

Response to *The Judge as Comparatist*: Comparison in Public Law

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This article by Basil Markesinis and Jörg Fedtke may be a turning point. It will encourage generations of judges to try the path of comparative law. We may have here the beginning of an intellectual revolution. In the past, we had the following phenomena: Judges did not tend to rely on comparative law; lawyers did not cite comparative law to judges; law schools did not stress comparative law; scholars did not emphasize comparative law; judges did not tend to rely on comparative law; and so on. This vicious circle is coming to its end. Judges *will* start to rely on comparative law; lawyers *will* tend to cite it to judges; law schools *will* start teaching comparative law; scholars *will* be encouraged to research in comparative law; judges *will* rely more and more on comparative law. And one of the important tools in breaking the vicious circle is this article of Markesinis and Fedtke. In what will follow, I am summarizing my own experience in the use of comparative law in public law. I do hope it may encourage other judges to follow in this path, both in public law and in private law.

I. THE IMPORTANCE OF COMPARATIVE LAW

I have found comparative law to be of great assistance in realizing my role as a judge. The case law of the courts of the United States, Australia, Canada, the United Kingdom, and Germany have

* President of the Supreme Court of Israel. This Article is adapted from a section in President Barak's book, *The Judge in a Democracy*, and will also appear with Sir Basil Markesinis's substantially enlarged article that will be published in book form by Cavendish Press, England, under the title *Judicial Recourse to Foreign Law: A New Source of Inspiration?*. Both are scheduled to appear in the spring of 2006.

helped me significantly in finding the right path to follow. Indeed, comparing oneself to others allows for greater self-knowledge. With comparative law, the judge expands the horizon and the interpretive field of vision. Comparative law enriches the options available to us. In different legal systems, similar legal institutions often fulfill corresponding roles, and similar legal problems (like hate speech, privacy, and now the fight against terrorism) arise.¹ To the extent that these similarities exist, comparative law becomes an important tool with which judges fulfill their role in a democracy (“microcomparison”).² Moreover, because many of the basic principles of democracy are common to democratic countries, there is good reason to compare them (“macrocomparison”).³ Indeed, different democratic legal systems often encounter similar problems. Examining a foreign solution may help a judge choose the best local solution. This usefulness applies both to the development of the common law and to the interpretation of legal texts.⁴

Naturally, one must approach comparative law cautiously, remaining cognizant of its limitations. Comparative law is not merely the comparison of laws. A useful comparison can exist only if the legal systems have a common ideological basis. The judge must be sensitive to the uniqueness of each legal system. Nonetheless, when the judge is convinced that the relative social, historical, and religious circumstances create a common ideological basis, it is possible to refer to a foreign legal system as a source of comparison and inspiration. Indeed, the importance of comparative law lies in extending the judge’s horizons. Comparative law awakens judges to the potential latent in their own legal systems. It informs judges about the successes and failures that may result from adopting a particular legal solution. It refers judges to the relationship between a solution to the legal problem before them and other legal problems. Thus, comparative law acts as an experienced friend. Of course, there is no obligation to refer to comparative law. Additionally, even when comparative law is consulted, the final decision must always be “local.” The benefit of

1. See *Police v. Georghiades*, [1983] 2 C.L.R. 33 (Cyprus). Justice Pikiis compared different national and international legal systems to give content to the right of privacy. It was decided by the Supreme Court of Cyprus that the right of privacy applies not only vis-à-vis the state but also in the relationships between individuals. *Id.* at 50-54, 60-65.

2. See 1 KONRAD ZWIGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 5 (Tony Weir trans., Clarendon Press 2d ed. 1987) (1977).

3. *Id.* at 4-5.

4. See TIM KOOPMANS, *COURTS AND POLITICAL INSTITUTIONS: A COMPARATIVE VIEW* 4 (2003).

comparative law lies in expanding judicial thinking about the possible arguments, legal trends, and decisionmaking structures available.

