

The use of foreign law in Irish constitutional adjudication

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Irish Supreme Court – the exclusionary rule – Justices Brian Walsh and William Brennan – *Quinn’s Supermarkets* – retrospective application of declarations of unconstitutionality – *Defrenne v. Sabena* – *A v. Governor of Arbour Hill* – Justice Gerard Hogan – suspended declarations of invalidity – proportionality and the application of *R v. Oakes* – the ‘right to die’ in Ireland and Canada – ‘comparative localist’ analysis in constitutional adjudication – foreign law and ‘theoretical authority’

Rather than mechanically scan all or a scientifically representative sample of the thousands of cases in which foreign law has been cited in Irish constitutional jurisprudence, we consider a dozen or so examples in this Chapter, selected on the basis of factors including a) the apparent influence of foreign law in the case and b) the apparent influence of the case at a notable juncture of constitutional development or in an important domain of constitutional law. For this reason, we focus on judgments of the Supreme Court rather than lower courts. This approach allows for an illuminating, if not rigorously empirical, account of the use of foreign law in Irish constitutional adjudication.

The Chapter is in five sections. The first provides a preliminary overview of the structure and powers of the apex courts in this domain, as well as of some of the relevant provisions of the Constitution of 1937. The next three focus on the role of foreign law in particular cases. Section II addresses three cases from the so-called “activist period”¹ of

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judicial review in Ireland. In this period, the courts were developing new constitutional rights and doctrines, frequently looking to the United States of America for inspiration. The leading Irish Jurist of this period, Mr Justice Brian Walsh, was in regular correspondence with Justice William Brennan of the US Supreme Court. They shared their thoughts on the development of constitutional law as well as specific cases, increasing the levels of cross-citation between the two courts.

Section III considers a discrete area of judicial decision-making that may be particularly apt for the consideration of foreign law: remedies and the effect of findings of constitutional invalidity. In this domain, the Irish courts have had particular regard to foreign law both in resolving difficult cases about the effect of a declaration of unconstitutionality and in considering whether to introduce suspended declarations of unconstitutionality.

Section IV turns to the embrace by Irish judges of the proportionality framework in rights adjudication from the 1990s. It considers in particular how Irish judges have applied the various limbs of the proportionality test so differently from Canadian judges, despite their routinely reciting the Canadian *R v. Oakes* version of the test word-for-word.² This difference is particularly apparent in the judicial consideration of blanket bans on assisted dying. This section provides a salutary lesson: even where judges are citing foreign law, they may not truly be applying that foreign law.

Section V concludes, reflecting on the way in which Irish judges use foreign law and relating this to some of the debates in the global comparative literature.

I. Constitutional rights and judicial review in Ireland: an overview

Article 34.3.2° of the Irish Constitution provides that “the jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of this Constitution...” The supremacy that Irish judges enjoy in respect of legislative acts thus has a basis in the constitutional text. The Supreme Court is the final court of appeal at the apex of a single court structure: constitutional cases thus form a subset of the

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¹ For this periodization of Irish constitutional law, see Oran Doyle, *THE CONSTITUTION OF IRELAND: A CONTEXTUAL ANALYSIS* (2018), chapter 9.

² *R v. Oakes*, [1986] 1 S.C.R. 103.

Court's broader workload resolving issues of private law and public law alike. The common law style of reasoning, developed primarily in the domain of private law, is therefore apparent in constitutional cases also, which involve written judgments referring to precedent cases that previously interpreted the relevant constitutional provisions.

The Supreme Court can consider the constitutionality of legislation in a form of pre-enactment review where the President refers legislation prior to signing it. However, only 14 such presidential references have been made since the enactment of the Constitution in 1937. Far more common, therefore, is the Court's consideration of constitutional issues in the context of ordinary litigation between parties. In this context, the Supreme Court can hear appeals from the High Court and, since 2014, from an intermediate Court of Appeal. The Supreme Court's appellate jurisdiction is now limited to cases which, in its view, involve "a matter of general public importance" or where it considers an appeal to be necessary "in the interests of justice."³ Constitutional amendments in 1940 and 2013 first introduced and then removed a requirement for the Supreme Court to deliver only a single judgment when considering the constitutional validity of legislation, a requirement which now only applies in respect of Presidential references. For a significant portion of constitutional cases—those between 1940 and 2013 involving a direct challenge to the constitutionality of a law—the Court's judgments represent a consensus of the judges, which led perhaps to less discursive judgments and analysis of case law.

The number of judges on the Supreme Court is prescribed by law rather than by the Constitution: under the latest legislative provision it is to comprise a Chief Justice and "not more than nine ordinary members," although at the time of writing there are only seven ordinary members. The Supreme Court normally sits in divisions of three or five, and occasionally of seven, as determined by the Chief Justice.

Constitutional challenges to legislation generally rely on the rights provisions of the Constitution. These comprise Article 38 (trial in due course of law) and Articles 40-44. Article 40 protects personal rights: rights to equality, life, liberty, inviolability of the dwelling, and the freedoms of expression, assembly and association. It contains the

³ Irish Const. art. 34.5.3°.

formula of words which – whether by accident or by design on the part of the drafters⁴ – prompted judges to establish the “unenumerated rights doctrine” whereby they identify rights as enjoying constitutional protection despite not being expressly provided in the text itself.⁵ Article 41 protects the family; 42 provides for education and children’s rights; 43 recognises a right to private property, while 44 protects rights to religion and conscience.

Some parts of these provisions are drafted in a manner that suggests an absolutist conception of rights of the kind associated with natural rights thinking – and one not especially in harmony with the proportionality framework: the family, for instance, is described in Article 41 as a “moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law,” while Article 43 holds that the State “acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.”⁶ Other parts of the rights provisions clash with that conception. The personal rights in Article 40.3 are protected only against *unjust* attack. The free expression, assembly and association clause protects those rights “subject to public order and morality.”⁷ And Article 43 goes on to allow property rights to be delimited in the *interests of the common good*. The courts have not placed much emphasis on the different language used by different constitutional provisions to authorise legislative restriction of constitutional rights. This issue attracted little judicial attention until the 1990s, when the courts began to elaborate more structured approaches to test the legitimacy of legislative restrictions on constitutional rights.

As in other jurisdictions, the approach of judges to interpreting these rights, and relatedly to interpreting the extent of their own role and power within the constitutional system, evolves over time. The simplest account of it is that from the enactment of the Constitution in 1937 to around 1965 (or indeed from independence in 1922, under the Free State Constitution, through 1937 and up to around 1965), Irish

⁴ See Gerard Hogan, *Unenumerated Personal Rights: The Legacy of Ryan v. Attorney General*, in JUDGES, POLITICS AND THE IRISH CONSTITUTION 49 (Laura Cahillane, James Gallen and Tom Hickey eds, 2017).

⁵ *Id.*, at 52.

⁶ See Eoin Daly and Tom Hickey, *The Constitution and Judicial Power: Theoretical Perspectives*, in JUDICIAL POWER IN IRELAND 220, 221 (Eoin Carolan ed, 2018)

⁷ Irish Const. art. 40.6.1°.

judges approached these matters with restraint. From 1965 through 2000 – and particularly in the 70s and 80s – Irish judges tended towards a more expansive approach.⁸ This is seen as having begun with the High Court judgment in *Ryan v. Attorney General*,⁹ when Kenny J initiated the unenumerated rights doctrine by finding that Article 40 impliedly protected a right to bodily integrity, as had been argued by counsel for the plaintiff who objected to legislation providing for mandatory fluoridation of the public water supply. *Quinn's Supermarkets v. Attorney General*¹⁰ and *McGee v. Attorney General*¹¹ are among the rulings that followed in that expansive vein, in these instances informed in part by foreign law – particularly US law in that period – as we consider below. The judges then imported the proportionality test in the mid-1990s, which broadly reflected a shift on the part of the judges around the turn of the century to a more technocratic and incremental approach to rights adjudication. Although they occasionally trammel the means used by the elected organs of government, Irish judges are not so inclined these days to proscribe the ends those organs pursue.

