

The Role of International Law in Louisiana Courts

This outline accompanies a panel presentation on the role of international law in Louisiana courts. Our panel will address the legal foundation of international law in the US and examine areas where international law enters Louisiana legal practice.¹

I. Introduction

Recently deceased Supreme Court Justice Antonin Scalia was a well-known strict constructionist, supporting the primacy of original constitutional intent. Justice Scalia's originalist judicial philosophy eschews international law in most respects as irrelevant to the US constitutional order.² By contrast, Supreme Court Justice Stephen Breyer maintains an evolutionary constitutional philosophy, accepting our constitution as a living, breathing document that evolves over time to comport with changing moral and societal standards. Justice Breyer embraces international law as part of our constitutional framework, providing color and texture to some of our most pressing judicial quandaries.

Justice Breyer's recent book, "The Court and the World" makes the case for international law playing an increasingly important role in the US legal order, not only in significant constitutional areas involving human rights, political questions, foreign affairs and capital punishment, but also areas like antitrust, discovery, securities, intellectual property and torts that legal practitioners are more likely to see in everyday practice.³

II. What is International Law?

A. Sources of International Law

- ◆ International law defies description, somewhat like the US Supreme Court's attempt to define pornography
 - "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [hard-core pornography], and perhaps I could never succeed in intelligibly doing so. But *I know it when I see it*, and the motion picture involved in this case is not that."⁴

¹ Panel members: Hon. Robert Murphy (La. Fifth Circuit Court of Appeal); Prof. Scott Sullivan (LSU Law Center); Richard Leefe (Leefe & Gibbs); Peter Strasser (Chaffe McCall); & Edward Hayes (Leake & Andersson).

² See e.g., Antonin Scalia, "Foreign Legal Authority in the Federal Courts," keynote address at the American Society of International Law Proceedings, Washington, D.C. (January 1, 2004).

³ STEPHEN BREYER, *THE COURT AND THE WORLD*, (2015).

⁴ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (Stewart, J., concurring) (emphasis added).

✦ Three broad categories of International Law:⁵

- Customary International Law
 - Requires general state practice and acceptance by states as law
 - Exs.: Diplomatic Immunity, Maritime Boundaries
 - *Jus Cogens*
 - Specific type of customary international law recognized by most states as a peremptory norm that is non-derogable
 - Exs. International Crimes (slavery, genocide)
- Public International Law
 - Laws enacted between states
 - Exs. Treaties—UN Charter, World Trade Organization, North Atlantic Treaty Organization
- Private International Law
 - Conventions, protocols, model laws that apply to and regulate private international behavior regarding contracts, marriage, jurisdiction, judgments, etc.
 - Exs. NY Convention on the Enforcement of Arbitral Awards, Convention on International Sales of Goods

✦ International Law v. Foreign Law

- International law is distinct from foreign law, which represents the specific domestic laws in any country
- Foreign law is not part of US domestic law, but is honored in US state and federal courts where it does not conflict with public policy (comity)⁶

⁵ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987)

III. Application of International Law in US States

- ✦ International law is part of US law under Supremacy Clause⁷
- ✦ States are bound by international law through the Supremacy Clause and preemption doctrine⁸
- ✦ 10th Amendment reservation of power to states⁹
 - All powers not explicitly provided to the federal government are reserved to the states
 - Leaves open the possibility of areas where states may infringe upon or detract from international law because US is constitutionally prohibited from acting in that area
- ✦ States play increasingly active role in areas that touch upon international law¹⁰
- ✦ States can adopt, consider and/or apply Foreign Law unless contrary to federal or state law, or public policy
- ✦ Approximately 32 States have enacted foreign law bans, primarily in an effort to ban Sharia law¹¹
 - Foreign law bans generally preclude state courts from relying upon, enforcing or considering foreign law sources, but some also include “international law” in the statutes¹²
 - Recent enactments are narrowly drafted to prevent foreign/international law application where it would violate a fundamental right

⁶ See e.g., *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) (comity is the “recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation . . .”)

⁷ U.S. CONST. art. VI. Treaties generally become the “supreme law of the Land” once approved and ratified. *Id.* at art.11, §2, cl.2.

⁸ *Id.* & *United States v. Pink*, 315 U.S. 203 (1942).

⁹ U.S. CONST. amend. X

¹⁰ See *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000) (Massachusetts law banning state contracts for companies doing business with Burma). See generally Edward T. Hayes, *Changing Notions of Sovereignty and Federalism in the International Economic System: A Reassessment of WTO Regulation of Federal States and the Regional and Local Governments Within their Territories*, 25 NW. J. INT’L. L. & BUS. 1 (2004).

¹¹ See generally, Patel, Duss & Toh, *Foreign Law Bans, Legal Uncertainties and Practical Problems*, Center for American Progress (May 2013).

¹² The various state statutes are generally categorized as either Sharia-specific or facially-neutral. See Bradford J. Kelley, *Bad Moon Rising: The Sharia Law Bans*, 73 LA. L. REV. 601, 613-615 (2013).

