

## A Tribute to Justice Sandra Day O'Connor From an International Perspective

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Today, we are witnessing momentous upheavals all over the globe. Social, political and economic structures are questioned and rejected as nations struggle to replace discredited, antidemocratic systems with systems predicated on the rule of law. In Latin America, Africa, and nations of the former Soviet bloc, new constitutions are debated and adopted, human rights are capturing the imagination of people everywhere, free and fair elections are the norm to be attained and a culture of constitutionalism is now developing.<sup>1</sup> The United States Constitution, with more than 200 years of continual existence, is the oldest surviving written constitution. As a result, it is one of the leading models that other nations look to as they seek to form a democratic society consonant with their own traditions and values.

This historic moment has attracted the attention and commitment of Justice Sandra Day O'Connor. Indeed, she has championed the essential elements of a democratic society endorsed by the international community and has become an eloquent spokesperson for, and teacher of, democratic values throughout the world. Justice O'Connor serves as an executive board member of the Central and East European Law Initiative of the American Bar Association (CEELI).<sup>2</sup> One of CEELI's goals is to foster a commitment to an economic and political culture that is based on the rule of law.<sup>3</sup> The CEELI program consists, in part, of tracking the prog-

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<sup>1</sup> See The Honorable Sandra Day O'Connor, *The Life of the Law: Principles of Logic and Experience From the United States*—[the Fairchild Lecture], 1996 WIS. L. REV. 1, 1.

<sup>2</sup> See Robert A. Stein, *Lending Freedom a Hand: CEELI brings American legal know-how to Bosnia-Herzegovina*, 82 Apr. ABA J. 101(1996). Other members of the board of directors include: Washington lawyer Homer E. Moyer Jr., chair; former ABA president Talbot "Sandy" D'Alemberte; former Senator John C. Danforth; Ambassador Max X. Kampelman; Abner J. Mikva, former counsel to the president; U.S. Court of Appeals Judge Patricia M. Wald; and Matthew F. McHugh, counsel to the president of the World Bank. See *id.*

<sup>3</sup> See Focus on Central and Eastern Europe, 2 U.S. DEP'T. ST. DISPATCH 62 (1991).

ress of the judiciary in new democracies,<sup>4</sup> and provides services including constitution drafting, judicial restructuring and training, and reform in criminal and civil law.<sup>5</sup>

Justice O'Connor acknowledges that although Eastern European nations form their constitutional foundations from traditions other than those used to create the U.S. Constitution, the nations can learn from American experiences.<sup>6</sup> She encourages the United States to persevere in its efforts to act as a judicial model for former Soviet bloc nations, which are working to restructure their courts.<sup>7</sup> Indeed, one of the little-known facts about our Justices is their interest in, and commitment to, justice around the world. Through professional associations, United States judges are invited to meet their counterparts in other countries and are encouraged to discuss the rule of law and democratic institutions in those countries. In Justice O'Connor's visits to Eastern European nations, she has been pleased with their efforts toward democracy and civil rights.<sup>8</sup> Furthermore, the Justice has visited Asia where she observed the progress of Far East nations in their efforts towards democracy.<sup>9</sup>

In analyzing the basic elements of a democratic society, Justice O'Connor has stated that an independent judiciary, protection for freedom of the press, and an effective legal mechanism for enforcing human rights, even against the majority's will, are the hallmarks of a society governed by the rule of law.<sup>10</sup> Beyond this however, free and fair elections of leaders both in the executive and legislative branches of government are the necessary underpinnings of a democracy.<sup>11</sup>

The paramount importance placed on these factors by Justice O'Connor can be traced both to her life experience and her judicial opinions. Her professional and private life reflect a respect for the democratic process, governmental institutions, and the importance of individual participation in the government process both through official posts and civic activities.<sup>12</sup>

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<sup>4</sup> See Mack Reed, *Justice Urges Courts to Set Example Abroad; Judiciary: O'Connor, At Reagan Library, Says System Ought to Be Model For Emerging Democracies*, L.A. TIMES, Aug. 30, 1995, at B1.

<sup>5</sup> See Stein, *supra* note 2, at 101.