II. Foreign law in the expansionist period

People (Attorney General) v. O'Brien concerned the admissibility of evidence in criminal trials where that evidence had been procured by illegal means.¹² Gerald O'Brien had been convicted of stealing articles of clothing that, in the course of the police investigation, had been found at his home at 118 Captain's Road in Crumlin, Dublin. The address on the warrant that had been issued for the search was wrong due to an apparent oversight: it was for 118 Cashel Road in Crumlin. The warrant was thus invalid on a technicality. O'Brien appealed against his conviction on the basis that the evidence leading to it had been obtained in breach of Article 40.5, whereby the dwelling is "inviolable" and "shall not be forcibly entered save in accordance with law." Although all five of the Supreme Court judges agreed that the evidence in the particular case should not be excluded, they split 3-2 on whether to adopt an "exclusionary rule" for improperly obtained evidence, as prevailed in US constitutional law. Three of them preferred not to do so, instead adopting a traditional but evolving common law approach which afforded the trial judge discretion as to whether to admit such evidence. Two judges, emphasizing the breach of constitutional rights and not merely legal rights, preferred a rule excluding evidence

⁸ See generally Doyle, *supra* note 1.

⁹ *Ryan v. Attorney General* [1965] I.R. 294. See Hogan, *supra* note 4.

¹⁰ *Quinn's Supermarkets v. Attorney General* [1972] I.R. 1.

¹¹ *McGee v. Attorney General* [1974] I.R. 284.

¹² *People (Attorney General) v. O'Brien* [1965] I.R. 142.

procured as a result of a “deliberate and conscious” violation of the accused person’s constitutional rights, unless “extraordinary excusing circumstances” warranted its.

Kingsmill Moore J’s majority judgment in *O’Brien* ran to a fraction over fourteen pages of the Irish Reports, with just over eleven of them devoted entirely to exposition and analysis of English, Scottish and US caselaw. He began by considering half a dozen English cases, emphasizing in particular the principles elaborated in the 1955 case *Kuruma v. The Queen*.¹³ Essentially the test preferred there was whether the evidence was relevant or “logically probative” – that it might have been obtained illegally was not generally important. Of the Scottish cases considered, most attention was given to *Lawrie v. Muir* from 1950, which – in contrast to the English position – ruled that while “an irregularity in the obtaining of evidence does not *necessarily* make that evidence inadmissible,” such irregularities “require to be excused” and “...are not lightly to be condoned.”¹⁴ The US cases elaborating a strict exclusionary rule were then canvassed, with reference to dicta in various cases suggesting that it was “better that a guilty individual should escape punishment than that a Court of justice should put aside a vital fundamental principle of the law in order to secure his conviction.”¹⁵ Of the three, Kingsmill Moore J opted for the Scottish position – whereby trial judges would have discretion as to whether an illegality might be excusable and the evidence thus admissible – in large part in light of what he saw as how poorly the other two had fared in some of the cases he had considered. It thus came to be the position in Irish constitutional law.

Walsh J employed a similar methodology to Kingsmill Moore J, although he did not consider the foreign law quite as comprehensively in his shorter judgment. Walsh J simply preferred the US approach and, as it happens, Walsh J’s preferred approach was adopted in subsequent caselaw on the matter.¹⁶ At the time of *O’Brien*, Walsh J was a relatively recent appointment to the Court, while Kingsmill Moore J was close to the end of his tenure. Walsh J subsequently became very influential: his judgments were cited in

¹³ *Kuruma v. The Queen* [1955] A.C. 197.

¹⁴ *Lawrie v. Muir* [1950] S.C.J. 19.

¹⁵ *Youman v. Commonwealth* (1920) 189 K.Y 152, cited in *People (Attorney General) v. O’Brien*, *supra* note 12, at 158.

¹⁶ See Yvonne Daly, *Overruling the protectionist exclusionary rule: DPP v. JC*, 19 Int. J. Ev. & Pr. 270 (2015).

nearly every significant constitutional case through the 80s and 90s¹⁷ and, along with Ó Dálaigh CJ and Henchy J, he is seen as having driven the “liberal” and “activist” orientation of the Court in the period of his tenure.¹⁸ He was also among the judges who routinely looked to foreign law – and particularly to US law – when grappling with constitutional conundrums. Recent scholarship shows that Walsh began a regular letter correspondence with Justice William Brennan of the US Supreme Court – himself an important figure on the interventionist US Supreme Court of that period – beginning shortly after the two met in Ireland in 1963, and continuing up until Brennan’s death in 1997.¹⁹ This included their exchanging of written judgments²⁰ that one might deem to be of potential interest to the other in the context of a given case, as well as accompanying commentary in some instances.²¹ Indeed Brennan sent Walsh copies of three then recent US judgments on the exclusionary rule as the Irish Court was considering *O’Brien*, each of which Walsh analyzed in the course of the judgment in which he ultimately endorsed the US position.²²

These two *O’Brien* judgments illustrate how foreign case law might be used at an early stage of constitutional development. It was a case in which the importance of abstract principle (or, as some legal theorists would argue, naked political preference) was particularly pronounced: there was little or no binding law on the question to even try to mechanically apply. Rather than engage in unbridled assessment of principles of political morality, each of the judges considered the possibilities suggested by the foreign law, adopting the approach that best appealed, apparently in light of abstract principle and the overall structure of the Irish constitutional system. Indeed Kingsmill Moore J expressly suggested a methodology along these lines. Early on in his judgment he commented that “there would appear to be no Irish decision on the question binding on this Court” and that “consideration may properly be given to the opinions expressed in

¹⁷ Aileen Kavanagh, *The Irish Constitution at 75 Years: Natural Law, Christian Values, and the Ideal of Justice* 48 *Ir. Jur.* 70, 75 (2012).

¹⁸ See Ruadhán Mac Cormaic, *THE SUPREME COURT*, 70-90 (2016).

¹⁹ *Id.*, at 83.

²⁰ In fact Brennan committed in one early letter to sending ‘slip opinions’ of every US Supreme Court judgment to Walsh once it became available. See *Id.*

²¹ That the dialogue went both ways is illustrated by the influence of *State (Sheerin) v. Kennedy* [1966] I.R. 379, relating to the due process rights of children, in *In re Gault*, 381 U.S. 1 (1967), a US case dealing with the same question. Brennan commented to Walsh that he had read *Sheerin* with “fascinated interest,” and that he had passed it onto Justice Abe Fortas who wrote the majority judgment, with which Justice Brennan concurred. Justice Fortas cited the Irish case in his judgment. See *Id.* at 138.

²² *Id.*, at 83.

