
The Use of Foreign Jurisprudence in Human Rights Cases before the UK Supreme Court

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Abstract

This thesis is the first major study of the UK Supreme Court's use of jurisprudence from foreign domestic courts in human rights cases. It contributes to the debate on judicial comparativism by asking when, how and why the Supreme Court uses foreign jurisprudence, as well as whether the Court should be making greater use of it.

The research findings are drawn from quantitative and qualitative analysis of judgments handed down by the Supreme Court during its first four years (2009-2013). These are supported by evidence obtained through interviews with ten Justices of the Supreme Court, one Lord Justice of Appeal and the eight Supreme Court Judicial Assistants.

In the absence of legislative guidance, the use of foreign jurisprudence is neither consistent nor systematic. Different Justices use foreign jurisprudence to different degrees and for different reasons. The main use of foreign jurisprudence is as a heuristic device: it provides the Justices with a different analytical lens through which to reflect on their own reasoning about a problem. Some Justices also use foreign jurisprudence when interpreting a common legislative scheme and to support their conclusions. As a result, the Justices use foreign jurisprudence differently according to the audience to whom their reasons are addressed. Thus foreign jurisprudence can assist the Supreme Court to enter into dialogue with the Strasbourg Court. However, this thesis does not support theories of transjudicial dialogue with other domestic courts; the evidence does not indicate that the Supreme Court considers itself to be part of global conversation. Further, the use of foreign jurisprudence is limited by practical barriers including, but not restricted to, time pressures, the availability of comparative resources and the greater use of plurality style judgments. These barriers are worth addressing if the Supreme Court is to fully utilise the heuristic value of foreign jurisprudence.

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Abbreviations

CJEU: Court of Justice of the European Union

ECA: European Communities Act 1972

ECHR: European Convention on Human Rights 1950

ECtHR: European Court of Human Rights

HRA: Human Rights Act 1998

IAT: Immigration Appeal Tribunal

JA: United Kingdom Supreme Court Judicial Assistant

JSC: Justice of the United Kingdom Supreme Court

Refugee Convention: 1951 Convention Relating to the Status of Refugees

UKSC: United Kingdom Supreme Court

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1 Introduction

The aim of this thesis is to examine the use of jurisprudence from foreign domestic courts ('foreign jurisprudence') in human rights cases before the UK Supreme Court (UKSC). This study contributes a fresh perspective to the vast literature in the field and is associated with research that describes the use of foreign jurisprudence by domestic courts as a phenomenon that has given rise to a 'migration of constitutional ideas',¹ or similar characterisations on the theme, such as: 'judicial internationalisation',² 'judicial cosmopolitanism',³ and 'trans-judicialism'.⁴ This non-exhaustive list broadly describes the simple practice of judges from one jurisdiction citing jurisprudence from another jurisdiction.⁵ There is also significant and important research concerning the propensity for courts to use the jurisprudence of foreign domestic courts as part of a 'global dialogue' or 'transjudicial dialogue'.⁶ The claim made by many of these works is that judges from different jurisdictions are in conversation with each other as to

¹ Sujit Choudhury, *The Migration of Constitutional Ideas* (Cambridge University Press 2006).

² Cass Sunstein, *A Constitution of Many Minds* (Princeton University Press 2009); Richard Posner, *How Judges Think* (Harvard University Press 2008).

³ The Hon. Mr. Justice John L. Murray, C.J., 'Judicial Cosmopolitanism' [2008] (2) *Judicial Studies Institute Journal* 1; Richard Posner, *How Judges Think*, *ibid*.

⁴ Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 39 *University of Richmond Law Review* 99; *A New World Order* (Princeton University Press 2004); Justice L'Hereux-Dube, 'The Importance of Dialogue: Globalisation and the International Impact of the Rehnquist Court' (1998) 34 *Tulsa Law Journal* 15.

⁵ See also Elaine Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (Hart Publishing 2013); Sam Muller and Sydney Richards (eds), *Highest Courts and Globalisation* (Hague Academic Press 2010); Antoine Hol et al, 'Special Issue on Highest Courts and Transnational Interaction' (2012) 8(2) *Utrecht Law Review* 1.

⁶ Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' *ibid*; David S Law and Wen-Chen Chang, 'The Limits of Global Judicial Dialogue' [2011] *Washington Law Review* 523.

the interpretation and development of certain legal norms. As Bell has recently written, the use of foreign jurisprudence:

is taken to be one of the indicators that legal systems are not self-contained but develop as a result of ideas coming from outside as well as from inside the system. In addition, it is seen as evidence of the increasing globalisation of the law. Such potentially expansive claims from the importance of comparative law as a judicial method of decision-making need to be put in context.⁷

Generally, researchers agree that judges have shown an increasing willingness to draw from a wealth of jurisprudence in the course of domestic adjudication. Slaughter has claimed that '[c]ourts are talking to one another all over the world'.⁸ In a valuable comparative volume titled *Judicial Recourse to Foreign Law*, Markesinis and Fedtke wrote of foreign law's 'overt' influence in Canada, Germany and South Africa and its 'covert' influence in France and Italy.⁹ Much has been written about the comparative approach of the Israeli Supreme Court, which is now well known for its reliance on foreign jurisprudence.¹⁰ Foreign jurisprudence has even found its way into a handful of judgments from the United States Supreme Court, which is usually given as the paradigmatic example of insularity.¹¹

⁷ John Bell, 'Comparative law in the Supreme Court 2010-11' [2012] CJICL 20, 20.

⁸ Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 39 *University of Richmond Law Review* 99, 99.

⁹ Basil Markesinis and Jörg Fedtke (eds), *Judicial Recourse to Foreign Law: A new source of inspiration?* (University College London Press 2006).

¹⁰ See e.g. Daphne Barak-Erez, 'The International Law of Human Rights and Constitutional Law: a case study of an expanding dialogue' (2004) 2(4) *International Journal of Constitutional Law* 611.

¹¹ *Atkins v Virginia* (2002) 536 U.S. 304; *Grutter v Bollinger* (2003) 539 U.S. 306; *Lawrence v Texas* (2003) 539 U.S. 558; *Roper v Simmons* (2005) 543 U.S. 551. These high profile decisions on the death sentence, criminalised sodomy and abortion that is responsible for

The use of foreign jurisprudence in UK domestic courts, however, has been given relatively little attention by researchers in the past. It is simply not clear that use of foreign jurisprudence matters. The aim of this research is therefore to provide evidence on the extent to which the UKSC makes references to foreign jurisprudence, as well as the reasons or purposes for which foreign jurisprudence is used. The following research questions are answered: Does the Supreme Court consider foreign jurisprudence in human rights cases? How is the jurisprudence used? For what purpose does the Supreme Court use foreign jurisprudence? What effect has the Human Rights Act 1998 (HRA) had on the use of foreign jurisprudence? And should the Court be making greater use of these sources? Questions of this kind have been considered in the context of other jurisdictions,¹² but few researchers have focused on the United Kingdom. This thesis therefore provides insights to questions that have not previously been given significant attention in the UK context.

A detailed account of the existing literature and an explanation as to how this thesis is to be distinguished among the most relevant works is provided in

much of the literature by exposing sharply divided opinion on the use of foreign jurisprudence in matters involving the interpretation of the Constitution. See e.g. Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006) 2: 'Advocates of the migration of constitutional ideas, however, appear to have gained the upper hand'. Cf Gordon A Christenson, 'Using Human Rights Law to Inform Due Process and Equal Protection analyses', (1983) 52 *Cincinnati Law Review* 3, 5: 'most united states courts ... show less inclination now than at the beginning of the Republic to use sources of foreign and international customary law to aid interpretation, especially in constitutional cases'; Bruce Ackerman, 'The Rise of World Constitutionalism' (1997) 83 *Virginia Law Review* 771, 772: 'The typical American judge would not think of learning from an opinion by the German or French constitutional court'.

¹² E.g. Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing 2013); James Allan, Grant Huscroft and Nessa Lynch, 'The citation of overseas authority in rights litigation in New Zealand- How much bark? How much bite?' (2007) 11 *Otago Law Review* 433.

chapter two. There it is explained that empirical research on the use of foreign jurisprudence in the UK is rare and that no one study has provided a detailed account of the practice. It follows that one of the most significant contributions made by this thesis to the existing literature in this field is the empirical data, gathered from analyses of the Supreme Court's judgments as well as through interviews with ten Justices of the Supreme Court, one Lord Justice of Appeal and the eight Supreme Court Judicial Assistants (JAs). A detailed account of the research methodology is provided in chapter three.

One of the main arguments in this thesis is that foreign jurisprudence can provide a useful perspective in human rights cases. It was therefore necessary to establish that the Supreme Court may legitimately use these sources. To that end, it is explained in chapter four that there are no rules governing the judicial use of foreign jurisprudence, whether in human rights cases specifically or other cases more generally. While the HRA 1998 provides that courts must 'take into account' the jurisprudence of the European Court of Human Rights (ECtHR) in Strasbourg, the Act is silent on the use of jurisprudence from the domestic courts of other jurisdictions. UK Courts are under no duty or obligation to follow the decisions of a foreign domestic court, but neither are these sources prohibited. Instead, foreign jurisprudence is merely 'persuasive' precedent and judges are free to use foreign jurisprudence in any manner that is thought to be helpful.

The non-binding status of these sources can give rise to criticisms—often raised in the United States debates—that the use of foreign jurisprudence is

instrumental and opportunistic.¹³ One of the main conclusions is that the UKSC does appear to use foreign jurisprudence in this way, but that this itself is not problematic. Chapter four closes with an explanation that the use of foreign jurisprudence *per se* is not the problem. Rather, concern about the legitimacy of the practice usually stems from a perception that courts are liable to use foreign jurisprudence in an unprincipled and unsystematic way. If that is the case, the risk is that foreign jurisprudence may mask judicial creativity or obscure political judgments that a court might be minded to make. In other words, it is uncertainty about the reasons for using foreign jurisprudence that is likely to attract criticism.¹⁴ The aim in chapters five, six, seven and eight is therefore to identify the way in which foreign jurisprudence is used at the Supreme Court and the purposes that these sources serve.

Chapter five sets out the reality of citations of foreign jurisprudence at the Supreme Court, by reference to empirical research. The data is important: as one recent publication in the field notes, 'studies have focused extensively on the theoretical aspects of this practice ... while empirical analysis of the frequency and meaning of citations remain generally still rare'.¹⁵ The data demonstrates that judges are using the jurisprudence of foreign domestic courts and that there are some clear patterns to the use. The main finding is

¹³ E.g. Richard Posner, 'No Thanks, We Already Have Our Own Laws' *Legal Affairs* July/Aug 2004 http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp accessed 01 February 2011; Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006); Yash Ghai, 'Sentinels of Liberty or Sheep in Woolf's Clothing? Judicial Politics and the Hong Kong Bill of Rights' (1997) 60 *MLR* 459.

¹⁴ Elaine Mak recently concluded that there was a lack of a systematic approach in the use of foreign legal materials at the UK Supreme Court: 'Why do Dutch and UK judges cite foreign law?' (2011) *CLJ* 420, 449.

¹⁵ Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges*, above n 12.

that—because there are no formal rules governing the use of foreign jurisprudence—the Justices have developed their own practices. Whether or not foreign jurisprudence is used is dependent on the approach of each individual Justice. For example, Lord Collins is known to be a more enthusiastic user of foreign jurisprudence, particularly from the United States of America. It is not surprising, therefore, that a larger proportion of cases contained explicit citations of foreign jurisprudence prior to Lord Collins' retirement in 2011, with a steady decline in citation numbers between 2011 and 2013. The decline in the use of foreign jurisprudence in human rights cases may otherwise be explained by developments in judgment styles. In particular, it is clear that the rise of plurality style judgments at the Supreme Court is likely to have had an effect:¹⁶ the proportion of plurality style judgments including citations of foreign jurisprudence is much smaller than in cases which comprise a full set of separate judgments.

Other practical considerations also affect the way that foreign jurisprudence is used at the Supreme Court. The interview evidence confirms that the Court is still highly dependent on counsel's submissions, although some Justices also introduce foreign jurisprudence through their own research. Nevertheless, the most obvious variant is that some Justices simply have a greater interest in foreign jurisprudence than others, which is often a product of personal connections with a particular jurisdiction. However, this thesis does not support theories of 'transjudicial dialogue' as expressed in much of

¹⁶ Briefly, in this work a plurality style judgment includes a single 'judgment of the court', a leading judgment with which all have agreed or a single judgment with which others in the majority agree. See further n 190 below.

the literature.¹⁷ While citations of foreign jurisprudence are mostly drawn from a small family of courts, it is not found that the UKSC considers itself to be part of a global conversation. A more realistic conclusion is that foreign jurisprudence is used as a heuristic device; the Justices use foreign jurisprudence instrumentally and only when helpful.

The use of foreign jurisprudence as a heuristic device is the subject of chapter six. Some of the classical explanations for the use of foreign jurisprudence fall into this category. A clear example of this is the popular theory that judges would be most likely to use foreign jurisprudence in order to fill 'gaps' in the indigenous case law. However, it is not accepted that the 'gap-filling' accurately explains the use of foreign jurisprudence at the UKSC. Although the Justices might be likely to consider foreign jurisprudence in those situations, filling the 'gap' is not the aim of the exercise. Rather, it is argued that the some Justices use foreign jurisprudence as an analytical lens, to help elucidate the issues or to seek reassurance about a conclusion reached independently of foreign jurisprudence. The purpose served by foreign jurisprudence in these circumstances is either to provide an opportunity for reflection or to form 'part of the process of reaching a more fully theorised ... agreement'.¹⁸

¹⁷ E.g. Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 39 *University of Richmond Law Review* 99; *A New World Order* (Princeton University Press 2004); Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing 2013).

¹⁸ Christopher McCrudden, 'Judicial Comparativism and Human Rights' in Esin Örüçü and David Nelken (eds), *Comparative Law: A Handbook* (Hart Publishing 2007) 371, 374.

The only evidence for the ‘gap-filling’ theory might be the tendency to review foreign jurisprudence in human rights cases where the Strasbourg jurisprudence was unhelpful or non-existent. Foreign jurisprudence may nevertheless be used to confirm the Strasbourg position and the Court has shown willingness to use those sources to that end. This is also affected by the well-reported tendency to elevate clear and constant Strasbourg jurisprudence to a status of binding, rather than persuasive, authority.¹⁹ Chapter seven explains that this is to do with a drive towards uniformity among the states signatory to the European Convention on Human Rights (ECHR). The most obvious purpose for using foreign jurisprudence is as a tool to identify a consensus in cases where it is necessary to maintain a uniform interpretation of a common instrument. Thus where there is clear and constant Strasbourg jurisprudence, the Supreme Court is likely to follow it.

One effect of the HRA duty to ‘take into account’ the relevant Strasbourg case law has therefore been to reduce the number of references to the jurisprudence of other foreign courts. The logic is intelligible: the conclusions of foreign courts interpreting similar but distinct instruments would not necessarily ensure compatibility with the ECHR, as the UK courts are bound to do. Thus even where it would be of interest to the Supreme Court to review the position of the other states signatory to the Convention, it is argued that

¹⁹ E.g. Roger Masterman, ‘Section 2(1) of the Human Rights Act: Binding domestic courts to Strasbourg?’ [2004] PL 725; Elizabeth Wicks, ‘Taking Account of Strasbourg? The British Judiciary’s Approach to Interpreting Convention Rights’ [2005] EPL 405; Francesca Klug and Helen Wildbore, ‘Follow or lead? The Human Rights Act and the European Court of Human Rights’, (2010) 6 EHRLR 621; Lord Irvine of Lairg, ‘A British Interpretation of Convention Rights’, Lecture at University College of London’s Judicial Institute (London, 14 December 2011).

the Court prefers to accept the results of the supranational (Strasbourg) court's research on the point.

The effect of the existence of a supranational court on the use of foreign jurisprudence is made clearer still by a review of the cases where no such court exists. The second half of chapter seven provides examples of the Supreme Court's greater willingness to use foreign jurisprudence in such cases. It is explained that the emphasis on maintaining uniformity among contracting states is particularly prevalent when the court is interpreting an international instrument with no supervisory body. Nevertheless, anxieties remain about the legitimacy of references to foreign jurisprudence, especially if the use of those sources lead to an interpretation that unduly enlarges the scope of rights or the obligations under the common instrument in question. In part, this risk also explains the Supreme Court's reluctance to make advances on the Strasbourg jurisprudence.

There is, however, some evidence that deference to Strasbourg may be on the decline. The Supreme Court is showing greater willingness to reject the Strasbourg jurisprudence where it is unhelpful or at odds with the constitutional arrangements in the United Kingdom. This is most obvious in cases where the Strasbourg jurisprudence has been thought to be out-dated; implicit in the construction of the ECHR as a 'living instrument' is the presumption that domestic courts may properly conclude that Convention

jurisprudence has lost its relevance with age.²⁰ Other opportunities for divergence are created by the ‘margin of appreciation’ doctrine or the accuracy, clarity and reasoning of the Strasbourg jurisprudence itself. In such cases foreign jurisprudence may provide a valuable and underused perspective on the Strasbourg jurisprudence, especially where the relevant case law of that court is unclear, unhelpful or has misunderstood some aspect of domestic law. It is argued in chapter eight that foreign jurisprudence can lend confidence to the Supreme Court’s reasoning in these cases, ensuring that the Court is not simply a ‘Strasbourg surrogate’.²¹ Viewed in this way, the jurisprudence of foreign domestic courts is more valuable than has so far been considered. By taking those sources into account, the Justices may begin to take a more theorised approach to human rights cases, working with the Strasbourg Court in human rights cases, rather than under it.

It is concluded that the Supreme Court’s use of foreign jurisprudence is both legitimate and appropriate. The perspective offered by these sources is a valuable tool and could assist the Supreme Court to realise its full potential: to develop the domestic law of human rights which many hoped the HRA 1998 would foster.

²⁰ *Tyler v United Kingdom* (1978) 2 EHRR 1 [31].

²¹ *R (Prolife Alliance) v BBC* [2002] EWCA Civ 297; [2002] 2 All ER 756, 771-772; also Roger Masterman, ‘Section 2(1) of the Human Rights Act: Binding domestic courts to Strasbourg?’ [2004] PL 725; Elizabeth Wicks, ‘Taking Account of Strasbourg?’ above n 19.

1.1 A note about style

The lack of any single gender neutral pronoun in the English language has led many writers to forge a sense of equality by using ‘they’ or ‘their’, rather than ‘him’, ‘her’, ‘his’ or ‘her’. This approach is not adopted in this thesis. Instead, the masculine should generally be taken to include the feminine wherever there may be ambiguity about the gender of the subject. The choice of masculine over feminine has been made only on the basis that there is, at the time of writing, just one female Justice of the Supreme Court. Using the feminine pronoun when talking about judicial practices may therefore give the unintended impression that Baroness Hale is always the subject of the sentence in point. It was felt that a better balance would be achieved by dividing this attention among the male Justices, especially where anonymity was to be preserved.

An inconsistency also lies with the treatment of numbers. In this thesis, numbers are written both as numerals and words depending on the nature of the passage and analysis. The widely adopted rule about spelling out single-digit whole numbers is therefore occasionally ignored when discussing quantitative data, as in chapter five.

2 The existing literature

Two centuries ago Friedrich Karl von Savigny wrote of his despair that England, which ‘in all other branches of knowledge actively communicating with the rest of the world, should, in jurisprudence alone, have remained divided from the rest of the world, as if by a Chinese wall’.²² In tune with the relative reluctance to compare there was, as one great comparative scholar has put it, ‘a remarkable dearth of comparative law teachers, books and articles’.²³ In the late twentieth century, the citation of foreign case law in domestic courts grew immeasurably and in the early 1990s, the late Lord Bingham wrote his hopeful prognosis that the decade would ‘be remembered as the time when England ... ceased to be a legal island, bounded to the north by the Tweed...’.²⁴ There now exists a vast literature on comparative law.²⁵ As one of the current Justices of the Supreme Court, Lord Mance, has recently recognised, ‘[i]ncreasing attention has been paid over recent years to the basis on which judges use foreign authority’.²⁶

²² As quoted in Tom Bingham, ‘There is a World Elsewhere: the Changing Perspectives of English Law’ (1992) 41 ICLQ 513, 514; Tom Bingham, *The Business of Judging: Selected essays and speeches* (Oxford University Press 2000), 88.

²³ Basil Markesinis (ed), *Foreign Law & Comparative Methodology: a subject and a thesis* (Hart Publishing 1997), 2.

²⁴ Tom Bingham, ‘There is a World Elsewhere’, above n 22, 514.

²⁵ E.g. Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, Oxford University Press 1998), Esin Örüçü and David Nelken (eds), *Comparative Law: A Handbook* (Hart Publishing 2007); Pierre Legrand and Roderick Munday, (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press 2003); John Henry Merryman and David S Clark, *Comparative Law: Western European and Latin American Legal Systems. Cases and Materials* (Bobbs-Merrill 1978); David Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997).

²⁶ Lord Mance, ‘Foreign Laws and Languages’ in Burrows, Johnston and Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford University Press 2013), 87.

Markesinis, in particular, has been responsible for notable contributions on both foreign and comparative law. He has published valuable work on the convergence in certain legal subjects across a number of jurisdictions,²⁷ on the opportunities offered by comparative law in a ‘shrinking world’ and,²⁸ most recently, with Fedtke on judicial recourse to foreign jurisprudence.²⁹ The literature on comparative methodology is rarely framed in a way that directly addresses the judicial use of foreign jurisprudence in domestic courts, making Markesinis’ latest publication of particular interest. However, like most of the literature, the scope is largely restricted to private law.³⁰

In public law—and in human rights cases specifically—Groppi and Ponthoreau have made one of the most relevant contributions in a volume titled *The Use of Foreign Precedents by Constitutional Judges*.³¹ As the editors of that volume point out, studies cataloguing the different approaches adopted by constitutional or supreme courts in their use of foreign jurisprudence are relatively rare. The volume therefore reports on the citation practices of different constitutional or supreme courts in both common and

²⁷ Basil Markesinis (ed), *The Gradual Convergence* (Clarendon Press 1994).

²⁸ Basil Markesinis, *Comparative Law in the Courtroom and in the Classroom* (Hart Publishing 2003)

²⁹ Basil Markesinis and Jörg Fedtke (eds), *Judicial Recourse to Foreign Law*, above n 9; Sir Basil Markesinis and Jörg Fedtke, ‘The Judge as a Comparatist’ (2005) 80 *Tulane Law Review* 11.

³⁰ E.g. Richard Fentiman, *Foreign Law in English Courts* (Oxford University Press 1998); Shaheed Fatima, *Using International Law in Domestic Courts*, (Hart Publishing 2005); Richard Bronaugh, ‘Persuasive Precedent’ in Laurence Goldstein, *Precedent in Law* (Clarendon Press 1987) 217; Albert Kiralfy, ‘The Persuasive Authority of American Rulings in England,’ (1948-9) XXIII *Tulane Law Rev* 209; Tom Bingham, ‘There is a World Elsewhere: the Changing Perspectives of English Law’ (1992) 41 *ICLQ* 513.

³¹ Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing 2013).

civil law traditions.³² Sixteen chapters report on the use of foreign precedents by a particular court. All chapters follow a quantitative approach and provide results on: the number of decisions citing foreign case law; the number of citations (generally and from each jurisdiction cited); the number of citations to foreign precedents in cases dealing with human rights and institutional issues; and the number of citations in majority or minority opinions. The research illustrates that citations of foreign case law are most common in human rights decisions.³³ The volume also includes visual representations of the empirical research to demonstrate the different courts' citation practice and behavioural patterns. The clarity afforded by these visual representations in part inspired the inclusion of similar representations in this thesis, explained further in the research methodology below.

However, unlike the approach taken in this thesis, the editors of *The Use of Foreign Precedents by Constitutional Judges* chose to direct attention only at explicit citations. The editors of that volume explain the omission of results on implicit citations on the basis that it would require significant extra-judicial research, conducted by way of interviews and questionnaires.³⁴ Research of this kind has been carried out for this thesis. A lack of express citations does not necessarily indicate of a lack of knowledge of foreign case law by the judges. Focusing only on explicit citations would inevitably ignore analysis of non-explicit uses of foreign precedents. As the author of the chapter on

³² Ibid 3.

³³ Ibid 416.

³⁴ Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges*, above n 31, 7.

Hungary points out, ‘the frequency of citations in itself does not tell us much about the reasons and effects of the references, so it is extremely difficult to evaluate the character of the use of foreign judicial practices and cases’.³⁵ The chapters of the collection that do engage with these questions provide interesting insights, hinting at greater uses of foreign jurisprudence than is otherwise detectable on the face of the judgments. Lastly, the volume does not include a report on the United Kingdom Supreme Court. The absence is not explained. The potential usefulness of such a report is however noted by the author of the chapter on the South African Constitutional Court, pointing out that such a report would have assisted with her own conclusions: ‘empirical research into the propensity of the UK court to cite South African courts would be needed in order to determine whether the ... relationship between these two countries has led to cross pollination or not’.³⁶

2.1 Does the UK Supreme Court use foreign jurisprudence?

An increasing number of works are published on the work of the UK Supreme Court generally and a smaller number of works have been published with specific reference to the use of foreign jurisprudence in that court.³⁷ Mak has made the most relevant contributions in two articles and one recently

³⁵ Zoltán Szente, ‘Hungary: Unsystematic and Incoherent Borrowing of Law. The Use of Judicial Precedents in the Jurisprudence of the Constitutional Court, 1999-2010 in Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges*, above n 31, 266.

³⁶ Christa Rautenbach, ‘South Africa: Teaching an ‘Old Dog’ New Tricks? An Empirical Study of the Use of Foreign Precedents by the South African Constitutional Court (1995-2010)’ in Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges*, above n 31, 200.

³⁷ The burgeoning literature on the UK House of Lords and now the UK Supreme Court was recognised by Penny Darbyshire, *Sitting in Judgment: The Working Lives of the Judges* (Hart Publishing 2011), 362. A helpful review of the most important works is given at 363-368.

published book. The articles, 'Why do Dutch and UK Judges cite foreign law' and 'Reference to Foreign Law in the Supreme Courts of Britain and the Netherlands: Explaining the Development of Judicial Practices' were published in 2011 and 2012 respectively.³⁸ *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts*, was published in November 2013.³⁹

In common with the approach taken in this thesis, the first of Mak's articles is aimed at identifying 'different judicial views and approaches to the use of foreign law'.⁴⁰ To that end, Mak conducted interviews with judges from the UK and Netherlands supreme courts. Mak's interviews were conducted prior to the interviews in this study but the article published some time after.⁴¹ For that reason it was, unfortunately, not possible to reflect and develop upon Mak's interview results ahead of the interviews conducted for this thesis. The result is that some of the research findings inevitably duplicate and corroborate Mak's published work. This thesis does nevertheless add to the interview evidence gathered by Mak, not least because a further four judges were interviewed, as well as the JAs.⁴² Further, Mak's comparison with the Supreme Court of the Netherlands leads to a division of attention between

³⁸ Elaine Mak, 'Why do Dutch and UK judges cite foreign law?' [2011] CLJ 420; Elaine Mak, 'Reference to Foreign Law in the Supreme Courts of Britain and the Netherlands: Explaining the Development of Judicial Practices' (2012) 8(2) Utrecht Law Review 20.

³⁹ Elaine Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (Hart Publishing 2013).

⁴⁰ Ibid 423.

⁴¹ Mak explains that the UK Supreme Court Justices were interviewed in November 2009, the first round of interviews conducted for the purposes of this research was October-November 2010.

⁴² Mak interviewed seven Justices of the UK Supreme Court and one retired Law Lord. Ten Justices of the UK Supreme Court and one Lord Justice of Appeal were interviewed for the purposes of this thesis.

the two courts. As a result, Mak's article is helpful insofar as it provides a broad overview of this practice, 'mak[ing] visible the variety of views within specific highest courts',⁴³ but does not provide the in-depth analysis of the UK Supreme Court undertaken in this thesis.

The aim of Mak's 2012 article was to 'explain the development of the highest courts' decision-making practices in light of the trend of the internationalisation of the law'.⁴⁴ Mak draws from the interview evidence presented in the 2011 article in order to highlight more nuanced points about the working methods at the UK and Dutch Supreme Courts. Of particular relevance, is the finding that the use of foreign jurisprudence is highly dependent on 'personal variables':⁴⁵

The judges of the Supreme Court for the UK feel that counsel should bring forward all legal materials which are relevant for deciding the case, including foreign judgments and academic resources concerning foreign law. The judges sometimes do conduct additional research themselves or ask a judicial assistant to look for useful sources. Some judges put more time and effort into this kind of research than others. With regard to a comparison with non-common law jurisdictions, the judges in general conduct research by themselves, i.e. without the help of judicial assistants. Therefore, the selection of this kind of foreign sources seems to be very much dependent on the personal background of the judges,

⁴³ Elaine Mak, 'Why do Dutch and UK judges cite foreign law?', above n 38, 449.

⁴⁴ Elaine Mak, 'Reference to Foreign Law in the Supreme Courts of Britain and the Netherlands...', above n 38, 20.

⁴⁵ *Ibid.*, 27.

in particular concerning the languages they master and the data they have access to.⁴⁶

These findings corroborate one of the main claims made in this thesis, that the method of foreign jurisprudence citation is not always obvious and that the Justices continue to take individualised approaches to the research and use of those sources. Mak concludes that '[f]urther research regarding the aims, methods and legitimacy of the use of foreign law can help to clarify what the highest national courts can and may do, and thus guide the further development of these courts' judicial decision-making practices'.⁴⁷

Much of this 'further research' is developed in her book *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts*.⁴⁸ The stated aim of that work was to 'offer a new perspective on a much-debated question in current legal scholarship: why do judges study legal sources which originated outside of their national legal system and how do they use arguments from these sources in the deciding of cases?'.⁴⁹ Mak's research for the volume was undertaken during a similar time period as the research for this study and publication fell very close to the submission of this thesis. As with the two articles discussed above, Mak's evidence on the UK Supreme Court is drawn from an analysis of decided cases as well as interviews with a number of the Justices. Again, some of the findings that are most closely connected to

⁴⁶ Ibid 30.

⁴⁷ Ibid 34.

⁴⁸ Elaine Mak, *Judicial Decision-Making in a Globalised World*, above n 39.

⁴⁹ Ibid 1.

those given in this thesis are about the individual approaches of the judges.

Mak writes:

... the interviews conducted for the research make clear that individual judges have an important influence on the way in which foreign law is used in their court. The individual use of foreign law by judges in deliberations and in judgments, beyond the mandatory use of sources, depends on three main factors: legal tradition, language and the prestige of foreign courts. Interestingly, the voluntary recourse to foreign law currently does not seem to follow a specific logic.⁵⁰

However, the book can be distinguished from this study in at least one obvious sense: Mak's work does not include a quantitative analysis of the use of foreign jurisprudence by the examined highest courts.⁵¹ Further, the research parameters are broader than in this thesis, drawing from comparative study of the highest courts in five legal systems: United Kingdom, Canada, United States, France and the Netherlands.⁵² Finally, Mak's findings about the use of foreign jurisprudence in the UK Supreme Court contribute to a wider analysis of trends in globalisation and the interaction between the studied courts. Nevertheless, Mak's work is a valuable contribution to the literature in this field and the similarity of the research findings and main claims provide strong support for the conclusions drawn in this thesis.

⁵⁰ Ibid.

⁵¹ Ibid 8.

⁵² Ibid 2.

Another closely related publication, 'Comparative law in the Supreme Court 2010-11', was published by Bell in 2012. In that article, Bell builds on Mak's 2011 research and considers the use of foreign jurisprudence during the second year of the Supreme Court's activity. He identifies a number of cases handed down by the Supreme Court during 2010-11, in which references were made to foreign jurisprudence. Interestingly, Bell finds that there was a paucity of decisions in that year directly discussing foreign jurisprudence but that this actually 'reflects the recent analyses of the widening horizons of UK judges'.⁵³ Bell's conclusions are that 'the Supreme Court is very open to looking at a variety of sources when value can be added to the justifications for their decisions by doing so'.⁵⁴ However, the scope for analysis is limited, confined to just four pages. It is the aim in this thesis to develop this analysis further and consider the full first four years of the Supreme Court's activity.

Additional insight has been given by the recently published *Comparative Reasoning in European Supreme Courts*, authored by Michael Bobek. The volume was also published towards this end of the time period for this study. In that work, Bobek considers both 'mandatory' and 'voluntary' or 'non-mandatory' uses of foreign legal rules. The former, it is explained, includes 'instances in which the national courts are obliged, by virtue of domestic law, to use foreign legal rules in deciding cases'.⁵⁵ The latter two would include 'references to foreign sources' which represent 'the choice of the national

⁵³ John Bell 'Comparative Law in the Supreme Court 2010-11' [2012] 1.2 CJICL 20, 24.

⁵⁴ Ibid 24.

⁵⁵ Michael Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford University Press 2013), 21.

judge to use the foreign as a source of inspiration for devising a solution and/or justifying a solution'.⁵⁶ Bobek explains that the focus is on the use of 'non-mandatory comparative arguments' by supreme courts in five jurisdictions: England and Wales, France, Germany, the Czech Republic, and Slovakia.⁵⁷ The purpose of the chapter titled 'England and Wales' is to examine the theory and the practice of comparative reasoning in the English courts.⁵⁸ In that chapter, Bobek also presents some empirical evidence from the UKSC's activity although the evidence is limited to an analysis of one judicial year, 2010-11.⁵⁹ Bobek's feeling was that the 'mainstream opinion' among the English judiciary could be said to be 'one of "reserved optimism" vis-à-vis the foreign: *yes, helpful and most illuminating, but...*'.⁶⁰

Some interesting research was also carried out on the use of foreign jurisprudence in the Court of Appeal and the House of Lords (prior to the establishment of the Supreme Court).⁶¹ 'Resort to foreign constitutional norms in domestic human rights jurisprudence with reference to terrorism cases' was published by Cram in 2009 with the aim of gaining 'a clearer sense of the nature of the role played by foreign human rights jurisprudence

⁵⁶ Ibid 33.

⁵⁷ Ibid 67.

⁵⁸ Ibid 75.

⁵⁹ An analysis based on just one year runs the risk of being skewed by a-typical results. Indeed, as is noted in chapter five below, the findings from this research are that foreign jurisprudence was used in an unusually high proportion of cases during the 2010-11.

⁶⁰ Michael Bobek, *Comparative Reasoning in European Supreme Courts*, above n 55, 80 (original emphasis).

⁶¹ The Supreme Court was established by part 3 Constitutional Reform Act 2005, assuming the judicial functions of the House of Lords as the highest appellate court in the United Kingdom (other than for Scottish Criminal cases). It started work on 1 October 2009.

in domestic judicial reasoning'.⁶² Cram identified and found five rulings which contained at least one reference to foreign jurisprudence, or, according to Cram's terminology, 'foreign constitutional norms'.⁶³ The results of that study appeared to support one of the main criticisms for judicial comparativism: that citation of foreign jurisprudence is mainly opportunistic and results-driven. However Cram did not seek to interview the judges and, by his own admission, the conclusions are based on rather 'limited evidence',⁶⁴ drawn from cases engaging the rights to liberty (Article 5 ECHR) and the right to a fair trial (Article 6 ECHR).⁶⁵

These works are valuable contributions to the literature in this field but none provide a systematic account of the use of foreign jurisprudence at the UK Supreme Court. For example, Bell found there to be a paucity of decisions citing foreign jurisprudence but cited just seven cases in his analysis of the cases decided in 2010-11.⁶⁶ It is not clear whether Bell found only seven cases or whether he considered seven cases as an example. A similar picture emerges from Cram's 2009 published study of the Article 5 and Article 6 claims before the Court of Appeal and House of Lords, which found

⁶² Ian Cram, 'Resort to foreign constitutional norms in domestic human rights jurisprudence with reference to terrorism cases' [2009] CLJ 118.

⁶³ Ibid 132.

⁶⁴ Ibid 141.

⁶⁵ Ibid. At 127 Cram explained his methodology was 'based upon searches of the Westlaw database of House of Lords and Court of Appeal decisions using each of the following search terms (i) "terrorism" and "Article 5"; (ii) "terrorism" and "right to liberty"; (iii) "terrorism" and "Article 6" and (iv) "terrorism" and "fair trial". Within these search categories I have sought to locate all instances of judicial reference to a foreign court's ruling in the period from October 2000 when the Human Rights Act 1998 came into force'.

⁶⁶ John Bell, 'Comparative Law in the Supreme Court 2010-11', above n 53, 20. Bobek relied on Bell's figures for 2010-11 in his analysis: Michael Bobek, *Comparative Reasoning in European Supreme Courts*, above n 55, 90 (n 76).

only five judgments citing foreign jurisprudence in the years since the coming into force of the Human Rights Act in October 2000.⁶⁷ The feeling from the existing studies of the use of foreign jurisprudence in UK courts is therefore that it is not a big factor and contributes to only a small proportion of cases. However these studies draw mainly from explicit citations to foreign jurisprudence, which cannot capture uses that didn't convert into a full attribution in the published judgment. Mak's study comes the closest to addressing this through her interviews with some Justices of the Supreme Court but also refrained from quantitative analysis of judgments, preferring to avoid 'any drawbacks related to the quantitative analysis of a small research sample'.⁶⁸

2.2 Is foreign jurisprudence used in human rights cases?

In human rights cases, the general consensus is that the frequency of judicial references to foreign jurisprudence is not unusual. Indeed, some commentators have said that judicial comparativism is seen most often in human rights cases,⁶⁹ although it is also said that the extent to which judges draw from foreign jurisprudence in human rights cases varies greatly between jurisdictions. In this field, Örüçü has made a significant contribution. Her edited collection, *Judicial Comparativism in Human Rights Cases*, brings together chapters on the experiences of England, France, Germany, Russia,

⁶⁷ Ian Cram, 'Resort to foreign constitutional norms...', above n 62.

⁶⁸ Elaine Mak, 'Why do Dutch and UK judges cite foreign law?', above n 38, 422.

⁶⁹ See e.g. See Christopher McCrudden, 'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights' (2000) 20(4) OJLS 499, 527, asking 'is there something specific to human rights that explains the apparently greater use of foreign case law in human rights cases?'

Scotland, Turkey, the Commonwealth and South Africa as well as the Court of Justice of the European Union (CJEU) (previously 'European Court of Justice') and the European Court of Human Rights (ECtHR). According to Örüçü, the reader can conclude from these studies that, in human rights cases at least, English and Scottish judges utilise comparativism on a much wider scale than judges from most other jurisdictions.⁷⁰ Indeed, the coming into force of the HRA 1998 provided an obvious opportunity for judicial comparativism through section 2, which explicitly obliges domestic courts to 'take into account' relevant Strasbourg jurisprudence. As Fenwick has written, '... it was always clear that the courts could also consider jurisprudence from other jurisdictions'.⁷¹ As Örüçü had suggested earlier, foreign jurisprudence may provide the 'analytical lenses' through which domestic judges 'converse' with the international judges of the ECtHR and the CJEU.⁷²

Along these lines, and around the time that the HRA 1998 was coming into force, Sedley suggested that the HRA's status as a domestic statute 'opens the door to a wealth of jurisprudence and experience from other

⁷⁰ Esin Örüçü, 'Comparative law in British Courts' in Ulrich Drobnig and Sief van Erp. (eds), *The Use of Comparative Law by Courts, 14th International Congress of Comparative Law* (Kluwer 1999).

⁷¹ Helen Fenwick, *Civil Liberties and Human Rights* (Cavendish 2007) 192.

⁷² Esin Örüçü (ed), *Judicial Comparativism in Human Rights Cases* (United Kingdom National Committee of Comparative Law 2003). The most relevant chapter for the purposes of this study is Paul Kearns' contribution, 'United Kingdom Judges and Human Rights Cases'. Unfortunately, however, Kearns centres his discussion on the impact of the Human Rights Act 1998 on domestic judicial reasoning generally therefore precludes detailed analysis of judicial comparativism with jurisprudence beyond the 'new European human rights landscape'.

Commonwealth, common law and European jurisdictions, as well as from the Strasbourg Court itself, in its interpretation and application'.⁷³ He continued:

It is through this rich prism that the Convention, in its turn will be read and applied in our courts: not as a monochrome exercise in textual interpretation and the application of received authority, but as a kaleidoscopic pattern combining the symmetry of law with the variety of experience.⁷⁴

In the context of the Scottish courts, Murdoch has commented that 'reliance upon domestic solutions to domestic questions [has been] particularly acute ... [with] little awareness of legal systems other than those closely-related common law systems (in particular, English law)' because 'Scotland ... was (at least until recently) a small and relatively homogenised country'.⁷⁵ In human rights cases, however, Murdoch has argued that judicial comparativism has greatly increased since the Scotland Act 1998 and the Human Rights Act 1998. These have 'provide[d] a vessel for the use of comparative law analysis since domestic courts in giving effect to Convention rights ... have to consider comparative practices in other European (and post *Christine Goodwin*, in other non-European) states'.⁷⁶ It is as a result of the

⁷³ Stephen Sedley in Stephen Grosz, Jack Beatson and Peter Duffy, *Human Rights: The 1998 Act and the European Convention* (Sweet and Maxwell 2000), foreword vii.

⁷⁴ *Ibid* foreword vii.

⁷⁵ Jim Murdoch, 'Comparative Law and the Scottish judges' in Esin Örucü (ed), *Judicial Comparativism in Human Rights Cases* (United Kingdom National Committee of Comparative Law, 2003), 88.

⁷⁶ Jim Murdoch, 'Comparative Law and the Scottish judges' above n 75, 105. In *Goodwin* it is reported that '[t]he Court ... attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed [by the legal recognition of gender re-assignment], than to the clear and uncontested evidence of a continuing international trend in favour not only of the increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals'. *Christine Goodwin v United Kingdom* (28957/95) [2002] ECHR 583, [85].

HRA 1998, Murdoch submits, that ‘the use of comparative law ... in the domestic courts is now obvious’.⁷⁷

Unfortunately, empirical evidence about the correlation between the citation of foreign jurisprudence and the type of issue is rare. As Bobek writes:

There are no conclusive empirical studies which have, for instance, qualitatively studied and compared the amount of comparative references made by the same jurisdiction in the various areas of law, thus confirming or rebutting the assumption that the greatest amount of comparative reasoning is indeed carried out in the area of human rights adjudication.⁷⁸

Groppi and Ponthoreau’s edited volume made a significant contribution to this particular question, by reference to data gathered from a number of courts from jurisdictions working in the common law and civil law traditions. As has already been mentioned, one of the main conclusions of that volume was that citations of foreign case law are most common in human rights decisions.⁷⁹ However, this is a finding which has yet to be substantiated in the UK context. One of the research aims for this study is therefore to consider the reality of any such correlation in the UKSC’s decided cases.