<sup>6</sup> See O'Connor, *supra* note 1, at 2.

<sup>7</sup> See Reed, *supra* note 4, at B1.

<sup>8</sup> See O'Connor, *supra* note 1, at 1.

<sup>9</sup> See Jeff Berliner, *Justice O'Connor Praises Democratic Reforms in Asia*, UNITED PRESS INT'L, Sept. 9, 1987, available in LEXIS, News Library, ARCNWS file.

<sup>10</sup> See O'Connor, *supra* note 1, at 1-2.

<sup>11</sup> See *id.* at 1.

<sup>12</sup> NANCY MAVEETY, JUSTICE SANDRA DAY O'CONNOR[:] STRATEGIST ON THE SUPREME COURT 14 (1996).

Justice O'Connor spent her childhood years on her family's ranch on the New Mexico-Arizona border.<sup>13</sup> Through the Justice's chores on the ranch, where she lived until she began attending a girls' private school in El Paso, Texas, the Justice learned the valuable lessons of self-sufficiency, community cooperation and civic participation.<sup>14</sup> In reminiscing about her childhood, the Justice, although independent at an early age, noted that the community was based upon mutual help: "This was just the way people lived and did things. We always tried to help other people."<sup>15</sup>

After graduating from Stanford Law School in 1952, Justice O'Connor joined the county attorney's office in San Mateo County, Arizona.<sup>16</sup> This position influenced the balance of her life because, as she remarked later, "it demonstrated how much I did enjoy public service."<sup>17</sup> After briefly engaging in private practice, Justice O'Connor volunteered in various community, law-related, and political activities.<sup>18</sup> She returned to employment in the public sector as an assistant attorney general in the State of Arizona and remained active in Republican politics.<sup>19</sup> In addition, Justice O'Connor was appointed an Arizona state senator to fill a vacated seat, and was subsequently elected to two full terms.<sup>20</sup> Justice O'Connor's remarkable performance garnered respect and led to her appointment as majority leader by her Republican colleagues—the first woman in the United States to hold such a position.<sup>21</sup>

Thus, first, as a volunteer for the Republican party in Arizona and then as an elected state official, Justice O'Connor has been involved in all phases of the electoral process. She has witnessed first hand both its mechanisms and its nuances and has come to respect the democratic process and the importance of free and fair elections. For Justice O'Connor,

<sup>13</sup> See *id.* at 12.

<sup>14</sup> See *id.* at 12-13.

<sup>15</sup> See *id.* at 13; ALAN FREEMAN & ELIZABETH MENSCH, SANDRA DAY O'CONNOR, in 5 JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 1761 (Leon Freidman & Fred Israe eds., 1995).

<sup>16</sup> See MAVEETY, *supra* note 12, at 13-14. Despite Justice O'Connor's academic success, including being an editor of the Stanford Law Review, she was not considered by major law firms for positions other than legal secretary upon graduation. See *id.* at 13.

<sup>17</sup> *Id.*

<sup>18</sup> See MAVEETY, *supra* note 12, at 14. Her involvement included being President of the Phoenix Junior League. See *id.*

<sup>19</sup> See *id.*

<sup>20</sup> See *id.* at 15.

<sup>21</sup> See *id.* Justice O'Connor was elected Arizona Senate Majority Leader in 1972. See *id.* She stated, however, that, "I was never one of the boys." *Id.* (citing Howard Kohn, *Front and Center*[:] Sandra Day O'Connor, L.A. TIMES, Apr. 28, 1993, (Magazine), at 62.

free and fair elections are essential because "[t]his is the basis on which people can govern themselves."<sup>22</sup>

Similarly, the international community has embraced free and fair elections as a priority concern of new nations and emerging democracies from Armenia to Nicaragua to Cambodia. For example, the international community has affirmed that "the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government."<sup>23</sup> States are accordingly urged to respect the rights of their citizens to take part in the governing of their country, either directly or through representatives freely chosen by them through fair electoral processes.<sup>24</sup> Economic, political, and personnel resources have been expended by international organizations such as the United Nations, the Council of Europe, and the Organization for Cooperation and Security in Europe to assure that nation building, at its inception, is based on a democratically-contested fair procedure for elections.

