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Thoughts on Referral to Foreign Law, Global Chain-novel, and Novelty

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THOUGHTS ON REFERRAL TO FOREIGN LAW, GLOBAL CHAIN-NOVEL, AND NOVELTY

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I. INTRODUCTION

Thomas J. Bogar was assigned to the Office of Military Commissions. In his article (included in this issue[1]), he combines his practical experience with academic skills when he urges changing the current means for determining status of military detainees into a more secure and just procedure. The motto of the article cites the immortal words of Martin Luther King, Jr.: "injustice anywhere is a threat to justice everywhere."[2] He argues that both the Combatant Status Review Tribunal and Article 5 of the Third Geneva Convention Tribunal are inadequate to accurately determine the correct status of prisoners captured in the global war on terror. Bogar calls for applying a different model. He argues that the current system for distinguishing lawful and unlawful combatant in the global war on terror should be modified to include International Law and the incorporation of pre-existing systems as exemplified in the Canadian Approach,[3] the U.K. Approach,[4] and the Israeli approach.[5]

Brianne N. McGonigle[6] takes a different look at the international war against criminal activity. She refers to the sentencing of war criminals and the position of victims in international criminal proceedings. In examining the victims' participation in the International Criminal Court, McGonigle

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* Deputy Chief Justice of the Supreme Court of Israel. I thank Guy Shani, Ariel Porat, Igal Mersel, and Joshua Jacobes for their important comments.

1. Thomas J. Bogar, *Unlawful Combatant or Innocent Civilian? A Call to Change the Current Means for Determining Status of Prisoners in the Global War on Terror*, 21 FLA. J. INT'L L. 29-92 (2009).

2. Martin Luther King, Jr., Letter from Birmingham Jail (Apr. 16, 1963).

3. Prisoner of War Status Determination Regulations, SOR/91-134 (Can).

4. Prisoner of War Determination of Status Regulations, 1958 (U.K.); *see also* Army Act of 1955, 1955, 3 & 4 Eliz. 2, c.18, § 135 (Eng.).

5. Incarceration of Unlawful Combatant Law, 5762-2002 (2002) (Isr.); *see also* the holding of the Israeli Supreme Court in HCJ 769/02; Pub. Comm. Against Torture in Israel v. Gov't of Israel, [2005] IsrSC.

6. Brianne N. McGonigle, *Bridging the Divides in International Criminal Proceedings: An Examination into the Victim Participation Endeavor of the International Criminal Court*, 21 FLA. J. INT'L L. 93-152 (2009).

describes the court's attempt at reconciling two divides: Between classical retributive and modern restorative goals and between adversarial and inquisitorial traditions – with regards to its victim participation scheme. The article recognizes the importance (and complexity) of implementing victim participation at the international court, hoping that it will mark a positive step toward restorative justice. Nevertheless, McGonigle warns against the possibility that such stance would infringe upon the fair trial rights of the parties.

Striving for justice is the common leitmotif of both articles. Brianne McGonigle insists that punishing criminals is not enough and that "there will be no justice without justice for the victims."[7] Thomas Bogar warns against the universal implication of injustice. He believes that determining prisoner status through a process that is unfair "may be a catalyst that threatens justice everywhere."[8] Bogar refers to foreign laws; McGonigle invokes foreign legal principles as well as international criminal law. They both conduct sophisticated comparative research based upon common concepts of fairness and justice. Both articles thus serve as illustrations of the well established academic willingness to refer to foreign law and, at same time, the current accessibility to foreign legal systems. Such willingness to refer to foreign law is shared now by many judges. The existing accessibility to foreign law enables the growing willingness to do refer to foreign law. Both articles also invoke a universal concept of justice. Some new dimensions of the notion of justice in the framework of private law will be further investigated in this Article. They will serve as an illustration of the development of the law through referral to foreign law. Part II will deal with the difficulties inherent in such referral and describe some special benefits of the use of comparative law. Specifically, it will detail the ability of comparative law to overcome status-quo bias in judicial decision making and to conduct an inter system effort to develop important judicial institutions. Part III will describe a specific perception of the concept of justice, in the context of private law, first in its traditional approach and then in its novel comprehensive form as reflected in Israeli modern tort law. Part IV, while discussing a specific case, will demonstrate how the elaboration of this novel perception of justice was achieved by referral to foreign law, and by unique inter-country judicial cooperation.

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7. *Id.*
8. Bogar, *supra* note 1.

II. HURDLES IN REFERRING TO FOREIGN LAW

Foreign law serves as a tool to enrich academic research and as an important source for experience and ideas in the adjudication process. It offers additional dimensions to domestic case law and may serve as a *secondary authority* alongside academic writing. The benefits of transnational judicial cooperation and mutual learning are clear. However, in order to leverage and use foreign law in a meaningful way, one must hold considerable knowledge and expertise in both foreign and local law. For one to have access to foreign law one must posses both the technical tools to approach the law and a normative understanding of its substance. In other words, leveraging and using foreign law requires the existence of a *common language* shared by both the referring and referred systems. Yet, despite the long list above, referral to foreign law is most and foremost conditioned upon a willingness to turn to foreign legal systems.

A. *Accessibility and the Common Language*

Growing accessibility to foreign law is the direct outcome of modern technology and the effects of globalization. Globalization, as we all now know, has both negative and positive consequences. The fact that traditional lines between the domestic and the transnational were blurred allows a better knowing and mutual understanding of the different cultural entities. There is a growing interchange of ideas between judges in the different countries and among members of the Academy. Judges from all over the world are meeting more often and in these encounters frequently discuss common legal issues. They realize that they share, in many instances, common problems. The developing inter-country scholarship made foreign law better understood.[9] Significant literature was published about comparative law and foreign law.[10] Modern technology and the expanded use of the web increase the accessibility to foreign law. The ability to take advantage of foreign law as a source of knowledge, novel ideas, and additional dimensions of common legal issues, is often a matter of language. Thus, it is only natural that referral

9. American and Canadian law schools have well recognized the importance of mutual exchange of different perspectives of law. The University of Florida is conducting international enrichment courses. Yale University and the University of Toronto regularly hold international seminars that bring together justices of high courts from several countries. And New York University brings foreign law professors to the United States to allow the students in NYU to benefit from international perspectives.

10. Evidence of this can clearly be seen, for example, by counting the number of international and comparative law journals that exist in the English speaking world. *See* WASHINGTON AND LEE UNIVERSITY SCHOOL OF LAW, LAW JOURNAL: SUBMISSIONS AND RANKINGS, (2009) (searching for "International and Comparative Law" journals).

to foreign law is much more common among the English speaking countries.[11] It is also a matter of shared concepts of law, of common legal roots, and of the similarity of the judicial culture. It is for these reasons that among the English speaking countries, referral to foreign law is most prevalent within the common law systems; yet, we are witnessing an increasing propensity to refer to foreign law among non-English speaking countries, including Continental Europe.[12] The integration between the United Kingdom and other European countries in the framework of the European Union is no doubt responsible for some of this.

B. *Willingness to Refer to Foreign Law*

1. The United States of America

The merits of the use of foreign law in domestic adjudication are subject to great debate, and this debate often exposes the true willingness of courts to utilize foreign law. The most robust dispute regarding the referral to foreign law is the one held in the United States. The controversy focuses on the issue of using foreign law in constitutional interpretation, yet it often embraces the question of relying on foreign law in other legal areas.[13]

American courts have historically declined to refer to foreign law when interpreting the U.S. Constitution, yet there have always been U.S. judges who did not share that approach. The controversy is currently reflected in modern decisions of the U.S. Supreme Court. While Justice Scalia believes the notion "that American law should conform to the laws of the rest of the world – ought to be rejected out of hand" because "in many significant respects the laws of most other countries differ from [American] law,"[14] other justices on the Court reveal in their opinions quite a different approach. In *Roper v. Simmons,* Justice O'Connor points to several decisions of the Court in which the Court referred to foreign and international law "as relevant to its assessment of evolving standards of decency."[15] Justice Kennedy expressed a significant readiness to refer to foreign law when he came to examine the constitutionality of juvenile death penalty. He stated that "it is proper that we

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11. *Id.*

12. *Id.*

13. On resorting to comparative law in tort law, see Jane Stapleton, *Benefits of Comparative Tort Reasoning: Lost in Translation*, 1 J.TORT L. issue 3, art. 6 (2007), *available at* www.bepress.com/jtl/vol1/iss3/art6 (arguing that extreme caution should be exercised in using comparative materials, especially when referring to foreign language systems in tort adjudication).

