The role of domestic courts in treaty enforcement

A Comparative Study

This book examines the application of treaties by domestic courts in eleven countries. The central question is whether domestic courts actually provide remedies to private parties who are harmed by a violation of their treaty-based rights. The analysis shows that domestic courts in eight of the eleven countries – Australia, Canada, Germany, India, the Netherlands, Poland, South Africa, and the United Kingdom – generally do enforce treaty-based rights on behalf of private parties. On the other hand, the evidence is mixed for the other three countries: Israel, Russia, and the United States. In Israel and Russia, the trends are moving in the direction of greater judicial enforcement of treaties on behalf of private parties. The United States is the only country surveyed where the trend is moving in the opposite direction. U.S. courts’ reluctance to enforce treaty-based rights undermines efforts to develop a more cooperative global order.

Professor David Sloss joined the faculty of Santa Clara University School of Law in 2008. He was a faculty member at Saint Louis University School of Law from 1999 to 2008. During his academic career, Professor Sloss has published approximately two dozen law review articles. Before embarking on an academic career, Professor Sloss spent nine years as a civil servant in the U.S. government. During that time, he participated in drafting and negotiating several important treaties and other international agreements. Professor Sloss earned his J.D. from Stanford Law School, his M.P.P. from Harvard University, and his B.A. from Hampshire College.
The Role of Domestic Courts in Treaty Enforcement

A COMPARATIVE STUDY

Edited by

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As I prepare to send this book to the printer, President Obama is evaluating potential nominees to fill Justice Souter’s soon-to-be-vacant slot on the United States Supreme Court. The selection of the next Supreme Court Justice could have significant implications for the international legal system and for the United States’ participation in that system.

The last two individuals appointed to the Supreme Court – Chief Justice Roberts and Justice Alito – view international law with a mixture of contempt and indifference, as evidenced by the Chief Justice’s 2008 opinion in *Medellin v. Texas* (which Justice Alito joined). They apparently view their job, in part, as one of shielding the domestic legal system from the unwanted intrusion of international law. Their elevation to the nation’s highest court exemplifies a broader trend in which the judicial branch in the United States has become a key obstacle to the nation’s performance of its international treaty obligations.

This book demonstrates that U.S. judges are out-of-step with their counterparts in other modern democratic nations. In most of the nations surveyed in this volume, domestic courts play a constructive role in promoting compliance with national treaty obligations by providing remedies to private parties who are harmed by a violation of their treaty-based rights. For most of United States history, judges in this nation played a similar role: they routinely enforced treaties on behalf of private parties, as envisioned by the Constitution’s founders. Unfortunately, over the past several decades, U.S. presidents have filled the courts with judges who have abandoned the judiciary’s traditional mission of enforcing individual rights protected under international law.

President Obama has an historic opportunity to reverse this unfortunate trend by appointing judges who, like their counterparts in other free
countries, will use their judicial power to promote compliance with international treaty obligations, rather than obstructing performance of those obligations. One Supreme Court Justice cannot transform the legal system overnight. But she can help nudge the courts toward an international-law-friendly perspective on the U.S. constitutional system. If this book makes a small contribution to that goal, the editor will be very gratified.

David Sloss
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