How Internationalization of the Law has Materialized in Canada*

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The current financial crisis is evidence that no country, not even a superpower like the United States, can resolve on its own the modern challenges posed by a deregulated banking system, the ecological imbalance, terrorism, international crime or world trade impacts. Internationalization is a reality that has, of course, applied to the law for a long time. We need a reasonably efficacious system to accommodate trading among nations; laws on shipping and bills of exchange, for instance, are meant to ensure respect for the principles of unity and continuity in the law. These principles extend far beyond the need to secure international trade. Indeed, section 1 of the *Canadian Charter of Rights and Freedoms* speaks of restrictions on fundamental rights that are justifiable in a free and democratic society; a reference to shared values and principles. At the first level, we can identify the universal values of human dignity, equality, democracy, and at the second level the requirements of a common methodology based on the application of the rules of proportionality by an independent judiciary.

We have obviously moved from a rather closed society to one of openness; this phenomenon being described as one of globalization. Justice Albie Sachs of South Africa questions this choice of words because globalization suggests that there is a centre imposing on others its technology, language, values. Universalization is a better choice, in his view, because it suggests that in a global struggle for freedom and fairness we recognize the equality of participants. I agree that what we now mean by globalization of the law is essentially access to all sources of law, national and international, and the circulation of norms and models. It is not, in my opinion, the search for supranational law as in the European Community.

The Supreme Court of Canada is still very much animated by respect for Canadian sovereignty and what I might call *internal judicial security.* It wants to develop the law cognizant of other nations' views, but does not believe fairness requires that the treatment of citizens of one country must mirror the treatment of citizens in any other particular nation. The confrontation of ideas is an enrichment but competition between legal systems is not. Diversity is also an important value and we therefore want to borrow or share what will help us make better decisions. Most often, we will be inspired by legal methodology and choice of criteria, but we will be careful in borrowing whole solutions that are often developed in an entirely dif-

ferent environment. Professor Jeremy Waldron of New York University provides an interesting example, that of the offence of desecrating the flag. The US precedents should always be considered because freedom of speech is a universal value that is well respected in the United States. But the examination of US precedents must take into account the fact that the US is a very old and stable democracy, that freedom of expression's content has been greatly extended there, and that veneration for the flag in the US is not comparable to that in other nations. In Canada the situation is different. Our flag is not very old; we do not define freedom of expression in such absolute terms, and we have s. 1 of the *Charter* to satisfy restrictions. But consider the case of a country like Kosovo which is a new and unstable democracy that is still very divided along ethnic lines. One part of the population still believes that separation from Serbia was illegal or illegitimate. Does flag burning take the same colour there even if the same criteria are applied to justify a restriction to freedom of expression?

Contextual analysis is important in the domain of human rights. Even within the community of nations who share the same fundamental values, harmony does not mean uniformity. Judicial borrowing must be limited to situations where it is truly appropriate. Nevertheless, it will appear more and more frequently because some judges in any given country will be afraid of marginalization; they will want to be seen as open to new ideas and new methodologies. They will look for new phrases and concepts. One good example of this judicial borrowing is our Oakes proportionality test which is largely based on one designed by the courts of Germany. Judicial borrowing will also add to the duty to give comprehensive reasons to explain how judgments are being used and why they are useful or not.

Internationalization of the law is not, in the Canadian context, a top down phenomenon. There is no outside agency or court defining rules with supranational force. It is a bottom up exercise. Universal values reflecting a commonality of objectives facilitates a certain form of harmonization. I will come back to this concept to argue that it must be dealt with in light of differences in legal cultures and legal domains. Harmonization of approaches and methods are what matters most, in my view. Cultural differences, legal cultures particularly, are important, but here again should not mask the need to modernize the law; public support for tradition in one or many nations at the same time should not be an excuse for institutionalizing past injustices and practices that do not meet our standards. New developments and interpretations in other countries do not mean national courts are free to develop the law as they wish. Legitimacy requires respect for national institutions that empower judges. External influences must in a sense be moderated to preserve legitimacy and the democratic order. Fair treatment does not require that claimants achieve the same result in similar circumstances throughout the world.

Perhaps the greatest challenge facing the political and legal order of the 21st century is to navigate our way through these seemingly competing ideals of sovereignty and internationalism. In my opinion, the Canadian domestic legal system

has negotiated this delicate balance by being open to international ideas but remaining committed to its fundamental principles and the coherence of its jurisprudence.

