

## ARTICLES

### NATIONAL SELF-SUFFICIENCY OR INTELLECTUAL ARROGANCE? THE CURRENT ATTITUDE OF AMERICAN COURTS TOWARDS FOREIGN LAW

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#### I. THE OPEN SOCIETY

DURING the 19th century American law (as, indeed, English law) was open to foreign influences. Foreign creativity was welcomed, not seen as an attempt to interfere with American values and life by telling them how to ordain their affairs. English statutes, mainly on matters of private law, would thus reach the westward expanding United States with a jet lag of anything between 10 and 20 years.<sup>1</sup> Decisions of the highest English courts would also be followed, within about the same period of time, unless local conditions made their adoption undesirable.<sup>2</sup> Occasionally and increasingly local courts also developed the courage to challenge the wisdom of the progenitor system, displaying not only growing intellectual confidence in their own, but also showing the flexibility that is found in societies which have the mixed blessing of a shorter tradition;<sup>3</sup> but when they did so, they invariably felt the need to

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<sup>1</sup> For instance Lord Campbell's Act of 1846. For the American statutes see S. Speiser, *Recovery for Wrongful Death*, 2nd ed., 1975.

<sup>2</sup> For instance *Rylands v. Fletcher* (1865) 3 H & C 774, 159 E.R. 737, reversed in *Fletcher v. Rylands* (1866) L.R. 1 Ex. 265, affirmed in *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330, a decision establishing a general rule of strict liability for the accumulation of any substance on the defendant's land likely to do mischief if it escaped. In the case in question, the substance accumulated was water (to assist a local milling industry), which is escaped through some disused mine shafts and flooded the low-lying land of the plaintiff. In states like Texas, where water was and is a scarce commodity and its accumulation should be encouraged and not penalised, the Texas courts refused to follow the English ruling. See, for instance, *Turner v. Big Lake Oil Co.*, 96 S.W. 2d 221 (1936), and Leon Green, "Tort Law Public Law in Disguise" (1959) 38 Texas L. Rev. 1, 5.

<sup>3</sup> E.g., *Lawrence v. Fox* 20 N.Y. 268 (1859), where the New York Court of Appeals essentially decided to depart from the traditional Common law doctrine of privity and recognise contracts in favour of third parties.

explain why they chose to go down another path. The reasons given for distinguishing or rejecting the parent model were often informative about both systems.<sup>4</sup> American courts were thus among the first which would allude openly to the policy reasons which dictated their results.

Initially, the relative “poverty” of American law was, undoubtedly, a reason for this willingness to borrow from the parent system; but it was not the only one. For throughout the 19th century we find American jurists of very high intellectual standing progressively interested in both the law of France and Germany; and this interest was not limited to the writings of some of the great Continental jurists of the period (or even earlier periods) but also extended to innovative legislative schemes.<sup>5</sup> By the turn of the 20th century, the German professoriate as an institution also came to be held in high esteem among many jurists of renown in the USA,<sup>6</sup> while the celebration of the first centenary of the Code Civil attracted a fair amount of discussion (and Napoleon, himself, came in for much praise).<sup>7</sup> Even the (short-lived) German school of “free law” found adherents in the USA. By the mid 1920s Karl Llewellyn was to spend much time teaching in Germany, an experience which was later to be reflected in many German ideas finding their way in the Uniform Commercial Code. Though this flirting with Continental Europe decreased rapidly as the Second World War approached, the end of that War brought to the United States many first class minds (and not only in law) of German or other central European origin. They represented a second, unwilling, and more concealed wave of Germanic ideas crossing the Atlantic and enriched many Law Schools such as those of Harvard, Yale, Chicago, and, later, Berkeley and Texas to mention but a few. At the same time Law Schools such as Tulane, respectably anchored in the civilian tradition, did a good job in keeping interest in French law alive, especially during the days when the late Professor “Ferd” Stone used to run its Institute of Comparative Law. In this climate, even Justinian’s Digest found its way in a number of American decisions as “supportive” authority used to alter existing American law, though the borrowing was not

<sup>4</sup> For instance, *Rowland v. Christian* 69 Cal. 2d 198, 443 P. 2d 561 (1968).

<sup>5</sup> As for instance Bismarck’s social legislation of the 1880’s which attracted much attention in the State of New York in the late 1890s.

<sup>6</sup> As it did in France after the Franco Prussian war of 1870. For more details on this see Claude Digeon, *La Crise Allemande de la Pensée Française, 1870–1914* (Paris 1959), esp. pp. 364 ff., and, more generally, Philippe Jestaz and Christophe Jamin, *La Doctrine* (Paris 2004), *passim*.

<sup>7</sup> A website search of the articles that appeared in American law journals on the centenary of the Code Civil shows them to be more than double than those that were published for its 150 years, while the number of articles mentioning, let alone celebrating, the (recent) bicentenary was a mere trickle.

always complete or well understood. This transatlantic movement of ideas has been documented by various authors so it need not occupy us further.<sup>8</sup> Towards the end of this essay, however, we shall express our concerns about its current decline.

## II. CONSTITUTIONAL LAW AND STATUTORY INTERPRETATION

Unlike the developments briefly sketched in the previous section, which concerned the domain of Common law (Europeans might, in this case, use the word private law with equal accuracy), the same pattern of imitative thought was not to be found in the domain of constitutional law and statutory interpretation.<sup>9</sup> The radical difference of the American Constitution from the unwritten English model, makes this obvious enough; but the differences in judicial interpretation were to become even more obvious in the area of judicial review of legislation—an indigenous development which has no real parallel in England and France, found an approximate equivalent in post-World War II Germany, but which in more recent times was destined to serve as a model of exportation to most modern democracies.<sup>10</sup>

In the USA, in the years that followed the Second World War, the control of constitutionality of legislation became more than an issue of legal interpretation. For it became so seriously intertwined with political arguments and philosophy, especially during the years of the Warren and Burger Courts,<sup>11</sup> that foreign commentators run the risk of seriously misunderstanding American constitutional law books and judicial decisions if they do not learn how to read them in the context of contemporary American political debates.

The importance of the Warren and Burger courts lies, of course, in the series of liberalising decisions announced in the sixties and seventies which greatly extended civil rights in a whole range of areas of daily life. The American “Right”<sup>12</sup> hated many of these liberty-enhancing decisions of the Warren Court, especially *Roe v.*

<sup>8</sup> For an excellent collection of essays see Mathias Reimann (ed.), *The Reception of Continental Ideas in the Common Law World 1820–1920* (Berlin 1993).

<sup>9</sup> Justice Scalia makes the point with great clarity in *A Matter of Interpretation: Federal Courts and the Law* (Princeton 1997).

<sup>10</sup> Among the rich literature see Anthony (now Lord) Lester “The Overseas Trade in the American Bill of Rights” (1988) 88 *Columb. L. Rev.* 537.

<sup>11</sup> Earl Warren was appointed by President Eisenhower and held office between 1953 and 1969, Warren E. Burger was appointed by President Nixon and was at the Supreme Court between 1969 and 1986. For some of the early reactions see A.M. Bickel, *Politics and the Warren Court* (New York 1965) and P.B. Kurland, *Politics, the Constitution and the Warren Court* (Chicago 1970).

<sup>12</sup> Though in modern Europe the terms “right” and “left” are—happily—losing much of their original appeal (as most parties with real pretensions for power realise that they must occupy the central ground) in America they are still widely used and have thus been retained here but without the use of inverted commas.

*Wade*<sup>13</sup> which they always believed had no roots in the Constitution; indeed, even liberals like John Hart Ely have described *Roe* as not law and not making any effort to pretend to be law.<sup>14</sup> Of course there are theories by which *Roe* is derived from the Constitution, but the Right utterly rejects those theories. So the problem the Right diagnosed to lie at the root of American society was unbridled judicial discretion leading to constitutionalising the political preferences of the left, and the remedy was to end (or try to end) judicial discretion and tie judicial power to a narrow and formalist theory of interpretation. If the Founding Fathers of the (American) Constitution did not say it, the judges could not do it. The theory of “originalism” or “textualism”, expounded by academics such as Robert Bork (President Reagan’s failed nominee for the US Supreme Court),<sup>15</sup> and now finding its most consistent and forceful proponent in Justice Antonin Scalia of the United States Supreme Court<sup>16</sup> was thus born.

