

## BOOK REVIEW

REVIEWING TOM BINGHAM, *WIDENING HORIZONS: THE INFLUENCE OF COMPARATIVE LAW AND INTERNATIONAL LAW ON DOMESTIC LAW*. CAMBRIDGE, ENGLAND, CAMBRIDGE UNIVERSITY PRESS 2010. PP 102, HARDBACK ISBN-13 978-0521138024

By  
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The increasing interconnectedness of global legal regimes has challenged the notion that domestic legal traditions exist, or can exist, as “islands, entire of [themselves].”<sup>1</sup> Recent developments have witnessed the proliferation of multilateral institutions and tribunals independent of any state; the spinning of ever-greater webs of public and private obligations between states; and the expansion of novel, more broadly-applicable international norms into domains once considered the exclusive purview of sovereigns. These events have given judges the opportunity—and at times, the mandate—to consider foreign and international sources of law in their domestic decision-making. Judges have generally responded to the problems and potentialities posed by these sources in one of two ways: they have either embraced such sources as increasingly appropriate analytic aids, or shunned them as an unwelcome, potentially destructive intrusion of alien and inconsequential ideas.

The gist of this dichotomy was classically captured in the 2005 Scalia-Breyer debate on the Constitutional Relevance of Foreign Court Decisions at American University.<sup>2</sup> While Scalia dismissed foreign legal sources as “irrelevant” and unconstitutional, Breyer offered a defense of a more outward-looking judicial philosophy.<sup>3</sup> Since that time, the issue has only garnered more

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1. TOM BINGHAM, *WIDENING HORIZONS: THE INFLUENCE OF COMPARATIVE LAW AND INTERNATIONAL LAW ON DOMESTIC LAW* 5 (Cambridge University Press 2010).

2. Justice Antonin Scalia & Justice Stephen Breyer, *Constitutional Relevance of Foreign Court Decisions at the American University U.S. Association of Constitutional Law Discussion* (Jan. 13, 2005).

3. *Id.*

attention, perhaps most dramatically illustrated by a spate of recent U.S. state constitutional amendments that specifically seek to ban judges from relying on foreign or international law in their opinions.<sup>4</sup>

Against this backdrop, Lord Thomas Bingham's *Widening Horizons* offers support for a broader application of international law to domestic adjudication. Unlike the countertrends in the U.S., British judges at the highest level have liberally, and increasingly, looked to foreign and international legal sources in their decision-making.<sup>5</sup> This tendency accelerated dramatically with the adoption of the Human Rights Act by the U.K. Parliament in 2000, which bound British courts to decisions of the European Court of Human Rights.

Bingham boasts exceptional credentials to comment on the outward-looking trends among the British judiciary. Described by some of his peers as the "greatest jurist of our time," Bingham served for decades as a lion on the British bench (including as Master of the Rolls, Lord Chief Justice and Senior Law Lord) before his retirement in 2008.<sup>6</sup> A leading proponent of the expansive consideration of foreign and international legal sources, particularly where universally recognized human rights are at issue, Bingham presided over key decisions where such sources were used, and was the first senior British judge to push for the adoption of the Human Rights Act.<sup>7</sup>

Writing for the Hamlyn Lectures, Lord Bingham's succinct work accomplishes two primary tasks: it tracks the recent trajectory of the influence of foreign and international legal sources in British judicial decision-making, and provides rationales for the expansive use of such sources. *Widening Horizons* serves as something of a shorter, more quickly consumable companion to another recently released Bingham work, *The Rule of Law*,<sup>8</sup> and is one of his last publications before his death in 2010.

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4. Oklahoma has already passed such a constitutional amendment, and six other states—Alaska, Arkansas, Indiana, Nebraska, South Carolina and Wyoming—are reportedly considering similar legislation. Julian Ku, *Even More States Follow Oklahoma's Prohibition on Foreign and International Law*, OPINIO JURIS, Jan. 28, 2011, <http://opiniojuris.org/2011/01/28/even-more-states-follow-oklahomas-prohibition-on-foreign-and-international-law/>.

5. See BINGHAM, *supra* note 1, at 2-3. However, as Bingham discusses, examples of judges looking beyond Britain's borders began long ago. *Id.* at 5-6.

