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**Report of Mr. Justice John L. Murray,  
President of the Supreme Court  
and Chief Justice of Ireland**

*Methods of Interpretation – Comparative Law  
Method*

The interpretation of legal texts such as statutes and constitutions has presented problems from the earliest times to the present day. Plato urged that laws be interpreted according to their spirit rather than literally. Voltaire expressed the view that to interpret the law is to corrupt it. Montesquieu viewed the judge as simply the mechanical spokesman of the law. The role of the Judge has been transformed since Montesquieu's day but the historic tension still exists between the search for the "true intent" of a legal norm and the desire for certainty and transparency in the application of the law.

That such tensions should persist to the present day is not surprising when one considers that first, there is the law; then there is interpretation. Then interpretation is the law. This simplified reference to the judicial process emphasises that when courts apply a legal norm the interpretation which they give it has ultimate authority. The process of interpretation reposes wide discretionary powers in the judge. Voltaire's misgivings would not be altogether misplaced in a judicial environment where methods of interpretation of legal norms were lax or applied subjectively or simply exploit-

ed to justify a desired end. Then there would be a real likelihood that in some cases the Courts would usurp the functions of the legislature and call in question their own legitimacy.

Some methods of interpretation surface, even in the same legal system, under different guises and many of them have common components. While the meaning of 'literal interpretation' is fairly obvious the teleological method of interpretation is also sometimes called the purposive and often difficult to distinguish from the schematic or the harmonious methods of interpretation.

Notwithstanding a certain ambiguity in the nomenclature of methods of interpretation it could be said that the literal, teleological and comparative law methods comprise a primary group of such methods.

Recourse to the comparative law method of interpretation was of primary importance to the Court of Justice from the time of its establishment and second only to its use of the teleological method even if the literal approach is invariably the starting point.

National legal systems invariably have particular rules for the interpretation of legal norms giving effect to international treaties not least because contracting parties to international agreements should seek, as far as possible, to give uniform effect to their provisions in national law (irrespective of whether the legal system has a dualist or monist approach to such treaties). Of course one of the primary roles of the Court of Justice is to ensure the coherent and harmonious application of community law throughout the European Union. According to the well-established jurisprudence of the Court of Justice national Courts are in turn under a duty to interpret national norms, so far as possible, in a manner consistent with community law. Moreover, as the *Cilfit*<sup>13</sup> case points out, national Courts must bear in mind several special factors when interpreting or applying community law. These include the fact that “community law uses terminology which is peculiar to it. ... legal concepts do not necessarily have the same meaning in community law and in the law of the various Member States. ... Every provision of community law must be placed in its context and interpreted in the light of the provisions of community law as a whole ...”. It seems evident that national Courts, in interpreting or applying community norms must adopt the same methods of interpretation as the Court of Justice.

It also follows from the foregoing that when national Courts interpret or apply community law, particularly in the absence of relevant case-law of the Court of Justice, it is entirely legitimate that they should have regard to the views expressed by other national Courts on questions of

community law, as this is conducive to its harmonious application in the Member States. Such an approach is also consistent with the requirement of the Court of Justice in *Cilfit*, with regard to a national Court which is relying on the notion of *acte claire* as a ground for declining to make a reference pursuant to Article 234. There the Court said that any perceived obvious meaning of community law must be “such as to be equally obvious to the Courts of other Member States and to the Court of Justice”.

However this is not the occasion for a broad consideration of the role of methods of interpretation generally in courts at national or supranational level. Instead I intend to focus my comments on certain aspects of the so-called comparative law method of interpretation.

In modern times Judges are increasingly accused of exceeding their judicial powers, even by their fellow Judges, in their use of methods of interpretation particularly as regards the use of the comparative law method.

For a variety of reasons the use of the comparative law method in the search for judicial solutions by national Courts is becoming increasingly widespread.

The fact that I am addressing Judges from at least 27 countries perhaps reflects the era in which we live. That is to say, not simply the era of European harmonisation, but the era also of globalisation.

Globalisation has by no means left the law and the administration of justice untouched. Just as

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<sup>13</sup> SRL *Cilfit* –v- Ministry of Health C-283/81 [1982] ECR 3415

in other fields of endeavour, there is an incremental growth in the globalisation of ideas and concepts of justice.<sup>14</sup>

The flow of information across the World Wide Web tells us that many of the same socio-legal issues pose challenges in all modern societies, irrespective of legal systems.<sup>15</sup>

Courts, particularly supreme or constitutional courts, are more than ever looking at how complex jurisprudential problems are resolved in judicial decisions of foreign countries and being inspired by the rationales that underlie such resolutions and the academic writings surrounding them. Comparative law – the study of similarities and differences between various legal systems, including judicial decisions on issues of common concern – is an increasingly rich source of inspiration for judges throughout the world.

