Human Rights Litigation and the States

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Seth Davis and Christopher A. Whytock, *State Remedies for Human Rights*, 98 **B.U. L. Rev.** 397 (2018).

It has been almost forty years since the Second Circuit's landmark decision in *Filártiga v. Peña-Irala*, which opened the door to human rights litigation in U.S. federal courts under the Alien Tort Statute (ATS). That statute—a creature of the first Judiciary Act in 1789—authorizes federal subject-matter jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." ATS litigation flourished in the decades following *Filártiga*, but more recently the Supreme Court has imposed new obstacles. In *Sosa*, the Court limited the scope of the federal common law cause of action that allows plaintiffs to assert violations of international law under the ATS. In *Kiobel*, the Court imported a presumption against extraterritoriality into ATS litigation, requiring that such claims "touch and concern the territory of the United States . . . with sufficient force to displace the presumption." And this Term, in *Jesner v. Arab Bank*, the Court immunized foreign corporations from liability under the ATS. (WNYC's *More Perfect* released a terrific podcast on the ATS following the Jesner oral argument last October.)

If federal law and federal courts are less receptive to actions seeking remedies for human rights violations, what about the states? That is the crucial question that Seth Davis and Chris Whytock tackle in their excellent article. They persuasively argue that state courts and state law can play a role in this context, and that the Supreme Court's restrictive decisions on questions of federal law do not automatically foreclose more sympathetic approaches at the state level.

A foundation of the authors' arguments is that state law and state courts have a constitutionally recognized power to redress legal wrongs. The basic notion that where there is a legal right, there is also a legal remedy is the "normative core of a state's interest in providing redress for the victims of human rights violations." Davis and Whytock support this view with reference to state law, federal law, and international law, as well as broader political theories of corrective justice, social contract, and cosmopolitanism. Although they recognize that a remedy for human rights violations will not be available in every case, courts considering the proper role of state courts and state law must give due weight to a state's interest in providing remedies. Their argument "shifts the ground of debate; what presumptively seemed a 'foreign relations' matter for the federal government alone now appears a remedial matter presumptively for state courts to decide."

Davis and Whytock then turn to various court-access doctrines that might restrict state remedies for human rights violations. They argue against removal of state court lawsuits to federal court, criticizing in particular removal on the theory that such lawsuits implicate foreign policy concerns. Likewise, they critique the use of the political question doctrine to dismiss suits seeking redress for human rights violations. Davis and Whytock also address personal jurisdiction. Although they recognize that state courts may lack personal jurisdiction over some foreign defendants, they argue that suits based on human rights violations should not be subject to more rigorous scrutiny than suits based on other wrongs, and that a state's interest in providing remedies for human rights violations strengthens the case that personal jurisdiction is reasonable. Finally, they discuss forum non conveniens, emphasizing that courts must take seriously the requirement that a dismissal is appropriate only when an adequate foreign forum exists. And even when a foreign system is an adequate alternative, a U.S. state's interest in providing a remedy for human rights violations is a public-interest factor in favor of allowing a case to proceed in the plaintiff's selected U.S. forum.

Davis and Whytock next examine substantive choice of law. They argue that under either the Second Restatement or interest analysis, courts must consider the forum state's interest in redressing wrongs, including wrongs that violate

human rights. In addition, the Supreme Court's presumption against extraterritoriality with respect to federal law—and its application of that presumption in human rights cases—does not apply to state law. And they clarify that even when foreign law is chosen, that choice is not fatal if foreign law would provide a basis for the plaintiff's claim.

Finally, they confront federal preemption. Considering both field and conflict preemption, they argue that preemption analysis should give substantial weight to the state's interest in providing law for the redress of wrongs. As to states providing remedies for violations of international law, state courts are not preempted from concurrent jurisdiction over the admittedly narrow federal common law cause of action for enforcing customary international law (CIL) that the Supreme Court recognized in *Sosa*. Even a state-law right of action enforcing CIL more broadly than *Sosa* endorsed should not be categorically forbidden. The state's interest must be taken into account, and "critics of state common law remedies for CIL have the burden of showing that foreign relations concerns leave little to no room for state remedial lawmaking." They close with a discussion of state remedies for violations of treaty-based human rights. Although they recognize that the case for preemption may be stronger in this context, they reject the view that state courts will necessarily face the same limitations as federal courts.

Ultimately, the proper role of the states in human rights litigation is a question of default rules. There is little doubt that the federal government can take steps to block such litigation at the state level if it so chooses—as Davis and Whytock put it: "[w]here a state oversteps, creating an actual foreign relations conflict, the political branches . . . have no shortage of ways of responding." So the real issue is what states can do when federal political institutions have not spoken with clarity. Davis and Whytock make a compelling case that the default position should not prohibit state-based remedies for violations of human rights.

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