14. Roper v. Simmons, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting).

15. *Id.* at 604 (O'Connor, J., dissenting).

acknowledge the overwhelming weight of international opinion against the juvenile death penalty."[16] "The opinion of the world community," he explained, "while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."[17] The willingness of the Court to refer to foreign law was expressed in other cases which involved the issue of capital punishment for juvenile murder,[18] affirmative action in university admissions,[19] and gay rights.[20]

In the United States, the debate with regard to the question of using foreign law by the Court is interrelated to another domestic controversy regarding the proper approach to the interpretation of the U.S. Constitution. This debate between the "originalists" and the "nonoriginalists" frequently plays out in judicial opinions and academic literature.[21] At the heart of this debate is a question of interpretation, a question that with regard to almost every part of the Constitution, yet the focal point of this debate is often centered on whether rights that are not expressly mentioned in the Amendments to the Constitution should be read into them by way of interpretation.

While the originalists believe that rights and freedoms are to be protected only if explicitly stated in the Constitution or clearly intended to be protected by the Framers, the nonoriginalists insist on the principle that courts are authorized to interpret the Constitution according to the evolving values of society. The courts are authorized, so they argue, to protect fundamental rights that are not expressly stated in the Constitution but are part of the American heritage of freedom.[22] It is thus permissible for the Court to interpret the Constitution to protect rights that are not expressly stated.[23]

There is a natural connection between the issue of interpreting the Constitution and the dispute about the legitimacy of referring to foreign law.[24] Those who believe that judges must confine to the original intention of the Framers and respect the unique American tradition would find it difficult to

16. *Id.* at 578.

17. *Id.*

18. Atkins v Virginia, 536 U.S. 304 (2002).

19. Grutter v. Bollinger, 539 U.S. 306 (2003).

20. Lawrence v. Texas, 539 U.S. 559 (2003).

21. The question about how to interpret the U.S. Constitution arises as a result of the fact that the Constitution is a classical document that does not explicitly refer to all of the rights it protects, nor explicitly defines the scope of the powers it confers (or reserves) to the federal and state governments. Thus, judges and academics must expound upon the language of the Constitution to determine of the extent of the powers and protections under the Constitution.

22. *See Roper*, 543 U.S. at 575-578.

23. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 17 (3d ed. 2006)

24. As distinguished from international law.

use foreign law when interpreting the Constitution.[25] They argue that "[f]oreign sources are cited . . . not to underscore our 'fidelity' to the Constitution, our 'pride in its origins,' and 'our own [American] heritage.'" [26] Rather, "they are cited *to set aside* [] [a] centuries-old American practice. . . . What these foreign sources 'affirm,' rather than repudiate, is the Justices' own notion of how the world ought to be, and their diktat that it shall be so henceforth in America."[27]

Nonoriginalists are of course more ready to rely upon a variety of external and modern sources, including foreign law. "The opinion of the world community," emphasizes Justice Kennedy, "while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."[28] The willingness to interpret the Constitution according to current norms[29] can easily embrace contemporary foreign sources.

It is important, however, to recognize that not all references to foreign law are equal. Citation to foreign law can fall roughly within three categories: expository, empirical, substantive references.[30] In a nutshell, expository references use foreign law as a contrast to American practice.[31] Empirical references use statistics introduced in foreign law cases as an aide to decision making.[32] And substantive references are used to obtain guidance from foreign law in defining what a domestic constitutional rule contains.[33] Under

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25. Originalists will argue that an unelected judge's discretion should be constrained and that a selective use of foreign law, according to their view, enables the judges to implicate personal value decisions. *See, e.g.*, Roper, 543 U.S. at 627 (Scalia, J., dissenting) (stating that "[t]o invoke alien law where it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision making, but sophistry").

26. *Id.* at 628 (referring to the majority opinion).

27. *Id.*

28. *Id.* at 578; *see also* Printz v. United States, 521 U.S. 898, 977 (1997) (J. Breyer dissenting):

> Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem . . . .

Id. (citations omitted).

29. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 228-231 (1976) (Brennan, J., dissenting) (considering the "cruel and unusual" clause of the Eight Amendment of the U.S. Constitution under an evolving standard).

30. *See* Joan L. Larsen, *Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283, 1286 (2004).

31. *Id.* at 1288-89.

32. *Id.* at 1289-91.

33. *Id.* at 1291.

this rubric, the references that fall under the category of substantive are of the greatest importance, because they represent a willingness by the courts to share with other jurisdictions the right to interpret the inherently American constitutional law. In doing so, American courts are necessarily borrowing from the moral and legal viewpoints of the foreign entity. On the other hand, the introduction of statistics that are part of foreign cases or references to differing foreign decisions in order to provide contrast in no way challenges the supremacy of American law.

The opinions of Justice O'Connor and Justice Kennedy in *Roper* are remarkable because of their adoption of the substantive content of foreign law.

2. Canada, Israel, & South Africa

A much more supportive approach to the issue of referral to foreign law can be found in other legal systems, including common law systems like Canada, Israel, and South Africa. The Canadian Charter of Human Rights was one of the first of a series of human rights bills adopted in the second half of the twentieth century by Commonwealth countries. The Canadian Supreme Court adopted from the very beginning what Americans might consider an nonoriginalist approach. A variety of sources, including foreign law, were taken into account by the Canadian Supreme Court when interpreting the Canadian Charter. The Canadian Supreme Court was, for example, willing to explore the relationship between Canadian and American approaches to constitutional protection of human rights,[34] acknowledging the importance of American practical and theoretical experience, while warning against "drawing too ready a parallel between constitutions born to different countries in different ages and in very different circumstances."[35]

In South Africa, the issue of referring to foreign law, when applying constitutional rights, was predetermined by the constitution itself. Article 39 of the second chapter of the new constitution of South Africa, the Constitution of 1996, states that "when interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law."[36] The South African Constitutional Court made it clear that "it is important to appreciate that this will not necessarily offer a safe guide to the interpretation

34. *See, e.g.*, Regina v. Keegstra, [1990] 3 S.C.R. 697 (Can.)

35. *Id.* at 744.

36. S. AFR. CONST. 1996. The constitutions of India and Spain have similar provisions.

of Chapter Three[37] of our Constitution."[38] Yet, the Court emphasized that "[c]omparative 'bill of rights' jurisprudence will no doubt be of importance, particularly in the early stages of the transition."[39]

Israel has always demonstrated willingness to refer to foreign law. In fact, "foreign law" was historically part of the Israeli legal system. Until 1918, the country was ruled by the Ottoman Empire and Turkish law was part of its system. Since 1918, Britain ruled the country according to an international mandate, and the British common law became an essential part of domestic law. When the state of Israel was established in 1948, it was first decided by the legislature that whenever there is a lacuna in domestic law, the courts ought to refer to the common law. Under current Israeli law, judges are no longer required to fill lacunae by referring to the British common law. Referral to foreign law depends now on the willingness and discretion of the judges to use comparative law in their decisions. The legal obligation to refer to foreign law was replaced by an impressive willingness of judges in Israel – especially Supreme Court justices – to refer to foreign law whenever they felt that they could benefit from relevant comparisons. Their extensive use of foreign law was reflected both in the sphere of public law and in the framework of private law.

Israel first adopted a partial Bill of Rights in 1992.[40] Until then, fundamental rights were not awarded constitutional status. They were protected by the Israeli Supreme Court by broadly interpreting existing legislation within the framework of judicial review. Absent a constitutional document, the Court in Israel referred to the American Bill of Rights (as interpreted by the U.S. Supreme Court) as a central model of constitutional law. American constitutional law was cited open-handedly and open-heartedly by the Israeli Supreme Court. The lacunae that existed in domestic constitutional law were filled by referral to landmark decisions of the U.S. Supreme Court.

