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An Interview with Martha Minow

Introduction

In this interview, Martha Minow (Jeremaih Smith, Jr. Professor and Dean of Harvard Law School) discusses her work with several international human rights organizations, her recently published book about *Brown v. Board of Education*'s underappreciated influence outside the United States, and her take on the merits of arguments debating whether U.S. courts should consider foreign and international law.

This is the inaugural edition of the Harvard International Law Journal Online's new interview series, "Profiles," which will publish interviews with influential international law practitioners and scholars. Many thanks to Dean Minow and her assistant, Kristin Flower, for making this interview possible.

Q: How did you become involved in international and comparative law issues?

Based on longstanding concerns about genocide and crimes against humanity, I started working in the early 1990s with a wonderful NGO, Facing History and Ourselves, which teaches teachers and communities about how individuals can stand up against hatred, and can learn from history about courage and civic responsibility in the face of bigotry and intolerance. After I directed a year of study with Facing History's founder, Margot Strom, culminating in an international conference comparing international criminal law, truth commissions, and reparations as responses to mass violence, I wrote a book, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (1998), which received the American Society of

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International Law Certificate of Merit. Much of my subsequent work can be linked directly to this project.

Q: Was this book linked to your involvement with the International Independent Commission on Kosovo and the United Nations High Commission for Refugees?

Absolutely. Justice Richard Goldstone, who at the time was serving on South Africa's Constitutional Court after his work as the first prosecutor at the International Criminal Tribunals for the Former Yugoslavia and Rwanda, invited me in 1999 to serve on a commission sponsored by the government of Sweden to analyze and assess options available to the international community before, during, and after the Kosovo crisis in the 1990s. This is how I became involved with the International Independent Commission on Kosovo. Justice Goldstone had written a foreword to my book, although we had not yet met. I worked with the Commission to produce our report on the origins of the Kosovo crisis, the diplomatic efforts to end the conflict, the role of the United Nations, NATO's military intervention, the decision to intervene militarily, the resulting refugee crisis including the responses of the international community to resolve the crisis, and the norms of international law and diplomacy brought to the fore by the Kosovo war relevant to the situation there and to Kosovo's future status. Our commission members, from around the world, worked hard and devised a thoughtful analysis which has contributed to international debates—although the subsequent events of September 11, 2001, significantly reshaped those debates.

On another day in 1999, I received a phone call from Madam Sadako Ogata who was serving as the UN High Commissioner for Refugees; she said she had read my book and though I could help her deal with refugee crises following mass conflict. I wasn't sure I could help, but our conversation led to a fascinating project for the agency that we dubbed "Imagine Co-Existence," which supported pilot initiatives promoting joint economic, social, and problem-solving efforts in the former Yugoslavia and Rwanda, and which produced guidelines to reduce the risk that refugee aid itself could exacerbate intergroup conflicts. Interdisciplinary research growing from this work is collected in the book I co-edited with Antonia Chayes, *Imagine Co-existence: Restoring Humanity After Violent Ethnic Conflict* (2003), and the Program on Negotiation at Harvard Law School was a terrific support for this work.

Q: How did your work on the Imagine Co-Existence project relate to your work on school desegregation in the United States?

The root of both lines of my work grows from the concern that degradation and demonizing of individuals due to their group identity lies at the core of gross human rights violations, intergroup violence, and brutal denials of life chances for so many individuals. I have worked on school integration issues since the 1970s, when I conducted research into Boston's court-ordered desegregation plan which had

occasioned real and violent opposition. I found fascinating convergences between the racial desegregation challenges and the insights of psychologists, sociologists, philosophers, and field-based aid workers in the Imagine Co-Existence project. In both contexts, I learned that prospects for overcoming intergroup hatred or bigotry improve where people from different groups work alongside one another on shared projects of mutual benefit.

Q: You recently wrote a book about Brown v. Board of Education.[1] Could you briefly describe that book?

I returned to issues of U.S. schools to find that the 50th anniversary of Brown v. Board of Education gave rise to many statements of disappointment and criticism over the continuing and in some ways worsening separation of school children by race in American schools. I argue that the landmark decision had more success—during the brief time when it was emphatically enforced by the courts and the Department of Justice—in overcoming racial separation, but perhaps its more enduring legacy is the inspiration for social movements to overcome discrimination and exclusion along lines of race, ethnicity, religion, disability, gender, socio-economic status, immigration status, language and sexual orientation—in this country and elsewhere. The rise of the school choice movement, with vouchers and charter schools, enable new forms of self-separation by, inter alia, language, gender, disability, and gender. The book traces social science evidence of the benefits of social integration and the costs of social separation in terms of academic achievement, team-based problem-solving, political stability, and individual flourishing.

Q: You also discuss Brown v. Board of Education in your article, *The Controversial Status of International and Comparative Law in the United States*, which was recently published by Harvard International Law Journal Online.[2] Can you give us some background about the article and how it relates to Brown?

The article centrally addresses the recent controversy among judges and elected officials over whether and how judges in the United States should consult or refer to international and comparative legal sources. The article steps back from the controversy to ask why it has emerged and what is at stake, and in the course of discussing the stakes, it considers how Brown has offered an example of U.S. jurisprudence carrying influence in many parts of the world, even as it was influenced by contemporaneous concerns about how racial segregation affected the foreign policy and world standing of the United States. This is a topic I explore more fully in my book.

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[1] MARTHA MINOW, IN *BROWN*'S WAKE: LEGACIES OF AMERICA'S CONSTITUTIONAL LANDMARK (2010).