The importance of this development, in part made possible by the fact that most of the writing available on interpretation was dedicated to Common law and not constitutional or statutory interpretation, is crucial for the understanding of all that follows.<sup>17</sup> It must also be combined with two other developments of relatively recent vintage.

The first is that the Supreme Court, especially during the Rehnquist years, has asserted a monopoly on constitutional interpretation.<sup>18</sup> One American commentator has put it this move in the following terms: “The Rehnquist Court’s activism explicitly denies the people any role in determining the ongoing meaning of their Constitution, other than by the grace of the Justices

<sup>13</sup> 410 US 113, 93 S. Ct. 705 (1973).

<sup>14</sup> “The Wages of Crying Wolf: A Comment on *Roe v. Wade*” (1973) 82 Yale L.J. 920.

<sup>15</sup> *The Tempting of America: The Political Seduction of the Law* (New York 1990); and, more recently, *Coercing Virtue: The Worldwide Rule of Judges* (Washington, D.C. 2003), an immoderately phrased exposition of the views of the American Right. The “originalist” view has by no means gained acceptance by judges, either of liberal or pro-minority hues or even the Right. For an example of the first see Thurgood Marshall “Reflections on the Bicentennial of the United States Constitution”, (1980) 101 Harvard L. Rev. 1; and for the second see Richard Posner, “What am I, a Potted Plant? The Case Against Strict Constructionism” (1987) 197 The New Republic, 23ff For thoughtful academic reactions see the replies to Justice Scalia’s *A Matter of Interpretation* (next footnote).

<sup>16</sup> Justice Scalia’s views can be found in his many judgments but have also been expounded in summary form in his following writings: *A Matter of Interpretation: Federal Courts and the Law* (Princeton 1997); “The Rule of Law as a Law of Rules” (1989) 56 U. Chi. L. Rev. 1175; and “Originalism: The Lesser Evil”, (1989) 57 U. Cin. L. Rev. 849. Some of his underlying theories also come through in “Assorted Canards of Contemporary Legal Analysis” (1990) 40 Case W. Res. L. Rev. 581.

<sup>17</sup> Though note Lord Bingham’s views reproduced in the previous section of this article about the different kind of interpretation called for by Constitutions compared to ordinary statutes.

<sup>18</sup> For instance *Texas v. Johnson* 491 US 397, 421, 434 (1989).

themselves”.<sup>19</sup> The second, accepted only by the originalists, is that when interpreting statutes, the consequences of interpretation are to be disregarded. Thus, whether in dealing with the Constitution, or with federal statutes, Justice Scalia and his followers<sup>20</sup> believe themselves to be interpreting a legal text, enacted at a particular time and place, in terms of the original understanding of that text—the understanding at the time of its enactment—and the understanding within the polity entitled to enact it. For the same reason, these judges refuse to look at the legislative history of statutes. They do look to the legislative history of the Constitution, and their explanation for how that is consistent seems to me not very convincing, but they look to constitutional history for evidence of original understanding. They sometimes assert the relevance of the traditions of the American people, but mostly to narrow constitutional text, not to expand it. As stated, for the same reasons, they also claim to give little weight to the consequences of statutory interpretation; and none at all if the statute is clear. In Scalia’s view, federal judges should have no discretion to make law or policy. Though, of course, he is not so naive as to think such discretion can be stamped out, he views its survival as a defect in the system, resulting from the inability of legislators and constitution writers to be sufficiently clear and specific. Federal judges thus do not make law, they interpret law that was enacted, *and they interpret it on the basis of original understanding*. It is in this context that one must place the current dislike of foreign ideas, even as source of inspiration and thought. For, seen in the light of what we have just described, it is conceptually impossible for foreign law to cast any light on the question of interpretation.

### III. THE DIVIDED COURT

The above has been intended to stress a point an observer of foreign law can easily miss. Simply put it is this. The ability to read a foreign text does not mean that the reader will understand foreign law. This is an error into which even high British judges have occasionally fallen.<sup>21</sup> In one sense, the more learned such a judge is—English or otherwise—in his own law, the greater the risk that he will “fill in gaps” in what he does not entirely understand by subconsciously transposing his own solutions and ideas into the

<sup>19</sup> Larry D. Kramer, “The Supreme Court 2000 Term Foreword: We the Court”, (2001) 115 Harv. L. Rev. 4, 130 In similar terms, Sarah K. Harding “Comparative Reasoning and Judicial Review”, (2003) 28 Yale J. Int’l L. 409, 449–50.

<sup>20</sup> At the time of writing—summer 2005—in the Supreme Court this means Chief Justice Rehnquist and Justice Thomas.

<sup>21</sup> See, for instance, the criticisms of Lord Cooke in “An Impossible Distinction” (1991) 107 L.Q.R. 46, 57 ff.

foreign landscape. What we stressed above, albeit briefly, suggests that American Constitutional law requires a sensitivity towards American politics. Without, the foreign observer is bound to go astray.

Yet, if beyond this point, we also gave the impression that the American interpretative techniques are monolithic, then we have misled the reader. For the reality is that the American Supreme Court is not monolithic; its decisions often depend upon shifting alliances between what is, at present, a court consisting of three right wingers, three liberal, and three shifting (but otherwise) conservatively-inclined judges. To make matters both more intriguing and more complicated for foreign observers, this composition can (and will soon) change (with long term effects). For each time an incumbent President appoints justices who reflect his own—Right or liberal—point of view, the effects on law and thus society can be as serious as his most important foreign or economic policy decisions and often more lasting in terms of time. In some cases, it can even be more serious and more long-lasting.

It is thus one of the primary functions of the comparatist to warn national lawyers against the danger of thinking that they can understand foreign law simply because they have mastered a foreign language. The exegesis of foreign law is an art that has to be learned; and it is, as we have elsewhere explained in detail,<sup>22</sup> best begun by comparing comparable and relatively narrow factual situations. This analysis can then be expanded progressively in a way that goes more and more into detail into other aspects of the law, of the political system, and then of the foreign society, itself.

So, what then is the current attitude of the Justices of the Supreme Court on matters of foreign law? Before attempting to answer this question, let us clarify a few more immediate points.

First, we are not here talking of cases where foreign law is applied because the rules of conflict of laws so require. Nor, second, are we talking of foreign law in the sense of public international law. Nor, finally, are we thinking of a set of rules that may be applicable because two or more countries are subject to the decisional law of some supra-national court—the court of the European Communities for instance. What we are talking about is the quantitatively few but qualitatively important type of cases where the national law is silent, dated, or contradictory, and the national judge asks himself whether he might be allowed to seek inspiration from the practice of other sister courts.

<sup>22</sup> Markesinis, *Comparative Law in the Courtroom and the Classroom. The Story of the Last Thirty Five Years* (Oxford 2003).

Remaining always with the American Supreme Court, since demands of space prevent us from looking at the practice of other courts, the answer to our question is both simple and confusing: the justices of the Supreme Court do not speak with one voice. Indeed, in two of the most controversial and oft-disputed type of cases—the availability of the death sentence and homosexual rights—the liberal wing of the court seems—for the time being—to be winning the battle. Yet for a variety of reasons we shall argue (or, at least consider) the possibility that the conservative, originalist, textualist, view (which we do not share) remains the more consistent, the most strongly phrased and, in some respects, even the most stimulating of the two positions one can adopt on such matters. Let us take these comments in turn.

