Brown v. Board of Education Overseas[1]

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IT IS A SPECIAL HONOUR to be admitted as a foreign member of your country's first learned society. The Society is distinctively American, but its founders were citizens of the world—cosmopolitan in their pursuit of useful knowledge and ideas. It is also a particular personal pleasure to be asked to speak at the fiftieth anniversary of *Brown v. Board of Education* under the firm moderating influence of Judge Louis H. Pollak, sharing the session with William T. Coleman Jr. I have been privileged to know each of them for many years. In his history of *Brown*, Richard Kluger recalled[2] the part they played in the NAACP Legal Defense Fund's struggle, led by Thurgood Marshall, to overcome the Supreme Court's endorsement of racial segregation in *Plessy v. Ferguson*.[3]

I hope that it may be of some interest, especially at this anxious time in our shared history, for an old friend of the United States to reflect on the overseas influence upon the *Brown* decision, and the influence of the decision itself beyond the United States.

I begin with the perception of another foreign observer, the great international jurist Sir Hersch Lauterpacht. He played a prominent part in the making of the Universal Declaration of Human Rights and the European Convention on Human Rights, and was an outstandingly learned and creative scholar who became the British judge on the International Court of Justice. In 1945, nine years before *Brown*, Columbia University published his brilliantly original book in which he observed[4] that, in the decisions of the Supreme Court upholding racial segregation,

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[1] Read 23 April 2004.

[2] Richard Kluger, *Simple Justice* (New York: Alfred A. Knopf, 1976), 292–93.

[3] 163 U.S. 537 (1896).

[4] H. Lauterpacht, *An International Bill of the Rights of Man* (New York: Columbia University Press, 1945) at 118.

"the interpretation of equality conceived as a mechanical equality of opportunity and advantage was, especially in the eyes of foreign observers, stretched to breaking point." Lauterpacht prophesied that *Plessy* might be "gradually abandoned by the Court."[5]

In 1942, another extraordinarily perceptive foreign observer, Gunnar Myrdal, the Swedish economist, published *An American Dilemma*, in which he noted that

> America, for its international prestige, power and future security, needs to demonstrate to the world that American Negroes can be satisfactorily integrated into its democracy. In a sense, this War marks the end of American isolation. . . . Statesmen will have to take cognizance of the changed geopolitical situation and carry out important adaptations of the American way of life to new necessities. A main adaptation is bound to be a redefinition of the Negro's status in American democracy. It is commonly observed that the mistrust of, or open hostility against the white man by colored people everywhere in the world has greatly increased the difficulties for the United Nations to win this War. . . . The treatment of the Negro in America has not made good propaganda for America abroad and particularly not among the coloured nations.[6]

Brown was decided several years after the Truman administration had ended racial segregation in the armed forces and other institutions over which it had direct control. Many factors contributed to the determination of Truman's government to eliminate racial discrimination in schools over which it had no control.[7] Truman had witnessed the signing of the United Nations Charter in June 1945, and he and his advisers were well aware of the harm caused to America's foreign relations by racial segregation.

As Lauterpacht noted in another work, published in 1950,[8] there was evidence that by this time the Supreme Court itself was becoming more internationally minded. Thus, in January 1948, in *Oyama v. California*,[9] a majority of the Supreme Court, presided over by Chief Justice Vinson, decided that California's Alien Land Law had deprived Fred Oyama of the equal protection of California's laws and of his privileges as an American citizen by discriminating against him on the

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[5] Ibid., citing *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) and *Mitchell v. United States*, 313 U.S. 80 (1941).

[6] The Complete Twentieth Anniversary Edition (New York: McGraw-Hill, 1962), 1016.

[7] See generally, Aryeh Neier, *Only Judgment: The Limits of Litigation in Social Change* (Middleton, Conn.: Wesleyan University Press, 1982), chap. 3.

[8] H. Lauterpacht, *Human Rights and International Law* (London: Stevens, 1950) at 151 and 156.

[9] 332 U.S. 633 (1948).

basis of his parents' country of origin—Japan.[10] What was significant for Lauterpacht was that, in the concurring opinions of four of the six justices in the majority (Justices Murphy, Rutledge, Black, and Douglas), the provisions of the UN Charter concerning human rights were relied upon as a source of legal obligations and public policy.

In January 1948, the Supreme Court also heard argument in the racially restrictive covenant cases of *Shelley v. Kraemer*[11] and *Hurd v. Hodge*.[12] Under Truman's attorney general, Tom Clark, the Department of Justice initiated its first *amicus* briefs on behalf of a civil rights plaintiff, in both cases.[13] The brief in *Shelley* referred[14] to the fact that the United States had been "embarrassed in the conduct of foreign relations by acts of discrimination in this country." The Supreme Court held that American courts could not enforce racially restrictive covenants.

