Editorial to the Special Issue of Proceedings from the 4th Annual Conference of the Irish Society of Comparative Law

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The Irish Society of Comparative Law (I.S.C.L.) was established in 2008, the fruit of persistent and sustained efforts by its founder and Vice-President, Dr. Seán Donlan of the School of Law, University of Limerick. Dr. Donlan gathered together several academics from three other law faculties on the island of Ireland as committee members: Professor Brice Dickson from Queens University Belfast to be President, Dr. Marie-Luce Paris, of University College Dublin, to serve as Treasurer, and Dr. Bénédicte Sage-Fuller, from University College Cork, as Secretary. In addition, organic links were created with colleagues in other faculties (Trinity College Dublin and the National University of Ireland Galway in particular). The first annual conference in 2009 was an immediate success with more than 50 scholars converging in Limerick for a week-end of comparative legal studies. Numbers have been sustained since, and always represent a wide panel of academics, from long-term established professors to students new in the field. All have in common the shared ambition to devote their research to comparative law. The society is affiliated with the International Academy of Comparative Law, and as such regularly attracts researchers from outside of Ireland, notably from Asia and the Americas. In 2012, the 4th conference was held at the Faculty of Law in University College Cork, and this was also the time when a new President and a new Secretary were elected, Professor Steve Hedley of University College Cork and Dr Niamh Connolly of Trinity College Dublin. The tradition of wide representation of legal research centres is therefore continuing.

The Constitution of the I.S.C.L. states in its Article 1 that the “purpose of the society is to encourage the comparative study of law and legal systems”. The present

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selection of essays written by comparatists was put together in an effort to uncover and understand specific aspects of law. The comparative study of others’ laws and legal systems, and their relationship with one’s own laws and legal systems serves a noble purpose, which is the discovery of better ways to advance justice through better laws. Mary-Ann Glendon refers to anthropologist Clifford Geerts who says that law is a way that society makes sense of things.\(^1\) Law is part of a distinctive manner of thinking of the reality that surrounds us, and comparative law is necessary to this thought process. Indeed, indifference to knowledge about other legal systems and laws is, to paraphrase Pierre Legrand, a “remarkable indifference to thinking”.\(^2\) By studying how a rule operates, how it is drafted, and where it originates from, how it is applied, the comparatist can think of ways of achieving better justice in his or her own law.

At the World Exhibition 1900 in Paris, Edouard Lambert and Raymond Saleilles convened the first International Congress of Comparative Law. The World Exhibition itself was putting the world on display in one location, with dozens of countries showing what they thought were the important aspects of their civilisation, culture, knowledge, advancements. In the same spirit, Lambert and Saleilles were moved by the ideal belief that by knowing each other’s legal systems and cultures, humanity would eventually arrive at a *droit commun de l’humanité*, nothing less than a law common for humanity. Lambert believed that the comparative study of private law would lead to the development of uniform principles of law, and in turn allow for the development of trade in the world, and raise standards of living. Today comparative law is broader than private law, and encompasses public law, as well as legal theory, and is linked to international law. It serves immediate and visible purposes, such as less national isolationism, international exchanges, openness to others and an approximation of viewpoints. Yet another important, and perhaps less visible purpose of comparative law, is the “belief in the existence of a unitary sense of justice”.\(^3\)

George Steiner in *The Poetry of Thought* wrote that

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To learn a language is to expand incommensurably the parochialism of the self. It is to fling open a new window on existence. Words do fumble and deceive. Certain epistemologies deny them access to reality. Even the finest poetry is circumscribed by its idiom. Nonetheless, it is natural language which affords humanity its center of gravity.⁴

So it is with this collection of essays: to learn about others' laws and legal systems, to search for the correct or most appropriate way of doing so is in a way to search for our “center of gravity”, or in other words, our true nature and dignity. The authors who contributed to this collection, each in their own way, have expanded outside of their parochialism. They have sought to understand how law protects and respects human nature and dignity, or fails to do so.