6. *Advocates Remember the 'Greatest Jurist of Our Time'*, SOLICITORS JOURNAL, Sept. 13, 2010, [http://www.solicitorsjournal.com/story.asp?sectioncode=2&storycode=16916&c=1&eclipse\\_action=getsession](http://www.solicitorsjournal.com/story.asp?sectioncode=2&storycode=16916&c=1&eclipse_action=getsession).

7. Martin Childs, *Lord Bingham of Conhill: Lawyer who Fought for Judicial Independence and Was Widely Recognized as the Greatest Judge of His Time*, THE INDEPENDENT, Sept. 14, 2010, <http://www.independent.co.uk/news/obituaries/lord-bingham-of-cornhill-lawyer-who-fought-for-judicial-independence-and-was-widely-recognised-as-the-greatest-judge-of-his-time-2078393.html>. Notable examples of such key decisions are the *Belmarsh* case and *A and others v. Secretary of State for the Home Department*, [2004] UKHL 56 (finding unlawful, and a breach of human rights, to detain foreign terror suspects without charge, and ruling that evidence against terror suspects obtained by torture was inadmissible).

8. THOMAS BINGHAM, *THE RULE OF LAW* (Penguin Group, 2010).

This review first seeks to recount the major themes and arguments laid out by Bingham in accomplishing his two primary tasks. The review then compares his vision and defense for the use of international and foreign law in domestic adjudication with countertrends in the U.S., and asks whether such justifications stand up to contrarians, epitomized by the positions Justice Scalia staked out in his 2005 debate with Justice Breyer. Finally, the review considers whether these arguments carry equal force in the U.S. context.

Bingham derives the title of his first section, “Foreign moods, fads, or fashions,” from Scalia’s famous dissent in *Lawrence v. Texas*.<sup>9</sup> In this section Bingham notes familiar criticisms of the use of foreign law in domestic decision-making: that the use of such sources suffers from differences in statutory background, legal culture, traditions and education between jurisdictions; that foreign law cannot be assimilated in an accurate or comprehensive way once it is artificially severed from its native context, a problem compounded by translation; and that one cannot know whether what is selected is the product of mainstream jurisprudence or the work of some maverick judge. Critics argue that these challenges make the use of foreign law ripe for abuse by an adjudicator looking to cherry-pick extraterritorial justifications for a particular viewpoint.

Bingham counters that comparative law scholars acquire expert knowledge of the law of foreign jurisdictions, which allows them to place such decisions in proper context and therefore creates an acceptable risk of error not unlike that present in any other means of judicial decision-making. Furthermore, contrary to myths of native purity, English law has never been free from foreign influence, but instead developed as “a mongrel, gaining in vigor and intelligence what it has lost in purity of pedigree.”<sup>10</sup> He points out that in no other field of intellectual endeavor are foreign insights categorically rejected, and that to disregard offhand helpful legal developments elsewhere can only serve to impoverish judicial reasoning. Finally, he notes that foreign law should be used to facilitate, not displace, more traditional means of judicial decision-making—it exists as one tool among many, but one particularly suitable for certain tasks.

Bingham notes two situations in which comparative legal sources are likely to be relevant and potentially decisive. First, when domestic law points to an answer that is inappropriate or unjust; and, second, when domestic authority offers no clear answer. Bingham provides numerous examples for both situations, including some cases over which he presided, and recounts the ways in which comparative law helped judges arrive at more equitable resolutions than what domestic law alone could have afforded.

In his second section, Bingham turns to the use of international law by British courts. Bingham notes that the founder of the Hamlyn Lectures could

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9. 539 U.S. 558, 598 (2003).

10. BINGHAM, *supra* note 1, at 5.

hardly have envisioned current developments in international law and may have found the embrace of such law by British jurists somewhat inconsistent with her “patriotic vision.”<sup>11</sup> In fact, at the time the Hamlyn Trust was founded in 1948, some argued that international law was “no law at all.”<sup>12</sup> Bingham describes the vehement opposition to the commonsensical adoption of the Hague Rules, the multilateral treaty governing the international carriage of goods by sea, as an example of the “almost hysterical” resistance often encountered when attempts are made to give domestic effect to international law.<sup>13</sup> But, as Bingham points out, since Miss Hamlyn’s time the world has shrunk considerably, and international tribunals and the importance of international law have grown accordingly.