IV. International/Foreign Law in Louisiana Courts

- ◆ Louisiana Foreign Law Ban (2010)
 - La. R.S. §9:6001 is a facially-neutral statute modeled after the American Laws for American Courts Act¹³
 - Louisiana statute bans the enforcement or application of foreign law if inconsistent with federal or state constitutional rights
 - Louisiana and similar statutes are provocative but not legally significant inasmuch as they only apply when application of foreign law would result in a constitutional right violation. Louisiana courts have always been able to prevent such violations under existing law or public policy exceptions.

- ◆ Louisiana Code of Evidence Article 202(B)(f)
 - “A court shall take judicial notice of the following if a party requests it and provides the court with the information needed by it to comply with the request, and may take judicial notice without request of a party of: (f) Law for foreign countries, international law, and maritime law.”¹⁴

- ◆ *Judicial Notice of French Law on Revocation of Donations for Ingratitude: Perry v. Perry*, 507 So.2d 881 (La. App. 4 Cir. 1987) (Klees, J.). Fourth Circuit reviews question of whether a son’s actions in carrying out a seizure of his mother and father’s property constitutes “ingratitude” sufficient to warrant revocation of a donation. La Civil Code art. 1560 allows revocation if the donee “has been guilty towards [the donor] of cruel treatment, crimes or grievous injuries.” The Fourth Circuit found no cases on point, but relied upon a French translation of a discussion of revocation for ingratitude by two learned scholars. The French discussion included “a seizure levied by the donee against the donor of whom he is creditor” in the definition of “injury.”

- ◆ *Judicial Notice of Iranian Law on Marriage Validity: Ghassemi v. Ghassemi*, 998 So.2d 731 (La. App. 1 Cir. 2008) (Kuhn, J.). First Circuit determines whether a marriage between first cousins in Iran is valid in Louisiana. Utilizing Louisiana’s conflict of laws

¹³ *Id.* at 614.

¹⁴ For Louisiana law on admission and authentication of foreign public documents, *see* La. Code Evid. art. 902.

provision on marriage, First Circuit determines that a marriage of first cousins is valid under Iranian law and the marriage does not violate a strong Louisiana public policy.

- ◆ *Judicial Notice of Panamanian and Venezuelan Law on Contracts, Successions and Corporation: Bartels de Nunez v. Bartels*, 727 So.2d 463 (La. App. 1 Cir. 1998) (Kuhn, J.). First Circuit resolves a complex commercial and personal dispute involving dissolution of a Panamanian corporation under Venezuelan and Panamanian law.
- ◆ *Judicial Notice of Belgium Insurance Law on Limitations: Lestelle v. Asbestos Claims Mgmt. Corp.*, 998 So.2d 149 (La. App. 4 Cir. 2008) (Bagneris, J.). Fourth Circuit undertakes a conflict of law analysis to determine that Louisiana rather than Belgium law governs timeliness of a third party demand for insurance coverage.
- ◆ Louisiana Judicial Implementation of International Agreements
 - Louisiana has a rich history of recognizing and applying international agreements, including where conflict with Louisiana law

V. International Law in Business Transactions

- ◆ Parties Enjoy Contractual Freedom (with notable exceptions)
 - Contractual Choice of Substantive Law Clause
 - Practical Considerations
 - Dispute Settlement-Arbitration, Venue
 - Practical Considerations
- ◆ Mandatory Laws
 - Each country maintains a legal system with mandatory laws that cannot be contractually dispensed
 - In many cases those mandatory laws are also international law norms (customary international law, *jus cogens*, treaty principals)

- Exs. Sharia Law System- interest on many transactions are not allowed (late payment penalty clause with interest may not be enforceable).

✦ Convention on International Sales of Goods (CISG)

- International Treaty applying to all signatory countries that seeks to harmonize common and civil laws on sales of goods
- US is a party along with 83 other countries¹⁵
- CISG supplies the law governing all cross-border transactions involving goods between treaty countries
 - Provides law on formation of contracts, substantive rights and obligations of the buyer and seller, conformity of goods
- CISG applies *ab initio* to all contracts between businesses located in treaty nations
- US federal and state courts have jurisdiction in CISG cases¹⁶ and CISG preempts otherwise applicable state or federal law¹⁷
- *****MALPRACTICE ALERT*****In order to exclude CISG application, parties must include specific opt out language in contract

¹⁵ Notable trading partners that are signatories include Australia, Bahrain, Brazil, Canada, Chile, France, Germany, Israel, Japan, Mexico, Republic of Korea, Russia, Singapore, and Spain.

¹⁶ See *Imuls I.D. Internacional, S.L. v. Psiom-Teklogix, Inc.*, 234 F.Supp. 2d 1267 (S.D. Fla. 2002).

¹⁷ See *Asante Technologies, Inc. v. PMC-Sierra, Inc.*, 164 F.Supp. 2d 1142 (N.D. Cal 2001).