

**AN INTRODUCTION TO THE REGENT JOURNAL  
OF LAW & PUBLIC POLICY & PRESIDENT  
JEAN-PAUL COSTA**

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Public policy is the attempt of an optimistic society to solve problems. All decisions made within the public policy realm have both benefits and opportunity costs. Consequently, those entrusted with the crafting of public policy in America work knowing that the impact of their decisions will be significant. The shrinking of the globe by modern technology and enterprise signals that public policy decisions may be felt both domestically and internationally. The breadth of public policy's impact enhances the honor I feel in taking part in this inaugural edition of the *Regent Journal of Law and Public Policy*.

After completing my public service as United States Attorney General, I had the pleasure of joining Regent University's mission of preparing students for service by pursuing truth with intensity. Over the past four years, I instructed countless Regent Law and Government students both on campus and in Regent programs abroad. As a distinguished professor of law and government, I teach courses on Civil Liberties and National Security as well as the Development and Implementation of National Legal Policy. Regent's International Law and Human Rights summer program in France, in which I also participate, is held in Strasbourg, the seat of the European Court of Human Rights, the Council of Europe, and the European Parliament.<sup>1</sup> In addition, in the summer of 2008, I

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1. Regent University School of Law, *Strasbourg Study Abroad Program: International Law and Human Rights*, <http://www.regent.edu/acad/schlaw/programs/strasbourg/> (last visited Mar. 19, 2009).

taught in Regent's new study program in Israel for Law and Government students.<sup>2</sup>

It is imperative that law students have an understanding of the close relationship between law and public policy in order to become effective advocates. American law, though unique, is not insulated from international issues; the influence of international courts is now being felt in the daily practice of law throughout the United States. Mankind's rendezvous with freedom reflects and contrasts with our own, and is worth our attention. The diversity of state laws in the American Republic manifests varying degrees of similarities to systems beyond our borders. For example, the age limit imposed on Missouri's judicial officers mirrors that of the European Court of Human Rights.<sup>3</sup> Well known to students is the similarity of Louisiana's Civil Law system to its cultural antecedents in Europe.<sup>4</sup>

The American Declaration of Independence identifies the universal essence of human rights. Indeed, its reference to mankind being endowed by the Creator with inalienable rights signals that such rights are the same in Washington, Strasbourg, and Baghdad. Therefore, it is proper that recognizing and articulating rights—and formulating laws and policies that respect them—should be, at some level, an international dialogue. The U.S. Supreme Court often reflects on the decisions of international and foreign courts and, while not generally accepting those decisions as binding, accords them “respectful consideration” in some key areas.<sup>5</sup> Issues such as immigration, law enforcement against aliens,<sup>6</sup> the

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2. Regent University School of Law, *Summer Program in Israel*, <http://www.regent.edu/acad/schlaw/programs/israel/home.cfm> (last visited Mar. 19, 2009).

3. *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (upholding a Missouri law mandating judicial retirement at age seventy).

4. SHAEL HERMAN, *THE Louisiana Civil Code: A European Legacy for the United States 1–2* (1993), available at [http://www.stephankinsella.com/texts/herman\\_louisiana-civil-code\\_1993.pdf](http://www.stephankinsella.com/texts/herman_louisiana-civil-code_1993.pdf) (last visited Mar. 19, 2009).

5. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2683 (2006) (quoting *Breard v. Greene*, 523 U.S. 371, 375 (1998)).

6. *Medellin v. Texas*, 128 S. Ct. 1346 (2008) (addressing whether judicial relief was available to Mexican citizen criminal defendants when U.S. government officials violated Article 36 of the Vienna Convention by failing to notify Mexican consulate of their detention); *Sanchez-Llamas*, 126 S. Ct. 2669 (same).

meaning of our Bill of Rights,<sup>7</sup> the right to privacy and sexual conduct,<sup>8</sup> evaluation of campaign regulations,<sup>9</sup> and the legal status of corporations,<sup>10</sup> to note a few, have involved consideration by our Supreme Court of the reasoning contained in foreign and international legal decisions.

Discussion of international law receives particular attention in regards to treaties. In *Hamdan v. Rumsfeld*, a majority of the Supreme Court decided that provisions of the Geneva Conventions were judicially enforceable by Hamdan,<sup>11</sup> a Yemeni national captured in the conflict with Al Qaeda and detained at Guantanamo Bay.<sup>12</sup> The Court's decision was a departure from the earlier principle, articulated in *Johnson v. Eisentrager*, that the provisions of the Geneva Conventions were not judicially enforceable.<sup>13</sup> The *Eisentrager* Court explained: "[i]t is . . . the obvious scheme of [the Geneva Convention of 1929] that responsibility for . . . enforcement of these rights is upon political and military authorities."<sup>14</sup>

The *Hamdan* Court reasoned that provisions in the Geneva Conventions were judicially enforceable for Hamdan because

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7. *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that capital punishment for juveniles who commit murder before reaching the age of 18 violated the Eighth Amendment's prohibition of cruel and unusual punishment).

8. *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that a statute prohibiting homosexual sodomy violated due process).

9. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000) (Breyer, J., concurring) (citing foreign court decisions affirming the legal test used in approving a campaign regulation).

10. *First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611 (1983).