Various areas are dealt with in this volume and in a second forthcoming one in different jurisdictional contexts. Yet, despite the wide thematic (Family Relationships, Marine Pollution, Constitutional Use of Comparative Law, Security Sector Reform, Police Surveillance, Human Embryonic Stem Cell Research, Abortion, Taxation, Class Actions, Financial Regulation) and geographical diversity of these essays (Canada, the US, Ireland, England and Wales, France, Poland, Germany, Timor Leste, European Union, European Convention on Human Rights), there are common threads running through them: method in comparative law, law and language, European and International influences on law, the definition of man and of human dignity, and the search for man’s well-being.

What follows are brief reviews of some of the works presented during the thematic sessions of the 4th conference and featuring in this issue of the I.J.L.S. Not all papers that were presented are published in this volume, but the I.S.C.L. would like to thank very warmly all the 2012 presenters and researchers for their contribution to comparative legal research in Ireland. Publication is only one way of refining and disseminating ideas, and the fertile discussions and emulating environment of the I.S.C.L. annual conference are at the heart of comparative legal research on this island. The society also wishes to extend its gratitude to the editorial board of the I.J.L.S. for

its constant and rigorous support throughout the reviewing and editing process. The personal commitment shown by Dr. Catherine O’Sullivan, Dr. Fiona Donson and Dr. Laura Cahillane was particularly appreciated.

The conference was honoured by two keynote speakers, Dr. Simone Glanert, University of Kent, and Professor Giuseppe Ferrari, Università Bocconi, Milan. Opening the proceedings, Dr. Glanert, whose paper entitled “Method?” was published elsewhere, asked the question of the role that comparative method may have on the theory and science of comparative law: “How, if at all, is method able to contribute to the credentialization of comparative law?” For her, interdisciplinary thought is essential: “Method connotes the search for a certain form of truth”. Yet, Glanert makes four points which defeat the idea that method could be a road to knowledge, a way of attaining truth. First, method is not pan-disciplinary. There is no agreement on what method is or should be within a discipline, let alone across disciplines. She writes: “Here remains a clear sense in which this very diversity challenges the sense of direction which method claims to afford (where should one go if many roads can be followed?)”. Second, method is not absolute. Zweigert and Kötz forcefully state that method is at its basis functional, but many disagree and prefer more variety in the choice of methods. Methods for some must be multi-faceted, and not unique to law. Interdisciplinarity actually requires it. Third, method is not objective. Zweigert and Kötz prescribe that the comparatist ought to extract him-/her-self from the preconceptions of his/her native system, but Glanert asserts that there is no point in doing so. Method is not so much shaping the discovery of another legal system as shaped by the legal system of the comparatist. She talks about the “irresistible historicity” which marks method. Fourth, method is speculative. Language and discourse necessarily are a representation of reality. Comparative law “filters through its own assumptions”. A French comparatist’s presentation of English Law is different from a German comparatist’s version of the same law. Both use words and assumptions

6 Ibid. at 65.
7 Ibid. at 66.
8 Ibid. at 68.
9 Ibid. at 69.
that are bound to their own context. Comparative law as method is “never objective”, it is “inscribed in finitude”.\textsuperscript{10} Glanert refers to Hans-Georg Gadamer’s theory of modern hermeneutics’ to support her argument.\textsuperscript{11} The interpreter of texts is acting in his/her own historical context, which s/he cannot escape, and cannot dispose of. Hermeneutics therefore is more about the conditions in which understanding of a text takes place than developing a procedure to understand the text. A neutral point of view is impossible as the interpreter is entirely bound to his/her own history. Jacques Derrida and Claude Levi-Strauss are then called upon. Levi-Strauss differentiates between the thinker who describes reality on the basis of concepts without specifically involving part of himself in the process (the scientist or engineer), and the thinker who is more consciously concerned with culture and puts part of himself in his apprehension of reality (the “bricoleur”). Derrida asserts that “every discourse is bricoleur”,\textsuperscript{12} and Glanert concludes that method is never completely differentiated from life itself: “the ideology of method proves to be more an epistemological challenge than a fertile source of epistemological opportunities”\textsuperscript{13}.

