinois district court following the issuance of a judgment in a parallel suit by a Belgian court, noting: "International judicial comity is an interest not only of Belgium but also of the United States."[6] In the *forum non conveniens* context, courts have referred back to nineteenth-century admiralty decisions dismissing cases to avoid interfering with foreign regulatory regimes, a debate that was recently rekindled in Texas.[7]

Many of these decisions still intertwine very general and amorphous notions of comity between nations with a more specific concept of judicial comity (though one can certainly be understood as a subset of the other). But even at this stage, it is possible to identify several distinct strands of judicial comity. First is a respect for foreign courts qua courts, rather than simply as the face of a foreign government, and hence for their ability to resolve disputes and interpret and apply the law honestly and competently. Second is the corollary recognition that courts in different nations are entitled to their fair share of disputes—both as coequals in the global task of judging and as the instruments of a strong "local interest in having localized controversies decided at home."[8] The *Ingersoll* court made this link, declining to criticize the district court for rejecting the " 'parochial concept that all disputes must be resolved under our laws and in our courts.' "[9] The quote is from the Supreme Court's seminal decision in *The Bremen v. Zapata,* in which

[3] Howe v. Goldcorp Invs., Ltd., 946 F.2d 944, 950 (1st Cir. 1991).

[4] Roby v. Corporation of Lloyds, 996 F.2d 1353, 1363 (2d Cir. 1993) (citing Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985)).

[5] Omron Healthcare Inc. v. MacLaren Exports Ltd., 28 F.3d 600, 604 (7th Cir. 1994).

[6] 833 F.2d 680, 685 (7th Cir. 1987).

[7] *Compare* Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 687 (Tex. 1990) (Doggett, J., concurring) ("Comity—deference shown to the interests of the foreign forum . . . is best achieved by avoiding the possibility of incurring the wrath and the distrust of the Third World as it increasingly recognizes that it is being used as the industrial world's garbage can.") (internal quotation marks and citations omitted) *with* Sequihua v. Texaco, Inc., 847 F.Supp. 61, 63 (S.D. Tex. 1994) ("exercise of jurisdiction by this Court would interfere with Ecuador's sovereign right to control its own environment and resources"; the case should thus be dismissed on comity grounds).

[8] Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947) (applying the *forum non conveniens* doctrine to dismiss a New York case in favor of a Virginia forum), *quoted in* Piper Aircraft v. Reyno, 454 U.S. 235, 241 (1981) (dismissing a case brought in the United States in favor of a Scottish forum).

[9] 833 F.2d at 685.

it agreed that American litigants could be forced to litigate abroad where they had negotiated a forum clause choosing a foreign forum.[10]

Respect for foreign courts need not mean deference. But it must mean at least awareness of the presence and potential interest of a foreign court, and at best direct interaction with that court in a cooperative effort to resolve the dispute at hand. In deciding whether to allow French litigants to use U.S. discovery procedures against an American litigating in French court (as provided for in 28 U.S.C. §1782), Judge Guido Calabresi of the Second Circuit concluded that U.S. courts should grant such assistance in the absence of a clear objection from the foreign tribunal. The U.S. statute "contemplates international cooperation," he wrote, "and such cooperation presupposes an on-going dialogue between the adjudicative bodies of the world community."[11] As an example of direct foreign judicial action, he cited a case in which two English courts had directly enjoined a litigant from using section 1782, on the ground that "the English court should retain control of its own proceedings and the proceedings that are before it."[12] The House of Lords subsequently vacated the injunction on the ground that the discovery sought was not unfair to the opposing litigant and did not interfere with "the due process of the [British] court."[13]

In other contexts, Judge Calabresi has been one of a handful of U.S. judges urging his U.S. colleagues to join a global trend and pay more attention to foreign decisions, not only decisions in the same dispute but more general precedents on point for the simple purpose of learning and cross-fertilization. In a concurring opinion in *United States v. Then,* he argued that U.S. courts should follow the lead of the German and the Italian constitutional courts in finding ways to signal the legislature that a particular statute is "heading toward unconstitutionality," rather than striking it down immediately or declaring it constitutional.[14] In conclusion, he observed that the United States no longer holds a "monopoly on constitutional judicial review," having helped spawn a new generation of constitutional courts around the world.[15] "Wise parents," he added, "do not hesitate to learn from their children."[16]

This view is shared in high places. Decriers of American parochialism are fond of citing Justice Scalia's fervent rejection, albeit in a dissent, of evidence of global public opinion about the death penalty with the reminder that "it is a constitution for the United States of America that we are expounding."[17] But Justice Breyer countered this past Term in his dissent in *Printz v. United States,* noting that the experience of foreign courts and legal systems "may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem."[18] More generally, Justice Sandra Day

[10] The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972).

[11] *In re* Application of Euromep, SA, 51 F.3d 1095, 1101 (2d Cir. 1995).

[12] South Carolina Ins. Co. v. Assurantie Maatschappij "De Zeven Provincien" NV, [1986] 3 W.L.R. 398 (1986), *discussed and quoted in Euromep,* 51 F.3d at 1100 n.3.

[13] 51 F.3d at 1100 n.3.

[14] United States v. Then, 56 F.3d 464, 468–69 (1995).

[15] *Id.* at 469.

[16] *Id.*

[17] Thompson v. Oklahoma, 487 U.S. 815, 869 (1988).