The first essential principle for a rule-of-law state, according to Justice O'Connor, is an independent judiciary.<sup>25</sup> She noted that whether or not a true separation of powers is incorporated into a system of government, the judicial branch must not be subjected to political domination by other branches of government.<sup>26</sup> In underscoring the importance of this concept, Justice O'Connor drew not only on the United States experience but also upon the writings of the French philosopher Montesquieu who stated "there is no liberty, if the judiciary is not separated from the legislative and executive."<sup>27</sup>

Prior to joining the Supreme Court, Justice O'Connor served both on the trial and appellate levels of the Arizona state court system.<sup>28</sup> Justice O'Connor's service in all three branches of Arizona state government has made her sensitive to separation of powers issues.<sup>29</sup> Both during her tenure on the Arizona Court and on the Supreme Court, she has shown deference to state and federal legislators.<sup>30</sup> At her confirmation hearing,

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<sup>22</sup> O'Connor, *supra* note 1, at 1.

<sup>23</sup> CONFERENCE ON SECURITY AND CO-OPERATION IN EUROPE: DOCUMENT OF THE COPENHAGEN MEETING OF THE CONFERENCE OF THE HUMAN DIMENSION, 29 I.L.M. 1305, 1309 (1990).

<sup>24</sup> *See id.*

<sup>25</sup> *See* O'Connor, *supra* note 1, at 2.

<sup>26</sup> *See id.* at 3.

<sup>27</sup> *Id.* at 2 (citing CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 174 (Thomas Nugent trans., rev. ed. 1873) (1748)).

<sup>28</sup> *See* MAVEETY, *supra* note 12, at 15.

<sup>29</sup> *See id.* at 16.

<sup>30</sup> For example in *FBI v. Abramson*, Justice O'Connor rebuked the majority Justices

Justice O'Connor indicated that while she was open to judicial reinterpretation, she was opposed to a "judicial activism that would change the law to accommodate social norms."<sup>31</sup>

Despite Justice O'Connor's opposition to such judicial activism, her position regarding the necessity of independence of the judiciary is wholly unqualified. "Judges are entrusted with ultimate decisions over the life, freedoms, rights, duties and property of citizens."<sup>32</sup> Consequently, "[i]t is essential that members of the watchdog branch be even-handed, consistent, and incorruptible."<sup>33</sup>

The requirements of independent and impartial justice are universal and are rooted both in natural and positive law. At the international level, the sources of this law are found in treaty obligations freely entered into among states, customary obligations, and general principles of law.<sup>34</sup>

In 1985 the United Nations adopted the Basic Principles on the Independence of the Judiciary, which envisages adequately-paid judges with full authority to act, free from pressures and threats, and equipped to carry out their duties.<sup>35</sup> Alarmed by an increase in attacks on lawyers and judges in the 1980s, the United Nations Commission on Human Rights appointed a Special Rapporteur to focus on problems—and progress—in promoting universal judicial independence.<sup>36</sup>

Justice O'Connor is effusive in her praise of the United States federal judicial system. The Justice noted that in the United States, "the power that federal judges wield is enormous. A single judge at any level . . . can declare an act of Congress invalid, can enjoin the enforcement of a state statute or order a prisoner freed."<sup>37</sup> Indeed, she has often said that the federal bench can be a model for Eastern European countries hammering out their own fledgling courts.<sup>38</sup>

The second principle necessary for a free society, in Justice O'Connor's view, is an independent, vigorous and responsible press.<sup>39</sup>

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for their construction of the Freedom of Information Act and accused them of usurping legislative authority by rewriting the statute and thus legislating. See 456 U.S. 615, 634-35 (1982) (O'Connor, J., dissenting).

<sup>31</sup> FREEMAN & MENSCH, *supra* note 15, at 1766.

<sup>32</sup> O'Connor, *supra* note 1, at 3.