Professor Ferrari provided conference attendees with an in-depth analysis of foreign law in constitutional case-law as can be seen in this article, entitled “The Use of Foreign Law by Constitutional Courts.” He writes that European constitutional laws are open to comparative law because they seek to be more a “ceaseless balancing of values than normative or dogmatic”. He calls comparative law “an instrument of interpretation that is consubstantial to the discursive method”. According to Ferrari, comparative law conflicts with the Westphalian type of order between nations as it is a subversive way of introducing novel values and principles into national constitutional systems. He places the increasing use of comparative law by constitutional courts in the context of globalisation. From a normative viewpoint, the increasing influence of comparative law on constitutional systems signifies the “dialectic of pluralism (of ideas and implementation)”. In this sense, constitutional courts are engaged in a dialogue with each other, which signifies that internal traditional structures and logics are no longer

\textsuperscript{10} Ibid. at 70.  
\textsuperscript{11} Ibid. at 72.  
\textsuperscript{12} Ibid., at 79.  
\textsuperscript{13} Glanert, supra note 5 at 81.
prevalent, but also that globalisation is not imposed informally. Constitutional interpretation has thus, since the late 1980s, become “aware of the possibility of overcoming formalistic positivism without running into iusnaturalism”. This evolution has concerned European, Eastern European and U.S. courts to varying degrees. This rise in judicial discretion is then looked at from the point of view of classification, an old and well-established method of comparative law. Ferrari is critical of a classification based on the existence or interpretation of constitutional provisions allowing the import of foreign law. He prefers taxonomic parameters, which in the end do not appear to lend themselves easily to systematic classification, but offer a more penetrative insight into the normative net-effect of the import of foreign law in constitutional systems.

Professor Catherine Piché, from Université de Montréal, in her paper “Langues, Cultures et Droit Comparé” writes about the connection between the evolution of law and linguistic diversity. Taking the example of the role of the judge in adjudicating out of court settlements in collective proceedings (or class actions) in four jurisdictions (Federal U.S., Ontario, British Columbia and Québec), she shows that linguistic diversity can be a vector of development of the law across jurisdictions. This topic is interesting because in the background there is the issue of achieving equity for some vulnerable members of classes in collective proceedings. Piché’s article is based on her doctoral thesis, which involved in-depth comparative analysis of the descriptors of the judges’ role in approving collective settlements in the four jurisdictions mentioned. The English and French words “fiduciary”, “protector”, “protecteur” and “ombudsman” are used to describe the role of judge at that stage of proceedings. Despite the initial impression that these words convey the same meaning in English and in French, it appears that they describe different realities. The role of judges depends on the specific features of the respective legal systems. For example, the Common Law concept of fiduciary duty does not exist in Civil Law systems. The French word “protecteur” used in Quebec does not mean “fiduciary” as in the U.S. How judges describe their own role also shows these differences, which range between protecting the interests of absent members of the class by standing in these members’ shoes (in Québec) to ensuring more objectively that the interests of the class as a whole are protected (in Ontario). However, it is undeniable that judges in Québec are influenced by developments in Common Law
provinces, and that the U.S. influence is also felt on the Canadian jurisprudence. The author argues that language permits the mutual enrichment of comparable legal processes and concepts which, she contends, is done independently from culture and tradition. The role of judges should always be described by its precise functions in their own legal system rather than by a single word. This role is to protect the interests of all actors in a collective settlement, but it is obvious that this is achieved using different paths in the four jurisdictions examined. Yet, all judges, across the four jurisdictions studied strive to ensure equity and fairness in collective settlement. Piché concludes by hinting that linguistic diversity is a bridge between judicial cultures, which permits communication between them, and pushes for the evolution, and perhaps harmonisation, of the standards of equity in collective settlements.