Courts of other jurisdictions administering a similar common law..." He insisted though that "...ultimately our decision must rest on our own view of the principles involved."²³

Walsh J's judgment in *Quinn's Supermarkets v. Attorney General* remains among the main judgments on religious freedom in Irish constitutional law nearly half a century later.²⁴ The judgment is notable in the present context for the extent to which it draws on foreign law, but also insofar as the case had so much in common with, and yet, we suggest, was different in such an important way from the *Sherbert v. Verner* case from 1963 that Justices Brennan and Walsh discussed in their correspondence at the relevant time.²⁵ Having been prosecuted under the Hours of Trading Act 1938 which proscribed the sale of meat in the evening, Quinn's Supermarkets sought to escape punishment by challenging the constitutionality of a ministerial order issued on foot of the Act on the basis that an exemption it provided to Jewish kosher shops offended the apparently rigid religious non-discrimination provision in Article 44.2.3°. That is, kosher butchers enjoyed an exemption allowing them to sell meat in the evenings to account for the fact that their Sabbath ran from sundown on Fridays through sundown on Saturdays. The idea was that the exemption facilitated observant Jews who, in the period before the widespread availability of refrigerators, wanted to buy meat for dinner on Saturday evening and/or Sunday (i.e. the exemption meant they could buy the meat on Saturday evening, after sundown).²⁶ The fact that it compensated kosher butchers for the commercial disadvantage they suffered compared with non-kosher butchers, particularly given that Saturday was the main market day in Ireland, was presumably an additional factor.

Quinn's Supermarkets was certainly reminiscent of Adel Sherbert's case. Sherbert, a Seventh Day Adventist, had been fired from her factory job in South Carolina on foot of her religion-inspired refusal to work on Saturdays. She was subsequently refused unemployment benefit – in line with the statute which Justice William Brennan's majority judgment ultimately invalidated – on the ground that she refused to accept

²³ In his concluding lines he essentially repeats this methodological point noting that foreign cases were not binding before insisting that "the problem must be approached on a basis of principle rather than authority." See *People (Attorney General) v. O'Brien*, *supra* note 12, at 159.

²⁴ *Quinn's Supermarkets v. Attorney General*, *supra* note 10. See Eoin Daly, *RELIGION, LAW AND THE IRISH STATE*, 85-98 (2016).

²⁵ *Sherbert v. Verner*, 374 U.S. 398 (1963).

²⁶ *Quinn's Supermarkets v. Attorney General*, *supra* note 10, at 26 (per Walsh J.).

available work “without good cause.” In Brennan’s analysis the statute forced Sherbert to choose between following her religious commitments and forfeiting unemployment benefit, on the one hand, and abandoning a pivotal religious commitment in order to accept work, on the other. The imposition by government of such a choice “puts the same kind of burden upon the free exercise of religion as would a fine imposed against the appellant for her Saturday worship.”²⁷ He thus concluded that, absent a “compelling state interest,” exemptions from facially neutral laws for religious objectors were required by the clause guaranteeing the free exercise of religion, where those laws placed a “substantial burden” on the exercise of a citizen’s religious beliefs.

It would be misleading to suggest that Walsh J relied solely on *Sherbert* in reaching his conclusion for the Irish Supreme Court in *Quinn’s Supermarkets*. While Brennan J’s judgment in that case is analyzed in some detail and mentioned several times, Walsh J also gives much attention to four other US cases of the period. In fact he dedicates three pages of his seventeen in total entirely to an excerpt from Brennan J’s judgment in *Abington School District v. Schempp*, also from 1963, in which Brennan had considered the puzzles around “defining the boundary...which separates the secular from the sectarian” in the context of the US free exercise and establishment clauses.²⁸ It is these dicta, which Walsh J deems “very important to the question at issue in this case,” that appears to inform his holding that “primary aim of Article 44” of the Irish Constitution “was to secure and guarantee freedom of conscience and the free profession and practice of religion...” and that what might read like a strict non-discrimination subsection accordingly did not preclude discrimination where it might be required in order to facilitate free profession and practice. This in turn led to the most radical element of Walsh J’s *Quinn’s Supermarkets* judgment, and one that goes a good deal beyond, and surely conflicts with, the US position: that *any* law that has the effect of burdening a religious practice is invalid in the absence of an exemption unburdening the religious practice.²⁹ Ultimately, however, Walsh J held that the measure was unconstitutional because, by allowing Kosher butcher shops stay open late every night, it went further than was necessary to enable Jewish people observe the requirements of their faith.

²⁷ *Sherbert v. Verner*, *supra* note 25, at 404.

²⁸ *Abington School District v. Schempp* 374 U.S. 203 (1963), at 231.

²⁹ *Quinn’s Supermarkets v. Attorney General*, *supra* note 10, at 24 (per Walsh J.).

The full effects of that holding have probably not been felt insofar as no Irish legislation has ever actually been invalidated for failing to make such an exemption.³⁰ It is the case, however – and apparently on the basis of this interpretation – that Article 44 is routinely cited in support of legislation that does make such exemptions, and also in defense of more general arrangements that appear to discriminate in more obviously dubious ways, for example in respect of the control of the Catholic church over public schooling in Ireland.³¹ The suggestion tends to be that Irish constitutional law takes religious *freedom* to trump religious *non-discrimination*, or at least that the legislature may legislate to protect religious freedom even if this involves religious discrimination.³²

The *Quinn's Supermarkets* case might thus represent a less clinical use of foreign law in an area of Irish constitutional law that, like in *O'Brien*, had not been considered by the Irish courts previously. We suggest that this might be attributable to an effort on the part of Irish judges to shoehorn what they saw as an attractive constitutional principle into an inapposite set of facts. That is, the burdens imposed on the respective religious minorities in the absence of an exemption were not fundamentally comparable. For observant Jews in Ireland, the arrangements would not have prevented the exercise of any faith-based imperative: there was no claim that an observant Jew was under any faith-based obligation to eat meat on Sundays or indeed on any day of the week, and in any case, observant Jews could freely buy meat on Sunday mornings without any exemption for kosher butchers. Neither was there any deprivation of a basic good such as the opportunity to work or pursue education. Thus the principle was imported with the “substantial burden” element allowed to fade, presumably because no such burden was present in the Irish case. This might to some extent explain the fact that the principle subsequently developed in the new setting to a point where it significantly departs from the original principle, and conflicts with its underlying purpose.

A year or so afterwards, Mary McGee, a 28 year old married mother of four who had been advised that a condition she had was such that another pregnancy might put her

³⁰ The Supreme Court in fact subtly moderated the *Quinn's Supermarkets* position some 25 years later, in *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 I.R. 321, holding that it was constitutionally permissible – but not constitutionally required – for the legislature to discriminate on grounds of religious profession belief or status insofar as this might be necessary to give life and reality to the guarantee of the free profession and practice of religion.

³¹ See Eoin Daly and Tom Hickey, *Religious Freedom and the Right to Discriminate in the School Admissions Context: A Neorepublican Critique*, 31 *Leg. Stud.* 615, 618-623 (2011).

³² *Id.*, at 628-635.

life in jeopardy, challenged section 17 of the Criminal Law (Amendment Act) 1935 which banned the “sale” and “importation” of contraceptives.³³ Having lost in the High Court, McGee was successful at the Supreme Court by a 4-1 majority, with three of the judges ruling that the provision violated what they identified as an unenumerated right to marital privacy under Article 40, and the fourth, Walsh J, that it violated the “inalienable and imprescriptible” family rights under Article 41.