#### IV. CONSISTENCY IN OPPOSING FOREIGN LAW AS IRRELEVANT

Those who oppose the use (in any form) of foreign law are consistent. It is not only foreign ideas they wish to stop from interpreting statutory texts, it is also contemporary local ones. For Scalia, the originalist,<sup>23</sup> believes that, whether he is dealing with the Constitution or with federal statutes, he is interpreting a legal text, enacted at a particular time and place. To understand it and apply it all he needs to know is the understanding of the text at the time of its enactment by the polity entitled to enact it.<sup>24</sup> With such a starting point, the possibility of foreign law casting any light on the enactment in question is not possible—indeed, *his approach precludes foreign law before one even gets to other reasons which make him hostile towards foreign ideas*. If the law he has to apply is bad or outdated, the change should come from the legislature—Federal or State. But it is not for the (unelected) judge to impose his moral values on society through legal sophistry or foreign borrowings. He has made this point on numerous occasions, most recently in *Roper v. Simmons*<sup>25</sup> where, however, he again found himself in the minority.

Scalia's liberal opponents do not deny the fact that they, too, have to interpret the American Constitution; but, like Justice Benjamin Cardozo, they accept that the power to declare the law “carries with it the power, within limits the duty, to make law

<sup>23</sup> See note 16 above.

<sup>24</sup> Though this has, occasionally, allowed him to attempt some fairly bold interpretations of the original understanding of the draftsmen. See, for instance, *Kyllo v. United States* 533 US 27 (2001): a thermal control device, checking from the outside premises to detect whether cannabis is grown within, can be treated as violating the unlawful search and seizure clause of the 4th Amendment.

<sup>25</sup> 125 S. Ct. 1183, 1217ff.

when none exists”.<sup>26</sup> They also give themselves more freedom as to where to look for inspiration—and that includes abroad—especially if foreign practice provides “significant confirmation” of the judges’ own conclusions.<sup>27</sup>

In *Printz v. US*,<sup>28</sup> Justice Breyer, after citing European practices, expressed the idea as follows:

Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. (...) But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common problem—in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent entity.

On this issue, which is the one that concerns us here, Justice O’Connor recently expressed similar views when she stated:

this Nation’s evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement—expressed in international law or in the domestic laws of individual countries—that a particular form of punishment is inconsistent with fundamental human rights.<sup>29</sup>

Earlier, in *Atkins v. Virginia*,<sup>30</sup> Justice Stevens stressed in a note that used evidence of wide-spread foreign practices that although this was

by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is consensus among those who have addressed the issue.

As a result of such thinking (and evidence), the execution of mentally retarded criminals was seen as being prohibited by the Eighth Amendment. More recently, the same happened in the case of murderers who were under the age of eighteen at the time they committed their crimes.

The above citations suggest that a sizeable section of the United States Supreme Court does not see a clear-cut divide between American and international values, certainly in times such as ours

<sup>26</sup> *The Nature of the Judicial Process* (New Haven 1921), p. 124.

<sup>27</sup> *Roper v. Simmons*, 125 S. Ct. 1183, 1199.

<sup>28</sup> 521 US 898, 977 (1997).

<sup>29</sup> 125 S. Ct. 1183, 1215 (2005). This citation is important. For, though the way foreign law was presented to the court and used by it may leave much to be desired, it does show that five out nine judges were, in principle not opposed to the idea of looking at foreign law.

<sup>30</sup> 536 US 304, 316 note 21 (2002).



when national borders have become porous and notions of justice as well as taste seem increasingly to be cut out of the same cloth. Of course, many in the United States would not share this view and insist that on a whole range of issues, such as for instance the death penalty, homosexual rights, abortion, child chastisement, and other such issues, Americans hold different, one might say sterner, views and, more importantly, they are influencing not only political decisions but also legal thinking.

Yet on closer analysis America is a very diverse country and cannot be said to hold monolithic views. Often, the attitude one gets to a particular issue depends on the way the question is asked. For instance, even on the death sentence, though it is constantly favoured by Gallup poll results and a majority of States have it on the statute books, nearly a third of these states refuse to carry it out.<sup>31</sup> A closer analysis of such statistics does not reveal as clear a national consensus as the American Right believes to exist but a confusing pattern of reactions which, one must say it again, is reflected in judicial opinions. Yet even if we are wrong in our view that the attitude towards the death sentence is truly nuanced, we feel Arthur Chaskalson, the President of the South African Constitutional Court, put the matter correctly in the South African death penalty case when he wrote:

If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution. By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is willingness to protect the worst and weakest amongst us, that all of us can be secure that our own rights will be protected.<sup>32</sup>

*Roper's* use of foreign ideas in a "supplementary" manner is attractive. Yet its full implications still have to be worked out. For,

<sup>31</sup> Thus, at the time of writing, there exist twelve "abolitionist" states, twenty-four "symbolic" states (recognising the death penalty but rarely practising it) and a further fourteen states being "executing" states. With the exception of Arizona, the other "executing" States coincide with the so-called "bible-belt" area of the USA.

<sup>32</sup> 1995 (3) SA 391, para. [88] (CC).

it gives no clue when this is permissible and when it is not.<sup>33</sup> Most (but not all) of the foreign material used by the US Supreme Court has been in the context of the death penalty and homosexual rights; and it has been brought into play by relying on the Eighth Amendment which prohibits “cruel and unusual punishment”, a phrase with a special meaning when it was enacted, but now to be interpreted against the background of “changing circumstances” or, as the Eighth Amendment jurisprudence calls them, “evolving standards of decency”. Can it/should it also come into play in other instances, not involving the Eighth Amendment, for instance the “due process clause”? The question awaits a definitive answer. *Roper’s* view of foreign law also seems more tentative than that adopted by the Privy Council decisions of the last ten years or so where foreign decisional law (and other material) was more readily accepted as an integral part of the entire reasoning process; but more about this below.<sup>34</sup>

Likewise, those who have advocated the use of foreign law do not seem to have given clear guidance whether it can be used to enlarge rights (contained in the Constitution) or also restrict them. Up to now, the practice of the Supreme Court has been to use foreign ideas to extend rights—hence the complaints by the American Right. Jurists who tend to oppose the use of foreign law have tended to see this point as an important one and thus raise the question given at the beginning of this paragraph.<sup>35</sup> Thus, could one, for instance, invoke the German Constitution<sup>36</sup> or the most recent decision of the Strasbourg Court in the Caroline case<sup>37</sup> and argue that privacy rights should be balanced against speech rights and thus, restrict the famous First Amendment? For us, by parity of reasoning, the same answer—in principle—should apply whether one is using the foreign model as a reason to expand or restrict local rights. For, ultimately, what really matters is the convincing force of the foreign rule and not whether it expands or restricts national law. But one can imagine, once again, the howls of anguish that would come from a section of the American society, especially the Press, at this prospect.

<sup>33</sup> For instance see Justice Scalia’s point in *Roper v. Simmons* 125 S. Ct. 1183, 1228: “To invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry”. Yet, with respect, this statement is, itself, sophistry for why cannot one invoke the use of foreign law only where its relevance can be demonstrated?

<sup>34</sup> For more details, see section 9 below.

<sup>35</sup> Justice Scalia’s “dialogue” with his critics in *A Matter of Interpretation* reveals, in our view, the diversity of opinions in the camp of his opponents.

<sup>36</sup> Articles 1 and 2, discussed in detail (in English) in Markesinis and Unberath, *The German Law of Torts: A Comparative Introduction*, 4th ed. (Oxford 2002), pp. 392 ff and 412 ff.

<sup>37</sup> ECtHR No. 59320/00 of 24 June 2004.

Finally, those who advocate the use of foreign law have also failed to address the question in what form this material should be introduced to the (potentially) borrowing court and how best this should be considered by it. We return to this important objection in subsection 6, below.

These “omissions”, taken as a whole, are seen by those who oppose the use of foreign law as a sign of loose or incomplete thinking on the part of those who favour the open model. The “originalists”, on the other hand, enjoy the benefit of a clear and unswerving rule. Or so at least they believe.