II. THE INFLUENCE OF COMPARATIVE LAW

Comparative law is a tool that aids in constitutional and statutory interpretation. This assistance may work on three levels. The *first* concerns interpretive theory. Comparative law helps the judge better understand the role of interpretation and the role of the judge therein. To exemplify the point, consider the interpretative status of the intent of the creator in understanding constitutions and statutes. Before judges decide their own position on the issue, they would do well to consider how other legal systems treat the question. The *second* level on which judges rely on comparative law is connected with democracy's fundamental values. Democracies share common fundamental values. Democracy must infringe certain fundamental values in order to maintain others. It is important for judges to know how foreign law treats this question and what techniques it uses. Does it employ a technique of balancing or of categorization? Why is one technique preferred over another? Every legal system grapples with the issue of constitutional limitations on human rights. What are these limitations and what technique was used to reach them? What are the remedies for violating an unlawful order and how can they be determined? The *third* level of aid provided by comparative law concerns the solutions it offers to specific situations: How protected is racist speech? Is affirmative action recognized? How does the foreign system deal with terrorism? Of course, the resolution of these issues is intrinsically local. In different legal systems, however, they have a common core in that they reflect the problems of democracy and the complexity of human relations. Again, I do not advocate adopting the foreign arrangement. It is never binding. I just advocate an open approach, one which recognizes that for all our singularity, we are not alone. That recognition will enrich our own legal systems if we take the trouble to understand how others respond in situations similar to those we encounter.

III. COMPARATIVE LAW AND INTERPRETATION OF STATUTES

Comparative law is an important source from which the judge may learn the objective purpose of a statute.⁵ This is the case with

5. See AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* 148 (Sari Bashi trans., 2005). For a discussion of comparative law and the courts, see generally *COMPARATIVE*

regard to both the specific purpose, or microcomparison, and the general purpose, or macrocomparison, of the statute. The comparison is relevant even if it is clear that the legislature was not inspired by foreign law. In looking for the specific statutory purpose, a judge may be inspired by a similar statute in a foreign democratic legal system. This is so when he wishes to learn of the purpose underlying legislation that regulates a legal "institution" such as an agency or a lease. The judge does not refer to the details of the foreign laws. Rather, he examines the function that the legal institution fulfills in the two systems. If there is a similarity in the functions, he may find interpretive ideas about the (objective) purpose of the legislation. An example of this potential use is the principle of good faith in executing a contract. To the extent that this principle fulfills a similar function in different legal systems, it is possible to use the law of a foreign system to discern the purpose that underlies the principle of good faith in local law. Moreover, it is possible to use comparative law—from other national systems and from international law—to determine the general (objective) purpose that reflects the basic principles of the system. Again, however, this comparative analysis is possible only if the two legal systems share a common ideological basis.

IV. COMPARATIVE LAW AND INTERPRETATION OF CONSTITUTIONS

Comparative law can help judges determine the objective purpose of a constitution. Democratic countries have several fundamental principles in common. As such, legal institutions often fulfill similar functions across countries. From the purpose that one given democratic legal system attributes to a constitutional arrangement, one can learn something about the purpose of that particular constitutional arrangement in another legal system. Indeed, comparative constitutional law is a good source of expanded horizons

LEGAL STUDIES: TRADITIONS AND TRANSITIONS (Pierre Legrand & Roderick Munday eds., 2003); PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* (2d ed. 1999); MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL* (2d ed. 1999); INT'L ACAD. OF COMPARATIVE LAW, *THE USE OF COMPARATIVE LAW BY COURTS* (Ulrich Drobnig & Sjeff Van Erp eds., 1999); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 65-79 (2004); Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411 (1995); H. Patrick Glenn, *Comparative Law and Legal Practice: On Removing the Borders*, 75 TUL. L. REV. 977 (2001); Basil Markesinis, *Comparative Law—A Subject in Search of an Audience*, 53 MOD. L. REV. 1 (1990); Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671 (2002).

and cross fertilization of ideas across legal systems.⁶ This is clearly the case when the constitutional text of one country has been influenced by the constitutional text of another. But even in the absence of any direct or indirect influence of one constitutional text on another, there is still a basis for interpretative inspiration. An example is where a constitution refers expressly to democratic values or democratic societies.⁷ But even without such a reference, the interpretative influence of comparative law is substantial.⁸ This is the case with regard to determining the scope of human rights, resolving particularly difficult issues such as abortion and the death penalty, and determining constitutional remedies.