If law is the science that we claim it to be, it cannot be viewed as having strict national boundaries. “*There is no such thing as ‘German’ physics or ‘British’ microbiology, or ‘Canadian’ geology.*”<sup>16</sup> I suppose in contrast to the natural sciences it must truthfully be said that the law has crystallised in each country under the influence or

pressure of historical and social forces which are often peculiar to that country. But that should be seen as an advantage, providing a more fertile soil in the pursuit of the primary aim of comparative law, as in all sciences; the search for knowledge fashioned from the experience of others.

The impact of globalization in the judicial domain has been referred to as the *growing judicial cosmopolitanism* resulting from the increased tendency of supreme courts to examine foreign judicial decisions and doctrines.<sup>17</sup>

Because globalisation affects all the areas of our social and political fabric, it also arouses fears. The impact of globalisation on the administration of justice or the evolution of the so-called judicial cosmopolitanism has given rise to some divergence of approaches, and indeed, controversy reflecting a fear of cultural or constitutional pollution.<sup>18</sup> It is from this perspective that the comparative law method of interpretation is often challenged.

In the divergence of approaches, we have at one end of the spectrum Article 39 of the Bill of Rights of the Constitution of the Republic of South Africa, adopted in 1996, which provides that when in-

<sup>14</sup> H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* 51-52 (2d ed. 2004).

<sup>15</sup> The numerous legal databases available through the internet demonstrate the importance of international comparative law and also indicate the need for all nations to address common socio-legal concerns. See, e.g., Lexis Nexis, <http://www.lexisnexis.com> and Westlaw International, <http://international.westlaw.com> (identifying just two of the many legal sources available on the World Wide Web for the purpose of researching and exchanging legal information). See also Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, Fifty-first Cardozo Memorial Lecture, 21 *CARDOZO L. REV.* 253, 253 (1999) (discussing affirmative action in the context of the fiftieth anniversary of the United Nations Universal Declaration of Human Rights).

<sup>16</sup> KONRAD ZWEIGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 15 (Tony Weir trans., Clarendon Press 1998) (1977).

<sup>17</sup> Gustavo Zagrebelsky, Presidente emerito della Corte costituzionale, Discorso, Cinquanta anni di attività della Corte costituzionale [President Emeritus of the Constitutional Court, Speech, Fifty Years of Activity of the Constitutional Court] (Apr. 22, 2006) (It.), available at [http://www.cortecostituzionale.it/ita/documenti/download/pdf/20060422\\_presemer\\_Zagr.pdf](http://www.cortecostituzionale.it/ita/documenti/download/pdf/20060422_presemer_Zagr.pdf).

<sup>18</sup> See Sanford Levinson, *Looking Abroad when Interpreting the U.S. Constitution: Some Reflections*, 39 *TEX. INT'L L.J.* 353 (2004) (discussing whether American judges should take into consideration international decisions when faced with American constitutional law questions and identifying methods adopted by other nations); Richard A. Posner, Foreword to *The Supreme Court 2004 Term: A Political Court*, 119 *HARV. L. REV.* 31, 85-90 (2005) (noting potential pitfalls associated with citing foreign laws).

terpreting the catalogue of rights the courts “*must consider international law; and... may consider foreign law.*”<sup>19</sup> At the other end of the spectrum, there are those who would view such a practice as diluting constitutional law into a generic constitutionalism so as to deprive the national constitution of its true meaning and identity.

The debate in the United States among the Judiciary provides an interesting cameo of the tensions in that spectrum. Justice Ginsburg, during a speech cited as supporting a more global view on judicial decision-making<sup>20</sup> before the American Constitution Society in 2003, observed, “*our ‘island’ or ‘lone ranger’ mentality is beginning to change. Our Justices... are becoming more open to comparative and international law perspectives.*”<sup>21</sup>

Justices O’Connor,<sup>22</sup> Breyer,<sup>23</sup> and Kennedy<sup>24</sup> are known in particular to have frequently quoted foreign decisions in their opinions. Justice Kennedy, for example, buttressed his majority opinion in *Lawrence v. Texas*<sup>25</sup> by citing the opinions of the European Court of Human Rights<sup>26</sup> and wrote: “*The right the petitioners seek in this*

*case has been accepted as an integral part of human freedom in many other countries.*”<sup>27</sup>

The tension engendered by such an approach is reflected in Justice Scalia’s view on recourse to foreign sources of law. In one of the earlier death penalty cases, he wrote:

“*We must never forget that it is a Constitution for the United States of America that we are expounding.... [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.*”<sup>28</sup>

This tension surfaced again in a relatively recent death penalty case, when the U.S. Supreme Court condemned the imposition of death sentences on persons under eighteen years convicted of capital murder.<sup>29</sup> In that case, Justice Kennedy, again writing for the majority, having cited foreign laws and decisions, concluded by saying, “[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”<sup>30</sup>

In his minority opinion in that case, Justice Scalia wrote: “*Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of*

<sup>19</sup> S. AFR. CONST. 1996 ch. 2, art. 39.