There are two distinct processes by which national courts are influenced by law beyond their borders. The first is the process of incorporating into domestic law values from international treaties and customary law to which the court's country has subscribed, whether or not the treaties and conventions have been incorporated into domestic statutes. The second is the process of transjudicial communication. This expression describes a much more diverse and messy process of judicial interaction, mainly through judicial borrowing, the citation of foreign judgments, and through informal networks.

I will be dealing here with two issues, this from the perspective of a recently retired judge of the Supreme Court of Canada. These issues are, first, whether the availability of non-domestic legal resources has changed the way in which judges decide cases, and, if so, whether this has contributed to the uniformisation of the law. Secondly, whether the formal and informal contacts between judges of different countries has brought about a change in judicial consciousness and attitudes, and whether this has affected the way judges decide cases.

THE USE OF NON-DOMESTIC LEGAL RESOURCES IN CANADA

I turn now to the use of non-domestic legal resources in Canada, first looking at international instruments and decisions, followed by a review of judicial borrowing.

International Instruments and Decisions

In the last twenty years, the Supreme Court of Canada has been much more proactive in bringing international law into domestic decision-making. The number of cases making use of international public law instruments in Canada has increased dramatically. Writing on this development in the jurisprudence of the Court, former Justice Gérard La Forest reported that between 1984-1996 the Court made use of key international human rights instruments in fifty cases in interpreting the *Canadian Charter of Rights and Freedoms*.[1] Since then, the number has doubled.[2] Economic globalization has brought on the privatization of policies and weakening of the regulatory capacity

* This presentation is largely based on a speech delivered during the conference Law of the Future 2008 at the Peace Palace, The Hague, under the auspices of the Hague Institute for the Internationalization of Law, October 23, 24 2008.

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1 Gérard V. La Forest, "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996) 34 Can. Y.B. Int'l. Law. 89 at 90-91.

2 Michel Bastarache, "The Honourable G.V. La Forest's Use of Foreign Materials in the Supreme Court of Canada and His Influence on Foreign Courts" in Rebecca Johnson & John P. McEvoy, eds., *Gérard V. La Forest at the Supreme Court of Canada 1985-1997* (Winnipeg: Canadian Legal History Project, 2000) 433 at 433-434.

of States, even for the protection of human rights and this has obviously influenced the Supreme Court.

Despite what is undoubtedly a positive trend, the role of international instruments has not been as significant as suggested by some. In a 2004 study dealing with *Charter* litigation at the Supreme Court, Bijon Roy found that while present references to non-domestic legal sources (including both international instruments and foreign judgments) remains limited (thirty-four cases out of 403 surveyed is roughly 8 percent), this type of result is hardly suggestive of large-scale transformative change in the judicial decision-making process. Furthermore, such instruments are treated only as sources of support, to be considered together with binding precedent, established domestic precedent, and other factors including social science evidence, legislative intent, and so on.[3]

In my opinion, the main reasons for this are that there have been a relatively small number of cases which would involve the discussion of international instruments, and the traditional rule that the incorporation of international norms in Canada is still dependant on the adoption of legislation to that effect or the creation of a new international custom. Canada's system of receiving international law into the domestic legal order is neither monist nor dualist; it is a hybrid of the two, demanding the implementation of conventional international law but allowing for the incorporation of customary international law.[4] In Canada, the rule for the use of international instruments is affirmed in *Slaight Communications v. Davidson*; which helps determine the content of a right or the validity of a legislative objective.[5]

The other factor to be considered is that very few counsel have recourse to international instruments in their facta or oral arguments; most of the time an international perspective will be presented by interveners or raised by members of the Court themselves. In those cases, arguments tend only to establish a context within which Canadian precedents can be established.

In recent years, there has been more interest on the part of judges for the consideration of international materials as part of the general context when interpreting national legislation. Moreover, there has been an increasing willingness in recent years to consider international instruments in the development of *Charter* jurisprudence. In *Baker v. Canada (Minister of Citizenship and Immigration)*, Justice L'Heureux-Dubé observed in *obiter* that the important role of international human rights law as an aid to interpreting domestic law has been emphasized in other common law countries and "[i]t is also a critical influence on the interpretation of the scope

3 Bijon Roy, "An Empirical Survey of Foreign Jurisprudence and International Instruments in *Charter* Litigation" (2004) 62 U.T. Fac. L. Rev. 99 at 136.
4 Gibran Van Ert, "Using Treaties in Canadian Courts" (2000) 38 Can.Y.B.Int'l Law 3 at 4.
5 *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416.

of rights included in the *Charter*."[6] Furthermore, in *Dunmore v. Ontario (Attorney General)*, the Court noted that International Labour Organization Conventions can be relevant and influential by helping to establish the normative foundation for determining the scope of the freedom of association rights contained in s. 2(d) of the *Charter* even where Canada has not ratified and accepted these conventions as binding.[7]