⁷⁷ Jim Murdoch, ‘Comparative Law and the Scottish judges’. Above n 75, 96.

⁷⁸ Michael Bobek, *Comparative Reasoning in European Supreme Courts*, above n 55, 64.

⁷⁹ *Ibid* 416.

2.3 Where does foreign jurisprudence come from?

On comparative law generally, methodological issues usually form the crux of academic debate. That is, which jurisdictions are compared and how one is to go about the exercise of comparing. Back in 1974 Otto Kahn-Freund took stock of the increasing comparativism and warned that ‘... in the process of becoming fashionable a thing gets distorted, and it is liable to be misused’.⁸⁰ Kahn-Freund was not seeking to condemn the use of comparative law. On the contrary, he encouraged it, seeking only to caution that it must be undertaken with specific regard to a number of factors beyond the legal systems of the countries compared. Thus scepticism about borrowing from other jurisdictions often stems from the perceived contextual differences, which are thought to preclude the possibility for useful analysis; in reality, local conditions produce difficulties ‘which are often subtle and require ... sophisticated analytical tools’ to separate them from their ‘culturally-determined realities’.⁸¹ Lest one forget Montesquieu's denial that useful comparisons could be made between jurisdictions at all. His well-rehearsed feeling was that the law of any nation would (or should) vary according to a range of factors including (but not restricted to) that nation's history and politics as well as the customs, religions and inclinations of its people. By its very nature, law was unsuited to a comparative exercise.⁸²

⁸⁰ Otto Kahn-Freund, ‘On Uses and Misuses of Comparative Law’ (1974) 37 MLR 1.

⁸¹ Nicholas HD Foster, ‘The Journal of Comparative Law: A New Comparative Resource’ <<http://www.wildy.co.uk/jcl/pdfs/foster.pdf>> accessed 01 December 2010.

⁸² In *The Spirit of the Laws* Montesquieu argued that the law of any jurisdiction ‘should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another’, Anne M. Cohler, Basia Carolyn Miller and Harold Samuel Stone (trans. and eds.), *The Spirit of the Laws* (Cambridge University Press 1989), 8-9.

This line of thought has links with concerns propounded by participants in the legal transplants debate, who have been emphasising the importance of contextual analysis for some time.⁸³ As one commentator elegantly put it:

[m]uch as winemakers claim that a grape variety transplanted outside its native *terroir* produces a different wine notwithstanding that it remains the same plant, a transplanted law often functions in a different way in its new home.⁸⁴

On the subject of legislative interpretation too, the emphasis is usually upon reading the statute as a whole and ‘drilling down into the substratum of meaning’.⁸⁵ Comparative methodologists take the same view and usually argue that if comparativism is to be meaningful, it would necessarily engage with even the subtlest of contextual differences since these may—even if indirectly—feed into the respective legislative regimes.⁸⁶

Given the importance attributed to the methodology of comparative law, it is curious that little has been said in relation to way that *judges* approach the matter, on either an empirical or on a normative level. Where it has been addressed, one of the common threads is a feeling that jurisdictions from which judges draw their sources must, above all else, be ‘fit for

⁸³ See e.g. Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993); Pierre Legrand, ‘What “Legal Transplants” in David Nelken and Johannes Feest (eds.), *Adapting Legal Cultures* (Hart Publishing 2001) 55; Ian Cram, ‘Resort to foreign constitutional norms...’, above n 62, 122.

⁸⁴ T.T. Arvind, ‘The “transplant effect” in harmonization’ [2010] ICLQ 65, 66.

⁸⁵ Mary Arden, ‘The Changing Judicial Role: Human Rights, Community Law and the Intention of Parliament’ (2008) 67(3) CLJ 490.

⁸⁶ E.g. Mark Van Hoecke, Mark Warrington, ‘Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law’ (1998) 47(3) *International and Comparative Law Quarterly* 495, 496: ‘... law cannot be understood unless it is placed in a broad historical, socio-economic, psychological and ideological context’.

comparison'.⁸⁷ Whether true or not, there is a perception that different ideological positions on human rights are taken by different jurisdictions and (if that is true) that drawing from one particular jurisdiction's approach to human rights may be regarded as a sign of a particular orientation towards human rights generally.⁸⁸ Thus the 'fit for comparison' perception has also been said to feed a reluctance to use foreign jurisprudence, especially where the domestic court suffers from a particular insularity whereby it sees its own jurisdiction as one which enjoys pre-eminence among civilised countries.⁸⁹ The reluctance to draw from foreign jurisprudence in the United States is a good example. There it is generally agreed that the nation sees itself as a leader rather than a follower in the world order and this means resorting to the approach of other courts is unlikely: the US is known for a limited adherence to international law and '[a]n attitude lingers' that it has 'little to learn from countries whose constitutions have not reached the two-century mark'.⁹⁰

Unsurprisingly, McCrudden found that 'it is [in the main] the judiciaries of liberal democratic regimes that cite each other ... [t]he citation of, for example, Chinese cases by the [UK] House of Lords, does not seem likely'.⁹¹

More recently, Groppi and Ponthoreau found that the practice of citing foreign

⁸⁷ Christopher McCrudden, 'A Common Law of Human Rights?' above n 69, 501.

⁸⁸ Ibid; Richard Clayton, 'Judicial Deference and 'Democratic Dialogue': the legitimacy of judicial intervention under the Human Rights Act 1998' [2004] PL 33, 47; Leighton McDonald, 'New Directions in the Australian Bill of Rights Debate' [2004] PL 22.

⁸⁹ Ian Cram, 'Resort to foreign constitutional norm...', above n 62, 124.

⁹⁰ EA Mearns, 'Emerging trends in international Constitutionalism: A Comparative Approach', (1996) 28 Case Western Journal of International Law 1, 1.

⁹¹ Christopher McCrudden, 'A Common Law of Human Rights?', above n 69, 517-518.

jurisprudence is usually confined to a particular group or ‘family’ of courts.⁹²

In the UK context, Mak has written:

For the UK Supreme Court judges, the first criterion for the selection of foreign judgments concerns legal tradition, in the sense of the shared background with other common law systems. Sources most often referred to come from Commonwealth legal systems and from the US legal system.⁹³

Jurisprudence under Bills of Rights from jurisdictions in similar legal traditions and that are of recent origin are likely to be especially relevant in this respect. Such instances are not difficult to identify: many countries with legal systems rooted in the common law have adopted Bills of Rights not dissimilar to the UK Human Rights Act. Indeed the framers of the HRA are often thought to have taken inspiration from some of those jurisdictions. For example, it is often pointed out that the Labour Party was strongly influenced by the Canadian position when it decided to campaign for human rights legislation.⁹⁴ Hence Feldman’s suggestion that the decisions of the Supreme Court of India under that country’s 1947 Constitution, those of the Court of Appeal of New Zealand on the New Zealand Bill of Rights Act 1990, and those of the South African Constitutional Court on the rights under South Africa’s 1993 and 1996 African Constitutions, may all contain ‘useful insights’.⁹⁵ The point

⁹² Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges*, above n 31, 430.

⁹³ Elaine Mak, *Judicial Decision-Making in a Globalised World*, above n 39, 206.

⁹⁴ E.g. Lord Irvine, ‘The legal system and law reform under Labour’ in David Bean (ed), *Law Reform for All* (Blackstone 1996) referred to in Richard Clayton, ‘Judicial Deference and ‘Democratic Dialogue’: the legitimacy of judicial intervention under the Human Rights Act 1998’ [2004] PL 33, 45.

⁹⁵ David Feldman (ed) *English Public Law* (Oxford University Press 2004), 397.

was frequently repeated in the early literature on the HRA. Before the coming into force of the Act, Starmer considered jurisprudence of this kind to be ‘invaluable’ in assisting the interpretation of Convention rights.⁹⁶ A few years later, Lester and Clapinska wrote that ‘[t]he developing principles contained in the constitutional case law of courts in other common law countries...are likely to be at least *as persuasive* as the Strasbourg case law’.⁹⁷ Indeed some of the more recent literature confirms that these jurisdictions frequently refer to UK jurisprudence,⁹⁸ but there is little empirical research to confirm that the UK courts follow the same pattern.

Quantitative analysis in these terms is uncommon. The most recent and direct attempt at empirical research on the citation of foreign jurisprudence—*The Use of Foreign Precedents by Constitutional Courts* (discussed above)—does not include a chapter on the United Kingdom experience. Mak’s work on the Dutch and UK Supreme Courts specifically excludes quantitative analysis and Bell’s 2012 piece takes a view of just one judicial year. Indeed, as Mak has pointed out in her most recent publication, ‘the views and practices of judges themselves have not been studied extensively’.⁹⁹

⁹⁶ Keir Starmer, *European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights* (Legal Action Group 1999) 27.

⁹⁷ Lord Lester and Lydia Clapinska ‘Human Rights and the British Constitution’ in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution* (5th edn, Oxford University Press 2004) 83.

⁹⁸ See e.g. Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges*, above n 31.

⁹⁹ Elaine Mak, *Judicial Decision-Making in a Globalised World*, above n 39, 2.

One study that does give data on the use of foreign jurisprudence is Flanagan and Ahern's 2011 article, 'Judicial Decision-Making and Transnational Law: A Survey of Common Law Supreme Court Judges'.¹⁰⁰ Flanagan and Ahern find that judges in foreign jurisdictions are likely to 'form a reference group' to domestic judges adjudicating on constitutional rights.¹⁰¹ However, the authors are cynical about judges citing foreign jurisprudence 'as a source of persuasive authority', concluding that this is likely to 'apply to only a minority of judicial comparativists'.¹⁰² Their data results also include some findings on the selection of foreign jurisprudence and supports the finding in this thesis that judges are likely to refer to a small family of courts, in particular those from Commonwealth jurisdictions. However, the research methods are quite different to those adopted in this study. Firstly, the data is drawn from a number of apex courts, including but not restricted to the United Kingdom judges. Secondly, Flanagan and Ahern did not conduct interviews, explained on the practical basis that the 'international dispersion of our intended subjects' meant that interviews were not feasible.¹⁰³

Another notable quantitative study of UK judicial comparativism was undertaken by Örüçü in a chapter headed 'Comparative law in British Courts',

¹⁰⁰ Brian Flanagan and Sinead Ahern, 'Judicial Decision-Making and Transnational Law: A Survey of Common Law Supreme Court Judges' (2011) 60 *International and Comparative Law Quarterly* 1.

¹⁰¹ *Ibid* 28.

¹⁰² *Ibid*.

¹⁰³ *Ibid* 9. A system of questionnaires and electronic submission were chosen as an alternative means of primary data collection. As explained in the methodology chapter below, interviews were feasible for this study and provided a distinct advantage: the possibility to follow up on interesting leads or to develop discussion in a way that is not possible in an electronic questionnaire. The point is also recognised by Elaine Mak, *Judicial Decision-Making in a Globalised World*, above n 39, 66.

published in Drobniġ and van Erp's edited collection, *The Use of Comparative Law by Courts, 14th International Congress of Comparative Law*.¹⁰⁴ In that chapter, Örüü aimed not only to account for the number and frequency of judicial comparativism but also to detect existing patterns. She considered decisions published in the All ER rendered in 1972, 1982, 1992 and between 1990-1995, finding that the proportion of references to foreign law in domestic cases had increased significantly by the end of 1995.¹⁰⁵ Her study also revealed that the main judicial comparisons were between members of the common law family with frequent references to the United States of America and other Commonwealth jurisdictions. Further, since 1993, references to common law jurisdictions had 'increased four-fold' while references to civil law jurisdictions had doubled.¹⁰⁶

Similar findings were given by Siems, who undertook a quantitative study of the Court of Appeal's citation of foreign jurisprudence.¹⁰⁷ Siems drew his data from the years between 1984 and 2006, concluding that the Court of Appeal referred to the jurisprudence of common law jurisdictions much more than non-common law jurisdictions.¹⁰⁸ Among the common law courts that were most frequently referred to were (in order of the frequency of citation)

¹⁰⁴ Esin Örüü, 'Comparative law in British Courts', above n 70, 253.

¹⁰⁵ From references to foreign law in 26 out of 602 cases in 1972, to 119 out of a total 285 cases in 1995. It is worth explaining that the years 1972, 1982 and 1992 were chosen to test whether entry to the European Community in 1972 altered the pattern of references. Örüü recognised that these intervals allowed for a large chance element and included the period between 1990-1995 in part to correct this (but also since it was the most recent period and one that she felt to be long enough to attempt meaningful analysis and reliable hypotheses).

¹⁰⁶ Esin Örüü, 'Comparative law in British Courts', above n 70, 253.

¹⁰⁷ Mathias Siems, 'Citation Patterns of the German Federal Supreme Court and the Court of Appeal of England and Wales' (2010) 21 KLJ 152.

¹⁰⁸ Siems found the Court of Appeal cited foreign common law courts in 16% of its cases while citations to non-common law courts were around 0.5%.

Australia, Canada, New Zealand, the United States, Ireland and South Africa.¹⁰⁹ Bobek also found that citations of foreign jurisprudence continue to be drawn from mainly common law jurisdictions.¹¹⁰ It was for that reason that the focus of Bobek's chapter on England and Wales was on how to classify such 'intra-common law referencing'.¹¹¹

Notwithstanding these suggestions, a contrasting theme from the existing literature has actually been that reference to non-European jurisprudence in human rights cases has taken a back seat where the human rights issue is one that falls under the scope of the ECHR. In part, this has been attributed to the duty under section 2 HRA 1998, which requires domestic courts to 'take into account' relevant Strasbourg jurisprudence. The section has been read as prioritising jurisprudence that the European Court would itself be likely to consider. The logic is intelligible: the ECHR and its jurisprudence are built into the structure of the HRA and therefore expressly tie domestic rights to those existing in the ECHR (in contrast to, say, the Canadian, Victorian and New Zealand experiences which do not draw from another treaty). As Masterman has suggested:¹¹²

Comparative jurisprudence from those countries outside the Council of Europe is likely to offer little in terms of the strict question of judging the compatibility of a statutory provision with

¹⁰⁹ Ibid figure 5; See also Martin Gelter and Mathias Siems, 'Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations between Ten of Europe's Highest Courts' (2012) 8 Utrecht LR 88, 93.

¹¹⁰ Michael Bobek, *Comparative Reasoning in European Supreme Courts*, above n 55, 75.

¹¹¹ Ibid.

¹¹² Roger Masterman, 'Taking the Strasbourg jurisprudence into account: developing a 'municipal law of human rights' under the Human Rights Act' [2005] 54(4) ICLQ 907, 923.

the Convention rights themselves; similarly it is unlikely to point to the direction in which the common law should be developed to ensure compatibility with the Convention rights.

Nevertheless, whether judges consider these as factors that influence the way they use foreign jurisprudence to form their domestic judgments is unclear. Certainly, judges do not explain their choices in these terms through their judgments. As Cram found:

English judges, it seems, do little to explain why the insights of a particular jurisdiction might be relevant to the interpretation of domestic law and why those derived from other jurisdictions were not. The reader of these law reports searches in vain for an account of the criteria by which the included jurisdictions were deemed includable and why the excluded were considered excludable.¹¹³

Like many comparative scholars, Cram's conclusion is that '[u]ntil the methodology for selection of foreign norms is made much more explicit, the suspicion will linger that the court's selection of foreign judgments is purely results-driven'.¹¹⁴

...some greater level of justification is needed from the courts as to why Case A from the Ruritania Supreme Court is relevant and possibly even dispositive of the dispute in hand whilst Case B from the Freedomian Constitutional Court can be dismissed as irrelevant and further why the domestic court does not even bother to look at Case C from the High Court of Syldavia.¹¹⁵

¹¹³ Ian Cram, 'Resort to foreign constitutional norms...', above n 62, 140.

¹¹⁴ *Ibid* 141.

¹¹⁵ *Ibid*.

Finally, judges are themselves also likely to approach arguments with a number of preconceived perspectives, which may include a willingness to look abroad. As Cardozo famously said, it is hard for judges to remove themselves from ‘the empire of [their] subconscious loyalties’.¹¹⁶ For example, some of the existing literature suggests that judges from scholarly backgrounds—particularly those that have studied abroad—are much more likely to cite foreign jurisprudence than career judges.¹¹⁷

Dickson opens his 2013 publication, *Human Rights and the United Kingdom Supreme Court*, with the suggestion that ‘judges who are appointed tend to share certain characteristics, which inevitably make for a court that is cautious and reserved in its law-making’.¹¹⁸ The book is focused ‘on the attitudes struck by the United Kingdom’s most senior judges in relation to the rights set out in the Human Rights Act 1998’.¹¹⁹ For the purposes of this study, the chief interest in Dickson’s book turns on the stated aim of paying ‘close attention to the views of individual judges in the domestic court and flag[ging] up the sharp differences of opinion which have often been expressed’.¹²⁰ To that end, Dickson has identified trends and characterised

¹¹⁶ Benjamin N Cardozo, ‘The Nature of the Judicial Process’: Lecture IV, ‘Adherence to Precedent. The Subconscious Element in the Judicial Process. Conclusion’ <http://www.constitution.org/cmt/cardozo/jud_proc.htm> accessed 08 March 2011.

¹¹⁷ Wen-Chen Chang and Jiunn-Rong Yeh, ‘Judges as Discursive Agent: The Use of Foreign Precedents by the Constitutional Court of Taiwan’ in Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges*, above n 31, 376.

¹¹⁸ Brice Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press 2013), 1.

¹¹⁹ *Ibid.* 2.

¹²⁰ *Ibid.*

the attitudes of Supreme Court Justices, through analysis of their judicial and extra-judicial pronouncements.¹²¹

Life experience is particularly likely to influence Justices when they are confronted with human rights arguments, because those arguments will relate to what it is that every human being is entitled to expect from the state. The fact that all of the Justices will be of a certain age when appointed (the average age at appointment of those currently in post was 63) means that their approach to such arguments will be affected by long personal experience. Today's Justices will have begun attending primary school in the 1950s and will not have experienced military service, as many of their predecessors would have done, nor the pre-welfare state era. As adolescents, they will have lived through the sexual revolution of the 1960s and 1970s and will have benefited from free university education (even if prior to university they attended private schools). As lawyers they will have built up considerable financial security and numerous esteem indicators. They will have acquired significant legal experience, including perhaps as a lower level judge, before the Human Rights Act was enacted in 1998.¹²²

In addition, it has been suggested that law and legal practice may simply be in harmony with a pattern of globally inter-dependent exchanges and that 'just as those parties appearing before the courts interact increasingly with

¹²¹ Ibid.

¹²² Ibid 13. Dickson notes a connected point made by Lord Neuberger in a 2011 lecture: 'yesterday's judges were children of the conventional and respectful 40s and 50s, whereas today's judges are children of the questioning and sceptical 60s and 70s'. See further Lord Neuberger of Abbotsbury, 'Who are the Masters Now?' Second Lord Alexander of Weedon lecture, 6 April 2011 <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-speech-weedon-lecture-110406.pdf>> accessed 24 November 2011, 15; Mak's work also confirms that the selection of foreign sources 'seems to be very much dependent on the personal background of the judges', Elaine Mak, 'Why do Dutch and UK judges cite foreign law?', above n 38, 429.

others beyond national boundaries, so inevitably are courts confronted with the existence and practices of other legal systems'.¹²³ Comparative materials are increasingly accessible, and communication with practitioners and judges of other legal systems is increasingly easy. It is often said that greater convergence between legal orders is linked to the forces of globalisation.¹²⁴ Ease of travel coupled with technological developments (particularly the dissemination of information via the world wide web) and the growth of an international legal 'community' facilitating conversation between judges and practitioners from all over the world contributes to the use of foreign jurisprudence in domestic courtrooms.¹²⁵ As Cram has suggested, electronic databases are likely to have had a profound effect on the citation of foreign legal materials and 'it would be surprising if the results of database searches had not begun to filter through from counsels' submissions to court judgments'.¹²⁶

Thus the jurisdictions from which judges may draw from may often be limited to the sources selected and put before them by counsel.¹²⁷ Analogy might be made with judicial reasoning on a more general level. Some time ago, for instance, Rudden identified 'four dialogues' that take place in the process of

¹²³ Ian Cram, 'Resort to foreign constitutional norms...', above, above n 62, 121.

¹²⁴ Although some commentators have been sceptical about this. William Twining was tempted to ban the use of the word 'globalisation': William Twining, 'Globalisations and Comparative Law' in Esin Öricü and David Nelken (eds), *Comparative Law: A Handbook* (Hart Publishing 2007) 69, 70. Nelken's introductory chapter also reminds us that 'globalisation can bring about difference as well as similarity', 31.

¹²⁵ Ian Cram, 'Resort to foreign constitutional norms...', above n 62, 121.

¹²⁶ Ibid.

¹²⁷ See e.g. Bernhard Rudden, 'Courts and Codes in England, France and Soviet Russia' (1974) 48 *Tulane Law Review* 1010; Alan Paterson, *The Law Lords* (Macmillan Press 1982), chapter three; Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing 2013), chapter two.

arriving at a decision: the dialogue between the Bar and Bench; the dialogue amongst the Bench; the dialogue with the past (or with precedent); and the dialogue with the future (whereby judges may consider the consequences of a decisions such as any opening of ‘floodgates’).¹²⁸ Alan Paterson’s valuable contribution in *The Law Lords* also provided some early insight by exposing the way that the judges themselves see their role and what they understand their processes to be.¹²⁹

Further observations on that theme are given in Paterson’s most recent publication: *Final Judgment: The Last Law Lords and the Supreme Court*.¹³⁰ In that book, Paterson concludes that decision-making in the UK’s top court is a social and collective process.¹³¹ That process, it is argued, is a product of several ‘dialogues’ that the Justices engage in when making their decisions. Aside from the main dialogue between the Justices themselves (to which Paterson devotes three chapters), Paterson also considers dialogues with counsel, with other branches of government, with lower courts, with academics and with the judicial assistants. A few pages are given on ‘dialogues with courts overseas’ although these do not enter into the detail intended in this study and the focus is mainly on the dialogue with the Strasbourg Court rather than with foreign domestic courts.¹³² However,

¹²⁸ Bernhard Rudden, ‘Courts and Codes in England, France and Soviet Russia’ (1974) 48 *Tulane Law Review* 1010.

¹²⁹ Alan Paterson, *The Law Lords*, above n 127.

¹³⁰ Alan Paterson, *Final Judgment*, above n 127.

¹³¹ *Ibid* 312.

¹³² *Ibid* 222-233.

Paterson's observations about the working methods at the Supreme Court are of clear interest and are referred to numerous times in this thesis.

2.4 Why do judges use foreign jurisprudence?

A method of study does not lend itself to definition otherwise than by an indication of the purposes for which it may be employed, and the essential problem is not—what is comparative law? The question of real importance is—what is its purpose?¹³³

Almost without exception, commentators addressing the 'why' in judicial comparativism have engaged with the concepts of comparative methodology. Grappling with the conceptual basis for comparativism is evidently felt to be an important pre-cursor to meaningful contribution. There are trends here too: the well rehearsed debate between 'universalism' and 'pluralism' (which echo the debates in human rights between universalism and cultural relativism) has become out-dated, although conversations continue to frame the possibility of a new 'common law' or 'common enterprise' which appears to operate in similar terms.¹³⁴ More recently the debate amongst comparative law scholars has explained the issue as a tension between 'functionalism' and a 'dialogic method',¹³⁵ of which functionalism was arguably the dominant

¹³³ Harold Cooke Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (2nd edn, Cambridge University Press 1949), 5.

¹³⁴ Often, these have led academics to consider the emergence of a regional (as opposed to universal) concept of human rights. See e.g. Christopher McCrudden, 'A Common Law of Human Rights?', above n 69; Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' above n 8, 127: there is likely to be an 'awareness of a common enterprise, even if only in the sense of confrontation of common issues of problems'.

¹³⁵ The 'dialogic method', is a response to the functionalist approach which has gained currency with comparative scholarship by—it is argued—better responding to the 'present context of globalizing politics' and providing a 'decentred view of constitutional practices deriving from pluralist sources, with the possibility of 'cross fertilization'. Space precludes extensive analysis of these debates here.

approach, proceeding on the basis of ‘usefulness and need’: ‘...only a fool would refuse quinine just because it didn’t grown in his back garden’.¹³⁶

Thus it is usually argued that foreign material can contribute solutions to similar legal problems. Along these lines, one of the best known comparative lawyers wrote in 1949 that ‘at some future date more extensive use will, no doubt, be made of foreign law for the purpose of assisting our judges to fill the gaps that are still to be found in our law’.¹³⁷ Lord Bingham touched on this explanation in his 2009 Hamlyn Lectures:

If...it is true, as I think it is, that modern British judges are on the whole more inclined than their forebears to consider the effect of foreign authority in appropriate cases, the case should not be put too high. It is not easy, if indeed it is possible, to identify cases in which resort to foreign authority (I am excluding cases relating to the law of the EU, international law and human rights law) can be confidently said to have had a decisive effect on the outcome in the sense that the judge would have decided differently but for the foreign authority. We should not, I think, regard foreign authority as a match-winner, a magical ace of trumps. But there are perhaps two situations in which foreign authority may exert a significant if not a decisive influence. One is where domestic authority points towards an answer that seems in appropriate or unjust. The other is where domestic authority appears to yield no clear answer. In such situations...the courts have proved willing to

¹³⁶ Rudolph von Jhering, *Geist des Römischen Rechts auf den Verschiedenen Stufen Seiner Entwicklung* [*The Spirit of Roman Law at Different Stages of its Development*], part i, 8f quoted in Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, Oxford University Press 1998), 17.

¹³⁷ Harold Cooke Gutteridge, *Comparative Law*, above n 133, 40.

take notice of, and give weight to, solutions developed elsewhere.¹³⁸

Bell was evidently persuaded by the possibility in his study of the Supreme Court's 2010-11 decisions, considering that *R v Chaytor* provided an example of foreign case law being used in this way (although Bell's definition of foreign jurisprudence evidently encompassed Privy Council decisions, unlike this thesis which considers only the case law of foreign domestic courts).¹³⁹ The gap-filling thesis also formed one of Feeley's five purposes for using comparative law, alongside being educated about other legal systems, assisting domestic law reform, assisting in the transnational spread of norms and to bring about greater harmony and unity across legal systems.¹⁴⁰

Alternatively, judges may use foreign jurisprudence as a vehicle for adopting a more theorised approach to human rights. As one commentator has hypothesised, '[e]ven where the *result* of the foreign judicial approach has not been adopted, it has often been influential in sharpening the understanding of the court's view of domestic law'.¹⁴¹ Another has suggested that 'where the difference between comparative jurisdictions is so great as to render the use of comparative jurisprudence irrelevant, it may nevertheless perform a cognitive function ... the confrontation of both legal systems may force some

¹³⁸ Tom Bingham, *Widening Horizons* (Cambridge University Press 2010), 7-8.

¹³⁹ John Bell, 'Comparative law in the Supreme Court 2010-11' above n 53, 23; *R v Chaytor and others* [2010] UKSC 52.

¹⁴⁰ Malcolm Feeley, 'Comparative Criminal Law for Criminologists: Comparing for What Purpose?' in David Nelken (ed.) *Comparing Legal Cultures* (Dartmouth 1997), cited in Ian Cram, 'Resort to foreign constitutional norms...', above n 62, 128.

¹⁴¹ Christopher McCrudden, 'Human Rights and Judicial Use of Comparative Law' in Esin Örüçü (ed.), *Judicial Comparativism in Human Rights Cases* (United Kingdom National Committee of Comparative Law, 2003), 17; Christopher McCrudden, 'A Common Law of Human Rights?', above n 69, 512.

consideration and better understanding of the nature of domestic law'.¹⁴² In this vein, both Mak and Bell have concluded that foreign judgments provide 'more of a benchmark of the rightness' for the Justices:¹⁴³

If a foreign court has decided a similar point, it is sensible to consider whether that solution reveals anything useful about whether it would be an appropriate decision in an English, Welsh, Scots, or Irish context.¹⁴⁴

Thus foreign jurisprudence is used 'when judges want to obtain better knowledge or a yardstick for the judgment of the case at hand'.¹⁴⁵ A connected possibility is that judicial comparativism can perform mainly a 'legitimation function'.¹⁴⁶ In other words, judges draw from foreign jurisprudence in order to re-assure themselves (and their audience) about the merits of their judgment. Slaughter has argued that '[r]eferences to the activity of fellow courts in other states can act as ... a security blanket ...',¹⁴⁷ and Justice Barak (of the Israeli Supreme Court) has talked of comparative law 'granti[ng] comfort to the judge and giv[ing] him the feeling that he is treading on safe ground'.¹⁴⁸

¹⁴² E.g. Luc Heuschling, 'Comparative Law in French Human Rights Cases' in Esin Örucü (ed), *Judicial Comparativism in Human Rights Cases*, ibid 44; Rabinder Singh, 'Interpreting Bills of Rights' [2008] *Statute Law Review* 82: 'courts are increasingly turning to comparative jurisprudence to better understand the content of human rights provisions' (emphasis added).

¹⁴³ John Bell 'Comparative Law in the Supreme Court 2010-11', above n 53, 23.

¹⁴⁴ Ibid.

¹⁴⁵ Elaine Mak, 'Why do Dutch and UK judges cite foreign law', above n 38, 444; Elaine Mak, 'Reference to Foreign Law in the Supreme Courts of Britain and the Netherlands...', above n 38, 33-34.

¹⁴⁶ See e.g. Luc Heuschling 'Comparative Law and the European Convention on Human Rights Cases' in Esin Örucü (ed), *Judicial Comparativism in Human Rights Cases*, above n 141, 47.

¹⁴⁷ Christopher McCrudden, 'A Common Law of Human Rights?', above n 69, 519, quoting Anne Marie Slaughter, 'A Typology of Transjudicial Communication', above n 8, 116.

¹⁴⁸ Aharon Barak, 'Constitutional Human Rights and Private Law', (1996) 3 *Review of Constitutional Studies* 218, 242.

Similarly, it has been suggested that courts have recourse to foreign material for pedagogical reasons. As Slaughter has said, 'the court of a fledgling democracy ... might look to the opinions of courts in older and more established democracies as a way of binding its country to this existing community of states'.¹⁴⁹ The use of foreign jurisprudence may be 'premised on the need to instil habits of Western democratic participation in a body politic that on the whole is inexperienced in the ways of democracy'.¹⁵⁰ Alternatively, foreign judgments may be used 'as a warning', where 'the foreign law is "the other", which must be avoided'.¹⁵¹

More cynically, it has been argued that judicial comparativism is mainly results-driven. That is to say, that judges use that jurisprudence which is likely to support their own predetermined conclusions,¹⁵² or a means of 'judicial fig-leaving', designed to obscure the reality of judicial choice.¹⁵³

¹⁴⁹ Anne-Marie Slaughter 'A Typology of Transjudicial Communication', above n 8, 134.

¹⁵⁰ GJ Jacobsohn, *Apple of Gold: Constitutionalism in Israel and the United States* (Princeton University Press 1995), cited in Christopher McCrudden, 'Human Rights and Judicial Use of Comparative Law', above n 141, 10. See also Christopher McCrudden, 'A Common Law of Human Rights?', above n 69, 518.

¹⁵¹ Christopher McCrudden, 'A Common Law of Human Rights?', *Ibid.*

¹⁵² E.g. Ian Cram, 'Resort to foreign constitutional norms...', above n 62, 139-141; Elizabeth Wicks, 'Taking Account of Strasbourg? The British Judiciary's Approach to Interpreting Convention Rights' [2005] EPL 405, 410. See also Justice Antonin Scalia, 'The Bill of Rights: Confirmation of Extent Freedoms or Invitation to Judicial Creation?' in Grant Huscroft and Paul Rishworth, eds, *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing 2002); James Allan, 'A Defence of the Status Quo' in Tom Campbell et al (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press 2003). Cf. Christopher McCrudden, 'A Common Law of Human Rights?', above n 69, 527: 'One possible explanation is that the use of foreign judgments is simply results-driven ... [leading to a] suspicion that the selective use of foreign judgments is inevitably associated with a rights-expanding agenda. But this would be mistaken'.

¹⁵³ Richard Posner, 'No Thanks, We Already Have Our Own Laws' *Legal Affairs* July/Aug 2004 http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp

Similar anxieties are prevalent about the ‘substantial “cherry picking” of which jurisdiction to cite’ which McCrudden has explained as a concern that ‘those jurisdictions chosen will be those which are likely to support the conclusion sought, leading to arbitrary decision-making, not legitimate judging’.¹⁵⁴ Cram, Mak and Bell all appear to agree that in the House of Lords and now the Supreme Court, foreign jurisprudence is ‘results-driven’ and often used opportunistically.¹⁵⁵

Nevertheless, perhaps the most compelling explanation for the use of foreign jurisprudence in human rights cases is that a particular regime requires it or that there exists a common alliance.¹⁵⁶ In the UK, judges have drawn from foreign jurisprudence for some time, typically through comparison with the judgments of Commonwealth courts (similarly rooted in the common law) and, more recently, with the European legal orders. The latter has been of greater relevance since the accession to the European Community and, in human rights cases, the ECHR.¹⁵⁷ Under the HRA 1998 domestic courts are under a duty to ‘take into account’ relevant Strasbourg jurisprudence, but the

accessed 01 February 2011; Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006), 7.

¹⁵⁴ Christopher McCrudden, ‘A Common Law of Human Rights?’, above n 69, 507.

¹⁵⁵ Ian Cram, ‘Resort to foreign constitutional norms...’, above n 62, 139-141; Elaine Mak, ‘Why do Dutch and UK judges cite foreign law’, above n 62; John Bell ‘Comparative Law in the Supreme Court 2010-11’, above n 53.

¹⁵⁶ Jochen Abr. Frowein, ‘European Intergration Through Fundamental Rights’ (1984) 18 *Michigan Journal of Law Reform* 5; Christopher McCrudden, ‘Human Rights and Judicial Use of Comparative Law’ in Esin Örüçü (ed), *Judicial Comparativism in Human Rights Cases* (United Kingdom National Committee of Comparative Law 2003) 13; David Richards, ‘Comparative Revolutionary Constitutionalism A Research Agenda for Comparative Law’, (1993) 26 *New York University Journal of International Law and Politics* 1, 59; Brian Flanagan and Sinead Ahern, ‘Judicial Decision-Making and Transnational Law: A Survey of Common Law Supreme Court Judges’ (2011) 60 *International and Comparative Law Quarterly* 1, 21.

¹⁵⁷ E.g. Murray Hunt, *Using Human Rights Law in English Courts* (Hart Publishing 1998).

Act does not specify the approach that domestic courts should take to that foreign jurisprudence otherwise. Regard to the decisions of European domestic courts, for instance, is unregulated, as is regard to non-European jurisprudence. However, as mentioned above, the HRA may have steered domestic courts in the direction of jurisprudence the ECtHR would be likely to consider.¹⁵⁸

In keeping with these findings, Örucü's 1990s study of Comparative Law in British Courts (discussed earlier) linked the tendency to cite certain jurisdictions to the purposes served by those sources. Thus Örucü concluded that comparison with common law jurisdictions led to a 'functional use' of comparative law whereas comparison with civilian systems lead to an arguably 'ornamental use' of comparative law.¹⁵⁹ Further, she linked the use of common law material with cases that 'deal mostly with domestic law and domestic problems' whereas the second group of cases, comparison with civilian law, 'fall mostly within a wider ambit, usually of European law or an international convention'.¹⁶⁰ On a classical 'like for like' breed of reasoning, these findings are not surprising. What is interesting then, is the extent to which these patterns have altered since her study, a time lag which has seen the coming into force of the HRA 1998, thus augmenting the status of the ECHR in domestic law and giving rise to the possibility that—in human rights cases at least—the relevance of foreign jurisprudence may have significantly altered.

¹⁵⁸ E.g. Elaine Mak, *Judicial Decision-Making in a Globalised World*, above n 39, 143.

¹⁵⁹ Esin Örucü, 'Comparative law in British Courts', above n 70, 294.

¹⁶⁰ *Ibid.*

Örücü's 2003 publication, *Judicial Comparativism in Human Rights Cases*, is a less directly relevant but nevertheless significant publication on the same theme. Through a number of collaborative chapters, it is discussed how far judges are employing the comparative approach, the legitimacy of this approach and whether Comparativism is an interpretative aid, 'functional', or 'ornamental'. However, the account of comparative legal models in national legal systems is discussed insofar as it relates to the development of a common law or '*ius commune*' of human rights. To that end, the book has a different focus to the one in this thesis. By seeking to address definitions of 'globalism' and 'localism' and whether there is a place for 'cultural exceptionalism' in the context of human rights, there is limited space for analysis of the reasons for the use of foreign jurisprudence or the way that judges use it.

To those questions, McCrudden has made one of the most relevant contributions. McCrudden has focused on 'the use by national judges in one jurisdiction of judicial interpretations of human rights norms in another jurisdiction'.¹⁶¹ He has sought (in series of articles and book chapters) to illuminate the principles underlying judicial comparativism in human rights cases.¹⁶² In doing so, McCrudden has addressed three central questions:

¹⁶¹ Christopher McCrudden, 'Human Rights and Judicial Use of Comparative Law' above n 141, 2. See also Christopher McCrudden, 'A Common Law of Human Rights?', above n 69, 503.

¹⁶² Christopher McCrudden, 'A Common Law of Human Rights?', above n 69; Christopher McCrudden, 'Human Rights and Judicial Use of Comparative Law', above n 141; Christopher

‘How far does comparativism happen?’, ‘Why does it happen?’ and ‘Is it legitimate?’¹⁶³ McCrudden has thus examined the relationship between human rights interpretation and comparative legal methods as well as identifying a number of factors that are said to affect or explain the use of foreign judgments in domestic human rights cases.

This study takes inspiration from McCrudden’s work but can be distinguished in the following ways: McCrudden has chiefly been concerned with exposing patterns in the way domestic courts use foreign case law and has therefore drawn from a number of jurisdictions. By contrast, this thesis is concerned with the use of foreign jurisprudence by United Kingdom judges specifically. While McCrudden’s work provides a valuable insight into why and how judges use foreign jurisprudence domestically, his analysis does not address the purposes for which judges *see themselves as applying* foreign jurisprudence. Moreover, McCrudden is himself conscious that his conclusions are, by his own admission, based on ‘somewhat anecdotal evidence’ and that he has ‘done little more than identify some of the issues that a more complete study of the complex phenomenon ... should examine more systematically’.¹⁶⁴ As Whitman has put it, ‘*some* kind of borrowing is surely taking place and we need *some* account of what is going on’.¹⁶⁵

McCrudden, ‘Judicial Comparativism and Human Rights’ in Esin Örüçü and David Nelken (eds), *Comparative Law: A Handbook* (Hart Publishing 2007)

¹⁶³ E.g. Esin Örüçü (ed), *Judicial Comparativism in Human Rights Cases*, above n 141, xiii (Introduction).

¹⁶⁴ See Christopher McCrudden, ‘Human Rights and Judicial Use of Comparative Law’, above n 141, 3–4.

¹⁶⁵ James Q Whitman, ‘The Neo-Romantic Turn’ in Pierre Legrand and Roderick Munday, (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press 2003), 342.

3 Research Methodology

One of the most significant contributions to the existing literature in this field is the empirical data, gathered from analysis of the Supreme Court's judgments as well as the information obtained through interviews with the Justices of the Supreme Court and the Judicial Assistants. Since this evidence is the foundation for the arguments presented in this thesis, this chapter is devoted to a detailed account of the research methodology. In the first part, the parameters of the study are set out and the key terms defined. The methodology followed during the data collection and an account of sources from which data is taken is detailed in the second part.

3.1 Research Parameters

The focus of this thesis is on the use of jurisprudence from foreign domestic courts (foreign jurisprudence) in human rights cases before the UK Supreme Court. In drawing these parameters, other persuasive sources commonly used in UK courts were excluded from the study. These might include, for example, the judgments of lower courts, *Obiter Dicta*, academic literature and the decisions of the Privy Council. Incorporating the UK Supreme Court's use of all persuasive authorities was considered in the early stages of the research design but could not be pursued for reasons of time and space; such a study would be of great interest but would be better undertaken as part of a larger project. Some of the findings about the use of foreign jurisprudence in this thesis may nevertheless contribute to understanding about the use of other persuasive sources more generally. In particular, it is

plausible that many of the findings reported in chapters five and six (how foreign jurisprudence is used and the use of foreign jurisprudence as a heuristic device) would be likely to reflect the approach to persuasive sources more generally. However, other findings are felt to be peculiar to the use of foreign jurisprudence. These most obviously include situations where the Court is looking to maintain consistency (chapter seven), in which the object of the exercise is to identify a common understanding or consensus among other jurisdictions. On those matters, it is not obvious that the findings in this thesis could apply to the use of other persuasive sources. For these reasons, this thesis therefore contributes strictly to the specific literature on judicial use of foreign jurisprudence and comparative law as a freestanding topic.

A number of the terms used for this project are common among other academic works or in other broader contexts. What follows is therefore an account of the meaning ascribed to each of these terms for the purposes of this study.

3.1.1 Foreign jurisprudence

In the context of this study, 'jurisprudence' refers to a body of law in the doctrinal sense. That is to say, it encompasses case law, legal instruments and relevant *travaux préparatoires*.¹⁶⁶ 'Foreign' takes its natural meaning and refers to non-domestic matters. 'Foreign jurisprudence' therefore relates to case law, legal instruments and relevant *travaux préparatoires* outside the

¹⁶⁶ Literally: 'preparatory works', referring to material produced during the drafting of legislation or related instruments.

domestic legal system. This definition important since different sources of law may be useful for different purposes. As Saunders has hypothesised,

One possible variation, which should be noted at the outset, is the nature of the foreign source on which a court draws. It may be a conclusion of law or a constitutional or legal norm, whether articulated by a court or otherwise. Equally, however, it may be an argument, a value, a perception, an interpretative approach, or merely a happy turn of phrase. The list is intended to be illustrative, rather than exhaustive.¹⁶⁷

Crucially, however, 'foreign jurisprudence' only encompasses foreign domestic law and does not refer to international law. It thereby excludes, for example, the jurisprudence of the ECtHR in Strasbourg,¹⁶⁸ although these materials are referred to by way of comparison or to better illustrate the approach taken to foreign jurisprudence in human rights cases where those sources are otherwise relevant. It also excludes the decisions of supranational courts which UK courts are bound to follow, including decisions of the CJEU under section 3 of the European Communities Act 1972 (ECA).¹⁶⁹ 'Foreign jurisprudence' thus limits the source pool to material from

¹⁶⁷ Cheryl Saunders, 'Comparative Constitutional Law in the Courts: Is There a Problem?' in Jane Holder and Colm O'Conneide (eds) *Current Legal Problems* (2006) Vol 59 (Oxford University Press 2007), 98-99; Cheryl Saunders 'The Use and Misuse of Comparative Constitutional Law' (2006) 13 *Indiana Journal of Global Legal Studies* 37.