<sup>20</sup> See, e.g., Earl Johnson, Jr., *Will Gideon’s Trumpet Sound a New Melody? The Globalization of Constitutional Values and Its Implications for a Right to Equal Justice in Civil Cases*, 2 SEATTLE J. SOC. JUST. 201, 226 (2003).

<sup>21</sup> Justice Ruth Bader Ginsburg, Supreme Court of the U.S., Remarks for the American Constitution Society: Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication (Aug. 2, 2003) (transcript at <http://www.acslaw.org/pdf/Ginsburg%20transcript%20final.pdf>; also, a video of the speech is available at <http://www.acslaw.org/video/stream/1004/rm>).

<sup>22</sup> *Washington v. Glucksberg*, 521 U.S. 702, 718-19 n.16 (1997) (O’Connor, J., concurring).

<sup>23</sup> *Printz v. United States*, 521 U.S. 898, 976-78 (1997) (Breyer, J., dissenting).

<sup>24</sup> *Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003).

<sup>25</sup> *Lawrence*, 539 U.S. 558.

<sup>26</sup> See *id.* at 573, 576 (citing P.G. & J.H. v. United Kingdom, 2001-IX Eur. Ct. H.R. 195; *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A) (1993); *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988); *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981)).

<sup>27</sup> See *id.* at 577.

<sup>28</sup> *Thompson v. Oklahoma*, 487 U.S. 815, 868-69 n.4 (1988) (Scalia, J., dissenting).

<sup>29</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>30</sup> *Id.* at 578.

*five Members of this Court and like-minded foreigners, I dissent.*<sup>31</sup> Referring to the views of other countries and the international community taking centre stage in the majority opinion he added “[u]nless the Court has added to its arsenal the power to join and ratify treaties on behalf of the United States, I cannot see how this evidence favors, rather than refutes, its position.”<sup>32</sup> Later on he stated, “[w]hat 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.”<sup>33</sup>

The extremity of the spectrum on this side of the argument could be said to be reflected in a Bill submitted to the United States Congress in 2004, titled Constitution Restoration Act, in which the Justices would have been forbidden to interpret the Constitution by taking into consideration legal documents different from national ones, including decisions of constitutional or supreme courts of other countries or international tribunals of human rights.<sup>34</sup>

Within the ambit of this spectrum there is plenty of scope for legitimate debate because there is a fundamental principle at stake. The role of foreign sources of law in constitutional interpretation directly engages the legitimacy of interpretation referable to such sources.

There is a great deal of substance in the concerns Justice Scalia has expressed - at least, and I emphasize this - in the terms in which he poses the

problem. To use foreign law or foreign sources of law as a naked means of importing legal concepts and values into national constitutional law would risk undermining the legitimacy of a supreme court by attributing meanings and values to a constitution which do not stem from, and are not indigenous to, that constitution itself. To allow the notion of the commonality of values to be a means of imposing conformity for its own sake in the protection of rights would be a denial of the democratic ideal of respect for diversity.

As has previously been observed, we live in a moral universe. The law, and particularly judicial decisions, are not detached from the morals that guide our society. Law is not a set of rules such as would run a railway system.<sup>35</sup> So, in searching for judicial resolution of complex moral or social problems facing society, a court must find those solutions within the ambit of its own constitutional and legal framework so that they are consistent with, and reflect, the values and ethos of the society fashioned by its constitution. To do otherwise would be to betray society.

No doubt Justice Scalia would say it is perfectly legitimate for the Supreme Court of South Africa to look outside that framework, for that is what its Constitution expressly permits it to do, but that he is interpreting the Constitution of the United States and not the South African Constitution.<sup>36</sup>

<sup>31</sup> *Id.* at 608 (Scalia, J., dissenting).

<sup>32</sup> *Id.* at 622.

<sup>33</sup> *Id.* at 628.

<sup>34</sup> Constitution Restoration Act of 2004, S. 2082, 108th Cong. § 201 (2004).