Nevertheless, the Court does not adopt rules set out by international instruments or the jurisprudence of international tribunals; it uses this material to demonstrate established or emerging patterns informing human rights jurisprudence throughout the world. These patterns are considered in a principled manner in the context of the domestic jurisprudence. For example, in *United States v. Burns*, an extradition case, the Court cautiously observed that the abolition of the death penalty had become a concern increasingly shared by most of the world's democracies.[8] Canada was noted to be very much at the forefront of this movement, suggesting that international consensus was used to support domestic principles. The conformity of Canadian legal principles and laws with international law has been further discussed in a few more recent cases, notably *R. v. Hape*, but here again there is no discussion of foreign jurisprudence, only an evaluation of the foreign norms to verify whether they are consistent with *Charter* values.[9]

It is difficult to say whether this new sensitivity has modified decisions, but it has changed the decision-making process. One judge of the Supreme Court has adopted the view that evidence of international agreements and even of foreign legislation in democratic countries should cause the Supreme Court to favour interpretations that would provide for the harmonization of legislative choices between countries. The main example of this attitude is reflected in the minority decision in the case of *Harvard College v. Canada*, which dealt with the possibility of obtaining a patent on a live animal.[10] This approach was rejected by a majority of the Court for a number of reasons. In *Harvard College*, the minority writes: "legislation varies but broadly speaking Canada has sought to harmonize its concepts of intellectual property with other like-minded jurisdictions. The mobility of capital and technology makes it desirable that comparable jurisdictions with comparable intellectual property legislation arrive (to the extent permitted by the specifics of their own laws) at similar legal results." This case did not involve interpreting provisions of domestic legislation that expressly implemented an international obligation, nor did it raise trans-judicial or extraterritorial aspects on its facts. The minority was willing to review a number of non binding foreign sources and international law principles not as passing references but in a concerted effort to ensure consistency between domestic law and that of com-

7 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193; *ibid.* at para. 70.

8 *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94; [2001] 3 S.C.R. 1016; 207 D.L.R. (4th) 193.

9 *United States v. Burns, 2001* SCC 7; [2001] 1 S.C.R. 283; 195 D.L.R. (4th) 1.

10 *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, 280 D.L.R. (4th) 385.

11 *Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76; [2002] 4 S.C.R. 45; 219 D.L.R. (4th) 577.

parable jurisdictions. This, I believe, is contrary to the jurisprudence of the Supreme Court of Canada. Although globalization is having a certain effect on domestic legal affairs, there is a clear demarcation between domestic law and international law. The Supreme Court has been willing to open up the interpretive method to actively include international norms and foreign sources of logic in its deliberations. It has expanded the rules of interpretation to permit reference to international treaties and foreign judgments in all cases in which to domestic legislation under review has been expressively or impliedly enacted or amended in order to implement an international obligation, This was confirmed specifically as the norm in the case of *National Corn Growers*, but setting aside the rules of interpretation to effect harmonization is not what was intended.[11]

Another scenario permits extrinsic sources to be used to interpret domestic legislation where it is interesting or impliedly necessary to look at the international context. Some examples of this are the decisions of the Supreme Court in *Baker v. Canada* and *National Corn Growers*. It is certain that the Supreme Court has adopted the pragmatic approach to decision-making and that it is now willing to draw on all sources to persuade its diverse audiences that its choices are appropriate. There are a number of reasons for finding that commonality of interests among peoples has never envisaged the possibility that courts harmonize interpretations of laws in order to protect like-minded institutions. First, it is not at all clear that there exists a firm international consensus with regard to any specific legislation in most cases; second, there is no justification in law for the idea that consideration of decisions taken abroad should lead Canadian courts to strive to attain a similar legal result. Legitimacy requires as much. For the court to look for a broader interpretive context to raise its knowledge of external aspects of its decisions is laudable, but this is totally different from forcing on our laws an interpretation geared to the attainment of similar legal results. One cannot treat the expansive approach as self evidently correct or completely dispense with the need to discuss the interpretive method adopted by the Supreme Court. What we need is broadening legal discourse, comparative deliberation that does not try to keep up with some kind of international development. Even if that were the case, what would be the like-minded jurisdictions? All common-law systems? All Western systems? All English and French speaking systems? Who should decide? It is interesting to note, on that issue, that the countries chosen for a comparison by the court in *Harvard College* and those chosen in *Théberge* were not the same![12] Was this because of some higher degree of persuasiveness? Cherry picking of countries is like cherry picking of foreign decisions within countries. It is probably unavoidable, but if it serves only to reinforce a position already taken to show consistency of results it is of little value.