¹⁶⁸ Strasbourg jurisprudence remains strictly 'international law' notwithstanding section 2 of the UK Human Rights Act 1998 which provides that domestic courts must 'take into account' Strasbourg jurisprudence (so far as it is 'relevant') in cases which engage the European Convention on Human Rights. On the use of Strasbourg jurisprudence in domestic courts, see e.g. Roger Masterman, 'Section 2(1) of the Human Rights Act: Binding domestic courts to Strasbourg?' [2004] PL 725; Elizabeth Wicks, 'Taking Account of Strasbourg? The British Judiciary's Approach to Interpreting Convention Rights' [2005] EPL 405; Jonathan Lewis, 'The European Ceiling on Human Rights' [2007] PL 720; Jonathan Lewis, '*In Re P and others*: an exception to the "no more, certainly no less" rule' [2009] PL 43; Francesca Klug and Helen Wildbore, 'Follow or lead? The Human Rights Act and the European Court of Human Rights', (2010) 6 EHRLR 621.

¹⁶⁹ The 'Practice Direction on the Citation of Authorities' also excludes these sources from its guidance on foreign jurisprudence: 'For the avoidance of doubt, paragraphs 9.1 and 9.2 do

foreign domestic legal orders—which have no more than a ‘persuasive’ authority in UK domestic courts.¹⁷⁰ To avoid confusion, the term ‘foreign jurisprudence’ has been preferred over ‘foreign law’ or ‘foreign precedents’, even where inelegant. The only exception to this is where other scholars have used the alternative terms in quoted material, in which case the original sense has been retained.

3.1.2 Use of foreign jurisprudence

The ‘use’ of foreign jurisprudence is the central thread of the enquiry. Identifying the use of foreign jurisprudence is the necessary first step in teasing out any method or motivation governing the practice. Discovering exactly how judges are utilising, employing, exercising, applying, exploiting, handling, managing, consuming or drawing from foreign jurisprudence are questions upon which all other research questions are parasitic. The ‘use’ of foreign jurisprudence must therefore be understood in the broadest sense.¹⁷¹

not apply to cases decided in either the European Court of Justice or the organs of the European Convention of Human Rights. Because of the status in English law of such authority, as provided by, respectively, section 3 European Communities Act 1972 and section 2(1) of the Human Rights Act 1998...’, s. 9.3 Practice Direction (Citation of Authorities) [2001] 1 WLR 1001; [2001] 2 All ER 510; Bobek has gone so far as to conclude that ‘status enjoyed by the decisions of either of the European courts (Luxembourg as well as Strasbourg) [means that they] belong in the ‘must’ and not a mere ‘may’ category. ... treated [by UK courts] essentially as domestic precedents’: Michael Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford University Press 2013), 78.

¹⁷⁰ This is in contrast with the approach taken by some other studies. For example, in her 1990s study of Comparative Law in British Courts, Örüçü counted any citation of any non-English jurisprudence, including the jurisprudence on international treaties or conventions: Esin Örüçü, ‘Comparative law in British Courts’ in Ulrich Drobnig and Sjef van Erp. (eds), *The Use of Comparative Law by Courts, 14th International Congress of Comparative Law* (Kluwer 1999); Mathias M Siems, ‘Citation Patterns of the German Federal Supreme Court and the Court of Appeal of England and Wales’ (2010) 21 KLJ 152.

¹⁷¹ The term ‘use’ was also applied by Groppi and Ponthoreau in *The Use of Foreign Precedents by Constitutional Courts* (Hart Publishing 2013); Another recent study has preferred the term ‘inspiration’, Michael Bobek, *Comparative Reasoning in European Supreme Courts*, above n 169.

It captures any contribution made by foreign jurisprudence to judicial reasoning, from explicit citation to a passing reference or even a very casual consideration—including references that do not form a part of the published judgment.¹⁷² The last of these is crucial, since the existing literature has largely ignored non-explicit uses of foreign jurisprudence.¹⁷³ Although practical difficulties make analysis of these non-explicit uses more challenging, it is necessary to engage with this question if the aim is to provide a comprehensive overview of the ‘use’ of foreign jurisprudence.

3.1.3 Courts and Judges

At the outset, this research project purported to analyse the use of foreign jurisprudence in UK human rights cases. As originally designed, this project would have incorporated human rights cases decided in any of the UK appellate courts. However, it became clear that the volume of judgments falling within those broadly drawn parameters would allow for little depth of analysis. The parameters were therefore revised to the UK Supreme Court specifically. The empirical research draws from judgments handed down by the UKSC since the start of its work in October 2009 and up to the end of the fourth judicial year in July 2013.¹⁷⁴ Interviews were held with the Justices of that court, their judicial assistants and one Lord Justice of Appeal. The choice

¹⁷² In the latter case, the obvious methodological issue is that such ‘use’ will not be discernable from the published decision. These are considered further in chapter five below, in the context of the methods through which the judges arrive at foreign jurisprudence.

¹⁷³ See e.g. Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing 2013), 7. The decision to ignore implicit influences in that volume was considered earlier in chapter two, see text around n 34.

¹⁷⁴ The Supreme Court was established by part 3 Constitutional Reform Act 2005, assuming the judicial functions of the House of Lords as the highest appellate court in the United Kingdom (other than for Scottish Criminal cases).

to focus on the Supreme Court was made on the basis that the Justices of the Supreme Court were the most likely to face the complex legal problems that would trigger the use of persuasive authorities such as foreign jurisprudence.¹⁷⁵ Time and resources preclude an extensive analysis of the way foreign jurisprudence is used in courts at all levels, although such a study would no doubt be very useful.¹⁷⁶

3.1.4 Human Rights Cases

'Human rights cases' takes a broad meaning, generally referring to claims under the Human Rights Act 1998. Human rights, as a field of enquiry, was chosen for two reasons: first, human rights claims raise some of the most interesting and divisive issues and are often sensitive and subject to cultural interpretation. Second, there was also a strong sense in the literature that judicial comparativism is more prevalent in human rights cases than in other fields.¹⁷⁷ Third, the diet of the highest court has been increasingly balanced

¹⁷⁵ Bobek considers there to be two reasons for this. First, on an institutional basis, '[s]upreme jurisdictions have a larger mandate: to look beyond the individual judicial file and case and see the broader picture'. Secondly, '[c]omparative analysis is, in terms of time, expertise, and resources, a demanding exercise' and 'it is at the level of supreme jurisdictions where human resources (analytical backup) and also procedural tools (lesser docket, selection of cases) may be available. These allow judges to concentrate on contentious legal issues in greater detail': Michael Bobek, *Comparative Reasoning in European Supreme Courts*, above n 169, 44-45; Konrad Schiemann, 'The Judge as Comparatist' in Basil Markesinis and Jorg Fedtke, *Judicial Recourse to Foreign Law: A New Source of Inspiration?* (University College London Press 2006) 369: 'The lower down the judicial ladder a judge finds himself the greater that pressure is in general'.

¹⁷⁶ In correspondence received towards the end of the study period, Lady Justice Arden noted that the subject of this thesis is also relevant to courts below the Supreme Court, including, in particular, the Court of Appeal where the vast majority of these cases are heard and not appealed: letter from Lady Justice Arden to author (17 January 2014).

¹⁷⁷ See e.g. E.g. Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges*, above n 173, 416 'The research clearly shows that citations of foreign case law prevail in ... human rights decisions'; Christopher McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional

towards public law and human rights cases,¹⁷⁸ and judges adjudicating on human rights claims often have to consider the jurisprudence of supranational courts. For example, where Convention rights are at issue, section 2 HRA 1998 provides that UK courts must ‘take into account’ any relevant jurisprudence of the European Court of Human Rights (ECtHR or ‘the Strasbourg Court’). The influence of the Strasbourg jurisprudence also raises a question as to the approach that would be taken to foreign jurisprudence should a claim fall outside the scope of the HRA 1998. In that case, judicial reasoning may reflect a different balance between foreign (domestic) and supranational jurisprudence. Where no supranational jurisprudence exists, the degree to which foreign jurisprudence is used by (or is useful to) domestic courts may also differ. Thus human rights cases provide a variety of perspectives on the uses of foreign jurisprudence by domestic courts, which is not possible in other fields. Therefore, while some of the research findings do reflect on the use of foreign jurisprudence in other fields, these are incidental to the analysis of human rights cases. It was not practical to consider fully the use of foreign jurisprudence in all fields within the given time period and ‘human rights cases’ were numerous enough to provide a suitable subject for the purposes of rigour and reliability.

Rights’ (2000) 20(4) OJLS 499, 527, asking ‘is there something specific to human rights that explains the apparently greater use of foreign case law in human rights cases?’

¹⁷⁸ This was mentioned by a number of the Justices interviewed for this study and is confirmed by another report of similar interviews conducted by Mak in 2009: Elaine Mak, ‘Why do Dutch and UK judges cite foreign law?’ [2011] CLJ 420, 432. Paterson also found that ‘...the type of case which now predominates is radically different ... tax, shipping and criminal law cases have declined, whilst public law and human rights cases have dramatically increased.’ See further Alan Paterson in his most recently published work, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing 2013), 17, Table 2.1.

3.2 Research Methodology

Such is the volume of literature covering theoretical approaches to the use of foreign jurisprudence that empirical research was felt to be the most useful analytical lens. As Bradney observed:

... quantitative and qualitative empirical research ... provides information of a different character from that which can be obtained through other methods of research. It answers questions about law that cannot be answered in any other way.¹⁷⁹

In order to test these research questions, it was necessary to undertake a detailed analysis of each case decided by the Supreme Court since its establishment in October 2009. This research involved quantitative analysis of each case by category (e.g. 'human rights') and citations of foreign jurisprudence. The findings were triangulated with qualitative data from the text of the judgments and through interviews with the Justices of the Supreme Court and one Lord Justice of Appeal.¹⁸⁰ The evidence from those interviews also raised new points of interest. The final analysis therefore results from this evolution of ideas and reflects a 'spiralling' rather than 'linear' progression through the research.¹⁸¹

¹⁷⁹ Anthony Bradney, 'The Place of Empirical Research in the Law School Curriculum' in Peter Crane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 1031, cited in Mandy Burton, 'Doing Empirical Research' in Dawn Watkins and Mandy Burton, *Research Methods in Law* (Routledge 2013).

¹⁸⁰ On triangulating research, see e.g. Eugene J Webb et al. *Unobtrusive Measures: Nonreactive Measures in the Social Sciences* (Rand McNally 1966); Norman K Denzin, *The Research Act in Sociology* (Aldine 1970); Alan Bryman, *Social Research Methods* (2nd edn, Oxford University Press 2004).

¹⁸¹ For further discussion of research methodology: Chava Frankfort Nachmias and David Nachmias, *Research Methods for the Social Sciences: Practice and Applications* (4th edn, St Martin's Press 1992); Bruce L Berg, *Qualitative Research Methods for the Social Sciences* (Pearson, 2007), 23; Karl R Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* (Harper and Row 1968); Barney Glaser and Anselm Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Cambridge University Press 1987).

3.2.1 Empirical research

A total 246 cases were handed down by the Supreme Court in its first four years. When recording cases decided by the Supreme Court, appeals reported together with the same neutral citation were counted as one case. Cases with different neutral citations but which dealt with procedural matters (such as costs or preliminary referrals to the CJEU) were also counted as one. As the outcome of conjoined appeals inevitably drew from the same reasoning, it would have skewed the data to record the use of foreign jurisprudence in such instances more than once. No issue arose as to the data concerning foreign jurisprudence in cases dealing with procedural matters, since, predictably, the Supreme Court did not refer to any such material in those instances. The 246 figure was therefore arrived at by calculating the number of cases (number of reported cases with individual neutral citations) minus the number of cases dealing with procedural matters.¹⁸²

¹⁸² If one counts each reported case decided by the UK Supreme Court during the first four judicial years, 2009-13, the total is 257 cases. However, eleven of these cases can be considered to deal with procedural matters or are in essence a duplicate by reason of a conjoined appeal. Indeed the UK Supreme Court website itself records (at the time of writing) these cases together and combines the neutral citations in these instances. Thus the following reported cases were counted as one rather than two case(s), the citation underlined was disregarded for the purposes of the data analysis in each instance: *R (E) v Governing Body of JFS and others* [2009] UKSC 15 & [2009] UKSC 1; *Her Majesty's Treasury v Mohammed Jabar Ahmed and others (FC), R (on the application of Hani El Sayed Sabaei Youssef) v Her Majesty's Treasury, Her Majesty's Treasury v Mohammed al-Ghabra (FC)* [2010] UKSC 2 & [2010] UKSC 5; *RTS Flexible Systems Limited v Molkerei Alois Müller GmbH & Company KG (UK Production)* [2010] UKSC 14 & [2010] UKSC 38; *British Airways plc Williams and others* [2010] UKSC 16 & [2012] UKSC 43; *Secretary of State for the Home Department v AP* [2010] UKSC 24 & [2010] UKSC 26; *Manchester City Council v Pinnock* [2010] UKSC 45 & [2011] UKSC 6; *Duncombe and others v Secretary of State for Children, Schools and Families* [2011] UKSC 14 & [2011] UKSC 36; *O'Brien v Ministry of Justice (Formerly the Department for Constitutional Affairs)* [2013] UKSC 6 & [2010] UKSC 34; *Daejan Investments Limited v Benson and others* [2013] UKSC 14 & [2013]

Information about each case was obtained from the official transcripts and law reports. Spreadsheets were generated to record basic information such as the full case name, neutral citation, date of hearing, and a list of the Justices sitting on the case. The spreadsheet also records the subject matter of each case. Since the research parameters set by this project were ‘human rights’ cases, it was necessary to ensure that all such cases were categorised. For the purposes of this research, a case was categorised as a ‘human rights’ case where it had one of more of the following attributes: where the words ‘human rights’ are found in the judgment and are used to substantive effect (that is, as more than a passing reference, comparison or analogy);¹⁸³ where human rights legislation or instruments (including but not limited to the HRA 1998 and the ECHR) are cited, again, with substantive effect; where the word ‘rights’ is discernably associated with human rights even if not explicitly stated (for example, in the case of common law rights).¹⁸⁴

UKSC 54; *Her Majesty's Revenue and Customs v Aimia Coalition Loyalty UK Limited (formerly known as Loyalty Management UK Limited)* [2013] UKSC 15 & [2013] UKSC 42; *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 38 & [2013] UKSC 39.

¹⁸³ For example, the judgment in *AB and others v Ministry of Defence* [2012] UKSC 9 makes one reference to ‘human rights’ and was therefore captured by the database search. This reference, however, serves merely to note the history of the case and the claimant’s knowledge of another case before the ECtHR. It has no direct bearing on the instant case and it would therefore distort the data to categorise the judgment as one concerning ‘human rights’.

¹⁸⁴ This broad definition of a ‘human rights case’ risks an amount of overlap with cases that might readily be classified under alternative categories, most obviously including ‘criminal law’ or ‘public law’ cases. This overlap is not felt to have a significant bearing on the findings in this study since the primary aim is to consider the effect of using foreign jurisprudence where there are human rights issues at stake. As such, breaking down the categories further was not felt to be a useful exercise. Nevertheless, the implications of the overlap are that the research findings must be considered to apply strictly to the parameters of this enquiry. If the cases were reorganised into these further categories so as to avoid the overlap, it is entirely possible that the overall data patterns would be slightly different.

A total of 102 cases were found to meet these criteria and were thus classified as concerning ‘human rights’ matters.¹⁸⁵ For these cases, the spreadsheets record information about the instruments engaged, e.g. significant human rights legislation cited, articles of the ECHR at issue etc. For a case to have been recorded as having ‘used’ foreign jurisprudence in the broad sense intended here, it was enough that foreign jurisprudence was cited in the judgment (even if not discussed).¹⁸⁶ To repeat the definition of ‘foreign jurisprudence’ given earlier, a case was considered ‘foreign’ if it was decided by the court of another country which does not also fall under the jurisdiction of the Supreme Court for the purposes of Part 3 Constitutional Reform Act 2005. Cases from Wales, Scotland and Northern Ireland were therefore excluded from the definition. While Scots criminal cases fall within the broad definition of ‘foreign jurisprudence’ (the High Court of Justiciary in Scotland sitting as an appeal court is the final court of appeal for criminal cases), the UK Supreme Court remains the final court of appeal in civil cases. As such, the Scots jurisprudence is slightly different in character to the

¹⁸⁵ There is a big disparity between this figure and the one given by Alan Paterson in his most recently published work, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing 2013). In that volume, Paterson works from the same figure for the total number of cases decided in the first four years (246) but divides these into six categories: ‘Criminal’; ‘Human Rights’; ‘Public’; ‘Private/Commercial’; ‘Family’; and ‘Tax’. The result is that just 35 cases are categorised as ‘human rights’ cases. Interestingly, if one combines Paterson’s figures for ‘Criminal’, ‘Human Rights’ and ‘Public’ cases the total is also 102. This does not, however, guarantee that the same cases would make up that sample. As Paterson explains in a footnote: ‘Any case classification contains room for quibbles. Many cases no contain human rights points, but where they are obiter, I have not classified them as human rights cases. Here I can do no better than quote from Louis Blom-Cooper and G Drewry, *Final Appeal* (Oxford, Clarendon Press, 1972) at 244. “Any subject-classification we construct is essentially arbitrary, and the assignment of marginal cases to particular categories is extremely difficult”’. See further Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing 2013), 17, table 2.1 and note 17.

¹⁸⁶ As previously mentioned, this method cannot account for implicit citations, which are not obvious from the published judgments. Some insight on the potential for implicit citations was obtained through the interviews with the individuals Justices, discussed further in chapter five.

case law of other foreign courts and is likely to be more familiar to the UK Supreme Court where, by convention, care is taken to ensure that at least two of the Justices have experience of the Scottish legal system.¹⁸⁷

The following analytical details were recorded about each case:

- A. If foreign jurisprudence was used in the judgments, by counsel, or both;
- B. If a foreign case was specifically referred to (and if so, by whom);
- C. Where the jurisprudence (if used) was drawn from;
- D. How many foreign cases were cited (for each jurisdiction);
- E. If foreign jurisprudence was distinguished;
- F. If foreign jurisprudence appeared to contribute to, or was determinative of, the outcome of the case;¹⁸⁸
- G. If the outcome was in line with the foreign jurisprudence cited;
- H. Whether references to foreign jurisprudence were made in leading, plurality, majority, minority, concurring or dissenting judgments.

For each case, the spreadsheets also record contributions made by the individual justices. This included whether a written judgment was given (in many cases a Justice may simply 'agree' with one of his colleagues), as well

¹⁸⁷ See e.g. Constitutional Affairs Select Committee, *Judicial appointments and a Supreme Court (court of final appeal)* First Report of Session 2003-04, HC 48-I, [43]; Joshua Rozenberg, 'Who will be the two new supreme court judges?' *The Guardian* (London, 27 July 2011) <<http://www.theguardian.com/law/2011/jul/27/supreme-court-judge-appointments>> accessed 22 May 2014.

¹⁸⁸ This test is stronger than the 'used to substantive effect' test applied to the identification of human rights cases. 'substantive effect' in the latter means more than a passing reference to 'human rights' which is not related to the issues in the case. In other words, that test would exclude from the data capture a contract law case which referred to the words 'human rights' for the purposes of some analogy. The 'contributed to or was determinative of the outcome of the case' test for the effect of foreign jurisprudence goes much further and records cases in which the outcome appears to rely in any way on the discussion of foreign jurisprudence. It should be noted that this test, along with others in this list, was applied only to assist with the analytical enquiry and that the much lower test was applied to capture cases using foreign jurisprudence generally; to have been 'used', it was enough that foreign jurisprudence was cited once, even if not discussed.

as whether a written judgment could be described as a leading judgment, a concurring judgment or a dissenting judgment. Identifying a lead judgment is significantly easier at the Supreme Court than it was at the House of Lords.

As Baroness Hale has explained:

One obvious change in the Supreme Court is that we can print the judgments in whatever order we choose, so the lead (what I call the 'donkey-work') judgment can come first regardless of seniority (although that may not always happen).¹⁸⁹

It was also recorded whether the Supreme Court gave a full set of separate judgments from each of the Justices, whether some Justices had associated themselves with the judgment of a colleague or whether the judgments constituted a plurality of effectively plurality judgment. The rise of the plurality type judgment is described in greater detail in Chapter five. Briefly, in this work a plurality style judgment includes a single 'judgment of the court', a leading judgment with which all have agreed or a single judgment with which others in the majority agree.¹⁹⁰ An 'agreement' is counted where the main aim of the Justice's passage is to associate himself with the fuller judgment of a colleague. In most cases, this is clearly established with one or two sentences. In other cases, it includes passages of slightly greater length but

¹⁸⁹ Brenda Hale, 'Judgment Writing in the Supreme Court' (First Anniversary Seminar, 30 September 2010) <http://www.supremecourt.gov.uk/docs/speech_100930.pdf> accessed 13 August 2013, 2.

¹⁹⁰ Cf Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing 2013), 14: Paterson defines a 'plurality judgment' as referring to 'the situation in which there is no majority judgment in the Court. In that situation the judgment which receives the most support is sometimes referred to as a plurality judgment'. Baroness Hale's explanation of plurality type judgments has been adopted in this thesis, see e.g. Dan Tranch and Laura Coogan 'Baroness Brenda Hale: "I often ask myself 'why am I here?'"' *The Guardian* (London, 16 September 2010) <<http://www.theguardian.com/law/2010/sep/16/uk-supreme-court-judiciary>> accessed 13 August 2013.

which serve only to add an observation or footnote to the judgment with which the Justice has otherwise associated themselves.

Finally, for each Justice, it was recorded if foreign jurisprudence had been explicitly cited. For the general purposes of the thesis, foreign jurisprudence was considered to have been ‘used’ even where a Justice had merely made reference to the position or attitudes of a foreign court or jurisdiction, without an explicit citation to a decision of that court. The situation arises in a number of cases where non-explicit references are made as part of a more general narrative. For example, in *R (F)*,¹⁹¹ Lord Phillips made references to the systems of several foreign jurisdictions and had evidently considered an argument made by counsel on the point:

Those acting for the first claimant have drawn attention to registration requirements for sexual offenders in France, Ireland, the seven Australian states, Canada, South Africa and the United States. Almost all of these have provisions for review...¹⁹²

A passage of this kind falls within the general meaning of ‘using’ foreign jurisprudence since it is evident that some aspect of the legal systems in those jurisdictions has been considered. In a number of cases it was possible to find references to the practice in a particular jurisdiction without any explicit reference to a reported judgment.

However, for reasons of consistency, non-explicit citations of this kind are not captured by the quantitative data analysis offered in chapter five. This

¹⁹¹ *R (F) and another v Secretary of State for the Home Department* [2010] UKSC 17.

¹⁹² *Ibid* [57] (Lord Phillips).

approach differs to that taken by some other academics. For example, Bobek explains that ‘unspecified references to a “foreign solution”, invoking for instance the situation in country X, but not making any further substantiated reference to legislation, case law, or scholarly works, were included’ for the purposes of his study.¹⁹³

...even allusions to ‘foreign democratic legal systems’; ‘a number of foreign democratic countries’; values shared by ‘the Member States of the EU and other developed countries of the Western Europe’; or ‘the founding principles of the contemporary Euro-Atlantic civilization’ were eventually counted as further unspecified instances of invoking some foreign inspiration, in spite of the fact that the displayed referencing culture and the quality of ‘comparative argument’ leaves much to be desired.¹⁹⁴

The exclusion of such cases from the quantitative data analysis in this study is based simply on the reality that non-explicit references are almost impossible to capture systematically. The consequence, as recognised by Cram when undertaking his own study of resort to foreign jurisprudence in terrorism cases, is that the extent to which foreign jurisprudence is used is likely to be understated.¹⁹⁵

...the overriding problem is one of a failure to make an explicit attribution. This may occur for reasons to do with national pride ...

¹⁹³ Michael Bobek, *Comparative Reasoning in European Supreme Courts*, above n 169, 68.

¹⁹⁴ *Ibid* 69.

¹⁹⁵ Ian Cram, 'Resort to foreign constitutional norms in domestic human rights jurisprudence with reference to terrorism cases' [2009] CLJ 118, 129. Bobek adds that the use of foreign jurisprudence may ‘hidden behind the veil of domestic scholarship’: Michael Bobek, above n 169, 72-73.

or simply because there is no formal requirement to acknowledge help from foreign sources.¹⁹⁶

Non-explicit citations are, however, considered as part of the qualitative analysis in later chapters.

To test hypotheses and facilitate pattern spotting in the qualitative analysis, cases were also coded using a number of 'tags' according to the research questions. As the literature review makes clear, there have been previous studies on the use of foreign jurisprudence, albeit with differing purposes or focus. The analysis and conclusions of those studies provide a number of classifications or 'codes' for the use(s) of persuasive authorities and/or foreign jurisprudence. A number of commentators have, for instance, suggested that judges use persuasive authority as a means of *judicial fig-leaving* or to support their own *predetermined conclusions*.¹⁹⁷ Other possibilities are that it is used as a *legitimation function*,¹⁹⁸ or as a vehicle for adopting a more *theorised approach* to human rights.¹⁹⁹ Alternatively, a court may look for foreign case law *pedagogical reasons*,²⁰⁰ as a *warning*,²⁰¹ or to

¹⁹⁶ Ian Cram, *Ibid.*

¹⁹⁷ E.g. Ian Cram, 'Resort to foreign constitutional norms...', above n 195, 139-141; Elizabeth Wicks, 'Taking Account of Strasbourg?' above n 168, 410.

¹⁹⁸ See e.g. Luc Heuschling 'Comparative Law and the European Convention on Human Rights Cases' in Esin Örüçü (ed), *Judicial Comparativism in Human Rights Cases* (United Kingdom National Committee of Comparative Law 2003) 47.

¹⁹⁹ Christopher McCrudden, 'Human Rights and Judicial Use of Comparative Law' in Esin Örüçü (ed), *Judicial Comparativism in Human Rights Cases*, above n 198, 17; Christopher McCrudden, 'A Common Law of Human Rights?', above n 177, 512.

²⁰⁰ Anne-Marie Slaughter 'A Typology of Transjudicial Communication', (1994) 29 *University of Richmond Law Review* 199, 134; GJ Jacohsohn, *Apple of Gold: Constitutionalism in Israel and the United States* (Princeton University Press 1995); Esin Örüçü (ed), *Judicial Comparativism in Human Rights Cases*, above n 198, 10; Christopher McCrudden, 'A Common Law of Human Rights?', above n 177, 518.

as part of a *gap-filling* exercise.²⁰² To preserve a sense of continuity in the legal scholarship, those classifications have been used in this study. To these I have added *respect for the judge or court* in questions, *responding to cited authority* and references made for *no discernible reason* at all.²⁰³

As explained in the literature review, one of the most valuable contributions to scholarship in this field has been empirical data. In particular, it is rare that researchers present their data in a digestible format, using charts, graphs or tables. This is not an approach that all academics agree upon. Some commentators have expressed doubt that this sort of analysis can provide any meaningful results at all. Bobek explained his own methodological choices from that viewpoint:

This study is not a study in statistics or the increasingly popular ‘quotation metrics’, the purpose of which were to generate a set of colourful, but for a real understanding of a phenomenon often quite useless, graphs or tables.²⁰⁴

This is not easy to agree with. Compiling charts, tables or figures is a time consuming task but the value of doing so is felt to be greater value than for mere aesthetics. It is through these that it is possible to illustrate data patterns or trends, especially interesting if one is seeking to set out changes in judicial reasoning or consistencies in practice. Indeed, some recent works

²⁰¹ Christopher McCrudden, ‘Human Rights and Judicial Use of Comparative Law’, above n 199, 10. See also Christopher McCrudden, ‘A Common Law of Human Rights?’, above n 177, 518.

²⁰² Harold Cooke Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (2nd edn, Cambridge University Press 1949), 40

²⁰³ The full database of cases is too large to print in a sensible format and is not included.

²⁰⁴ Michael Bobek, *Comparative Reasoning in European Supreme Courts*, above n 169, 74.

have made use of such techniques to good effect, enabling the representation of findings which might not otherwise have been possible to outline fully.²⁰⁵

3.2.2 Interviews

The most significant contribution to legal scholarship made by this research project has been the information derived from interviews. Interview subjects were selected by a nonprobability method, sometimes called ‘purposive’ or ‘judgmental’ sampling: it was always clear that questions about judicial reasoning at the UKSC would be best answered by the Justices of that court.²⁰⁶

Difficulty with access to interviewees would have required a significant revision to the central research question but the problem did not materialise; almost all interview requests were granted. This result was surprising, given the problems reported by many researchers seeking to interview elites, including the most senior judges.²⁰⁷ For example, the author of one of the most recent studies has written:

²⁰⁵ E.g. Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges*, above n 173; Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing 2013), above n 190.

²⁰⁶ See e.g. Bruce L Berg, *Qualitative Research Methods for the Social Sciences*, above n 181, 44. As Berg explains, ‘When developing a purposive sample, researchers use their special knowledge or expertise about some group to select subjects who represent this population’; Frank E Hagan, *Research Methods in Criminal Justice and Criminology* (Allyn and Bacon 2006).

²⁰⁷ See e.g. Mandy Burton, ‘Doing Empirical Research’ in Dawn Wilkins and Mandy Burton (eds), *Research Methods in Law*, above n 179, 59: ‘Organisations, such as the police and courts, are often deluged with research requests and those in authority may be reluctant to grant permission for their staff to devote time to what they see as unproductive academic research activities’.

Problems start already at the level of identifying judges to interview: it was largely only those judges who themselves tend to be in favour of 'the foreign' and 'the international' that would typically consent to an interview on the subject. Those who do not care or are even mentally hostile to anything foreign are not inclined to share their views with a foreign researcher coming to talk to them about precisely that subject. Moreover, as Continental supreme jurisdictions are larger institutions, only several judges can in fact be interviewed, typically precisely those interested. Both of these factors generate a rather non-representative sample.²⁰⁸

Problems of this kind did not arise during this research. There was never any expression of hostility towards the subject and the smaller number of Justices at the UKSC (compared to other continental courts) made it possible to ensure a representative sample. In the UK Context at least, it is possible that the general willingness to be interviewed may reflect an increasing willingness on the part of judges to consider engagement with academics as a part of their judicial role.²⁰⁹ Darbyshire reached similar conclusions from her experience of studying judges: '[b]aby boomer judges seem to understand social research and academic freedom and most trust academics not to behave like journalists'.²¹⁰ Greater interaction with academics is also obvious from the judgments. It is no longer uncommon for judges to refer to academic

²⁰⁸ Michael Bobek, *Comparative Reasoning in European Supreme Courts*, above n 169, 71; Mak reported a similar experience: Elaine Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (Hart Publishing 2013), 63.

²⁰⁹ See e.g. Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (2013), above, n 190, 5: 'My experience of elite 'off the record' interviews both 40 years ago and now attests to the levels of trust that many interviewees are prepared to repose in an academic researcher that they may hardly know'.

²¹⁰ Penny Darbyshire, *Sitting in Judgment: The Working Lives of Judges* (Hart Publishing 2011), 7.

work in judgments—a significant contrast to a time when academics were cited only once deceased.²¹¹

3.2.3 Primary Subjects

The primary subjects were appellate court judges, active between 2011 and 2012. Interviews with the judges were sought by letter and conducted in two rounds. The first round letters were sent in August 2011 and the corresponding interviews took place between October and December of the same year. In total, ten Justices of the Supreme Court and one Lord Justice of Appeal were interviewed. The decision to interview a single Court of Appeal judge was made early in the research period, when it was thought that more Court of Appeal judges may be interviewed as part of a broader study.²¹² Although the parameters were later revised to include only the use of foreign jurisprudence at the UK Supreme Court, it was felt that the evidence obtained through the interview with Lady Justice Arden was nevertheless helpful to retain on the basis that it provided a useful perspective from outside the Supreme Court. Nevertheless, care has been taken to ensure that this interview evidence is used strictly anecdotally in this thesis, rather than contributing directly to the evidence from the UK Supreme Court interviews.

²¹¹ The point was also recognised by Michael Bobek, *Comparative Reasoning in European Supreme Courts*, above n 169, 87-88.

²¹² Explained further above at 3.1.3 'Courts and Judges'.

The interviewees in round one were Baroness Hale of Richmond, Lord Phillips of Worth Matravers (then President of the Supreme Court), Lord Mance and Lady Justice Arden. The second round letters were sent in March 2012, with the corresponding interviews taking place between April and July of the same year. The interviewees in the second round were Lord Dyson, Lord Reed, Lord Kerr, Lord Clarke, Lord Walker, Lord Collins and Lord Sumption.²¹³ Requests were made for just 30 minutes but the majority of the interviewees extended this time and provided useful information or thoughtful suggestions on developing the study. All interviews took place in the judicial offices of the relevant court. The interview communication and design is detailed in annexe one.

Perhaps the most interesting findings related to the working practices of the judges—a subject that the judges generally considered to be obvious or uninteresting. Surprise was expressed, for example, when a question was posed about the use of the judicial assistants or about their own methods for finding sources of law. In fact, the answers to these questions provide the most obvious contributions to legal scholarship. The way that judges do their work and the resources that they use may seem routine and mundane to the judges but were not at all obvious to a researcher.

²¹³ Lord Phillips and Lord Walker have since retired from the Supreme Court. Lord Dyson was appointed as Master of The Rolls with effect from 1 October 2012.

3.2.4 Questions

While necessary to retain structure and continuity in the questions for purposes of data analysis, the exploratory nature of the research required a broad scope for answers and it was important that the interviewees could fully explore these with minimal interruption or guidance. For these reasons, some questions were common to all interviews while other questions varied according to the interview and the relevant experience or interest that the interviewee was able to offer. For example, judges that were already known to make liberal use foreign jurisprudence were asked more probing questions about the reasons for those uses and their guiding motivations.

In all cases, a 'semi-standardised' or 'guided-semistructured' method of interviewing was applied.²¹⁴ In other words, the questions posed to each interviewee were the same mixture of open questions but the interviewees were able to develop certain points above others where it was felt more relevant. It was crucial to the research aims that the judges were given the opportunity to expand on an answer or volunteer further information. In those circumstances, time was given to following any interesting leads insofar that this did not detract from the consistency of the interviews in general or detract from an otherwise important point of discussion. This flexibility was necessary in order to ensure that the interviews were not self-fulfilling and to allow for the consideration of matters that may not otherwise have been

²¹⁴ The alternatives are given as either a 'standardised' or 'unstandardised' (or in words to similar effect). In contrast to the semi-standardised, these require a rigid schedule of predetermined questions or an open schedule, with questions located on the imaginary continuum: Bruce L Berg, *Qualitative Research Methods for the Social Sciences* (Pearson 2007), 92-95. Mak chose took the same approach in her interviews: Elaine Mak, *Judicial Decision-Making in a Globalised*, above n 208, 64.

raised. As one methodologist has described, the essence of the qualitative interview is the elicitation of stories:

When people are least interrupted, when they can tell their stories in their own way ... they can react naturally and freely and express themselves fully ... [Interruptions and leading questions are likely to have the effect that] ... the adventures into the unknown, into uncharted and hitherto undisclosed spheres, has been destroyed.²¹⁵

Where less was known about the particular area concerned, it was interesting to enable the judges to talk for longer, give their views more fully and to hear the variety of ideas and feelings.²¹⁶

It is also worth noting that these situations were, however, not always intentional. As is common with elite interviews, there was a general tendency among the Justices to steer the focus of the interview towards topics that they felt comfortable discussing. Such answers, however, are difficult to quantify and require strict attention to the precise language and comments given. The obvious limitation is that this kind of material restricts analysis to reporting the answers in their diversity, leading to anecdotal evidence or the 'cherry picking' of particular comments to fit a purpose. For that reason, careful consideration was given to whether insight was valued above comparable data and open questions were preferred to closed questions only where the balance fell with the former. Some attempt to focus the interview

²¹⁵ Pauline Young, quoted in Carol A B Warren and Tracy X Karner, *Discovering Qualitative Methods* (Roxbury 2005), 12: citing Jennifer Platt, 'The History of the Interview' in Jaber D Gubrium and James A Holstein (eds), *Handbook of Interview Research* (Sage 2002), 37.

²¹⁶ The interview design is given in Annexe 1.

discussion was made by defining the topics (as given within the ‘research parameters’ above) at the start of each interview. While these were primarily set out to ensure a common understanding of the terms and enhance the comparability of answers, this technique also provided a useful way to communicate the research aims and develop a rapport with the interviewee, reducing the need for ‘throwaway questions’ or other such devices often suggested for those purposes.²¹⁷

Despite the potential for disparity between interviews, the interviewees covered a number of common themes. These themes were usually a product of question design (drawing from questions common to all interviews) and where this was the case, it is interesting to compare and contrast the responses given by each of the judge. However, there are some surprising variations and some common themes were raised independently or as a corollary to the standard questions. For example, almost all of judges interviewed raised the ‘linguistic barrier’ as part of their explanation about the limited use of jurisprudence outside the traditional common law countries.²¹⁸ Judges that didn’t raise the matter of their own accord were asked about this factor. Interestingly, those that raised the matter independently of any leading question raised the linguistic barrier issue partly in response to a question regarding the overt reliance on the jurisprudence of Commonwealth jurisdictions. Of the judges that were prompted to consider the possible effect

²¹⁷ See eg Bruce L Berg, *Qualitative Research Methods for the Social Science*, above n 181, 101.

²¹⁸ The ‘linguistic barrier’ refers simply to the use of foreign jurisprudence precluded by unfamiliarity in the published language.

of a linguistic barrier on the use of foreign jurisprudence, most were dismissive about its relevance. A number of Justices expressed the feeling that language would not be a problem and usually gave examples of competency in other languages.

Finally, an ethical issue arose as to the use of the interview evidence. It was not at first clear whether it would be appropriate to refer to each Justice by name when using interview evidence in the analysis. It was concluded that the value to be drawn from comparing the interview findings with the case analysis would make it impossible to retain full anonymity.²¹⁹ Each interviewee was therefore offered a right of refusal over the recorded material and, to preserve that discretion, the full interview transcripts are not included. As Paterson found, the confidential atmosphere of each interview ‘undoubtedly led to very candid discussions’.²²⁰ Nevertheless, in common with Paterson’s experience, it was rare that discussions were indicated to be ‘off limits’. Any revisions to the recorded discussion made by the judges were very minor and had little to no bearing on the substance of the discussion in point.

3.2.5 Secondary Subjects

An important research aim was to expose the practical side of using foreign jurisprudence, as well as the theoretical. Questions about the research

²¹⁹ This is in contrast to the approach taken by Mak. Mak does not name her interview subjects and offered this as a guarantee in her initial communication with the judges: *Judicial Decision-Making in a Globalised World*, above n 208, 8.

²²⁰ Alan Paterson, *Final Judgment*, above n 190, 6.

behind the citations led to questions about those persons, other than the Justices, who contribute to the research process. At the time, little information was available on those who support judicial work and it became clear that speaking with the judicial assistants (JAs) might provide the desired insight.²²¹ They are therefore the secondary subjects.

JAs support the work of judges by sourcing material, preparing briefs or undertaking specific items of research. JAs are usually appointed for one year but some are in post for just one or two terms and, although very rarely, a JA may be in post permanently. Only one of the JA posts in the UKSC is filled permanently.²²² The positions are usually filled by early career solicitors or barristers, having completed—or being near the completion of—their training contracts or pupillages. Aside from some common duties, such as summarising the applications for permission to appeal into petition memos and the writing of press summaries, the work of a JA can vary significantly according to the judge by whom they are instructed.²²³

The individuals in post at any one time are not publicly listed. Contact was made with the assistance of the Justices and their personal assistants. The meeting was agreed with the permission of Lord Kerr (as the Justice with

²²¹ Recent publications have since shed light on the work of the Supreme Court judicial assistants: Tetyana Nesterchuk, 'The View from Behind the Bench' in Burrows, Johnston and Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford University Press 2013); Alan Paterson, *Final Judgment*, above n 190.

²²² The judicial assistant to Lord Phillips of Worth Matravers, Penelope Gorman, had progressed with Lord Phillips up from the Court of Appeal. See further Tetyana Nesterchuk, 'The View from Behind the Bench', *ibid* 101.

²²³ *Ibid* 104.

overall responsibility for the JAs at the time) and arranged by e-mail. Seven JAs were present at the meeting, which was conducted as a focus group. The focus group dynamic was not a conscious research choice but was simply a product of the terms under which it was agreed that I could speak to the JAs.²²⁴ Thus the focus group took place in the JAs' open plan offices at the UKSC in July 2012. All seven JAs were in post at the time of the focus group, although six were coming to the end of their annual contracts.

3.2.6 Reliability of Interview Evidence

The duration of each interview varied from 28 minutes to 64 minutes. It is evidently harder to cover any subject comprehensively in 28 minutes than is possible 64 minutes. This must be coupled with the general tendency of judges to maintain focus on what most interests them. When combined, these factors explain the different level of depth and consideration given to some of the subjects raised. It also explains the lack of any interview evidence on certain points, from particular judges.

In all but two cases, the reliability of interview data was greatly increased by the use of a digital recording device.²²⁵ The best efforts were made when transcribing the interviews; it is generally considered good practice to capture

²²⁴ The consequences of this dynamic are explored further under the heading of 'reliability' below.

²²⁵ This is another contrast with Mak's experience. Mak explains that she did not use a recording device but relied on writing up notes the day of the interview: *Judicial Decision-Making in a Globalised World*, above n 208, 64-65.

interviewees' comments as completely and accurately as possible.²²⁶ In the majority of the interviews, recording devices made redundant the debate about memory aids and transcriptions before the interview has 'gone cold', although there remain important considerations about preserving accuracy of mood and tone apart from the language itself. Mischler notes that an interview is a speech event as well as a special type of social interaction, requiring the contextual entirety of the dialog to be recorded.²²⁷ Thus research methodologists generally agree that the interviewer's own questions, prompts and probes should be included and, accordingly, the transcripts reflect these fully. Transcriptions were not outsourced,²²⁸ and no more than one week was allowed to pass before each interview was fully transcribed.²²⁹ In the two cases in which a recording device was not permitted, the interview was written up immediately after the event.

