

JUDICIAL COSMOPOLITANISM

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I. COMPARATIVE LAW IN A GLOBALISED WORLD

That national courts increasingly refer to the case law of foreign and international courts is a phenomenon indicative of the era in which we live. That is to say, the era of globalisation.¹ Globalisation has by no means left the law and the administration of justice untouched. Just as in other fields of endeavour, there is an incremental growth in the globalisation of ideas and concepts of justice.²

The transmission of ideas and concepts through time and space is not a new phenomenon. To quote from another era: “Our constitution is called a democracy because power is in the hands not of a minority but of the whole people”.³ This sentiment is as valid today as it was when expressed by Pericles in his funeral oration honouring the dead soldiers of the Peloponnesian War in 430 B.C.⁴ It was evident in the post-Homeric age when the first hazy conceptual embryos of formal law emerged.⁵

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¹ The term “globalisation” characterises a worldwide change that started in the 1960s. Globalisation refers to “processes whereby many social relations become relatively delinked from territorial geography, so that human lives are increasingly played out in the world as a single place”. See Baylis and Smith, *The Globalization of World Politics* (2nd ed., 2001), pp. 14-15.

² Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (2nd ed., 2004), pp. 51-52.

³ Thucydides, *History of the Peloponnesian War* (Rex Warner, trans.) (Penguin, 1972).

⁴ *History of the Peloponnesian War* (previous note), at pp. 144-45.

⁵ See Bury, *A History of Greece to the Death of Alexander the Great* (3rd ed., 1959), p. 53 (describing how Homeric poems gave the earliest glimpse of the collaboration between King, Council and Assembly – three elements creating a

The democratic sentiment was present in the ensuing era of the Hellenic world, when the first efforts were made to inscribe in permanent and public form rules which formerly had the more insubstantial status of custom.⁶ That is the spring from which the idea of the rule of law in organised society emerged; spread to the Roman world, from where it flowed inexorably over the centuries across Europe; and eventually to the New World, so that the idea of law, although in a constant state of evolution, is today the lifeblood of the modern democratic state.⁷

While the fertilisation of society by concepts and ideas from afar is not a novel experience, it is the immediacy and pervasiveness of the forces of globalisation across the world, which marks out this modern phenomenon from anything that has happened in previous eras. At the click of a mouse, a Sri Lankan student can instantly access the databanks of American and European universities, or a US professor can compare ideas with his colleagues in Europe and Australia. Judges may trawl the websites of supreme or constitutional courts throughout the world.

Courts, particularly supreme or constitutional courts, are more than ever looking at how complex jurisprudential problems are resolved in judicial decisions of foreign countries, and being inspired by the rationales that underlie such resolutions, and the academic writings surrounding them. Comparative law – the study of similarities and differences between various legal systems – is an increasingly rich source of inspiration for judges throughout the world.

The terrain on which this phenomenon naturally develops is that of fundamental rights – or rather on the fundamental aspects of fundamental rights – such as the death penalty, the rights of minorities, the issue of positive discrimination, the limitation of rights for reasons of national security, issues concerning the right to life and right to die and other sensitive aspects of the human

democratic principle that serves as a basis for later European constitutions).

⁶ See Kelly, *A Short History of Western Legal Theory* (1992).

⁷ See Beatty, “The Forms and Limits of Constitutional Interpretation” (2001) 49 *American Journal of Comparative Law* 79, 79: “[T]he rule of law established itself as one of the defining ideas in the political organization of modern democratic states”.

existence, freedom of expression, freedom of conscience, public policies towards schools and religious confession, and the status of the family, to name but a few. Also, due process is a universal touchstone for fairness in the determination of rights and obligations. It is at this level that the comparison of jurisprudential experience has tended to engage and develop.⁸

The flow of information across the World Wide Web tells us that many of the same socio-legal issues pose challenges in all modern societies, irrespective of legal systems.⁹

If law is the science that we claim it to be, it cannot be viewed as having strict national boundaries. “There is no such thing as ‘German’ physics or ‘British’ microbiology, or ‘Canadian’ geology”.¹⁰ I suppose in contrast to the natural sciences it must truthfully be said that the law has crystallised in each country under the influence or pressure of historical and social forces, which are often peculiar to that country. But that should be seen as an advantage, providing a more fertile soil in the pursuit of a primary aim of comparative law, as in all sciences; the search for knowledge fashioned from the experience of others.