#### V. STRONGLY PHRASED REJECTION OF RELEVANCE OF FOREIGN LAW

The opponents of foreign law have also had an impact in the United States (though, arguably not elsewhere) because of the strong and emotive use of language they have used to express their opposition to it. This may not be particularly appealing to jurists; but in the currently polarised American political scene, it has helped galvanise the support of those who share these views. In the current political climate in the USA law feeds on politics and vice versa. Here, for instance is how Justice Scalia opposed the liberalisation of sodomy laws in the recent Texas decision of *Lawrence v. Texas*. He said:

Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behaviour. Much less do they spring into existence, as the Court seems to believe, because foreign nations decriminalise conduct. (...) *The Court's discussion of these foreign views (...) is therefore meaningless dicta. Dangerous dicta, however, since "this court (...) should not impose foreign moods, fads or fashions on Americans"*.<sup>38</sup>

It is the italicised end of the quotation that will arrest the attention of the foreign reader. And yet it is the opening statement that holds the key to the Scalia doctrine, gives it coherence, and also earns it its opponents. For, paraphrasing it, it states that contemporary law reform in the American States and, a fortiori, in foreign countries, cannot change the original understanding of the US Constitution.

Yet, how we speak often says much about how we think, and Justice Scalia's words (“foreign moods, fads or fashions ...”) talk volumes of how he perceives the underlying “values” that are currently shaping the case law of foreign courts, many of which are comparable in standing to his own not only in form but also in

<sup>38</sup> *Foster v. Florida*, 537 US 990, n. (2002) (Thomas, J.)

achievements.<sup>39</sup> To begin with he sees them as “passing fads and fashions”, not responses to changing habits and values experienced by modern societies. That these different values or views can equally strongly and honestly be held by others does not seem to be allowed by the words he uses. That Justice Scalia is, indeed, using these words in a pejorative manner can also be seen from his earlier *dictum* in *Atkins*, where he wrote:<sup>40</sup>

Equally irrelevant are the practices of the “world community”, whose notions of justice are (*thankfully*) not always those of our people ... (italics added).

Other jurists of the American “Right” have used even more vivid language to express their dislike of European criticism of American “insularity”. Thus, Professor Robert Bork has referred<sup>41</sup> to academics who like the present author argue for an open mind, as socialist, anti-religious, “faux intellectuals ... [hoping] to outflank American legislatures by [imposing] liberal views on the United States”. And at pages 24–5 of the same book he described the European reaction to Justice Kennedy’s reluctance to cite in *Stantford v. Kentucky*<sup>42</sup> foreign law as “insolent browbeating”. A glance at the Privy Council decisions cited briefly in section 9, below, and showing how widely held these views are by some of the most eminent judges of our times makes one wonder whether, on reflection, Professor Bork might be happier to withdraw the description “faux intellectuals” which, according to his thinking, would seem to apply to all of the above.

Professor Bork, who after an animated Senate hearing was rejected as President Reagan’s nominee as a Justice to the Supreme Court, may, conceivably, have personal reasons for adopting such strident language. But the greatest irony must surely be that the judge he defended for siding with the majority in *Standford v. Kentucky* and *refusing* to take into account foreign law—Justice Kennedy—was fated to be the judge who gave the majority decision in the most recent death penalty case of *Roper v. Simmons* which *did* indeed invoke foreign law as a supplementary reason for the changed outcome. This must be more than ironical. For it offers a good example of the how the “time factor” can legitimise the use of foreign law, reversing old practices when there are reliable signs that public mores have changed. And by “time

<sup>39</sup> For who can deny the democratic credentials of the German Constitutional Court which has achieved in law a revolution similar in importance and amplitude to the so called post-War economic miracle.

<sup>40</sup> 536 US 304, at 347–8.

<sup>41</sup> *Coercing Virtue: The Worldwide Rule of Judges*, pp. 2–16.

<sup>42</sup> 492 US 361 (1989).

factor” we refer here to another neglected element in comparative studies namely how the passage of time may alter societies and ideas and thus not only call for a different interpretation of dated words but also make change and transplanted possible where, only a few years earlier, it was believed to have been impossible.

#### VI. THE STIMULATING SIDE OF “NEGATIVISM”

Unlike the South African Constitution of 1995, which deliberately left the question of the death penalty to be decided by the newly established Constitutional court, the American Constitution in several of its provisions makes it clear that it recognises this extreme sanction. Thus, the moderating impact of modern views on this matter has only been felt through the Eighth Amendment and its prohibition of “cruel and unusual punishment”—a term as already indicated understood to take into account the “evolving standards of decency”. It was reliance on this “escape phrase” that thus allowed the Supreme Court to overrule in *Atkins v. Virginia*<sup>43</sup> its earlier decisions in *Penry v. Lynaugh*<sup>44</sup> and proscribe the death sentence in the case of mentally incapacitated persons and, more recently, to overrule in *Roper v. Simmons*<sup>45</sup> its earlier decision in *Stanford v. Kentucky*<sup>46</sup> and prohibit the carrying out of a death sentence in the case of persons who committed murder while under the age of 18 years.

Both landmark changes were five to four decisions reflecting the political divisions in the court but also the importance of the “swing votes”. For in *Roper*, Justice Kennedy, delivering the majority opinion, relied (as he did not in *Stanford*) on foreign practice to *bolster* the conclusion reached by himself and his colleagues in the majority on the basis of the “internal” review of the changing pattern of State practices. He then proceeded to add:<sup>47</sup>

Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court’s decision in *Trop*,<sup>48</sup> the Court has referred to the laws of other

<sup>43</sup> 536 US 304, 122 S. Ct. 2242.

<sup>44</sup> 492 US 302, 109 S. Ct. 2934.

<sup>45</sup> 125 S. Ct. 1183.

<sup>46</sup> 492 US 361, 109 S. Ct. 2969.

<sup>47</sup> “Though the views of our own citizens are essentially irrelevant to the Court’s decision today, the views of other countries and the so-called international community take centre stage”. (*per* Justice Scalia, at p. 1225).

<sup>48</sup> *Trop v. Dulles* 356 US 86, 102–3, 78 S.Ct. 590 (plurality opinion).

countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments".

We italicise the word "bolster" since Justice Kennedy was eager to stress that while "(T)he opinion of the world community, [*does not control the outcome*], [it] does provide respected and significant confirmation for our conclusions mainly reached on other grounds".

Yet the "negativist" approach of the originalists has also some advantages, and among them is the condemnation of judges who choose to impose their own views about morality, by-passing the constitutional wording (as original understood). It is thus permissible to downplay the caveat indicated by the italicised word of Justice Kennedy in order to support the view that the Court was here doing more than simply interpreting the law of the USA. This criticism of Justice Kennedy's stance, strongly voiced by the dissenting opinion of Justice Scalia, is at the very least arguable since due regard must be had to the fact that the "shift" in court practice that took place between *Stanford v. Kentucky*<sup>49</sup> and *Roper v. Simmons* in favour of abolishing the death penalty for juveniles was much lower (namely 4)<sup>50</sup> compared to that which justified the Court in *Atkins v. Virginia*<sup>51</sup> to overrule *Penry v. Lynaugh*<sup>52</sup> (16 States passing specific statutes since the earlier case was decided). Justice Scalia may thus have been right when pointing out the unreliable basis of the test which now allows the Supreme Court to find (on the basis of arguably slim evidence) that there has been a shift from previous practice. For this now makes it easier for the Court to detect a "shift" in national consensus rather than insist, as it arguably used to do, on an "overwhelming opposition to a challenged practice".<sup>53</sup>

Though this author feels that there is, among political and legal circles, a clear world-wide opposition to the death penalty, he also recognises that this may not reflect the views of the voter in the street (be he English or American). This means that the accusation that the judge "importing" such a reform may thus be supplanting his own view for that of the electorate is not one which can be ignored though one, equally, cannot ignore that legislative reform is not always easy to achieve because of the fudges which current political realities tend to promote. Thus, the final answer on this

<sup>49</sup> 492 US 361, 109 S. Ct. 590.

<sup>50</sup> Plus one State Supreme Court had construed the State's death penalty statute not to apply to the under-18 offenders: *State v. Furman*, 122 Wash. 2d 440, 458, 858 P.2d 1092, 1103 (1993).

<sup>51</sup> 536 US 304, 122 S. Ct. 2242.

<sup>52</sup> 492 US 302, 109 S. Ct. 2934.