Margo Bernelin in a way also writes about the ambiguities of the relationship between language and law. In her article “Regulating Embryonic Stem Cell Research, A Comparative Study of French and British Law,” she unveils several aspects of British or French legislation which at first sight seem one thing but upon scrutiny are quite another. For example, British law expressly allows human embryonic stem cell research (h.E.S.C.) research, whereas French law only allows it as an exception to a ban. Yet, U.K. law places a clear limit of 14 days from conception for the use of embryos for research, whereas is appears that French law places no time-limit at all. Indeed, France has a very ambiguous definition of an embryo. Taking a Kantian approach to the debate on h.E.S.C., France refused to explicitly acknowledge that human embryos could be created for the purpose of research because a person should not be used to achieve an end. As a result, h.E.S.C. research is allowed only on embryos that were created for I.V.F. purpose, were not implanted, and would have otherwise been destroyed. However, in the I.V.F. context, embryos are not considered persons until parents have a “parental project” for them. In other words, embryos under French law are only considered persons if their parents decide that they are persons, not by virtue of being human embryos. In this context, theoretically, surplus I.V.F. embryos can be used for research purposes at any stage, as without a “parental project”, they are not persons. But there is no explicit time-limit, as setting one would be an implicit recognition that embryos are persons independently of a “parental project”. Under French law, they
would be entitled to full legal protection, and h.E.S.C. would as a result not be allowed. Bernelin therefore shows that language and appearances can be deceptive, and that in reality, the French regime of regulation of h.E.S.C. is arguably more permissive than the British regime.

Grégor Puppinck’s article, “Abortion and the European Convention on Human Rights,” shows how language can be used with dramatic consequences. The very same provision, Article 2 of the European Convention of Human Rights ("[e]veryone’s right to life shall be protected by law"), can be applied with opposite outcomes. Indeed, the meaning of the very notion of “person” determines whether human life and dignity are taken as a reality inherent to being human, or as an intellectual construction dependent on human will. Puppinck gives a steady and rigorous interpretation Article 2 as it relates to abortion. Through a very detailed, comprehensive, and at times critical, analysis of the European Court of Human Rights’ (E.Ct.H.R) case-law, he shows how abortion can never be considered as a right under the Convention if the E.Ct.H.R. is to keep with the ethos and original intentions of the Convention’s drafters. The Convention was drafted as a reaction to the trauma inflicted on Europe by WWII, and the profound implications for human life and dignity that this war had. Article 2 therefore mandates that the law of States party shall protect all human life. Reading into and deriving a “right to abortion” in the Convention would be a significant departure from its anthropological foundations. This departure is already signalled by the fact that the Court has recently decided that it is incapable of defining a “person” for the purposes of Article 2. A human right is rooted in the reality of human beings’ nature and dignity. It is meant to be a positive legal protection for the natural features that constitute human dignity. To the contrary, abortion is based on choice and will, not on intrinsic human features. Abortion is not necessary to human dignity, like the rights to life or to property are, and therefore it cannot be the object of a fundamental legal right. Puppinck goes further and says that women have a right under the Convention not to abort. Indeed, their choice to abort is so often forced by socio-economic circumstances that it cannot seriously be considered as a “free” choice. According to Puppinck, States who are members of the Council of Europe have a positive legal obligation to address those socio-economic circumstances which affect women’s life and dignity and are
responsible for their choice to have recourse to abortion. The right not to abort falls squarely within the scope and ethos of Article 2, whereas the “right to abort” does not. The analysis is vigorously led with recourse to all legal aspects related to abortion, including its connections with other Convention provisions and obligations (Article 8, concepts of “margin of appreciation”, of “consensus”, of “legitimate interests”, procedural obligations for States, freedoms, and euthanasia).

Human dignity, democracy and the rule of law in the context of Security Sector Reform (S.S.R.) are the matters dealt with by James Gallen in his article entitled “Security Sector Reform, Models of Policing and Methods of Comparison.” Internationally there are few, if any, legally binding standards for S.S.R. in countries emerging from international or civil war situations. The problem is not entirely resolved by looking at the comparative models used by international donors when financially supporting S.S.R. effort in transition countries. Indeed, domestic models of policing have their own malfunctioning issues and may not easily be exported to different contexts. The problem is more fundamental and touches upon the theoretical framework of S.S.R. in relation to State sovereignty and the protection of human dignity. The correct understanding of the shape, identity, values and history of a country in transition are necessary to evaluate its policing needs and to structure its police forces. In Timor-Leste, for example, the import of community policing models developed and applied domestically in Japan and New Zealand has not provided the desired peace and stability that policing is meant to bring to a population traumatised by a violent and long decolonising-occupation process. Gallen proposes to look at John Rawls’s and Jeremy Waldron’s theoretical ideas on “circumstances of justice” and “circumstances of politics” in order to identify “circumstances of transition” for countries in need of S.S.R. People in these countries have suffered personal and widespread violations of their human dignity, partly because of the inability of the police to maintain peace, justice, trust and the rule of law. In modern democracies these basic elements are considered as the foundation stones of society and this is what is sought to