Globalisation, and the transmission of knowledge and information, should not be viewed as a one-way stream moving from the epicentres of major powers to a so-called lesser world.

⁸ Gustavo Zagrebelsky, Presidente emerito della Corte costituzionale, Discorso, “Cinquanta anni di attività della Corte costituzionale” [President Emeritus of the Constitutional Court, Speech, “Fifty Years of Activity of the Constitutional Court”] (22 April 2006) (It.), available at <http://www.associazionedei costituzionalisti.it/materiali/speciali/cinquanta/index.html>.

⁹ The numerous legal databases available through the internet demonstrate the importance of international comparative law, and also indicate the need for all nations to address common socio-legal concerns. See, for example, LexisNexis (<http://www.lexisnexis.com>), and Westlaw International (<http://international.westlaw.com>), to name just two of the many legal sources available on the World Wide Web for the purpose of researching and exchanging legal information. See also Ginsburg and Jones Merritt, “Affirmative Action: An International Human Rights Dialogue”, 51st Cardozo Memorial Lecture, (1999) 21 *Cardozo Law Review* 253, 253 (discussing affirmative action in the context of the 50th anniversary of the United Nations Universal Declaration of Human Rights).

¹⁰ Zweigert and Kötz, *Introduction to Comparative Law* (Tony Weir, trans.), (3rd ed., 1998), p.15.

It is more a centrifugal force spreading ripples of knowledge and information from and to all points of the compass. Its impact in the judicial domain has been referred to as the *growing judicial cosmopolitanism* resulting from the increased tendency of supreme courts to examine foreign judicial decisions and doctrines.¹¹

Because globalisation affects all the areas of our social and political fabric, it also arouses fears. The impact of globalisation on the administration of justice or the evolution of the so-called judicial cosmopolitanism has given rise to some divergence of approaches, and indeed, controversy reflecting a fear of cultural or constitutional pollution.¹²

In this divergence of approaches, we have at one end of the spectrum Article 39 of the Bill of Rights of the Constitution of the Republic of South Africa, adopted in 1996, which provides that when interpreting the catalogue of rights the courts “must consider international law; and ... may consider foreign law”.¹³ At the other end of the spectrum, there are those who would view such a practice as diluting constitutional law into a generic constitutionalism, so as to deprive the national constitution of its true meaning and identity.¹⁴

Tensions within that spectrum have emerged particularly vividly in the United States.

II. THE US DEBATE ON THE USE OF COMPARATIVE LAW

In a speech given in 2002, in the context of the post-September 11th climate, Justice Sandra Day O’Connor of the US

¹¹ Gustavo Zagrebelsky, above n. 8.

¹² See Levinson, “Looking Abroad when Interpreting the US Constitution: Some Reflections” (2004) 39 *Texas International Law Journal* 353 (discussing whether American judges should take into consideration international decisions when faced with American constitutional law questions, and identifying methods adopted by other nations); and Posner, Foreword to “The Supreme Court 2004 Term: A Political Court” (2005) 119 *Harvard Law Review* 31, 85-90 (noting potential pitfalls associated with citing foreign laws).

¹³ Constitution of the Republic of South Africa, 1996, Ch. 2 Art. 39(1).

¹⁴ See, for example, Justice Scalia’s dissent in *Roper v. Simmons* 543 U.S. 551, 624-628 (2005). The US debate on comparative law is dealt with in the following section.

Supreme Court noted that, because democracy is an ever-growing trend worldwide (citing 120 democracies out of 190 nation states), the rule of law and its underlying principle, that no person is above the law, is giving rise to a “law of nations” to which all countries are subject in some fashion.¹⁵ US courts, including the Supreme Court, she said, should be more open to studying how other countries deal with problems that face the United States as well.¹⁶ Knowledge of legal systems and issues outside our borders would help, she observed, to bring out the positive aspects of globalisation.¹⁷ She emphasised that legal education can play a vital role in making the entire American legal community, from students to judges, realise that knowledge of the law of other countries is a duty, not just a legal specialty, in this era of “transnational” law.¹⁸

Two years later, in a speech before the American Constitution Society in 2003, Justice Ginsburg observed: “our ‘island’ or ‘lone ranger’ mentality is beginning to change. Our Justices ... are becoming more open to comparative and international law perspectives”.¹⁹ This speech has been cited as supporting a more global view on judicial decision-making.²⁰

Justices O’Connor,²¹ Breyer,²² and Kennedy²³ of the US

¹⁵ Justice Sandra Day O’Connor, Supreme Court of the United States, “Keynote Address at the American Society of International Law Annual Meeting” in (2002) 96 *American Society of International Law Proceedings* 348, 351.