Linguistic ability and educational background have contributed to a fruitful referral to foreign law by Israeli courts. One of the most important decisions of the Israeli Supreme Court in the area of constitutional law, a decision which is considered the cornerstone of free speech adjudication in

37. This is referring to a similar previous version of the constitution.

38. State v. T. Makwanyane & M. Mchunu 1995 CCT/3/94 (CC) (S. Afr.).

39. *Id.* This is referring to the transition from the former political regime to the new regime in the country.

40. Two Basic Laws were adopted by the Israeli parliament in 1992. The most important of the two is "Basic Law: Human Dignity and Liberty" which enumerate certain fundamental human rights but not all of the rights entrenched by important western countries' constitutional documents, such as the U.S. Constitution, the South African Constitution, and the Canadian Charter. Basic Law: Human Dignity and Liberty, 5752, 1992, S.H. 1391.

Israel, was rendered by Justice Shimon Agranat, who obtained his legal education in the United States. In the early 1950s, at a time when easy and immediate access to new developments in foreign legal systems was impossible, a short visit to the United States exposed Justice Agranat to new trends in American constitutional law. Upon his return to Israel he wrote his landmark judgment regarding free speech[41] reflecting the state of the art of then American constitutional law.[42]

In 1992, when an Israeli partial "Bill of Rights" was adopted, the fact that it shared important characteristics with the Canadian Charter of Human Rights made Canadian case law an additional relevant source of foreign law to the Israeli Court. Israeli adjudication demonstrates an open-hearted willingness to use comparative law not only in the sphere of constitutional law, but also in other areas of law, including private law. Indeed, as it will be shown in Part III, the development of certain important judicial institutions in private Israeli law was the direct outcome of referral to foreign law and an "uncoordinated" cooperation of different legal systems.

3. Reciprocity with the United States?

The willingness of foreign courts to rely on American case law serves to some as an argument for the need of a reciprocal approach on the part of American judges. Justice Claire L'Heureux-Dube of the Canadian Supreme Court is of the opinion that the Rehnquist Court, for instance, has isolated itself from the globalization trend of law, which has led to a reciprocal reluctance by the courts of other nations to rely on American case law.[43] L'Heureux-Dube maintains that "the failure of the United States Supreme Court to take part in the international dialogue among the courts of the world" played one of the most important roles in the Rehnquist Court's diminished influence.[44] She argues that this tendency to look inward may well make the judgments of the U.S. Supreme Court less relevant internationally.[45] The former Chief Justice of the Israeli Supreme Court, Aaron Barak, holds similar views. "Regrettably," he laments, "the United States Supreme Court makes very little use of comparative law."[46] Referring

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41. *See* HCJ 73/53 Kol Ha'am Co. v. Minister of the Interior, [1953] IsrSC 7(2) 871.

42. On American influence upon Israel's adjudication, see Pnina Lahav, *American Influence on Israel's Jurisprudence of Free Speech*, 9 HASTINGS CONST. L.Q. 21 (1981).

43. CLAIRE L'HEUREUX-DUBE, THE IMPORTANCE OF DIALOGUE: GLOBALIZATION, THE REHNQUIST COURT, AND HUMAN RIGHTS IN THE REHNQUIST COURT A RETROSPECTIVE 234, 240 (Martin H. Belskey ed., 2002).

44. *Id.*

45. *Id.* at 245.

46. *See* Aaron Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a*

to L'Heureus-Dube,[47] he states that "if I am occasionally critical of the U.S. Supreme Court, it is because I regret that it is losing the central role it once had among courts in modern democracies."[48] Judge Richard A. Posner[49] believes that Justice Barak's book, and by extension Justice Barak himself, serves as an illuminating proof ("Exhibit A" – in Posner's words) to Posner's counter contention that American judges should be very careful about citing foreign judicial decisions. Barak, according to Posner, inhabits "a completely different – and, to an American, a weirdly different – juristic universe."[50]

I believe that both assertions should be modified. L'Heureu-Dube and Barak are wrong in considering referral to foreign law a matter of reciprocity. If it is true that U.S. Supreme Court's global influence is waning, it is not because of lack of reciprocity. The fact that there are judges in the United States that refrain from referring to foreign law does not make American jurisprudence "irrelevant and isolated" – especially when it comes to constitutional issues.

Indeed, America no longer has a monopoly on constitutional judicial review. Often, it will be very beneficial to American judges, as well as to judges in other countries, to refer to foreign judicial opinions in certain relevant issues.[51] Yet, referring to American law is still relevant with regard to constitutional review. A judge that would decide to refrain from looking at the American case law just because American judges do not cite his judgments would not act rationally. The U.S. Constitution is the oldest and most influential constitutional document in the western world. The doctrines interpreting this constitution, developed over two hundred years, have much to offer in terms of legal insight and judicial experience. No matter how supportive American courts are with regard to referring to foreign law, American constitutional law might serve as an important source of theoretical and practical experience, and using Barak's own words, "an important source of inspiration."[52] American constitutional law is exceptional

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Democracy, 116 HARV. L. REV. 16, 114 (2002).

47. L'HEUREUX-DUBE, *supra* note 43.

48. Barak, *supra* note 46, at 27.

49. Richard A. Posner, *Enlightened Despot*, NEW REPUBLIC, Aug. 23, 2007, at 53 (reviewing AARON BARAK, THE JUDGE IN A DEMOCRACY (2006)).

50. *Id.* Referring to Barak's "judicial hubris" (using the words of Robert Bork), Posner argues that Barak's views should be considered "Exhibit A" for why American judges should be extremely wary about citing foreign judicial decisions – especially those of a "hyperactive judiciary." *Id.*

51. *See* United States v. Then, 56 F.3d 464, 469 (1995) (Calabresi, J., concurring) (indicating that since World War II, "many countries have adopted forms of judicial review . . . These countries are our 'constitutional offspring' and how they have dealt with problems analogous to ours can be very useful to us when we face difficult constitutional issues.").

52. Barak, *supra* note 46, at 114. Further, according to Barak, "[t]he United States is the richest and deepest source of constitutionalism in general and of judicial review in particular."

in its jealousness to protect important human rights, such as the freedom of expression, free exercise of religion, and the right to due process.[53] Using it as an important model cannot be conditioned on reciprocity.[54]

Nevertheless, a sweeping rejection of any referral to foreign law by American judges, as suggested by Posner, cannot be justified. Referral to foreign law does not mean an indiscriminative reliance upon foreign adjudication. It does not mean allowing judicial policy which is not accepted by domestic jurisdiction. It should not mean the acceptance or adoption of legal approaches that are "weirdly different" from domestic traditions. In fact, Posner's referral to Barak's conception of the role of a judge in democratic society – in order to explain and illustrate Posner's own conception – can be marked "exhibit B" in explaining why referral to other systems can be helpful. It can well illustrate the fact that even where there is a fierce debate on a particular issue referral to a foreign legal system can be used as a reflective tool for demonstrating unsatisfactory legal approaches. Referral to foreign law does not necessarily mean the adoption of foreign choices or reliance on foreign experiences in reaching a judicial decision. It does mean a better evaluation of competing options, an available source of empirical experience and a source of novel ideas and knowledge.

Referral to foreign law is beneficial, of course, only when the law referred to is relevant and when we can derive assistance from it. If Posner means that we have to examine foreign law with a critical eye, it is self-evident. Posner is right in arguing that domestic judges should not follow indiscriminately foreign methods or foreign judicial stance.[55] One can critically examine foreign concepts about the role of a judge in a democracy, and many indeed

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Barak, *supra* note 46, at 27.

53. A radical description of American exceptionalism is included in Steven G. Calabresi, *"A shining city on a hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1344-74 (2006). In it, Calabresi argues that the U.S. Supreme Court should be cautious of citing foreign law in most constitutional cases because the United States is an exceptional country with exceptional people and an exceptional role to play in the world. *Id.* For a different view, see Aeyal M. Gross, *Globalization, Human Rights and American Public Law Scholarship – A Comment on Robert Post*, 2 THEORETICAL INQ. L. 337, 346 (2001) (arguing that "American public and constitutional law can clearly benefit from being open and amenable to international and comparative law which should help to rid U.S. human rights law of its isolation").