Lauterpacht observed[15] that, although no direct reference was made by the Court to the UN Charter, "it is probable that, apart from other factors, the inarticulate impact of the Charter was instrumental in prompting these revolutionary decisions." There was a hint of this in the reference by Chief Justice Vinson, in *Hurd v. Hodge*,[16] to the public policy of the United States as "manifested" not only in the Constitution, federal statutes, and legal precedents, but also in treaties.

Philip Elman, an attorney committed to racial justice, who had played an important role in persuading Attorney General Clark and Solicitor General Philip B. Perlman to intervene in *Shelley*, also fashioned the potent *amicus* brief filed by the Truman administration in *Brown* in December 1952. Elman later described it as the thing he was proudest of in his legal career.[17] The brief argued on the basis of

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[10] The Oyama family had been evacuated from the Pacific coast in 1942, along with all other persons of Japanese descent, and, in 1944, his land had been taken by the state on racial grounds.

[11] 334 U.S. 1 (1948).

[12] 334 U.S. 24 (1948).

[13] As a member of the Roosevelt administration in 1942, Tom Clark was chief of the West Coast offices co-ordinating and directing the incarceration of American citizens of Japanese ancestry. As attorney general he was "Truman's favourite Cold Warrior as the nation began looking under its bedsprings for domestic Communists." Kluger, n. 2 above, at 252. After becoming a justice of the Supreme Court in 1949, Clark consistently voted in favour of racial integration, for example in *Sweatt v. Painter*, 339 U.S. 629 (1950), and *Terry v. Adams*, 345 U.S. 461 (1953), as well as joining the unanimous decision of the Supreme Court in *Brown v. Board of Education*. When Justice Tom Clark retired from the bench his seat was filled by Thurgood Marshall.

[14] Kluger, n. 2 above, at 253.

[15] Lauterpacht, n. 8 above, at 156.

[16] At 34–35. In *Shelley*, Chief Justice Vinson cited *Oyama v. California*, n. 9 above, at 21.

[17] According to Kluger, n. 2 above, at 558. Elman had also drafted the Truman administration's *amicus* briefs in *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950),

principle—the constitutional right to equal treatment before the law—and in the interests of the foreign policy of the United States.

It explained that the problem of racial discrimination was particularly acute in the District of Columbia, the nation's capital.

> This city is the window through which the world looks into our house. The embassies, legations and representatives of all nations are here, at the seat of the Federal Government. Foreign officials and visitors naturally judge this country and our people by their experiences and observations in the nation's capital; and the treatment of colored persons here is taken as the measure of our attitude towards minorities generally.

The brief also explained that

> The United States is trying to prove to the people of the world, of every nationality, race and color, that a free democracy is the most civilized and most secure form of government yet devised by man. We must set an example for others by showing firm determination to remove existing flaws in our democracy.
>
> The existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith.

Secretary of State Dean Acheson wrote a letter, included in the *amicus* brief, containing an authoritative statement of the effects of racial discrimination in the United States upon the conduct of foreign relations. Acheson explained how the damage to the foreign relations of the United States had become progressively greater. Acheson wrote that

> The United States is under constant attack in the foreign press, over the foreign radio, and in such international bodies as the United Nations because of various practices of discrimination in this country. . . . Soviet spokesmen regularly exploit this situation in propaganda against the United States. . . . The hostile reaction among normally friendly peoples . . . is growing in alarming proportions. . . . [T]he continuance of racial discrimination in the United States remains a source of constant embarrassment to this Government in the day-to-day conduct of its foreign relations; and it jeopardizes the effective

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Sweatt v. Painter, 339 U.S. 629 (1950), and *Henderson v. United States*, 339 U.S. 816 (1950). Neier notes (n. 7 above, at 51) that in *Henderson*, the brief documented the way domestic discrimination embarrassed the U.S. government in the conduct of foreign relations, and that "[t]he 1952 call to the Supreme Court in *Brown* to take into account cold war needs was foreshadowed in the brief the United States filed in *Sweatt* and *McLaurin* in 1950."

> maintenance of our moral leadership of the free and democratic nations of the world.

Although the Court's opinion in *Brown* made no reference to these considerations of foreign policy, there is no doubt that they significantly influenced the decision.