¹⁶ “Keynote address” (previous note), at 352.

¹⁷ “Keynote address” (previous note), at 349.

¹⁸ “Keynote address” (previous note), at 350-352.

¹⁹ Justice Ruth Bader Ginsburg, Supreme Court of the United States, Remarks for the American Constitution Society: “Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication” (2 August 2003) (transcript at <http://www.acslaw.org/pdf/Ginsburg%20transcript%20final.pdf>; also, a video of the speech is available at <http://www.acslaw.org/node/1004>).

²⁰ See, for example, Earl Johnson, Jr., “Will Gideon’s Trumpet Sound a New Melody? The Globalization of Constitutional Values and Its Implications for a Right to Equal Justice in Civil Cases” (2003) 2 *Seattle Journal for Social Justice* 201, 226.

²¹ *Washington v. Glucksberg*, 521 U.S. 702, 718-719 n.16 (1997) (O’Connor J. concurring).

²² *Printz v. United States*, 521 U.S. 989, 976-978 (1997) (Breyer J. dissenting).

²³ *Lawrence v. Texas*, 539 U.S. 558, 576-577 (2003).

Supreme Court are known in particular to have frequently quoted foreign decisions in their opinions. For example, in *Lawrence v. Texas*,²⁴ in which the Supreme Court declared unconstitutional a Texas law that prohibited certain homosexual acts, Justice Kennedy buttressed his majority opinion by citing the opinions of the European Court of Human Rights,²⁵ and wrote: “The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries”.²⁶

The tension engendered by such an approach is reflected in Justice Scalia’s view on recourse to foreign sources of law. In one of the earlier death penalty cases, he wrote:

We must never forget that it is a Constitution for the United States of America that we are expounding ... [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.²⁷

This tension surfaced again in a relatively recent death penalty case, when the US Supreme Court condemned the imposition of death sentences on persons under eighteen years convicted of capital murder.²⁸ In that case, Justice Kennedy, again writing for the majority, referred to the fact that “the United States is the only country in the world that continues to give official sanction to the juvenile death penalty”.²⁹ He concluded by saying:

It does not lessen our fidelity to the Constitution or our

²⁴ *Lawrence v. Texas*, 539 U.S. 558.

²⁵ *Lawrence v. Texas*, 539 U.S. 558, at 573, 576 (citing *P.G. & J.H. v. United Kingdom*, 2001-IX E.C.H.R. 195; *Modinos v. Cyprus*, 259 E.C.H.R. (ser. A) (1993); *Norris v. Ireland* 142, E.C.H.R. (ser. A) (1988); *Dudgeon v. United Kingdom*, 45 E.C.H.R. (ser. A) (1981).

²⁶ *Lawrence v. Texas*, 539 U.S. 558, at 577.

²⁷ *Thompson v. Oklahoma*, 487 U.S. 815, at 868-869 n.4 (1988) (Scalia J. dissenting).

²⁸ *Roper v. Simmons*, 543 U.S. 551 (2005).

²⁹ 543 U.S. 551, at 575.

pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.³⁰

In his minority opinion in that case, Justice Scalia wrote:

Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.³¹

Referring to the significance attached to the views of other countries and the international community in the majority opinion he added: “Unless the Court has added to its arsenal the power to join and ratify treaties on behalf of the United States, I cannot see how this evidence favors, rather than refutes, its position”.³² Later on he stated: “What these foreign sources ‘affirm,’ rather than repudiate, is the Justices’ own notion of how the world ought to be, and their diktat that it shall be so henceforth in America”.³³

The extremity of the spectrum on this side of the argument could be said to be reflected in a Bill submitted to the United States Congress in 2004, titled the Constitution Restoration Act, in which the Justices of the US Supreme Court would have been forbidden to interpret the Constitution by taking into consideration legal documents different from national ones, including decisions of constitutional or supreme courts of other countries or international tribunals of human rights.³⁴

III. BETWEEN EXTREMES

Within the ambit of this spectrum there is plenty of scope for legitimate debate, because there is a fundamental principle at

³⁰ 543 U.S. 551, at 578.