The most significant cases dealing with international issues have been cases of private international law. In this area, the Court has not opted for a dialogue be-

12 *National Corn Growers Assn. v. Canada (Import tribunal)*, [1990] 2 S.C.R. 1324; 74 D.L.R. (4th) 449.

13 *Théberge v. Galerie d'Art du Petit Champlain Inc.*, 2002 SCC 34; [2002] 2 S.C.R. 336; 210 D.L.R. (4th) 385.

tween courts as exemplified in the American decision of *Kaepa v. Achilles Corp.*[13] This dialogue is not the way the Supreme Court of Canada sees its role; it has instead opted to focus on legal coherence and principle within its own system. It is worth noting further that the increased resort to arbitration and regional organizations have the potential to weaken the universality of values and development of a globalized system for the enforcement of international law. This potential is important in Canada given the NAFTA agreement and the importance of private international law in deciding how international issues are handled by national courts, an approach contrary to that exemplified in *Kaepa*. There are therefore approaches and rules which work against the universality concept.

Judicial Borrowing

Many commentators have observed that the changing nature of judicial decision-making is characterized by an increased willingness on the part of judges to refer to and apply foreign sources of law when they interpret domestic law.[14] A former Supreme Court Justice, Claire L'Heureux-Dubé, has observed:

> What is often given less attention in the legal community is how globalization is also occurring in the process of judging and lawyering, and how growing international links and influences are affecting and changing judicial decisions, particularly at the level of top appellate courts throughout the world. More and more courts, particularly within the common law world, are looking to the judgments of other jurisdictions.[15]

This said, I still believe that the influence of judicial borrowing in Canada is overstated by some. In my opinion, judicial borrowing in Canada remains primarily legitimizing in nature and remains subservient to the domestic jurisprudence. The logic employed by other courts provides guidance to Canadian courts rather than precedents to be followed. In our system especially, foreign judgments can only serve to help define values that can guide the interpretation of national laws, or international instruments that have obtained official recognition in our country.

Given its common law history, the notion of transjudicial borrowing, or horizontal communication, is not new to Canada. Nevertheless, it is important to note that all foreign decisions ultimately influence Canadian law based on persuasive, rather than binding, authority.[16]

14 *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624 (5th Cir. 1996).

15 See e.g., Myra J. Tawfik, "No Longer Living in Splendid Isolation: The Globalization of National Courts and the Internationalization of Intellectual Property Law" (2007) 32 Queen's L.J. 573.

16 The Honourable Claire L'Heureux-Dubé, "The Importance of Judicial Dialogue: Globalization and the International Impact of the Rehnquist Court" (1998) 34 Tulsa L.J. 15 at 16.

17 Anne-Marie Slaughter, "A Typology of Transjudicial Communications" (1994) 29 U. Rich. L. Rev. 99, identifies three distinct forms of transjudicial communication: horizontal, vertical and mixed vertical-horizontal. Given the fledgling status of supranational rights jurisprudence and Canada's non involvement with more established international tribunals like the European Court of Human Rights, it is not surprising

Historically, English judicial decisions played an important role because of their persuasive influence on Canadian judicial decision making. Today, English common law has lost its lustre as a material source of persuasive legal authority in Canada as a rich domestic jurisprudence has evolved.[17] English case law is still a supplementary source, but can be considered as just one foreign law source along with decisions from other common law jurisdictions and even some civil law states.

More recently, Canada's relationship with US jurisprudence has proven the subject of much discourse and debate. The use of US precedents in Canadian judicial decisions dates back to the nineteenth century. In the early twentieth century, however, reliance on US law as persuasive authority declined as the nation turned inwards and nation-building sentiments developed. However, the late twentieth century saw another reversal of this trend. A 1981 study of Supreme Court of Canada decisions (excluding civil law cases) comparing two periods (1957-59 and 1977-79) indicated that references to doctrine and foreign law per judgment (excluding cases from the United Kingdom) more than quadrupled in number and tripled in frequency between the two periods.[18] With respect to U.S. decisions, there was a 417 percent increase in frequency of reference between the two periods, and there was a 200 percent increase in the reference to other foreign common law cases.[19] In the 1977-79 period, U.S. case references were dominant, comprising 75 percent of the foreign case citations.[20]