54. The Canadian Supreme Court, for instance, was well aware of the importance of the American constitutional law as a model: "In the United States, a collection of fundamental rights has been constitutionally protected for over two hundred years. The resulting practical and theoretical experience is immense, and should not be overlooked by Canadian Courts." Regina v. Keegstra, [1990] 3 S.C.R. 697 (Can.). On the influence of the decisions of the U.S. Supreme Court upon other systems, see generally Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537 (1988).

55. *See* Posner, *supra* note 49.

share Posner's views of Israel in this regard, but even then looking at other jurisdictions might be pensive. It might be useful if only to demonstrate the shortcomings of a different option.

Anyhow, domestic judges should not be barred from looking to foreign case law. Sometimes, even "hyperactive judges," i.e., judges of which Posner warns, offer some wonderful ideas. Indeed, being acquainted with the legal system referred to and with its normative background is a prerequisite for a meaningful referral. The authority of the court referred to within its own jurisdiction is a significant factor in the evaluation of the foreign source. Such information is not easy to collect even in the Internet era. Furthermore, although referral to foreign law is not necessarily synonymous with judicial activism, it might serve an undesired expansion of judicial discretion. A selective use ("cherry picking") of foreign sources in order to reinforce "the justices' own notion of how the world ought to be, and their dictate that it shall be so henceforth,"[56] might distort the integrity of the use of foreign sources. It might reflect an apologetic statement of an unconvinced judge. Nevertheless when properly exercised, judges can only benefit from referral to foreign law, no matter if such referral is mutual or unilateral.

C. *The Goals of Referring to Foreign Law: "Global Chain-Novel" & Innovation*

Referral to foreign law serves an important goal: overcoming domestic juristic biases. It can serve as an important tool to overcome the status quo bias[57] in domestic legal decision making. The existence of status quo bias among judges often acts to stabilize existing law by making it less subject to repeal by judicial interference. The evolution of certain legal rights is likely to be affected by status quo bias,[58] and the ability to cope with some conservative notions might exceed the power of domestic judiciary. Status quo bias is often considered to be a psychological account for a normality

56. Roper v. Simmons, 543 U.S. 551, 628 (2005) (Scalia, J., dissenting).

57. This is referring to a cognitive bias for the existing situation. The status quo bias holds that, all things being equal, people will prefer not to change an established behavior unless the incentive to do so is compelling. William Samuelson & Richard Zeckhouser, *Status Quo Bias In Decision Making*, 1 J. RISK & UNCERTAINTY 7, 7-59 (1988) (arguing that the status quo bias exerts a significant influence on judicial decision making, even when efficiency criteria would serve a departure from the status quo). Corrective justice, as discussed in the next chapter, would do often the same, yet the need to overcome current and conservative forms of corrective justice is required not because of the need to prefer economic and efficiency criteria but rather because of considerations of justice and equality.

58. *See* Robert L. Scharff & Francesco Parisi, *The Role of Status Quo Bias and Bayesian Learning in the Creation of New Legal Rights*, 3 J.L. ECON. & POL'Y 25, 29-42 (2006).

bias; the tendency for people to react more strongly to bad outcomes that spring from abnormal circumstances than to otherwise identical outcomes that spring from more ordinary circumstances.[59] Human nature is inherently conservative, and therefore, it should not be surprising that law is also conservative[60] and that when suggestions for change do emerge they are received skeptically.[61] Old laws that would never receive support if offered anew go unchallenged. Economic incentives are not enough to explain the inclination for normality and status quo.[62] True, judges quite often ignore economic considerations;[63] sometimes they pay little or no attention to the deterrent rationale of tort law. Yet, this tendency is not related necessarily to a status quo bias. It is often the outcome of an instinctive inclination to lean upon "just" considerations, such as the corrective justice rationale. Status quo bias is also not the only reason for the judicial tendency to stabilize the law. The adherence to the existing law is part of the traditional common law approach toward the need to secure legal stability and predictability. This notion is reflected in the status of precedents and the principle of *stare decisis*.

Status quo is not undesirable per se. Stability is needed and desired when based on rational considerations, such as securing predictability and consistency within the legal system. However, the status quo bias is disadvantageous when it reflects irrational stances and serves to chill the evolution of modern law and to block legal responses to urgent social needs. Referral to foreign law might help to overcome such bias. Of course, such referral is only useful where the foreign system referred to is free from the same bias and can serve as an anchor of change. Referral to foreign law might itself be biased when it is only intended to reinforce the referring judge's own bias by way of "cherry picking" foreign ideas and stances that might support his personal views. Only a genuine referral to other legal systems might help a judge to overcome his or her own personal bias. Such

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59. Robert A. Prentice & Jonathan J. Koehler, *A Normality Bias in Legal Decision Making*, 88 CORNELL L. REV. 583, 599 (2003). Prentice and Koehler argue that "human nature is inherently conservative. Therefore, it should not be surprising that law, like consumer preferences, medical philosophy, and science more generally, is also conservative. The law favors inaction over action and the usual over the unusual." *Id.* at 589.

60. *Id.* For a related discussion with regard, inter alia, to malpractice cases, see Gideon Parchomovsky & Alex Stein, *Torts and Innovation*, 107 MICH. L. REV. 285, 285-87 (2008). The article exposes the cost of current tort law with regard to its effect on innovation. It is argued that "courts' reliance on custom and conventional technologies as the benchmark of liability chills innovation and distorts its path." *Id* at 286.

61. *See* Prentice & Koehler, *supra* note 59, at 589.

62. *See* Prentice & Koehler, *supra* note 59, at 586, 592.

63. Jonathan Baron & Ilana Ritov, *Intuitions About Penalties and Compensation in the Context of Tort Law*, 7 J. RISK & UNCERTAINTY 17, 31-32 (1993).

referral should not be predetermined, and it should be subject to a rational examination.

Should referral to foreign law be a conscious dialogue between the different systems – even if there no reciprocity exists? Not necessarily. Justice L'Heureux-Dube[64] and former Chief Justice Barak[65] complained about the fact that the U.S. Supreme Court is not participating in the international dialogue about human rights and other issues. But referral to foreign law is not necessarily a dialogue – at least not a conscious dialogue. Developing of domestic law via referral to foreign law can be confined to only one party, the referrer, while the referred system is unaware of its involvement in the process. Yet, such referral can trigger an efficient, though uncoordinated, cooperation between the different legal systems. In this process, each system contributes its own innovations to the common pool of developing law. It was Ronald Dworkin who, in defining the law as integrity, compared the judicial decision making to the writing of a "chain novel." This novel, according to Dworkin, is written by a group of authors, each adding a new chapter that makes sense as part of the story as a whole. The judge, as the chain-novel's author, should be connected to the decisions of the past.[66] He must consider past decisions as a part of a continuing story and must award them the proper interpretation and then continue according to his own judgment of how to make the developing story as good as it can be.[67] Each deciding judge writes upon a background to which he must adhere. In his theory, Dworkin refers to an imaginary judge of superhuman intellectual power and patience whom he calls 'Hercules.' Every judge should strive to be, according to Dworkin, this Hercules when making his legal decision.[68]

Let us transform Dworkin's theory into the global arena. We might find that referral to foreign law can offer Hercules an efficient tool to cope with his mighty task. An accumulative effort to which each and every legal system

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64. L'HEUREUX-DUBE, *supra* note 43, at 246.

65. Barak, *supra* note 46 at 42-53.

66. RONALD DWORKIN, LAW'S EMPIRE 228-29 (1998). Dworkin describes the writing of the chain novel as follows:

> In this enterprise a group of novelists writes a novel *seriatim*; each novelist in the chain interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives and so on. Each has the job of writing his chapter so as to make the novel being constructed the best it can be, and the complexity of this task models the complexity of deciding a hard case under law as integrity.

Id.

67. *Id.* at 229.

