THE CITY UNIVERSITY OF NEW YORK LAW REVIEW

City University of New York Law Review

Volume 3 | Issue 1

1998

Plenary Remarks: Judges and the Role of International Human Rights Law

Kristin Booth Glen
CUNY School of Law

PLENARY REMARKS: JUDGES AND THE ROLE OF INTERNATIONAL HUMAN RIGHTS LAW

Dean Kristin Booth Glen†

Hearing Judge Shapiro speak,[1] I am reminded again of why we invited her, and gratified that we did. I think she is the best example of the kind of federal judge, with whom those of you who are litigators and who want to do this kind of work, might find success. The things she said about educating herself and others like her are probably among the more valuable contributions to come out of this conference. As the last speaker, I would like to make a few final observations about the issues that arose out of this panel.

First, a number of people, beginning with Judge Jones and ending with Judge Shapiro, mentioned the cases of *Kadic v. Karadzic*[2] and *Filartiga v. Pena-Irala*.[3] I think it is important to acknowledge while we are all together in this room, that those cases were brought by lawyers from one of the co-sponsers of this conference, the Center for Constitutional Rights. Ron Daniels, the President, is here today and I think that we owe the Center and its excellent lawyers a real debt of gratitude for their groundbreaking work. As for the *Karadzic* case, I am proud that one of the lead counsel, as well as a person of enormous importance in introducing and advancing international human rights for women, is the City University of New York School of Law's own Professor Rhonda Copelon, whose presence we are also fortunate to share today.

---

† B.A., Stanford University; J.D., Columbia University Law School. A member of the judiciary since 1980, she served as a Civil Court Judge for six years before being elected to New York Supreme Court in 1986. In 1993, she was appointed an Associate Justice of the Appellate Term, First Judicial Department, and in 1995, she left the Bench to become the third Dean of the City University of New York School of Law. These remarks were made at *Bringing It Home: Building International Human Rights Law, Advocacy and Culture, A Conference to Mark the 50th Anniversary of the Universal Declaration of Human Rights*, held at The City University of New York School of Law, 1 May - 3 May 1998.

[1] Judge Norma Shapiro of the United States District Court for the Eastern District of Pennsylvania was also a speaker in the plenary session, entitled "Judges and the Role of International Human Rights Law."

[2] 70 F.3d 232 (2d Cir. 1995), *reh'g denied*, 74 F.3d 377 (2d Cir. 1996) (holding alien plaintiffs could sue Bosnian-Serb leader Radovan Karadzic in a United States district court for tortious acts committed in Bosnia-Herzegovina by forces under Karadzic's direction, thus violating customary international law).

[3] 630 F.2d 876 (2d Cir. 1980) (holding the Alien Tort Claim Act, 28 U.S.C. § 1350 (1994), granted federal subject matter jurisdiction over a wrongful death action by the family of Paraguayan torture victim).

Besides the thanks which flow from discussion of those cases, I was also reminded of a major legal question which seems to me to have no single answer. When we first imagined this conference, we thought, "Here are all of these cases, like *Filartiga*, in which foreign nationals, whose international human rights have been violated can litigate in U.S. Courts, but when will we begin to see U.S. Courts doing the same thing for U.S. nationals, whose international human rights have been violated in this country?" Although it would seem there should be a certain symmetry in these cases, I am reminded of a Second Circuit Judicial Conference that I attended two years ago, which focused in part on international human rights. There was a major panel on the *Filartiga* and *Karadzic* cases, and at the end of the panel, a judge—who will not be named—stood up and said, "I have a troubling thought. Does this mean that people could use international human rights norms here against the U.S. Government or State Governments?" One of the academics on the panel, who clearly had less to fear than lawyers who appear in front of those federal judges, answered "Well yes, of course," and the house almost came down. It was quite stunning, partly because the level of resistence was so enormous and so overt, and it was also frightening. It is clear that this is not going to be an easy battle, and the federal courts cannot be expected to be exactly "welcoming."

One of the reasons I agreed to come on to this panel at the last moment, to subsitute for Judge Gans[4] who has been very active in the International Association of Women Judges and interested in these issues, is because I also want people to think seriously about the importance of state courts, since that is part of what she would have represented. Sometime more than fifteen years ago, when I was still a lawyer, and the United States Supreme Court's attacks had begun to chip away at various Constitutional protections, academics and practitioners began to talk about using state constitutions rather than relying entirely on the Federal Constitution as the basis for finding a right to privacy which resulted in striking down the New Jersey sodomy law.[5] Contrarily, New York

---

[4] The Honorable Louise Gruner Gans, Acting Supreme Court Justice, New York County.

[5] *See* State v. Ciuffini, 395 A.2d 904, 906-07 (N.J. Super. Ct. App. Div. 1978) (holding sodomy statute infringed on right of privacy under state constitution); *see also* Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. Ct. App. 1996) (holding that the Homosexual Practices Act violated right to privacy under state constitution); Commonwealth v. Morales, 826 S.W.2d 201, 206 (Tex. Ct. App. 1992) (holding the sodomy statute unconstitutional because it violated right of privacy under state constitution); Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992) (holding the sodomy statute

relied on the Federal Constitution to make the same determination,[6] leaving its decision subject to review by the Supreme Court.[7]

What worked in the case of sodomy laws, and the ability of state courts to use their own constitutions strikes me as more problematic in the area of international human rights, which generally, derive from federal treaties. I suspect that a decision of the highest state court based on international human rights and its constitution would, because of the federal issues involved, probably still be reviewable by the Supreme Court, and that's a place where many of us do not want to spend any more time than we absolutely have to. I want to suggest, however, that there are other ways to use international human rights norms in state courts rather than simply by arguing that a particular statute—say, capital punishment—violates an international treaty like the Convention against Torture, and thus must be struck down.