<sup>53</sup> 125 S. Ct. 1183, 1218.

point must be that the issue here is not one that lends itself to easy answers and that the “originalists”, through their persistent opposition (negativism) towards the use of foreign law, may be rendering comparative law a service in so far as they are alerting jurists of all hues of the need to address these points more cogently. Merely quoting that most states have abolished the death sentence may not, on its own, be enough. For in appropriate circumstances, one may need additional information. For instance, does a state have the death sentence on the statute books but does not enforce it? Does life imprisonment mean, in practice, life imprisonment (as it does in the USA) or does it mean that parole rules can, effectively, make a mockery of the term?

The Scalia dissent may have offered a further service to comparative law when doubting the “form” in which the (apparently) universal practice towards juvenile death sentencing was presented. This took the form of amicus briefs, was not discussed or contradicted in open court, and the way the data was collected was never tested in a scientific way.<sup>54</sup> This, of course, does not speak conclusively against the use of evidence of foreign law before a national court but it does suggest that, for instance, the way in which this was handled by the House of Lords in *Fairchild v. Glenhaven*<sup>55</sup> was more convincing. For there, their lordships themselves asked Counsel for both sides to address them on the attitudes taken by the Supreme Courts of Continental Europe on the issue there at hand and, when dealing with that information they, themselves, added that the material had to be used with caution. Thus Lord Bingham argued that:<sup>56</sup>

Development of the law in this country [the UK] can not 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 accordance with principle, so as to serve, even-handedly, the ends of justice. If however a decision is given in this country which offends one’s basic sense of justice, and if consideration of international sources suggests that a different and more acceptable decision would be given in most other jurisdictions, whatever their legal tradition, this must prompt review of the decision in question.

The cautionary remarks made in this sub-section are only intended to address the attention of the reader to another (healthy) warning advanced by those opposing the use of foreign law. But if this warning, once again, criticises, the way that foreign law is studied

<sup>54</sup> 125 S. Ct. 1183, 1221.

<sup>55</sup> [2002] 1 A.C. 32.

<sup>56</sup> *Ibid.*, at p. 66.

in Universities and presented to national courts, it does not imply that if the right methodological way towards foreign law can be developed its utility cannot increase in the years to come. We can thus only conclude by referring the reader to a very detailed consideration of the dangers and difficulties of comparative law which we have attempted with a colleague of ours and assure him that to most of these worries satisfactory answers seem to be emerging at a pace quicker than ever before in the history of comparative law.

#### VII. WIDER REASONS WHICH MAY HELP THE CURRENT CLIMATE OF INSULARITY SPREAD EVEN FURTHER

Though one can criticise the way practising lawyers<sup>57</sup> have tried to introduce foreign law in American constitutional litigation, the real obstacle to the use of foreign law is this native belief that it should have no role to play in the shaping of American law. At the risk of repetition, we also stress again that this “lack of interest” in foreign ideas must also be seen against the wider context of the American political debate about the proper role of judges—something which we have made a leitmotif of this paper since so few non-American lawyers are genuinely able to evaluate it fully.

Yet, what (plausibly) applies to constitutional interpretation may, as stated, already be (implausibly) infecting interpretation in the area of private law, as well, contradicting a well-established contrary practice. All this spreading of the “introversion disease” may be aided and abetted by an “opposite disease”, in the ascendancy at the moment among the governing political elites. This is founded in the belief that America is “a city on the hill”, better than others but—and this is the most modern trend—morally bound to improve others who do not attain its own standards.<sup>58</sup> This sounds like a tall order yet, indisputably, there are many politicians, journalists, and even lawyers, who see in the United States an example to the world: the one that first implemented democracy, protected human rights, recognised judicial review, and now re-proclaims the merits of a property-owning nation, with its citizens taking their fate in their hands. This is to say nothing of its own type of capitalism which, though prone to suffer from greed, is also promoted as the only way of increasing standards of living.

<sup>57</sup> And the writers of amicus briefs which are used in American courts but not in England or France.

<sup>58</sup> These key words, coming from John Winthrop’s address on the founding of the Massachusetts Bay Colony (and probably derived from Matthew 5:14). As the phrase became “politicised” over the ages, and certainly after the “Reagan years” when it became often cited, it lost its cautionary note and became simply “we are an example to the world”.



One may debate to what extent these American claims are justified and not exaggerated. One must at least question whether America has any right to “force” others to adopt its values rather than merely rely on the superiority of its ideas and ideals to attract their own adherents—something which, of course, works both ways. But what cannot be in doubt is the fact that many Americans—especially those who form the ruling elites of today—believe in the superiority of their values. Such beliefs thus form part of the current “political climate” that we find in this great (in more ways than one) country; and they are reinforced, in the minds of many Americans, by non-legal arguments such as the contemporary European reservations about America’s transformation of public international law to suit its foreign policy. Reason and sentiment—moral, political, religious, and economic—thus seem to combine with legal concerns to produce an “unstable” mix the likes of which has rarely been encountered in the history of comparative law and the movement of ideas. Taken together they must account for the growing suspicion which a substantial proportion of the American population (including lawyers) nurtures towards contemporary Europe, its values, its law, and its courts. A fear or dislike of foreign values nowadays thus comes with a very inadequate understanding of the “rest of the world”, its sensitivities, its structures, its law and its achievements. That is why we repeat our earlier conviction that however inept lawyers may have been in trying to interest American courts in foreign law, the main cause of resistance must be sought elsewhere

This emerging and complex picture of America’s self-conscious superiority may thus make it adverse to borrowings and intellectual dialogues even in the areas where once there was give and take and which the more globalised economic and commercial world we live in makes even more necessary. Yet here, the movement of ideas on technical matters that are regulated by the kind of rules we are envisaging, should be facilitated and not impeded out of abstract notions of principle which may be relevant to the constitutional group of cases but not this category of disputes.

In making the above suggestion we do not, of course, delude ourselves in believing that it will stop opponents of all forms of foreign dialogue from trying to prevent it even in the case of comparison of rules (and not values). For it does not take much ingenuity but only a minimum amount of disingenuousness to claim that, for instance, even ordinary contract or tort rules can be linked to “values” held dear by some societies in order to preserve the status quo. Thus, any teacher of contract law in almost every state on the European continent will be aware of the growing number of

rules favouring consumer protection. Almost all—certainly those which strive for greater employment protection—could be declared as incompatible with the American form of capitalism which seems hell-bent since the 1980s to unpick the New Deal revolution of the 1930s and return closer to the nineteenth century ideal of *laissez faire*. Those who imagine European (including English) lawyers as being all “socialists”, “anti-religious”, “faux intellectuals” will certainly be tempted to try this tack.

The same could, likewise, be argued in the domain of tort rules,<sup>59</sup> which in Europe are, admittedly, fashioned against the reality of a safety net provided by a more developed system of social security. The conclusion of this sub-section thus is that the more America becomes anxious to assert its interests globally and export its institutions, the less sensitive it has become to different values if they are incompatible with those held by its ruling elites. The fact that a section of its judiciary do not seem to share this view does not mean that in the current political climate they are set to get their way. The next two or three nominations in the United States Supreme Court could prove of crucial importance for at least one generation of Americans. Europeans should also take stock.

#### VIII. COMPARISONS WITH OTHER WORLD COURTS

What is remarkable about the above scene is that, while it has been hardening in the way suggested, the supreme courts of almost all the major legal systems have made significant strides towards using foreign law as a source of local inspiration. In this category one thus finds some very unlikely bed-fellows: the House of Lords, for long considered (by outsiders) as an enclave of tradition and conservatism; the Canadian Supreme Court, a modern champion of constructive but not slavish engagement with its southern large neighbour; the South African Constitutional Court, a newcomer with an enviable record of comparative law in action; and, to complete this short list, even the Israeli Supreme Court which has shown itself able to borrow in matters of human rights from a wide range of cultures even when this led to internal opposition based on strong religious views. The contrast with the United States is thus not only great; it also raises another interesting question namely which of the two models—the open or the closed—will, in the end, prove more attractive to the emerging democracies and, in the long run, the most formidable of all emerging powers: China.