Nonetheless, as we have seen, interpretive inspiration is only useful if there is an ideological basis common to the two legal systems and a common allegiance to basic democratic principles. A common basis of democracy is, however, a necessary but insufficient condition for comparative analysis. As judges, we must also examine whether there are factors in the historical development and social conditions that make the local and foreign systems different enough to render

6. For more on the influences of comparative constitutional law, see George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683, 695-96 (1998); Kathryn A. Perales, *It Works Fine in Europe, So Why Not Here? Comparative Law and Constitutional Federalism*, 23 VT. L. REV. 885, 886-91, 901-05 (1998); Lorraine E. Weinrib, *Constitutional Conceptions and Constitutional Comparativism*, in DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW 3, 23-29 (Vicki C. Jackson & Mark Tushnet eds., 2002). See generally NORMAN DORSEN ET AL., COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS (2003) (presenting issues and possible solutions in comparative constitutional law); VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW (1999) (same); FRANCOIS VENTER, CONSTITUTIONAL COMPARISON: JAPAN, GERMANY, CANADA AND SOUTH AFRICA AS CONSTITUTIONAL STATES (2000) (comparing various aspects of the constitutions of the subject countries and proposing guidelines for constitutional comparison in general); Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819 (1999) (examining various approaches to comparative constitutional interpretation); Christopher McCrudden, *A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights*, in HUMAN RIGHTS AND LEGAL HISTORY 29 (Katherine O'Donovan & Gerry R. Rubin eds., 2000) (discussing trends in the application of comparative constitutional interpretation to issues of individual rights); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999) (evaluating three approaches to comparative constitutional interpretation).

7. See, e.g., Constitution Act 1982, pt. 1, § 38, Canada Act 1982, sched. B, ch. 11 (U.K.), reprinted in R.S.C. No. 44 (app. B); S. AFR. CONST. 1996 § 36(1); see also David M. Beatty, *The Forms and Limits of Constitutional Interpretation*, 49 AM. J. COMP. L. 79, 102-09 (2001).

8. See generally Donald P. Kommers, *The Value of Comparative Constitutional Law*, 9 J. MARSHALL J. PRAC. & PROC. 685 (1975) (discussing the viability of comparative constitutional law as an academic subject and as a legal discipline).

interpretive inspiration impracticable.⁹ But when there is an adequate similarity, interpretive inspiration is possible. This is the case with regard to inspiration from the law of another democratic country. It is also true with regard to interpretive inspiration from international law, as various international conventions enshrine constitutional values.¹⁰ These conventions influence the formation of the objective purpose of different constitutional texts.¹¹ The case law of international and national courts that interpret these conventions ought to serve as a basis for the interpretation of the constitutions of various nations.

V. USE OF COMPARATIVE LAW IN PRACTICE

The use of comparative law for the development of the common law and the interpretation of legal texts is determined by the tradition of the legal system. Israeli law, for example, makes extensive use of comparative law. When Israeli courts encounter an important legal problem, they frequently examine foreign law. Reference to law from the United States, the United Kingdom, Canada, and Australia is commonplace.¹² Those with the linguistic ability also refer to Continental European law and, sometimes, we use English translations of Continental European (mainly German, French, and Italian) legal literature.

In countries of the British Commonwealth, there is much cross fertilization. Each such nation refers to United Kingdom case law. United Kingdom judges refer to Commonwealth case law and Commonwealth judges, in turn, refer to each other's case law. The

9. See, e.g., *McQueen v. Keegstra*, [1990] 3 S.C.R. 697, 740; *Rahey v. The Queen*, [1987] 1 S.C.R. 588, 639 ("While it is natural and even desirable for Canadian courts to refer to American constitutional jurisprudence in seeking to elucidate the meaning of *Charter* guarantees that have counterparts in the United States Constitution, they should be wary of drawing too ready a parallel between constitutions born to different countries in different ages and in very different circumstances. . ."). See generally PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* 827-28 (4th ed. 1997).