[18] 117 S.Ct. 2365, 2405 (1997). Writing for the majority in the *Printz* case, Justice Scalia again rejected Justice Breyer's invitation to make a comparative analysis, with the assertion that "such comparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one." *Id.* at 2377 n.11. On the other hand, in another case decided during the 1997 Term brought by several members of Congress challenging the line-item veto, Chief Justice Rehnquist pointed out that "[t]here would be nothing irrational about a system which granted standing [to legislators] in these cases; some European constitutional courts operate under one or another variant of such a regime . . . . [although] it is obviously not the regime that has obtained under our Constitution to date." Howell v. Raines, 117 S.Ct. 2312, 2322 (1997).

O'Connor has been exhorting U.S. lawyers around the country to pay more attention to foreign law[19] and has led several delegations of U.S. Supreme Court Justices to meet their foreign counterparts, first from the French Conseil d'Etat, the Conseil Constitutionnel, and the Cour de Cassation, and most recently from the European Court of Justice (ECJ), the European Court of Human Rights, and the German Constitutional Court. Following a daylong exchange of views with ECJ members and the opportunity to attend a hearing, both Justice O'Connor and Justice Breyer noted their willingness to consult ECJ decisions "and perhaps use them and cite them in future decisions."[20]

Justice O'Connor has been equally vocal on the need for U.S. judges to consult case law in foreign jurisdictions regarding both the interpretation of the "ever-increasing network of international treaties" and the proper relationships between national courts and a wide range of international tribunals.[21] Indeed, she has even cited the *Breard* case as a specific example of a situation involving a U.S. treaty obligation in which U.S. judges "are going to want to draw upon our awareness of the jurisprudence from other jurisdictions," to find out "what other countries have done."[22] The ICJ would have been a fine place to look. It does not express the views of any one country, but of many knit together by a shared understanding of the needs of a global community. It is also the tribunal of choice among the parties to the treaty in question.

In the end, however, simple cross-fertilization of judicial ideas is unlikely to be enough. Comity requires more than consultation born of intellectual curiosity. It expresses an appreciation of different assignments and a global allocation of judicial responsibility, sharpened by the realization that the performance of one court's function increasingly requires cooperation with others. On the other hand, it does not import subordination or even the more subtle constraints of ritual deference.

Refining and implementing a specific concept of judicial comity may ultimately raise large political and philosophical issues. But the *Breard* case does not. The Supreme Court was directly requested by the ICJ not to defer to its decision, but simply to *wait.* It was asked to take a measure that was within its power as a matter of federal law, to give the ICJ a chance to decide whether the case was properly before it and to weigh and consider the legal issues pending before both courts. A stay would have preserved the ultimate rights of all parties (other than a purported right of the state of Virginia to execute its death row inmates as quickly as possible), until the ICJ could at least express its views on the issue and have them considered not only by the Supreme Court, but by other U.S. and state officials. Such a step is the minimum respect required.

Ironically, and sadly to many, I think it actually quite unlikely that Angel Breard would have gained anything more than a further stay of execution if the Supreme Court had decided to respond affirmatively to the ICJ's request. The ICJ would have to decide that the remedy for the type of violation of the Vienna Convention at issue in the *Breard* case is an invalidation of the conviction or sentence in a particular national decision. Yet why should the ICJ even attempt to set forth such a specific remedy to be followed by all

[19] Sandra Day O'Connor, *Broadening our Horizons: Why American Judges and Lawyers Must Learn about Foreign Law,* INT'L JUD. OBSERVER (Int'l Jud. Acad./ASIL), June 1997, at 2 (article adapted from speech given by Justice O'Connor at the 1997 spring meeting of the American College of Trial Lawyers).

[20] *Justices See Joint Issues with the EU,* WASH. POST, July 8, 1998, at A24. The quote is from Justice O'Connor. Justice Breyer added the following comment: "Lawyers in America may cite an EU ruling to our court to further a point, and this increases the cross-fertilization of U.S.-EU legal ideas."

Other members of the delegation included Chief Judge Richard Arnold of the Eighth Circuit and Texas Chief Justice Tom Philips. Press Briefing in Brussels, U.S. Justices Compare U.S., EU Judicial Systems (July 8, 1998) ⟨http://pdq2.usia.gov/scripts/cqcgi.exe/@pdqtest1.env⟩. Justice Anthony Kennedy was also present for the meeting with the members of the ECJ.

[21] Press Briefing in Brussels, *supra* note 20.

[22] *Id.*

national authorities? It understands its own position and the necessary respect due not only to national courts, but also to national governments more generally, all too well. It is far more likely to find a violation and to set forth a general formula concerning the magnitude and type of remedy that would be appropriate in cases of this kind, perhaps accompanied by a specific measure of damages in this particular case.[23]

The Supreme Court thus had little to lose, but much to gain. The Clinton administration declared the issue to be one of persuasion rather than law—denying the Supreme Court a role but turning to internal diplomacy between the U.S. Secretary of State and the Supreme Court of Virginia. The outcome of the case may indeed have turned on a question of persuasion rather than coercion, but it should have been a question of persuasion court to court.

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[23] In its indication of provisional measures, the Court itself noted the existence of a "dispute as to whether the relief sought by Paraguay is a remedy available under the Vienna Convention." It further recited the view of the United States that for it to order the remedy sought by Paraguay would put it "in a position of acting as a universal court of criminal appeal," and then concluded its recitations with the firm assertion that "the function of this Court is to resolve international legal disputes between States, *inter alia* when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal." Case concerning the Vienna Convention on Consular Relations (Para. v. U.S.), Provisional Measures, paras. 31, 30, 38 (Order of Apr. 9, 1998) ⟨http://www.icj-cij.org⟩.

* Of the Board of Editors.