Walsh J’s was subsequently the most widely-cited judgment, and it may be the most widely-discussed judgment in academic scholarship on Irish public law. This is so mainly because of the dramatic language Walsh uses, and its apparently radical implications for the meaning of rights and the role of judges – matters which go beyond the present scope. He did consider then recent US caselaw that the *McGee* facts called to mind: *Griswold v. Connecticut* from 1965,³⁴ *Poe v. Ullman* (1961)³⁵ and *Eisenstadt v. Baird* (1972).³⁶ But he presented them in a paragraph at the tail-end of his fifteen page judgment, commenting that his “reason for not referring to them is not because I did not find them helpful or relevant, which indeed they were, but because I found it unnecessary to rely upon any of the dicta in those cases to support the views which I have expressed in this judgment.”³⁷

Mr Justice Seamus Henchy’s main judgment in *McGee* gives a more prominent place to those US cases. His overall conclusion – based on an expansive reading of the meaning of Articles 40 and 41 on personal and family rights – is clear by the end of the fourth of a seven-page judgment, by which stage he had not yet considered the foreign law. But the fifth and sixth pages are devoted to *Griswold’s Case* in particular, and to what he sees as its central rationale, as expressed in Goldberg J’s concurring judgment in that case: that the state interest in safeguarding marital fidelity could be served “by a more discriminately tailored statute” which, unlike the statute at issue in *Griswold* – and indeed in *McGee* as Henchy J saw it – did not “sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples.”³⁸ Henchy J then went on to reject what looks like fairly spurious treatment of

³³ *McGee v. Attorney General*, *supra* note 11.

³⁴ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

³⁵ *Poe v. Ullman*, 367 U.S. 497 (1961).

³⁶ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

³⁷ [*McGee v. Attorney General*, *supra* note 11, at 319.

³⁸ *Id.*, at 327, quoting Goldberg J. in *Griswold v. Connecticut*, *supra* note 34, at 498.

foreign law in both the High Court and the dissenting Supreme Court judgment in *McGee*. Those judges had dismissed the relevance of the US cases on the basis that the legislation in those instances banned the “use” of contraceptives whereas the Irish legislation banned merely its “sale” and its “importation.” The implication was thus that foreign law had to be precisely on point before it could be taken as persuasive, which Henchy J saw as implausible.

Griffin J agrees with Henchy J on that point, and indeed generally. The manner in which he considers the foreign law though – particularly Douglas J’s dicta in *Griswold* – suggests that it plays a decisive role, whereas for Walsh and even Henchy it merely provides a kind of *ex post facto* support for the positions they take primarily on the basis of their other reasoning. That might be more a case of where Walsh and Henchy JJ had presented the foreign law in their judgments, however. That is, that the essential rationale of the foreign law had had a more telling effect in their reasoning than the presentation of their reasoning suggests. It warrants mention, incidentally, that the expansion of the logic of *Griswold* into the domain of abortion in *Roe v. Wade* apparently influenced an anti-abortion movement in Ireland to mobilize and to lobby government for a constitutional amendment concerned with preventing a similar expansion from the logic of *McGee*.³⁹ This led to the approval of Ireland’s eighth amendment guaranteeing the right to life of the “unborn” in 1983, which was repealed in the summer of 2018.

III. Foreign law and the effects of findings of invalidity

Understandably, the text of the Irish Constitution does not make the effect of a finding of unconstitutionality clear in every conceivable circumstance. Although the quandary was considered at the periphery of a few earlier cases, it first came to prominence in *Murphy v. Attorney General*, reported in 1982.⁴⁰ In an initial ruling handed down in January of 1980, the Supreme Court had found a breach of Article 41 arising from provisions of the Income Tax Act 1967 that imposed a higher tax burden on the husband and wife applicants than would have applied to two single persons with identical incomes. (As it happens, the judges dismissed the relevance of US, German and Cypriot law in respect of the applicants’ unsuccessful Article 40/equality argument in a manner reminiscent of that dismissal of foreign law by the High Court and dissenting Supreme Court judge in

³⁹ See Mac Cormaic, *supra* note 18, at Chapter 14.

⁴⁰ *Murphy v. Attorney General* [1982] 11.R. 241.

*McGee*⁴¹). Following that initial ruling, the Court reconvened to consider two further questions. First, whether the declaration of unconstitutionality would operate retrospectively or prospectively: that is, whether the Court's ruling meant that the provisions of the Income Tax Act 1967 had been void from the moment of its enactment in 1967, or whether it was void merely from when the Court had declared it inconsistent with the Constitution in January 1980. Second, if it was to be the former, whether all of the "tens of thousands of married couples"⁴² that had had income deducted on the basis of the unconstitutional provisions could recover that income from the State, or whether it could only be the Murphys and, if only the Murphys, if it could be for income deducted from the date they had married in 1975, or merely from the moment that they had initiated their claim in the courts in 1978.

On the first of those questions (the retrospectivity question), foreign law had little influence. By a 4-1 majority, the Court ruled that under Irish constitutional law declarations of unconstitutionality operate retrospectively rather than prospectively, with each of the four written judgments relying essentially on analysis of the text of what they saw as the relevant provisions of the Irish Constitution. For the majority, the Article 15.4.1° prohibition on parliament enacting any law "which is in any respect repugnant to this Constitution" and the Article 15.4.2° assertion that "every law" enacted by parliament that is "repugnant" to the Constitution "*shall...be* invalid" together meant that legislation later found to be unconstitutional has been invalid from the beginning.⁴³ For Chief Justice Tom O'Higgins in dissent, those provisions should be read in conjunction with others, including those in Article 25.4.1° which hold that a bill "*shall become and be* law as on and from the day on which it is signed by the President..." That findings of unconstitutionality would apply retrospectively would be to bring those two elements of the constitutional text into conflict, he suggested, whereas their applying only prospectively would be to harmonize them.⁴⁴

Although counsel for the State had urged the judges to adopt the US position on this retrospectivity question, the dissenting judge agreed with his colleagues in the majority that it was not persuasive in this instance on the ground that the power of judicial

⁴¹ *Id.*, at 284-285.

⁴² *Id.*, at 317.

⁴³ *Id.*, at 308.

⁴⁴ *Id.*, at 300.

review had a fundamentally different basis in Ireland. That is, the fact that the US judges had identified the power of judicial review over legislation as implicit in their Constitution, whereas in the Irish case the power was explicit in the constitutional text, meant that the discretion that US judges had similarly identified for themselves with respect to whether they might apply their own rulings prospectively could not be simply imported by Irish judges.⁴⁵

It was on the second question then that foreign law appears to have played a critical, and perhaps decisive, role in the *Murphy* case. Having ruled definitively in favour of retrospective application, the majority effectively limits the damage to State coffers by finding that, in Henchy J's words, it is "not a universal rule that what has been done in pursuance of a law which has been held to have been invalid for constitutional or other reasons will necessarily give a good cause of action."⁴⁶ Henchy J cites ten cases in support of this claim of which nine are foreign.⁴⁷ This includes the US jurisprudence that he and his colleagues had deemed inapplicable to the prior question of retrospective/prospective application. Henchy J notes the shift from a kind of absolutist position in *Norton v. Shelby County*⁴⁸ from the late 19th century – whereby any arrangements made on foot of what turned out to be a void statute could not have any legal standing – towards a more common sense approach in cases such as *Great Northern Railway Company v. Sunburst Oil and Refining Company*⁴⁹ and *Linkletter v. Walker*,⁵⁰ whereby US judges had given due regard to the fact that individuals had made arrangements on foot of what they and others had understood at the relevant time to be valid law.

⁴⁵ *Id*, at 294 (O'Higgins CJ), at 313 (Henchy J), at 327 (Griffin J), and at 333 (Kenny J). It is worth noting that the dissenting judge Chief Justice Tom O'Higgins – who preferred the position on the question that happened to be the US position – pointed out that while he "[felt] bound to consider this matter on the basis of our own Constitution and in light of its particular provisions," he was nevertheless "noting the American precedent," at 294. This characterization by him of his use of foreign law corresponds with the apparent logic of his reasoning: that he was moved mainly what the provisions of constitutional text suggested to him and that he was happy that that outcome happened both to appeal to him in principle and to correspond with the US position.

