Could I Interest You in Some Foreign Laws?

No Thanks, We Already Have Our Own Laws

The court should never view a foreign legal decision as a precedent in any way.

BY RICHARD POSNER

THE QUESTION FOR THIS DEBATE IS: "SHOULD FOREIGN OR international legal decisions ever be considered relevant to United States Supreme Court rulings?" Alternatively but equivalently: "In what circumstances, if any, should the United States Supreme Court cite a decision by an international or other foreign court?" The alternative formulation zeroes in on the essential distinction between informational and precedential citations. Anything can be cited as a source of information bearing on an adjudication. Suppose a judge happened to read a decision of the German Constitutional Court concerning the right to an abortion and found in it an argument against abortion (or perhaps facts about the motives for or procedures of abortion) that he hadn't seen before and that he found persuasive. Suppose he wanted either to give credit where credit was due or simply to identify a source, because judges, like most other lawyers, are obsessive citers (a reflex designed to conceal the subjective and unstable character of much legal reasoning). Or the foreign decision might be material in a legal sense, for example, because of a choice-of-law provision in the contract on which the U.S. suit was based, or because the foreign decision was claimed to have a pre-emptive effect in a U.S. litigation. These would be cases in which foreign law was incorporated into American law.

International law, influenced or even created by foreign judicial decisions, can also be a basis for a claim or defense in an American court. The Constitution authorizes Congress to "define and punish ... Offences against the Law of Nations," and the Alien Tort Claims Act confers (controversially) similar powers. Admiralty law is a body of international law enforced in our federal courts. An English decision from the 18th century might be cited to establish the original meaning of "cruel and unusual punishments" in the Eighth Amendment; this is an example of a genealogical relation between foreign and U.S. law. And a foreign decision that revealed that a foreign nation persecutes members

of an ethnic group seeking asylum in the United States could be material as well. All these are examples of unexceptionable citation to foreign decisions—and all are remote from cases in which a foreign decision is relied on for its *precedential* effect.

Problems arise only when the foreign decision is believed to have some (even if quite attenuated) persuasive force in an American court merely by virtue of being the decision of a recognized legal tribunal. This occurs, in short, when it is treated as an *authority*, albeit not a controlling one, in a U.S. lawsuit even though the issue is purely local, such as whether abortion should be forbidden, or the execution of retarded murderers forbidden, or gay marriage allowed.

The problems with this kind of citation of foreign decisions are four, besides the obvious one that unless the meaning of a treaty is at issue, the foreign court will not have been interpreting the same constitutional or statutory text or precedents that would frame and guide the analysis by the U.S. court.

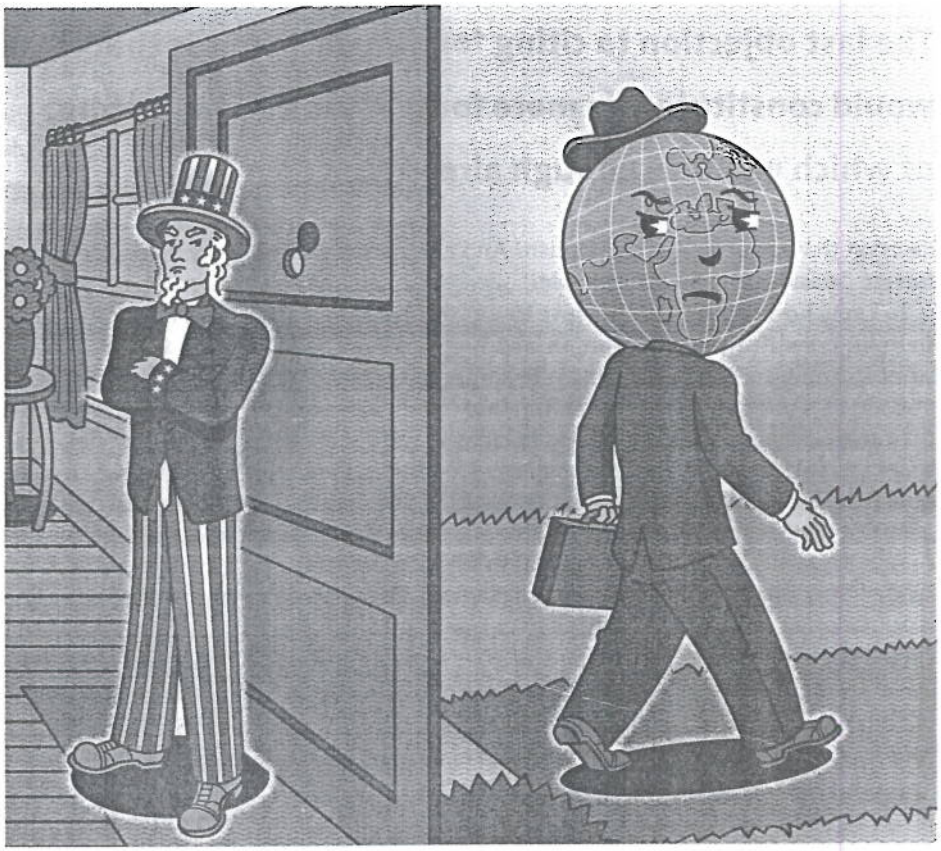
Before proceeding further, I must make sure that some essential distinctions are clear—between citing a decision as controlling authority and as authority that is not controlling, and between citing a decision as either kind of authority and as no authority at a[1]