³¹ 543 U.S. 551, at 608 (Scalia J. dissenting).

³² 543 U.S. 551, at 622.

³³ 543 U.S. 551, at 628.

³⁴ Constitution Restoration Act of 2004, S.2082, 108th Cong. § 201 (2004).

stake. The role of foreign sources of law in constitutional interpretation directly engages the legitimacy of interpretation referable to such sources.

There is a great deal of substance in the concerns Justice Scalia has expressed – at least, and I emphasise this – in the terms in which he poses the problem. To use foreign law or foreign sources of law as a naked means of importing legal concepts and values into national constitutional law would risk undermining the legitimacy of a supreme court, by attributing meanings and values to a constitution which do not stem from, and are not indigenous to, that constitution itself. To allow the notion of the commonality of values to be a means of imposing conformity for its own sake in the protection of rights would be a denial of the democratic ideal of respect for diversity.

As has previously been observed, we live in a moral universe. The law, and particularly judicial decisions, are not detached from the moral values that guide our society. Law is not a set of rules such as would run a railway system.³⁵ So, in searching for judicial resolution of complex moral or social problems facing society, a court must find those solutions within the ambit of its own constitutional and legal framework so that they are consistent with, and reflect, the values and ethos of the society fashioned by its constitution. To do otherwise would be to betray society.

No doubt Justice Scalia would say it is perfectly legitimate for the Supreme Court of South Africa to look outside that framework, for that is what its Constitution expressly permits it to do, but that he is interpreting the Constitution of the United States and not the Constitution of South Africa.³⁶

At least some of Justice Scalia's objections to the use of international conventions find some support in the case law of the

³⁵ See, e.g., Perry, *Love and Power: The Role of Religion and Morality in American Politics* (1991), pp. 8-16 (describing the United States as a morally pluralistic society, where the legal and political systems are not free from moral influences); and Perry, *Morality, Politics, and Law* (1988), pp.121-79 (explaining that judges in the United States are members of a morally pluralistic political community, and this influences judicial decision making).

³⁶ See *Atkins v. Virginia*, 536 U.S. 304, 348 (2002) (Scalia J. dissenting) (citing *Thompson v. Oklahoma*, 487 U.S. 815, 868-869 n.4 (1988) (Scalia J. dissenting)).

Court of Justice of the European Union.³⁷ The treaties of the European Union, characterised by the Court as the EU's constitutional charter, did not contain an express guarantee of fundamental rights, any more than the Constitution of the United States had a Bill of Rights when it was first adopted.³⁸ In order to add legitimacy to the EU legal system, the Court of Justice found it was necessary to identify a doctrine which permitted the protection of such rights and, in its case law, identified as the source of those rights the common principles to be found in the constitutions of the member states of the European Union and international treaties and conventions to which the member states had subscribed.³⁹ Those principles fall to be applied by the Court in the field of fundamental rights.⁴⁰ The development of that doctrine is altogether another topic.

The point that I wish to emphasise is the Court's exclusion from consideration, as an external source of law, of treaties and conventions not ratified or subscribed to by the member states, simply because they lacked the kind of legitimacy that could be attributed to treaties to which the member states subscribed.⁴¹ This mirrors the concern expressed by Justice Scalia in one of the quotations just referenced.⁴²

I do, however, believe that between the antipodean poles of this argument there is a middle course, in which enriching our judicial knowledge and functions by recourse to case-law of other countries need not be seen as a Trojan Horse, distorting national constitutional interpretation, one in which the citizens of the system are not called on to endure inclinations and empiricisms of

³⁷ See Joined Cases 21-24/72, *International Fruit Co. NV v. Produktschap voor Groenten en Fruit* [1972] E.C.R. 1219.

³⁸ Hartley, *European Union Law in a Global Context* (2004), p. 297: "Human rights were not mentioned in the original Community Treaties, possibly because it was thought they would not be relevant to an organization whose immediate aims were economic". The Charter of Fundamental Rights of the European Union was signed and proclaimed through a special procedure at the European Council meeting in Nice on 7th December 2000: Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1.