⁴⁶ *Id*, at 314 (Henchy J). On this element, it was Henchy J's judgment that was decisive, with Griffin J suggesting simply that "the egg cannot be unscrambled" and adding that he had "had the advantage of reading in advance of the judgment of Mr. Justice Henchy and I agree with his conclusions and the reasons which he has stated therefor," at 331.

⁴⁷ *Id*, at 314-324. He also cites a New Zealand statute on restitution, as well as excerpts English, US and New Zealand textbooks on related matters. See in particular at 324.

⁴⁸ *Norton v. Shelby County*, 118 U.S. 425 (1886).

⁴⁹ *Great Northern Railway Company v. Sunburst Oil and Refining Company*, 287 U.S. 358 (1932).

⁵⁰ *Linkletter v. Walker*, 381 U.S. 618 (1965).

It also includes *Defrenne v. Sabena*, a 1976 judgment of the then EEC Court of Justice.⁵¹ There the judges had ruled that even though under Article 119 of the Treaty of the EEC the principle of equal pay for equal work had had horizontal direct effect from the outset (i.e. it was enforceable not merely between individuals and their national governments, but also between private parties such as between Gabrielle Defrenne and the airline company for which she had worked), that only the applicant air hostess and other workers who had already made equivalent claims could rely on the principle to support claims concerning pay periods prior to the date of the judgment.⁵² In Henchy J's analysis, the EEC Court had thus attempted to reconcile the concern for the supremacy of Community law with concerns that full retrospective application "would produce a cascade of claims that could swamp many private employers and do irreparable harm to national economies."⁵³

It could be that it was a principle relating to legitimate expectations that ultimately did the trick for the Supreme Court judges in *Murphy*, or simply some kind of intuitive sense of the best outcome, all things considered. But the manner in which Henchy J in particular presents his judgment suggests that it was that principle *as it has been elaborated in foreign law* that was decisive – although he never says that openly in the judgment.⁵⁴ In the end, just as in *Defrenne*, it was only the Murphys that could recover the money and, at that, only from the moment that the legislation had first been effectively impugned, i.e. when the Murphys initially brought their claim in 1978.

When the question re-emerged in *A v. Governor of Arbour Hill*, reported in 2006, Chief Justice John Murray handed down a judgment in which foreign law was again influential, and indeed got probably its most systematic consideration in Irish constitutional jurisprudence.⁵⁵ In June 2004, Mr. A had been convicted of unlawful carnal knowledge in respect of a girl who was under the age of consent, contrary to section 1(1) of the

⁵¹ *Defrenne v. Sabena*, Case 43/75 ECR 455 (1976).

⁵² *Murphy v. Attorney General*, *supra* note 40, at 323.

⁵³ *Id.*, at 322.

⁵⁴ Although he recognized a range of factors that gave "a distinctiveness" to *Defrenne* which he suggested may "limit its persuasiveness as a precedent" for *Murphy*, he nevertheless took it to "stand as a cogent example of the principle that what has been done or left undone under a constitutionally invalid law may, in certain events such as the evolution of a set of circumstances which it would be impossible, or unjust, or contrary to the common good, to attempt to reverse or undo, have to be left beyond the reach of full redressive legal proceedings..." *Id.*, at 323-324.

⁵⁵ *A v. Governor of Arbour Hill* [2006] 4 I.R. 88.

Criminal Law (Amendment) Act 1935. Two years later, in May 2006, the Supreme Court had ruled in a case called *CC v. Ireland*⁵⁶ that that particular statutory provision was unconstitutional insofar as it precluded a defence being raised by an accused person to the effect that that accused had had reasonable grounds for believing that the complainant was over the age of consent. Although Mr. A at no stage claimed that he had been under any misapprehension as to the age of his victim (who was a 13 year-old school friend of his own daughter), the High Court agreed to his post-CC application for release on the ground that he had been convicted of an offence which – on the basis of the *Murphy* ruling on the retrospective effect of findings of unconstitutionality – had not existed at the time of his arrest or conviction. The expedited Supreme Court hearing, which took place before five judges and against the backdrop of a storm of political controversy, resulted in a unanimous ruling to order the re-arrest of Mr. A.

While considerations of foreign law are interspersed generally in Murray CJ's thirty-five page judgment, ten of those pages are devoted entirely to foreign law, with individual sections considering i) "retroactivity generally in the common law system," and then retrospectivity in ii) the European Union, iii) under the European Convention on Human Rights, and then in iii) India, iv) the United States and v) Canada. We need not go through the caselaw in detail, because the principles elaborated essentially correspond with the majority position in *Murphy*.⁵⁷ So far as methodology is concerned, he appears to embrace something along the lines of those in the judgments already considered in this Chapter. Armed with various rulings including that in *Murphy*, he had more in the way of domestic constitutional precedent to follow than had the judges in *O'Brien* and *Quinn's Supermarkets*, for example. He begins with some light reference to that jurisprudence and also by emphasizing those principles around an ordered society and legal finality that he took to be embraced by the Constitution understood in "holistic" lens.⁵⁸ It appears from the presentation of the judgment, and indeed arguably from his own dicta, that these elements were decisive so far as the outcome of *A* was concerned, and thus that the foreign law safari merely "reinforced" the principle which he saw as a

⁵⁶ *CC v. Ireland* [2006] 4 I.R. 1.

⁵⁷ He repeatedly emphasizes what he calls "transcendental constitutional reasons" (which include interests such as "the common good in an ordered society, legal certainty and the need to avoid...incoherence and injustice") that satisfy him that a declaration of constitutional invalidity "should not in principle have retrospective effect so as to necessarily render void cases previously and finally decided and determined by courts..." *A v. Governor of Arbour Hill*, *supra* note 55, at 142.

⁵⁸ *Id.*, at 113.

principle of Irish constitutional law in the first place.⁵⁹ It is worth noting that he makes a point of emphasizing that it was the foreign law in systems that, like in Ireland's, apply such declarations of unconstitutionality retrospectively that "particularly" reinforced his view on the appropriate outcome in *A*.⁶⁰ Thus he suggested that the Indian and ECJ jurisprudence he considered was more important in his reasoning process than that from the US, for example.⁶¹

The noted constitutional scholar and later judge of the Court of Appeal and Advocate General at the Court of Justice of the European Union, Gerard Hogan, had referred extensively to Canadian jurisprudence⁶² on the effects of declarations of unconstitutionality in his submissions to the Supreme Court while acting for the State in *A v. Arbour Hill*.⁶³ This may have influenced Ms Justice Susan Denham (as she was at that stage) in engaging with that jurisprudence as carefully as she did in her concurring judgment in that case. Denham J considered the concept of "suspended declarations of invalidity" in particular, elaborating their operation in the Canadian Charter context while approving what she saw as their dialogical rationale.⁶⁴ Although her comments were *obiter* as *A* did not call for a "suspended declaration," she approved their importation into the Irish setting, dismissing any concern around a conflict with the Article 15.4.2° supremacy clause on the grounds that "the declaration of invalidity of a law and any order relating to the application of that declaration are two quite separate matters" and that "the inherent jurisdiction of the superior courts to administer justice is applicable to the decision on both issues."⁶⁵

⁵⁹ *Id.*, at 142.