The nature of the focus group interview with the JAs posed some difficulties, which were not encountered during the transcription of the judicial interviews. The number of responses and the effect of differing distances from the recording unit,²³⁰ led to the loss of some material. To some extent it was possible to resolve these problems by reference to notes taken during the

²²⁶ Carol A B Warren and Tracy X Karner, *Discovering Qualitative Methods*, above n 215, 12; See also Jennifer Platt, 'The History of the Interview' in Jaber D Gubrium and James A Holstein (eds), *Handbook of Interview Research*, above n 215, 37.

²²⁷ Elliot G Mischler, *Research Interviewing: Context and Narrative* (Harvard University Press 1986), cited by Carol A B Warren and Tracy X Karner, *Discovering Qualitative Methods*, above n 215, 152-153.

²²⁸ Methodologists warn that transcriptions through 'hired hands', whom may not have the benefit of memories of the interview, can lead to unsatisfactory results. See eg Carol A B Warren and Tracy X Karner, *Discovering Qualitative Methods*, above n 215, 152.

²²⁹ In the vast majority of cases, the transcriptions were completed within a day or two of the interview.

²³⁰ Up to five metres in one case.

interview but it is nevertheless acknowledged that human error undoubtedly resulted in minor errors or omissions. These practical complications are additional to those fed by the nature of the focus group, as opposed to the one-to-one interviews conducted with the Justices. While the focus group dynamic has the potential to stimulate new thinking about a subject, an obvious drawback is that participants may be less willing to give a view on sensitive topics.²³¹

It is worth noting that other researchers have been sceptical about the reliability of interview evidence as a foundation for data analysis generally. For example, Flanagan and Ahern point out that some commentators have questioned the validity of what is termed 'judicial self-reporting'.²³² They cite Epstein and King's cynicism:

... asking someone to identify his or her motive is one of the worst methods of measuring motive. People often do not know, or cannot articulate, why they act as they do. In other situations, they refuse to tell, and in still others, they are strategic both in acting and in answering the scholar's question. This is obvious from the example of asking justices about how they reach decisions...²³³

The related risk is that self selection bias might play a role in determining the subjects of any interview study. Flanagan and Ahern explain:

²³¹ See e.g. Richard A Krueger, *Focus Groups: A Practical Guide for Applied Research* (4th edn, SAGE 2009).

²³² Brian Flanagan and Sinead Ahern, 'Judicial Decision-Making and Transnational Law: A Survey of Common Law Supreme Court Judges' (2011) 60 *International and Comparative Law Quarterly* 1, 8.

²³³ Lee Epstein and Gary King, 'The Rules of Inference' (2002) 69 *U Chi L Rev* 1, 93.

there may be a self selection bias at work due to a judge's personal attitudes toward comparison. In principle, such an effect might cancel itself out, with those anxious to present favourable and unfavourable points of view experiencing an equal marginal inclination to respond. As it was voiced to the authors, however, the concern is that the effect would predominately work to attract responses from those favourable to comparison.²³⁴

Yet, as Flanagan and Ahern point out, 'as a method of investigating judicial decision-making, asking those with actual experience thereof offers unique advantages'.²³⁵ Since it was possible to interview most of the Supreme Court Justices active during the time period for this study, it is hoped that the danger of 'self selection bias' has been avoided.²³⁶

A final but important point is related to the extent to which it is possible to rely on responses that are subject to human fallibility. As Paterson found, 'very few Law Lords or Justices have a very accurate picture of decision-making data'.²³⁷ Paterson's examples include:

the frequency with which they are on the winning or losing side where the court is sharply divided, their agreement rates with other judges, the proportion of judgments that are single, majority judgments, or whether their share of the lead judgment allocations is above or below the average for the Court.

Paterson continues that 'even more intuitive statistics', including 'dissent rates, the average time taken between the hearing and judgment being

²³⁴ Brian Flanagan and Sinead Ahern, 'Judicial Decision-Making and Transnational Law', above n 232.

²³⁵ Ibid.

²³⁶ Ibid 12.

²³⁷ Alan Paterson, *Final Judgment: the Last Law Lords and the Supreme Court*, above n 190, 8.

handed down, and the average success rate for permission to appeal petitions or for full appeals, are matters where the Law Lords and Justices' "guessimates" may be considerably off the mark'.²³⁸ Similar findings were made during the interviews conducted for this study: a number of the Justices interviewed were unable to make accurate guesses about the frequency with which foreign jurisprudence was cited at the Supreme Court. A connected problem is that, at the time of interview, two of the Justices—Lord Sumption and Lord Reed—had been in post for only a short time.²³⁹ This relative lack of experience would be likely to prevent the Justices from obtaining an accurate picture of the Supreme Court's working methods. The evidence from the interviews with Lord Sumption and Lord Reed must therefore be qualified by the relative lack of experience that the Justices would at that stage have had as a Justice of the Supreme Court.

It is for these reasons that the quantitative data collection is important. The thesis therefore balances the interview evidence against the evidence obtained through the empirical analysis of decided cases, using the former to flesh out some of the findings from the latter rather than to represent a reliable factual account.

²³⁸ *Ibid.*

²³⁹ Lord Sumption was sworn in on 1 January 2012 and interviewed on 22 May 2012. Lord Reed was sworn in on 6 February 2012 and interviewed on 8 May 2012.

3.2.7 Secondary Sources

An important supplement to the primary materials was given by a substantial volume of literature on the subject of judicial reasoning and, to a more limited extent, on the use of foreign sources and comparative methodology. Previous works were primarily identified and sourced through online databases. One text on research methodology cautioned against reliance on computer searches alone, noting the reality that online indexes, as with print, often suffer from terminological classification bias.²⁴⁰ For that reason, physical searches through library collections were also conducted and did yield some additional material. An early review of the literature was an essential part of the project design and fed adjustments to the initial research questions where appropriate. The research period for this study ended in August 2013 but a small number of very relevant works were published later that year.²⁴¹ Final revisions to the literature review were made in January 2014.²⁴²

²⁴⁰ Bruce L Berg, *Qualitative Research Methods for the Social Sciences*, above n 181, 21.

²⁴¹ Three important volumes were published in November 2013 which have made valuable contributions to legal scholarship in general and to this study in particular. The first of these is Burrows, Johnston and Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford University Press 2013), which contained an insightful chapter on 'Foreign Laws and Languages', authored by Lord Mance. The second, Alan Paterson, *Final Judgment: the Last Law Lords and the Supreme Court*, above n 190, which draws evidence from a number of interviews, including a significant number conducted with the Law Lords and Justices of the Supreme Court. The third publication is the most closely related: Elaine Mak, *Judicial Decision-Making in a Globalised World*, above n 208.

²⁴² Mak's most recent publication was not discovered until January 2014. It was not at the time available in any of the London libraries and was not possible to acquire in hardcopy prior to the submission of this thesis. The inclusion of that work was facilitated by reference to the proofed manuscript, which Mak kindly shared electronically.

4 The basis for using foreign jurisprudence

There are no rules governing the use of foreign jurisprudence in UK domestic courts. Decisions of foreign courts are not authoritative in the precedential sense; UK Courts are under no duty or obligation to follow the decisions of a foreign court.²⁴³ In fact, there is no guidance on using foreign jurisprudence at all. The UK has no provision similar to section 39(1) of the South African constitution, which provides that the Constitutional Court must consider international law and may consider foreign law. Indeed as Cram has pointed out, the South African provision for consideration of foreign jurisprudence is 'the exception rather than the rule'.²⁴⁴ Cram continued:

More commonly, the citing of foreign norms is largely unregulated by constitutions, leaving the judges to exercise their discretion as to whether, and in which circumstances, the practice is appropriate.²⁴⁵

Some limited guidance is given to advocates by the 'Practice Direction on the Citation of Authorities', which both welcomes the use of foreign jurisprudence and also cautions against the overuse of those sources. Section 9.1 reads as follows:

Cases decided in other jurisdictions can, if properly used, be a valuable source of law in this jurisdiction. At the same time,

²⁴³ Recall that 'foreign jurisprudence' in this thesis refers to the domestic jurisprudence of foreign courts. It does not include in its scope the decisions of supranational courts such as the European Court of Human Rights in Strasbourg (the jurisprudence of which, for example, UK domestic courts are obliged to 'take into account' where relevant under the Human Rights Act 1998).

²⁴⁴ Ian Cram, 'Resort to foreign constitutional norms in domestic human rights jurisprudence with reference to terrorism cases' [2009] CLJ 118, 119.

²⁴⁵ *Ibid.*

however, such authority should not be cited without proper consideration of whether it does indeed add to the existing body of law.²⁴⁶

Advocates are therefore directed to resist citation to foreign jurisprudence if unnecessary. Section 9.2 provides that any advocate who seeks to cite an authority from another jurisdiction must:

ii. indicate in respect of each authority what that authority adds that is not to be found in authority in this jurisdiction; or, if there is said to be justification for adding to domestic authority, what that justification is;

iii. certify that there is no authority in this jurisdiction that precludes the acceptance by the court of the proposition that the foreign authority is said to establish.²⁴⁷

This guidance does not extend to the judiciary. There are no rules specifying the way that judges must use foreign jurisprudence. In the absence of any guiding principles, the authority of foreign jurisprudence is merely persuasive. Indeed, as Cram also recognised, the most that could be claimed is that the lack of any limitation or prohibition on references to foreign jurisprudence might indicate a possible acquiescence on the part of the legislature.²⁴⁸ The judges have not suggested a greater role for foreign jurisprudence. Thus Lord Mance recently made clear his view that domestic courts could derive assistance from foreign jurisprudence, in much the same way that they could derive assistance from any other non-binding authority.

²⁴⁶ s. 9.1 *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001; [2001] 2 All ER 510.

²⁴⁷ *Ibid* s. 9.2.

²⁴⁸ *Ibid* 125.

When judges look to comparative and international material, they may do so for information, inspiration, or confirmation, just as they use domestic decisions that are not binding on them. ... What Ronald Dworkin calls a 'relaxed doctrine of precedent' may embrace the past decisions not only of courts above him or at the same level in his jurisdiction but of courts in other states or countries.²⁴⁹

However, to say that foreign jurisprudence is merely 'persuasive', is to ignore the possibility that some sources may (legitimately or not) be more persuasive than others. For many, persuasive authority is a nebulous concept, '...well-known but imprecise',²⁵⁰ about which we are 'still in the dark'.²⁵¹

4.1 Persuasive authority

As a starting point, it is usually agreed that persuasive authority sits in direct contrast to binding or precedential authority. Whereas a court must follow or give reasons for departing from otherwise binding authority,²⁵² a court is neither obliged to follow nor to give reasons for departing from persuasive

²⁴⁹ 'Foreign Laws and Languages' in Burrows, Johnston and Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford University Press 2013), 87-88 citing Ronald Dworkin, *Law's Empire* (Hart Publishing 1986), 25.

²⁵⁰ Patrick H Glenn, 'Persuasive Authority' (1987) 32(2) McGill Law Journal 261, 264.

²⁵¹ Chris Flanders, 'Towards a theory of persuasive authority' (2009) 62 Oklahoma Law Review 55, 57.

²⁵² The Supreme Court may depart from its own previous decisions (or those of its predecessor, the Appellate Committee of the House of Lords): 1966 Practice Statement. See further James Lee, 'The Doctrine of Precedent and the Supreme Court', Inner Temple Academic Fellow's Lecture, Inner Temple, (London, April 2012), <http://www.innertemple.org.uk/downloads/education/lectures/lecture_james_lee.pdf> accessed 28 November 2012.

authority. Indeed, for Schwartz it is the ‘touchstone’ of persuasive authority that a court is not ‘required to follow [its] result or reasoning’.²⁵³

Schauer agrees: ‘...the distinction between [persuasive and binding authority] hinges on whether the decision maker has a choice to use the authority’.²⁵⁴ If persuasive authority is not mandatory, it must essentially be optional.²⁵⁵ But it is difficult to reconcile ‘optional’ with ‘authoritative’, since the ‘authoritative’ is frequently defined as ‘proceeding from an official source and requiring compliance or obedience’.²⁵⁶ As Schauer has asked, ‘is there anything at all authoritative about an optional authority whose use is solely at the discretion of the judge?’²⁵⁷ Along similar lines, Flanders has proposed that it may be ‘puzzling to speak of persuasive *authority*? Why not simply persuasive *sources*?’²⁵⁸ The answer must be that it is ‘authority’ if a judge uses it as such. In the most straightforward sense, drawing from another argument in support of one’s own is an appeal to authority. Law is a practice based on authority,²⁵⁹ the appeal to which is signalled by citation.²⁶⁰ As Schauer has explained:

²⁵³ Timothy Schwartz, Comment, ‘Cases Time Forgot: Why Judges Can Sometimes Ignore Controlling Precedent’, (2007) 56 Emory Law Journal 1475, 1479.

²⁵⁴ Frederick Schauer, ‘Authority and Authorities’ (2008) 94 Virginia Law Review 1931, 1945-1946.

²⁵⁵ *Ibid* 1947.

²⁵⁶ Oxford Dictionaries <<http://oxforddictionaries.com/definition/english/authoritative>> accessed 15 August 2013. Other well known writers have described authority in similar terms. E.g. John Lucas, *The Principles of Politics* (Oxford 1966), 16: ‘A man, or body of men, has authority if it follows from his saying “Let X happen”, that X ought to happen’, in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979).

²⁵⁷ Frederick Schauer, ‘Authority and Authorities’, above n 254, 1947.

²⁵⁸ Chris Flanders, ‘Towards a theory of persuasive authority’, above n 251, 66.

²⁵⁹ E.g. H.L.A. Hart, ‘Commands and Authoritative Legal Reasons’, in *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon Press, 1982) 243, 261–66;

a legal argument is often understood to be a better legal argument just because someone has made it before, and a legal conclusion is typically taken to be a better one if another court either reached it or credited it on an earlier occasion.²⁶¹

A source therefore manifests itself as authority if it is followed or distinguished and—crucially—cited. The intuitive hypothesis about persuasive authority is therefore that it is ‘authority’ insofar as a court is persuaded to use it as such; it is authority which attracts adherence.²⁶²

Schauer’s conclusion, however, was that ‘persuasion is rarely part of the equation when persuasive authorities are being used...’²⁶³ The problem is one of semantics:

... being persuaded is fundamentally different from doing, believing, or deciding something because of the prescriptions or conclusions of an authority. But if this is so, then the very idea of a persuasive authority is self-contradictory, for persuasion and authority are inherently opposed notions. ... The use of a source can be one or the other—it can be persuasive or it can be authoritative—but it cannot be both at the same time.²⁶⁴

It is the ‘persuasive’ element that is misleading. The problem for Schauer is that, on his analysis, a judge who draws from persuasive authority is learning

Frederick Schauer, ‘The Questions of Authority’ (1992) 81 *Georgetown Law Journal* 95, 95–96; Frederick Schauer ‘Authority and Authorities’, above n 254, 1935.

²⁶⁰ Frederick Schauer, ‘Authority and Authorities’, above n 254, 1934-1935: ‘Rather than being little more than the characteristic form of legal jargon, the law’s practice of using and announcing its authorities—its citation practice—is part and parcel of law’s character’; Generally, Joseph Raz, *The Authority of Law: Essays on Law and Morality*, above n 256.

²⁶¹ Frederick Schauer, ‘Authority and Authorities’, above n 254, 1950.

²⁶² Patrick H Glenn, ‘Persuasive Authority’, above n 250, 263.

²⁶³ Frederick Schauer, ‘Authority and Authorities’, above n 254, 1944-1945.

²⁶⁴ Frederick Schauer, ‘Authority and Authorities’, above n 254, 1944. Moreover, Schauer’s conclusion is that ‘persuasion is rarely part of the equation when persuasive authorities are being used...’, 1944-1945.

from that source rather than taking it as authoritative. In that sense, he says, it is treated no differently in the decision making process to the treatment of a persuasive argument from any source at all. But it is surely not the same thing for a judge to be persuaded by an argument 'heard from her brother-in-law or in the hardware store',²⁶⁵ as for a judge to be persuaded by, say, the argument of a subject expert or the reasoning of learned judge in a similar case before another court. Even if a judge is merely 'learning' from persuasive authority, it is clear that some sources are better suited to the job than others; if a man is to learn about fishing, he would be advised to learn from a fisherman. The reasoning of a learned judge in a similar case, considering similar problems in a similar court, will be more persuasive and carry more authority than the arbitrary reasoning of friends, family or strangers.²⁶⁶

A further manifestation of the importance attached to the nature of the source is the distinction between *ratio dicensendi* and *obiter dicta*. While it is only the *ratio* of binding precedent that must be followed, *obiter dicta* (statements that do not go to the principle upon which a case is decided) have frequently been treated as more than merely persuasive authority by courts. Indeed in some well-known cases, *obiter dicta* were so persuasive as to effectively bind future courts. A good example is the development of the doctrine of promissory estoppel in *Central London Property Trust v High Trees House*. As is well-known, the facts of the case centred on the lease of a block of flats

²⁶⁵ Ibid 1943.

²⁶⁶ Ibid 1943.

in London. In 1940, given the reduced occupancy rates at the outbreak of war, the landlord agreed to reduce the rental rate by half, but did not specify the period for which this would apply. By 1945 the flats were at full occupancy and the landlord sued for the full rental rate. Denning J upheld the claim that the full rate was payable from the moment of full occupancy. However, Denning elaborated that a claim for the full rate from 1940 onwards would have been unsuccessful, since it would be inequitable for the landlord to resile from a representation on which the tenants had relied. This elaboration was made in an *obiter* statement but was subsequently followed in a number of cases which continued to develop the doctrine of promissory estoppel in English contract law.²⁶⁷ A further example along these lines might be the *obiter* statement in *Hedley Byrne v Heller* that a duty of care could arise with respect to a negligent misstatement giving rise to pure economic loss.²⁶⁸ The statement was relied upon in a number of later cases despite not being strictly binding.²⁶⁹

In part, reliance on *obiter dicta* may be explained by the fact that the task of distinguishing the *ratio* of a case can be difficult.²⁷⁰ This might be especially so where a case is comprised of multiple judgments as opposed to single or

²⁶⁷ E.g. *Combe v Combe* [1951] 2 KB 215; *Amalgamated Investment Co v Texas Bank* [1982] QB 84; *Collier v P & MJ Wright (Holdings) Ltd* [2007] EWCA Civ 1329.

²⁶⁸ *Hedley Byrne v Heller* [1963] UKHL 4

²⁶⁹ E.g. *Esso Petroleum Co Ltd v Mardon* [1976] QB 801.

²⁷⁰ As one introductory text points out, 'judges do not actually separate their judgments into these two clearly defined categories.' Gary Slapper, *How the Law Works* (Routledge 2011), 87-88.

plurality judgments.²⁷¹ Alternatively, the willingness to follow *obiter dicta* could be indicative of the greater persuasiveness of judicial pronouncements, over other sources such as academic literature. This would also explain greater persuasiveness of some Privy Council decisions.²⁷²

The conclusion that the source of a given statement could have bearing on its authority sits in tension with the inclination amongst scholars to define persuasive authority as ‘content-dependent’.²⁷³ Since persuasive authority does not bind intrinsically, it is argued that ‘the authority it holds flows from the persuasive content of the authority ... [It] ‘compels by what it says, not by what it is’.²⁷⁴ Clearly, however, courts do consider the source of persuasive authority to be relevant to their analysis about the value of that authority. The well-known example about the reluctance of English courts to cite academic work of living authors bears this out well.²⁷⁵ It was evidently not the content of

²⁷¹ E.g. *Doherty v Birmingham City Council* [2006] EWCA Civ 1739 in which the Court of Appeal struggled to find a clear account of the majority *ratio* in the House of Lords decision in *Kay v Lambeth Borough Council* [2006] UKHL 10. Similar difficulties arose for the Court of Appeal when deciding *Secretary of State for the Home Department v AF and others* [2008] EWCA Civ 1148. See further Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing 2013), 210-211.

²⁷² E.g. In *Doughty Turner Manufacturing* [1964] 1 QB 518 the Court of Appeal felt that one of its own earlier decisions (*Re Polemis* [1921] 3 KB 560) could no longer be good law in light of the Privy Council decision in *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd* (*‘The Wagon Mound’*) [1961] UKPC 1. A rarer example of the weight attached to certain decisions of the Privy Council can be found in *R v James (Leslie)* [2006] EWCA Crim 14, in which the Court of Appeal declines to follow a House of Lords decision in preference to the more recent Privy Council case. See further Richard Ward et al, *Walker & Walker’s English Legal System* (OUP 2011) 79.

²⁷³ Vlad F. Perju, ‘The Puzzling Parameters of the Foreign Law Debate’ (2007) 1 Utah Law Review 167, 179: ‘The authority of a legal norm is content independent when it does not depend on that norm’s background justification’.

²⁷⁴ Chris Flanders, ‘Towards a theory of persuasive authority’, above n251, 67; Frederick Schauer, ‘Authority and Authorities’, above n 254, 1935-1936.

²⁷⁵ Frederick Schauer and Virginia J Wise, ‘Legal Positivism as Legal Information’ (1997) 82 Cornell Law Review 1080, 1088–89. This practice altered in 1945 when the House of Lords cited work by Arthur Goodhart; Alan Paterson, *The Law Lords* (Macmillan Press 1982), 14-20.

those sources that altered with death; it was the source itself and, presumably, the perceived authority of that source. Even when judges do cite the work of living academics it is not always clear what the source of authority is. As Paterson wrote in his 1982 study of the Law Lords, it is unclear 'whether these academics influence the Law Lords by the authority of their reasoning or by reason of their authority...'.²⁷⁶

For many, the importance attached to the source of the 'authority' is at the heart of the legitimacy debate. This is particularly clear from the United States context. Posner explains:

Problems arise only when the foreign decision is believed to have some (even if quite attenuated) persuasive force in an American court merely by virtue of being the decision of a recognized legal tribunal. This occurs, in short, when it is treated as an *authority*, albeit not a controlling one ...²⁷⁷

In the UK, it is very clear that some sources are thought to be of greater relevance or than others. The point has been recognised in another recent publication:

Within the category of persuasiveness, the scale is a sliding one, depending on the case in question, its context, and its factual setting. Highly persuasive would typically be the judicial decisions from other common law jurisdictions, especially their highest courts. However, within the same category of persuasive precedent (albeit not with the same weight) also fall the decisions

²⁷⁶ Alan Paterson, *The Law Lords* (Macmillan Press 1982), 20.

²⁷⁷ Richard Posner, 'No Thanks, We Already Have Our Own Laws' *Legal Affairs* July/Aug 2004 <http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp> accessed 01 August 2013.

of any other courts in other jurisdictions, which might provide some inspiration or analogy in the case at hand, including decisions of Continental or other jurisdictions.²⁷⁸

The Court of Appeal, for example, has described decisions of the Privy Council as being of both 'strong' and 'high' persuasive authority,²⁷⁹ while the Supreme Court has referred to decisions of the Grand Chamber of the ECtHR as 'at least of the very highest persuasive authority'.²⁸⁰ In *Cadder v HM Advocate*,²⁸¹ Lord Hope explained that 'the court is faced with a unanimous decision of the Grand Chamber' and that 'this, in itself, is a formidable reason for thinking that we should follow it'.²⁸² Clearly therefore, some persuasive authority is made more important by virtue of its 'pedigree'.²⁸³ This is not surprising. In cases engaging provisions of international treaties, the decisions of associated supranational courts are of obvious relevance to a court attempting to reconcile international with domestic law. Similar cases would be those involving international conventions with no supranational court, where it surely makes sense to look

²⁷⁸ Michael Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford University Press 2013), 77.

²⁷⁹ '...the decision of the Privy Council in *Perera v Perera* [1901] AC 354 is strong persuasive authority for upholding the decision in *Parker v Felgate* (1883) 8 PD 171', *Perrins v Holland and others* [2010] EWCA Civ 840, [23]; 'I doubt whether technically it is binding on this court, being contained in a decision of the Privy Council. None the less, it is of high persuasive authority', [49]. See also *R (HRH Sultan of Pahang) v Secretary of State for the Home Department* [2011] EWCA Civ 616, [35] in which the Court of Appeal sought to formally distinguish the Privy Council decision in *Liquidators of the Maritime Bank of Canada v Receiver-General of New Brunswick* [1892] AC 437 that was said to have been of 'high persuasive authority' and followed by the Court of Appeal in *Mellenger v New Brunswick Development Corporation* [1971] 1 WLR 604.

²⁸⁰ *HM Treasury v Mohammed Jabar Ahmed and others (No.2) (FC)* [2010] UKSC 2; [2010] 2 AC 534, 596 referring to *Kadi v Council of the European Union (Joined Cases C-402/05P and C-415/05P)* [2009] AC 1225.

²⁸¹ *Cadder v Her Majesty's Advocate (Scotland)* [2010] UKSC 43.

²⁸² *Ibid* [45]-[46] (Lord Hope).

²⁸³ Cf Chris Flanders, 'Towards a theory of persuasive authority', above n251, 62 arguing that persuasive authority does not bind by virtue of its pedigree.

for jurisprudence from other jurisdictions interpreting the same instrument. In these cases, a court may rely on the foreign jurisprudence in much the same way as domestic case law, seeking to identify the interpretation given to a particular clause in similar vein to the identification of the core principle (or *ratio*) of a previous decision. However, a distinction between *ratio* and *obiter* is likely to be of less importance when referring to foreign jurisprudence in general, since the domestic court has no obligation to follow the foreign case in any event. The court therefore simply refers to foreign jurisprudence because it is useful to do so. This is most evident in cases of interpretation since (to repeat an earlier conclusion) the reasoning of a learned judge in a similar case, considering similar problems in a similar court, will be of greater use than the jurisprudence of some other court dealing in different instruments. In fact, in such cases, the source (rather than content) of the material is probably the very feature that renders it legitimate to use.

4.1.1 Cherry picking

A related but rather different concern, is the tendency for courts to favour the jurisprudence of a court or a family of courts for reasons that are not strictly connected to the subject of the instant case. Anxieties about the ‘substantial “cherry picking” of which jurisdiction to cite’ are prevalent.²⁸⁴ McCrudden has explained this as a concern that ‘those jurisdictions chosen will be those which are likely to support the conclusion sought, leading to arbitrary

²⁸⁴ Christopher McCrudden, ‘A Common Law of Human Rights? Trans-national Judicial Conversations on Constitutional Rights’ [2000] OJLS 449.

decision-making, not legitimate judging’.²⁸⁵ The asymmetry in the use of comparative case law in some domestic decisions does little to rebut this suggestion. For instance, Lord Walker found a judgment of the Constitutional Court of South Africa ‘very helpful’ when giving judgment in *Williamson* and borrowed heavily from Justice Sachs’ reasoning in that decision in order to conclude that the ban on corporal punishment did not violate Article 9 of the ECHR.²⁸⁶ In that case Lord Nicholls preferred to distinguish the decision of the Strasbourg Court in *Campbell and Cosans* in order to reach the same conclusion.²⁸⁷

Using foreign jurisprudence in an inconsistent or arbitrary fashion leads to the most prevalent of criticisms, that is that it invites manipulation. Such an approach can be encapsulated in Judge Harold Leventhal's well known remark, that ‘[u]sing legislative history is like looking out over the crowd at a cocktail party to try to identify your friends’.²⁸⁸ Part of the problem, of course, is that the burgeoning pool of foreign jurisprudence means that ‘identifying friends’ is almost always possible; a judgment might easily be manipulated by the ‘unprincipled selection of foreign experience’.²⁸⁹ As John Roberts, Chief Justice of the United States, said in his confirmation hearings before the United States Senate, ‘you can find anything you want [in foreign law]. If

²⁸⁵ *Ibid* 507.

²⁸⁶ *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15; [2005] 2 WLR 590, [67].

²⁸⁷ *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293.

²⁸⁸ Repeated at Confirmation Hearing on the Nomination of John G Roberts Jr to be Chief Justice of the United States, 2005, 109th Congress 200, 200-201.

²⁸⁹ Cheryl Saunders, ‘Comparative Constitutional Law in the Courts: Is There a Problem?’ in Jane Holder and Colm O’Cinneide (eds) *Current Legal Problems* (2006) Vol 59, (Oxford University Press 2007), 114.

you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever'.²⁹⁰ This, it is argued, is where the method and reasons involved in using foreign jurisprudence become obscured. The consequence is that judicial reasoning is left open to criticism on the basis that it appears opportunistic or random. The Supreme Court might expose itself to this risk by, for example, citing foreign jurisprudence with not real explanation as to how and why the relevant decision was chosen. Sometimes, of course, the problem is that the reasons are felt to be too obvious to explain. The clearest example might be the tendency to cite jurisprudence from a small family of common law courts, as illustrated in chapter five. Thus in *SerVaas Inc v Rafidian Bank*, Lord Clarke referred to decisions from the US Court of Appeals 9th Circuit as 'strong persuasive authority',²⁹¹ while Lord Rodger felt a decision of the High Court to be 'powerful authority' in *HJ (Iran) v Secretary of State for the Home Department*.²⁹² In keeping with these findings, several of the Justices interviewed suggested that the courts of long established democracies were likely to be the most useful. Lord Phillips, for example, explained that 'some of the Canadian judgments are most impressive and can be very powerful

²⁹⁰ Confirmation Hearing on the Nomination of John G Roberts Jr to be Chief Justice of the United States, above n 288.

²⁹¹ *SerVaas Incorporated v Rafidian Bank and others* [2012] UKSC 40, [28] (Lord Clarke).

²⁹² *HJ (Iran) v Secretary of State for the Home Department; HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31

support indeed for a judgment,²⁹³ while Lord Sumption added that ‘the quality and compelling character of the judgments can be very persuasive’.²⁹⁴

The simplest summation is that the legitimacy of foreign jurisprudence citation is clouded by an absence of reasons for using jurisprudence from one jurisdiction or another. It is because of this that the main purposes for using foreign jurisprudence are considered in chapter six, seven and eight, where the aim is to elucidate some of the guiding principles applied by the Supreme Court when using those sources. Clarity must also be sought on the status of foreign jurisprudence and the use of the word ‘authority’. In fact, one of the main conclusions of later chapters is that foreign jurisprudence is not considered to be ‘authoritative’ in human rights cases before the UKSC. For better or for worse, that is a status better associated with the jurisprudence of the European Court as the supranational courts providing an authoritative interpretation of an international instrument.

4.1.2 Supranational jurisprudence

In contrast to the lack of guidance about foreign jurisprudence, Parliament has legislated on the use of jurisprudence from some supranational courts. UK courts are obliged to follow supranational jurisprudence in some cases, or

²⁹³ Interview with The Rt. Hon. Lord Phillips of Worth Matravers, former President of the United Kingdom Supreme Court (The Supreme Court, London, 23 November 2011).

²⁹⁴ Interview with The Rt. Hon. Lord Sumption, Justice of the United Kingdom Supreme Court (The Supreme Court, London, 28 May 2012).

take them 'into account' in others.²⁹⁵ The existence of such guidance has arguably increased the weight of those authorities such they are at least more persuasive than the decisions of foreign domestic courts. Indeed, many have recognised that the attention paid to the Strasbourg jurisprudence has often come close to the attention paid to binding authorities.²⁹⁶ So close, in fact, that counsel have placed greater focus on the decisions of the Strasbourg Court in their arguments. As Baroness Hale recently put it:

If you come and listen to a human rights case being argued in the Supreme Court, you will be struck by the amount of time counsel spend referring to and discussing the Strasbourg case law. They treat it as if it were the case law of our domestic courts.²⁹⁷

As Baroness Hale has recognised, this is strange because the 'Strasbourg case law is not like ours. It is not binding upon anyone, even upon them'.²⁹⁸ The Strasbourg cases are therefore 'at best, an indication of the broad approach which Strasbourg will take to a particular problem'.²⁹⁹

It is worth remembering that the Strasbourg authority was never intended to be anything more than strictly persuasive authority. The words 'must take into

²⁹⁵ E.g. Section 3 ECA 1972 has the effect of binding UK courts to case-law of the CJEU. Section 2 Human Rights Act 1998 does not bind domestic courts to the jurisprudence of the ECtHR, but at least obliges them to 'take into account' its decisions.

²⁹⁶ E.g. Helen Fenwick, *Civil Liberties and Human Rights* (Cavendish 2007) 193, 'the obligation under s.2 as interpreted ... comes close to affording binding force to the jurisprudence'; also Roger Masterman, 'Section 2(1) of the Human Rights Act: Binding domestic courts to Strasbourg?' [2004] PL 725; Elizabeth Wicks, 'Taking Account of Strasbourg? The British Judiciary's Approach to Interpreting Convention Rights' [2005] EPL 405; Jonathan Lewis, 'The European Ceiling on Human Rights' [2007] PL 720; Jonathan Lewis, 'In Re Pand others: an exception to the "no more, certainly no less" rule' [2009] PL 43; Francesca Klug and Helen Wildbore, 'Follow or lead? The Human Rights Act and the European Court of Human Rights', (2010) 6 EHRLR 621.

²⁹⁷ Brenda Hale, 'Argentorum Locutum: Is Strasbourg or the Supreme Court Supreme?' (2012) 12 (1) Human Rights Law Review 65, 68.

²⁹⁸ Ibid.

²⁹⁹ Ibid.

account' were heavily debated during the legislative stages of the HRA 1998 and replacements like 'must follow' or 'shall be bound by' were rejected for precisely the reason that

... the word 'binding' is the language of precedent ... [Strasbourg decisions] are a source of jurisprudence indeed, but not binding precedents which we necessarily should follow or even necessarily desire to follow.³⁰⁰

In the House of Lords debates, Lord Browne-Wilkinson concluded that 'the doctrine of stare decisis ... does not find much favour north of the Border, finds no favour across the Channel and is an indigenous growth of dubious merit'.³⁰¹ Similarly, Lord Lester took the view that any stronger obligation than to 'take into account' would be inappropriate 'since such cases deal with laws and practices which are not those of the United Kingdom',³⁰² while Lord Irvine thought it would give way to becoming 'more European than the Europeans'.³⁰³ It was instead important to avoid 'putting the courts in some kind of straitjacket where flexibility is what is required'.³⁰⁴ Accordingly the White Paper prior to the enactment of the HRA clarified that the scheme of section 2 would require domestic courts to 'take account of relevant decisions ... (although these will not be binding)'.³⁰⁵ More recently, the then President of the Supreme Court, Lord Phillips, said that 'if the wording "take into account" gives a message at all, it is that we are not bound by decisions of

³⁰⁰ Hansard HL vol 583 col 515 (18 November 1997) (The Lord Chancellor Lord Irvine of Lairg).

³⁰¹ Ibid col 513 (18 November 1997).

³⁰² Hansard HL vol 584 col 1269 (19 January 1998).

³⁰³ Hansard HL vol 583 col 514 (18 November 1997).

³⁰⁴ Ibid col 515 (18 November 1997).

³⁰⁵ *Rights Brought Home: The Human Rights Bill*, Cm 3782 (October 1997) [2.4].

the Strasbourg court as binding precedent'.³⁰⁶ In fact, in his view, had those words not been included, 'we might actually be treating them as stronger precedent than we do'.³⁰⁷

Nevertheless, the dominant approach in the early years of the Human Rights Act was to treat the jurisprudence of the Strasbourg court as more than merely persuasive authority. This has been a point of criticism in much of the academic commentary, where it has been said that the judicial interpretation of section 2(1) HRA as requiring domestic courts to 'follow' or 'keep pace' with the 'clear and constant' Strasbourg jurisprudence,³⁰⁸ has led domestic courts to 'mirror' the Strasbourg conclusions.³⁰⁹ Some went so far as to suggest that the UK courts risk becoming little more than 'Strasbourg surrogates'.³¹⁰

This loyalty to the Strasbourg jurisprudence prevailed for most of the Human Rights Act's first decade but some reluctance to adhere so strictly to the Strasbourg court's conclusions did begin to manifest itself even during the final years of the House of Lords. This is most evident from a series of possession proceedings cases, starting with *Qazi*, and culminating in the

³⁰⁶ Lord Phillips of Worth Matravers, Oral Submission to the Joint Committee on Human Rights, HC 873-ii, 15 November 2011, Question 64.

³⁰⁷ *Ibid.*

³⁰⁸ *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837, [18] (Bingham LJ); *R (Alconbury) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 [26] (Slynn LJ); *R (Ullah) v Special Adjudicator; Do v Immigration Appeal Tribunal* [2004] UKHL 26; [2004] 2 A.C. 323, [20] (Bingham LJ).

³⁰⁹ Jonathan Lewis, 'The European Ceiling on Human Rights' [2007] PL 720.

³¹⁰ *R (Prolife Alliance) v BBC* [2002] EWCA Civ 297; [2002] 2 All ER 756, 771-772; also R. Masterman, 'Section 2(1) of the Human Rights Act: Binding domestic courts to Strasbourg?' [2004] PL 725; Elizabeth Wicks, 'Taking Account of Strasbourg?' above n 296.

Supreme Court decision in *Powell*.³¹¹ As Paterson has written, in this series of ‘fraught exchanges’, the House of Lords were split between a group opposed to the Convention destabilising a key part of the common law relating to property and an opposing group who were more content to follow Strasbourg.³¹² In *Qazi*, although the House of Lords unanimously held that Article 8 was engaged the majority (Lord Hope, Lord Scott and Lord Millett) held—contrary to the relevant Strasbourg jurisprudence—that Article 8 was not infringed. By the time the matter came back to the House of Lords in *Kay*,³¹³ Strasbourg had decided *Connors v UK* the other way.³¹⁴ The majority (Lord Hope, Lord Scott and Lady Hale) in the House of Lords repeated their objections to the Strasbourg position. The saga went for another round with the Strasbourg decision in *McCann*,³¹⁵ which took the minority view in *Kay*. When the matter came back in *Doherty*,³¹⁶ The majority (again Lord Hope and Lord Scott, along with Lord Rodger and Lord Walker)³¹⁷ explained the reluctance to follow the Strasbourg line on the basis that the Strasbourg Court had not ‘fully appreciated the very real problems that are likely to be caused if [the court] were to depart from the majority view in *Kay*’.³¹⁸

³¹¹ *Qazi v Harrow London Borough Council* [2003] UKHL 43; *Hounslow London Borough Council v Powell* [2011] UKSC 8. For an account of the cases and the state of the law relating to possession proceedings leading up to *Powell* see e.g. Ian Loveland, ‘The shifting sands of article 8 jurisprudence in English housing law’ (2011) 2 EHRLR 151.

³¹² Alan Paterson, *Final Judgment: the Last Law Lords and the Supreme Court* (Hart 2013), 228.

³¹³ *Kay v Lambeth London Borough Council* [2006] UKHL 10.

³¹⁴ *Connors v United Kingdom* (2004) 40 EHRR 189.

³¹⁵ *McCann v United Kingdom* (2008) 47 EHRR 913.

³¹⁶ *Doherty v Birmingham City Council* [2008] UKHL 57.

³¹⁷ Although Paterson notes that Lord Walker expressed ‘grave disquiet while concurring only because he felt bound by the principles of stare decisis to do so’: Alan Paterson, *Final Judgment*, above n 312.

³¹⁸ *Doherty v Birmingham City Council* [2008] UKHL 57, [20] (Lord Hope).

Once *Kay* was decided in Strasbourg (predictably endorsing the minority from the House of Lords),³¹⁹ this internal conflict took a sharp turn. By the time the matter returned in *Pinnock*,³²⁰ the jurisdiction of the House of Lords had transferred to the Supreme Court who, in the unanimous decision of a 9-strong court, retreated to a position of guarded loyalty to the Strasbourg jurisprudence. Lord Neuberger authored the single judgment, explaining that where there is

a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line.³²¹

A year later, a 9-strong Supreme Court endorsed the approach again, in *Powell*.³²²

These fluctuations in the approach of the top court are also clear outside of the possession proceeds saga. Prior to the retreat in *Pinnock* and *Powell*, the Supreme Court had decided *Horncastle*, which chapter eight argues represents one of the clearest examples of a ‘departure’ from the relevant Strasbourg jurisprudence.³²³ The Court changed direction again in *Cadder*, considering itself compelled to follow the Strasbourg jurisprudence on the

³¹⁹ *Kay v United Kingdom* [2011] (Application no 37341/06) [2011] HLR 2, 21 September 2010.

³²⁰ *Manchester City Council v Pinnock* [2010] UKSC 45.

³²¹ *Ibid*, [48] (Lord Neuberger).

³²² *Hounslow London Borough Council v Powell* [2011] UKSC 8.

³²³ Chapter eight from n 791.

right to a fair trial. The current mood turns back the other way; a number of Supreme Court Justices have recently set out the view that the time has come to reconsider the *Ullah* type loyalty to the Strasbourg jurisprudence.³²⁴ The once well-ingrained temptation to ‘mirror’ the Strasbourg line appears to have been diluted. It appears that the weight of Strasbourg authority is tending back towards persuasive, in the optional sense discussed above.³²⁵

But even if not considered to be more than persuasive, it at least appears that the Strasbourg jurisprudence ranks higher than the jurisprudence of foreign domestic courts. Mak has argued that this is part and parcel of an ‘acknowledgement by British judge of a certain ideological affinity with the Strasbourg Court’.³²⁶

In comparison with other courts the Strasbourg case law is considered to fit the ideological framework of the British highest court regarding human rights protection relatively well. A judge mentioned [in Mak’s interviews] that the UK Supreme Court used to refer more often to the Supreme Court of Canada, which developed important human rights case law after the introduction

³²⁴ E.g. Lord Wilson proposed reconsidering the *Ullah* principle in *Sugar v British Broadcasting Corporation* [2012] UKSC 4, [59] (discussed further in chapter eight). Extra judicially, see e.g. Lord Sumption, ‘The Limits of Law’, 27th Sultan Azlan Shah Lecture (Kuala Lumpur, 20 November 2013); Lord Judge, ‘Constitutional Change: Unfinished Business’ (University College London, 4 December 2013) Brenda Hale, ‘Argentorum Locutum: Is Strasbourg or the Supreme Court Supreme? (2012) 12 (1) Human Rights Law Review 65; Lord Phillips, ‘Strasbourg Has Spoken’ in Burrows, Johnston and Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford University Press 2013), 118.