In 1982, Canada enacted the *Canadian Charter of Rights and Freedoms*, which was modeled in part on the American *Bill of Rights*. The Canadian experience with the *Charter* quickly became distinct from any English experience and it was clear from the outset that American constitutional interpretation would have an impact on Canadian law. Consequently, there was much discussion in the literature at the time concerning what role U.S. case law would have in interpreting the new *Charter*. As anticipated, U.S. case law citations reached a high-water mark in the 1980s (7.2 percent), but this number declined slightly in the 1990s (5.6 percent).[21] These figures were significantly below what had been anticipated in some of the literature. As Canada's domestic jurisprudence developed, the uniqueness of the national experience has led to warnings about blind recourse to American or other foreign jurisprudence. In *Lavigne v. Ontario Public Service Employees Union*, Wilson J cautioned:

[T]his Court must exercise caution in adopting any decision, how-

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that Canada's experience with transjudicial communication falls primarily within the category of horizontal communication.

18 Linda C. Reif, "The Evolution of Common Law in Canada" in Louis Perret & Alain-François Bisson, eds., *The Evolution of Legal Systems, Bijuralism and International Trade* (Montréal: Wilson & Lafleur, 2003) 95 at 103.

19 Donald Casswell, "Doctrine and Foreign Law in the Supreme Court of Canada: A Quantitative Analysis" (1981) 2 Sup. Ct. L. Rev. 435 at 442.

20 *Ibid.* at 446.

21 *Ibid.* at 448.

22 Peter McCormick, *Supreme at Last: The Evolution of the Supreme Court of Canada* (Toronto: James Lorimer & Company Ltd., 2000).

> ever compelling, of a foreign jurisdiction. This Court has consistently stated that even although it may undoubtedly benefit from the experience of American and other courts in adjudicating constitutional issues, it is by no means bound by that experience or the jurisprudence it generated. The uniqueness of the *Canadian Charter of Rights and Freedoms* flows not only from the distinctive structure of the *Charter* as compared to the American Bill of Rights but also from the special features of the Canadian cultural, historical, social and political tradition.[22]

Justice Wilson's concern that foreign jurisprudence is not suitable for direct transplantation because of its contingency on many culturally, historically, and socially specific variables unique to each jurisdiction is supported in the comparative law literature.[23] This concern is a somewhat more open variation of the view expressed by Scalia J, who asserts that American courts must rely exclusively on American ideas and standards.[24] There is undoubtedly a further difficulty in knowing which countries present appropriate comparisons for Canadian courts and knowing exactly how many countries are needed to form a meaningful comparison.

The use of decisions of foreign courts must be considered in light of the Court's dependance on British authorities because of the appeals to the Judicial Committee of the Privy Council that endured until 1949 in civil cases, and because of the practice of the Bar and Bench until the adoption of the *Canadian Charter of Rights and Freedoms* in 1982. Quoting foreign judgments meant essentially quoting decisions of Commonwealth countries, and this is still the case in matters of civil law. Quoting decisions of American courts has never been extremely important, and it has not varied much other than in the area of human rights after the adoption of the *Charter*. But even then, as noted above, the use of American jurisprudence has been more restricted than anticipated and has influenced decisions in a very modest way. References to decisions of the European Court of Human Rights have been very limited. It may be that the terms of the European Charter are too dissimilar or that the *margin of appreciation* that characterizes European decisions has caused the Supreme Court to resist following the Europeans, or it may just be that the Court decided early on that it would follow its own course and only look at decisions of foreign courts to instruct itself of other judicial approaches and philosophies.

Despite these limitations, the Supreme Court of Canada does, of course, cite foreign judgments on occasion. As was noted above, the beginning of the *Charter* era gave rise to numerous studies on the use of foreign decisions (namely those from the U.S.) in Canadian judicial decisions. Since that time, there have been significantly fewer

23 *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211 at 256.

24 See e.g., Mark Tushnet, "The Possibilities of Comparative Constitutional Law" (1999) 108 Yale L.J. 1225.

25 Justice Scalia, writing for the majority, states that "it is American conceptions of decency that are dispositive," and that sentencing practices in other countries are not relevant considerations: *Stanford v. Kentucky*, (1989) 492 U.S. 361 at 369.

studies. One of note, however, is a 2004 study by Bijon Roy which focused on the use of foreign jurisprudence in *Charter* litigation, which tends to be human rights oriented.[25]

In terms of quantity, Roy reviewed a total of 402 *Charter* cases decided by the Supreme Court between 1998 and 2003. Research limitations addressed at length in his paper reduced the total number of *Charter* cases containing relevant references to foreign jurisprudence and international instruments to thirty-four cases.[26] These thirty-four cases included a total of eighty-seven discrete references to and uses of foreign materials. Of these thirty-four cases, nineteen included two or more references to foreign materials; six cases contained five or more such references.[27]