68. *Id.* at 239.

makes its own contribution can ease the "Herculean" effort to achieve judicial progress without breaking the chain. Such process often reflects an uncoordinated cooperation between different jurisdictions when some of them might not even be aware of their contribution to the process. All of them take part in this global chain-novel writing, although the writer of the latest chapter is often the only one that is aware of the whole process. In this process of global chain novel writing, whenever it takes place, each system writes an additional chapter of the developing story and contributes its own share to the final outcome. Each jurisdiction takes one or more steps toward the conclusion of the judicial process. But unlike the domestic chain novel process, some of the chapters are written independently, and it takes the initiative of one system or one court to connect them all and to build upon them the new chapter. It is only the last chapter that makes all other chapters a linked chain. Yet, although the former bricks laid by the different systems were not necessarily linked to each other, the final outcome is only possible where it is laid upon the foundations that were accumulatively constructed. There is no need for a conscious dialogue between the contributing systems; indeed, such inter country uncoordinated cooperation, in the arena of private law, will be illustrated in the third part of this Foreword.

Global judicial cooperation can assist domestic courts to depart from local status quo bias. It can serve as a means to achieve progress and overcome irrational judicial conservatism by relying on the "global market" of innovations. At the same time, it can also serve as a restraint imposed upon domestic courts, preventing them from exceeding the borders of the general consensus about what the "novel" should tell. Dworkin's Hercules accepts law as integrity. He must restrain himself and choose an interpretation that fits the fundamental spirit of the text. In that matter, referral to foreign law is similar to Dworkin's metaphor of a chain novel. When a judge considers himself part of the system – for that matter the global legal system – he will tend to avoid a significant departure from the global consensus.[69] Of course, such restraint is conditioned on the very willingness to refer to foreign law.

69. A good example for the desire to remain within the global consensus can be found in the majority judgment in Roper v. Simmons, 543 U.S. 551, 577-78 (2005). Referring to the laws of other countries, the Court indicates that "only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China and that since then, each of them has either abolished such punishment or made public disavowal of the practice." *Id.* at 577. The Court states that "[i]t is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty." *Id.* at 578.

III. PRIVATE LAW AND FOREIGN LAW – THE CASE OF CORRECTIVE JUSTICE

A. *Public Versus Private Law*

The debate regarding the referral to foreign law has focused, in the United States and other countries, on the sphere of constitutional law. Nevertheless, the issue of referring to foreign law in constitutional adjudication is only a part of a broader issue – referral to foreign law in general. Indeed, the fact that most democracies share common agreement with regard to the protection of certain fundamental human rights makes the mutual influence of the different systems, with regard to constitutional adjudication, more natural and understandable. Yet, the differences between the diverse constitutional documents, and their historical roots as well as the difference between the natures of the different courts and the tradition of judicial review raises some difficulties with regard to referral to foreign constitutional law. The U.S. Constitution for instance refers to some important rights in absolute terms. Other, younger constitutional documents include some modified provisions aimed at weighing in advance individual rights and public interests. Those constitutions enacted in the second half of the twentieth century also reflect a starkly different conception of the relationship between individuals and the State. This dissimilarity makes it often difficult and sometimes totally irrelevant to refer to foreign law in constitutional adjudication. The United States, for instance, is exceptional in its strong priority in protecting freedom of speech. While there are some legal systems that were willing to follow the first amendment as a desirable model,[70] others will reflect a deep cautiousness about referring to the American constitutional case law in that matter.[71]

It is then sometimes much easier to find a common language between different legal systems in the sphere of private law. Many systems, especially those known as the Anglo-American legal systems, share common principles and common concepts of private law. These principles are shared not only by the British Commonwealth countries; they are shared by some non-English

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70. For example, this is true of Israel until recently, when a more conservative approach to the freedom of speech was adopted by the majority of the Court.

71. For example, the Canadian Supreme Court, although ready to refer to foreign law, indicated the difficulties inherent in the referral to American constitutional law: "just as similarities will justify borrowing from the American experience, differences may require that Canada's constitutional vision depart from that endorsed in the United States." Regina v. Keegstra, [1990] 3 S.C.R. 697 (Can.). Referring to the American First Amendment doctrine, and its applicability in the context of a challenge to hate propaganda legislation, the Canadian Court held that "the special role given equality and multiculturalism in the Canadian Constitution necessitate a departure from [the path taken in the United States]." *Id.*

speaking states that are not part of the common law legal regime nor share a common tongue – yet share a common "legal language" consisting on universal concepts. One of these concepts is the concept of "justice" as a central goal of exercising private law.

B. *Private Law and the Developing Notion of Corrective Justice*

1. Corrective Justice – The Traditional View

Recent decisions of the Supreme Court of Israel can serve as an illustration for the link between domestic private law and "cosmopolitan" adjudication.[72] They demonstrate a novel reading of the concept of corrective justice. In the traditional view of corrective justice, imposition of liability in private law rectifies for injustice inflicted by one person on another. This idea has become central to contemporary theories of private law.[73] Corrective justice aims to restore the notional equalities with which the parties held when they entered the interaction between them. It ties a connection between the wrong and the suggested remedy with the goal of correcting any injustice the defendant inflicted upon the plaintiff. In corrective justice, the remedy aims to undo the injustice done to one party and simultaneously to take away from the other party exactly what is being awarded to the first. Both injustice and its rectification are thus correlative. The disturbance of the equality by a wrongful act connects two, and only two, parties.

The purest version of corrective justice was articulated by Weinrib.[74] Corrective justice in its strictest form is characterized by its bipolar nature and insists that the "only normative factors to be considered significant are those that apply equally to both parties."[75] A factor that applies only to one of the parties – for example, the defendant being in a position to distribute losses broadly – is an inappropriate justification for liability.[76] Corrective

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72. The term "cosmopolitan" has been used to refer to the use of foreign law in constitutional interpretation. *See generally* Ken L. Kersch, *The New Legal Transnationalism, The Globalized Judiciary, and the Rule of Law*, 4 WASH. U. GLOBAL STUD. L. REV. 345 (2005). Eric A. Posner uses the term "judicial cosmopolitanism" to describe the view that judges have a constitutional obligation to protect the interests of non-citizens. *See* Eric A. Posner, *Boumediene and the Uncertain March of Judicial Cosmopolitanism* (Univ. of Chicago, Public Law Working Paper No. 228, 2008).

73. ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 204-31 (1995) [hereinafter WEINRIB BOOK].

74. *Id.*; Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 549-56 (2002) [hereinafter Weinrib Article].

75. Weinrib Article, *supra* note 74, at 351.

76. *Id.*

justice in its strictest form dismisses distributive consideration as irrelevant to tort law. Moreover, because private law involves justifications that pertain, according to the pure version of corrective justice, only to the relationship between the two parties, a court cannot impose on this relationship an independent policy of its own choosing (e.g., promoting the general welfare). Strict corrective justice would ignore the interest of a third party or collective social goal and would reject the Learned Hand Formula as a proper standard for imposing liability in tort as it weighs the risk created by the defendant against the burden that he or she will shoulder when trying to prevent the risk.[77] Giving any weight to the defendant's burden (costs of precaution) would infringe the correlativity requirement of traditional corrective justice.[78] Strict corrective justice would also rule out the economic analysis of law for being incompatible with the non-instrumental character of private law as perceived by it.[79] Whenever the defendant breaches a duty correlative to the plaintiff's right, the plaintiff is entitled to reparation.

Correcting the injustice inflicted upon the plaintiff requires that he or she will be restored, to the extent possible, to the position in which he or she would have been had the wrong not been committed. In this sense, damages under corrective justice are actual and compensatory. Indeed, the rule of restoring the victim to his or her original condition might conform to different modes of liability justifications[80] and serves as one of the most important principles in the Common Law with regard to the law of damages.[81] The parties are less concerned with the specific theory of liability than with the consequences of it (i.e., payment of damages), yet judges are often more

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77. According to Judge Learned Hand's formula, negligence exists only when the costs of precaution are lower than the expected loss. United States v. Carrol Towing Co. 159 F.2d 169, 173 (2d Cir. 1947).

78. For a critical review of pure corrective justice, see Ariel Porat, *Questioning the Idea of Correlativity in Weinrib's Theory of Corrective Justice*, 2 THEORETICAL INQ. L. 161, 168-70 (2001). Porat argues that the "effect of the defendant's behavior upon a third party's interest is an inevitable consideration in evaluating whether the former's behavior was reasonable or not." *Id.* at 170.