³²⁵ Paterson was tempted to conclude that the fluctuations in the approach of the top court in part reflect the political dynamics surrounding the 2010 general election, the threats to the Human Rights Act from the political right, the Brighton Declaration and the more recent prisoner voting saga. See further Alan Paterson, *Final Judgment*, above n 312, 232; Chapter eight from n 791.

³²⁶ Elaine Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (Hart Publishing 2013), 143.

of the Canadian Charter of Rights and Freedoms in 1982. However, this judge observed that the UK Supreme Court is now shifting its attention to Strasbourg, as it considers the Canadian Supreme Court's jurisprudence to be too liberal.³²⁷

An unofficial 'hierarchy' of persuasive authorities seemed to be well established among some of the Justices interviewed for this study. Lord Dyson, for example, explained that the approach in Convention cases would be to start with House of Lords or Supreme Court cases, if there were any. After those would come the Strasbourg jurisprudence, and after those the domestic courts but that the latter were 'considerably down the list'.³²⁸ The logic is intelligible: it 'reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court'.³²⁹ Courts are able to use the jurisprudence of the supranational court as a barometer. Moreover, as Masterman has suggested, the case law of jurisdictions not signatory to the European Convention is 'unlikely to point to the direction in which the common law should be developed to ensure compatibility with the Convention rights'.³³⁰

³²⁷ Ibid.

³²⁸ Interview with The Rt. Hon. Lord Dyson MR, former Justice of the United Kingdom Supreme Court (The Supreme Court, London, 1 May 2012).

³²⁹ *Ullah*, above n 308, [20] (Bingham LJ).

³³⁰ Roger Masterman, 'Taking the Strasbourg jurisprudence into account' developing a 'municipal law of human rights' under the Human Rights Act' [2005] 54(4) ICLQ 907, 923.

4.2 Legitimacy of using foreign jurisprudence

Part of the difficulty with using the jurisprudence of foreign domestic courts is that Parliament has offered no instruction, making the guiding principles behind the use of these sources more obscure. Obscurity in judicial reasoning does not sit comfortably with the principles of transparency and predictability, which are integral to the usual understanding of the rule of law.³³¹ Predictably, the lack of clear guiding principles has given rise to some debate about the legitimacy of using foreign jurisprudence in the first place. As Cram has suggested, resort to foreign jurisprudence has the potential to pose ‘awkward questions concerning judicial forays into the policy-making realm of the constitution and the erosion of parliamentary sovereignty’.³³²

In the United States, where the debate is most polarised, an argument has been developing about the use of foreign jurisprudence in cases of constitutional interpretation for some time. Following several controversial decisions of the United States Supreme Court, commentators have questioned the motivation and mandate for using foreign jurisprudence in cases of constitutional interpretation. Although this debate revolves around questions that are arguably specific to the United States, there are some transferrable themes since the debate engages with broader questions about

³³¹ See generally Tom Bingham, *The Rule of Law* (Penguin 2011); Lord Bingham, ‘The Rule of Law’ [2007] CLJ 67.

³³² Ian Cram, ‘Resort to foreign constitutional norms in domestic human rights jurisprudence with reference to terrorism cases’ [2009] CLJ 118, 125.

sources of law, the nature of 'authority', the role of the judge, judicial reasoning and the globalisation of the courts.³³³

On a very basic level, to draw from foreign jurisprudence supports the simple premise that collective deliberation will produce a better solution.³³⁴ Many minds may weed out bad judgements through an evolutionary process, while the multiple analyses may contribute different perspectives. In turn, these may lead to better deliberation and better conclusions. Those who support the practice of domestic courts using foreign jurisprudence in their judgments often cite the benefits of seeking guidance 'from the accumulated legal experience of mankind'.³³⁵ 'If I have a difficult case and a human being called a judge, though of a different country, has had to consider a similar problem, why should I not read what that judge has said? It will not bind me, but I may learn something'.³³⁶ It is illogical, the argument goes, to ignore the 'established body of findings to which others have contributed over the

³³³ Norman Dorsen, 'A conversation between U.S. Supreme Court justices' (2005) 3(3) *International Journal of Constitutional Law* 519; Vicki Jackson 'Comparative constitutional federalism and transnational judicial discourse' (2004) 2(1) *International Journal of Constitutional Law* 91; See also Jo Eric Khushal Murkens, 'Comparative Constitutional Law in the Courts: Reflections' (2008) LSE Law, Society and Economy Working Papers 15/2008 <<http://papers.ssrn.com/abstract=1268487>> accessed 03 February 2011, 1 (Abstract); Richard Posner, 'No Thanks, We Already Have Our Own Laws' *Legal Affairs* July/Aug 2004 <http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp> accessed 01 August 2013. Cf Vicki Jackson, 'Yes Please, I'd Love to Talk with You' *Legal Affairs* July/Aug 2004 < http://legalaffairs.org/issues/July-August-2004/feature_jackson_julaug04.msp> accessed 13 August 2013.

³³⁴ Anne-Marie Slaughter, 'A Typology of Transjudicial Communication', (1994) 29 *University of Richmond Law Review* 99, 132.

³³⁵ Jeremy Waldron, 'Foreign Law and the Modern *Ius Gentium*' (2005) 119 *Harvard Law Review* 129, 140.

³³⁶ Norman Dorsen, 'A conversation between U.S. Supreme Court justices' (2005) 3(3) *International Journal of Constitutional Law* 519, 523 (Justice Breyer).

years'.³³⁷ The argument is usually reinforced by analogy to scientific study.

As Waldron explains:

Existing science claims neither unanimity among scientists nor infallibility; nevertheless, it stands as a repository of enormous value to individual researchers as they go about their work, and it is unthinkable that any of them would try to proceed without drawing on that repository to supplement their own individual research and to provide a basis for its critique and evaluation.³³⁸

Foreign jurisprudence is therefore 'available to lawmakers and judges as an established body of legal insight, reminding them that their particular problem has been confronted before and that they like scientists, should try to think it through in the company of those who have already dealt with it'.³³⁹ The South African Constitutional Court's approach to foreign jurisprudence proceeds on these grounds. It has explained that '[c]omparative research is generally valuable, and is all the more so when dealing with problems new to our jurisprudence but well developed in mature constitutional democracies'.³⁴⁰ Indeed, Rautenbach's recent empirical study of the South African Constitutional Court's use of foreign jurisprudence shows the court to be among the heaviest users of comparative law in the world.³⁴¹

³³⁷ Jeremy Waldron, 'Foreign Law and the Modern *Ius Gentium*', above n 335, 139.

³³⁸ *Ibid* 132-133.

³³⁹ *Ibid* 132-133.

³⁴⁰ *Sanderson v Attorney-General, Eastern Cape 1998 (2) SA 38 (CC)* (emphasis added); Rabinder Singh, 'Interpreting Bills of Rights' [2008] Stat LR 82. The South African Constitution expressly says that '[w]hen interpreting the Bill of Rights, a court, tribunal or forum may consider foreign law' (Constitution of the Republic of South Africa 1996 s.39(1)(c)) but that it 'must consider international law' (s.39(1)(b)).

³⁴¹ Christa Rautenbach, 'South Africa: Teaching an 'Old Dog' New Tricks? An Empirical Study of the Use of Foreign Precedents by the South African Constitutional Court (1995-2010), in

The 'many minds' theory, however, has lost momentum and is often criticised for being stylised or pitched at a high level of abstraction.³⁴² It has also been viewed with scepticism by those who see foreign jurisprudence as irrelevant to the interpretative task of the judge. The arguments in the US debate on foreign authority exemplify this well. The primary objection to the judicial use of foreign jurisprudence in US constitutional cases is usually derived from a so-called 'originalist' view, whereby the task of interpreting the constitution 'is to try to understand what it meant' and 'what it was understood by the society to mean when it was adopted'.³⁴³ The other viewpoint is that it is the task of judges to interpret the Constitution in light of the present day and that it is appropriate to do so in the context and culture in which the issues arise. Justice Breyer, for instance, sees himself as interpreting the Constitution of the United States '...in today's world' and that 'where similar relevant experience becomes more and more common we are more likely to learn from other countries'.³⁴⁴

The objection to this approach is sometimes connected to concerns about the quality and standing of foreign jurisprudence. Not too long ago the late Lord Bingham wrote about the earlier reluctance of English courts to draw

Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing 2013), 194, 411-12.

³⁴² Adrian Vermeule, 'Many-Minds Arguments in Legal Theory' (2008) Harvard Public Law Working Paper No. 08-02 <<http://ssrn.com/abstract=1087017>> accessed 5 July 2011.

³⁴³ Norman Dorsen, 'A conversation between U.S. Supreme Court justices', above n 336, 525 (Justice Scalia).

³⁴⁴ *Ibid* 537 (Justice Breyer).

from foreign jurisprudence, feeling the ‘unquestioning belief in the superiority of the common law and its institutions’ to be at the root of the matter:³⁴⁵

When I started in practice, it was an almost universal article of faith that English law and legal institutions were without peer in the world, with very little to be usefully learned from others...³⁴⁶

This attitude lingers in the United States. Several of the participants in the foreign authorities debate there have expressed scepticism about the value in borrowing from certain jurisdictions not previously famous for the quality of their human rights decisions.³⁴⁷

Moreover, using foreign jurisprudence as an aid to constitutional interpretation is said to undermine the authority of the original text and risk importing a meaning that was not intended when the constitution was drafted. Since judges in UK human rights cases are not reasoning by reference to an original text, the emphasis on retaining the original meaning and sovereignty of the constitutional text is itself irrelevant. In fact the absence of such an instrument may itself provide the opportunity for comparativism. As Lord Mance has recently put it, ‘without the constraints of a constitution or code,

³⁴⁵ Tom Bingham, ‘There is a World Elsewhere: the Changing Perspectives of English Law’ (1992) 41 ICLQ 513, 514.

³⁴⁶ Ibid.

³⁴⁷ Norman Dorsen, ‘A conversation between U.S. Supreme Court justices’ (2005) 3(3) International Journal of Constitutional Law 519, 528 (Justice Breyer): ‘I may have made what one might call a tactical error in referring to a case from Zimbabwe—not the human rights capital of the world’.

the legal systems of England and Scotland have a particular freedom to look to other systems'.³⁴⁸

The underlying tension between judicial interpretation and judicial law making, however, remains important. This is a tension that is usually marched alongside accusations of the 'cherry picking' of jurisdictions from which citation occurs. These charges are discussed in further detail in later chapters, where the purposes for using foreign jurisprudence are given a more lengthy analysis. For now it is sufficient to note that a piecemeal or arbitrary approach to foreign jurisprudence is not one normally aligned with an interpretative exercise and tends to detract from the legitimacy of citing such sources.

It is not hard to see why. Used in this way, foreign jurisprudence may simply be ornamental, cited when it suits the court to do so. Waldron notes that 'reference to official judgments, whether local or foreign, helps rescue judges from a feeling of intellectual nakedness',³⁴⁹ whereas Posner describes the judicial search for quotations and citations of foreign jurisprudence (as well as previous decisions) as an effort 'to further mystify the adjudicative process and disguise the political decisions that are at the core of the Supreme Court's output'.³⁵⁰ Slaughter has added that 'citation of [foreign decisions]

³⁴⁸ Lord Mance, 'Foreign Laws and Languages' in Burrows, Johnston and Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford University Press 2013), 87

³⁴⁹ Jeremy Waldron, 'Foreign Law and the Modern *Ius Gentium*', above n 335, 138.

³⁵⁰ Richard Posner, 'No Thanks, We Already Have Our Own Laws', above n 277; See also Dianne Marie Amann, "Raise the flag and let it talk": on the use of external norms in

seems most likely to reflect a calculation by the listening court that evidence of foreign support or parallel reasoning will strengthen its own decision'.³⁵¹ Indeed, it is not universally accepted that legal citations are necessarily connected to the outcome in any given case:

Legal sophisticates these days worry little about the ins and outs of citation, tending instead to cast their lot with the legal realists in believing that the citation of legal authorities in briefs, arguments, and opinions is scarcely more than a decoration. Citation may be professionally obligatory, the sophisticates grudgingly acknowledge, but it persists largely as an ornament fastened to reasons whose acceptance rarely depends on the assistance or weight of the cited authorities ... it is a mistake to think that the cited authorities have very much to do with the substance of legal argument or the determination of legal outcomes.³⁵²

It must be true that the potential for ornamental citation is greater than ever before. Technological developments, in particular, have had a profound effect and the World Wide Web has made available a burgeoning pool of materials. As Wilson and Horne have commented:

...from about the mid-1990s judgments started to become available on the internet. Previously, most unreported judgments effectively vanished. With the internet—coupled with the growing

constitutional decision making' (2004) 2(4) *International Journal of Constitutional Law* 597, 605: 'Foreign law has tended to appear as an expendable afterthought, a gratuitous remark on alien practice'.

³⁵¹ Anne-Marie Slaughter, 'A Typology of Transjudicial Communication', above n 334, 119.

³⁵² Frederick Schauer, 'Authority and Authorities', above n 254, 1932.

number of specialist series—almost every judgment is now freely available to counsel.³⁵³

The effect is recognised in the first paragraph of the ‘Practice Direction on the Citation of Authorities’:

In recent years, there has been a substantial growth in the number of readily available reports of judgments in this and other jurisdictions, such reports being available either in published reports or in transcript form. Widespread knowledge of the work and decisions of the courts is to be welcomed. At the same time, however, the current weight of available material causes problems both for advocates and for courts in properly limiting the nature and amount of material that is used in the preparation and argument of subsequent cases.³⁵⁴

However, the research findings do not indicate a strong inclination on the part of the Supreme Court Justices towards ornamental citations for the purpose of strengthening decisions in the manner described by Schauer above. In fact, not all of the Justices felt that the vast numbers of cited authorities would always be an advantage. Lord Reed considered that very numerous citations could often be ‘a sign of the weakness of an argument’.³⁵⁵ There is also a limit to the number of authorities that can realistically be used, as Lord Kerr explained:

... if you attend an appeal hearing that’s going to last two or three days in the Supreme Court and which involves a number of human

³⁵³ James Wilson and Alexander Horne, ‘Judgment Matters’, (2010) *New Law Journal* 7446 <<http://www.newlawjournal.co.uk/nlj/content/judgment-matters>> accessed 18 August 2013.

³⁵⁴ *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001; [2001] 2 All ER 510, [1].

³⁵⁵ Interview with The Rt. Hon. Lord Reed, Justice of the United Kingdom Supreme Court (The Supreme Court, London, 8 May 2012).

rights issues, you will see vast bundles of authorities, most of which are never referred to.³⁵⁶

The mere presence of foreign jurisprudence in the bundles would not therefore prompt the use of those sources by the Supreme Court.

The case law also hints at reluctance to use comparative sources in this way.

Consider, for example, Lord Carnwath's comments in *ANS v ML* [2012]

UKSC 30:

We were referred to numerous cases dating back over more than 20 years, dealing with the rights of children and parents in similar contexts. ... In general little help is likely to be gained by detailed comparative or historical analysis. In the present case, as Lord Reed has shown, the relevant Strasbourg principles are readily apparent from the most recent cases, and the leading UK authorities, as cited in his judgment.³⁵⁷

When interviewed, Lord Clarke noted that the cases referred to in the judgments are 'very often the tip of the iceberg in terms of what is actually considered ... one simply can't refer to every case that was referred to ...' and pointed to some thick bundles of authorities to show the size of the practical problem. It is not surprising, therefore, that the comparative authorities which Lord Carnwath had implied were referred to by counsel in *ANS* are not found in the published judgment.

³⁵⁶ Interview with The Rt. Hon. Lord Kerr of Tonaghmore, Justice of the United Kingdom Supreme Court (The Supreme Court, London, 9 May 2012).

³⁵⁷ *ANS and another v ML (AP) (Scotland)* [2012] UKSC 30, [67] (Lord Carnwath).

If it were the case that citations represent little more than decoration, they could surely be left out altogether, as Lord Carnwath apparently felt able to do here. Indeed during the data collection stages of research, it was clear even from the smaller number of references given in the law reports (as opposed to the full lists that would be found in the printed cases) that counsel frequently cited foreign jurisprudence which did not subsequently appear in the judgments. Some of the interviewed judges explained the discrepancy. Reflecting on the length of judgments in some jurisdictions, Lord Walker pointed out the size of the ‘bundle’ of authorities given to them by counsel (prior to the oral hearing), some of which included over 300 cited cases.³⁵⁸ The numbers of citations was, he felt, ‘terrifying, and one of the reasons that litigation is so expensive’.³⁵⁹ Moreover, ‘a judgment shouldn’t be a textbook. It shouldn’t try and refer to all the relevant cases’.³⁶⁰

Since judges decide cases on the basis of reasoned arguments, it is expected that there would be a strong correlation between materials referred to by counsel and those cited in the judgments. However, without access to the printed cases, it is impossible to quantify the full extent of counsel’s submissions so as to prove this correlation.³⁶¹ The most that can be claimed

³⁵⁸ Lord Walker also gave a rare insight into these bundles of authorities in *HJ (Iran) v Secretary of State for the Home Department; HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31, [87]: ‘After all the carefully-researched debate that the Court has heard and participated in (we have had 23 bundles of authorities containing 250 different items)...’

³⁵⁹ Interview with The Rt. Hon. Lord Walker of Gestingthorpe, former Justice of the United Kingdom Supreme Court (The Supreme Court, London, 15 May 2012).

³⁶⁰ *Ibid.*

³⁶¹ Law reports may provide a summary of the arguments but these are not extensive. The reports also tend to list cases cited by counsel as additional to those cited in judgment, making the correlation between the two unclear.

is that there is a general perception that counsel at the Supreme Court would be likely to refer to foreign jurisprudence. Lord Clarke felt this to be obvious from the quality of counsel at the Supreme Court:

The great thing about being in the Supreme Court is that we have, on the whole, very high quality counsel, who spend a great deal of time preparing every conceivable argument on every conceivable point and quite a few inconceivable points. And so they'd think nothing of filling the books with endless references to jurisprudence from all around the world.³⁶²

Baroness Hale also explained that this was always going to be more likely at the highest appellate court:

... you will find big variations as between this court and the Court of Appeal and the High Court, because obviously, any advocate preparing a case has got to think, 'how interested will the Court be in this comparative material?' ... it costs money to cast your net wider and it's pretty tricky for them ... to predict the level of interest that there will be in a very busy court, whereas they can be pretty certain that, by the time it gets to us, we will want to know whether there is anything helpful in the rest of the world.³⁶³

If the citation of foreign jurisprudence does follow from references made by counsel especially those made during the oral arguments, courtesy may be a factor. As Wilson and Horne explain: 'counsel feel able, and often obliged, to cite multiple authorities and judges, in turn, feel compelled to deal with all of

³⁶² Interview with The Rt. Hon. Lord Clarke of Stone-cum-Ebony, Justice of the United Kingdom Supreme Court (The Supreme Court, London, 9 May 2012).

³⁶³ Interview with The Rt. Hon. Baroness Hale of Richmond, Justice of the United Kingdom Supreme Court (The Supreme Court, London, 19 October 2011).

them’.³⁶⁴ Although they considered the practice likely to be more acute in the lower courts (where a judge may prefer to deal with as many of the authorities as possible by way or a pre-emptive strike ‘lest failure to do so results in an appeal’), it is evident that similar considerations apply at the most senior level. For example, Lord Reed described during interview that foreign jurisprudence might come to his attention while reading into the academic literature on a problem. That jurisprudence, he explained, may not necessarily find its way into the judgment unless it were directly on point and important—in which case it would just be ‘good manners, apart from anything else, to acknowledge the idea you’ve found somewhere else’.³⁶⁵ Citations made out of courtesy was also a theme picked up by Mak in her interviews:

The attitude of the British judges in particular has consequences for the use that is made of judgments from foreign courts. ... If an argument is found in a foreign judgment and used in the reasoning of the case at hand, it is only courteous to mention the author, as one Supreme Court judge stated.³⁶⁶

Bell later agreed and argued that evidence of courteous citations could be found in the Supreme Court’s recent case law:

Knowsley very much reflects courtesy to counsel, who had presented the material at length and so merited a response, even if it was not very positive. Certainly Lord Mance's comments reflect a concern to show that he had considered the material, even if he

³⁶⁴ James Wilson and Alexander Horne, ‘Judgment Matters’, above n 353.

³⁶⁵ Interview with The Rt. Hon. Lord Reed, above n 355.

³⁶⁶ Elaine Mak, ‘Why do Dutch and UK judges cite foreign law?’ [2011] CLJ 420, 444-45; Elaine Mak, *Judicial Decision-Making in a Globalised World*, above n 326, 150-151.

felt he could come to a decision without having to make a final decision on the value of that material.³⁶⁷

There are numerous other examples in the Supreme Court's case history to demonstrate this sort of approach. For example, in *HJ Iran v Secretary of State of the Home Department* Lord Hope made a point of noting that 'the court was referred to a number of decisions in Australia, New Zealand, South Africa, the United States and Canada' and went on to spend five paragraphs reviewing those authorities, presumably to explain his conclusion that they did not 'reveal a consistent line of authority' on the point.³⁶⁸

Nevertheless, citations of this kind are not necessarily ornamental in the 'decorative' sense described by Schauer above. At the very least, it is a fundamental feature of judgment writing that reasons are given for the conclusions reached. As many academics point out, the giving of principled reasons for judgments is a core aspect of the rule of law and judicial accountability.³⁶⁹ It is no surprise, then, that a judge would address arguments put to him by counsel and seek to explain why he did or did not take the same view (especially, perhaps, in the case of the latter).

³⁶⁷ John Bell, 'Comparative Law in the Supreme Court [2012] 1.2 CJICL 20, 22, citing *Knowsley MBC v Willmore* [2011] UKSC 10.

³⁶⁸ *HJ (Iran) v Secretary of State for the Home Department; HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31, [30]-[34].

³⁶⁹ See e.g. Andrew Le Sueur, 'Developing mechanisms for judicial accountability in the UK' 2004 *Legal Studies* 73, 76. Le Sueur lists 'the common practice of giving reasons, well written judgments' as one of a number of practices that form accountability arrangements. Others would include the fact that most courts sit in public and the possibility that judgments are appealable to a higher judicial body.

A slightly different version of the courtesy point is that judges may cite foreign jurisprudence (or any jurisprudence) out of respect for a particular court or jurist. In other words, a judge might cite foreign jurisprudence in their judgment if it has been thought to provide a particularly well-reasoned account of the relevant issue, even where the conclusion in the domestic case is not in line with that authority. In these circumstances it might look like foreign jurisprudence is being formally distinguished, in the manner of binding precedent. When raised in the interviews with some of the Justices, two possible explanations were given. The first was a speculation that it might be a means of showing respect to the jurist who had authored the judgment in question. The second was that judges may do this simply as part and parcel of the duty to give reasons—in this case explaining why a source has not been very persuasive especially if counsel have placed emphasis on it in the arguments. This explanation ties in with the earlier discussions of showing respect to counsel and was best articulated by Lady Justice Arden, in the Court of Appeal:

Most likely [foreign jurisprudence is distinguished] because it has been cited and ... if you're turning away a party and holding that their case must be rejected, if they've relied on some foreign authority and made a big point of it then you have to deal with it.³⁷⁰

Nevertheless the prevailing feeling in the UK is that judgments are already too long and that citations of this kind would be increasingly unlikely. The Justices of the Supreme Court are visibly taking steps to reduce the length of

³⁷⁰ Interview with The Rt. Hon. Lady Justice Arden, Lord Justice of Appeal (Royal Courts of Justice, London, 7 December 2011).

their reasoning.³⁷¹ Ornamental citations of foreign jurisprudence are therefore less and less likely to be a feature of judicial reasoning. Indeed none of the interviewed Justices expressed the view that superfluous citations of this kind would be a useful addition to a judgment. Lord Kerr's assessment was that:

... to add to the authorities that we consider by casting around in domestic courts is probably not going to be a profitable exercise. Ultimately ... the outcome of these cases depends critically on your own powers of analysis. Reference to authority, be it domestic, supranational, international or whatever, is always going to be by way of supplement to your own reasoning in the case. Hopefully to confirm the views that you have formed and, occasionally, to shape those views. But I see that very much in a secondary—an extremely important but nevertheless secondary – role.³⁷²

The dismissive view adopted by Schauer's legal realists therefore cannot provide a satisfactory explanation for citations of foreign jurisprudence at the UK Supreme Court. The Justices are not interested in padding out judgments by referencing foreign jurisprudence. Moreover, if the explanations given by Lord Walker, Lord Kerr and Lord Reed above explain anything about the use of foreign jurisprudence it is that citations would probably only be relevant if directly on point and important.

³⁷¹ The most obvious example is the common use of single and plurality style judgment (As discussed in chapter five, text from n 514) even if the reality isn't quite as envisaged. Paterson's empirical research revealed that 'on average, sole leading judgments are longer than multiple leading judgments in the Supreme Court'. Alan Paterson, *Final Judgment: the Last Law Lords and the Supreme Court* (Hart 2013), 106-107 and n161.

³⁷² Interview with The Rt. Hon. Lord Kerr of Tonaghmore, above n 356..

The attitude is more severe in the United States. Justice Scalia of the US Supreme Court has repeatedly denounced any reference to foreign jurisprudence as a practice that ‘invites manipulation’.³⁷³ Dissenting in *Roper v Simmons*,³⁷⁴ Scalia said that ‘to invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry’.³⁷⁵ For Justice Scalia then, citation of foreign jurisprudence is entirely opportunistic: ‘[w]hen it agrees with what the justices would like the case to say, we use the foreign law, and when it doesn’t agree, we don’t use it’.³⁷⁶ The criticism usually derives from a lack of transparency about the use of foreign jurisprudence or a feeling that judges are not applying a methodical approach to the selection of those sources. As Cram has written:

...frequently no clear methodology is adopted to explain why certain sources were considered and others ignored, leaving its practitioners open to accusations of methodological sloppiness and a tendency to judicial activism. The latter charge arises because, critics argue, only those foreign norms that sit comfortably with the judge's moral preferences are ever likely to be invoked.³⁷⁷

An obvious opportunity to level this sort of criticism can be drawn from the propensity of judges use foreign jurisprudence which has not been raised by

³⁷³ Norman Dorsen, ‘A conversation between U.S. Supreme Court justices’, above n 336, 531 (Justice Scalia).

³⁷⁴ *Roper v Simmons* (2005) 543 U.S. 551, 627.

³⁷⁵ *Ibid.*

³⁷⁶ Norman Dorsen, ‘A conversation between U.S. Supreme Court justices’, above n 336, 521 (Justice Scalia).

³⁷⁷ Ian Cram, ‘Resort to foreign constitutional norms...’, above n 244, citing Yash Ghai, ‘Sentinels of Liberty or Sheep in Wolf's Clothing? Judicial Politics and the Hong Kong Bill of Rights’ (1997) 60 MLR 459, 479.

counsel. For example, it is possible that relevant foreign jurisprudence may come to light after the oral hearing or that judges would be willing to engage in extra research into comparative material. Evidence that the late Lord Rodger engaged in research of this kind can be drawn from Tetyana Nesterchuk's—one of his previous judicial assistants—recent account of her role. Nesterchuk explained that written pieces of research to assist with the writing of the judgment would usually be commissioned at the post-deliberation meetings with Lord Rodger (after the oral hearing in any given case) but that Lord Rodger would often carry out his own research in parallel.³⁷⁸ She continued:

I soon discovered that I was linguistically ill-equipped to assist Lord Rodger who could read a number of languages, including French, German and Italian, and would often look up decisions from foreign jurisdictions to inform or supplement his judgments.³⁷⁹

When interviewed, Lord Phillips implied that this was a relatively frequent occurrence at the Supreme Court:

We do a bit of our own research on areas of foreign law ... that was particularly the case with Lord Collins. He would almost always go off and do some research and come up with a chunk of his judgment which didn't owe very much to counsel.³⁸⁰

Lord Collins explained in the interview that there were a number of factors that led him to conduct independent research of this kind. The first was to do with expense: while in big commercial cases few expenses are spared, in

³⁷⁸ Tetyana Nesterchuk, 'The View from Behind the Bench' in Burrows, Johnston and Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford University Press 2013), 109.

³⁷⁹ *Ibid.*

³⁸⁰ Interview with The Rt. Hon. Lord Phillips of Worth Matravers, above n 293.

others such as human rights cases, looking into foreign jurisprudence may not be included in the advocate's fee but may nevertheless be helpful for the court to hear about it. The second factor was a question of practicality: it was 'not for counsel to start looking at American law when they are not familiar' with the exercise—'these things take time'.³⁸¹ Lord Collins felt himself well placed to look into these matters and fill voids left by counsel.

Some of the justices felt this to be a bigger problem than others. Lord Kerr, for example, considered that if that jurisprudence was in any way controversial it was important that counsel should be given the opportunity to make submissions on it:

If counsel had not made submissions on this particular theme, and we subsequently discovered that there was a rich vein of jurisprudence to be mined from other jurisdictions, there would be two alternatives: ... if it was in any way controversial, if there were arguments to be made on either side of the particular theme, I think it's likely that we would invite submissions from counsel on it. More usually submissions in writing, but occasionally—very occasionally—we have found ourselves in a situation (and I'm not now talking about foreign jurisprudence) where after deliberations between the Justices, issues have arisen which we feel were not sufficiently canvassed in the appeal hearing and we have reconvened to allow counsel to address those.³⁸²

³⁸¹ Interview with The Rt. Hon. Lord Collins of Mapesbury, retired Justice of the United Kingdom Supreme Court (The Supreme Court, London, 22 May 2012).

³⁸² Interview with The Rt. Hon. Lord Kerr of Tonaghmore, above n 356. The issue of judges referring to material that was not raised by counsel is given further discussion in chapter 5, from n 428.

It is therefore considered to be sufficient that counsel have been given the opportunity to consider an argument that the Justices plan to use in the determination of the case. However, if the position was felt to be ‘sufficiently clear so as not to require further submissions’, the Court might ‘conduct the research ourselves and take whatever course that jurisprudence led us to’.³⁸³

This latter suggestion risks controversy. In such circumstances it is easy to sympathise with Justice Scalia’s feeling that citations of foreign jurisprudence are largely opportunistic. It is the task of judges to decide cases on the basis of reasoned arguments and the idea that a judge might conduct their own research, independently of the arguments given by counsel, runs the risk of obscuring the reasons for their conclusions and compromising the transparency upon which the legitimacy of the judicial process is founded. At the extreme, such techniques may be considered to render a trial unfair for the purposes of Article 6 of the ECHR since the essence of a fair trial is that the parties are entitled to hear and reply to the case against them.

Perhaps for these sorts of reasons, Lord Clarke explained that ‘one is generally reluctant ... to decide cases on arguments that were never run’ and that the preference would be ‘not to cite important authorities that were never mentioned’.³⁸⁴ Lord Sumption explained that even reliance on written submissions ‘would be very unsatisfactory on a brand new area’.³⁸⁵ It would risk ‘counsel passing like ships’ and one would ‘not [be] able to ask them

³⁸³ *Ibid.*

³⁸⁴ Interview with The Rt. Hon. Lord Clarke of Stone-cum-Ebony, above n 362.

³⁸⁵ Interview with The Rt. Hon. Lord Sumption, above n 294.

about points which you need to clarify'.³⁸⁶ Thus even where relevant material has been found independently of counsel's arguments, the Supreme Court will try to give counsel the opportunity to address them on it. If a Justice were to be influenced by foreign jurisprudence that was considered independently of counsel's arguments, it would always be referenced in the judgment. As Lord Kerr put it:

If I, in writing a judgment, have been influenced by a foreign judgment, I will say so. I will not ... keep it in the background and allow it to inform my thinking but not refer to it in the judgment. I think that would be ... a very curious way of writing a judgment: allowing yourself to be influenced by a factor which you don't refer to.³⁸⁷

In any case, foreign jurisprudence is not generally used as a 'magical ace of trumps'.³⁸⁸ Lord Collins felt 'sure that [he had] never been turned by foreign law'.³⁸⁹ At best he 'might have been confirmed in [his] feelings'.³⁹⁰ Such research would be 'very much icing on the cake' (and preferably prior to the arguments 'so that you can put any tricky matters to them').³⁹¹ Lord Justice Sedley was of a similar mind when contributing to a 'roundtable' on comparative constitutionalism:

Comparative constitutional law is of infinite interest but of little or no practical value in constitutional adjudication (...) My sympathies

³⁸⁶ Ibid.

³⁸⁷ Interview with The Rt. Hon. Lord Kerr of Tonaghmore, above n 356.

³⁸⁸ Tom Bingham, *Widening Horizons* (Cambridge University Press 2010), 7-8.

³⁸⁹ Interview with The Rt. Hon. Lord Collins of Mapesbury, above n 381.

³⁹⁰ Ibid.

³⁹¹ Ibid.

are with the British academic who has described the practice—not the theory—of comparative law as judicial tourism. Tourism is enjoyable and informative, but the artifacts which you bring back cannot be more than decorative. The real value of what you learn is to enhance your appreciation of your own culture. Like other British judges I refer to comparative sources in some of my judgments, a number of them on constitutional issues. But no judge I know anywhere in the world has ever decided a case differently because of persuasive decisions in other jurisdictions. Comparative sources will either amplify the decision which the judge has already decided is the correct one or, at worst, will be sidelined as unhelpful. This is not the isolationism of a Scalia. It is the cosmopolitanism of a Kennedy, a Breyer, a Ginsburg—tempered by judicial realism.³⁹²

A distinction ought to be made, however, between piecemeal citations of foreign cases and citations of multiple foreign cases together presenting a common consensus. To conflate the two would commit the fallacy of composition. Identifying a consensus on a particular issue is one of the most obvious reasons for which judges draw from foreign jurisprudence.³⁹³ For some, referring to a consensus position is the most legitimate way to use foreign jurisprudence. Returning to the science analogy, a consensus represents ‘a dense network of checking and rechecking results’.³⁹⁴ It is more

³⁹² Stephen Sedley, ‘Constitutional Court Judge’ in ‘Comparative Constitutionalism in Practice: Constitutional court judges’ roundtable’ (2005) 3 *International Journal of Constitutional Law* 543, 569–70.

³⁹³ Vlad F. Perju, ‘The Puzzling Parameters of the Foreign Law Debate’, above n 273, 175; Jeremy Waldron, ‘Foreign Law and the Modern *Ius Gentium*’ above n 335, 139.

³⁹⁴ Jeremy Waldron, ‘Foreign Law and the Modern *Ius Gentium*’, *ibid* 145.

than a simple accumulation of authorities and may therefore be more than the sum of its parts.³⁹⁵

For those that see foreign jurisprudence as an opportunity to draw assistance from other judges facing similar problems, a consensus may represent a viewpoint that a judge would be remiss to ignore. As Justice Breyer of the United States Supreme Court has put it, ‘... the fact that everyone in the world thinks one thing is at least worth finding out’.³⁹⁶ For others, this approach is problematic. Identifying and relying upon a consensus in the foreign jurisprudence is to legitimate that authority on the basis of a nose-count; it is the mere fact of that conclusion being reached by a number of foreign jurisdictions that is the justification. Used in this way, the authority of foreign jurisprudence is content-independent and tends towards more than merely persuasive authority. A court draws value not from the reasoning towards the consensus position but from the consensus itself.³⁹⁷ In this situation, the difference between precedential decisions and decisions with merely persuasive authority turns out to be, as Flanders as put it, ‘more a difference in degree than a difference in kind’;³⁹⁸ a kind of ‘super persuasive’ authority.³⁹⁹

³⁹⁵ Jeremy Waldron, ‘Foreign Law and the Modern *Ius Gentium*’, above n 335, 145.

³⁹⁶ Norman Dorsen, ‘A conversation between U.S. Supreme Court justices’, above n 336, 519, (Justice Breyer)

³⁹⁷ Vlad F. Perju, ‘The Puzzling Parameters of the Foreign Law Debate’, above n 273, 178-179; Richard Posner, ‘No Thanks, We Already Have Our Own Laws’, above n 277; Frederick Schauer, ‘Authority and Authorities’ (2008) 94 *Virginia Law Review* 1931, 1944.

³⁹⁸ Chris Flanders, ‘Towards a theory of persuasive authority’, above n 251, 59.

³⁹⁹ *Ibid* 82.

The ‘nose-counting’ exercise is also problematic on the basis that it presumably relies on the consensus theory of truth. Among the most obvious of criticisms is the simple possibility that a consensus can be engineered. Young has related the point well, arguing that a consensus amongst foreign jurisprudence ‘carries no guarantee of moral authority’ because the consensus itself ‘could be the result of international arm-twisting, legitimacy-seeking, or simply a tendency to fall into patterns by imitating the behaviour of other states (“acculturation”)’.⁴⁰⁰

An altogether different situation is the one in which the aim of the exercise is to identify the consensus itself. Such an exercise may be relevant, for example, to a court whose aim is to adjudicate in line with a particular agreement or regime. This point is pertinent to UK human rights cases since UK courts are duty bound by the HRA 1998 to decide cases compatibly with the ECHR.⁴⁰¹ Unlike the US Constitution, which places emphasis on interpreting an original meaning, it is well known that the Convention is said to be a ‘living instrument’, to be interpreted ‘in the light of present-day conditions’.⁴⁰² A by-product of this is that the ECtHR has frequently altered its decisions on the basis of an ‘emerging consensus’. Keeping track of any evolving consensus is an exercise that has, on occasion, been passed down to the domestic

⁴⁰⁰ Ernest A. Young, ‘Foreign Law and the Denominator Problem’, (2005) 119 *Harvard Law Review* 148, 157 (citing Ryan Goodman and Derek Jinks, ‘How to Influence States: Socialization and International Human Rights Law’, (2004) 54 *Duke Law Journal* 621, 638–56); Vlad F. Perju, ‘The Puzzling Parameters of the Foreign Law Debate’, above n 273, 180. Cf Chris Flanders, ‘Towards a theory of persuasive authority’, above n 251, 84: ‘the more courts that have decided a matter in a certain way, the greater weight those decisions may be said to have, and not necessarily because consensus is a measure of truth’.

⁴⁰¹ Section 6(1) and 6(3) Human Rights Act 1998.

⁴⁰² *Tyler v United Kingdom* (1978) 2 EHRR 1 [31].

courts of the United Kingdom.⁴⁰³ When seeking to ‘keep pace’ with the Strasbourg jurisprudence in such cases, UK courts may find the domestic jurisprudence of other signatory states instructive. As the late Lord Bingham wrote:

... the judge's task is not, as in an ordinary domestic case, to ascertain the meaning to be given to an expression in English law: it is to ascertain the autonomous meaning which an expression bears under the Convention.⁴⁰⁴

Courts discharging such a task would be likely to refer to the jurisprudence that the Strasbourg Court would itself be likely to consider. Similar considerations prevail when the Court is interpreting an international Convention with no supranational court. In those cases the case law of foreign domestic courts is of even greater importance; the very purpose of these instruments is to harmonise standards on a particular issue. Consider, for example, the preamble to the 1951 Convention Relating to the Status of Refugees (‘Refugee Convention’), which recognises that ‘a satisfactory solution of a problem of which the United Nations has recognised the international scope and nature cannot therefore be achieved without

⁴⁰³ The duty of a domestic court to keep track of the development in Convention attitudes is most clearly exemplified by a series of judgments on the rights of transsexuals: *Rees v UK* (1987) 9 EHRR 56; *Cossey v United Kingdom* (1991) 13 EHRR 622; *Sheffield and Horsham v United Kingdom* (1999) 27 EHRR 163; *Bellinger v Bellinger* [2001] EWCv Civ 1140. In the earlier cases, the Court held that the refusal of the United Kingdom Government to alter the register of births or to issue birth certificates concerning the recorded gender of the individual could not be considered as an interference with the applicant’s Article 8 right, instead affording the UK a wider margin of appreciation but stressed the importance of keeping appropriate legal measures in this area under review. In *Goodwin v United Kingdom* [2002] EHRR 583 The Strasbourg Court was satisfied that European (and international) consensus had progressed so that the ‘fair balance’ now tilted in favour of the applicants and The House of Lords in *Bellinger* accordingly say the case as an appropriate one for a declaration of incompatibility.

⁴⁰⁴ Tom Bingham, ‘The Human Rights Act’, (2010) 6 EHRLR 568, 572.

international co-operation' (emphasis added).⁴⁰⁵ Similarly, the preamble to the United Nations Convention on the Rights of the Child includes 'Recognizing the importance of international cooperation for improving the living conditions of children in every country'.⁴⁰⁶ Where several jurisdictions are adjudicating with reference to a particular legislative instrument or agreement, the decisions of other jurisdictions may deserve recognition for exactly the same reasons that courts are minded to follow their own past decisions. That is, to uphold the same principles of predictability and stability which are embedded by the rule of law domestically.⁴⁰⁷

Critics point out that this exercise is at odds with the cultural sensitivity of law. Returning to the science analogy, the problem is that it ignores the possibility that law—or interpretations of the law—can alter from one jurisdiction to another. Inescapably, law is a social science and subject to a number of external influences that flow from historic and cultural differences. In reality, local conditions produce difficulties 'which are often subtle and require ... sophisticated analytical tools' to separate them from their 'culturally-determined realities'.⁴⁰⁸

⁴⁰⁵ Convention Relating to the Status of Refugees, Geneva, July 28, 1951, 189 U.N.T.S. (entered into force 4 October 1967), preamble.

⁴⁰⁶ United Nations Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, preamble.

⁴⁰⁷ Chris Flanders, 'Towards a theory of persuasive authority', above n 251, 84.

⁴⁰⁸ Nicholas HD Foster, 'The Journal of Comparative Law: A New Comparative Resource' <<http://www.wildy.co.uk/jcl/pdfs/foster.pdf>> accessed 01 December 2010. Cf Anne-Marie Slaughter, 'A Typology of Transjudicial Communication', (1994) 29 University of Richmond Law Review 99, 127: Recognition of this commonality does not obviate cultural differences, but it assumes the possibility that generic legal problems such as the balancing of rights and duties, individual and community interests, and the protection of individual expectations, may transcend those differences'.