These are some very preliminary thoughts, but it seems to me that when, as is often the case, we have statutes and regulations which are ambiguous and subject to several possible constructions, it is possible to make arguments about international human rights norms weighing on the side of the desired statutory construction. This is something we need to think about and try to do more frequently. Certainly there are many areas in state law and litigation where the magic words "public policy" are important, or even dispositive. In such cases, exceptions may be read into statutes or prior court decisions based on "public policy" considerations. Alternatively, ambiguous statutes or policies may be enforced because they comport with the court's notion of "public policy." We should consistently be arguing that "public policy" in such contexts necessarily incorporates international human rights norms. I suspect that there may be other contexts in state court litigation

---

violated the right of privacy and equal protection rights guaranteed by the Kentucky State Constitution). Indeed, since the time this conference occurred the Supreme Court of Georgia struck down under its state constitution the sodomy law at issue in the case of *Bowers v. Hardwick*, 478 U.S. 186 (1986). In *Hardwick*, the United States Supreme Court held that the Federal Constitution did not confer a fundamental right to engage in homosexual sodomy and therefore let Georgia's sodomy law stand. *Id.* at 189. In *Powell v. State*, 510 S.E.2d 18 (Ga. 1998), the Supreme Court of Georgia held the sodomy law violated the right of privacy guaranteed by Georgia's Constitution. *Id.* at 26.

[6] *See* People v. Onofre, 415 N.E.2d 936 (N.Y. 1980) (holding New York law which criminalized consensual sodomy violated privacy and equal protection guarantees of the United States Constitution).

[7] *See id., cert. denied*, 451 U.S. 987 (1981). *See generally* Marbury v. Madison, 5 U.S. 137, 177 (1803) (holding that the United States Supreme Court is the final authority on the meaning of the United States Constitution).

where we can use these concepts in a progressive way. Perhaps by the time we do the proceedings of this conference, some other ideas may have come forth which can be included.

I want to say one final thing this time about judicial education—which again was prompted by Judge Shapiro's presentation. I am an optimist who believes that when most judges are knowledgeable about the existence and enforceability of international human rights, they will use them, where appropriate, if they can. The problem is whether judges know about them, and if not, why not? I use myself as an example. I think I was a progessive, relatively activist judge. Like all judges though, I was a generalist, because in some ways state—and federal—judges have to know about everything. Consequently, they know little about the kind of things that generally do not come before state courts. Obviously, given the limitations of the twenty-four hour day, most judges use their time developing knowledge about what there is, as opposed to what might someday be there. Certainly, without overtly having international human rights as one of the subjects in my case load, I knew next to nothing about them. Unless we find ways to share information about these issues with judges, we cannot legitimately expect them to do it by themselves.

In an analogous area, I have recently been trying to do some writing about issues relating to the elderly and the obligations of government to monitor adult guardianships. Because I am here at the City University of New York School of Law, I know that there must be international human rights implications, but even for me here, it is difficult to know how to go about finding them. I am exceptionally fortunate, and atypical, in having faculty members like Rhonda Copelon and Sharon Hom to help me, but this is not the case for most people. Realistically speaking, you cannot expect them—especially if they are judges—to do a major research project to come up with something that, at best, may be potentially relevant, not to mention professionally risky. Arguing, and thoroughly briefing international human rights in cases which are litigated is one way to get the word to our individual judges; judicial education is another.

I think my own example suggests that even the most likely candidates among judges are unlikely and unable to know much about international human rights norms. Listening to Judge Jones and Judge Shapiro talk about the Wingspread Conference, I am reminded that only the most elite, well-known judges get invited to gatherings like that. If you want to reach the far greater audience

of state court judges, you should think seriously about working in your own jurisdictions through less glamorous, but potentially far more important state judicial education establishments. State judicial education is often supervised by the Court of Appeals of the respective states. Many of those Courts are quite liberal and open to interesting new ideas and issues. Some are less so, but I still believe that devoting some energy to working in judicial education around international human rights norms in those states may have a significant impact—even though it may be tougher to do and to do well.

Here, as one who has sat on both sides of the table, I observe the painful but unnecessary lack of communication between legal academia and the judiciary. It doesn't have to be that way. Academics think judges are powerful, and judges think that academics are really smart, so there is a basis for meaningful mutual dialogue. With a little work, academics can be welcomed by many members of state judiciaries for their contributions in spreading information and the messages we have been speaking about for the last two days.

I hope that as we leave this conference and begin to develop strategies for implementing international human rights norms on the domestic front, the state courts will not be forgotten or ignored. This will require creativity as there are many, if not more, thoughtful and progressive judges in the state court systems than there are in the federal courts, our illustrious panel notwithstanding. This is truly a terrain and venue of struggle that should not be ignored, but rather one that we might see as potentially a first order of business.