⁶⁰ *Id.*

⁶¹ Indeed he noted in particular the "substantial correspondence" between the Article 15.4 provisions of the Irish Constitution mentioned earlier – as well as Article 50.1 which concerns the position with respect to pre-1937 legislation such as the legislation at issue in *A* – and Articles 13.1 and 13.2 of the Indian Constitution. He was also reassured by the fact that despite the Indian Constitution's being "more explicit as to the void nature" of invalidated legislation Indian judges were happy to limit the retrospective effect of findings of invalidity for the same kinds of transcendental reasons as applied in *A*. *Id.*, at 122.

⁶² *R. v. Bain*, [1992] 1 S.C.R. 91; *Schachter v. Canada* [1992] 2 S.C.R. 679 and others in what has become a long line of Canadian cases.

⁶³ *A v. Governor of Arbour Hill*, *supra* note 55, at 100, 104-105.

⁶⁴ She commented that it "enables dialogue in the community as to the best way to proceed" and that it "encourages...the democratic process of consultation..." *Id.*, at 153.

⁶⁵ *Id.* She also noted the similarity of the supremacy clause in Section 52(1) of the Canadian Charter, and that it had been no obstacle for Canadian judges on this front.

Following his appointment to the High Court shortly afterwards, Hogan J deployed the suspended declaration concept in cases including two from 2011: *Kinsella v. Governor of Mountjoy Prison*⁶⁶ and *G v. District Judge Murphy*,⁶⁷ although without express reference to foreign law or even to Denham J's dicta in *A*. Then 2017 saw something of a blitz in this regard, spearheaded by the decision of a unanimous seven-judge Supreme Court in *NVH v. Minister for Justice*.⁶⁸ This was a challenge brought by a Burmese man who had been waiting eight years for his asylum application to process to section 9(4) of the Refugee Act 1996, which bans asylum seekers from working. Writing the sole judgment for the Court, Mr Justice Donal O'Donnell suggests that there are different ways in which the constitutional infirmity could be addressed: that such a ban could pass constitutional muster if there was a legal requirement that an asylum application would be processed within a specified time period, for instance, or if it were softened after a specified time period. Because he saw these options to be "first and foremost a matter for executive and legislative judgement," he held that "in principle" he "*would be prepared to hold* that the impugned provision was contrary to the constitutional right to seek employment," but adjourned the matter for a period of six months after which he would invite the parties to make submissions on the form of the order "in the light of circumstances then obtaining."⁶⁹

The judgment was greeted with a degree of excitement in the academic community, partly because the identification of an implied right to seek employment seemed to revive the unenumerated rights doctrine that had lain dormant since the turn of the century, and partly because of the apparently radical remedy adopted by the judges.⁷⁰ This was not a quite a suspended declaration in the Canadian format but it was close to it: the judges in *NVH* all but suggested to the political actors that they might resolve the matter as they saw fit within the six month period. If the Article 15.4.2° supremacy clause had been tricky for the judges in *Murphy* and *A*, this remedy went a good deal further: it was to effectively preserve into the future and to continue to enforce a law that the judges had all but held to be unconstitutional, whereas the earlier judgments

⁶⁶ *Kinsella v. Governor of Mountjoy Prison* I.E.H.C. 235 [2011].

⁶⁷ *G v. District Judge Murphy* I.E.H.C. 455 [2011].

⁶⁸ *NVH v. Minister for Justice* I.E.S.C. 82 [2017].

⁶⁹ *Id.*, at para. 21.

⁷⁰ See Conor O'Mahony, *Unenumerated Rights: Possible Future Directions After NHV*, Dub. Uni. L. J. (f'coming, 2018); Eoin Carolan, *A 'Dialogue-Oriented Departure' in Constitutional Remedies? The Implications of NHV v. Minister for Justice for Inter-Branch Roles and Relationships*, 40 Dub. Uni. L. J.

merely preserved and continued to enforce undertakings made in the past on foot of legislation that had later been found to be unconstitutional.⁷¹ If the Denham J *obiter dicta* from *A* addressed that concern – or indeed if the Canadian dicta which she had cited in which judges had overcome the equivalent supremacy clause in Section 52(1) of the Canadian Charter in the same context had been – this went unmentioned by O'Donnell J in what was a remarkably brief judgment.

The idea had taken hold by that point, and so it was followed a few months later by Mr Justice John McMenamin for a unanimous six-judge Supreme Court in *PC v. Minister for Social Protection*: this time there was a forthright finding of invalidity with respect to section 249 of the Social Welfare Act 2005 (on the ground that it deprived convicted prisoners of social welfare benefits thus representing a non-judicial punishment in contravention of Articles 34 and 38) combined with an *NVH*-style adjournment on the form that the remedy might take to allow the parties to make submissions on that question.⁷² The concept was endorsed again that same year in *obiter* comments by Mr Justice Frank Clarke (as he then was) in *Persona Digital Telephony Ltd v. Minister for Public Enterprise*, albeit again without direct reference to Canadian or other foreign jurisprudence.⁷³

Hogan J, by now on the Court of Appeal, returned to the concept in 2018 when in *AB v. St. Loman's Hospital*⁷⁴ and *Agha and Osinuga v. Minister for Social Protection*⁷⁵ he adopted outright "suspended declarations of invalidity," while referring to *NVH* as if the Supreme

⁷¹ See Carolan, *A 'Dialogue-Oriented Departure*, *supra* note 70.

⁷² *PC v. Minister for Social Protection* [2017] I.E.S.C. 63.

⁷³ *Persona Digital Telephony Ltd v. Minister for Public Enterprise* [2017] IESC 27, at para. 4.1. where another unanimous Supreme Court ruled that old common law rules against champerty (third party funding of litigation) continued to apply in Ireland such that an agreement that the applicants had entered into with a third party to help fund an action they were taking against the State was unlawful. In what was a concurring judgment Clarke J. referred to what he sees as serious problems relating to the constitutional right to access to justice but acknowledged that there were various policy options that could be taken to address the constitutional concern and that these were fundamentally a matter for the political branches. He warned though that "circumstances could arise where, after a definitive finding that there has been a breach of constitutional rights but no action having been taken by either the legislature or government to alleviate the situation, the courts, as guardians of the Constitution, might have no option but to take measures which would not otherwise be justified."

⁷⁴ *AB v. St. Loman's Hospital* [2018] IECA 123.

⁷⁵ *Agha and Osinuga v. Minister for Social Protection* [2018] IECA 155.

Court had similarly done so.⁷⁶ Overall, while foreign law has had a considerable influence in the overall domain of the temporal effect of findings of invalidity, its influence with respect to this apparent embrace of suspended declarations of invalidity is less obvious, but, we suggest, traceable nevertheless.

IV. Foreign law and proportionality in rights adjudication

Ireland has not escaped colonization by the proportionality test – the apparently international standard of review with Canadian and German origins.⁷⁷ The concept had been implicit in some of the jurisprudence since at least the time of *Quinn's Supermarkets* but first got explicit attention in the 1992 case, *Cox v. Ireland*, in which a statute that enacted penalties to deter subversive crime was struck down on the ground that it applied the penalties to offences without a subversive element, thus counting as overbroad in pursuit of a legitimate purpose.⁷⁸ Two years later, in *Heaney v. Ireland*,⁷⁹ Mr Justice Declan Costello explicitly adopted the Canadian version of proportionality, reciting word-for-word the framework as it had been elaborated in the *R v. Oakes*,⁸⁰ the 1986 judgment of the Canadian Supreme Court. The *Heaney* test (or the *Oakes* test) is routinely set out in Irish constitutional rights judgments ever since, with its Canadian heritage often mentioned.