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be achieved through S.S.R. in places like Timor-Leste. What is particularly interesting in Gallen’s approach is his emphasis on the need for international donors to develop trust in society as a criterion to set up and evaluate S.S.R. Civic trust and the rule of law are basic goods that can be used to evaluate neutrally the effects, positive or otherwise, of SSR. Gallen concludes by saying that a comparative method for the law on S.S.R. should expand beyond the realm of law, and work across disciplines. He refers to Waldron’s 2007 Storr’s Lecture (“Partly Laws to All Mankind”) to place his argument in the broader context of the making of jus gentium and what is needed for man and his dignity – civic trust and the rule of law. In this article again, one can understand the limits of language: mere words such as civic trust, democracy and rule of law are insufficient to provide effective help to countries in transition from violent events, and they need to be defined with regard to what constitutes human dignity per se.

Ghislaine Lanteigne’s piece is called “Parenting Arrangements and Relocation Law in England and Wales, and Canada: In Search of Better Rules and Guidelines.” Following separation, a parent may wish to relocate with his or her child to a different jurisdiction, leaving to other parent behind. This raises the obvious question of how the child is going to continue having a relationship with that other parent, and the wider issue of how to preserve the well-being of children in those circumstances. Lanteigne conducts a comparative study of how the problem is dealt with in England/Wales and in Canada. The Best Interests of the Child test applies in both jurisdictions; however, it is subject to considerable variation and leads to unpredictable outcomes. In what is ultimately a binary result (either the child stays, or s/he goes), a multifactoriel approach under the Best Interests of the Child test offers little certainty and is open to personal bias on the part of judges. Lanteigne presents the attempt in British Columbia to set down better and more certain procedures in applying this test, centred on the determination of existing parenting arrangements. While many uncertainties remain, this new approach has the merit of recognising in law that maintaining a good relationship with both parents should be an underlying presumption, albeit rebuttable, in determining what is in his/her best interests. This article also addresses the underlying difficulties of language and law. In all case-studies, the same expression, Best

15 Waldron, ibid.
Interests of the Child, is referred to as the determining factor. Yet, it is very clear that that same expression can mean something very different depending on judges’ personal values, ideologies and even mood of the day. More is needed to understand, regardless of language, what constitutes the best interest of the child in relocation cases.

Dominic De Cogan applies historical method in order to undertake comparative research and explains “The Wartime Origins of the Irish Corporation Tax.” Going back to the reasons and context for which this tax was created allows the interested reader to understand that there is more than meets the eye in this matter. The tax was designed to meet the huge financial demands that WWI imposed on Britain, and was very quickly admitted by tax experts to be ill-conceived and unworkable. So much that it was repealed in the U.K. shortly after the war...until 1965! To the contrary, the Irish Free State did not consider it to be problematic, and kept the model, which has endured until now, with of course some changes along the way. A tax that is today seen as one of the pillars of Ireland’s fiscal attractiveness appears to have very dubious origins. This article confirms Alan Watson’s view that Legal History is one of the two essential ingredients of Comparative Law. The other essential ingredient is Jurisprudence. De Cogan’s article leaves the reader wondering about the theoretical implications of this tax for justice and fairness in today’s globalised economy, considering its rather accidental and chaotic foundation.

The ever influential role of the E.Ct.H.R. as a drive for change of domestic law and a relay for comparison with other legal systems is the thrust of Maria Murphy’s contribution on “The Relationship between the European Court of Human Rights and National Legislative Bodies: Considering the Merits and the Risks of the Approach of the Court in Surveillance Cases.” Taking the surveillance regime for the interception of communications in Ireland as her case study, she argues for a reconsideration of the approach in the area. The originality of her argument lies in the articulation she expounds between a careful analysis of the case law of the E.Ct.H.R. and the specific influence it has had on Irish legislation (Interception Act 1993). Broadening the debate by

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referring to the recent E.Ct.H.R. case law on D.N.A. retention, she suggests that a more structured approach to the proportionality test could be an interesting appealing model for future surveillance cases. By pitching the relationship between the E.Ct.H.R. and the domestic legislator at the right level of comparative analysis, this piece adds valuable insights for anyone interested in this sensitive area of case law.