79. Weinrib adopts the Kantian perspective of corrective justice on top of the foundation laid by Aristotle. Weinrib Article, *supra* note 74, at 353-54.

80. The payment of full damages may serve as an efficient deterrence with regard to the defendant and also serve the goal of compensating the plaintiff or the goal of corrective justice (relating to both defendant and plaintiff).

81. The American practice of restoration is summarized by Marc A. Franklin et al., TORT LAW AND ALTERNATIVES, CASES AND MATERIALS 698 (8th ed. 2006). ("The fundamental goal of damages awards in the unintentional tort area is to return the plaintiff as closely as possible to his or her condition before the accident. This is achieved by measuring certain items of harm in past and future terms.").

comfortable with the theory of corrective justice as a justification for the imposition of liability being a moral, neutral, policy-blind theory.[82]

2. Corrective Justice: a Comprehensive Normative Version

The Israeli Court has acknowledged competing theories of private law but has refused to sweepingly reject any one theory of tort law. Indeed, when the question whether to prefer economic considerations to corrective justice was faced straightforwardly by the Supreme Court of Israel, it rejected, in principle, the notion that considerations of economic efficiency enjoy any supremacy.[83] Yet, the cost of precaution was often considered by the Court. It did not ignore the interest of a third party or collective social goal. It did not reject off-handedly the Learned Hand Formula as a relevant standard for imposing liability in tort, but it offered a more flexible version of the formula. The "burden" side of the formula was often considered by the Court when imposing liability and in some instances, the Court weighed the risk created by the defendant against the burden that he or she will shoulder when trying to prevent the risk.[84] The Hand Formula was not restricted to monetary terms in Israeli case law. It was held that society may attribute social values and a variety of just considerations to both sides of the formula: the burden of precaution and the estimation of the expected damage.[85] Moreover, so it was held, the formula can also serve as a tool to achieve corrective justice.[86] Alongside the struggle to achieve corrective justice, the Court examined the economic rationale of its decision quite often. Indeed, the economic rationale was never recognized by the Israeli Court as a decisive consideration, not even as a central one,[87] yet it always served as a supportive tool accompanying the central theory of corrective justice.

The readiness of the Israeli Supreme Court to take into consideration the interests of a third party when awarding damages to a tort victim was well-

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82. For an early manifestation of Corrective Justice in the United States, see Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 100-01 (N.Y. 1928); WEINRIB BOOK, *supra* note 73, at 158-64.

83. CA 44/76 Ata v. Schwartz [1976] IsrSC 30(3) 785.

84. CA 3510/99 Valles v. Egged Bus Co. [2001] IsrSC 55(5) 845.

85. CA 5604/94 Hamed v. State of Israel [2004] IsrSC 58(2) 498.

86. "Inflicting upon justice is a burden and corrective justice is a benefit," and "the idea of cost and benefit may relate to a variety of ideas of justice including distributive justice." *Id.*

87. For a different view, *see* Ronen Pery, The Notion of Reasonableness in Negligence: A Positive Theory and a Normative Critique, 38 MISHPATIM, 351 (2008). The author is of the opinion that while the Israeli Supreme Court has never conclusively adopted an exclusive definition of negligent conduct, the dominant perception of this term in Israeli case law has been utilitarian-economic in nature. *Id.*

illustrated in a recent case.[88] The Court in *John Doe* took into consideration the price that a third party might pay for awarding damages to the plaintiff in an automobile accident.[89] As a result of the accident, the plaintiff in *John Doe* suffered bodily harm which impaired his sexual function.[90] He sued, inter alia, for reimbursement of expenses for hiring the services of "escorts," claiming that these expenses "will restore him to his former position" (i.e., the ability to conduct a "normal relationship with the other sex").[91] His claim for these sexual damages was rejected by the Court.[92] It held that no pecuniary damages should be awarded for the cost of such services.[93] The Court was of the opinion that, in these circumstances, pecuniary damage cannot restore the victim to his former position.[94]

While this was seemingly a traditional application of the principle of restoration, the Court added a novel dimension to the traditional analysis. It invoked policy considerations to hold that when awarding damages courts should not ignore the possible effect upon a relevant disempowered group, such as exploited women.[95] The Court reasoned that, in the light of the harsh reality with regard to the prostitution industry, the Court should avoid awarding money that might be used to finance criminal activity – particularly criminal activity that so clearly exploits others.[96] The Court openly took into account the effect of awarding damages upon the interests of a third party, thus departing from the bipolar correlative nature of traditional corrective justice.[97] Pure corrective justice would never accept the imposition of independent policy, such as promoting the general welfare or interests of a third party.[98] *John Doe* makes clear that Israeli jurisprudences has pivoted toward a more integrative and comprehensive version of corrective justice,[99] which tries to overcome the shortages of each of the competing goals of private law in general and tort law in particular.[100] It is submitted that such a

88. CA 11152/2004, John Doe v. Migdal Ins., [2006] IsrSC.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. The Court, nevertheless, indicated that pecuniary damages can be awarded for medications and medical therapies. *Id.* Moreover, according to the Court, damages can also be awarded for certain non-pecuniary injuries like pain and suffering. *Id.*

94. *Id.* ("[n]o money, can pay for the loss of love, intimacy and partnership").

95. *Id.*

96. *Id.*

97. *Id.; see* Weinrib Article, *supra* note 74, at 355 (discussing corrective justice within a bilateral – or bipolar – framework).

98. *See John Doe*, CA 11152/2004.

99. *Id.*

100. For example, the theory of distributive justice in its pure mode raises questions of

comprehensive reading of the notion of corrective justice might benefit from the advantages of the different theories pertaining to the goals of private law, and depart from the weaknesses of each of them when applied in its pure form.

The new reading of corrective justice goes further than this insofar as it constitutes not only a departure from the bipolar characteristic of corrective justice but also a new stance toward the "status quo" to which the victim of the tort should be restored. The indecisive approach toward the different rationales for imposing liability in private law is replaced by a clear choice of a unified new version of corrective justice and a new understanding of the meaning of just correction. According to this novel concept of corrective justice, correction means the restoration of the victim to a just and fair status, safeguarding her normative rights, striving for a fair correction of the tort, exceeding the historical dimension of the status quo to which the law wishes to restore the tort victim, and looking for its normative aspects. Such an approach enables the courts to realize what has actually changed concerning the status of the plaintiff.

This normative change in the perception of the notion of corrective justice was reflected in yet another important tort case: *Abu Hanna*.[101] In fact, the decision in *John Doe* was made possible by the holding in *Abu Hanna*, which was decided one year earlier. *Abu Hanna* itself was made possible by its special referral to foreign law.

IV. THE CASE OF *RIM ABU HANNA* – REFERRAL TO FOREIGN LAW, AND THE NOVEL CONCEPT OF CORRECTIVE JUSTICE

It is now clear that modern trends in tort law did not escape the Israeli system. The Supreme Court in Israel was not ready to ignore the fact that tort law has much influence outside the bipolar relations of plaintiff and defendant. The Court has recognized that tort law has a wider normative meaning as well as an important practical effect. In spite of its neutral image, tort law can enhance and detract from important social values. Corrective justice was thus developed in Israel toward a theory that does not ignore value considerations. In the case of *Abu Hanna,* they strive to develop a more comprehensive version of corrective justice and the need to attune its

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legitimacy, though it may be invoked by the courts as a political consideration of private law; while the economic approaches may be invoked by the courts for their utilitarian considerations – though they may pose serious moral objections, see, e.g., JEFFERY L. HARRISON, LAW AND ECONOMICS, POSITIVE, NORMATIVE AND BEHAVIORAL PERSPECTIVES 101 (2d ed. 2007) (citing JOHN RAWLS, A THEORY OF JUSTICE, 42-43 (1971)).

101. CA 10064/02 Migdal Ins. v. Rim Abu Hanna, [2005] IsrSC.

traditional notion into an updated moral understanding of its goals were tied to a need to overcome status quo bias within the system. It was in fact a status quo bias that related to the concept of "status quo" itself – namely, the former status to which tort law endeavors to restore the victim by awarding him damages. Referral to foreign law served in that case as a legal means to make such novel reading of the concept of corrective justice acceptable.