<sup>59</sup> A host of tort rules—*e.g.*, class actions suits, capping of damages, availability of punitives—could fall into this category. For restrictions imposed on any of them would, in Europe, be seen as reflecting tort choices where, in the United States, many would regard them as giving a free hand to enterprises to place profit before social responsibility.

We have pondered over some of these questions elsewhere<sup>60</sup> so here suffice it to conclude with some very specific conclusion aimed at our English audience.

#### IX. SOME SPECIFIC CONCLUSIONS FOR ENGLISH COURTS AND JURISTS

So far, much of this article has focused on American law and the kind of challenges and problems it presents to foreign observers. In this context, we have advanced the thesis that it is in these “internal” political disputes—the internal “clash of cultures” between the religious Right and the liberal Left, as some have called it—that we must seek the explanation for the perceived irrelevance of foreign law though, in recent years, the “Right” has also been articulating additional reasons for mistrusting foreign, especially European, ideas. But are there any other lessons that can be drawn from the current debate in the USA for the benefit of English lawyers? Here are five reflections, unequally developed; and more could be added if one had the time and space to examine the American examples in closer comparative juxtaposition with the case law of other systems.

##### (a) *First Reflection*

On the narrow (but important) issue of the death penalty, how have the English judges performed compared with their American counterparts? The question cannot be brushed aside as being academic because the death penalty has been abolished in the UK. This is because the Privy Council has, in the recent past, had many occasions when it has been forced to consider related issues coming to them in the form of appeals from the Caribbean islands and its decisions undoubtedly provide food for thought. These decisions say much about our judges, their receptiveness to foreign law, and their form of reasoning. Five points in particular need to be stressed under this heading.

First, focusing on just three decisions—*Pratt*,<sup>61</sup> but mainly *Reyes*,<sup>62</sup> and *Matthew*,<sup>63</sup>—one must admit that the Privy Council opinions have made good, indeed, extensive use of foreign law and, unlike the American courts, made no apologies for this. In fact, the foreign law cited in these opinions is neither “ornamental” nor “supportive” of a result already reached on other grounds but forms an essential part of the Board’s reasoning. Thus, to the

<sup>60</sup> This is attempted in great detail by Basil Markesinis and Jörg Fedtke in “The Judge as Comparatist”, the 2005 Eason-Weinmann Lecture, (2005) 81 *Tulane L. Rev.* 11.

<sup>61</sup> *Pratt v. Attorney General for Jamaica* [1994] 2 A.C. 1.

<sup>62</sup> *Reyes v. The Queen* [2002] 2 A.C. 235.

<sup>63</sup> *Charles Matthew v. The State* [2005] A.C. 433.

extent that foreign law forms an integral part of the reasoning of these (criminal) cases it differs, qualitatively, from the use made of foreign ideas by the House of Lords in matters of private or commercial law where, though increasing in frequency, it remains somewhat timid.

Second, if private law lags behind—and we think it does—human rights law, what is the position in specific areas of private law such as commercial law and international finance? Clearly, these topics must be studied further before one can develop any plausible thesis. Yet one can, from the outset, state one's impression that these are areas of the law where the Common law could provide a considerable lead to modern civilian systems. And I see this as a growth area both for academics but also for practitioners given the City's pre-eminent position in such matters. To put it differently, this is a potential "export" area for the Common law.

The third point is related to the previous one. The comparative element in these cases has been aided by the fact that most of the constitutions of these islands use notions and language which owe much to both the English and American legal traditions and texts. It is thus worth noting the ease with which the members of the Privy Council slip from English into American and then back into English texts. Indeed, one might describe this ease as excessive in so far as the references to the 8th Amendment do not always make clear the particular American difficulties<sup>64</sup> over the meaning of the crucial words "evolving standards of decency" which have given the liberal justices the peg on which to hang their use of foreign law. One further wonders how long it will take before other general phrases in the American constitution—*e.g.*, the "due process" clause—also become "gateways" for foreign ideas to enter American constitutional litigation.

Fourthly, the breadth of the citations found in the Privy Council decisions goes further than the two jurisdictions mentioned, with South African and Canadian cases attracting almost as much attention as American. Taken together and along with references to various "international" instruments and conventions, the above goes to show that in the area of human rights the globalisation of law has taken huge forward strides making it nowadays virtually impossible to attempt to solve a problem by interpreting solely "national" law. A related point is that comparatively minded judges no longer have one (other) model to compare their law with, *i.e.*, the law of the United States' Supreme Court. Does this mean that

<sup>64</sup> This obvious when comparing carefully Justice Scalia's judgment in *Roper v. Simmons* 125 S. Ct. 1183 with those of Justice Kennedy and Justice O'Connor.

with the passage of time, attention to what other legal systems do will grow in this country? And will this broadening of the horizons be limited to English speaking courts, or will others, such as the German or the French, attract more attention than they have hitherto done? The extensive use which the South African Constitutional Court has made of German Constitutional case law and doctrine suggests that the “language factor” is more of an excuse than an impediment for such forays into foreign but original legal systems. This need to look at advanced civil law systems may also grow as more and more lawyers in this country become accustomed to the new reality, namely that English and American law may no longer be as close as most think. In *Roper* once again Justice Scalia did English lawyers a considerable service by bursting the bubble of a “special Anglo-American relationship”<sup>65</sup> which many can still not bring themselves to do in law or in politics. This is a subject worthy of an article in itself!

Our final observation about the Privy Council decisions touch upon an important concern stressed by American judges who oppose the use of foreign law. For the Privy Council decisions address squarely and, it is submitted, more thoroughly, the fear that, by invoking foreign law, a judge is only buttressing his own predilections and moral values which he is then trying to substitute for what the Constitution actually provides in its text. This is a fear that we must begin to take seriously ourselves even in this country, especially in the light of recent “clashes” between Home Secretaries (and Shadow Home Secretaries) and our judiciary. Yet we submit that in both *Reyes* and *Matthews* Lords Bingham and Hoffmann address this point. In *Matthews*, for instance, Lord Bingham elaborated from the outset of his judgment this view by re-stating the orthodox position but also adding a subtle proviso. He thus said:

The [Privy Council] has of course recognised that the provisions of any constitution must be interpreted with care and respect, paying close attention to the terms of the constitution in question. *But it has also brought to its task of constitutional adjudication a broader vision, recognizing that a legalistic and over literal approach to interpretation may be quite inappropriate when seeking to give effect to the rights, values and standards expressed in a constitution as these evolve over time.*

The italicised words emphasise the crucial difference from the “originalists”. Lord Bingham also gives an attractive twist to his argument when he invokes more than the “time factor” to justify

<sup>65</sup> 125 S. Ct. 1183, 1227–8.

the need for his “up-dating” interpretive techniques and, in this sense, his judgment could be of use to those in the United States who feel instinctive sympathy with his position. He thus states:

The task of expounding a constitution is crucially different from that construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must therefore be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed the idea aptly when he admonished the American courts “not to read the provisions of the Constitution like a last will and testament lest it become one”.<sup>66</sup>

Before I continue with other views expressed in this same judgment allow me to diverge for a moment and stress that Lord Bingham’s views about the peculiarities of constitutional interpretation are not only convincing and elegantly crafted but also happen to agree entirely with those found in the German system. And I choose to stress Germany not only because it has a system which has attracted my interest for a long time but mainly because since it has one of the oldest, if not most sophisticated, system of rules of statutory construction going back at least to 1840 when Savigny<sup>67</sup> developed the four basic norms of grammatical, historical, contextual and purposive interpretation. Now though these norms were devised for the interpretation of statutory *private* law (which was, after all the main preoccupation of that time), they have, on the whole, been accepted also for public law though also have also been modified to take into account that constitutions are (a) durable documents; (b) tend to contain vaguely drafted provisions; and (c) are political in nature requiring a mixture of legal and pragmatic political analysis.<sup>68</sup> Their texts, therefore, in the words of a great German constitutional expert<sup>69</sup> cannot

<sup>66</sup> 2004 WL 1372517, at p. 8.

<sup>67</sup> *Das System des heutigen Römischen Rechts*, vol. I, s. 33 (Berlin 1840), especially at 213–4.