Brown had a major impact *beyond* the United States. It greatly enhanced the prestige and authority of the Supreme Court overseas. The Warren Court became celebrated across the world for its enlightened judicial activism. One of the most influential decisions, born of the struggle for racial justice in the South, was Justice Brennan's luminous opinion in *New York Times v. Sullivan*[18] applying the First Amendment to unduly restrictive state libel laws. The activism of the Burger Court further enhanced the Court's international reputation and influence. Its historic decision in *Griggs v. Duke Power Co.*[19] expanded the concept of invidious discrimination to include, in Chief Justice Burger's phrase, "practices that are fair in form, but discriminatory in operation." That important enlargement of the concept of discrimination had its origins in *Brown*, and it took root across Europe and the common law world, even though, disappointingly, the same Court refused to apply it to the guarantee of equal protection of the law under the Fourteenth Amendment.[20]

The civil rights movement that was inspired by *Brown* in turn became the inspiration for human rights activists across the world. Four years after *Brown*, the British prime minister, Harold Macmillan, spoke in South Africa's Parliament against the country's system of *apartheid*, referring to the "wind of change" blowing through the continent of Africa, as more and more black Africans in British colonies claimed the right to rule themselves: " . . . [t]his growth of national consciousness is a political fact." The *Brown* decision stimulated consciousness of the need, in Macmillan's words, to create a society "in which individual merit, and merit alone, is the criterion for a man's advancement."

Brown also influenced the generally recognised standards of international human rights law. The UN Convention for the Elimination of All Forms of Racial Discrimination is one of the most widely accepted human rights treaties, at the last count ratified by 174 states.[21] It

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[18] 376 U.S. 254 (1964).

[19] 401 U.S. 424 (1971).

[20] See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976).

[21] In 1994, forty years after *Brown*, it was ratified by the United States, with reservations against the convention's application to "private conduct," and a declaration that its provisions are not self-executing.

provides[22] that the States Parties "particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction." So, thanks to *Brown*, the racially discriminatory separate-but-equal doctrine is now contrary not only to American law but also to the general principles of international human rights law.

When the U.K. Parliament legislated against racial discrimination, in 1968 and again in 1976, specific provisions were included[23] declaring that racial segregation constitutes unlawful racial discrimination. Parliament has not outlawed segregation and the separate-but-equal doctrine in other contexts. For example, our legislation against sex discrimination in education contains a specific exception[24] for single-sex public and private schools and colleges. Under British law, separate educational facilities provided for students of each sex are not inherently unequal. But where separate selective schools are provided for girls and boys, it is well established[25] that there must be equal access to the educational opportunities they provide. It is not necessary for the complainant to prove a discriminatory motive or intent; the test is objective: the central question is whether, but for her sex, the girl would have access to opportunities equivalent to those available to a comparable boy. It is also well established that in order to prove less favourable treatment on the grounds of sex, the complainant does not have to show that selective education is better than non-selective education. It is enough that, by denying the girls the same opportunity as the boys, the complainant is being deprived of a choice that is valued, on reasonable grounds, by many others.[26]

To take an example from a different context, the Supreme Court of Israel held[27] in March 2000 that the denial by the Israel Land Administration of the right of Arabs to build their homes on lands in Israel intended for the public at large constituted unlawful discrimination on the basis of nationality. In delivering the Court's landmark judgment, President Aharon Barak cited *Brown* in rejecting the contention that, because the administration was prepared to allocate land to establish an exclusively Arab communal settlement, the treatment of Arabs and

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[22] Article 3.

[23] Race Relations Act 1968 (Chapter 71), section 1(2) Race Relations Act 1976 (Chapter 74), section 1(2).

[24] Sex Discrimination Act 1975 (Chapter 65), section 26.

[25] *Reg. v. Birmingham City Council, Ex parte Equal Opportunities Commission* [1989] AC 115 5 (HL); *James v. Eastleigh Borough Council* [1990] 2 AC 751 (HL).

[26] *Reg. v. Birmingham City Council, Ex parte Equal Opportunities Commission*, above, at 1193.

[27] *Ka'adan v. The Israel Land Administration* HCJ 6698/95.

Jews amounted to separate-but-equal treatment, which was lawful. That was as courageous a decision, given the fraught and tragic conditions of Israel today, as was *Brown* in seeking to dismantle entrenched segregation and Jim Crow laws and practices in the American South fifty years ago.

In 1987, in a lecture celebrating the bicentennial of the Constitution of the United States,[28] I recalled how the Declaration of Independence, the Constitution, and the Bill of Rights were the handiwork of men who understood the Old World as well as the New World. I explained how the Old World has returned the compliment paid to its ideas and values by the master builders of the American system of government. Not only have American concepts of freedom shaped the rise of constitutionalism in Europe and elsewhere; courts overseas have regard to Supreme Court judgments in constitutional cases. I added that, if the overseas trade in the American Bill of Rights is an important means of strengthening international human rights, it is a misfortune for the United States to be so isolated from international and comparative human rights law.

I expressed the hope that the United States would acknowledge that the obligation to protect human rights is an international obligation to be accepted by the United States itself. I expressed the hope too that the United States judiciary would not retreat into literalism, positivism, and historicism, for, if American human rights are diminished, so are the rights of the rest of humanity.