<sup>33</sup> *Id.*

<sup>34</sup> See UNITED NATIONS SPECIAL RAPPORTEUR 8 (Feb. 6, 1995)

<gopher://gopher.un.org/00/esc/cn4/1995/39>.

<sup>35</sup> See *id.* at 9-10.

<sup>36</sup> See *id.* at 5, 8.

<sup>37</sup> Mack Reed, *O'Connor Praises U.S. Bench in Speech at Reagan Library*, L.A. TIMES, Aug. 30, 1995, at A3.

<sup>38</sup> See *id.*

<sup>39</sup> See O'Connor, *supra* note 1, at 5.

A press with these attributes "permits democratic institutions to correct themselves through the powerful forces of informed debate and public opinion."<sup>40</sup>

In planning and drafting the United Nations Charter following World War II, freedom of opinion and expression were among the basic human rights to be protected.<sup>41</sup> At its first session, the United Nations General Assembly, in calling for an International Conference on Freedom of Information, declared:

Freedom of information is a fundamental human right and is the touchstone of all freedoms to which the United Nations is consecrated; . . .

Freedom of information requires as an indispensable element the willingness and capacity to employ its privileges without abuse. It requires as a basic discipline the moral obligation to seek facts without prejudice and to spread knowledge without malicious intent  
 . . . .<sup>42</sup>

The Universal Declaration of Human Rights (UDHR), adopted without dissent by the General Assembly in 1948, sets forth specific inalienable rights and freedoms that cannot be abridged by any nation. Although technically non-binding as a source of international law, the UDHR was intended to serve as "a common standard of achievement" to which all states should aspire.<sup>43</sup> Provision for freedom of expression is contained in Article 19 of the Universal Declaration, which states: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and hold opinions and impart information of all kinds regardless of frontiers . . . ." <sup>44</sup>

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<sup>40</sup> *Id.*

<sup>41</sup> The preamble of the U.N. charter reaffirms "faith in the fundamental human rights, . . . in the dignity and worth of the human person," and in the "equal rights of men and women". U.N. CHARTER pmbl.

<sup>42</sup> Calling of an International Conference on Freedom of Information, G.A. Res. 59(I), U.N. Doc. A/64/Add.1 (1947), *reprinted in* 1 UNITED NATIONS RESOLUTIONS, SER. I 82 (Dusan J. Djonovich ed., 1973).

<sup>43</sup> *See* LOUIS HENKIN, *THE RIGHTS OF MAN TODAY* 1 (1978). The vote on the Declaration was forty-eight in favor, zero votes against, eight abstentions, and two were absent. *See id.* The dissenting votes were from five East European Communist Bloc countries, Saudi Arabia, and South Africa. *See id.* The rights contained in the Declaration have been compared in significance to the Magna Carta. *See* U.N. GAOR 3d Sess., pt. 1, at 262 (1948). The text of the pronouncement has been incorporated in national legislation. *See* UNITED NATIONS OFFICE OF PUBLIC INFORMATION, *THE UNITED NATIONS AND HUMAN RIGHTS*, U.N. Doc. OPI/621, at 166 (1978).

<sup>44</sup> MARC J. BOSSUYT, *GUIDE TO THE "TRAVAUX PREPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 380-81 (1987).

The Article contains the essential and universally relevant elements of the right to freedom of expression. All subsequent international and regional human rights treaties contain similar safeguards for freedom of expression and a free press.

While Justice O'Connor acknowledged that emerging capitalist democracies face daunting problems such as nationalism, mounting crime, unemployment, and rampant inflation, she cautioned that "if a country is to adapt itself to new times and new ideas, it must permit unconstrained exchanges of opinions."<sup>45</sup> "[O]nly where the press is free to criticize—and the people are free to challenge—the government, can freedom thrive, and the government be responsive to its citizens. A free press is a means by which government officials are held accountable for its actions."<sup>46</sup> Thus, freedom of the press is paramount.