<sup>68</sup> The literature is vast so I draw the reader’s attention to two classic works: Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* s. 2 II 1, 16th ed. (Karlsruhe 1988); Winfried Brugger, *Rundfunkfreiheit und Verfassungsinterpretation* (Heidelberg 1991).

<sup>69</sup> Winfried Brugger “Legal Interpretation, Schools of Jurisprudence, and Anthropology: Some Remarks from a German Point of View” (1994) 42 *Amer. J. Comp. L.* 395 and 398.

be “construed” (*ausgelegt*) but must be “actualised” (*aktualisiert*) or “concretised” (*konkretisiert*); the difference being that a strict “construction” reveals a solution already inherent in the text, whereas an “actualisation” or “concretisation” entails a dialectic process of creatively determining results in conformity with, but not determinable by, the Constitution.

But let us return to our Privy Council decision and other views given about the proper way to interpret constitutional provisions.

In his dissent, Lord Nicholls returned to this theme and we stress this since it is so different from that adopted by the American Right.<sup>70</sup> He said:

I do not believe the framers of these constitutions ever intended the existing laws savings provisions should operate to deprive the country's citizens of the protection afforded by rising standards set by human rights values. The saving clauses are intended to smooth the transition, not to freeze standards for ever ... This is not to substitute the personal predilections of individual judges for the chosen language of the constitution. Rather, it is a recognition that the values underlying a constitution should be given due weight when the constitution falls to be interpreted in changed conditions.

#### (b) *Second Reflection*

The second reflection from the earlier observations about the American scene demonstrates how necessary it is to try to understand foreign judicial attitudes by seeing them within its wider context of the political debates taking place in their own countries. The Scalia, type arguments must thus be clearly seen as part and parcel of the American Right's reaction to the liberal decision of their Supreme Court in the late sixties and seventies. Yet the views expressed in the Privy Council decisions referred to above about the proper limits of interpretation find almost universal support. The rich references to other jurisdictions given in the Privy Council and alluded to earlier on show clearly that they have strong adherents among important judges, almost the world over. Such statistical syllogism not only reinforces one's belief that, by adopting such a stance, one is on the right track; it also shows how basic human rights and their interpretation are, as never before, seen to be cut out of the same cloth. If one accepts this view and then couples it with the undoubted reality that we live in a world with porous

<sup>70</sup> Though one can forget sometimes that similar thoughts have also been expressed by American courts in the past (for instance, *Weems v. United States* 317, 349 (1910)) and powerfully supported by Supreme Court justices even in our times. Thus, see William Brennan Jr. “The Constitution of the United States. Contemporary Ratification”, reprinted in David M. O'Brien, *Judges on Judging: Views from the Bench* (Washington, DC 2004), p. 183.

borders, one must surely foresee an enhanced (and not reduced) judicial dialogue in the future. The Privy Council decisions thus lend their force to similar attitudes found in such other major legal systems as the Canadian and the South African.

(c) *Third Reflection*

Despite the warnings sounded earlier on, one must not—*de lege ferenda*—be content to tolerate judicial introvertedness of the American kind. For if this spirit is allowed to spread further in the United States it could affect or, should one say, infect the way they interpret legal rules, even on matters which appear to belong to the realm of so-called black letter law. For even such rules as pertain to the domains of contract or tort, could, easily, be linked to wider political and economic decisions and thus lead those who oppose even the mere consideration of foreign ideas to oppose such reasoning by falling back on these wider considerations. Again, some instances were given in the text above and need not be discussed further.<sup>71</sup>

(d) *Fourth Reflection*

Fourthly, the ingenuity of invoking local “environmental” factors, ranging from fiscal policy to religion, can easily be invoked as an opposing force to any attempt to consider (even be inspired) by foreign law. This has happened in America and also in our country. Yet one must look with admiration at some of the decisions of the Israeli Supreme Court to see how bold judges (such as its current President) have managed to borrow, for instance, from Canadian Human Rights law, and transform local law despite fierce opposition from extreme conservative religious sections of their society. In *El Al Airlines Ltd. v. Danilowitz*<sup>72</sup> a three-judge panel Israeli Supreme Court proved transplantation was possible even in one of the most sensitive of areas on which local religious feelings have clear cut views (homosexual rights). Thus, Justice Dorner indulged in an extensive use of comparative (mainly Canadian) law

<sup>71</sup> In passing, however, one could refer to the prolonged dispute in the USA some fifteen years ago as to whether the American law of civil procedure could be made more efficient by adopting managerial type characteristics found in other systems such as the German. On this see: Ronald J. Allen, Stephan Kock, Kurt Reichenberg and D. Toby Rosen, “The German Advantage in Civil Procedure: A Plea for More details and Fewer Generalities in Comparative Scholarship”, (1988) 82 NW U. L. Rev. 705 to which Professor Langbein replied “The German Advantage”, (1988) 82 NW U. L. Rev. 763. Allen’s riposte, entitled “Idealisation and Caricature in Comparative Scholarship”, appeared in (1988) 82 NW U. L. Rev. 785. Others joined the fray. Thus, see John H. Merryman, “How Others Do It: The French and German Judiciaries”, (1988) 61 So. Cal. L. Rev. 1865 and John C. Reitz, “Why We Probably Cannot Adopt the German Advantage in Civil Procedure”, (1990) 75 Iowa L. Rev. 987. The articles mentioned in the next note show that the discussion is not abating but, on the contrary, it is now acquiring a new, sociological dimension.

<sup>72</sup> (1994) 48(5) P.D. 749.



as did Justice Barak who, as a result, in fact nearly lost his scheduled promotion to the post of President of the Court.<sup>73</sup> And, closer to home, one can ponder Sir Otto Kahn-Freund's doubts, expressed in the mid seventies,<sup>74</sup> as to whether Irish law could ever change and adopt divorce (or, one could add, abortion) given the strong opposition of the Catholic Church. Yet this prediction, based on the local "environment" opposing legal change, was disproved in the space of about twenty years! This does not diminish Sir Otto's intellectual gifts; it only shows how rapidly modern societies are evolving and, in many respects, moving away from their own roots.

Reading this literature one may further be led to ask whether the opposition to foreign ideas may not often come from local and, one might even call them, mundane forces even though they also represent formidable obstacles to be overcome. I am thinking now of the organisation of the local profession, legal or medical, local habits, and local insurance practices. Here, much of the opposition may be fuelled by fears which have never been proved or disproved but which interested groups can exaggerate in their pursuit of their own agendas. Let me give but two instances: the recognition of a tort of privacy and the doctrine of informed consent in medical malpractice cases.

The creation of a right of privacy has been impeded on many grounds which I have, elsewhere, explained why I find to be unconvincing. But one often used is pragmatic: if privacy was recognised as an independent heading of liability it would open the floodgates of litigation. In my treatise on the German Law of Torts, co-authored with Dr. Hannes Unberath of the University of Munich, we showed how the number of cases which have reached the higher German Courts during the last twenty years is less than two hundred and fifty. If the existence of a tort of privacy in Germany, where access to courts is cheap and the litigation mentality is developed, has only produced such a small sample, what empirical evidence can the English opponents of privacy adduce that in this country where recourse to courts is seen as the ultimate remedy and where litigation costs are particularly prohibitive (especially in the absence of legal aid) the pattern would be different?

<sup>73</sup> See "An equal-rights decision that flies in the face of some beliefs", *Jerusalem Post* of 12 December 1994 at p. 7, and the 1 December issue of the same publication at p. 2. For a further discussion of the use of foreign law by Israel's Supreme Court see Z. Segal, "The Israeli Constitutional Revolution: The Canadian Impact in the Midst of a Formative Period", (1997) 8:3 *Forum Constitutionnel*, and A. Dodek, "The Charter ... in the Holy Land?", (1996) 8:1 *Forum Constitutionnel*.

<sup>74</sup> "On Uses and Misuses of Comparative Law" (1974) 37 *M.L.R.* 1, 15.