10. For the products of some of the most important international conventions, see International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 17; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; American Declaration of the Rights and Duties of Man, Doc. 21 rev. 6, 1948, OASTS; Universal Declaration of Human Rights, G.A. Res. 217(III)A, at 71, U.N. GAOR 3d Sess., 183rd plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

11. See, e.g., *Newcrest Mining (WA) Ltd. v. Commonwealth*, (1997) 190 C.L.R. 513, 655 (Austl.).

12. See Prina Lahav, *American Influence on Israel's Jurisprudence of Free Speech*, 9 HASTINGS CONST. L.Q. 21, 24 (1981); Renée Sanilevici, *The Use of Comparative Law by Israeli Courts*, in INT'L ACAD. OF COMPARATIVE LAW, *supra* note 5, at 197.

Supreme Court of Canada is particularly noteworthy for its frequent and fruitful use of comparative law.¹³ As such, Canadian law serves as a source of inspiration for many countries around the world. Generous use of comparative law can also be found in the opinions of the South African Constitutional Court. In South Africa's Constitution, it is explicitly determined that: "When interpreting the Bill of Rights, a court, tribunal, or forum—(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and, (c) may consider foreign law."¹⁴

Regrettably, until very recently, the United States Supreme Court has made little use of comparative law.¹⁵ Many democratic countries derive inspiration from this Court, particularly in its interpretation of the United States Constitution.¹⁶ By contrast, some justices of the Supreme Court do not cite foreign case law in their judgments. They fail to make use of an important source of inspiration, one that enriches legal thinking, makes law more creative, and strengthens the democratic ties and foundations of different legal systems. Justice Claire L'Heureux-Dubé of the Canadian Supreme Court has rightly observed that "[i]f we continue to learn from each other, we as judges, lawyers, and scholars will contribute in the best possible way not only to the advancement of human rights but to the pursuit of justice itself, wherever we are."¹⁷ Of course, American law in general, and its

13. See Anne F. Bayefsky, *International Human Rights Law in Canadian Courts*, in ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS 295, 310 (Benedetto Conforti & Francesco Francioni eds., 1997).

14. S. AFR. CONST. 1996 § 39(1).

15. See, e.g., *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) ("Justice Breyer's dissent would have us consider the benefits that other countries, and the European Union, believe they have derived from federal systems that are different from ours. We think such comparative analysis inappropriate to the task of interpreting a constitution . . ."); *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) ("We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* . . . that the sentencing practices of other countries are relevant."); *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting) ("The plurality's reliance upon Amnesty International's account of what it pronounces to be civilized standards of decency in other countries . . . is totally inappropriate as a means of establishing the fundamental beliefs of this Nation.").

16. See Gérard V. La Forest, *The Use of American Precedents in Canadian Courts*, 46 ME. L. REV. 211 (1994). See generally Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537 (1988) (discussing the use of American concepts of rights by foreign courts).

17. See Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization, The Rehnquist Court, and Human Rights*, in THE REHNQUIST COURT: A RETROSPECTIVE (Martin H. Belsky ed., 2002).

constitutional law in particular, is rich and developed. American law is comprised of not one but fifty-one legal systems. Nonetheless, I think that it is always possible to learn new things even from other democratic legal systems that, in their turn, have learned from American law. As Judge Guido Calabresi rightly said: "Wise parents do not hesitate to learn from their children."¹⁸ There appears to be the beginning of a change in the United States Supreme Court's attitude towards comparative law. In some recent cases, Supreme Court justices have cited case law from other jurisdictions.¹⁹ Is this Court moving toward wider use of comparative law?

18. *United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995).

19. *See, e.g.,* *Lawrence v. Texas*, 539 U.S. 558, 560 (2003); *Atkins v. Virginia*, 531 U.S. 304, 316 n.21 (2002).