Of the eighty-seven references made to foreign materials, sixty (69 percent) were examples of horizontal communication; that isreferences to the jurisprudence of other national constitutional or supreme courts. The remaining references were to international instruments or decisions. Of the horizontal references, exactly half were to US constitutional jurisprudence, while 80 percent (twenty-four) of the remaining references were to the jurisprudence of other Commonwealth nations (the United Kingdom (eleven), Australia (six), New Zealand (three), South Africa (three), and India (one). Beyond the United States and the Commonwealth, there was one reference to the Israeli Supreme Court and five to broader groups, centering on Western European nations or "other free and democratic societies".[28]

It is important to note that Roy's study, while helpful, is limited to cases involving the *Charter* and human rights litigation. I do not consider it realistic to talk only of exchanges regarding human rights because the real issue here is whether the national and international judicial systems themselves are being transformed; many other subjects give rise to exchanges. While I have no specific studies to cite, outside of *Charter* cases, foreign case law has been used in various public law decisions (which may involve international law issues) and in private law jurisprudence, such as contract and tort law, fiduciary relations, and conflict of laws.[29] In these cases, foreign approaches

26 Roy, *supra* note 3.
27 *Ibid.* at 115-119.
28 *Ibid.* at 124.
29 *Ibid.* at 125.
30 See e.g., *Re Canada Labour Code*, [1992] 2 S.C.R. 50 (state immunity: U.S., Norwegian, Dutch, Italian and English cases); *R. v. Parisien*, [1988] 1 S.C.R. 950 (extradition: English, U.S., Swiss, Venezuelan, German and Hungarian cases); *Carey v. Ontario*, [1986] 2 S.C.R. 637 (production of cabinet documents: English, Scottish, Australian, N.Z. and U.S. cases); *Baker v. Canada* (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 (immigration: cases from N.Z. and India); see e.g., *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 1 S.C.R. 551 (insurance and tort: U.S. English and N.Z. cases); *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 (breach of confidence: English, Australian and N.Z. cases); *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 (privity of contract, tort: English, Australian, U.S. cases, N.Z. and Scottish statute law); see e.g., *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 (English and U.S. cases); *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 (English and Australian cases); Conflict of laws and private international law is an area where a robust form of transjudicial communication has evolved: see e.g., *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256; *Amchem Products*

are considered but not always followed. For example, the legitimate expectations doctrine affirmed in the Australian cases of *Minister of State v. Teoh* and *Haoucher v. Minister for Immigration, Local Government and Ethnic Affairs* was rejected in Canada in *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*.[30]

It is worth noting at this point that the figures and references provided above undoubtedly understate the influence of foreign judgments in that they only incorporate those cases where a foreign case is cited. It is entirely possible that in researching a case, recourse was had to foreign law but not cited. Anne-Marie Slaughter argues that courts seeking ideas or inspiration from foreign jurisprudence have no incentive to credit the source of those ideas in their decision. The consequence is that "cross-fertilization through transjudicial communication is likely to be very difficult to track."[31] She further relies on anonymous anecdotal evidence from clerks at various courts and careful readings of various decisions as evidence that "courts draw on the opinions of foreign courts without attribution."[32] In my own experience, this is not the case in Canada; attribution is systematic and considered mandatory.

Looking at how the cited foreign jurisprudence was used by the Supreme Court, Roy's study revealed that of the eighty-seven total references to foreign materials, their use is categorized under 'survey' in twenty-nine instances (33 percent), 'support' in forty-one instances (47 percent), 'followed' only once, and 'distinguished' sixteen times (about 18 percent).[33] Elsewhere, Harvie and Foster, studying only citations of American cases in the pre-*Charter* era, observed similarly few explicit rejections or adoptions of foreign cases; in most instances American jurisprudence being cited only for a supportive purpose.[34]

I am also interested in considering whether judicial borrowing is heuristic (inspiring decisions) or legitimizing (used to justify decisions already made). Roy's study seems to affirm my own view that much of the Supreme Court of Canada's use of foreign materials is generally legitimizing in nature, external sources being rarely, if ever, dispositive of *Charter* issues. The Court frequently surveys foreign law, noting its own consistency with courts of these jurisdictions, but seemingly drawing little more from the exercise than the comfort—and credibil-

Incorporated v. British Columbia (Worker's Compensation Board), [1993] 1 S.C.R. 897; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289. Nevertheless, given the inherent internationalist bent of these cases, I consider them beyond the scope of this analysis. Our interest should focus more on the extent to which foreign decisions influence areas of law which are arguably more naturally addressed by domestic considerations.