11. *Hamdan v. Rumsfeld*, 548 U.S. 557, 627–28 (2006). After the Court decided that the provisions of the Geneva Conventions were judicially-enforceable for Hamdan, it refrained from deciding whether the Conventions were generally applicable to him. Instead, the Court decided that "at least one provision [of the Geneva Conventions], Common Article 3, applied. Common Article 3 provides that in a "conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum," certain provisions protecting "[p]ersons taking no active part in the hostilities, including . . . those placed *hors de combat* by . . . detention." *Id.* at 629–30.

12. *Id.* at 566.

13. *Id.* at 627.

14. *Id.* (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950)). In *Hamdan*, the Court explained that "'the obvious scheme' of the 1949 Conventions is identical in all relevant respects to that of the 1929 Geneva Convention," and therefore, without "some other provision of law," the protections of the Geneva Convention would not be judicially enforceable by Hamdan. *Id.*

they had become “part of the law of war,” and “compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted.”<sup>15</sup> The Court transformed the Conventions’ rules into judicially enforceable rights, thereby making what was enforceable only by “political and military authorities” enforceable, instead, by individuals courts.<sup>16</sup> This jurisdictional change may have great implications; dissenting in *Rasul v. Bush*, Justice Scalia said that it would “spring a trap” on America’s Executive branch.<sup>17</sup> In *Boumediene v. Bush*, Justice Scalia further described the change as a “bait-and-switch” making the war on terror a more difficult fight.<sup>18</sup>

The ability for the United States to execute its own laws is increasingly affected by the application of international decisions and treaties. For instance, many European countries deny extradition requests where offenders may be subject to the death penalty,<sup>19</sup> a policy reflected in the European Convention on the Protection of Human Rights and Fundamental Freedoms<sup>20</sup> and the European Convention on Extradition.<sup>21</sup> The European Convention on the Protection of Human Rights and Fundamental Freedoms prohibits capital punishment “in times of peace”<sup>22</sup> and in times of “war and serious national crisis.”<sup>23</sup>

The European Convention on Extradition states that extradition to a state that applies the death penalty for the particular offense may be denied by a state that does not apply the death penalty, unless the requesting state convincingly gives assurance that the death penalty will not

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15. *Id.* at 628.

16. *See id.* at 717–18 (Thomas, J., dissenting).

17. *Rasul v. Bush*, 542 U.S. 466, 497-98 (2004) (Scalia, J., dissenting).

18. *Boumediene v. Bush*, 128 S. Ct. 2229, 2285 (2008) (Scalia, J., dissenting).

19. Tung Yin, *Disposable Deontology: The Death Penalty and Nuclear Deterrence*, 55 ALA. L. REV. 111, 122 (2003).

20. Convention on the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

21. European Convention on Extradition, Dec. 13, 1957, 359 U.N.T.S. 273; Yin, *supra* note 19, at 121.

22. Yin, *supra* note 19, at 121-22.

23. The 13th Protocol to the Convention “was signed by the Council of Europe in early 2002.” *Id.* at 122.

be applied.<sup>24</sup> Extradition treaties between the United States and European nations often include provisions that mirror those of the European Convention on Extradition.<sup>25</sup>

The European Court of Human Rights was constituted under Article 19 of the European Convention on Human Rights of 1950 in order to monitor compliance by signatory parties.<sup>26</sup> Under Article 33 and 34 of the Convention, applications against signatory parties for human rights violations can be brought before the Court either by other states or by individuals.<sup>27</sup>

President Jean-Paul Costa of the European Court of Human Rights is a distinguished statesman of Europe. It was a pleasure to personally introduce him for his speech in Strasbourg to Regent Law students and members of the European Centre for Law and Justice.<sup>28</sup> President Costa has graciously permitted the *Journal* to publish this speech in the United States. President Costa was born in Tunis and went on to study in Paris where he earned undergraduate and graduate degrees in political studies and law.<sup>29</sup> As a professor, he taught at various French universities including the Pantheon-Sorbonne University. He served the French Republic as the political secretary to the Minister of Education. He also served the judicial section of the Council of State.<sup>30</sup> President Costa's position as a judge of the European Court of Human rights began in 1998, and his presidency of the Court began January 2007.<sup>31</sup>

The purpose of discussing international legal systems is not necessarily to agree or disagree with their philosophies,

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24. *Id.*

25. *Id.*; see Extradition Treaty, U.S.-U.K., art. 7, Mar. 31, 2003, 2003 U.S.T. Lexis 129; Extradition Treaty, U.S.-Fr., art. 7, April 23, 1996, 1996 U.S.T. Lexis 53; Extradition Treaty, U.S.-Belg., art. 6, April 27, 1987, 1987 U.S.T. Lexis 203; Treaty Concerning Extradition, U.S.-F.R.G., art. 12, June 20, 1978, 32 U.S.T. 1485.

26. European Convention on the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

27. *Id.*

28. For information about the European Centre for Law and Justice, see <http://www.eclj.org>.

29. European Court of Human Rights, *Composition of the Court*, <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/Judges+of+the+Court/> (last visited Mar. 19, 2009).

30. *Id.*

31. *Id.*

but rather is an effort to prepare for the practice of law while dealing with complex and developing international influences. Men like President Costa are valuable friends to those who love the rule of law. He is an insightful co-laborer in the pursuit of freedom.