Rim Abu Hanna, the plaintiff, was injured in a road accident.[102] She was five months old.[103] She was living in a village where women generally did not seek employment outside the home after marriage.[104] She sued for damages in tort and asked to be compensated for past and future expenses and for loss of future earnings.[105] The defendant argued that the lost earnings should be computed by reference to evidence of her potential earning power in light of her personal and familial background, the employment patterns of her sector, and above all the average wage data of the village where she lived.[106]

The Israeli Court rejected this argument, holding that the appropriate statistical basis for computing future loss of earnings should be the tables of the average wage throughout the country.[107] The Court used classical corrective justice language when it turned to assess the damages.[108] Yet, with regard to the computation for future earning loss for a minor with no employment history, it offered a novel perception of the "status quo" – i.e., the "original" situation to which the plaintiff should be restored.[109] The Court emphasized that "restoring the status quo under the heading of loss of earning power means bringing the injured person to a place destined for him in the future, not returning to the place where his forefathers (and foremothers) were in the past."[110] The average level of employment in the market, so it was held, is the best basis for realizing the goal to encompass the range of narratives that are open to a child in the country, "every child of whatever

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102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. According to the Court, "[w]hen a tortious act deprives a person of the capacity to choose the outcome of his life, the law of torts seeks to restore the status quo and, so far as it can, to return the right that was lost." *Id.* Further, the Court noted that "[r]estoration of the status quo . . . comes to negate, to the extent it can, the result of breach of equality between plaintiff and defendant according to Aristole's conception." *Id.*
109. *Id.* Referring to the right that was lost in the tortious event, the Court described it as "the right to sketch the narrative of [plaintiff's] life, a narrative of hope, a narrative of the aspiration to realize this hope." *Id.*
110. *Id.*

sex, origin, race, or religion."[111] This novel perception of restoration is the result of a non-traditional application of the idea of corrective justice: "corrective justice, as an important goal of the law of torts, is just one branch of a large tree that expresses the conception of universal justice, the justice that requires equality, that requires recognition of the right to autonomy, and that nourishes hope."[112]

This new reading of corrective justice which embraces fundamental values and universal creeds hints to certain constitutional implications of the choice of statistical data with regard to future loss compensation. The reliance on racial, ethnic, and sex-based wage tables can be considered as the equivalent of using explicit race, ethnic, and sex classification.[113] It might perpetuate past injustices and reflect bias.[114] The Court in *Abu-Hanna* refrained from an explicit discussion of these principle issues.[115] Yet, it was aware of the need to reach an indiscriminative outcome.

The judgment in *Abu Hanna* included expanded referral to foreign law. When the Court reached the question of using gender and ethnic-based statistics in computing future earnings losses of a girl born in a poor village, it started an international legal tour.[116] This was quite a long journey. It started in the United States and ended in Australia, making stops in Canada and the United Kingdom along the way.[117] (One should note that all of the

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111. *Id.* The average wage "reflect[s] the range of possibilities that was open to the injured infant. This basis has to express not only the possibility that the infant on maturity would be found on the lowest stratum of employment but also the possibility that in due course, he would have achieved professional greatness." *Id.* Furthermore, according to the Court:

> [T]he choice of any other basis on the exclusive ground that the injured infant belongs to certain group, signifies adherence to the assumption that the vocational opportunities that exist in the country are not open, and never will be open in the future to a child in that group. This denial has no factual or normative ground.

Id.

112. *Id.* The Court in *Abu-Hanna* did not rule out some aspects of the economic analysis of the issue and recognized the importance of certain distributive justice considerations as well of the relevance of human rights to private law, but preferred to base its decision on a comprehensive reading of corrective justice. *See id.*

113. Federal statutes in the United States prohibit discrimination in pay on the basis of sex. *See* Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1994); *see also* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1994).

114. On the linkage between civil law and civil liberties, *see generally* Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435 (2005).

115. *Abu Hanna*, CA 10064/02.

116. *Id.*

117. *Id.*

stops were in common law systems – most of which are still part of the British Commonwealth.) All foreign systems referred to have coped with the difficulties in computing damages for future losses of a minor with no employment history.[118] Certain systems took into consideration group characteristics, such as age sex and socio-economic status.[119] Professor Martha Chamallas indicates[120] that in the United States, it is commonplace for expert witnesses in tort suits to rely on gender and race based statistics "to determine both the number of years that plaintiff would likely have worked and the likely annual income the plaintiff would have earned."[121] In Canada, the issue was avoided in 2004 by the Supreme Court on procedural grounds when it rejected the claim that gender-specific statistics should not have been used by the trial court.[122] The Israeli Supreme Court also could not find much

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118. For example, it was Lord Denning who wrote in 1975:

> At his very young age these [calculations] are speculative in the extreme. Who can say what a baby boy will do with his life? He may be in charge of a business and make much money. He may get into a mediocre groove and just pay his way. Or, he may be an utter failure . . . . It is even more speculative with a baby girl. She may marry and bring up a large family, but earn nothing herself. Or, she may be a career woman, earning high wages.

Taylor v. Bristol Omnibus Co. Ltd, (1975) 1 W.L.R 1054 (K.B.).

119. *E.g.*, Hughes v. Pender, 391 A.2d 259, 263 (D.C.1978). In one case, the court indicated that "[The expert in the case], who has performed thousands of lost income analyses, testified that no one had ever asked him to provide race- and sex-neutral calculations in wrongful death cases." United States v. Bedonie, 317 F. Supp. 2d 1285, 1315 (D. Utah 2004).

120. Chamallas, *supra* note 114, at 1438.

121. *Id.* Courts in the United States and in other common law countries have traditionally assessed lost of future earnings awards for women according to specific statistics. In Caron v. United States, 548 F. 2d 366 (1st Cir 1946) the court stated that "[o]ne does not need expert testimony to conclude that there is inequality in the average earnings of the sexes." In Frankel v. United States 321 F. Supp. 1331, 1338 (E.D. Pa. 1970), the court held that consideration must be given in a case of a female plaintiff to the likelihood of marriage and motherhood in her future because "[m]arriage probably would have interrupted her career." Chamallas argues that "when experts rely on race or gender based statistics to assess tort damages, we tend not to notice the discrimination and to accept it as natural and unproblematic." Chamallas, *supra* note 114, at 1442. In an earlier article, she argues that use of race and gender based statistics is an unconstitutional practice that amounts to telling the jury that it is permissible to treat men and women, whites and minorities differently. *See* Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 75 (1994).

122. Toneguzzo-Novell v. Burnaby Hosp., [1994] 1 S.C.R. 114 (Can.) (holding that "[d]ue to the manner in which this case was presented at trial, we are not in a position to entertain the argument advanced for the first time in this court that female earning tables should be replaced by other alternatives").

support for a constitutional analysis of the civil suit.[123] Yet, the journey was not in vain. It became clear that most modern legal systems were aware of the need to depart from group based statistics or at least to restrict their impact. In some instances, courts, although using gender or race based tables, were willing to modify them by adding a certain sum of money to female earnings data or by subtracting a certain amount from male wage tables when awarding damages to women.[124]

In the United States, some courts made a clear choice not to use gender-based or race-specific wage tables.[125] They often reached this decision relying on factual grounds, rather than normative choices, raising doubts about the probative value of such statistics.[126] In those cases, the courts doubted the probative value of the assumption that current employment and income disparity between men and women will still exist in the future and decided to turn to neutral tables.[127]

The Israeli Supreme Court found similar trends in Australian case law where it was emphasized more than once that the borders between male earnings statistics and female employment data were blurred. Such were the decisions of the Supreme Court of Tasmania, which indicated that "these days men become cake decorators, and women become underground miners,"[128] and the decision of the Supreme Court of New South Wales, Australia with regard to the use of sub-group statistics about members of the Aboriginal race.[129]

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123. One can find a number of cases in the United States, Canada, and Australia in which courts have computed damages according to gender based data without invoking the question whether such practice is prescribed by domestic constitutional documents.