31 *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh*, [1995] HCA 20, 128 ALR 353; *Haoucher v. Minister for Immigration, Local Government and Ethnic Affairs*, [1990] HCA 22, 19 A.L.D. 577; *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281.

32 Slaughter, *supra* note 17 at 118.

33 *Ibid.*

34 Roy, *supra* note 3 at 127.

35 Robert Harvie & Hamar Foster, "Ties that Bind? The Supreme Court of Canada, American Jurisprudence, and the Revision of Canadian Criminal Law Under the Charter" (1990) 28:3 Osgoode Hall L.J. 729.

ity—of the assurance that its own jurisprudence falls within the norms established by Canada's international peers.[35] Indeed, the Court almost never follows foreign jurisprudence without vigorously qualifying the move and going to great lengths to establish the foreign jurisprudence as "supportive" rather than "authoritative."[36]

Much of the use of foreign judgments is a result of what Slaughter describes as the independent value of evidence that a foreign court has reached a similar conclusion. Indeed, "the listing court may reach the same legal conclusion or formulate the same line of reasoning independently, yet nevertheless search for and cite evidence that foreign courts are like-minded."[37] Consequently, we may account for the observed tendency of the Court to cite foreign law when it helps or, at least, does not stand in the way of a result it wishes to reach, but not otherwise.[38]

In my view, judicial borrowing in Canada exists but remains largely legitimizing in nature. Roy himself summarizes his study as showing that "the Supreme Court of Canada's use of foreign jurisprudence reflects this view that transjudicial communication has an important but clearly limited role in the development of domestic rights jurisprudence."[39] Furthermore, as noted above with respect to international instruments, the Supreme Court has rejected the idea that any form of harmonization should guide it when interpreting Canadian laws in areas where other courts have adopted different solutions, the best example being that of *Harvard College v. Canada*.[40] For the Supreme Court, the primary value is certainty and legal unity. In my view, the Supreme Court is interested in pursuing a course governed by considerations of national policy and will continue to do so, as exemplified by its recent decisions in matters relative to the development of the common law. I think consideration is given to the legitimacy principle and that the expansion of discretion in the Supreme Court has been attenuated over the last few years.

All of my remarks thus far have addressed judicial borrowing by Canadian courts of foreign judgments. It may be interesting at this point to briefly consider the reverse perspective of transjudicial communication. The courts of other countries do occasionally rely on Canadian forty-two Supreme Court decisions. Some make extensive use of Canadian precedents, notably New Zealand. In South Africa, Supreme Court of Canadadecisions are relied upon as persuasive authority in the interpretation of their own constitutional laws.[41] Furthermore, some Supreme Court of Canada deci-

41 Roy, *supra* note 3 at 110.

36 *Ibid.* at 120.

38 Slaughter, *supra* note 17 at 118.

39 Roy, *supra* note 3 at 130. See also S.I. Bushnell, "The Use of American Cases" (1986) 35 U.N.B.L.J. 157, where this attitude was observed with respect to American jurisprudence in the period immediately preceding the adoption of the Charter. Judges generally adopt foreign jurisprudence if they agree with the foreign position, but ignore it if they disagree.

40 Roy, *supra* note 3, at 115.

40 *Harvard College v. Canada (Commissioner of Patents), supra* note 11.

41 See e.g., *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* (1999), [2000] 2 S. Afr. L.R. 1, 39 I.L.M. 798 (S. Afr. Const. Ct.) (citing a number of Supreme Court of Canada decisions);

sions have been used as persuasive authority by the International Criminal Tribunals for the former Yugoslavia and for Rwanda, both established by the United Nations Security Council.[42]

FORMAL AND INFORMAL INTERNATIONAL NETWORKS

Transjudicial communication takes many forms and much of it exists outside of black letter judicial decisions. The Supreme Court of Canada takes part in a number of international organizations and contributes to a limited number of projects designed to provide assistance to foreign courts. Furthermore, delegations from the Court visit colleagues in other countries and receive return visits by these colleagues.

The Court also participates in a very limited number of endeavours that might be called international cooperation. Such initiatives entail the provision of advice or transfer of information, training or assistance in ameliorating the administration of justice in another court. Generally the Supreme Court does not have the resources to participate in such activities, but will make exceptions in some cases when a Supreme Court in another jurisdiction is trying to improve its own processes and wants to benefit from the experience of the Canadian Court.