Thus the problem is not the reference to foreign jurisprudence per se. It is the elevation of foreign jurisprudence, often different in character to domestic law, to a position where it is treated it as authoritative in domestic courts: '[t]he problem is not learning from abroad; it is treating foreign judicial decisions as authorities ... as if the world were a single legal community'.⁴⁰⁹ The risk is not lost on the Justices of the Supreme Court. The late Lord Rodger, who is usually said to have been one of the most enthusiastic users of foreign jurisprudence at the Supreme Court, was aware of the issue and apparently voiced it among his colleagues. Lord Mance has recently written that Lord Rodger was 'insistent that the proper use of comparative law cannot permit the loose or selective citation of random foreign material; a full, informed, and up-to-date understanding is necessary'.⁴¹⁰

4.3 Conclusions

The use of foreign jurisprudence is nowhere prohibited and there are no rules governing the practice. First and foremost, therefore, judges use foreign jurisprudence because those sources are available to them in the same way as other persuasive authorities. Nevertheless, foreign jurisprudence represents an unusual kind of persuasive authority. It is unclear, for example,

⁴⁰⁹ Richard Posner, 'No Thanks, We Already Have Our Own Laws', above n 277; Mary Arden, 'The Changing Judicial Role: Human Rights, Community Law and the Intention of Parliament' (2008) 67(3) CLJ 490, 506.

⁴¹⁰ Lord Mance, 'Foreign Laws and Languages', above n 348, 88, citing 'The Use of Civil Law in Scottish Courts' in David L Carey Miller and Reinhard Zimmerman (eds), *The Civilian Tradition and Scots Law* (1997) 225, 228-9; 'Roman Law in Practice in Britain' (1992) *Rechtshistorisches Journal* 261, 269-70; 'Savigny in the Strand' (1993-95) 28-30 *Irish Jurist* 1, 19, where Lord Rodger commended the work of 'scholars like Professor Treitel [in] providing the kind of detailed comparative treatment of particular topics without which, certainly, such a development'—ie the use of codified civil law sources—'can never begin'.

that the usual distinction between persuasive and binding authority—that these carry authority by virtue of content and source respectively—works in the context of foreign jurisprudence. Further obscurity is created by the variety of purposes for which it is used and, in turn, by the anomaly of the consensus theory through which foreign jurisprudence tends towards binding rather than merely persuasive authority.

The problem is to do with methodology. Pointing to examples of arbitrary decision-making ultimately represents a complaint that the working methods behind the use of foreign jurisprudence are unclear. A lack of transparency leaves the door open to charges of judicial activism and illegitimate law making and, as Perju has highlighted, ‘methodological challenges may be fatal to ... the authority of foreign law in such situations’.⁴¹¹

The intuition is that methodological questions—such as which jurisdictions judges should consult, how to check sources and references, how they can escape the dangers of nominalism, and how to assess the relevance of a particular provision or line of reasoning outside of its broader legal, cultural, and historical context—are more difficult to answer in situations of piecemeal comparisons, with serious implications about the integrity of constitutional discourse.⁴¹²

If it is not to be taxed as arbitrary or opportunistic, a system that uses foreign jurisprudence must have some methodical basis. It is the lack of clear guiding principles that is confusing. To extricate these principles it will be necessary to draw together the ways in which judges use foreign jurisprudence, the

⁴¹¹ Vlad F. Perju, ‘The Puzzling Parameters of the Foreign Law Debate’, above n 273.

⁴¹² *Ibid.*

effect of that practice on domestic human rights cases and the processes or influences involved. The answers to these may go a long way towards dispelling some of the increasingly tired complaints about judicial law making. Or, if they must be rehearsed, they may at least refresh the debate. As Waldron has explained, 'we should not reject the idea of a theory of citation of foreign law simply because we see foreign law being cited opportunistically; we should reject it only if we think inconsistent and unprincipled citations is inevitable...'.⁴¹³

⁴¹³ Jeremy Waldron, 'Foreign Law and the Modern *Ius Gentium*', above n 335, 131.

5 How is foreign jurisprudence used?

It was explained in the literature review that most of the published work in the field of judicial comparativism focuses on the legitimacy of using foreign jurisprudence or on the possibility that uses of foreign jurisprudence have provided for a dialogue between courts around the world. All such studies usually make an implicit assumption: that the courts are, in fact, using such sources. Very few, however, seek to set out the reality of the practice, making it difficult to get a real sense of the extent to which courts are actually using foreign jurisprudence. As one recent publication in the field notes, 'studies have focused extensively on the theoretical aspects of this practice ... while empirical analysis of the frequency and meaning of citations remain generally still rare'.⁴¹⁴ This chapter sets out some of the results from the quantitative and qualitative analysis of the judgments handed down by the Supreme Court during the first four years of its activity (2009-2013). Although this research focuses on human rights cases, quantitative data is given on citations of foreign jurisprudence in both human rights cases and non-human rights cases. A holistic view is important in order to understand the general trends in the use of foreign jurisprudence, so as to enable any context specific conclusions to be drawn about human rights cases. The data corroborates some of the accounts given by the existing literature and adds some new contributions. Crucially, the data shows that the Supreme Court is using foreign jurisprudence in human rights cases.

⁴¹⁴ Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing 2013), 3; See also Elaine Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (Hart Publishing 2013), 2.

5.1 Extent to which foreign jurisprudence is used

The first claim in this thesis is that the Justices of the Supreme Court *are* using the jurisprudence of foreign domestic courts. Judgments frequently make references to the decisions of foreign domestic courts. Of the 246 cases handed down by the Supreme Court in the first four years, explicit citations of foreign jurisprudence are found in 77, just over 30% of the total.

Table 1: Proportion of judgments in which at least one decision of a foreign domestic court is explicitly cited, by case type.

	Total judgments handed down between 2009-2013	Total cases with citations of foreign jurisprudence	Cases citing foreign jurisprudence as a percentage of total cases.
All cases	246	77	31.3%
Non-human rights cases	144	42	29.2%
Human rights cases	102	35	34.3%

Some of the literature suggests that a greater use is made of foreign jurisprudence in human rights cases but the empirical research did not find this to be true of the UK Supreme Court.⁴¹⁵ As table 1 shows, the balance is broadly the same whether a case considered a human rights issue or not: of the total 246 cases decided by the Supreme Court in the time period, 144 do not engage human rights issues and explicit citations of foreign jurisprudence can be found in 42 of those, or 29.2%. The remaining 102 can be described

⁴¹⁵ E.g. Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges*, above n 414, 416: 'The research clearly shows that citations of foreign case law prevail in ... human rights decisions'; Christopher McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20(4) OJLS 499, 527, asking 'is there something specific to human rights that explains the apparently greater use of foreign case law in human rights cases?'; Also Jim Murdoch, 'Comparative Law and the Scottish judges' in Esin Örüçü (ed), *Judicial Comparativism in Human Rights Cases* (United Kingdom National Committee of Comparative Law 2003), 96.

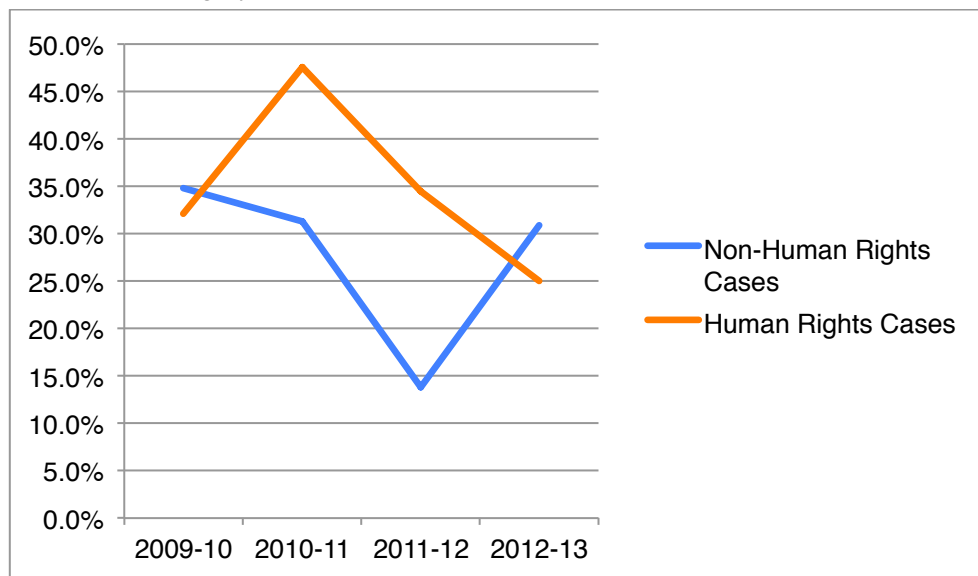
as human rights cases and explicit citations of foreign jurisprudence can be found in 35 of those, or 34.3%. In other words, the Supreme Court is likely to cite a decision of a foreign court in around one in three cases, no matter what the subject. However it is important to note that the figures differentiate only between 'human rights cases' and 'non-human rights cases'. They do not consider human rights cases compared to, say, commercial law cases, corporate law cases, and property or tort law cases.⁴¹⁶ Further, as explained in the methodology, these numbers do not account for non-explicit citations of foreign jurisprudence or capture citations of Privy Council decisions.

The data on explicit citations does, however, provide interesting insights. It is clear from table 1 that the overall figure for the proportion of cases citing foreign jurisprudence is fairly constant when human rights cases and non-human rights cases are compared. If the same proportions are considered by year, however, a more erratic picture emerges. Figure 1 (overleaf) plots the proportion of human rights and non-human rights cases containing explicit citations of foreign jurisprudence on a line graph, by year. The graph shows a spike in the 2010-11 year when explicit citations of at least one foreign decision were found in around 47.6% of human rights cases, and this is followed by a steady decline between 2011 and 2013. The numbers were surprising given the findings outlined by the existing literature: Bell's conclusion was that there had been a paucity of cases citing foreign

⁴¹⁶ Some insight on these can be gained from Elaine Mak, *Judicial Decision-Making*), above n 414, 180: 'British judges considered that citations of foreign law mostly occur in human rights cases and in private law cases ... In contract and tort cases, the shared background with other common legal systems is thought to make legal comparison often useful. ... The use of foreign law is less frequent in criminal law cases.'

jurisprudence in 2010-11 and noted just seven where such sources were to be found (not specifically human rights cases). However, as mentioned in the literature review, it is not clear whether Bell found only seven cases or chose only to consider seven of the found cases for the purposes of that article.⁴¹⁷ The data supporting this thesis shows that 23 of the 58 judgments handed down in 2010-11 cited at least one decision of foreign court, and that this included 10 (of a total 21) human rights judgments. Meanwhile, the trend for citations of foreign jurisprudence in non-human rights cases suffers a significant dip in 2011-12, falling to just 13.8%.⁴¹⁸

Figure 1: Percentage of human rights and non-human rights cases making explicit citation to foreign jurisprudence, by year.



The spikes in the use of foreign jurisprudence may be caused by any number of factors. It may be, for example, that the use of foreign jurisprudence in human rights cases prompted the use of foreign jurisprudence in other types

⁴¹⁷ John Bell, 'Comparative Law in the Supreme Court' [2012] 1.2 CJICL 20

⁴¹⁸ The data is given in greater detail in Annexe two.

of case. Another possibility is that counsel before the Supreme Court in 2010-11 were more inclined to make reference to foreign jurisprudence in their arguments than in 2011-12. The influence of counsel's submissions on the use of foreign jurisprudence citation in a judgment is not always obvious from the law reports as the 'bundles' of authorities given to the Justices prior to the hearing are generally not included.⁴¹⁹ Some speculative analysis of counsel's influence is drawn from the interview evidence below. At the very least, it is clear that the use of foreign jurisprudence relies upon it being introduced to the Court in the first place. As Lord Kerr explained:

First of all we need to have been referred to the jurisprudence of foreign courts, or to have some means of entry to it which arises extraneously from the litigation of the appeal. ...⁴²⁰

Alternatively, the Justices active at the Supreme Court in that year may have been more inclined to look abroad than their successors in 2011-12.

5.2 The individual approaches of the Justices

It is clear from the case analysis and the interviews that the tendency to use foreign jurisprudence is very likely to be connected with the background and inclination of the individual Justices.⁴²¹ Along these lines, Lady Justice Arden

⁴¹⁹ Although the ICLR's Appeal Cases report series do often provide a summary of counsel's arguments, the full list of authorities provided to the Court prior to the oral hearing in the 'bundle' is not included. The reports also resist repetition and only list 'additional cases cited in argument' further to those cited in the judgment(s) of the court. Thus it is not always possible to tell whether judges are citing authorities because counsel have presented them, or whether they have come to the court through some other route.

⁴²⁰ Interview with The Rt. Hon. Lord Kerr of Tonaghmore, Justice of the United Kingdom Supreme Court (The Supreme Court, London, 9 May 2012).

⁴²¹ A point recognised by other recent works: John Bell, 'Comparative law in the Supreme Court 2010-11', above n 417, 21; Elaine Mak, 'Why do Dutch and UK judges cite foreign law?' [2011] CLJ 420.

considered that many judges would be ‘self-starters’ in comparative law: if judges had done a lot of work internationally or studied abroad, they would be ‘natural self-starters on this because they have no problem with different legal cultures’.⁴²² At the Supreme Court, Lord Mance explained that the extent to which a judge would be likely to use foreign jurisprudence was dependent on:

...how interested you got, how relevant you thought it might be and how difficult it was. Lord Collins, for example, ... used to ... focus quite heavily on American authority. He had access to databases and so on which I don’t have access to and he mined that. He’s obviously ... from his academic work ... very much interested in comparative law.⁴²³

Lord Mance was himself frequently referred to as a more likely user of foreign jurisprudence, by the other interviewed Justices. Talking about the possibility of an increase in the use made of foreign jurisprudence, Lord Dyson felt Lord Mance to be ‘a shining example’, being ‘more adventurous’.⁴²⁴ Baroness Hale, one of the lightest users of foreign jurisprudence at the Supreme Court, felt it obvious that the Justices may have different interests and ‘go off on frolics on their own’, giving the example of occasions on which the Court may get ‘Mance on the German law of something’.⁴²⁵ Lord Clarke implied that he was less likely to use foreign jurisprudence than some of his colleagues:

⁴²² Interview with The Rt. Hon. Lady Justice Arden, Lord Justice of Appeal (Royal Courts of Justice, London, 7 December 2011).

⁴²³ Interview with The Rt. Hon. Lord Mance, Justice of the United Kingdom Supreme Court (The Supreme Court, London, 6 December 2011).

⁴²⁴ Interview with The Rt. Hon. Lord Dyson MR, former Justice of the United Kingdom Supreme Court (The Supreme Court, London, 1 May 2012).

⁴²⁵ Interview with The Rt. Hon. Baroness Hale of Richmond, Justice of the United Kingdom Supreme Court (The Supreme Court, London, 8 May 2012).

I think we would be unlikely to go on a frolic of our own. I mean I would be unlikely myself to send my JA to go and look into the French text. But I might, I mean one might ... some people are keener on it than others. ... Lord Mance is very interested in German Law for example.⁴²⁶

Table 2 shows a breakdown of the citation practices according to each member of the Supreme Court that heard at least one case between 2009 and 2013. For each judge, the table gives: the total number of cases heard; the total number in which the judge contributed a written judgment (which includes concurring and dissenting judgments, insofar as these amounted to more than the simple expression of agreement with another of the judgments in any one case); the number of those written judgments in which explicit citations of foreign jurisprudence are found; and the latter figure expressed as a percentage. Thus, for example, Lord Hope heard 172 cases between 2009 and 2013, contributing a written judgment in 128 of those cases. Foreign jurisprudence was explicitly cited in 25 of those judgments, amounting to 19.5%. In other words, between 2009 and 2013, Lord Hope made explicit citation of at least one foreign decision in approximately one fifth of his judgments. This proportion is consistent with the practice of several of the Justices. Of the Justices that have given more than 20 written judgments, the majority fall close to the 20% figure. Lord Clarke, Lord Mance, Lord Walker, Lord Phillips, Lord Dyson, Lord Wilson, Lord Rodger, and Lord Neuberger fall into this camp. Baroness Hale, Lord Brown and Lord

⁴²⁶ Interview with The Rt. Hon. Lord Clarke, Justice of the United Kingdom Supreme Court (The Supreme Court, London, 9 May 2012).

Carnwath, however, appear less inclined to cite foreign jurisprudence, with Lord Brown doing so in just 4.2% of his judgments. Heavier users of foreign jurisprudence are Lord Neuberger and Lord Collins. In fact, the fluctuation between 2010-11 and 2011-12 shown by figure 1 may be explained on the basis of Lord Collins' contributions. Lord Collins cited foreign jurisprudence in 42.9% of his written judgments between 2009 and 2013. In 2010 that figure peaked at 63.6%.⁴²⁷ In 2011, Lord Collins gave just two written judgments before retiring, neither of which made explicit citations of foreign jurisprudence and the figure therefore fell to zero.

The fact that certain judges are more willing to use foreign jurisprudence than others is further supported by the different approaches taken to resourcing those materials. For example, if counsel had not referred to foreign jurisprudence, a number of the Justices interviewed said that they might ask for it if they felt it was useful to do so. Lord Kerr explained:

... If we knew that there was a line of authority which bore on the questions that we had to answer and that we considered it was likely to be helpful in analysis, and we were alerted to it in sufficient time, then certainly we would ask counsel to address us on it. There have been occasions—very rare occasions—where we have pointed out to counsel that there was possibly some assistance to be derived from jurisprudence in other countries and invited them to research it themselves and to make submissions on it.⁴²⁸

⁴²⁷ In 2010 Lord Collins heard 23 cases, gave written judgments in 11 and cited foreign jurisprudence in 7.

⁴²⁸ Interview with The Rt. Hon. Lord Kerr of Tonaghmore, above n 420.

Table 2: Citations of foreign jurisprudence in judgments written by each member of the UK Supreme Court 2009-13.

UK Supreme Court Justice (JSC)	Total Cases	... total number of cases in which JSC contributed a written judgment	... of these, number of cases in which at least one foreign case is explicitly cited	Percentage of cases in which written judgment was given and FJ explicitly cited
Lord Hope (2009 – 2013)	172	128	25	19.5%
Baroness Hale (2009 – 2013)	165	78	7	9%
Lord Kerr (2009 – 2013)	151	55	7	12.7%
Lord Clarke (2009 – 2013)	138	66	10	15.2%
Lord Mance (2009 – 2013)	133	76	13	17.1%
Lord Walker (2009 – 2013)	129	57	10	17.5%
Lord Brown (2009 – 2012)	118	72	3	4.2%
Lord Phillips (2009 – 2012)	97	56	12	21.43%
Lord Dyson (2010 – 2012)	94	52	10	19.2%
Lord Wilson (2011 – 2013)	87	28	5	17.9%
Lord Reed (2010 – 2013)	68	27	3	11.1%
Lord Rodger (2009 – 2011)	61	33	5	15.2%
Lord Collins (2009 – 2011)	54	28	12	42.9%
Lord Carnwath (2011 – 2013)	51	20	1	5.0%
Lord Neuberger (2012 – 2013)	51	23	6	26.1%
Lord Sumption (2012 – 2013)	49	22	4	18.2%
Lord Judge*	16	9	0	0.0%
Lord Saville (2009 – 2010)	14	2	2	100.0%
Lord Toulson (2013)	9	3	1	33.3%
Lord Hughes (2013)	9	5	2	40.0%
Lord Hamilton*	2	2	0	0.0%
Lord Carloway*	1	0	0	0.0%

* Neither Lord Judge, Lord Carloway nor Lord Hamilton were permanent members of the UK Supreme Court

The issue was picked up by Paterson during his interviews for *The Law Lords*,⁴²⁹ and revisited in his more recent publication. Paterson notes that:

Among the counsel whom I have interviewed in the last 40 years, there has been a high degree of consensus on [this] point. Even at the level of the House of Lords or Supreme Court [counsel] do not consider it appropriate for the judges to decide appeals on points of law which have not been argued by counsel or at least put to them for comment.⁴³⁰

As Paterson points out, the differences between the Justices in relation to the expectation has surfaced in a number of the Supreme Court's cases:

Thus, Lord Dyson ... observed that Lord Phillips had breached the convention [in *Lumba*], 'In my view it is not appropriate to depart from a decision which has been followed repeatedly for almost 30 years unless it is obviously wrong (which I do not believe to be the case), still less to do so without the benefit of adversarial argument.'⁴³¹

Others among the Justices, however, were less convinced that these steps would always be necessary. Paterson notes that 'Lord Phillips and Lady Hale were sceptical as to the strength of the convention when interviewed',⁴³² while Lord Reed felt it would be 'a question of judgement what you decide to do'.⁴³³

⁴²⁹ Alan Paterson, *The Law Lords* (Macmillan 1982) 38-45.

⁴³⁰ Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing 2013), 20.

⁴³¹ *Ibid* 22, citing *Walumba Lumba (Congo) v Secretary of State for the Home Department* [2011] UKSC 12, [25] (Lord Dyson).

⁴³² *Ibid* 21.

⁴³³ *Ibid* 22.

Some indication of the willingness to conduct or commission research on foreign jurisprudence can be seen in some of the Supreme Court's case law. In *HM Treasury v Ahmed*,⁴³⁴ Lord Rodger wrote in his judgment that he had found it 'instructive in this regard to see how certain other Commonwealth countries' had approached the instrument in question.⁴³⁵ Mak reported another example:⁴³⁶ the *Jewish Free School* case.⁴³⁷ The case is well known and concerned a policy to impose a criterion for admission to the Jewish free School that a child applicant be recognised as being Jewish by the Office of the Chief Rabbi of the United Congregation of the Commonwealth. The issue was whether the policy constituted discrimination under section 1(1)(a) of the Race Relations Act 1976. The Supreme Court judgments cite *inter alia* jurisprudence from Israel, New Zealand and the United States of America.⁴³⁸ The source of the jurisprudence is not obvious from the reported judgment but Mak's evidence from her own interviews is that '[s]everal members of the panel indicated that extra comparative legal research had been carried out at the request of the judges themselves'.⁴³⁹

⁴³⁴ *Her Majesty's Treasury v Mohammed Jabar Ahmed and others (No.2) (FC)* [2010] UKSC 2. The case is discussed further below, from n 873.

⁴³⁵ *Ibid* [199].

⁴³⁶ Elaine Mak, 'Reference to Foreign Law in the Supreme Courts of Britain and the Netherlands: Explaining the Development of Judicial Practices' (2012) 8(2) *Utrecht Law Review* 20, 31.

⁴³⁷ *R (E) v Governing Body of JFS* [2009] UKSC 15.

⁴³⁸ Respectively: *No'ar K'halacha v Ministry of Education HCJ 1067/08* (unreported) 6 August 2009, SC Israel; *King-Ansell v Police* [1979] 2 NZLR 531; *Bob Jones University v United States* (1983) 461 US 574.

⁴³⁹ Elaine Mak, 'Reference to Foreign Law in the Supreme Courts of Britain and the Netherlands', above n 436, 31.

5.3 Practical matters: accessing foreign jurisprudence

Since the Justices do sometimes consider foreign jurisprudence as a product of their own research in this way, it is interesting to consider how this unfolds. These questions are part and parcel of any understanding about the way that foreign jurisprudence is used at the Supreme Court. Baroness Hale confirmed that there were several avenues to the use of foreign jurisprudence:

We might ask Counsel, we might know about it anyway, we might look it up, or we might get one of our legal assistants to look it up and see if there is anything.⁴⁴⁰

Practical considerations play an important part. Lord Collins explained that the main barrier to using foreign jurisprudence was likely to be a question of resources:

By contrast with the United States, we don't have banks of law clerks here, and so those Justices who are interested in the way things are done abroad will get their law clerks to research it and those who are not, won't. Here, by contrast, we are ... largely dependent on counsel for our legal materials. We have some judicial assistants but on the whole I don't think that they are used much for research...⁴⁴¹

The judicial assistants (JAs) are qualified barristers or solicitors in the UK. All but one JA (at the time of writing) are appointed for one-year posts and are generally available to assist their assigned Justice(s) in their work. The JAs

⁴⁴⁰ Interview with The Rt. Hon. Baroness Hale of Richmond, above n 425.

⁴⁴¹ Interview with The Rt. Hon. Lord Collins of Mapesbury, retired Justice of the United Kingdom Supreme Court (The Supreme Court, London, 22 May 2012).

do not write judgments but have had a growing input in other ways.⁴⁴² For example, it is no longer uncommon for JAs to see and comment on draft judgments of their own Justice or sometimes even those of other Justices.⁴⁴³ Their role may also include conducting research on the cases and a Justice could certainly ask his JA to look into foreign jurisprudence if it appeared relevant. This might be of particular relevance if a Justice relies on his assistant to carry out online searches. Although not specifically discussing foreign jurisprudence, one of Lord Brown's JAs has written that she was frequently asked to conduct research of this kind:

Either in the morning before the oral hearing or in the lunchtime break, Lord Brown would often think of a case that contained useful guidance on the matter that was before the Court. If the parties had not relied on this particular authority, it would be my job to find it and print enough copies for the Justices and the parties if Lord Brown decided to bring it up in oral argument. I would also give my view on the relevance of this new authority and highlight any important passages.⁴⁴⁴

Lord Reed explained that his JA might make notes through her own initiative and that she may choose to give references to foreign jurisprudence but that he hadn't so far specifically asked her to research foreign jurisprudence.⁴⁴⁵ However the amount of foreign jurisprudence that would be likely to come

⁴⁴² Penny Darbyshire, *Sitting in Judgment: The Working Lives of the Judges* (Hart Publishing 2013), 383; Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing 2013), 254-256.

⁴⁴³ Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court*, *Ibid*, 254-257.

⁴⁴⁴ Tetyana Nesterchuk, 'The View from Behind the Bench' in Burrows, Johnston and Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford University Press 2013), 107.

⁴⁴⁵ Interview with The Rt. Hon. Lord Reed, Justice of the United Kingdom Supreme Court (The Supreme Court, London, 8 May 2012).

from the JAs is limited. For the most part, the JAs are often too busy to undertake extensive research of this kind without having been prompted for it. It is also not the case that the UKSC Justices each have their own JA as do, for example, the Justices of the United States Supreme Court or the courts of other countries.⁴⁴⁶ The JAs explained that it was normal for some of their work to be shared between two Justices, and, at the time of the interviews, Lord Reed and Lord Kerr shared a JA.⁴⁴⁷ Lord Kerr confirmed that there were limited opportunities for the JAs to undertake this kind of extraneous research:

... partly because I share [a judicial assistant] with Lord Reed, but mainly because we are so busy, the opportunity to cast a wide net over potentially relevant foreign jurisprudence just doesn't exist.⁴⁴⁸

Others among the Justices interviewed expressed similar sentiments about time pressures in reference to their own research. For example, Lord Mance felt that digesting the precise meaning of foreign jurisprudence would necessarily take time:

If I get say six decisions of the German Supreme Court or Constitutional Court, it takes some time to read them – they are not short! ... You could easily spend, you know, three or four hours reading those decisions once you've got them, and you've got to find them first.⁴⁴⁹

⁴⁴⁶ See further David S Law and Wen-Chen Chang, 'The Limits of Global Judicial Dialogue' [2011] *Washington Law Review* 523.

⁴⁴⁷ Focus group interview with the judicial assistants of the United Kingdom Supreme Court (The Supreme Court, London, 22 May 2012).

⁴⁴⁸ Interview with The Rt. Hon. Lord Kerr of Tonaghmore, above n 420.

⁴⁴⁹ Interview with The Rt. Hon. Lord Mance, Justice of the United Kingdom Supreme Court (The Supreme Court, London, 6 December 2011).

Nevertheless several of the justices admitted that they would be likely to conduct their own research into areas of foreign jurisprudence that were felt to be of interest. Technological developments, in particular, have had a profound effect on this; the ability to conduct research and communicate online has made available a burgeoning pool of materials. This compliments a growing tradition of international conferences and symposiums, which facilitate a direct exchange of ideas between judges and practitioners from all over the world. As Cram has said, 'just as those parties appearing before the courts interact increasingly with others beyond national boundaries ...so are courts confronted with the existence and practices of other legal systems',⁴⁵⁰ and it is not surprising that these have filtered into their judgments. Baroness Hale commented, 'you only have to push a few buttons' to find any material that may be of interest.⁴⁵¹

In most cases this involved using the various legal databases such as Westlaw International or LexisLibrary (previously LexisNexis) which was itself indicative of one of the main differences between judicial reasoning at the Supreme Court and in lower courts. In the Court of Appeal, for example, Lady Justice Arden explained that the time pressures would often be too great to allow for much research of this kind on the part of the judges:

You have to have something which gets you started with the foreign law, because you simply do not have time to go and, as it were, sit down with Lexis Australia or Lexis South Africa, and work

⁴⁵⁰ Ian Cram, 'Resort to foreign constitutional norms in domestic human rights jurisprudence with reference to terrorism cases' [2009] CLJ 118, 121.

⁴⁵¹ Interview with The Rt. Hon. Baroness Hale of Richmond, above n 425.

out what relevant cases there might be. There has to be somebody who has done some work first.⁴⁵²

The Supreme Court also has its own library which may be asked, by the Justices, to source relevant materials for consideration. The library is well stocked with law reports from various foreign jurisdictions and, in addition to this, produces a monthly broadsheet which includes some comparative law material. In a lighter way, the UKSC blog site evidences its attention to developments in other foreign courts by posting notes on key cases from 'Supreme Courts around the World'.⁴⁵³

Academic work is also an important vessel for comparative jurisprudence, again partly as a result of time pressures on the Court. Lord Phillips explained that 'academics have the advantage of being able to spend much [more] time on looking at particular area of the law than [the Supreme Court]' and the Justices would all be likely to read 'the leading academics on a particular topic to see what they have to say'.⁴⁵⁴ It is evident that where foreign jurisprudence has been identified by academics in leading works, the Supreme Court would be alerted to it.⁴⁵⁵ A good example of academic work being used in this way can be drawn from the *HJ (Iran)* case considered in chapter seven.⁴⁵⁶ In that case Lord Dyson did not 'find it necessary to examine the Australian authorities to which [the Supreme Court] were

⁴⁵² Interview with The Rt. Hon. Lady Justice Arden, above n 422.

⁴⁵³ E.g. <<http://ukscblog.com/supreme-courts-around-the-world-the-us-supreme-court>> accessed 18 August 2013.

⁴⁵⁴ Interview with The Rt. Hon. Lord Phillips of Worth Matravers, former President of the United Kingdom Supreme Court (The Supreme Court, London, 23 November 2011).

⁴⁵⁵ Ibid.

⁴⁵⁶ Chapter seven, text from n 736.

referred'. Instead, it was 'sufficient' to refer to an academic paper exploring the impact of the troublesome *S395/2002* case on the refugee jurisprudence of Australia and the United Kingdom five years on. Lord Dyson was satisfied that the paper showed 'the reasoning of the majority judgments is being generally applied in Australia...'.⁴⁵⁷ Lord Walker also noted comparative academic work on this point and reproduced a lengthy paragraph from the paper to which Lord Dyson referred in the judgment.⁴⁵⁸

The suggestion implicit here is that cases which have not been digested by academic work are not as likely to be used as those that have. Lord Reed took this view to explain the reasons why some jurisdictions were cited more than others:

There is a practical problem about finding foreign jurisprudence. ... I've got ... a French textbook on human rights law, which obviously cites French case law. But not many people have got foreign textbooks on their shelves.⁴⁵⁹

This reliance on academic research may therefore further inform the consideration as to why certain jurisdictions are cited above others, as discussed below. According to Lord Mance, one wouldn't look up jurisprudence from smaller foreign courts, for example. If foreign sources are used, 'it would be because it was in some particular international field and

⁴⁵⁷ *HJ (Iran) (FC) v Secretary of State for the Home Department* [2010] UKSC 31, [112] (Lord Dyson). Citing J Millbank, 'From discretion to disbelief: recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom' (2009) 13 *IJHR* 391

⁴⁵⁸ *HJ (Iran)*, *Ibid* [92].

⁴⁵⁹ Interview with The Rt. Hon. Lord Reed, above n 445.

had received a degree of notoriety'.⁴⁶⁰ 'That sort of case', he explained, 'would be a case that had achieved international note and had therefore appeared in human rights textbooks and you would be referred to it because it was there in a footnote'.⁴⁶¹ Otherwise, 'unless one had been to a conference in Africa [for example] with the Commonwealth Magistrates and Judges Association or something like that, and it had been mentioned then, you wouldn't come across it probably'.⁴⁶²

The last suggestion that a judge might learn about foreign jurisprudence through conferences or judicial exchanges has perhaps been the most popular idea in the modern literature on judicial comparativism. The most fashionable explanation for the increase in judicial comparativism in recent years has been that judges refer to foreign jurisprudence simply because their eyes have been opened to it. The more widely known theory is the notion of a 'transjudicial dialogue'. This usually encompasses 'dialogue' both in the sense that judges may communicate through their judgments, and in the more obvious sense of judges communicating through a direct—face to face—exchange of ideas with other judges and practitioners from all over the world. Broadly speaking, dialogue of this kind can be summarised simply as meetings which bring about an awareness of each other's decisions.⁴⁶³

⁴⁶⁰ Interview with The Rt. Hon. Lord Mance, Justice of the United Kingdom Supreme Court (The Supreme Court, London, 6 December 2011).

⁴⁶¹ *Ibid.*

⁴⁶² *Ibid.*

⁴⁶³ Anne-Marie Slaughter, 'A Typology of Transjudicial Communication', (1994) 29 *University of Richmond Law Review* 99, 103.

Such meetings are of obvious relevance between national and supranational courts, especially where national judges may wish to seek guidance as to the supranational court's jurisprudence. Thus it is not surprising that, as Paterson has noted, these meetings are common between the Justices of Supreme Court and the judges at the ECtHR. Interestingly, Paterson also notes that the Supreme Court interacts with the Strasbourg Court much more frequently than with the CJEU in Luxembourg:

...there is far more interaction—oral and written—between the two courts than there is with Luxembourg. Members of each court visit the other and discussions ensue of actual cases and points of debate. Written exchanges are also frequent, and not just in judgments but also through lectures, and even occasional emails.⁴⁶⁴

Paterson explains that the difference may be due to the style of the judgments in either court: 'the outputs from the Luxembourg court are short, stilted and enigmatic, adhering to a civilian style which appears as though drafted by a committee with no spark of individualism'.⁴⁶⁵ Similar explanations were given by several of the Justices of the Supreme Court interviewed for this study.

As regards interaction with judges of top domestic courts in other jurisdictions, the Supreme Court regularly participates in international conferences and judicial exchanges and there are a few international visits a year, usually lasting three to four days. Some of the Justices interviewed did

⁴⁶⁴ Alan Paterson, *Final Judgment*, above n 430, 224.

⁴⁶⁵ *Ibid* 223. Paterson notes (at n 72) that no dissents or concurrences are permitted at the Luxembourg court.

consider that international conferences and symposiums of this kind would be likely to contribute to an awareness of foreign jurisprudence which might later be used in the process of reasoning. Lord Walker, for example, felt that personal relationships between judges would affect the attention paid to the jurisprudence from a particular court:

In my case that certainly is a factor. When I was at the bar and as a first instance judge, I did virtually no networking, I simply just got on with my work and it's really only since I got to the top appeal court that I have started travelling and I have done quite a bit in the last... I first went to Australia in 2005 I think to give a lecture and I'm going for the 5th time this summer. So that's five times in seven years. I've been to New Zealand a couple of times. And you do get to know people and it does make a big difference that you read a judgment and you know who it is that is writing it. I think that, right or wrongly, that is a very important factor in how much interest you take.⁴⁶⁶

However none of the Justices appeared to consider that these sorts of meetings would usually be a primary source of foreign jurisprudence. It was felt to be only in very exceptional cases that dialogues of this kind would substantially affect judicial reasoning. Rarely was an example given during the interviews in which a Justice could recall an instance of discussion with judges from other jurisdictions which was visibly linked to reasoning in a later judgment. Only one such example could be recalled, regarding the well-

⁴⁶⁶ Interview with The Rt. Hon. Lord Walker of Gestingthorpe, former Justice of the United Kingdom Supreme Court (The Supreme Court, London, 15 May 2012).

known *Daly* case from the early years of the HRA.⁴⁶⁷ Lord Dyson recounted a story about a visit to the Israeli Court during which a round-table discussion took place on the concept of proportionality. Lord Dyson felt that Lord Steyn's judgment in *Daly* drew heavily from that meeting. Lord Dyson recalled Lord Steyn to have said something along the lines of: 'this has been a very useful discussion, especially as I have now to write a judgment concerning this issue'.⁴⁶⁸

No more recent examples could be recalled and, aside from the *Daly* example, the general feeling was that international meetings would usually be very interesting but would not always be likely to contribute substantively to the work of a judge in their home court.⁴⁶⁹ In part this may be explained by a convention that discussion of topics that are known to be coming up in the Supreme Court are avoided, but there are a number of other reasons as well. Firstly, the meetings are pitched at varying levels. For example, the Israeli and Canadian conferences are regarded, by some Justices, to be more serious affairs than some of the other events. Some of the Justices that had not participated in those more serious conferences felt more sceptical about the value of international judicial exchanges, expressing the feeling that such meetings were often likely to descend to 'chitter chatter'.⁴⁷⁰ One Justice went so far as to joke that international visits could often be described as 'Judicial

⁴⁶⁷ *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 WLR 1622.

⁴⁶⁸ Interview with The Rt. Hon. Lord Dyson MR, above n 424.

⁴⁶⁹ Similar findings are reported by Mak in her most recent publication: Elaine Mak, *Judicial Decision-Making in a Globalised*, above n 414, 85.

⁴⁷⁰ Interview with The Rt. Hon. Lord Clarke of Stone-cum-Ebony, above n 426.

Tourism'.⁴⁷¹ Secondly, some of the Justices were more enthusiastic about these meetings than others. While some of the Justices recounted that they had led delegations to other courts and found these meetings useful, others explained that they were not as keen on participating in this way, preferring instead 'to get on with the business of judging'.⁴⁷² Thirdly, these meetings repeat. Visits tend to be to those courts that are already familiar to the Justices of the Supreme Court, such as Canada and South Africa, where there is already an established relationship. The established relationships and familiarity with certain courts also perpetuates the tendency to refer to the jurisprudence of those jurisdictions. It is also likely that there are reasons connected to the perceived quality of the jurisprudence from certain jurisdictions or that there are other practical concerns, such as language barriers. These are questions that are best considered in context. The next section of this chapter therefore addresses the more literal 'where does it come from' question.

5.4 The preference towards common law jurisdictions

It is indisputable that the Supreme Court generally cites foreign jurisprudence from a small family of courts.⁴⁷³ As a proportion of all explicit citations of foreign jurisprudence at the Supreme Court, figure 2 shows that the jurisprudence of common law courts is the clear favourite. Of the total 316 foreign decisions cited by the Supreme Court between 2009 and 2013, 277

⁴⁷¹ Interview with The Rt. Hon. Lord Sumption, above n 294.

⁴⁷² Interview with The Rt. Hon. Lord Clarke of Stone-cum-Ebony, above n 426.

⁴⁷³ This much has been recognised by other recent publications, e.g. Elaine Mak, *Judicial Decision-Making in a Globalised World*, above n 414, 206.

were from common law jurisdictions. Figures 3 and 4 show that the pattern is fairly consistent between human rights cases and non-human rights cases, although the proportion of citations of common law courts appears to be greater in human rights cases.

Figure 2: Proportion of citations from common law jurisdictions in all cases decided by the UK Supreme Court 2009-13.

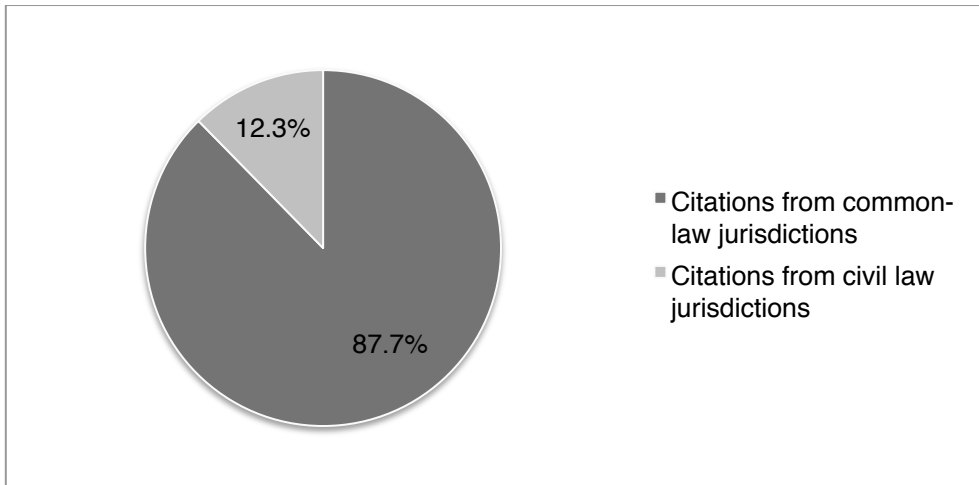


Figure 3: Proportion of citations from common law jurisdictions in non-human rights cases by the UK Supreme Court 2009-13

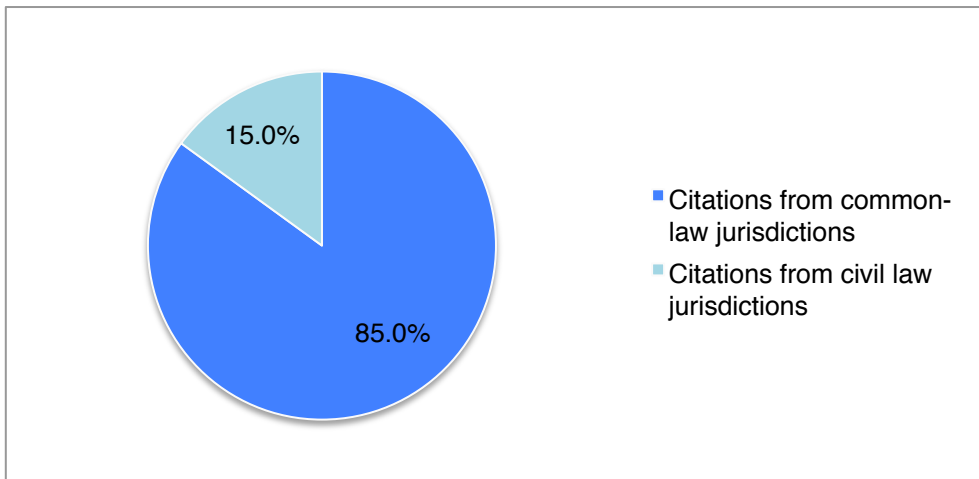


Figure 4: Proportion of citations from common law jurisdictions in human rights cases by the UK Supreme Court 2009-13.