<sup>35</sup> See, e.g., MICHAEL J. PERRY, LOVE AND POWER 8-16 (1991) (describing the United States as a morally pluralistic society, where the legal and political systems are not free from moral influences); MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW 121-79 (1988) (explaining that judges in the United States are members of a morally pluralistic political community, and this influences judicial decision making).

<sup>36</sup> See *Atkins v. Virginia*, 536 U.S. 304, 348 (2002) (Scalia, J., dissenting) (citing *Thompson v. Oklahoma*, 487 U.S. 815, 868-69 n.4 (1988) (Scalia, J., dissenting)).

At least some of Justice Scalia's objections to the use of international conventions by his Court find some support in the case law of the Court of Justice of the European Union.<sup>37</sup> The treaties of the European Union, characterised by the Court as the E.U.'s constitutional charter, did not in their earlier form contain an express guarantee of fundamental rights, any more than the Constitution of the United States had a Bill of Rights when it was first adopted.<sup>38</sup> In order to add legitimacy to the E.U. legal system, the Court of Justice found it was necessary to identify a doctrine which permitted the protection of such rights.<sup>39</sup> The Court of Justice, in its case law, identified as the source of those rights the common principles to be found in the constitutions of the member states of the European Union and international treaties and conventions to which the member states had subscribed.<sup>40</sup> Those principles fall to be applied by the Court, and consequently by national Courts, in the various domains to which community law applies.<sup>41</sup> The development of that doctrine is altogether another topic. The point that I wish to draw attention to is the Court's exclusion from consideration, as an external source of law, treaties and conventions not ratified or subscribed to by the member states. This is logical since they lack the

kind of legitimacy that could be attributed to treaties to which the member states subscribed.<sup>42</sup> This mirrors the concern expressed by Justice Scalia in one of the quotations just referred to.

Indeed the Court of Justice itself identified the danger which the unqualified importation of national concepts into community law could pose for the coherence and legitimacy of the community legal system. In a succession of judgments it qualified the import of constitutional traditions in stating that the principles and criteria according to which the Court had to judge the compatibility of a community measure with principles of fundamental rights must be decided autonomously in the light of community law alone because "*the introduction of special criteria for assessment stemming from the legislation or constitutional law of a particular Member State would, by damaging the uniformity and efficacy of community law, lead inevitably to the destruction of the unity of the common market and jeopardising the cohesion of the community*".<sup>43</sup> In short it is with the Court of Justice that final responsibility rests for defining a community standard of protection for any individual right.

I do, however, believe that between the antipodean poles of this argument there is a middle course in which enriching our judicial knowledge and functions by recourse to case-law of other countries need not be seen as a Trojan Horse, distorting national constitutional interpretation, one in which the citizens of the system are not called on to endure inclinations and em-

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<sup>37</sup> See Joined Cases 21-24/72, *Int'l Fruit Co. NV v. Produktschap voor Groenten en Fruit*, 1972 E.C.R. 1219.

<sup>38</sup> TREVOR C. HARTLY, *EUROPEAN UNION LAW IN A GLOBAL CONTEXT* 297 (2004) ("*Human rights were not mentioned in the original Community Treaties, possibly because it was thought they would not be relevant to an organization whose immediate aims were economic.*"). The Charter of Fundamental Rights of the European Union was signed and proclaimed through a special procedure at the European Council meeting in Nice on December 7, 2000. Charter of Fundamental Rights of the European Union, December 7, 2000, 2000 O.J. (C 364) 1.

<sup>39</sup> See, e.g., Case 29/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419 and case C-44/79 *Hauer* [1979] ECR 3727.

<sup>40</sup> E.g., *id.*

<sup>41</sup> E.g., *id.*

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<sup>42</sup> See Joined Cases 21-24/72, *Int'l Fruit Co. NV v. Produktschap voor Groenten en Fruit*, 1972 E.C.R. 1219.

<sup>43</sup> *Hauer* at p. 3744

piricisms of foreign fashions as Justice Scalia remarked.<sup>44</sup> As Professor Gustavo Zagrebelsky put it “[t]he [judicial] object is principally one of internal law. It is like resorting to ‘a friend rich in experience’ to solve a difficult problem, who helps one think more clearly,... widens perspectives and enriches arguments, brings to life points of view perhaps otherwise ignored.”<sup>45</sup>

But from my perspective, the interpretation of the Constitution of Ireland, which contains express and implicit guarantees concerning due process<sup>46</sup> and the fundamental rights of citizens,<sup>47</sup> may at times be greatly assisted by recourse to the comparative law method of interpretation where decisions of other courts, are not determinative, but may illuminate the search for a judicial solution relating to the application of common principles in analogous situations.