Bingham contends that domestic courts have a critical role to play in the observance and shaping of international law, British courts included. Bingham, beginning from the premise that international law should have one universal meaning autonomous from domestic courts (a view which may not be shared by all), recounts examples of British courts contributing to the development of international law. He provides examples related to the return of abducted children under the Hague Convention on the Civil Aspects of International Child Abduction and the elaboration of protected social groups under the Convention on the Status of Refugees. In demonstrating how judges cross-reference similarly situated adjudicators in other countries grappling with common interpretive issues, these examples “illustrate the way in which courts across the world, grappling with the same problem arising under an international convention, seek, collaboratively, to feel their way towards a consensual international solution.”<sup>14</sup> Bingham draws on two terrorism related cases in which British judges made deep forays into international law to demonstrate that national courts at times are called on to contribute to the development of international law, whether they desire to or not, and that this duty admirably contributes to “peace and good order in the world.”<sup>15</sup>

In his third section, “Nonsense on international stilts” (again, a title taken from an outspoken critic of international law<sup>16</sup>), Bingham explores the interplay

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11. *Id.* at 29.

12. *Id.*

13. *Id.* at 31-32.

14. *Id.* at 44.

15. *Jones v. Ministry of the Interior Kingdom of Saudi Arabia* UKHL 26 (2006), 1 AC 270 (2007) (deciding that there was no ‘torture exception’ based on preemptory norms for sovereign immunity under the U.K. State Immunity Act 1978) and *R (Al-Jedda) v. Secretary of State for Defence (JUST-ICE and another intervening)* UKHL 58 (2007); AC 332 par 55 (2008) (distinguished from *Behrami/Saramati* Kosovo case the arrest and detention without charge or trial of a British Iraqi); *Id.* at 44-54.

16. Quote by Jeremy Bentham in his critical analysis of the French Declaration of the Rights of Man and Citizen. Ross Harrison, *Jeremy Bentham, UTILITARIAN PHILOSOPHERS*, 1995, <http://www.utilitarian.net/bentham/about/1995----.htm>.

between international and national law in the development of human rights jurisprudence. In probably his most comprehensive section—a nod to his expertise in this area—Bingham begins with the lack of a substantive body of human rights protections in British jurisprudence and notes that it was not until the Universal Declaration of Human Rights that “human rights went global.”<sup>17</sup> Soon thereafter, Britain became a foremost proponent for the global application of human rights provisions, extending them to most of its vast colonial empire.

Once former colonies became independent, human rights provisions were enshrined in several post-colonial state constitutions, subject to occasional interpretations by the British Privy Council. In a foreshadowing of current debates, the Privy Council approached these provisions with two distinct voices: one being traditional and conservative, and the other broader and more internationalist in tenor. Bingham tracks these approaches through a series of death penalty cases from former Caribbean colonies and observes that a shifting legal culture resulted in a judicial reposturing, away from a cautious hesitancy when interpreting constitutionally protected human rights norms and towards a stance striving to “better reflect the modern values of society.”<sup>18</sup> Undergirding this shift was the acceptance by the Privy Council that if certain rights were truly universal they could not be demarcated by national boundaries.

Bingham then tracks the effects of the adoption of the European Human Rights Convention in the Human Rights Act of 1998 (“the Convention”), and British courts’ attendant duty to recognize decisions of the European Court of Human Rights (“the European Court”), on the development of human rights law in the U.K. Perhaps contrary to expectations, Bingham notes 150 instances where the European Court has found Britain in breach. Focusing on violations under Article 8 of the Convention (the right to private and family life, home and correspondence), Bingham categorizes these breaches as follows: the interception of private communications; the right of the individual to know of material held in official files on him or her; the correspondence of serving prisoners; the right to respect for one’s home; and laws criminalizing homosexual behavior. Almost invariably, Bingham agrees with the outcomes reached by the European Court and finds it doubtful that a comparable result would have been achieved without the European Court’s influence. The general thrust of Bingham’s overview suggests that the European Court has pushed British law in a direction to be celebrated, as it has nudged Britain closer in line with its European brethren and towards greater state respect for individual autonomy.

Unquestionably, Bingham succeeds in providing a concise and insightful overview of the recent use of foreign and international law in British jurisprudence. His insider expertise allows him to choose the most important and

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17. BINGHAM, *supra* note 1, at 56.