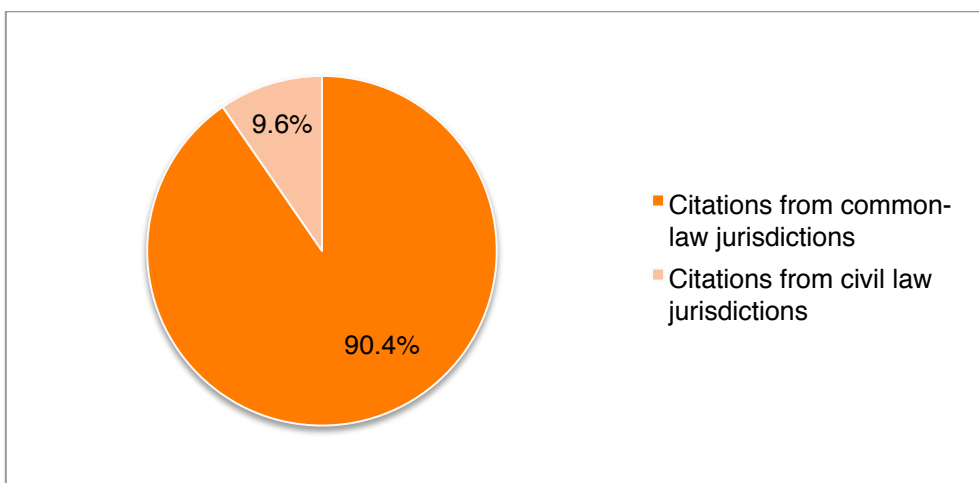


Figure 5 shows the number of cases of the total 246 handed down in the time period in which explicit citation were made to each jurisdiction. Of the 13 jurisdictions cited by the Supreme Court, only 5 jurisdictions are cited in more than 10 judgments, all from established common law or mixed systems. In human rights cases the numbers are less polarised on account of fewer judgments, but they follow the same pattern. Most citations are drawn from Australia, the United States, Canada, New Zealand and South Africa. Table 3 (overleaf) gives the break down of citations for each jurisdiction and case type.

Figure 5: Number of cases in which at least one case from the given country is cited, between 2009 and 2013.

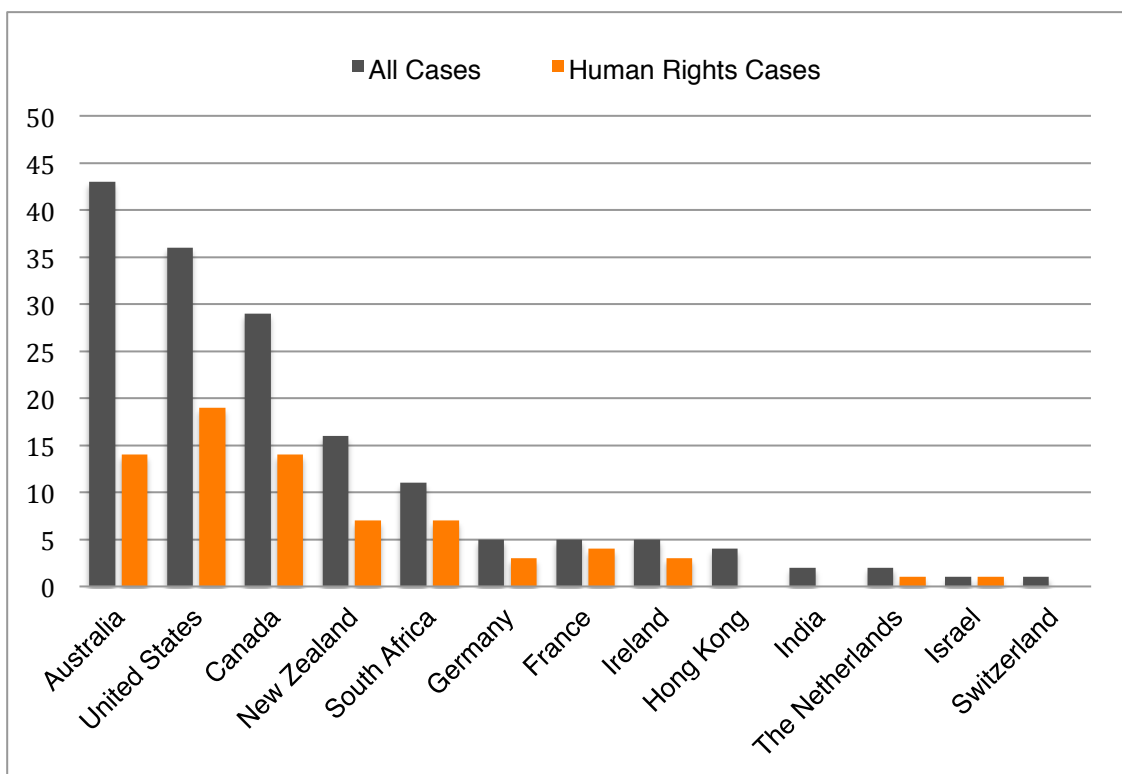
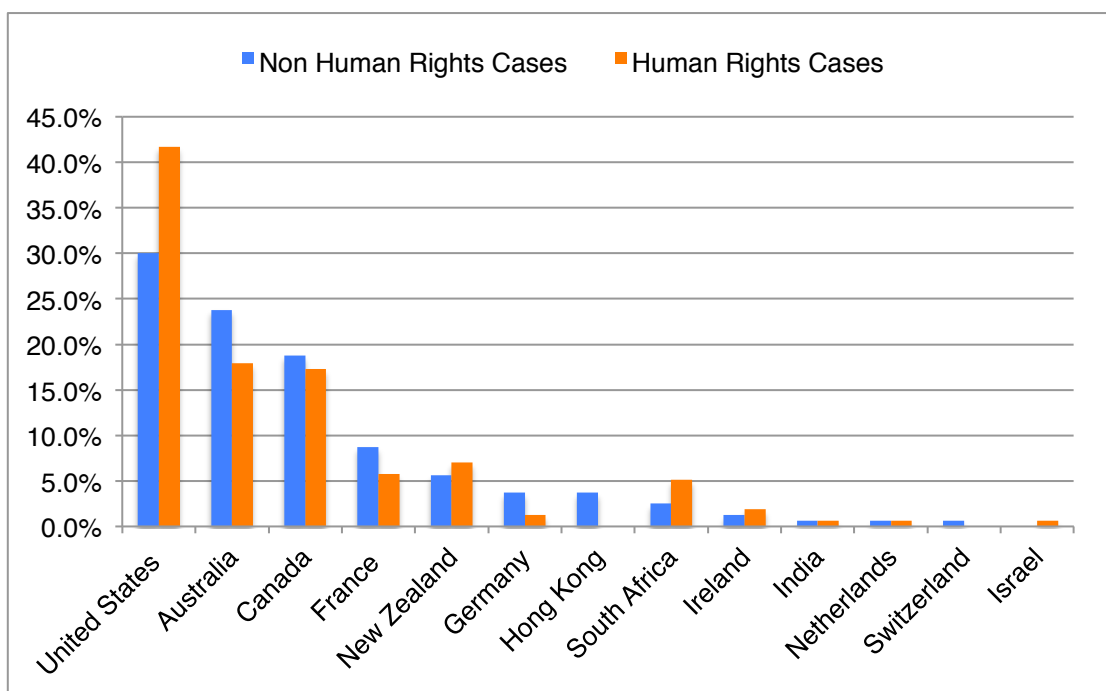


Table 3: Total citations of foreign jurisprudence by country and case type, between 2009 and 2013.

Jurisdiction	Total citations in all cases		Total citations in non-HR cases		Total citations in HR cases		Percentage of total citations
	all cases	Percentage of total citations	non-HR cases	Percentage of total citations	HR cases	Percentage of total citations	
United States	113	35.8%	48	30.0%	65	45.1%	
Australia	66	20.9%	38	23.8%	24	16.7%	
Canada	57	18%	30	18.8%	20	13.9%	
France	23	7.3%	14	8.8%	9	6.3%	
New Zealand	20	6.3%	9	5.6%	10	6.9%	
South Africa	12	3.8%	4	2.5%	7	4.9%	
Germany	8	2.5%	6	3.8%	3	2.1%	
Hong Kong	6	1.9%	6	3.8%	0	0.0%	
Ireland	5	1.6%	2	1.3%	3	2.1%	
India	2	0.6%	1	0.6%	1	0.7%	
Netherlands	2	0.6%	1	0.6%	1	0.7%	
Israel	1	0.3%	0	0.0%	1	0.7%	
Switzerland	1	0.3%	1	0.6%	0	0.0%	
Total	316	100%	160	100%	144	100%	

The balance is even more extreme in human rights cases, where citations of common law courts make up over 90% of the total references to foreign jurisprudence—141 of the total 156 foreign case citations. These trends are best illustrated by figure 5, which shows the number of cases cited from each jurisdiction. Viewed this way, it is not only clear that the Supreme Court is likely to cite common law authorities the most often, but also that it is likely to cite more of those decisions per case.

Figure 5: Total explicit citations of foreign jurisprudence between 2009-13, arranged by country and case type.



The reasons for citing any particular jurisdiction are not made obvious in the judgments. As Cram found:

English judges, it seems, do little to explain why the insights of a particular jurisdiction might be relevant to the interpretation of domestic law and why those derived from other jurisdictions were

not. The reader of these law reports searches in vain for an account of the criteria by which the included jurisdictions were deemed includable and why the excluded were considered excludable.⁴⁷⁴

Whether true or not, there is a perception that different ideological positions on human rights are taken by different jurisdictions and that comparative standards drawn from a particular jurisdiction's approach to human rights may be regarded, therefore, as a sign of a particular orientation towards human rights generally.⁴⁷⁵ The treatment of comparative authority by the South African Constitutional Court is illustrative of this point.⁴⁷⁶ The Court has explained that '[c]omparative research is generally valuable, and is all the more so when dealing with problems new to our jurisprudence but well developed in *mature constitutional democracies*'.⁴⁷⁷ On that basis, it is hardly surprising that 'it is [in the main] the judiciaries of liberal democratic regimes that cite each other'.⁴⁷⁸

Cram was tempted to conclude his own study by suggesting that 'the judges in the House of Lords and Court of Appeal conceive, in the main, of the Canadian and United States Supreme Courts as similarly placed institutions

⁴⁷⁴ Ian Cram, 'Resort to foreign constitutional norms in domestic human rights jurisprudence with reference to terrorism cases' [2009] CLJ 118, 140.

⁴⁷⁵ See Christopher McCrudden, 'A Common Law of Human Rights?', above n 415, 501; Richard Clayton, 'Judicial Deference and 'Democratic Dialogue': the legitimacy of judicial intervention under the Human Rights Act 1998' [2004] PL 33, 47; Leighton McDonald, 'New Directions in the Australian Bill of Rights Debate' [2004] PL 22.

⁴⁷⁶ s.39(1)(b) South African Constitution the Constitution expressly declares that '[w]hen interpreting the Bill of Rights, a court, tribunal or forum *may* consider foreign law'⁴⁷⁶ but that it '*must* consider international law' (emphasis added).

⁴⁷⁷ *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) (emphasis added); Rabinder Singh, 'Interpreting Bills of Rights' [2008] Statute Law Review 82.

⁴⁷⁸ Christopher McCrudden, 'A Common Law of Human Rights?', above n 415, 517.

functioning under similar circumstances within a framework of broadly similar rules and underlying values'.⁴⁷⁹ This is a conclusion that is supported by the interview evidence from this research. As Baroness Hale explained:

The common law world is preferred to elsewhere and that is partly because it is all in English and partly because we are dealing in similar instruments, similar modes of thought and similar modes of judgment.⁴⁸⁰

Others among the interviewed Justices agreed. The then President of the Supreme Court, Lord Phillips, felt that there would be:

... more use when we are a looking at courts in the long established democracies than some of the countries which have not had the benefit of developing over years with democratic and independent judiciaries.⁴⁸¹

In large part, this is related to a perception that the quality of the reasoning is greater in the established common law courts. Lord Phillips added that whether or not foreign jurisprudence would be used depended very much on 'the nature of the authority' and that some decisions of foreign courts have been really 'carefully thought out'—giving the example of some Canadian judgments.⁴⁸² Explaining what it takes to be 'carefully thought out', Lord Phillips said that 'you have to be an outstandingly good jurist'.⁴⁸³ Asked if that was something perceived from reading the cases or if that is known before, Lord Phillips answered: 'We have a very good idea of who the really

⁴⁷⁹ Ibid.

⁴⁸⁰ Interview with The Rt. Hon. Baroness Hale of Richmond, above n 425.

⁴⁸¹ Interview with The Rt. Hon. Lord Phillips of Worth Matravers, former President of the United Kingdom Supreme Court (The Supreme Court, London, 23 November 2011).

⁴⁸² Ibid.

⁴⁸³ Ibid.

outstanding jurists in the Commonwealth are'.⁴⁸⁴ Lord Collins gave similar answers to these questions, expressing a requirement for confidence in the jurisdiction that one is drawing from:

[Foreign jurisprudence] won't necessarily be ... of direct assistance, unless it is a court of great authority and it's something that hasn't come up here, like the Supreme Court of Canada ...⁴⁸⁵

In fact, this apparently provides one of the barriers to the use of foreign jurisprudence from other countries:

It is very difficult to judge the quality of foreign decisions if you don't know the people and their reputation ... I suppose in itself you can say well the Supreme Court—American Supreme Court or Canadian Supreme Court or Australian High Court—they wouldn't have got there unless they were pretty good. ... You get a feel for it. When precedents are cited here, even of English judges, there are some who have got much greater reputation than others – for example. One might pay more attention to what Lord Bingham or Lord Hoffman has said than to another judge whose reputation is not so high.⁴⁸⁶

Nevertheless, the tendency to cite common law jurisprudence is surprising given the fact that the dominant force in human rights cases is likely to be the ECHR. That the United Kingdom has moved steadily towards convergence with the rest of Europe is hardly contentious. Indeed, the UK was among the first members of the Council of Europe to ratify the Convention and English lawyers made a substantial contribution to the drafting of the document.

⁴⁸⁴ Ibid.

⁴⁸⁵ Interview with The Rt. Hon. Lord Collins of Mapesbury, above n 441.

⁴⁸⁶ Ibid.

Moreover, a major factor said to be involved in the reluctance of the French judges to rely on Strasbourg decisions is their national pride in front of a new instrument, which is supposed to be dominated by English legal conceptions.⁴⁸⁷ More significantly, and as Masterman suggested, cases from jurisdictions outside the Convention borders are 'unlikely to point to the direction in which the common law should be developed to ensure compatibility with the Convention rights'.⁴⁸⁸ Unlike the Canadian, Victorian and New Zealand experiences, the Convention and its jurisprudence are built into the structure of the HRA.

The use of common law jurisprudence is especially surprising given the cautionary statements made in the early days of the HRA. For example in *Sheldrake*, Lord Bingham set out that, even though courts had on a number of occasions 'gained valuable insights from the reasoning of Commonwealth judges',⁴⁸⁹ the UK 'must [now] take its lead from Strasbourg'.⁴⁹⁰ In *Gillan* Lord Bingham thought it was 'perilous ... to seek to transpose the outcome of Canadian cases',⁴⁹¹ by reason of their being 'decided under a significantly different legislative regime'.⁴⁹² In *Marper*, Lord Steyn rejected the idea that domestic traditions bear any relevance to the scope of Convention rights at

⁴⁸⁷ J-F Burgelin and A Lalardrie, *L'application de la Convention par le juge judiciaire français*, Mélanges Pettiti (Bruylant, 1998) 160 referred to in Luc Heuschling 'Comparative Law and the European Convention on Human Rights Cases' in Esin Örucü (ed), *Judicial Comparativism in Human Rights Cases* (United Kingdom National Committee of Comparative Law, 2003) 36.

⁴⁸⁸ Roger Masterman, 'Taking the Strasbourg jurisprudence into account: developing a 'municipal law of human rights' under the Human Rights Act' [2005] 54 ICLQ 907, 923.

⁴⁸⁹ *Sheldrake v DPP* [2004] UKHL 43; [2004] 3 WLR 876 [33].

⁴⁹⁰ *Ibid.*

⁴⁹¹ *R (Gillan) v Commissioner of Police for the Metropolis* [2006] UKHL 12; [2006] 2 AC 307, [23].

⁴⁹² *Ibid.*

all.⁴⁹³ The court in *British American Tobacco* recognised that ‘it is instructive ... to see how another respected jurisdiction has dealt with a related but confined problem’ but also considered that comparison (with the jurisprudence of the US First Amendment) should be undertaken with care.⁴⁹⁴

...the balance between State legislation and federal legislation in the United States is a subject of renowned complexity. Decisions on such matters can have limited effect on our consideration of the balance to be struck in considering a restriction of a limited Convention rights and the measure of a discretion to be afforded to Parliament and ministers under our own rather different constitutional system.⁴⁹⁵

Implicit in the idea that common law jurisprudence is likely to provide less assistance in human rights cases for the reason that they were ‘decided under a significantly different legislative regime’,⁴⁹⁶ is that jurisprudence from courts interpreting the same legislative regime would be of greater relevance. Thus one might reasonably consider the jurisprudence of European domestic courts interpreting the same instrument to be of interest to the Supreme Court. As Bobek has written:

After the UK joined the European Communities, some people might have hoped (and others feared) that the UK would now join Continental Europe. This should be evidenced by a change in the (comparative) attention of the English courts: less comparative

⁴⁹³ *R (Marper) v Chief Constable of Yorkshire* [2004] UKHL 39; [2004] 1 WLR 2196 [27].

⁴⁹⁴ *R (British American Tobacco UK Ltd) v The Secretary of State for Health* [2004] EWHC (Admin) 2493s.

⁴⁹⁵ *Ibid* [36].

⁴⁹⁶ *R (Gillan)*, above n 491, [23] (Lord Bingham).

consideration would be given to the common law world and more considerations to Continental Europe.⁴⁹⁷

If the courts have followed this sort of approach, the use of foreign jurisprudence from common law jurisdictions should be on the decline. If that were true, the trend evidenced by figure 5 represents a rather more discouraging outlook: rather than representing a greater use of jurisprudence from common law jurisdictions in human rights cases, it may represent an overall decline in the use of foreign jurisprudence altogether. This is difficult to substantiate without comparable data on explicit citations of foreign jurisprudence in the early years of the Human Rights Act. The closest of the existing studies is that conducted by Cram, encompassing judicial references to a foreign court's jurisprudence in cases concerning rights to liberty and fair trial since October 2000. Cram found just five cases referencing other nations' constitutional courts but does not give a figure for the overall number of cases captured by his research.⁴⁹⁸ From those five cases, Cram also found that citations were most likely to be drawn from common law jurisdictions.⁴⁹⁹ Another study reviewed the decisions of the House of Lords in its final year, 2009. In that year, Bobek counted that 'legal materials from outside of the UK' were referred to in 24% of cases. These were 'almost

⁴⁹⁷ Michael Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford University Press 2013), 93.

⁴⁹⁸ Ian Cram, 'Resort to foreign constitutional norms in domestic human rights jurisprudence with reference to terrorism cases' [2009] CLJ 118, 132.

⁴⁹⁹ *Ibid* 140: 'The United States and Canada supplied by far the most frequent sources to which our judges refer, although the jurisprudence of five other jurisdictions is also represented in this survey'. See also Mathias M Siems, 'Citation Patterns of the German Federal Supreme Court and the Court of Appeal of England and Wales' (2010) 21 KLJ 152.

exclusively of common law provenience’, with just one referenced to materials from outside the common law world.⁵⁰⁰

An obvious explanation is that the analysis of explicit citations distorts the picture. In fact the Supreme Court does consider the jurisprudence of European domestic legal orders but the Justices can usually rely on the ECtHR to outline the position of national legal systems. Sir Nicholas Bratza, the then President-elect of the European Court of Human Rights, has explained that it is ‘the wider role of the Court’ to ‘[examine] the law and practice in other Member States in resolving issues of general importance for the development of the Convention’.⁵⁰¹ Bell has pointed out that this applies to the jurisprudence of supranational courts generally:

[i]t is through [the decisions of the supranational courts] that the state of the law in other European countries comes to the notice of the UK justices. Strasbourg and Luxembourg consider the different ways a common problem is handled by national courts and select a permitted range of acceptable solutions (often by deferring to national decisions, rather than imposing a single right answer). As a result, it is not necessary for lawyers or justices to look directly at national law.⁵⁰²

The reliance on comparative research from supranational courts is also a reflection of the fact that the Supreme Court is a very busy court and does

⁵⁰⁰ Michael Bobek, *Comparative Reasoning in European Supreme Courts*, above n 497, 89.

⁵⁰¹ Nicolas Bratza, ‘The relationship between the UK courts and Strasbourg’ [2011] EHRLR 505, 507.

⁵⁰² John Bell, ‘Comparative Law in the Supreme Court 2010-11’, above n 417, 24; Michael Bobek, *Comparative Reasoning in European Supreme Courts*, above n 497, 93; See also Jane Wright, ‘Interpreting Section 2 of the Human Rights Act 1998: towards an indigenous jurisprudence of human rights’ [2009] PL 595, 614-615, arguing that while ‘customary for the ECtHR to recite international materials on any question ... the reasoning of the ECtHR is generally premised upon European authorities’.

not always have time to conduct research into the approach of other jurisdictions. Lord Phillips explained this when interviewed:

We basically don't have time to go to the other European countries and look at the way they've addressed [an issue] with some exceptions. There is quite enough case law in Strasbourg itself ... we're looking at how Strasbourg deals with the decisions of courts in other member states and when you do that you are also looking to see how that particular court dealt with a problem and then how Strasbourg has viewed the approach of that court. And so, in some cases, we're looking quite closely at the domestic decision in the field of human rights.⁵⁰³

An alternative explanation for the tendency to draw from common law courts is that linguistic barriers preclude meaningful comparison with non-English speaking jurisdictions. Thus some comparative law scholars have been persuaded that different languages and styles are likely to be a significant barrier to judicial comparativism.⁵⁰⁴ Discussion of this suggestion was one of the common themes from the interviews. As mentioned in the methodology chapter, it is interesting that the Justices held different views about the significance of linguistic barriers and that these views broadly correlated with whether or not the Justice had raised the matter of their own accord or if they were directly questioned on it. Thus when asked about the propensity to use jurisprudence from the main common law courts, Lord Mance replied that

⁵⁰³ Interview with The Rt. Hon. Lord Phillips of Worth Matravers, above n 454.

⁵⁰⁴ Norman Weiss, 'The Impact of the European Convention on Human Rights on German Jurisprudence', in Esin Örucü (ed), *Judicial Comparativism in Human Rights Cases* (United Kingdom National Committee of Comparative Law, 2003) 60-61; Elaine Mak, *Judicial Decision-Making in a Globalised World*, above n 414, 114-115.

... for language reasons, obviously, it is easier to use common law courts. Unless you speak the language pretty fluently it's not so easy to use most other European courts. Although if you do speak the language, it is interesting to be able to do so.⁵⁰⁵

Lord Mance went on to explain that he is comfortable reading German and that he often found the German jurisprudence to be useful.⁵⁰⁶ Lord Collins raised similar issues:

There is a language issue in all of this, and ... there is also unfamiliarity with the legal system. On the whole we don't get presented with anything from France or Germany or Italy, ... I suppose, if there is a really important issue and that the French Conseil d'Etat has heard or the German Constitutional Court, maybe we would be told about it ... but then we would just be told what they did ...⁵⁰⁷

Baroness Hale explained the problem to be one of confidence: confidence in any translation that one may use and confidence in one's own standard in the relevant language:

The linguistic barrier is, I think, a very strong one because good translation is difficult to come by and very expensive. We may think that we understand French and one of my colleagues has good German but nevertheless you've got to be very confident that you have good legal French and good legal German.⁵⁰⁸

⁵⁰⁵ Interview with The Rt. Hon. Lord Mance, Justice of the United Kingdom Supreme Court (The Supreme Court, London, 6 December 2011).

⁵⁰⁶ In one judgment, published in the days before submission of this thesis, another Supreme Court Justice made reference to jurisprudence from the German Constitutional Court: *R (HS2 Action Alliance Limited) v The Secretary of State for Transport and another* [2014] UKSC 3. Two references to judgments of the German Constitutional Court are made by Lord Reed at [106] and [111], approving a principle applied by the German court (that the rulings of the CJEU should not be read as undermining national constitutions).

⁵⁰⁷ Interview with The Rt. Hon. Lord Collins of Mapesbury, above n 441.

⁵⁰⁸ Interview with The Rt. Hon. Baroness Hale of Richmond, above n 425. Other Justices expressed similar sentiments.

The point was put most simply by Lord Clarke:

With the best will in the world you have to speak very good French to understand legal French. ... I once spent six months on a farm in France and spoke quite good French at the end, but that doesn't really qualify you to read dense texts at the Conseil d'Etat.⁵⁰⁹

Others among the Justices attributed much less influence to language as a barrier to the use of jurisprudence from non-English speaking jurisdictions. Lord Sumption, for example, felt that 'the linguistic barrier is not terribly important'; 'Most judges speak French'. In fact, Lord Sumption considered that it was 'the duty of every civilised man to read another language if not more than one'.⁵¹⁰ Lord Kerr was also dismissive of the idea that judges were prevented from using such materials by a lack of language proficiency and gave an altogether different explanation:

It is certainly not a linguistic barrier [that prevents use of case law from European domestic courts], because it is always possible to get a translation of the particular judgment. It's just that we have, generally, a wealth of material to get through and ... if you attend an appeal hearing that's going to last 2 or 3 days in the Supreme Court and which involves a number of human rights issues, you will see vast bundles of authorities—most of which are never referred to.⁵¹¹

⁵⁰⁹ Interview with The Rt. Hon. Lord Clarke of Stone-cum-Ebony, above n 426.

⁵¹⁰ Interview with The Rt. Hon. Lord Sumption, above n 294. In another context, Lord Sumption is reported to have lamented the loss of a 'general culture' among the newest generation of barristers and solicitors: 'It is very unfortunate, for example, that many of them cannot speak or read a single language other than their own'. Lord Sumption in conversation with Stephen Turvey and Matthew Lawson for Counsel Magazine (July 2012), published by LPA legal <<http://lpalegal.com/news/conversation-with-lord-sumption>> accessed 21 December 2013.

⁵¹¹ Interview with The Rt. Hon. Lord Kerr of Tonaghmore, above n 420.

Although acknowledging language as a factor, Lord Walker's explanation for the lack of citations of jurisprudence from European domestic courts proceeded along slightly different lines:

I think it is much more [to do with] habits of judgment writing. English judgments ... are far too long and most continental judgments are—to our taste—a good deal too short. I remember being shown a judgment of the Supreme Court of the Netherlands and it was so short and so devoid of reasoning. I mean no doubt all the reasoning was there, but it was concealed in their discussions and not really set out in their judgment.⁵¹²

Finally, there is a more general problem surrounding the research framework involved in finding relevant foreign jurisprudence. As Lord Sumption concluded, 'the main barrier is not knowing where to start on the research'.⁵¹³

5.5 The effect of changing judgment styles

There is also a close connection to be made between the use of foreign jurisprudence and judgment types. As Dickson wrote, one feeling about the shift from the House of Lords to the new Supreme Court was that there might be new opportunities to develop the methods adopted by the House of Lords, 'so as to operate in a more modern and accessible way'.⁵¹⁴

The Justices do now compile and deliver their judgments slightly differently from the way their predecessors did, with the first

⁵¹² Interview with The Rt. Hon. Lord Walker of Gestingthorpe, above n 466.

⁵¹³ Interview with The Rt. Hon. Lord Sumption, above n 294.

⁵¹⁴ Brice Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press 2013), 3.

judgment no longer always being that of the most senior judge but rather that of the judge who has written the most detailed judgment explaining why the decision has gone a certain way; any dissenting judgments are usually placed after the judgments of all the judges in the majority. Moreover, Justices are increasingly issuing joint judgments...⁵¹⁵

Dickson's last point touches on one of the most interesting findings from this research, that the Supreme Court now commonly hands down plurality style judgments. The idea of a plurality judgment was explained by Baroness Hale in an interview for the UK Supreme Court Blog, published in *The Guardian* Newspaper in 2010:

The idea of plurality judgments as the norm is very radical. It would mean that the majority who agreed on the result would have one judgment which reflected their common views (with possible post-scripts from adherents) rather than numerous judgments reasoning in almost identical ways towards the same result.⁵¹⁶

In a speech shortly after that interview, Baroness Hale explained that the Parliamentary procedure in the House of Lords made these kinds of judgments difficult.⁵¹⁷

In the House of Lords, we could have a considered opinion of the whole appellate committee, individual opinions with which the

⁵¹⁵ Ibid. At page 4 Dickson also notes changes surrounding the decisions as to whether more than five judges should hear the appeal. The criteria, he notes, has been made more explicit. Dickson takes this to be an indication 'that the Court wishes to be more transparent about the way it operates and that it envisages a larger bench being convened reasonably frequently'. Moreover, '[d]ecisions by larger benches have the potential to allow the Court to present a more powerful and united front to the outside world'.

⁵¹⁶ Dan Tranch and Laura Coogan 'Baroness Brenda Hale: "I often ask myself 'why am I here?'" *The Guardian* (London, 16 September 2010) <<http://www.theguardian.com/law/2010/sep/16/uk-supreme-court-judiciary>> accessed 13 August 2013.

⁵¹⁷ See also Alan Paterson, *Lawyers and the Public Good* (Cambridge University Press 2012) 159, 164 et seq.

others simply agreed, or a series of individual opinions; but jointly authored or plurality opinions were difficult and rarely tried.⁵¹⁸

The trend from the early years of the Supreme Court's activity is towards a significant change in that pattern. In her speech, Baroness Hale gave figures collected by one of the JAs from that year. It is worth reproducing this information in full, since it also provides the explanation of how a 'plurality' or 'effectively plurality' judgment has been defined here:

Richard Reynolds, one of this year's judicial assistants (to whom I am greatly indebted for his researches on this subject), has surveyed our first 57 decided cases. He found that in 20, there was a 'judgment of the court'; and in a further 11, there was either a single judgment (with which all the other Justices agreed), or a single majority judgment (with which all the Justices in the majority agreed), or an 'effectively' single or single majority judgment (because separate judgments were simply footnotes or observations). So 31, or more than half, came out as plurality or effectively plurality judgments.⁵¹⁹

This is consistent with the results of the data collection conducted for the purposes of this study. Following the same criteria, if all decided cases are included (i.e. including cases concerning procedural matters that are otherwise ignored for the purposes of this particular study), 31 cases from the first year were also found to be plurality or effectively plurality judgments. The figure is revised to 26 when the procedural cases or conjoined appeals are discounted. The proportion remains constant as the years go on. Of the total

⁵¹⁸ Brenda Hale, 'Judgment Writing in the Supreme Court' (First Anniversary Seminar, 30 September 2010) <http://www.supremecourt.gov.uk/docs/speech_100930.pdf> accessed 13 August 2013, 1.

⁵¹⁹ *Ibid* 2.

246 cases handed down by the Supreme Court between 2009 and 2013,⁵²⁰ there were 130 with plurality or effectively plurality judgments. Interestingly, only 33 of the remainder actually comprised a full set of separate judgments; although the other 83 could not be classified as being a plurality or effectively plurality judgment, in each case at least one member of the court chose to associate himself (by the expression of agreement) with the judgment of another.⁵²¹ Dickson has added useful figures on the numbers of Justices contributing judgments as well as the number of Justices hearing cases:

In its first three 'legal' years, 2009–12, out of 164 separate sets of judgments issued by the Justices, no fewer than 35 involved seven Justices and a further 12 involved nine Justices. Of the 35 cases, 14 concerned human rights issues, and of the 12 cases seven involved human rights issues. Altogether, 29 per cent of all the cases dealt with involved more than five Justices, and 45 per cent of the cases involving more than five Justices concerned human rights issues. In the last three years of the Appellate Committee of the House of Lords, by way of contrast, only two of the 180 cases involved more than five Law Lords (just over 1 per cent), each of which raised human rights issues.⁵²²

This is not altogether surprising, since it is often said that the move to the new Supreme Court has promoted a greater sense of collegiality. For example, Paterson has described the establishment of 'team-working'

⁵²⁰ An explanation of the calculation of the 246 figure is given in chapter three, text to n 182.

⁵²¹ The data for each year and the total figures given are set out in Annexe two.

⁵²² Brice Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press 2013), 3.

practices under Lord Phillips and Lord Neuberger as far greater than had been the case at the House of Lords.⁵²³ Mak explains:

Since October 2009, the judges have been experimenting with a system in which one judge writes the lead opinion and the other judges on the panel may choose to concur with this judge, to write a separate opinion, or to write a dissenting opinion.⁵²⁴

By changing its working methods in this way, 'the Court aims to create more transparency'.⁵²⁵ The reasoning is that 'working with majority opinions leads to more consistency and gives clearer guidance to the lower courts on how to operate in the future'.⁵²⁶ Darbyshire has a more practical take on this development in judgment writing. 'Jurisprudentially, judges claim they are sparing us the pain of extracting the ratio decidendi from multiple judgments' but '[p]ractically, single judgments have become a labour saving device'.⁵²⁷

Not all commentators agree that plurality style judgments are a positive move. Writing in 1998, Robertson was cautious:

... the Lords have moved to the expectation that there will only usually be one major speech ... Whatever value this may have for legal certainty ... it has reduced the extent of genuine argument

⁵²³ Alan Paterson: *Final Judgment*, above n 430, 141.

⁵²⁴ Elaine Mak, 'Why do Dutch and UK judges cite foreign law?' [2011] CLJ 420, 430.

⁵²⁵ *Ibid.*

⁵²⁶ *Ibid.* Indeed, this is itself an area where the Supreme Court may have learned from courts of other jurisdictions. When Baroness Hale made the case for developing towards plurality judgments in *OBG Ltd v Allan* it was clear that some support was derived from the practices applied abroad: [T]here would be much to be said for our adopting the practice of other supreme courts in having a single majority opinion to which all have contributed and all can subscribe without further qualification or explanation. *OBG Ltd v Allan, Douglas v Hello! Ltd (No.3), Mainstream Properties Ltd v Young* [2007] UKHL 21; [2008] 1 AC 1 at [303], cited in James Lee, 'A defence of concurring speeches' [2009] PL 305.

⁵²⁷ Penny Darbyshire, *Sitting in Judgment*, above n 442, 344-345.

and discussion of issues in a way that not only academic lawyers but many leading counsel find distinctly unhelpful.⁵²⁸

A further drawback has been pointed out by Paterson, relating to a 'loss of individualism in our Justices':⁵²⁹

Single judgments representing the outcome of the internal debates within the Supreme Court which are not publicly rehearsed, remove the humanity of individual difference and potentially undermine transparency. ... Fewer dissents and concurrences in return for more single judgments mean more judgments devised by a committee and consequently more compromise.

Paterson cites Lord Rodger of Earlsferry as a supporter of this view, setting out evidence obtained through interview:

If the powers that be have their way, and the new Supreme Court of the United Kingdom adopts more single judgments, then there will be less scope in future for humour or indeed for any other expressions of the judges' individuality. By definition the author of a composite judgment is not writing just as himself and will alter his voice accordingly.The much touted efficiency savings of a single judgment will be clearly bought if, as a result, we lose individual hallmark contributions of [the] quality [of Lords Macnaghten, Wilberforce and Bingham].⁵³⁰

The effect of plurality style judgments on the use of foreign jurisprudence appears to be significant. Interestingly, one of the judges interviewed by Mak 'indicated that the use of foreign jurisprudence need not be hampered by the

⁵²⁸ David Robertson, *Judicial Discretion in the House of Lords* (Oxford University Press 1998), 77-78; More recently, see e.g. Alan Paterson: *Final Judgment*, above n 430, 91-95; Penny Darbyshire, *Sitting in Judgment*, above n 442, 387-390.

⁵²⁹ Alan Paterson, *Final Judgment*, above n 430, 315.

⁵³⁰ *Ibid*, 315-216.

increased use of majority opinions' because 'an individual judge might still choose to write a separate opinion about foreign law if ... not satisfied with the majority opinion'.⁵³¹ However, the findings from this study indicate otherwise. As figures 6, 7 and 8 show, the proportion of citations of foreign jurisprudence is smallest in plurality type judgments, greater in cases with more than one written judgment and greatest in cases where a full set of separate judgments were given.⁵³² The proportions are similar in both human rights and non-human rights cases. The spike in 2010-11 also correlates to the year in which the highest proportion of plurality judgments cited foreign jurisprudence (30.4%, compared to just 11.5% in 2009-10, 10.7% in 2011-12, 17.0% in 2012-13).

If not to do with the loss of individualism as discussed above, the lesser frequency of foreign jurisprudence citations in plurality judgments may be explained on the basis of the nature of the cases themselves. As explained in later chapters, some of the Justices indicated in the interviews that foreign jurisprudence would be helpful for 'insight',⁵³³ especially where the law is

⁵³¹ Elaine Mak, 'Why do Dutch and UK judges cite foreign law?', above n 524, 430; Elaine Mak, 'Reference to Foreign Law in the Supreme Courts of Britain and the Netherlands: Explaining the Development of Judicial Practices' (2012) 8(2) *Utrecht Law Review* 20, 26.

⁵³² The percentages in these figures add up to greater than 100%. This is because the charts do not represent the proportion of judgment types where foreign law is cited out of all judgments citing foreign law. Instead, the charts show the proportion of cases that cite foreign jurisprudence out of each judgment type. I.e. in figure 2, out of 130 cases that can be categorised as plurality style judgments, 22 contain citations of foreign jurisprudence; foreign jurisprudence is cited in 16.9% of plurality style judgments. The figures are supported by data in Annexe two.

⁵³³ Interview with The Rt. Hon. Lord Mance, Justice of the United Kingdom Supreme Court (The Supreme Court, London, 6 December 2011).

‘uncertain’.⁵³⁴ A number of the Justices also acknowledged a tendency to seek reassurance from foreign jurisprudence, seeking to learn from the experience of other courts ‘about the impact of particular laws’,⁵³⁵ which might in turn lead a Justice to be ‘encouraged or emboldened’ by what other jurisdictions have done.⁵³⁶ It wouldn’t be surprising, therefore, if foreign jurisprudence would be most likely to find its way into the more difficult or morally contested cases, which, in turn, would be more likely to produce multiple judgments. This would fit with the citation of foreign jurisprudence in the controversial assisted suicide cases: *Pretty*,⁵³⁷ *Purdy* and,⁵³⁸ most recently, *Nicklinson*.⁵³⁹ In these circumstances, where the Justices may find it harder to reach a consensus, separate judgments are more likely. These in turn increase the chance of foreign jurisprudence citation, which may otherwise have been cut out of the final product after a degree of compromise. Alternatively, since foreign jurisprudence citation is optional, the citation of these sources is dependent on the inclination of the Justice that is writing the judgment. If a single judgment were to be handed down which has been authored by a Justice that is less keen on comparative law, one could speculate that the explicit citation of foreign jurisprudence would be less likely overall.

⁵³⁴ Interview with The Rt. Hon. Lord Phillips of Worth Matravers, former President of the United Kingdom Supreme Court (The Supreme Court, London, 23 November 2011).

⁵³⁵ Interview with The Rt. Hon. Lord Kerr of Tonaghmore, Justice of the United Kingdom Supreme Court (The Supreme Court, London, 9 May 2012).

⁵³⁶ Interview with The Rt. Hon. Lord Collins of Mapesbury, retired Justice of the United Kingdom Supreme Court (The Supreme Court, London, 22 May 2012).

⁵³⁷ *R (Pretty) v Director of Public Prosecutions and Secretary of State for the Home Department* [2001] UKHL 61.

⁵³⁸ *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45.

⁵³⁹ *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38.

Figure 6: Citations of foreign jurisprudence by judgment type 2009-13, in all cases.

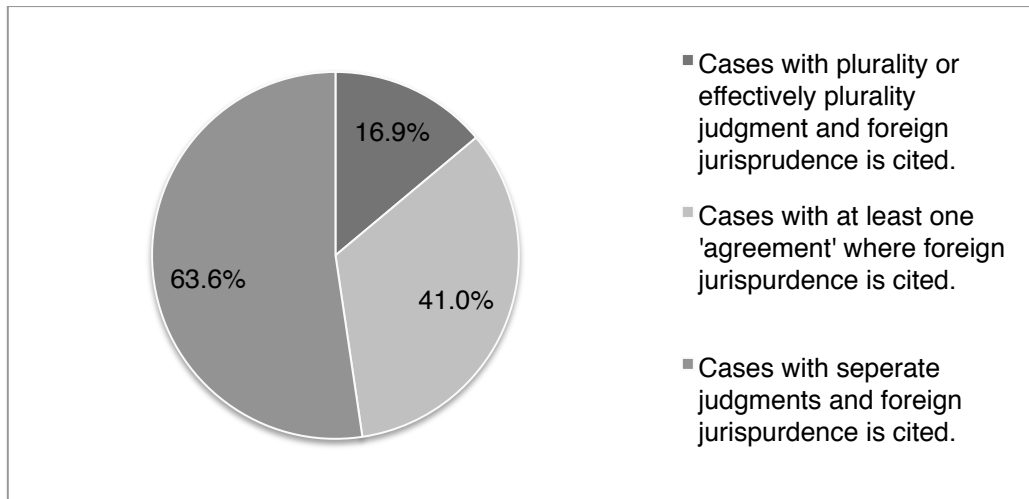


Figure 7: Citations of foreign jurisprudence by judgment type 2009-13, in non-human rights cases.