[2] Martha Minow, *The Controversial Status of International Comparative law in the United States*, 52 HARV. INT'L L.J. ONLINE 1 (2010).

Q: How would you summarize your new article?

I ask what might be the concerns of people who oppose the use of international and comparative legal sources by U.S. courts and suggest three potential worries:

- That the United States risks being taken over or losing its identity if it engages with others;
- That because the United States is exceptional as the last superpower, it faces politically motivated attacks in the use of international law; and
- That the ambiguity and amorphous quality of "customary international law" in particular poses risks of uncertain and politically motivated application.

The article responds to these concerns by explaining that:

- Judges in the United States can entertain arguments from international and comparative sources without mindlessly conforming to them, and in fact, consideration of non-U.S. sources can help clarify unique values and features of legal and political commitments in the United States;
- The law of the United States—which requires Presidential and Congressional authorization before a treaty becomes binding—directs judges in this country to refer to international law where they are part of U.S. law, and protects the United States from coercion under international law where it is not part of U.S. law; and
- The risk of customary international law overriding domestic law did grow when federal courts opened the door to using customary international law, but the U.S. Supreme Court has clearly restricted applicable norms to "traditions and understanding in this country in 1789," and thus forecloses application of amorphous or changing standards announced elsewhere.

Finally, the article argues that outside of judicial action, the United States may learn from consulting international and comparative experiences, with the examples of soft law and the institutional design of the International Criminal Court's reliance on complementarity offering tools of potential use in law reform in the United States. The experience that the United States has had with the international reception of Brown should be a source of pride in our own experience with comparative and international repercussions—and a good reminder of the foreign relations perspective that influenced domestic advocacy in that case.

Q: One could argue that Brown's influence is a testament to American exceptionalism—that the U.S. court system is superior to others and this supplies no basis to suggest we should look to others for models or advice. When Brown was decided, few other countries had a civil rights movement. To hope that other nations learn from the United States bears no further

implication that the United States should learn from other countries. How would you respond to that argument?

Well, there really are three concerns raised here.

One is the suggestion that the U.S. judiciary is superior to others and hence comparisons with other systems are irrelevant. The curious element of this claim is its historicity: our court system drew directly on the British system and some other systems as well. In addition, the authors of the Declaration of Independence and framers of the Constitution explicitly referred to the opinion of the world and the law of nations.

The second concern is whether the role of a social movement, like the civil rights movement, is unique to the United States, rendering the reference to Brown irrelevant. The language of civil rights has been deployed by social reformers in Germany since the mid-19th century to argue against the oppression of same-sex sexual relationships. As unique as has been the struggle for freedom for African-Americans in the United States, the antebellum abolition movement was global, reaching success in England before it did in the United States. History tells us that the U.S. civil rights movement was itself deeply connected with liberation and anti-colonial movements around the world; moreover, it was concern about the standing of the United States in the world that led the State Department to urge the Eisenhower administration to support the plaintiffs in Brown.

Finally, the argument that the learning can and should flow only from the United States to other countries and not the other way around seems a curiously insecure view; if our practices are better, we can confirm that by comparing them with others. Where we have different values and traditions, we strengthen them by affirming them in the face of comparison, and where we have common problems and traditions, we can learn from how others proceed. I don't see why we should be threatened by the possibility of learning about others.

Q: Would you feel differently about the propriety of the Supreme Court considering international consensus in 8th Amendment cruel and unusual punishment analysis if the rest of the world condoned the death penalty more than did the United States, say, if every country permitted the execution of mentally retarded defendants, which the Supreme court prohibited in *Atkins v. Virginia* in 2002?

The 8th Amendment to our Constitution is unique in directing assessment of what is unusual, and that arguably summons—pursuant to U.S. law—a canvassing of laws elsewhere—and surely that would be the same whatever the laws elsewhere are. No other part of our Constitution does this, and the consultation of legal rules and practices elsewhere proceeds not on this textual ground within U.S. law but instead as a source, like a treatise, that simply may offer insight.

Q: You claim in your article that we should not worry too much about U.S. judges considering international and foreign laws because judges can entertain other viewpoints without conforming to them. That claim conflicts somewhat with the prevailing theories of social psychology, which contend that social forces in general, and consensus among peers in particular, can have very powerful influences on people, and can in fact effectuate de facto conformity (see, for example, the Asch conformity experiments). How would you respond to that argument?

Assuming that the analogy between the judicial process of reading sources and the lab experiments among small groups of people performing a very simple task has merit, there are few if any instances in which the comparative and international sources will all align in a consensus contrary to the United States. But I also wonder whether the analogy works. Judges engage in a process of assessing arguments presented by competing advocates, which by definition prevents the kind of surrounding of uniform, conforming views; judges engage in a process of reasoned elaboration and presentation of their reasons which in turn are subject to challenge and review. None of these features matches the conformity experiments.

Q: Do international or comparative sources figure in your teaching?

Over the course of my 30 years of teaching at Harvard Law School, I have by necessity become far more aware of comparative and international materials. You can't teach Civil Procedure today without addressing issues of extraterritoriality in jurisdiction and comparative issues in choice of law. Constitutional Law is much enriched through comparative materials. I also have been teaching a course on the International Criminal Court. And over that period of time, the level of student interest in comparative and international issues has skyrocketed, as has student experiences abroad both before and during law school.

Q: What advice do you have for students and young lawyers when it comes to international and comparative law?

Read widely, follow your curiosity, and work on being the best lawyer you can be.