18. *Id.* at 69-70.

illustrative examples that have impacted his colleagues and himself, and to intelligently fit these experiences into broader trends in British case law. Many of the cases discussed are fascinating in their own right. *Greatorex v. Greatorex*, for example, presented the question of whether a firefighter who rescued his own son after an attempted suicide could sue this son for psychological trauma.<sup>19</sup> In refusing to find such liability, the presiding judge referenced decisions from Australia, British Columbia and Germany.<sup>20</sup> Readers interested in a colorful and astute catalogue of the function of foreign and international law in U.K. opinions will not be disappointed.

However, those looking for more emphatic arguments in favor of broad extraterritorial considerations may find Bingham's more circumspect approach less than satisfying. Although he briefly references critics of comparative law, Bingham provides only a cursory sampling of familiar arguments and equally brief responses, altogether taking only a few pages. Nevertheless, Bingham's real contribution to proponents of outward-looking judicial decision-making emerges organically as the carefully selected opinions unfold. Taken together, the examples that Bingham provides demonstrate that the sky does not fall when judges look beyond their own national borders. Indeed, native traditions of legal reasoning remain intact, and are even enriched, as judges are more likely to arrive at socially desirable outcomes in these instances.

Bingham peppers his examples with his own observations about the benefits of comparative law and the proper role of modern domestic courts given the interlocking nature of contemporary international legal regimes. For example, he praises Lord Goff's decision in *Kleinwort Benson Limited v. Lincoln City Council and others*, as "gain[ing] immeasurable strength from the world-wide perspective which [he] adopted."<sup>21</sup> Bingham's tone remains more contemplative than confrontational throughout, more praising of supporting viewpoints than derogatory of opponents. Characteristic of Bingham's restraint are the subtle sideswipes at Scalia and Bentham, with whom he clearly does not agree, contained within section titles. But the analysis largely forgoes direct challenges to these very same opponents; instead the examples themselves provide the true force of Bingham's counterarguments, which he summarizes only briefly at the end of each section.

One consequence of Bingham's indirect style is that it provides plenty of potential fodder for counter conclusions. Consider where Bingham quotes his celebrated *Fairchild v. Glenhaven Funeral Services Ltd* opinion: "Development of law in this country cannot of course depend on a head-count of decisions and codes adopted in other countries around the world, often against a background of different rules and traditions. The law must be developed coherently, in

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19. 1 WLR 1970 (2000); *Id.* at 23.

20. BINGHAM, *supra* note 1, at 24-25.

21. 2 AC 349 (1999); *Id.* at 10.

accordance with principle, so as to serve, even-handedly, the ends of justice.”<sup>22</sup> Despite this proclamation, others have criticized the ‘*tour d’horizon*’ approach evident in this opinion, as it cites the legal traditions of Germany, Greece, Austria, The Netherlands, France, Spain, Norway, Italy, Switzerland, South Africa, and the U.S.<sup>23</sup> Some may feel uncomfortable having their domestic law develop according to what may appear to be an international popularity poll. Furthermore, Scalia would likely criticize the court’s exclusive reliance on decisions from Western countries, while neglecting decisions from the Middle East, Africa or other countries with which judges may disagree.<sup>24</sup> Scalia would contend that this self-serving selection at best reflects only a skewed, abstracted, and poorly understood international consensus.<sup>25</sup>

Another, perhaps more charged, criticism emerges when one considers the effects of the European Court decisions on the development of British law. While Bingham may have strategically placed the more controversial cases later in his list of examples in an attempt to downplay implications for the U.K., the takeaway remains undeniable: British courts have felt themselves compelled to follow the holdings of a foreign tribunal, even when it conflicts with established British law, British practices, and British social mores. Among other holdings, the European Court found laws criminalizing homosexual behavior and those requiring forcible tenant evictions to be in violation of the Convention.<sup>26</sup> British courts do retain some discretion to disregard the holdings of the European Court, as they did following the eviction cases, but the official stamp of disapproval from Strasbourg remains. Furthermore, Bingham argues that in all cases, the European Court laid down the more just and socially desirable decision, and that these outcomes point towards the regional consensus and lead towards a more progressive, internationally-integrated society. Of course, some may not agree with these underlying sociological claims.<sup>27</sup> Moreover, those who follow Scalia’s logic would likely find that the ends do not justify the means in these cases, especially where the means may remain susceptible to abuse by an overzealous, anti-majoritarian judiciary.<sup>28</sup>

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22. UKHL 22 (2002), 1 AC 32 (2003); BINGHAM, *supra* note 1, at 13-15.