Brown was decided by a Supreme Court aware of the relevance and importance of the international dimension. The decision itself was profoundly influential overseas, not least in overcoming the evil *apartheid* regime in South Africa, and in inspiring people like me to become involved in the struggle for racial justice. But in recent decades, a majority of the Supreme Court has deliberately isolated American constitutional jurisprudence from international and comparative law. As a result, its influence overseas has greatly diminished, as has the prestige of American legal and political ideas and values, even in my country.

Justice Scalia leads the judicial opposition to the use of international and comparative law in constitutional cases. He argues that American constitutional values do not emerge, "because foreign nations decriminalize conduct. . . . The Court's discussion of these foreign views . . . is therefore meaningless dicta. Dangerous dicta, however, since [in Justice Thomas's words] 'this Court should not impose

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[28] *The Overseas Trade in the American Bill of Rights*, Columbia Law Review 88 (1988): 537–61.

foreign moods, fads, or fashions on Americans.'"[29] Justice Scalia also inveighs against imposing "the views of other nations . . . upon Americans through the Constitution."[30]

In the same vein, Judge Robert H. Bork refers[31] to what he calls "the insidious appeal of internationalism," and, only last month, members of the House of Representatives described the process as reminiscent of King George III's imposition of foreign laws.[32]

I respectfully submit that such views are profoundly mistaken. There is no question of imposing the views of foreign nations or foreign courts upon the United States or its courts. The influence of American legal and political ideas and values across the world is seriously damaged by the refusal of each branch of government to recognise the universality of human rights, and at least to have regard to international and comparative human rights.

There are hopeful signs in very recent case law[33] of a return to the enlightened and internationally minded approach that characterised the Supreme Court during the early postwar period, as it had done in the early decades of the Court's history. It is a method well used by senior courts in the U.K. and the rest of the democratic world in interpreting their constitutions and ordinary laws; they have regard to international and comparative law without being slavishly bound by the view and judgments of supranational and foreign courts. Such a broad-minded approach accords with the cosmopolitan and enlightened values of the founders of the American Republic and of this Society.

I am co-counsel for 175 members of the Westminster Parliament as *amici curiae* in support of British citizens indefinitely detained in a

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[29] *Lawrence v. Texas*, 123 S.Ct. 2472, 2495 (2003) (Scalia, J., dissenting, quoting *Foster v. Florida*, 537 U.S. 990 (2002) n., 123 S.Ct. 470, 154 L.Ed.2d 359 (2002), Thomas, J., concurring in denial of certiorari).

[30] *Atkins v. Virginia*, 536 U.S. 304 (2002) 260 Va. 375,534 S.E. 2d 312 (Scalia, J., dissenting).

[31] *Coercing Virtue: The Worldwide Rule of Judges*, American Enterprise Institute Press, 2003, at 22.

[32] H. Res. 568 of 17 March 2004 sponsored by Representative Tom Feeney for himself and fifty-nine others, proposing that the sense of the House of Representatives is "that judicial determinations regarding the meaning of the laws of the United States should not be based on judgments, laws or pronouncements of foreign institutions unless such foreign judgments, laws or pronouncements inform an understanding of the original meaning of the laws of the United States."

[33] *Lawrence v. Texas* (above). *Atkins v. Virginia* (above). In *Atkins* an *amicus* brief was submitted by American diplomats to advise on the "likely impact the continuing administration of the death penalty against individuals with mental retardation would have upon our diplomatic relations with foreign governments and upon our standing in the international community." No. 00-8727 June 8 2001. Whilst the brief was not cited in *Atkins* it is likely to have had a persuasive effect as the *amicus* brief had in *Brown*.

legal black hole at Guantanamo without access to independent courts and the due process of law.[34] That case and others[35] provide the Court with an opportunity to vindicate the rule of law under the Constitution and to recover its lost prestige across the world by having regard to universal standards of human rights that owe so much to American concepts of liberty, equal protection, and due process. In an age of barbarous terrorism without end, the Court faces a difficult challenge. But it is no greater than the challenge that faced the Court fifty years ago in *Brown*.

[34] *Shafiq Rasul et al. v. George W. Bush et al., Fawzi Khalid Abdullah Fahad Al Odah et al. v. United States*, brief filed on 14 January 2004.

[35] The judgment of the International Court of Justice of 31 March 2004 in the *Case Concerning Avena and other Mexican Nationals (Mexico v. United States)* requires the United States and its courts to give full faith and credit to the Vienna Convention on Consular Relations by reviewing and reconsidering the conviction and sentencing of Mexican and other foreign nationals sentenced to death in the United States in circumstances involving breaches of the convention. See, generally, Sarah M. Ray, *Domesticating International Obligations: How to Ensure U.S. Compliance with the Vienna Convention on Consular Relations*, California Law Review 91 (2003): 1729–71.