A decision by a higher court in the same judicial system, and, depending on the precise doctrine of *stare decisis* embraced by a court, an earlier decision by one's own court, is controlling. It must be followed regardless of whether the current judges think it sound. No one supposes that foreign decisions have that kind of authority.

But often a court will cite a decision that lacks authority in this strong sense because it was rendered by a court in a different jurisdiction (it might be the decision of another state supreme court or another federal court of appeals, for example), but to which the court will give some weight by virtue of its having been decided by a sister court assumed to have similar values, traditions, and outlook. Apart from the intrinsic persuasiveness of the decision, the fact that it is a decision by such a court carries some weight. If many sister courts have converged on a particular rule or doctrine, the fact of convergence will push a court that is confronted with the question for the first time toward the same result unless it has strong contrary feelings about the particular case.

In either case—that of controlling authority and that of authority that is not controlling—the earlier case is cited for the fact that the court has ruled one way or another, regardless of how persuasive the court's reasoning is. It is cited because it is a precedent. It is quite something else to cite a decision by a foreign or international court not as a precedent but merely because it contains persuasive reasoning (a source or informational citation), just as one might cite a treatise or a law review article because it was persuasive, not because it was considered to have any force as precedent or any authority.

The first problem with according even limited precedential weight to foreign or international decisions is the promiscuous opportunities that are opened up—a problem brought into focus by the common judicial practice of limiting the classes of case that may be cited to them as precedents. Many courts in the United States do not permit an advocate to cite to them, as precedents, their opinions that are not published in the official reports.



They do this because those opinions receive less careful attention from the judges than the ones they publish. Allowing unpublished opinions to be cited as precedents would increase the amount of research that lawyers and judges would have to do, without leading to better decisions. In addition, the Supreme Court economizes on its time by giving little weight to decisions by the federal courts of appeals and the state supreme courts. Such decisions are rarely cited except to indicate the law's status when the Supreme Court intervened to lay down a uniform rule.

The court's saying no to foreign citations would make even more sense than the implicit rule against citing more than very occasionally the decisions of other American courts. The judicial systems of the United States are relatively uniform, and their product readily accessible, while the judicial systems of the rest of the world are immensely varied and most of their decisions inaccessible, as a practical matter, to our monolingual judges and law clerks. If foreign decisions were freely citable, it would mean that

any judge wanting a supporting citation had only to troll deeply enough in the world's *corpus juris* to find it. Perhaps Justice Antonin Scalia would turn from denouncing the citation of foreign decisions by his court to casting his own net wide enough to haul in precedents supporting his views on homosexuality, abortion, capital punishment, and the role of religion in public life.

The second problem with citing foreign decisions in U.S. courts is that they emerge from a complex socio-historico-politico-institutional background of which our judges, I respectfully suggest, are almost entirely ignorant. (Do any of the Supreme Court justices know any foreign languages well enough to read a judicial decision that is not written in English? And are translations of foreign decisions into English reliable?)