23. BINGHAM, *supra* note 1, at 15.

24. *See* Scalia & Breyer, *supra* note 2 (Scalia: “[I]t’s not universally, but don’t just talk about Europe.”).

25. *See id.* (Scalia: “I mean, it lends itself to manipulation. It lends itself. It invites manipulation. You know, I want to do this thing; I have to think of some reason for it. What reason—you know, I want to come out this way. Now, I have to write something that—you know, that sounds like a lawyer, okay?”).

26. BINGHAM, *supra* note 1, at 78-81.

27. *See* Scalia & Breyer, *supra* note 2 (Scalia: “Societies don’t always mature. Sometimes they rot. [...] [Judges should look for the] standards of decency of American society—not the standards of decency of the world, not the standards of decency of other countries that don’t have our background, that don’t have our culture, that don’t have our moral views.”).

28. Scalia, like many critics of the use of foreign and international law, see such methods as particularly appealing to activist judges in their attempts to take essentially legislative decisions

Additionally, readers may wonder how well Bingham's arguments hold up in the U.S. context. Though they share a common legal heritage, obvious differences exist between the legal and constitutional regimes of the U.S. and the U.K. Due to its proximity and historical relationship with Continental Europe, the U.K. may feel more inclined to look to its neighbors for inspiration. Britain's colonial past also intertwined its legal regime with those of several post-colonial states in symbolic, historical, and sometimes binding ways (as in the case of Privy Council review). Finally, the decision to subject British courts to the authority of the European Court of Human Rights resulted from a legislative act, and thus existed as an indirect expression of the will of the British people to be so bound.

In contrast, the U.S. has a very different geopolitical orientation, and claims of American exceptionalism confound any easy transplantation of internationalist arguments that may be valid in the British context. It can be argued that Americans simply do not feel as much of a need to follow the rest of the world, or to join with it in an international consensus. As Scalia contends, for the U.S. way of life and system of government, the legal regimes of other countries are simply "irrelevant."<sup>29</sup> Furthermore, the distinctly American thread of "originalism" underlines arguments from Scalia and other U.S. jurists.<sup>30</sup> This view, which holds that the U.S. Constitution should be read as an unchanging document, does not sit well with an approach that assumes that globally, policies continually improve as they move towards a more socially desirable consensus.

In the end, a host of important assumptions underlie either perspective. These assumptions center on the proper contours of state power vis-à-vis the individual, the private sphere and the international community, and what, if anything, is fundamentally shared by all people regardless of culture, country or government. Bingham, perhaps more importantly than in the succinct arguments sprinkled throughout his book, provides strong empirical evidence for the feasibility, the desirability, and, at times, the necessity of an outward-looking judicial philosophy. The thrust of Bingham's collected decisions points persuasively to the conclusion that nations' judiciaries can learn a lot from each other irrespective of national boundaries, and a shift to a global perspective is occurring whether they like it or not. Bingham closes with a quote from the famed economist Amartya Sen: "we have to recognize that our global civilization is a world heritage—not just a collection of disparate local

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away from the representative branches of government. *Id.* (Scalia: "And the best way, the only way to determine that is certainly not to ask a very thin segment of American society—judges, lawyers and law students—what they think but rather to look at the legislation that exists in states, democratically adopted by the American people.").

29. *Id.*

30. *Id.* (Scalia: "Now, my theory of what I do when I interpret the American Constitution is I try to understand what it meant, what was understood by the society to mean when it was adopted. And I don't think it changes since then.").

cultures.”<sup>31</sup> This echoes Breyer’s appeal to our common humanity in his rebuttal to Scalia, “on [these] kind of issue[s] you’re asking a human question, and the Americans are human—and so is everybody else. [I]t doesn’t determine it, but it’s an effort to reach out beyond myself to see how other people have done.”<sup>32</sup> Bingham’s *Widening Horizons* documents judges doing just that: “reach[ing] out” to similarly situated decision-makers grappling with novel or common questions, in a way that recognizes, reaffirms, and celebrates our shared human condition.

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31. BINGHAM, *supra* note 1, at 83.

32. Scalia & Breyer, *supra* note 2.