The third element necessary for a democratic society, Justice O'Connor noted, is the principle that certain fundamental rights "must be placed outside of the reach of political exigency."<sup>47</sup> In the United States experience, the Bill of Rights performs that function: "It has permitted us to place the most essential individual liberties beyond the reach of the majority, and to guard the individual against the excesses of collective government."<sup>48</sup>

Prior to the demise of the former Soviet Union, the constitutions of Soviet Block countries contained human rights, but were in fact illusory.<sup>49</sup> Communist theory, however, rejected the concept of inalienable rights, positing that rights were created by the government and were therefore subject to governmental limitation and restriction when such a right conflicted with the "public good" or the "principles of social cooperation."<sup>50</sup> Although the Constitution of the Soviet Union and of affiliated socialist countries provided for civil liberties and political rights, effective enforcement mechanisms were lacking and individual rights were, in reality, illusory. In the mid-1980s, with the opening provided by *Perestroika*, the socialist concept of rights began to move in the direction of the traditional western model based upon inalienable rights of all persons. The western view had been endorsed by the United Nations and was embodied in the early United Nations statements on human rights, including

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<sup>45</sup> O'Connor, *supra* note 1, at 5-6.

<sup>46</sup> *Id.* at 6.

<sup>47</sup> *Id.* at 7.

<sup>48</sup> *Id.*

<sup>49</sup> See Wiktor Osiatynski, *Rights in New Constitutions of East Central Europe*, 26 COLUM. HUM. RTS. L.REV. 111, 112 (1994).

<sup>50</sup> Herman Schwartz, *Constitutional Developments in East Central Europe*, 45 J. INT'L AFF. 71, 80-84 (1991); see Osiatynski, *supra* note 49, at 112.

the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. This concept, however, was never totally accepted by the Soviet Union, which abstained from voting for the Declaration.<sup>51</sup> As Eastern and Central Europe gradually accepted this idea, political and civil rights based on the inalienable rights of all persons and on individual autonomy, together with an increased focus on procedural guarantees, were incorporated in the new constitutions.<sup>52</sup> Thus, virtually all of the new constitutions rely on Natural Law theory in explaining the basis of individual rights and incorporate international norms.<sup>53</sup>

Justice O'Connor is supportive of this view and emphasizes the importance of mechanisms to protect the range of civil rights and to assure that the will of the majority does not trample the rights of the minority.<sup>54</sup> Because under the former Soviet regime, the dictates of the Communist party subordinated and distorted the written Constitution, she cautioned that if countries "do not provide the institutions and processes necessary for effective enforcement of these rights, their constitutions will represent nothing more than collections of grandiose statements that afford no real protection."<sup>55</sup>

Finally, Justice O'Connor noted that civic engagement and public responsibility are essential for a democratic state to thrive.<sup>56</sup> She encourages attorneys to become involved in the community and perform pro bono service.<sup>57</sup> Justice O'Connor is the true embodiment of the good citizen—one who is involved in all aspects of civic life and who gives generously of her talents for the betterment of society.

Today, Justice O'Connor has turned her attention to the international arena. The Justice shares the views of those working throughout the world to create democratic institutions and she optimistically concludes: "I think there's hope at the international level of world peace through the rule of law . . . ."<sup>58</sup>

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<sup>51</sup> Although when adopted the Declaration was understood to be non-binding, some noted scholars have taken the position that the provisions are binding as customary international law or as part of the Charter obligations of member states. See Louis Sohn, *The Universal Declaration of Human Rights*, 8 J. INT'L COMMISSION JURISTS 17, 26 (1967).

<sup>52</sup> See Osiatynski, *supra* note 49, at 112.

<sup>53</sup> For example, the Hungarian Constitution, as amended, recognized that rights are inviolable. See Schwartz, *supra* note 50, at 82.

<sup>54</sup> See O'Connor, *supra* note 1, at 7.

<sup>55</sup> *Id.* at 8.

<sup>56</sup> See *id.*

<sup>57</sup> See Lisa Brennan, *O'Connor Urges New Lawyers to Feel the Power*, 146 N.J. L.J. 783, Dec. 2, 1996, at 7.

<sup>58</sup> Mary Schlangenhein, UNITED PRESS INT'L, *O'Connor Says Courts Provide Hope for Peace*, Sept. 8, 1982, available in LEXIS, News Library, ARCNEWS file.