One such project was with Russia, under the direction of the Commissioner of Judicial Affairs where a component provided for exchanges and discussions between members of the Supreme Court and members of the Constitutional Court of Russia. Essentially, the Court was asked to explain its methodology for dealing with important issues relating to problems of federalism, human rights and constitutional review. The method adopted there was to identify decisions of the Russian Court, translate them, then identify decisions as similar as possible in Canada, translate them, and finally to organize seminars where discussions concerning methodology, description of underlying principles and judgment writing would be discussed.

Julie Allard and Antoine Garapon argue that the influence of a Court on the international scene largely depends on recognition and past history.[43] In that sense, they suggest that the "major" Supreme Courts with great legal traditions such as France, England and the United States have more influence on the international scene than courts with a less-established tradition. In my opinion, this is not always the case. Many judges have approached the Supreme Court of Canada specifically because it was not that of a former colonial power or of a present political and economic power like the United States. This opinion seems to be confirmed by Adam Tiptak in his New York

S.I. Smithey. "Comparative and International Law in South Africa Since Apartheid", in S.S. Nagel, Ed., Handbook of Global Legal Policy (New York: Marcel Dekker Inc., 2000), 17 at 30-31.

42 See William A. Schabas, "Twenty-Five Years of Public International Law at the Supreme Court of Canada" (2000) 79 Can. Bar Rev. 174 at 175-176.

44 Julie Allard & Antoine Garapon, *Les juges dans la mondialisation: La nouvelle révolution du droit* (Paris: Seuil, 2005) at 73.

Times article of 17 September 2008 titled "US Court is now guiding fewer nations".

One element of great importance in judicial dialogue is the interplay of legal values and cultural differences. Justice reform is inevitably about values and one must ask whether Canadian assistance is about exporting Canadian legal values. And what are those values? They may start with the protection of human rights, especially equality rights, democracy, and independent legal institutions. Can projects then be undertaken with countries who do not share these values? Does non-acceptance of those values signify that some regimes are incapable of reforms that are acceptable to Canadians? Can the desirability of modest changes justify assistance? In my opinion, isolating repressive regimes is not very productive, but there must be a commitment to some reform. Short term objectives can also form the basis for future developments.

Outside of official organizations and initiatives, the internet has played an important role in the process of judicial internationalization. Access to other legal sources has increased with the Internet. I think it is important to note here that the Internet has provided a means for continuous direct contact between judges, a sort of international chat room, that, for some, has created a break in isolation and an opportunity to consult on ways of dealing with common issues. This contact has also created consciousness of other systems and approaches, curiosity and a desire to know more. For judges of developing countries, the realization that there is an international community of judges has created the desire to be part of it, not just to discover new perspectives and possibilities, but to gain credibility. Not all courts are considered ready to participate in this informal group; value judgments about independence and quality are very present. This participation has changed judicial attitudes in many cases. For developed countries, it is a matter of cross-fertilization in effect, and the importance of being part of a common enterprise for individual judges.

Nevertheless, one must be realistic and see that political and symbolic factors play a major role in the choices of emerging democracies, especially if they are ancient colonies or countries which have adopted the American constitution as a model. Canada considers that the global economic movement has often ignored cultures, history, religion and the psychology of peoples; it has also contributed to the legalization of humanity, as explained by Alain Pellet of the UN International Law Commission. The Supreme Court of Canada therefore believes in cooperation and in the training of judges, but will not do any jockeying for status.

In Canada, there is little attention to global awareness at the Supreme Court level i.e., whether the world is watching, because there is no desire to be accepted as is the case for emerging democracies. This just does not play out. But for individual judges and courts of appeal, most commentators believe there is an intimidation factor. One must therefore temper any enthusiasm for Canada as a model. Nevertheless, looking at Canada's influence specifically, transjudicialism is not accepted in Canada, not

so much because of the fears that it can be another form of imperialism, or because of the possibility of rejections that will imperil the development of international law, but because the Supreme Court does not generally believe in harmonization of results and wants Canada to chart its own course, nevertheless conscious of the difficulty in having different interpretations of international instruments and universal values. Canada is also committed to recognizing rights for the breach of which there is a remedy; such as environmental, labour, and human rights issues which all call for national action.

CONCLUSION

In conclusion, I would say that internationalization has had a minimal impact on our Court to date. The use of international decisions is largely still limited to commonwealth countries and the USA; the use of international documents is limited because of our internal rules and difficulties created by our federal system. Contacts with foreign judges is limited in the Supreme Court as is internet communication. Nevertheless, there is more interest in international jurisprudence and some effort to be better informed of foreign decisions on matters of mutual interest. Internationalization is a reality.