³⁹ See, e.g., Case 29/69, *Stauder v. City of Ulm* [1969] E.C.R. 419.

⁴⁰ See, e.g., *Stauder v. City of Ulm* (previous note).

⁴¹ See Joined Cases 21-24/72, *International Fruit Co. NV v. Produktschap voor Groenten en Fruit* [1972] E.C.R. 1219.

⁴² See above, text accompanying notes 31-33.

foreign fashions as Justice Scalia remarked.⁴³ As Professor Gustavo Zagrebelsky put it:

The [judicial] object is principally one of internal law. It is like resorting to ‘a friend rich in experience’ to solve a difficult problem, who helps one think more clearly, ... widens perspectives and enriches arguments, brings to life points of view perhaps otherwise ignored.⁴⁴

Or in the words of Aharon Barak, Chief Justice of Israel, when he stated, “Comparative law serves me as a mirror: it allows me to observe and understand myself better”.⁴⁵

From the domestic perspective, it is in my view no less true that the interpretation of the Constitution of Ireland, which contains express and explicit guarantees concerning due process⁴⁶ and the fundamental rights of citizens,⁴⁷ may at times be greatly assisted by recourse to the comparative law method of interpretation where decisions of other courts, are not determinative, but may illuminate the search for a judicial solution relating to the application of common principles in analogous situations. This is a perspective that tends to be shared by European judges and many elsewhere.⁴⁸

⁴³ See *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia J., dissenting). Justice Scalia cited Thomas J.’s statement in *Foster v. Florida*, 537 U.S. 990, n. (2002) that the US Supreme Court “should not impose foreign moods, fads, or fashions on Americans”.

⁴⁴ Zagrebelsky, above n. 8 (translation kindly provided by author).

⁴⁵ Zagrebelsky, above n. 8 (quoting Aharon Barak, Chief Justice of Israel, “Comparative Law, Originalism and the Role of a Judge in a Democracy: A Reply to Justice Scalia”, address at the Fulbright Convention (29th January 2006), at http://www.fulbright.org.il/fileadmin/fulbright/editor/images/news/Documents_for_news/Barak_50th_symposium_speech.doc) (translation kindly provided by author).

⁴⁶ See Articles 38, 40.3.1 and 40.3.2 of the Constitution.

⁴⁷ See Articles 38-40 of the Constitution.

⁴⁸ See, e.g., Goldsworthy, “Introduction”, in Goldsworthy (ed.), *Interpreting Constitutions: A Comparative Study* (2006), p.3: “We live in an era of ‘cosmopolitan constitutionalism’ in which lawyers and judges increasingly look beyond their own borders and borrow ideas from other jurisdictions”.

Judicial *dicta* of other supreme courts may also demonstrate that a national interpretive decision is not egregious, or that it states a principle essential to any constitutional democracy. They may contain an effective or eloquent expression of a principle anchored in a national constitution, and in doing so add an entirely legitimate rhetorical or corroborative persuasiveness to judicial rationale. I would have no problem in citing the words of Pericles in 430 B.C.,⁴⁹ nor those of Justice Robert Jackson, in the well-known case of *West Virginia Board of Education v. Barnette*,⁵⁰ when he observed:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities [or functionaries] and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.⁵¹

Both Pericles and Jackson emphasise that constitutional justice is the function of a constitution itself, and not subject to the day to day whims of political action – a universal concept of the role of constitutions in a democracy. Citing Pericles or Jackson could hardly be said to imperil the legitimate interpretation of any constitution that is anchored to the same premise. On the contrary, they tend to buttress its authority and legitimacy.

IV. RECOURSE TO COMPARATIVE LAW IN THE IRISH COURTS

Ireland is no stranger to the effects wrought by globalisation on constitutional exegesis. Of course, reference to foreign law has long been a feature of domestic constitutional jurisprudence well before globalisation fully hit its stride: the social and legal history

⁴⁹ See above, text accompanying notes 3-4.

⁵⁰ 319 U.S. 624 (1943).