The last objection to citing foreign decisions is that it would constitute one more form of judicial fig-leafing, of which we have enough already.

To know how much weight to give to, say, the decision of the German Constitutional Court in an abortion case, you would want to know such things as how the judges of that court are appointed and how German constitutional judges conceive of their role. You would especially want to know how German attitudes toward abortion have been shaped by peculiarities of German history, notably the abortion jurisprudence of the Weimar Republic, which is thought to have set the stage for some of Nazi Germany's legal atrocities, such as involuntary euthanasia. And, speaking of history, it seems highly likely that the European rejection of the death penalty, which advocates of abolition in the United States cite as evidence for an emerging international consensus that ought to influence our Supreme Court, is related to two things: the past overuse of the penalty by European nations (think only of the executions for petty larceny in 18th-century England, the Reign of Terror in France, and the rampant employment of the death penalty by Nazi Germany and the Soviet Union); and the less democratic cast of European politics, which makes elite opinion more likely to override public opinion there than in the United States. For example, public opinion in the United Kingdom supports the death penalty as strongly as public opinion in the United States does, yet Parliament repealed the death penalty (except for some military crimes) in 1965 and has since steadily refused to reconsider. To cite foreign law as authority is to flirt with the discredited (I had thought) idea of a universal natural law; or to suppose fantastically that the world's judges constitute a single, elite community of wisdom and conscience.

This brings me to the third problem, which is the undemocratic character of citing foreign decisions. Even decisions rendered by judges in democratic countries, or by judges from those countries who sit on international courts, are outside the U.S. democratic orbit. This point is obscured because we think of our courts as "undemocratic" institutions. But that is imprecise. Not only are most state judges elected, but federal judges are appointed and confirmed by elected officials, the president, and the members of the Senate. So our judges have a certain democratic legitimacy. But the judges of foreign countries, however democratic those countries may be, have no democratic legitimacy here. The votes of foreign electorates are not events in our democracy.

Particularly questionable in this regard is citing foreign decisions to establish an international consensus that should have weight in U.S. courts. Such nose-counting is like subjecting legislation enacted by Congress to review by the United Nations General Assembly. I think that the Supreme Court would be making not only a juridical but also a political error by asking the American people (as one justice did in an opinion) to accept that decisions by the Supreme Court of Zimbabwe should influence decisions by our Supreme Court. I think most Americans would think it outrageous that Zimbabwean judges, however distinguished they may be, were making law for us.

The last objection to citing foreign decisions in U.S. courts is that such citing is one more form of judicial fig-leafing, of which we have enough already. Few judges are so cosmopolitan in outlook as to want to take their cues from Europe or any other foreign region. In politically fraught cases, such as the sodomy decision *(Lawrence v. Texas)* that touched off this debate, judges take their cues from their personal experiences, values, intuitions, temperament, reading of public opinion, and ideology. None of these influences on adjudication at the highest level has been shaped by the study of foreign judicial decisions. Some foreign nations criminalize sodomy, others don't; is it to be supposed that the justices in *Lawrence* weighed the arguments made in other nations about the criminalization of sodomy?

Judges are likely to cite foreign decisions for the same reason that they prefer quoting from a previous decision to stating a position anew: They are timid about speaking in their own voices lest they make legal justice seem too personal and discontinuous. They are constantly digging for quotations and citations to support positions they've adopted on grounds other than the compulsion of precedent. In-depth research for a judicial opinion is usually conducted after rather than before the judges have voted, albeit tentatively, on the outcome. Citing foreign decisions is probably best understood as an effort, whether or not conscious, to further mystify the adjudicative process and disguise the political decisions that are the core, though not the entirety, of the Supreme Court's output.

I do not suggest that our judges should be provincial and ignore what people in other nations think and do. Just as our states are laboratories for social experiments from which other states and the federal government can learn, so are foreign nations laboratories from whose legal experiments we can learn. The problem is not learning from abroad; it is treating foreign judicial decisions as authorities in U.S. cases, as if the world were a single legal community. ■

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