The same could be said about the transformation—in the course of the last twenty years or so—of the so called *Bolam*<sup>75</sup> test. Whether one likes it or not, and whether one genuinely fears that the adoption of a more pro-plaintiff test would increase recourse to courts, is debatable. What is not debatable are two things. First that in a culture of rights and entitlements such as the one we now live in, this old bastion of “doctor knows best” philosophy has been subjected, albeit in the typical Common law way, to an incremental erosion. But also not debatable is the fear that the liberalisation of the test would, indeed, lead to more claims being brought under this heading. Again, the German experience does not support this fear and neither, I believe, does the American.

(e) *Fifth Reflection*

These last two examples bring me to yet another use of foreign law by a national court namely the use of it as a means of providing empirical evidence as to whether a particular solution works or not in practice. Interestingly enough, this way of using foreign material finds approval even among American writers who do not like the idea of foreign material being used to displace American values and solutions. Here, for instance, is how the chief proponent of this view, Professor Sanford Levinson of the University of Texas, put it recently when discussing Justice Scalia’s views in the context of the death penalty and regulation of homosexual expression. He said:<sup>76</sup>

It really depends whether one is trying to place such issues within the context of expressing basic social values about the importance of retributive punishment ... and condemning “unconventional” sexual expression. If one is behaving as a legal anthropologist *manqué*, which is at least one way of understanding the “fundamental values” enterprise, then the central task is indeed trying to figure out what constitutes a particular society’s way of expressing values in the world. It is almost by definition, *this* society and *not* one elsewhere that is the centre of our inquiry ... Things [however] get far more complicated if we view these not so much in *expressive* terms, reflecting our basic values, but rather far more *instrumentally*. Consider, for example, the proponent of capital punishment who speaks not of revenge but, rather, its deterrent effect and concomitant saving of lives or the opponent of gays in the military who emphasises the ostensible effects on military cohesion of accepting gays ... into the armed forces. Given that these latter assertions are entirely *empirical* in their thrust, they call for an entirely different response from those that are only *expressive*.

<sup>75</sup> *Bolam v. Friern Hospital Management Committee* [1957] 1 W.L.R. 582.

<sup>76</sup> “Looking Abroad When Interpreting the US Constitution; Some Reflections” (2004) 39 *Texas Int. L. J.* 353, 363–4.

Citations such as the above, and others could be given taking this line, are not without their significance. For they suggest that in the United States, even those who doubt in principle the utility or appropriateness of judicial recourse to foreign law, would not oppose it if it helped prove how a debatable proposition *actually* worked in another system. Thus, it is in this sense that, regrettably, the House of Lords, in its recent decision in *JD (FC) v. East Berkshire Community Health NHS Trust and others*,<sup>77</sup> missed the chance to test the validity of the fears that prompted the majority to decide the case in favour of the defendant council by relying on its favourite device: “no duty”! Only Lord Bingham, consistent with early opinions of his,<sup>78</sup> dissented from this position. Rightly, in my view, he thus laid great emphasis on the fact that the law in the area had evolved in recent years—partly as a result of decisions of the European Court of Human Rights, which had shown “that [the application of an exclusionary rule] may lead to serious breaches of Convention rights”. And, rightly again, he also referred to French and German law to suggest that neither of these systems had suffered from allowing such claims. Once again, the open-mindedness of this learned judge impresses as much as his wider reading and common sense. Yet the real point relevant to this discussion lies elsewhere.

For is this not also a perfect topic for comparative *empirical* research to show whether other equally advanced systems of equally industrialised societies have suffered from the rule which so frightens the highest English court? Have other systems suffered by imposing liability where English law prefers immunity? Have not the fears of the British judges been addressed by their foreign counterparts? And of their reasoning is not transplantable into our system, why is that so?

The truth of the matter is that the research here needed requires the collaboration of practitioner and academic, for only the later can furnish the former with the information he needs to support any comparative arguments in court. And collecting and shifting this raw material is not easy. For if one takes Germany as an example one sees that such claims have invariably been allowed to be brought before a court but that few succeed in practice.<sup>79</sup> Lest it

<sup>77</sup> [2005] UKHL 23.

<sup>78</sup> “If [the child/claimant] can make good her complaints (a vital condition, which I forebear constantly to repeat), it would require very potent considerations of public policy, (...) to override the rule of public policy which has first claim on the loyalty of the law: that wrongs should be remedied”. *M. v. Newham London Borough Council and X v. Bedfordshire County Council* [1995] 2 A.C. 633, at 663. A German case with very similar facts (BGH NJW 2005, 68) had no doubt that in this case liability would be imposed.

<sup>79</sup> Useful raw data can be found in Bundesministerium der Justiz (ed), *Zur Reform des Staatshaftungsrechts* (1976), pp. 161, 197; Infratest Burke Rechtsforschung, *Zur Reform des*

be objected that even this is too much for any legal system to digest, since it can take up much court time and effort, one should then enquire how many of these claims were actually dismissed summarily without the excessive costs and delays of a full and lengthy trial. And finally, one should check the level of awards—and if one does, one will find that these are substantially lower in these types of cases than those one would find in cases of medical malpractice or traffic accidents. If that is, indeed, the case—and this summary of observations is only meant to whet the appetite of the reader as to how the research should proceed—should not the answer then lie in the law of damages rather than be found through the use of the blunt instrument of duty of care?

Lord Bingham touched upon these points in his judgment; and for those interested, we provide new ideas of how the evidence about foreign law should be marshalled, analysed, and then used. That this needs patience, careful research, and collaborative action is beyond doubt. But this way of providing the empirical data could also dispel the (justified) fears<sup>80</sup> about the danger of producing misleading information about foreign law. Lord Bingham not only opened up these possibilities to inquisitive researchers and broad-minded practitioners; he also proved again that imaginative judges are the exception; those who prefer to hide behind opaque concepts, the rule. If *Berkshire* represents another example of a missed opportunity to reflect about the law more widely, it also shows to those who believe in international dialogue how much ground still has to be covered before such dialogue becomes routine.

Yet the above does not mean that the foreign material can be introduced into the court before it has been properly tested by both Counsel and judges to make sure not only that it is accurate and up-to-date but also that the methodology used to assemble it is acceptable. This, in my view, is less likely to be the case when the foreign law is introduced through *Amicus* briefs, prepared by interested parties, and one thus has much sympathy with Justice Scalia who objected to the way this evidence was presented to the United States Supreme Court in the recent death penalty case of *Roper v. Simmons*.<sup>81</sup> By contrast, their Lordships' request of counsel in the *Fairchild*<sup>82</sup> case to address them on the solutions given to the problem before them by continental legal systems was

*Staatshaftungsrechts, Tabellarische Ergebnisse (1993–1995)*, Tables B 4.1, K 4, L 4.1, T 1 (though this material needs “packaging” before it can acquire meaningful significance for an English court).

<sup>80</sup> Expressed convincingly by Justice Scalia in *Roper v. Simmons* 125 S. Ct. 1183, 1222 ff.

<sup>81</sup> 125 S. Ct. 1183 (2005).

<sup>82</sup> *Fairchild v. Glenhaven Funeral Services* [2003] 1 A.C. 33.

as developed an example as one can find so far of the use of foreign law by an English court. *Fairchild* thus seem to me to provide a good example of when and why one can look abroad for inspiration. For, as Lord Bingham put it,<sup>83</sup>

Development of the law in this country [the UK] can not 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 accordance with principle, so as to serve, even-handedly, the ends of justice. If however a decision is given in this country which offends one's basic sense of justice, and if consideration of international sources suggests that a different and more acceptable decision would be given in most other jurisdictions, whatever their legal tradition, this must prompt review of the decision in question.

So the American debates about the dangers and advantages of using foreign law as a source of ideas—and no one, let us make this clear, has ever suggested that it can be anything more than that—has, despite its introverted (even aggressive) tone, much to offer. Not least is its warning on how to present the foreign material to our own courts. But if we overcome these difficulties, our lawyers and our law could end up being enriched. For the examination of different legal systems in comparative juxtaposition can give one the occasion to be both humble and proud.

<sup>83</sup> *Ibid.*, at p. 66.

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