⁵¹ 319 U.S. 624, at 638.

of this State has seen an enduring tendency to look “over the water”, as it were, to the case law of England and Wales, while the presence of a written constitution encouraged a conscious shift in the Supreme Court of the 1970s, from an exclusively common law analysis of cases based on traditional deference to parliament, to a more receptive attitude towards the US genre of judicial review.⁵²

However, reflecting the current era of globalisation, the present day courts are wont to refer, when relevant, to the case law of any common law country, including the US, Australia, Britain, Canada and New Zealand, as well as, on occasion, to the case law of European constitutional courts. The courts have also referred for some time to the case law of the European Court of Human Rights, a practice which was relatively common even prior to the incorporation of the European Convention into domestic law through the European Convention on Human Rights Act, 2003.

A judgment of the Court of Criminal Appeal from 2005 provides a practical illustration of the manner in which decisions of other courts can corroborate or confirm a national decision. In *D.P.P. v. Boyce*,⁵³ the Court of Criminal Appeal decided that the compulsory taking of blood samples of a criminal suspect for the purpose of DNA testing is not a breach of that person’s right to silence when charged with a criminal offence. In determining that issue, the Court of Criminal Appeal called in aid the decision of the European Court of Human Rights in the case of *Saunders v. United Kingdom*,⁵⁴ which recognised the right to silence as guaranteed by Article 6 of the Convention.⁵⁵ The judgment contains the following passage at paragraph 69:

The right not to incriminate oneself is primarily concerned, however, with respecting the will of an

⁵² O’Donnell, “James Joyce, Boss Croker, Oliver Wendell Holmes and the Influence of America on Irish Constitutional Law” (2008) 13(1) *Bar Review* 2, 2.

⁵³ Court of Criminal Appeal, unreported, 21 December 2005.

⁵⁴ [1997] 23 E.H.R.R. 313.

⁵⁵ It may be noted that at the time *Saunders v. United Kingdom* was decided, the ECHR had not yet been incorporated into domestic law.

accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention, and elsewhere, it does not extend to the use in criminal proceedings of a material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath blood and urine samples and bodily tissues for the purposes of DNA testing.

The Court of Criminal Appeal then referred to essentially the same distinction which was adopted by the Supreme Court of the United States in *Schmerber v. California*,⁵⁶ when it considered a citizen's right to silence and privilege against self-incrimination under the Fifth Amendment of the United States Constitution.

Delivering the opinion of the US Supreme Court in that case, Brennan J. acknowledged that the Fifth Amendment of the Constitution of the United States guaranteed the right of a person to remain silent, unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty for such silence. He went on to state:

We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends.

Not all such comparative decisions are so obviously pertinent, but this case is nonetheless a good example of the shared understanding of common concepts which can exist between different legal systems.

Reference to foreign case law in the Irish constitutional tradition has always been voluntary. However, under section 2 of the ECHR Act, 2003, the courts are now obliged to interpret, in so far as possible, "any statutory provision or rule of law" in a

⁵⁶ 384 U.S. 757 (1996).

manner compatible with the European Convention on Human Rights. The full text of the section provides:

In interpreting and applying any statutory provision or rule of law, a court shall, in so far as possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.

For these purposes, the Act formally requires that judicial notice is to be taken of the Convention and of decisions of the European Court of Human Rights (section 4).

A number of brief points may be made regarding section 2. First, it clearly does not require the court to give general and direct application to Convention law in the State. Second, it focuses on the interpretation of statutory provisions or rules of law. The section therefore does not affect the interpretation of the Constitution (nor could it). As the long title of the Act makes clear, the provision seeks to give greater effect to the Convention *subject to the Constitution*.⁵⁷

Of course, where an incompatibility is found between a legal provision and the Convention, a court may make a "declaration of incompatibility" under section 5(1) of the 2003 Act.⁵⁸ However, under section 5(2) of the Act such a declaration does not affect the validity, continuing operation or enforcement of the statutory provision or rule in respect of which it is made.⁵⁹

⁵⁷ See also, e.g., Hogan and Whyte, *J.M. Kelly: The Irish Constitution* (2003) p.1319.

⁵⁸ "5.—(1) In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of section 2, on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this Act as 'a declaration of incompatibility') that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions."

⁵⁹ "5. —(2) A declaration of incompatibility—

(a) shall not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made, and

(b) shall not prevent a party to the proceedings concerned from making submissions or representations in relation to matters to which the declaration relates in any proceedings before the European Court of Human Rights."