For those often intrigued by the ever more “digitally exposed” celebrities engaged, somewhat paradoxically, in lawsuits to protect their image, the contribution by Emmanuel Kolawole Oke on "Image Rights of Celebrities in the Digital Era: Is There a Need for the Right of Publicity in Ireland?” is for them. The author offers a fascinating comparative account of whether or not image rights of celebrities should be accorded legal protection. He appropriately sets apart the right of publicity developed by the U.S. courts from remedies offered by other common law jurisdictions, grouping the United Kingdom, Australia and Canada where no such right of publicity but other interesting options exist. Adopting a comparative but also interdisciplinary method (i.e. the sociological definition of what is a “celebrity” is worth the read!), the author does not go for the most obvious solution. He argues in favour of the more balanced and innovative approach of the Canadian courts. As Irish courts are likely to be confronted with such issues soon, the piece is timely in providing lines of approach in this area.

Fariborz Safari gives an account of Irish marine pollution law in “Ireland’s Legislative Measures on Marine Pollution: An Assessment of Liability and Redress Regimes.” This country depends on the sea for 98% of its imports and exports of goods. An appraisal of the regimes of liability for accidental and operational ship-source pollution in the light of international standards comes at an opportune time. Ireland has suffered relatively few marine pollution disasters, but the occurrence of such an incident would have dramatic socio-economic consequences, as unfortunate examples from other jurisdictions show. Ireland has a regime combining civil and criminal liability. It is also a party to the main pollution international compensation regimes. Safari’s article shows how one area of the law, marine pollution law, bears the hallmark of internationalisation, while still keeping specific national traits.
The piece by Agnese Pizzola entitled “Comparative Law and Financial Regulation: Methodological Remarks” has clearly a methodological rather than substantive orientation. In the author’s words, “[i]n a globalised world everything can be compared, as long as we can logically and coherently explain why.” She engages in a critical explanation of the reasons why a comparative approach would be suitable and/or useful in the area of financial regulation. This specific field is chosen as the paradigm of the analysis not only because of the relative absence of comparative studies in the area but also because of the seemingly relevant potential for a new dynamic approach to comparative research in this regard. The author confronts the ongoing criticisms towards traditional comparative law methods (i.e. distinction between public and private law, categorisation of legal families, impact of globalisation) with the distinctive features of financial regulation. The work results in a concise exercise of applied comparative methodology which advocates, especially in the area of financial regulation, for a more flexible and ad hoc methodology, tailored to the needs and the scope of the research that clearly explains to the readers the rationale behind that particular study.

Magdalena Duggan’s article on “Determining Filiation of Children Conceived via Assisted Reproductive Techniques: Comparative Characteristics and Visions for the Future” does exactly what it says on the tin. First, the author presents comparative features of the legal frameworks in place in several jurisdictions for determining filiation of children conceived with the help of assisted reproductive techniques (A.R.T.). The originality of the analysis lies in the relatively broad spectrum of the comparison which includes France, Ireland, Germany, Poland and the United Kingdom. It is interesting to note that Ireland stands apart, as does Poland, as a country where, to date, no single comprehensive lex specialis has been developed in the area of A.R.T. The author then proceeds to identify a number of current legal issues whose significance will only become more pressing as the technology develops. Key challenges such as the anonymity of donors (in case of donation of gametes), the status of the “gestational mother” (as regards surrogacy) and, generally, the dangers of “reproductive tourism” are examined. The author also addresses the fundamental issue of the well-being and dignity of children as regards their right or need to know their biological origins. She
concludes by arguing in favour of more legislation in the area as a way to secure transparency and security in A.R.T. processes to the benefit of all parties involved, including third parties, while protecting the interests, paramount of all, of the child born as a result of these medical techniques.

Once again, we renew our thanks to all presenters at the 4th annual conference of the I.S.C.L. with a special thanks to those who have contributed to this volume and the following one. We also warmly thank the editorial team of the I.J.L.S. who made the publication of these two special issues possible which are a great outcome of the 2012 conference.