Thus judicial dicta of other supreme courts may also demonstrate that a national interpretive decision is not egregious or states a principle essential to any constitutional democracy. They may contain an effective or eloquent expression of a principle anchored in a national constitution and in doing so add an entirely legitimate rhetorical or corroborative persuasiveness to judicial rationale.

In 1972, in *Byrne –v- Ireland*<sup>48</sup>, the Supreme Court of Ireland had to decide whether the State, Ireland, was entitled to assert a claim of sover-

eign immunity from liability to compensate individual victims for civil wrongs committed by its servants or agents. In rejecting the State’s claim of immunity from suit on the grounds of its sovereign status the Court referred to the fact that the law of many other sovereign countries allowed for liability to be imposed on the State for the actions of its servants. In particular, it cited<sup>49</sup> the *Blanco* decision of 8<sup>th</sup> February 1873, in which the French *Conseil d’État* refused to follow the *ancien régime* principle of *le roi ne peut mal faire* in deciding that the French state could be held to answer for the actions of its servants or agents (‘faute de service’). Support for the proposition that the State could be liable in tort for the actions of its agents was also found in the law of the Federal Republic of Germany, Australia, India, New Zealand and South Africa.

Although the Supreme Court found the constitutional notion of state sovereignty in other countries to be confirmative by way of analogy in considering its meaning in Irish constitutional law that did not undermine the legitimacy of its decision which was anchored primarily on Article 6 of the Constitution leading it to the conclusion that “... *the Constitution and its form are the creation of the people ... it is the people who are paramount and not the State*”.

A judgment of our Court of Criminal Appeal (in *D.P.P. –v- Boyce*)<sup>50</sup> provides a perhaps more obvious illustration of the manner in which decisions of other Courts can corroborate or confirm a national decision. In that case the Court of Criminal Appeal decided that the compulsory

<sup>44</sup> *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting).

<sup>45</sup> <sup>98</sup>. Gustavo Zagrebelsky, *supra* note 69.

<sup>46</sup> See IR. CONST., 1937, art. 38, available at [http://www.taoiseach.gov.ie/attached\\_files/Pdf%20files/Constitution%20of%20IrelandNov2004.pdf](http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Constitution%20of%20IrelandNov2004.pdf)

<sup>47</sup> See *id.* arts. 38-40.

<sup>48</sup> [1972] I.R. 274

<sup>49</sup> *ibid* at 267

<sup>50</sup> Court of Criminal Appeal (21st December, 2005)

taking of blood samples of a criminal suspect for the purpose of DNA testing is not a breach of that person's right to silence when charged with a criminal offence. In making that decision under Irish law the Court of Criminal Appeal called in aid that of the European Court of Human Rights in the case of *Saunders –v- United Kingdom* [1997] 23 EHRR 313 which recognised the right to silence as guaranteed by Article 6 of the Convention<sup>51</sup>. The judgment contains the following passage at paragraph 69:

*“The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention, and elsewhere, it does not extend to the use in criminal proceedings of a material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath blood and urine samples and bodily tissues for the purposes of DNA testing.”*

The Court of Criminal Appeal then referred to essentially the same distinction which was adopted by the Supreme Court of the United States in *Schmerber –v- California* [384 U.S. 757] when it considered a citizen's right to silence and privilege against self-incrimination under the Fifth Amendment of the United States Constitution.

Delivering the opinion of the Court, Brennan J. acknowledged that the Fifth Amendment of the

Constitution of the United States guaranteed the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty for such silence. He went on to state:

*“We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends.”*

Not all such comparative decisions are so obviously pertinent but it is nonetheless a good example of the common understanding of common concepts which can exist between different legal systems.

Accordingly, the reliance on judicial rationale in foreign supreme courts resolving similar questions does not have to compromise the identity of one's own. It is part of a grand dialogue, particularly on themes of constitutional protection of human rights, which takes place today between supreme courts and among supreme court judges, both judicially and extra-judicially. But, the national judge, remaining true to his or her constitutional principles, is the filter through which universally discussed ideas enlighten but do not determine the interpretation of his or her own constitution in which must always be found the essential ingredients for the justification of his or her judicial conclusions. In this sense the search for knowledge and enlightenment outside national boundaries seems, from my perspective, to be entirely legitimate.

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<sup>51</sup> The ECHR was not then directly applicable in Ireland



In conclusion allow me to quote again Justice Ginsburg, when she observed:

*“[our] perspective on constitutional law should encompass the world. ... We are the losers if we do*

*not both share our experience with, and learn from, others.”*<sup>52</sup>

Thank you for allowing me to share this occasion and experience with you today.

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<sup>52</sup> Supra note 74.