To date, only a handful of such declarations have been made.⁶⁰ This may be seen to be due, at least in part, to the fact that, while differences of course exist between the Constitution and the Convention, the level of fundamental rights protection afforded by each instrument is strikingly similar.⁶¹

The explicitly sub-constitutional status of the European Convention, through the interpretive model of incorporation of that instrument in the ECHR Act,⁶² means that, although the courts may of course on their own initiative have regard to Convention case law in constitutional cases, as they have done prior to the entry into force of the Act, they are under no obligation to do so. Incorporation of the ECHR into Irish law under the 2003 Act therefore precludes the Convention acting, like a “cuckoo in the nest”, to supplant the Constitution in the national legal order.⁶³ While this model of incorporation has been subjected to significant criticism,⁶⁴ which is not considered here, it is nevertheless the model within which the courts are required to operate.

That said, even before incorporation, the Supreme Court had clearly held that the jurisprudence of the European Court of Human Rights can serve as a useful reference or source of inspiration in the interpretation of constitutional rights:

⁶⁰ The first declaration of incompatibility was made by McKechnie J. in *Foy v. An t-Ard Chlaraitheoir and Others*, High Court, unreported, 19 October 2007.

⁶¹ See, e.g., Hogan and Whyte (above n. 57), p. 1320. See also Ó Cinnéide, “The European Convention on Human Rights and the Irish Constitutional System of Rights Protection: Complementary or Divergent?” in Carolan and Doyle (eds.), *The Irish Constitution: Governance and Values* (2008) p.511.

⁶² See, e.g., O’Connell, “The ECHR Act 2003: A Critical Perspective”, in Kilkelly (ed.), *ECHR and Irish Law* (2004).

⁶³ Except perhaps where Convention case law is followed and applied by the European Court of Justice, since decisions of the latter court have *erga omnes* or direct effect on all Member States of the European Union.

⁶⁴ See, e.g., O’Connell (above, n. 62); and Hogan, “Incorporation of the ECHR: Some Issues of Methodology and Process”, in Kilkelly (previous note), pp.13-35 (examining the interpretive model of incorporation and the merits and demerits of other models of incorporation, primarily the Constitution Review Group’s recommendation of incorporation by replacement of the fundamental rights provisions in the Constitution and the “Swedish model” of incorporation at the constitutional level, according primacy to the Convention and the case law of the European Court on Human Rights).

The judgments of the Court of Human Rights may be useful sources of persuasive authority where they contain reasoning ... relevant to the interpretation of legal rights guaranteed by the Convention which are analogous to rights which are known in our law and Constitution and which our courts have to apply.⁶⁵

The case law of the European Court, like that of other courts, will no doubt continue to serve as a most useful point of reference, when deemed relevant, in future constitutional decisions.

CONCLUSION

Although reference to the jurisprudence of other courts can understandably raise fears, this practice does not have to compromise the identity of one's own constitutional order. It is part of a grand dialogue, particularly on themes of constitutional protection of human rights, which takes place today between supreme courts and among supreme court judges, both judicially and extra-judicially. Academic centres such as schools of law from all over the world contribute to the dialogue between supreme courts on the great themes of constitutional law, and they are one of the most fruitful interlocutors in that dialogue. So it is more at an abstract level that we speak of a transnational communication of knowledge, concepts and ideals of justice.

The national judge, remaining true to his or her constitutional principles, is the filter through which universally discussed ideas enlighten, but do not determine, the interpretation of his or her own constitution, in which must always be found the essential ingredients for the justification of his or her judicial conclusions. In this sense the search for knowledge and enlightenment outside national boundaries seems, from my perspective, to be entirely legitimate.

I do not believe that judicial solutions to complex problems can be found always and exclusively through the sometimes

⁶⁵ Fennelly J. in *Glencar Exploration Plc. v. Mayo Co. Co.* [2002] I.L.R.M. 481.

myopic lens of purely national perspectives. Justice was not just born on one day, some time ago in one country. It has to be found time and time again, as societies evolve and new challenges arise in a converging world. In the search for solutions we should be willing to enrich our knowledge and wisdom from sources wherever they are to be found. To quote again Justice Ginsburg who observed, when addressing a body of constitutional lawyers, “[our] perspective on constitutional law should encompass the world ... We are the losers if we do not both share our experience with, and learn from others”.⁶⁶

⁶⁶ Ginsburg, above n. 19.