Although foreign law has thus been of considerable influence in this most influential domain of constitutional law, it would be a mistake to draw the conclusion that rights adjudication in Ireland has simply merged with international trends. Based on a comprehensive “comparative localist” analysis of Irish and Canadian rights adjudication since *Heaney*, David Kenny points out that certain surface commonalities in approach tend to mask deeper divergences: that in fact rights adjudication in Ireland continues to

⁷⁶ In *Agha and Osinuga*, as it happens, he was very much “driven to the conclusion” to find section 246 of the Social Welfare Act 2005 unconstitutional by German and Strasbourg caselaw that he saw as “closest on point,” that point concerning the withholding of the payment of child benefit to an Irish citizen child because of the immigration status of the parent claiming the benefit), at paras 43, 37. *Niedzwiecki v Germany* [2006] E.C.H.R. 928, 1 BvL 4/97, 1 BvL 5/97, 1 BvL 6/97.

⁷⁷ Moshe Cohen-Eliya and Iddo Porat, *American Balancing and German Proportionality*, 8 Int. J. Con. L. 263 (2010); Aharon Barak, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* (2012).

⁷⁸ *Cox v. Ireland* [1992] 2 I.R. 503. See Paul Gallagher, *The Irish Constitution – Its Unique Nature and the Relevance of International Jurisprudence* Ir. Jur. 22, 38-39 (2010).

⁷⁹ *Heaney v. Ireland* [1994] 3 I.R. 593.

⁸⁰ *R v. Oakes*, *supra* note 2.

be governed to a great extent by contingent and local considerations.⁸¹ Thus, although Irish judges routinely recite the *Heaney/Oakes* test, they routinely apply its various elements in ways that depart from the ways in which Canadian judges apply them – and they do so without referring to those departures, and in some instances possibly without being conscious of them.

One of those is the “minimal impairment” limb of the proportionality test: the limb that says that if a law interferes with a constitutional right in pursuit of a legitimate goal, that it must interfere with that right “as little as possible,” or no more than is necessary to achieve the goal. While Peter Hogg describes this as the “heart and soul”⁸² of Canadian rights adjudication – that is, where most of the scrutiny is done and where most laws that don’t pass muster are likely to fall – in Ireland it is often not applied at all, or, when it is, is applied in a way that blunts its bite. Kenny suggests that the difference in approach in respect of this limb is pronounced in cases involving blanket bans in particular. Whereas in Canada such bans will survive this stage “only...where the government can show that only a full prohibition will enable it to achieve its objective,” (in Justice Beverley McLachlin’s words⁸³), in Ireland they almost routinely survive – and where they don’t, these are “isolated cases that are unusual and unexplained departures from general practice or are best understood as not being minimal impairment problems at all.”⁸⁴

The contrast is illustrated in near identical challenges brought around the same time by women against blanket bans on assisted suicide. In the 2013 case *Fleming v. Ireland*, a Divisional High Court was satisfied that the blanket ban “in principle” engaged the right to personal autonomy, which the three judges (including Mr Justice Gerard Hogan) saw as lying at the core of the protection of the person in Article 40.3.2°. ⁸⁵ They were not satisfied, however, that it went further than was necessary to pursue what they saw as the legitimate goal of the ban, namely protecting vulnerable people from being coerced or unduly influenced into taking the option of euthanasia. The thought was that any

⁸¹ David Kenny, *Proportionality and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland*, 66 Am. J. Comp. L. (f’coming, 2018).

⁸² Peter Hogg, *CONSTITUTIONAL LAW OF CANADA*, 38.36 (5th ed., 2007).

⁸³ *RJR MacDonald v. Canada* [1995], 3 S.C.R. 199, at para. 343-44.

⁸⁴ Kenny, *supra* note 79, at X. In support of the claim, Kenny cites: *King v. Minister for Environment* [2006] I.E.S.C. 61, *Blehein v. Minister for Health* [2008] I.E.S.C. 40 and *McCann v. District judge Monaghan* [2009] I.E.H.C. 276.

⁸⁵ *Fleming v. Ireland* [2013] I.E.H.C. 2.

softening of the ban would necessarily mean that at least some who might be vulnerable to such coercion would be exposed to it; essentially that the gap between a blanket ban and the next step down was just too much.⁸⁶

Although the judges in *Fleming* state that they have reached their conclusion at a point in their judgment immediately prior to the where they begin to consider foreign law, they give foreign law a great deal of attention and, as they themselves point out, the positions they identify in most of the foreign law they consider essentially mirrors their own reasoning and conclusion in the case at hand.⁸⁷ Thus where the US Supreme Court had dismissed a similar challenge in the 1997 case *Washington v. Glucksberg*,⁸⁸ they did so mainly out of concerns around protecting vulnerable people and a slippery slope: the Irish judges quote Chief Justice Rehnquist's analysis at length before concluding that although his "words were uttered in the context of a rationality analysis" (rather than the lower-level intensity review than applies in Irish rights-adjudication), his "reasoning seems to this Court to be compelling."⁸⁹ Similarly *Rodriquez v. Canada*, a Canadian case from 1993 in which a challenge to the blanket ban had been rejected on the basis that any loosening of it would inevitably mean that at least some vulnerable people might be exposed to coercive influence.⁹⁰

The tricky one for the High Court in *Fleming* was the *Carter v. Canada*⁹¹ judgment from the previous year, which at that stage was on appeal to the Canadian Supreme Court. In the lower court judgment Justice Lynn Smith had departed from *Rodriquez* in holding that the blanket ban fell foul of the minimal impairment limb; she had done so partly on the ground of new evidence based on the experience of more liberal euthanasia laws in Oregon, the Netherlands and Belgium that she deemed to allay fears with respect to

⁸⁶ *Id.*, at para. 76.

⁸⁷ Their presentation of the role that foreign law plays in their judgment is reminiscent of Walsh and Henchy JJ in their *McGee* judgments: the suggestion again is that it provides *ex post facto* support for a conclusion they had already reached. The seventeen pages that they devote entirely to foreign law begins immediately after a paragraph in which they state that for the reasons they have outlined in three preceding paragraphs Marie Fleming's challenge fails.

⁸⁸ *Washington v. Glucksberg*, 521 U.S. 702 (1997).

⁸⁹ *Fleming v Ireland*, *supra* note 85, at para. 82.

⁹⁰ *Rodriquez v. Canada*, [1993] 3 S.C.C. 519. The Irish judges commented that Sopinka J's "analysis of the proportionality issue substantially accords with [their own] views." *Fleming v. Ireland*, *supra* note 85, at para. 87.

⁹¹ *Carter v. Canada*, [2012] B.C.S.C. 886.

exposing vulnerable people to the risk of coercive influence.⁹² The Irish judges in *Fleming* devoted six pages to setting out the grounds of their disagreement with the Canadian trial judge on the implications of the evidence considered; in short, they insisted that she had been wrong to conclude that the risks in question had not in fact materialized in those jurisdictions.

Although the different outcome may be explained simply by disagreement on the interpretation of evidence, David Kenny suggests that it reflects broader differences between how Canadian and Irish judges tend to apply the proportionality framework. He points out that the Canadian judges in *Carter* (including the Supreme Court judges, who rejected the State's appeal⁹³) showed little deference to legislative determinations concerning risk of exploitation and a slippery slope; that they dealt with the evidence presented by the State "in a curt manner," demanding "very hard evidence" that, in the context of such a complex social question, was probably just not possible to gather.⁹⁴ In contrast, the Irish judges deferred to legislative judgement based on evidence that Kenny suggests was "clearly less extensive than that presented to the Canadian courts."⁹⁵ They claim that if they were to "unravel a thread of this law by even the most limited constitutional adjudication in [Marie Fleming's] favour, it would – *or at least might* – open a Pandora's box which thereafter would be impossible to close;"⁹⁶ they are concerned about "*possible* implications for third parties and society at large."⁹⁷ The Irish judges are thus not intolerant of blanket bans in the way Canadian judges tend to be, and they are more deferential to legislators with respect to what might justify an interference with a constitutional right.