124. *E.g.*, MacCabe v. Westlock Roman Catholic Separate Sch. Dist. No. 110, [1998] 226 A.R 1 (Can.).; *see* Christopher J. Bruce, *MacCabe v. West Lock: The Use of Male Earnings Data to Forecast Female Earning Capacity*, 37 ALBERTA L. REV. 748, 760 (1999).

125. In Reilly v. United States, 665 F. Supp. 976, 997 (D.R.I. 1987), the court rejected an economist's assumption that the plaintiff, being a woman, would not work forty per cent of her working period. The court expressed serious doubt as to the probative values of such statistics with respect to twenty-first century women's labor patterns. *Id.*

126. *E.g.*, Drayton v. Jiffee Chem. Corp., 591 F.2d 352 (6th Cir. 1977).

127. For a similar approached based upon alternative application of the Federal Rules of Evidence, see Sherri R. Lamb, *Toward Gender-Neutral Data for Adjudicating Lost Future Earning Damages: An Evidentiary Perspective*, 72 CHI.-KENT L. REV. 299, 328-29 (1996). The author argues that a gender-neutral method for determining lost future earnings damages will be consistent with the Federal Rules of Evidence being more accurate and more relevant. *Id.* The author argues that gender-neutral tables better reflect women's increasing participation rates and pay increases, and that they are more relevant to a determination of lost earning capacity than sex-specific data. *Id.* at 329.

128. Grimsey v. S. Reg'l Health Bd. (1997) 1997 Tas. Lexis 96, 144 (Austl.).

129. In Rotumah v. New S. Wales Ins. Ministerial Corp., (1998) 1998 NSW Lexis 1714, 98-99 (Austl.), Donovan J. opined that "I have some doubt about whether other evidence could include

The Israeli Court could thus find important support in foreign case law for its own assumption that equality will be a reality in the future. Important foreign courts shared the belief that in the future, the disadvantages suffered by females and minorities will have considerably less impact. Such belief underscored its own beliefs. It was clear that most enlightened jurisdictions were aware of the need to advance equality within tort law. They all made some important steps toward this goal. The Israeli Court followed these steps. But it did not stop there. It did not stop at the factual reasoning.[130] It went further toward a comprehensive reading of the idea of corrective justice while giving a normative interpretation to the principle of restoration. It stated that the asset lost by this poor village girl was not her former historic status.[131] It was the right "to sketch the narrative of her life."[132] It was not the historic expectation of earnings; it was the right to autonomy, the right to sketch the narrative of one's life – a narrative of hope – and the aspiration to realize this hope, and the right to choose between the paths opened to every other infant.[133] This is the asset that should be restored. The Court stated that the justice she was entitled to "requires equality and recognition of the right to autonomy that nourishes hope."[134] The status – quo bias, the tendency to adhere to traditional notions of restoration was abandoned. In fact, the meaning of "status quo ante" was changed. The Court in the case of *Abu Hanna* was able to depart from the traditional notion of restoration.[135] It overcame the conservative approach to corrective justice by the use of inter-system cooperation. Each and every legal system took an important step toward a more just and fair reading of the notion of traditional corrective justice. Some of them might not even been aware of their contribution to the writing of this global chain novel. Yet, they all cooperate in this judicial enterprise. The development of private law in that context, in the systems referred to, was gradual and in some cases quite independent. Each system has contributed its own share to the final outcome. Reciprocity had nothing to do with this.

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statistics about sub-groups within Australia. The plaintiff's racial group in this case has already been included in the overall statistics of average weekly earnings. This reflects the equality of opportunity in this country and I do not think that the general statistics which may reflect economic opportunity should be rebutted by specific statistics of sub-groups."

130. In fact, the approach found in certain foreign law of resolving the question of damages computation on factual grounds often masks the principal question whether it is permissible to treat men and women, whites and minorities differently.

131. CA 10064/02 Migdal Ins. v. Rim Abu Hanna, [2005] IsrSC.

132. *Id.*

133. *See id.*

134. *Abu Hanna*, CA 10064/02.

135. *See id.*

It was easier, then, for the Court in *Abu Hanna* to take a further step toward a totally new interpretation of the concept of corrective justice and toward a new normative reading of the notion of restoration. It will be easier for other legal systems to develop their own law if they will chose to do so by using comparative law. Referral to foreign law can make it easier for domestic courts to overcome natural biases and to complete the evolution of new concepts. It can enable them to exercise the "superhuman" intellectual power needed to write the next chapter of the global chain-novel; it can ease the ability to sketch an additional chapter on top of those already written by other jurisdictions provided that it will remain within the universal legal boundaries.

V. CONCLUSION

The use of foreign law in domestic adjudication is debatable. While a supportive approach to such referral can be found in certain legal systems (e.g., Canada, South Africa and Israel), the use of comparative law is still debatable in the United States. American courts have historically declined to refer to foreign law when interpreting the U.S. Constitution, and indeed, American constitutional law is exceptional in its jealous strive to protect fundamental human rights such as the freedom of speech. In this context, one could hardly find a better model to follow. Nevertheless a sweeping rejection of any referral to foreign law, as suggested by judges and scholars in the United States, even when it comes to constitutional law cannot be justified. America no longer has a monopoly on constitutional judicial review and the opinion of the world community can provide an important source of experience and legal knowledge. Private law is even more suitable for comparative law. Many legal institutions and concepts of private law are common to different legal systems, and each of them can benefit from the mutual sharing of knowledge. Referral to foreign law can serve as an important tool to enrich legal knowledge and as an important source of universal judicial experience. It offers the ability to improve domestic stances and to overcome irrational conservative notions. Referral to foreign law should not be conditioned upon reciprocity. A sweeping rejection of referral to those countries that refuse to reciprocate makes little sense. It simply denies the benefits of referral to those willing to rely upon it, while imposing no real costs of those who refuse to refer to foreign law.

Indeed, the benefit of using foreign law in domestic adjudication is conditioned upon the existence of a normative proximity between the two systems engaged in the process, the existence of sufficient technical tools to excess foreign law, and the ability to understand the normative nature of the specified legal system. Yet, it is most and foremost conditioned upon a

willingness to turn to foreign law. To promote such willingness, it should be made clear that referral to foreign law does not mean an indiscriminative reliance upon foreign case law nor does it mean the acceptance and adoption of legal stances that are strange to domestic traditions. The domestic judge is always sovereign in his decision whether to rely upon foreign law or to be assisted by it and to what extent.

Abu Hanna serves as a good illustration for the benefits of using comparative law. It illustrates the use of comparative law as a legal tool for developing domestic law and overcoming undesired domestic status quo bias when a legal innovation is most needed. It can also serve as an illuminative demonstration of the very special mechanism by which an inter system co–building of a new legal institution operates. In this gradual process, each system contributes to the ultimate outcome by exposing a new understanding of the issue and sometimes by removing a certain obstacle. In this context, Dworkins' idea of comparing decision making to the writing of a "chain novel" receives a new dimension – a global version of the "chain novel." This chain process can assist the domestic judge to overcome irrational conservatism. It also serves as a restraining factor whenever the judge tends to apply his personal views to his decisions. In this context, it is important to distinguish between personal bias of the judge and a general bias inherited in the system at large. Referral to foreign law can serve as a useful means to overcome systematic status quo bias and archaic stances inherited in a domestic system. It should and it can restrict the local judge in his decisions where his personal status quo bias affects them.

Domestic courts often find a moral support in foreign adjudication. Pointing to similar approaches in other legal system and relying on a "silent" inter country consensus enhances the credibility of domestic adjudication. At the same time, the very willingness to refer, substantially, to foreign law, imposes a constraint upon the domestic judge: Linking himself to the global narrative chains him to the universal consensus.

Referral to foreign law is thus neither wrong nor correct. Such referral might be beneficial when it is genuine and relevant. It is totally undesired when it is used as an excuse for imposing a personal bias or when it replaces the need to strive for a desired change within the domestic system itself. Looking for changes already achieved outside the domestic legal sphere can serve as an anchor for a change in a system that has reached the right turning point. It cannot by itself bring the needed legal innovation to an unprepared society.