In the judgment on appeal, the Irish Supreme Court was even more restrained than the High Court, holding that the ban on assisted suicide did not engage any right in the Irish Constitution in the first place; that the right claimed amounted to a right to commit suicide rather than one relating to autonomy (i.e. meaning that proportionality considerations did not even come into play).⁹⁸ Chief Justice Denham also reined in the

⁹² *Id.*, at para. 1241, cited in *Fleming v. Ireland*, *supra* note 85, at para. 91.

⁹³ *Carter v. Canada*, [2015] S.C.C. 5.

⁹⁴ Kenny, *supra* note 79, at X.

⁹⁵ *Id.*, at X.

⁹⁶ *Fleming v. Ireland*, *supra* note 85, at para. 76 (italics added).

⁹⁷ *Id.*, at para. 55 (italics added).

⁹⁸ *Fleming v. Ireland* [2013] I.E.S.C. 19, at para. 107.

High Court judges on a matter of considerable practical importance that also distinguishes the Irish and Canadian approaches to the application of the proportionality framework: the placement of the burden of proof. Because section 1 of the Charter requires that a restriction on rights shall be “demonstrably justified,” the Canadian position since *Oakes* has been that once an applicant demonstrates that there has been an interference with a right it is up to the State to show that that interference is justified: the burden with respect to proportionality rests entirely with the State. In Ireland, the position prior to the adoption of proportionality in *Heaney* had been that applicants had to make their case with respect to rights claims, and that the State’s lawyers adopted a defensive mode. This did not change following *Heaney*, again demonstrating how local norms survived the adoption of that international standard of review. Where the High Court in *Fleming* had apparently shifted the burden onto the State, Denham CJ in the Supreme Court commented:

[A]n argument was advanced, derived it appears from Canadian jurisprudence, suggesting that the court should approach the question by first determining in general whether a right existed, whereupon the onus shifted to the State to justify by evidence any limitation whatsoever on the general right asserted, by reference to the principle of proportionality...It should be observed that there is no support in the jurisprudence of this Court for such an approach. Accordingly this court expressly reserves for a case in which the issue properly and necessarily arises...whether the approach to proportionality urged by the appellant...is required by, or compatible with, the Constitution.⁹⁹

V. Reflections

Courts might have two broad reasons for engagement with foreign law in constitutional cases. First, national courts might view themselves as engaged in a common endeavour with foreign courts. This might be the case because their constitution is committed to a particular transnational vision of rights.¹⁰⁰ Or it might be because their constitution shares genealogical connections with other constitutions, making decisions interpreting

⁹⁹ *Id.*, at para 140. See also David Kenny, *Proportionality, the Burden of Proof, and Some Signs of Reconsideration*, 52 Ir. Jur. 141, 149-152 (2014).

¹⁰⁰ See Jeremy Waldron, *PARTLY LAWS COMMON TO ALL MANKIND* (2012).

those constitutions particularly relevant.¹⁰¹ Second, courts might view the case law of foreign courts as relevant, in some way, to the different task of interpreting their own constitution. This phenomenon has been explained in various ways, using terms such as judicial learning,¹⁰² dialogue,¹⁰³ engagement,¹⁰⁴ and theoretical authority.¹⁰⁵ The Irish courts' use of foreign cases falls within this second model. The judges view their role as being to interpret the Irish Constitution, not to engage in a general project of transnational constitutionalism. However, they recognise that foreign law can be helpful to them in some way as they elaborate Irish constitutional principles.

Understood in this way, it is not surprising to see that foreign law featured significantly in the early activist phase of the Supreme Court. Courts that have not developed their own constitutional jurisprudence have more to learn from the decisions of foreign courts.¹⁰⁶ This explains the reliance placed on the case law of the United States Supreme Court in *O'Brien*, *Quinn's Supermarket*, *McGee* and *Murphy*. The use of foreign law is not quite so prevalent in recent years and the range of countries to which regard is had has increased. Consistent with other global trends, the Irish Supreme Court is probably now more likely to look decisions of the Canadian Supreme Court than the United States Supreme Court.

As we noted in section II, it is not always easy to identify precisely what role the foreign law is playing in the Court's decision-making. This reflects the general difficulty of conceptualising how foreign law can play some role in the decision-making process without being so definitive as to alter the content of national law, thereby raising the anti-democratic problems decried by Antonin Scalia.¹⁰⁷ Oran Doyle has argued elsewhere that judges treat foreign law as theoretically authoritative.¹⁰⁸ One person holds

¹⁰¹ See Han Ru Zhou, *A Contextual Defense of Comparative Constitutional Law* 12 Int. J. Const. L. 1034 (2014).

¹⁰² Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court* 34 *Tulsa L.J.* 15, 17 (1998).

¹⁰³ Sujit Choudhry, *Globalisation in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation* 74 *Ind. L.J.* 819 (1999).

¹⁰⁴ Vicki Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement* 119 *Harv. L. Rev.* 109 (2005).

¹⁰⁵ Oran Doyle, *Constitutional Cases, Foreign Law and Theoretical Authority* 5 *Glob. Const.* 85. (2016).

¹⁰⁶ See the comments of Chaskalon P. of the South African Constitutional Court in *The State v. Makwanyane* [1995] Z.A.C.C. 3 at para. 37.

¹⁰⁷ Antonin Scalia, *Commentary* 40 *St. Louis U. L. J.* 1119 (1996).

¹⁰⁸ Doyle, *supra* note 105.

theoretical authority over another where she knows more about the subject-matter in question. For instance, an expert on Aristotle is authoritative as to the best interpretation of Aristotle, at least over those who have less or no familiarity with the work of Aristotle. At the start of the national court's consideration of a case, the decision of a foreign court on a cognate issue holds theoretical authority because the foreign court should have arrived at a better understanding of the issue. The foreign court came to its conclusion following detailed submissions and evidence and the opportunity for lengthy deliberation and reflection. As such, it holds relative theoretical authority over the national court which is only now beginning its consideration of the issue. However, the theoretical authority of the foreign court dissipates as the national court engages with the issue, leading to a situation where the foreign law ultimately can only persuade on its merits. This is consistent with how foreign law is treated in the Irish cases considered in this chapter.

Under this model, foreign law can only hold theoretical authority where the foreign court is from a reasonably similar constitutional system considering a reasonably similar issue. For this reason, cases of judicial method are particularly appropriate for the consideration of foreign law. In such cases, it is less likely that specific constitutional text will determine or be highly relevant to the outcome. This increases the opportunities for judicial learning. Consistent with this observation, the Supreme Court has been particularly open to the consideration of foreign case law in this domain, as we saw in section III.

The Irish approach to the proportionality doctrine, considered in section IV, provides a salutary lesson. Notwithstanding that the Irish Supreme Court has cited verbatim the proportionality test laid down by the Canadian Supreme Court, it has applied that test in a radically different way. Ultimately, unspoken attitudes of judicial deference have had a greater impact than the imported foreign law. This illustrates both that judicial references may not be what they seem and, more substantively, that national law and national legal attitudes can be quite resistant to foreign influences.