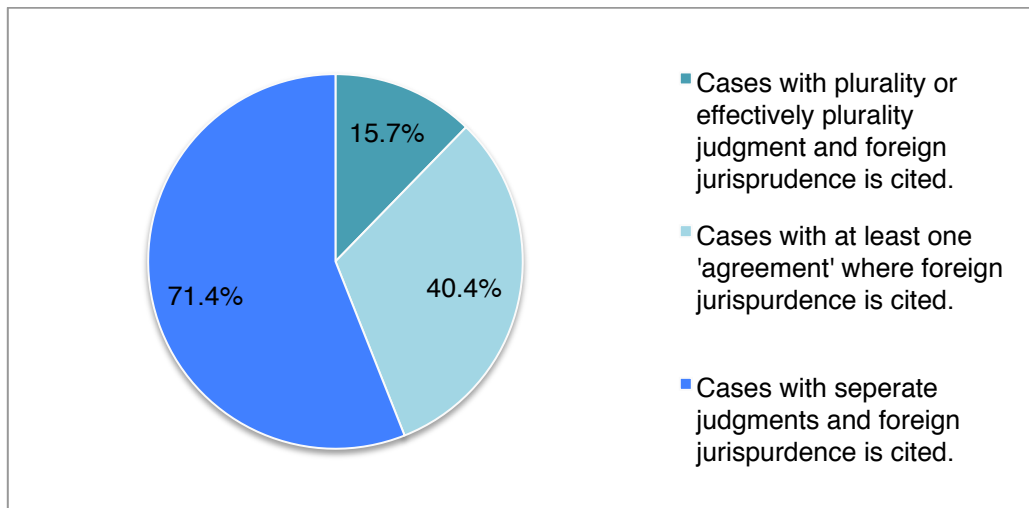
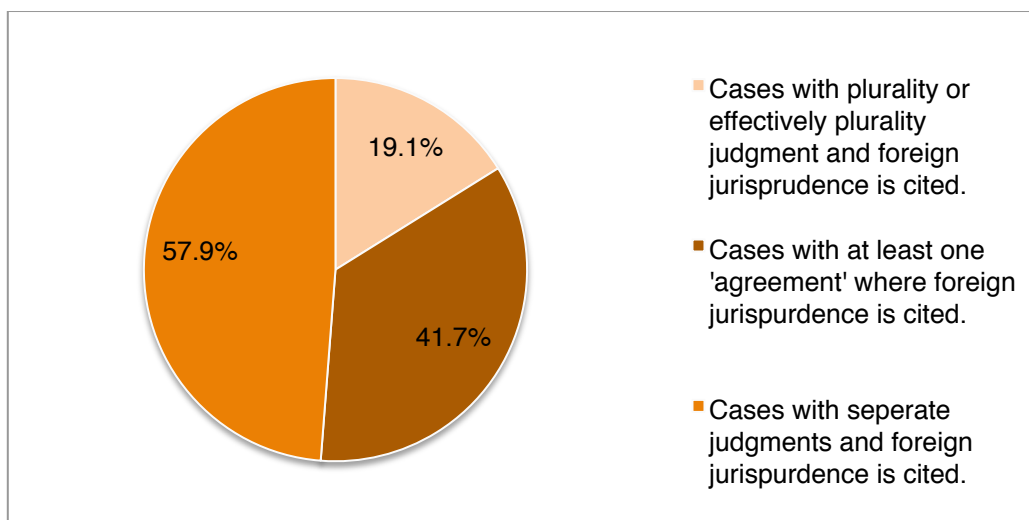


Figure 8: Citations of foreign jurisprudence by judgment type 2009-13, in human rights cases.



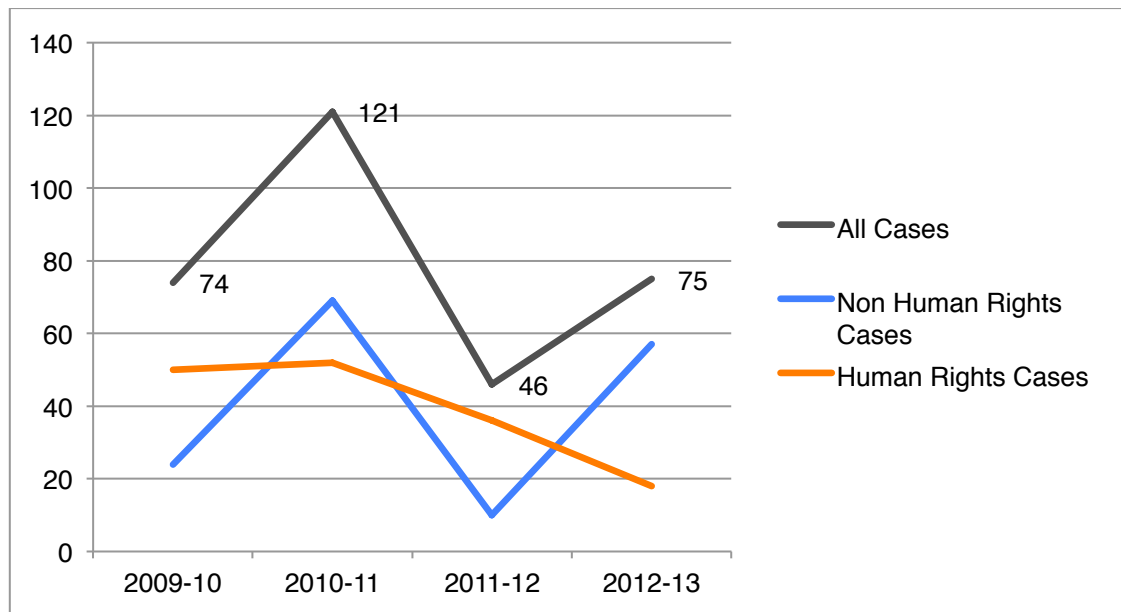
Alternative explanations for the rise and fall in the use of foreign jurisprudence can, of course, be offered on a qualitative analysis of the cases themselves. For example, it is not necessarily the case that citations of foreign jurisprudence indicate heavy use of those materials. Indeed, drawing from Mak's earlier research on the reasons for citing foreign jurisprudence,⁵⁴⁰ Bell concluded that in the 2010-11 cases, foreign jurisprudence does not discernibly contribute to the outcome of those cases. These are conclusions that are discussed at greater length in a later chapter. For now, it is sufficient to note that the simple citation of foreign jurisprudence does not necessarily indicate the importance attached to those decisions or the attention and depth of analysis that they have been afforded.

5.6 The decline of comparativism in human rights cases

The emerging picture from human rights cases appears to be that of a decline in the number of explicit citations of foreign jurisprudence. Figure 9 illustrates this by plotting the number of foreign cases cited each year on a line graph. The fluctuation in numbers is largely due to citations in non-human rights cases. In human rights cases, the trend is more constant.

⁵⁴⁰ Elaine Mak, 'Why do Dutch and UK judges cite foreign law?', above n 524.

Figure 9: Total foreign jurisprudence citations at the UK Supreme Court by year.



This pattern of citations of foreign jurisprudence may simply be explained on the basis of a variation in the number of human rights cases and non-human rights cases decided by the Supreme Court in those years. Although the number of human rights cases themselves remain fairly constant, the number of human rights cases as a proportion of the total number of cases each year fluctuates: 28 human rights cases were decided in 2009-10 (representing 55% of the total 51); 22 human rights cases were decided in 2010-11 (representing 37% of the total 60); 29 human rights cases were decided in 2011-12 (representing 50% of the total 58); and 24 human rights cases were decided in 2012-13 (representing 30% of the total 79). Therefore, in 2010-11 and 2012-13—the years that show spikes in the use of foreign jurisprudence in non-human rights cases—there was generally a greater number of non-human rights judgments handed down. However, these figures do not explain the general decline in the number of citations in human rights cases, since the number of human rights cases

remained between 22-29, with the lowest number (22) in 2010-11, the year in which the most human rights cases were found to have citations of foreign jurisprudence. As suggested earlier, it is likely that the influence of certain Justices could have had an impact on these trends: one of the heaviest users of foreign jurisprudence, Lord Collins, cited those sources in 63.6% of his written judgments in the 2010,⁵⁴¹ before retiring in 2011.

Another explanation for the decline in the number of citations is to do with an increase in the body of UK human rights jurisprudence since the coming into force of the HRA in October 2000.⁵⁴² Indeed, with citations in about 30% of its case law, the United Kingdom sits among the lesser users of foreign jurisprudence when compared to other common law courts. For example, a recent study found that the South African Constitutional Court had cited foreign jurisprudence in 52% of its decisions since its establishment.⁵⁴³ The High Court of Australia's citation practices were similar, with foreign jurisprudence in 52.3% of its constitutional cases.⁵⁴⁴ The Supreme Court of Canada and the Supreme Court of Israel come closer to the UK Supreme Court's proportions, citing foreign jurisprudence in 37.9% and 28% of constitutional cases respectively. Indeed the only exception is the United States, where the practice of citing

⁵⁴¹ In 2010 Lord Collins heard 23 cases, gave written judgments in 11 and cited foreign jurisprudence in 7.

⁵⁴² This would support the idea that judges largely refer to comparative sources where the indigenous jurisprudence is lacking. The 'gap-filling' thesis is discussed further in chapter six.

⁵⁴³ Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges*, above n 414, 412.

⁵⁴⁴ *Ibid.*

foreign jurisprudence is highly controversial.⁵⁴⁵ The UK jurisprudence also ranks highly for foreign jurisprudence citations in other countries. In Australia and Ireland, the UK jurisprudence is cited more often than the decisions of other foreign courts and is frequently cited by the Canadian, Indian and New Zealand courts.⁵⁴⁶

The connected possibility is that the decline in the number of citations of foreign jurisprudence in human rights cases is a product of the attention paid to the jurisprudence of the ECtHR.⁵⁴⁷ As other commentators have suggested, a combination of resource strain and an obligation to take into account certain sources of law may simply mean that there is little time for judges to look beyond those parameters. As Bodek has explained:

...there appears to be a correlation between the amount of the mandatory foreign sources and the likeliness of any further, non-

⁵⁴⁵ E.g. Cheryl Saunders, 'Comparative Constitutional Law in the Courts: Is There a Problem?' in Jane Holder and Colm O'Cinneide (eds) *Current Legal Problems* (2006) Vol 59, (Oxford University Press 2007), Jo Eric Khushal Murkens, 'Comparative Constitutional Law in the Courts: Reflections' (2008) LSE Law, Society and Economy Working Papers 15/2008 <<http://papers.ssrn.com/abstract=1268487>> accessed 03 February 2011; Norman Dorsen, 'A conversation between U.S. Supreme Court justices' (2005) 3(3) *International Journal of Constitutional Law* 519; Vicki Jackson 'Comparative constitutional federalism and transnational judicial discourse' (2004) 2(1) *International Journal of Constitutional Law* 91; Richard Posner, 'No Thanks, We Already Have Our Own Laws' *Legal Affairs* July/Aug 2004 <http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp> accessed 01 August 2013.

⁵⁴⁶ Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges*, above n 414, 412. Ibid. Although the use of UK jurisprudence by other Commonwealth courts is not surprising, given the common constitutional and legal origins and shared historical influences. I am grateful to Michael Walker for this reflection. See further e.g. Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges*, above n 414; Christopher McCrudden, 'A Common Law of Human Rights?', above n 415; Michael Bobek, *Comparative Reasoning in European Supreme Courts*, above n **Error! Bookmark not defined.**, 91-93. Bobek has gone so far as to ask whether references to the law of selected few common law nations, especially the British dominions like Australia, Canada, or New Zealand, are references to foreign law at all.

⁵⁴⁷ Section 2 Human Rights Act 1998 obliges domestic courts to 'take into account' the relevant jurisprudence of the Strasbourg Court.

mandatory foreign inspiration. The relationship is one of inverse proportion: the more mandatory foreign, the less likelihood of any non-mandatory foreign. The impression that one obtains ... is that ... any available judicial energy will be spent on researching and navigating within the mandatory foreign. ... the exponential growth of the European and international *must* sources takes away much of the free space and energy for the *may* ones.⁵⁴⁸

The close attention paid to the Strasbourg jurisprudence is well documented in the case law and commentary on the Human Rights Act and it would not be surprising if foreign jurisprudence citations gave way to the Strasbourg Court's case law, where relevant. It may simply be that in the later years, the Strasbourg had recently spoken,⁵⁴⁹ and had provided clearer guidance. Since the Supreme Court is under a duty to 'take into account' the Strasbourg jurisprudence and it is that jurisprudence which provides the authoritative interpretation on Convention rights, there is little incentive to use foreign jurisprudence if an authoritative judgment is to be found in the Strasbourg case law.⁵⁵⁰

Indeed, the influence of the Strasbourg jurisprudence is so clear as to be evident in some jurisdictions not signatory to that instrument. For all the common law jurisdictions mentioned above, the decisions of the ECtHR are considered 'foreign law' (on the basis that the states are not signatory to the

⁵⁴⁸ Michael Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford University Press 2013), 195.

⁵⁴⁹ Baroness Hale, 'Who Defines Convention Rights?' (2010) 5(2) JUSTICE Journal 10, 13: [T]here is nothing in the [Human Rights] Act ... to support the reluctance ... to seek such guidance as we can from the jurisprudence of foreign courts ... especially on subjects where Strasbourg has not recently spoken.

⁵⁵⁰ The influence of the Strasbourg jurisprudence is given further discussion from n 654, below.

Conventions and therefore do not fall within the jurisdiction of the Strasbourg Court). But as Groppi and Ponthoreau found, the decisions of the ECtHR ‘are experiencing an increasing influence’.⁵⁵¹

The many reasons explaining this phenomenon ... include the accessibility for English-speaking countries of the [European Court of Human Rights] decisions and the fact that human rights are a more fertile ground for foreign citations.⁵⁵²

A final possibility for the decline in the number of foreign jurisprudence citations shown in figure 9 represents one of the drawbacks of using a relatively small data sample for statistical representation. The four-year data collection period may represent an unusual period of Supreme Court activity (not least because these are the first four years of its activity) and may not therefore provide an accurate picture of this trend. It would be interesting to revisit this trend after a few more years of Supreme Court activity.

5.7 Conclusions

The quantitative analysis illustrates the central patterns in the use of foreign jurisprudence at the Supreme Court. It is clear, for example, that the Supreme Court does make reference to foreign jurisprudence. It is also clear that the proportion of cases in which foreign jurisprudence is cited has remained fairly constant across the first four years of the Court’s activity, although there are some yearly fluctuations to note—especially in 2010-11. The number of

⁵⁵¹ Ibid 420.

⁵⁵² Ibid.

individual citations, however, appears to be declining in human rights cases in particular.⁵⁵³

The data set also reveals some surprising results and made clear the importance of direct qualitative evidence derived from interviews with the protagonists, exposing the likelihood of implicit use of foreign jurisprudence. For example, one surprising finding from the data analysis was that there were very few citations of German jurisprudence: just five cases—including three human rights cases—cited German jurisprudence out of the possible 246 handed down between 2009 and 2013. Given the reputation that Lord Mance, in particular, has regarding enthusiasm for German law, it was expected that the number would be much greater. Having said this, figure 5 shows German cases were the next most cited after the common law jurisdictions.

For the same reason, it was surprising to see that Lord Rodger did not come out as one of the more frequent users of foreign jurisprudence. Lord Rodger's enthusiasm for using comparative law is well documented, including in recent contributions by Lord Mance and Tetyana Nesterchuk (a former JA) in a volume of essays published in Lord Rodger's memory.⁵⁵⁴ One possible implication of these results is that that foreign jurisprudence is used more extensively than is possible to tell on the face of the judgments. It is perhaps for this reason that

⁵⁵³ Although it is acknowledged that an obvious drawback of the relatively small four-year data collection period may not provide an accurate picture of this trend.

⁵⁵⁴ Lord Mance, 'Foreign Laws and Languages' and Tetyana Nesterchuk, 'The View from Behind the Bench', in Burrows, Johnston and Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford University Press 2013).

Lady Justice Arden commented during interview that there is ‘far more use of comparative law than appears on the face of the judgments ... it’s informing the judges behind the scenes’.⁵⁵⁵ There is an obvious explanation for the surprisingly low number of explicit citations from these Justices, otherwise known to be enthusiastic about comparative law: foreign jurisprudence may not always be being used as ‘authority’ or cited out of courtesy to counsel, as mooted in chapter four. Instead, it is possible that foreign jurisprudence is being used more determinatively, as an analytical lens, to help with a process of reflection on a problem but which does not necessarily contribute to the outcome of a case. As Lord Mance recently put it:

when judges look to comparative and international material, they may do so for information, inspiration, or confirmation, just as they use domestic decisions that are not binding on them.⁵⁵⁶

The potential for using foreign jurisprudence simply as a heuristic device is explored further in chapter six. For now, it is sufficient to be reminded that foreign jurisprudence may legitimately be treated like any other persuasive source, which need not be cited.

Whether used implicitly or explicitly, it was clear from the interviews that practical considerations are some of the main forces driving the manner and frequency with which foreign jurisprudence is used at the Supreme Court. The Court continues to rely on counsel for references to legal materials that are to be used in the process of judicial reasoning, although it would not be unusual

⁵⁵⁵ Interview with The Rt. Hon. Lady Justice Arden, above n 422.

⁵⁵⁶ Lord Mance, ‘Foreign Laws and Languages’, above n 594, 87.

for judges to ask counsel to address comparative material if it was felt to be useful. Beyond this, the Justices might be willing to undertake their own research, but this is likely to be closely connected to the individual approach of each judge. It is worth noting that those Justices who did express greater willingness to embark upon research of this kind also tended to be heavier users of foreign jurisprudence.⁵⁵⁷

When foreign jurisprudence is sourced independently of counsel's submissions, online databases and collections in libraries provided the most obvious avenue. To a lesser extent, the JAs might also have raised comparative material but this would be less usual. Accessibility and time pressures are additional factors. The Supreme Court does have a little more time for research on complex points of law than the lower courts but, as several of the justices explained during the interviews, there are limits to what can be done.⁵⁵⁸ As a result, the feeling prevails that citations of foreign jurisprudence remain unsystematic. Baroness Hale seemed to agree:

We do all sorts of things for all sorts of reasons, just as things come to us in all sorts of ways. ... There is a large random element to all of this...⁵⁵⁹

⁵⁵⁷ Further analysis of the correlation between personal attributes and the frequency of foreign jurisprudence citations is given by Michael Bobek in his study of the supreme courts in Europe: Michael Bobek, *Comparative Reasoning in European Supreme Courts*, above n **Error! Bookmark not defined.**, 57.

⁵⁵⁸ Cf. Michael Bobek, *Comparative Reasoning in European Supreme Courts*, ibid 44-45: '[c]omparative analysis is, in terms of time, expertise, and resources, a demanding exercise' and 'it is at the level of supreme jurisdictions where human resources (analytical backup) and also procedural tools (lesser docket, selection of cases) may be available. These allow judges to concentrate on contentious legal issues in greater detail'.

⁵⁵⁹ Interview with The Rt. Hon. Baroness Hale of Richmond, above n 425.

An effective time saving measure is to refer to the works of leading academics in the relevant field. This, in turn, is likely to influence the jurisdictions that are used since the discretion is with the author rather than the judge. Other related influences, despite having less practical significance, are the various judicial exchanges and international meetings or conferences. These meetings may perpetuate the tendency to resort to jurisprudence from a small family of courts, but there is little evidence to suggest that new material is introduced as a result of such meetings. Even where this appears to be more likely, it is arguably better to explain uses of foreign jurisprudence as part of a prior willingness to draw from selected foreign jurisprudence in the first place, rather than as a product of judicial exchanges *per se*. Indeed Lord Steyn's use of the Israeli perspective in *Daly* comes as no particular surprise given the general openness to foreign jurisprudence exhibited by some of his earlier judgments. For example, in *McFarlane v Tayside Health Board*,⁵⁶⁰ Lord Steyn explained that he would have used foreign jurisprudence mainly to assist in his own reflections about the case. Lord Steyn also argued that comparative law has the 'inestimable value of sharpening our focus on the weight of competing considerations'.⁵⁶¹

For that purpose, it is most likely that the Justices simply refer to jurisprudence from the jurisdictions that they feel most confident with, either because there is an impression about the quality of the jurists from a particular court or because it is simply easier to consider decisions from English speaking jurisdictions. As

⁵⁶⁰ *McFarlane v Tayside Health Board* [2000] 2 AC 59.

⁵⁶¹ *Ibid* [81] (Lord Steyn).

Markesinis and Fedtke have written, ‘one must not ignore the very pragmatic limitation that language limitations may restrict the extent of these “fishing expeditions”’.⁵⁶² Despite the fact that not all the Justices agreed that language would be a barrier to foreign jurisprudence, it is not surprising that, where there are citations of foreign jurisprudence, there is an enduring allegiance to the courts of established common law jurisdictions.⁵⁶³ Flanagan and Ahern reported similar results from their electronic questionnaires:

A large majority of judges, 81 per cent, indicated that a democratic form of government was a prerequisite for the citation of the law of another jurisdiction in a judgment about domestic rights. Conversely, 17 per cent of judges indicated they set *no* jurisdictional prerequisites. Only a single judge indicated a set of traits that did not include democracy, namely, that it be a common law jurisdiction. Other than democracy, the most cited prerequisite was that it be a common law jurisdiction (26 per cent), followed by commonality of language (14 per cent). There were seven comments to the effect that, were a jurisdiction to possess the ‘same language’ and ‘common law’ traits, it would be more readily comparable, but that, democracy aside, such traits were not a *sine qua non*.⁵⁶⁴

The effect of the HRA 1998 might have been thought to promote greater interest in the position of European domestic courts but, as in other areas, practical considerations usually drive the Supreme Court to rely on the Strasbourg

⁵⁶² Sir Basil Markesinis and Jörg Fedtke (eds), *Judicial Recourse to Foreign Law: A new source of inspiration?* (University College London Press 2006), 71.

⁵⁶³ Alan et al have made similar findings in the context of the use of foreign jurisprudence in New Zealand: James Allan, Grant Huscroft and Nessa Lynch, ‘The citation of overseas authority in rights litigation in New Zealand- How much bark? How much bite?’ (2007) 11 *Otago Law Review* 433, 438.

⁵⁶⁴ Brian Flanagan and Sinead Ahern, ‘Judicial Decision-Making and Transnational Law: A Survey of Common Law Supreme Court Judges’ (2011) 60 *International and Comparative Law Quarterly* 1, 21.

jurisprudence to inform them on such matters. Undoubtedly, the changes in judgment styles since the last years of the House of Lords have also had an obvious effect. For example, it is clear that the Justices are inclined to work towards plurality style judgments,⁵⁶⁵ which in turn appear to yield significantly fewer citations of foreign jurisprudence.

These are changes that must be balanced against the value of foreign jurisprudence. The potential to derive assistance from foreign jurisprudence is not in doubt and many of the Justices interviewed confirmed the usefulness of these sources. For example, writing in memory of Lord Rodger, Lord Mance expressed the feeling that it was his ability and willingness to take a comparative view of matters which formed an important part of Lord Rodger's legacy as a judge. It is worth reproducing the passage at length:

Part of Lord Rodger's legacy as a judge will lie in the weight he attached to looking at matters from all angles and from the viewpoint of others. That is the essential role of the comparativist, for whom languages are correspondingly important. Too often in the highest court, issues arise which one feels must have been considered in other major legal systems. Too often, difficulties of obtaining appropriate information or an appropriate interlocutor to explore or explain a foreign system stand in the way of cross-fertilization of this sort. Lord Rodger's knowledge and experience straddled different legal systems and was, in that respect, unique. His departure invites the thought that the Supreme Court should itself aim to acquire a comparative legal and linguistic expertise that its present admirable

⁵⁶⁵ Paterson has found that the proportion of single judgments has increased greatly since the House of Lords and that along with there there has been 'a parallel growth in judgments by one Justice with which one of more colleagues will join or agree. See further Alan Paterson: *Final Judgment*, above n 430, 102-107.

judicial assistants do not generally bring. Other European courts, supranational and national, have within their organization young lawyers, often with the highest academic qualifications. ... Their role is to research issues where comparative legal input could be relevant and to liaise with their homologues in similar positions.⁵⁶⁶

Lord Mance continued:

There have been numerous cases at the highest level where this might have proved of interest. ... [and] [i]n all these cases, it could have been valuable to have a direct in-house facility for comparative law research. It is an idea worth pursuing after Alan Rodger's much-mourned departure from the court.⁵⁶⁷

⁵⁶⁶ Lord Mance, 'Foreign Laws and Languages', above n 554, 96-97.

⁵⁶⁷ *Ibid* 97.

6 Foreign jurisprudence as a heuristic device

'The question of real importance is —what is its purpose?'⁵⁶⁸

It was concluded in chapter four that the legitimacy of using foreign jurisprudence must be contingent—at least in part—upon the reason for which it is used. That conclusion is not controversial: Saunders has recently suggested that legitimacy is intimately connected to the purposes for using foreign jurisprudence.⁵⁶⁹ In fact, for Saunders, the latter was said to assume the former. Thus Saunders' thesis was that the legitimacy of using any foreign jurisprudence would necessarily vary according to the purpose for which a court employs it.⁵⁷⁰ The result is that foreign jurisprudence can be a legitimate judicial recourse in some conditions and not in others.

The conditions in which the use of foreign jurisprudence might give rise to problems can be summarised as ones in which the result is the adoption of foreign norms or the development of domestic jurisprudence in reliance on those norms. The crux of the problem is the enduring debate about sovereignty. If a court uses foreign jurisprudence to develop domestic law in a direction not

⁵⁶⁸ Harold Cooke Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (2nd edn, Cambridge University Press 1949), 5.

⁵⁶⁹ Cheryl Saunders, 'Comparative Constitutional Law in the Courts: Is There a Problem?' in Jane Holder and Colm O'Conneide (eds), *Current Legal Problems* (Vol 59, Oxford University Press 2006).

⁵⁷⁰ *Ibid.*

envisaged by the legislature, it effectively assumes legislative sovereignty.⁵⁷¹

This is particularly clear in the US debate about the legitimacy of recourse to foreign jurisprudence. Cram explains:

[One] strand of US exceptionalism objects to foreign norm citation on sovereignty grounds. The suggestion here is that where the Constitution does not authorize or formally give a status to foreign norms, resort to such norms by the court is improper, occurring as it does without a proper mandate from the people or their representatives. ... These difficulties are further compounded where the judiciary enjoy a power of review over primary legislation and when the foreign source is being used by the domestic court to strike down a measure that has been passed by the democratically elected legislature. It is unsurprising therefore when resort to comparative legal resources is labeled as foreign interference and something to be resisted.⁵⁷²

Criticisms of this kind are perpetuated by the relative lack of transparency about the methods or purposes involved in the use of foreign jurisprudence. In a limited number of cases, explanations for the citation of foreign materials can be derived from the context of a judgment. However, in by far the greatest proportion of cases, little to no explanation is given why the foreign jurisprudence has been cited.

Further uncertainty is created by the disparity between the data collected from the judgments and the evidence obtained through interviews, which suggested

⁵⁷¹ E.g. Roger Alford, 'Misusing International Sources to Interpret the Constitution' (2004) 98 *American Journal of International Law* 57, 59; Roger Alford, 'In Search of a Theory for Constitutional Comparativism' (2005) 52 *ULC Law Review* 639.

⁵⁷² Ian Cram, 'Resort to foreign constitutional norms in domestic human rights jurisprudence with reference to terrorism cases' [2009] *CLJ* 118, 123-124.

that judges use foreign jurisprudence to a greater extent than is detectable from the judgments themselves. If that is so, it is worth clarifying the reasons for these additional recourses to foreign jurisprudence. Certainly, the evidence from the interviews described in chapter four was that the citations of foreign materials are not usually made for purely decorative or ornamental purposes. Moreover, if this were to be the case, foreign jurisprudence would always be detectable on the face of the judgment.

The thesis in the following three chapters is that there are three main purposes for using foreign jurisprudence in Supreme Court human rights cases (and, often, in Supreme Court cases generally). The first is the purpose considered by this chapter: that foreign jurisprudence is used as a heuristic device. Foreign jurisprudence represents an opportunity for reflection on a given issue. Although this may be prompted by a lack of relevant or helpful domestic jurisprudence, the ‘gap-filling’ thesis propounded in much of the literature is not supported. The Supreme Court is not concerned with filling gaps *per se*. Rather, the Justices are using foreign jurisprudence as an analytical lens,⁵⁷³ through which to theorise on the domestic issue. These recourses to foreign jurisprudence are most likely to be conducted as an ‘extra’ but will not usually make a substantive contribution to the reasoning in any one case. As such, foreign jurisprudence used for this purpose would not necessarily convert into explicit citations in a published judgment. Chapters seven and eight detail the other two main purposes for which it is argued that the Supreme Court uses foreign

⁵⁷³ The term ‘analytical lens’ is used in Esin Örüçü (ed), *Judicial Comparativism in Human Rights Cases* (United Kingdom National Committee of Comparative Law 2003).

jurisprudence in human rights cases: to identify and maintain consensus or uniformity; and instrumentally, to support conclusions at odds with the relevant domestic (or Strasbourg) jurisprudence.

6.1 Gap filling

Gutteridge wrote in 1949 that ‘at some future date more extensive use will, no doubt, be made of foreign law for the purpose of assisting our judges to fill the gaps that are still to be found in our law’.⁵⁷⁴ Some years later, a strong theme remains that foreign jurisprudence may offer a useful perspective where the indigenous jurisprudence is lacking or unsettled. In such circumstances, it is usually argued that foreign jurisprudence can contribute solutions to similar legal problems. It is a functionalist approach, which proceeds on the basis of ‘usefulness and need’ and the logic is intelligible: ‘...only a fool would refuse quinine just because it didn’t grown in his back garden’.⁵⁷⁵ Lord Bingham referred to such circumstances in his 2009 Hamlyn lecture:

There are perhaps two situations in which foreign authority may exert a significant if not a decisive influence. One is where domestic authority points towards an answer that seems inappropriate or unjust. The other is where domestic authority appears to yield no clear answer.⁵⁷⁶

⁵⁷⁴ Harold Cooke Gutteridge, *Comparative Law*, above n 568, 40; More recently see eg Cheryl Saunders, ‘Comparative Constitutional Law in the Courts: Is There a Problem?’, above n 569, 114.

⁵⁷⁵ Rudolph von Jhering, quoted in Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, Oxford University Press 1998), 17.

⁵⁷⁶ Tom Bingham, *Widening Horizons* (Cambridge University Press 2010), 7-8.

It is fairly clear that counsel would tend to approach foreign jurisprudence in this way, making use of it as evidence for a movement in the domestic position or to persuade a court about the way domestic jurisprudence ought to be construed and developed. Legal practitioners are trained to give evidence for their arguments and the accessibility of foreign jurisprudence through the Internet has enlarged the pool of potential authorities. As McCrudden has written:

For the human rights advocate the role of comparison is that of persuasion to an essentially moral position. Lawyers in the human rights context often use comparison to legitimate their argument that a particular interpretation of an existing human rights norm should be adopted, or as part of the process of generating further norms.⁵⁷⁷

It is clear that some Justices of the Supreme Court expect counsel to behave in this way. Lord Kerr explained:

I suppose there must be a tendency on the part of counsel to have resort to foreign jurisprudence that deals with the point if there isn't any unambiguous answer to be found in domestic jurisprudence.⁵⁷⁸

Whether or not judges articulate 'gap-filling' as a purpose, there are examples of cases in which foreign jurisprudence appears to have been used in this way. For instance, the development of the common law breach of confidence action, so as to protect the privacy right enshrined under Article 8 of the ECHR, owes much to a decision of the Australian High Court.⁵⁷⁹ The approach has been

⁵⁷⁷ Christopher McCrudden, 'Judicial Comparativism and Human Rights' in Esin Örüçü and David Nelken (eds), *Comparative Law: A Handbook* (Hart Publishing 2007) 371, 376.

⁵⁷⁸ Interview with The Rt. Hon. Lord Kerr of Tonaghmore, above n 535

⁵⁷⁹ *Australian Broadcasting Corporation v Lenah Game Meats* [2001] HCA 63; Roger Masterman, 'Section 2(1) of the Human Rights Act: Binding domestic courts to Strasbourg?'

similar where the jurisprudence of the ECtHR (which the HRA 1998 obliges domestic courts to 'take into account') is silent or unhelpful.⁵⁸⁰ As Baroness Hale has confirmed (extra judicially):

[T]here is nothing in the [Human Rights] Act ... to support the reluctance ... to seek such guidance as we can from the jurisprudence of foreign courts ... especially on subjects where Strasbourg has not recently spoken.⁵⁸¹

One of the best examples is given by two cases handed down prior to the move to the Supreme Court, by the House of Lords. In *Secretary of State for the Home Department v MB*,⁵⁸² the issue turned on the minimum requirements for a fair hearing in control order cases, for the purposes of Article 6 of the ECHR. In brief, the question was whether disclosure of closed material to a special advocate would enable a controlled person to have a fair trial. When *MB* was before the House of Lords, the Strasbourg Court's approach to the level of disclosure required to render a hearing fair was unclear. As Baroness Hale wrote, 'Strasbourg [had] not yet had to deal with a case exactly on all fours with the present'.⁵⁸³ The Grand Chamber had not yet decided *A and others v United Kingdom*, which considered breaches of procedural guarantees in Article 5(4) of the Convention (providing similar requirements about the lawfulness of a

[2004] PL 725, 726; Gavin Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy Under the Human Rights Act' (2003) 65 MLR 726, 731.

⁵⁸⁰ Section 2 of the Human Rights Act 1998 obliges domestic courts to 'taking into account' relevant Strasbourg jurisprudence in cases that raise a Convention point; Francesca Klug, 'The Human Rights Act 1998, Pepper v Hart and All That' [1999] PL 246, 251: Domestic courts will therefore draw from foreign jurisprudence especially where there is 'little or no steer from the Strasbourg organs'.

⁵⁸¹ Baroness Hale, 'Who Defines Convention Rights?' (2010) 5(2) JUSTICE Journal 10, 13.

⁵⁸² *Secretary of State for the Home Department v MB* [2007] UKHL 46; [2008] 1 AC 440.

⁵⁸³ *Ibid* [67] (Baroness Hale).

decision, as determined by a court).⁵⁸⁴ In the absence of clear and constant Strasbourg authority, the House were forced to attempt to identify some of the guiding principles from the existing Strasbourg case law. In doing so, Lord Bingham made heavy reference to the approach of the Canadian and United States courts on the issue. The references to those jurisdictions did not themselves provide the ‘magical ace of trumps’,⁵⁸⁵ but it is clear that the House found them to be a useful resource and used them to confirm that the Strasbourg case law had developed along the same lines. It was after quoting passages from the Canadian and United States Supreme Courts,⁵⁸⁶ that Lord Bingham noted that ‘[s]tatements to similar effect, less emphatically expressed, [were] to be found in the Strasbourg case law’.⁵⁸⁷

By the time *Secretary of State for the Home Department v AF (No 3)* reached the House of Lords,⁵⁸⁸ the Grand Chamber judgment in *A v United Kingdom* had been handed down.⁵⁸⁹ As Baroness Hale later explained (extra judicially):

Although *A v United Kingdom* was concerned with detention, and the control order cases were not, the House of Lords in *AF (No*

⁵⁸⁴ Article 5(4) reads: Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

⁵⁸⁵ Tom Bingham, *Widening Horizons*, above n576, 7-8.

⁵⁸⁶ *Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350; *Hamdi v Rumsfeld* (2004) 542 US 507.

⁵⁸⁷ *Secretary of State for the Home Department v MB* [2007] UKHL 46; [2008] 1 AC 440, [30]-[31] (Lord Bingham).

⁵⁸⁸ *Secretary of State for the Home Department v AF and another* [2009] UKHL 28; [2010] 2 AC 269.

⁵⁸⁹ *A v the United Kingdom* [2009] EHRR 301.

3) considered it inevitable that Strasbourg would take the same view of the procedural requirements for confirming control orders.⁵⁹⁰

While the Canadian and United States authorities were again cited (when referring to *MB*), the effect of the decision in *A v United Kingdom* prompted Lord Rodger's well-known conclusion: '*Argentoratum locutum, iudicium finitum* - Strasbourg has spoken, the case is closed'.⁵⁹¹

The *MB* and *AF (No 3)* cases demonstrate that a wider net might be thrown where the Strasbourg position is unclear, but it is difficult to link such examples to an attitude of using foreign jurisprudence as 'gap fillers' generally. If the gap-filling explanation were accurate, the assumption would be that the use of foreign jurisprudence would significantly decline—or be non-existent—where domestic law is settled, unless its suitability is questioned in some way:⁵⁹² while it is said that only a fool 'would refuse quinine just because it didn't grow in his back garden', it is also said that '[n]o one bothers to fetch a thing from afar when he has one as good or better at home'.⁵⁹³ The first problem with this reasoning is that it is not easy to find examples of cases where foreign jurisprudence would have been cited *but for* the existence of relevant domestic law. The Justices are hardly likely to highlight such possibilities in their

⁵⁹⁰ Brenda Hale, 'Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme?' (2012) 12 (1) Human Rights Law Review 65, 67.

⁵⁹¹ *Secretary of State for the Home Department v AF and another*, above n 588, [98] (Lord Rodger).

⁵⁹² Christopher McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20(4) OJLS 499, 523. Cf. Albert Kiralfy, 'The Persuasive Authority of American Rulings in England,' (1948-9) XXIII Tulane Law Review 209, 210; Cheryl Saunders, 'Comparative Constitutional Law in the Courts: Is There a Problem?' in Jane Holder and Colm O'Connell (eds) *Current Legal Problems* (2006) Vol 59, (Oxford University Press 2007), 101.

⁵⁹³ Rudolph von Jhering, quoted in Zweigert K and Kötz H, *An Introduction to Comparative Law*, above n 575, 17.

judgments, which the Justices are in any case aiming to reduce in complexity and length. The second problem is that, even in cases where the attitude is possible to discern, the matter is not necessarily put so clearly. Lord Rodger's short statement in *AF (No 3)* is unusual. As Lord Mance has written, the 'brevity and wit were here a misleading guide to the approach which Lord Rodger might have taken in other contexts'.⁵⁹⁴ Further obscurity is created by the fact that the House of Lords in the later cases did repeat the citations to the foreign jurisprudence used in *AF*, which is not unexpected given the House was considering the identical issue and was reviewing the reasoning of the House in the earlier case. Indeed, when reviewing the cases handed down by the Supreme Court between 2009 and 2013, it was noted that many references to foreign jurisprudence were prompted by discussion of previous cases that had considered those sources, rather than as a result of a fresh contribution.⁵⁹⁵

The gap-filling thesis is therefore very hard to confirm. In fact, if there were to be cases where judges were inclined to look abroad notwithstanding a relevant body of domestic jurisprudence, the risk would be that citations would begin to

⁵⁹⁴ Lord Mance, 'Foreign Laws and Languages' in Burrows, Johnston and Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford University Press 2013), 95.

⁵⁹⁵ Other examples include: *Smith and Others (FC) v Ministry of Defence* [2013] UKSC 41, [87] where Lord Hope considered a decision of the Australian High Court by reference to an earlier domestic case: 'In *Mulcahy v Ministry of Defence* [1996] QB 732, 746 Neill LJ said that it seemed to have been recognised in the Australian cases that warlike activities fell into a special category. He concluded ... that an English court should approach a claim of negligence ... in the same way as in the High Court of Australia did in the *Shaw Savill* case...'; In *The Catholic Child Welfare Society and others v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools and others* [2012] UKSC 56, [67]-[68] Lord Phillips made reference to Canadian decisions when considering the domestic jurisprudence: 'In *Lister v Hesley Hall Ltd* [2002] 1 AC 215 ... Lord Steyn ... referred to *Bazley v Curry* 174 DLR (4th) 45 and *Jacobi v Griffiths* 174 DLR (4th) 71 as "luminous and illuminating" judgments which would henceforth be the starting point for consideration of similar cases'.

look opportunistic. The point is a regular feature of the debate about the use of foreign jurisprudence in United States constitutional cases. For example, arguing against references to foreign material in *Knight v Florida*,⁵⁹⁶ Justice Thomas suggested:

the only reason why this material was resorted to was there was no support in the American constitutional tradition or in this Court's precedent [for the conclusion reached] ... [Had there been] any such support in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council.⁵⁹⁷

Perhaps the most vocal critic has been Justice Scalia of the US Supreme Court. For Justice Scalia, if domestic jurisprudence is lacking '...[t]hat's the end of the question ... [w]hat good would reading Canadian opinions do, unless it was my job to be the moral arbiter, which I don't accept?'⁵⁹⁸

The ferocity of the US debate is not mirrored in the UK where recourse to foreign jurisprudence has not been the subject of great concern. Besides, the argument that recourse to foreign norms would imply greater creativity on the part of a judge is not itself logically sound. It is entirely possible that the use of foreign jurisprudence in such cases is motivated by a desire to elucidate an issue or provide an analytical lens, rather than signalling the opportunity to

⁵⁹⁶ *Knight v Florida* (1999) 120 S Ct 459.

⁵⁹⁷ *Ibid* 460 (Thomas, J).

⁵⁹⁸ Norman Dorsen, 'A conversation between U.S. Supreme Court justices' (2005) 3(3) *International Journal of Constitutional Law* 519, 535 (Justice Scalia).

support an otherwise illegitimate conclusion.⁵⁹⁹ It is not difficult to read Lord Bingham’s judgment in *MB* as taking this sort of approach.⁶⁰⁰

In any case, the idea that foreign jurisprudence has some substantive influence on the outcome of the case where there is dearth of domestic law is a little extreme. The Justices provided some insight during the interviews. While Lord Dyson seemed to agree with Lord Bingham’s Hamlyn lecture formulation—that foreign jurisprudence was useful especially where there was ‘not a great deal of domestic [material]’ or if a case raised a ‘relatively new point’,⁶⁰¹ Lord Kerr was evidently less convinced about the impact of foreign jurisprudence on gap-filling situations:

Just because there is a dearth of authority, doesn’t mean to say that we have to close the gap by recourse to foreign jurisprudence. ... Very often, cases come here because there is no clear—or unambiguous—answer, and that is entirely as it should be. We have to try to come up with the proper principled response to whatever problem is presented to us. Now, we would be unwise to neglect to have recourse to whatever assistance we can derive in order to help us in that process. But I think it would be wrong to overestimate the influence that foreign jurisprudence has in circumstances where there isn’t any clear national or domestic authority.⁶⁰²

⁵⁹⁹ It is presumed that Justice Scalia and Justice Thomas would consider a conclusion that was not supported by domestic jurisprudence to be illegitimate.

⁶⁰⁰ *Secretary of State for the Home Department v MB*, above n 587.

⁶⁰¹ Interview with The Rt. Hon. Lord Dyson MR, former Justice of the United Kingdom Supreme Court (The Supreme Court, London, 1 May 2012).

⁶⁰² Interview with The Rt. Hon. Lord Kerr of Tonaghmore, above n 578.

It has in any case not been possible to find any clear empirical examples of foreign jurisprudence being transplanted to fill a gap in domestic law in the way that the gap-filling thesis often suggests.

6.2 Analytical lens

A more realistic version of the gap-filling thesis is that an absence of relevant domestic (or Strasbourg) authority might prompt judges to use foreign jurisprudence as an analytical lens, through which to test ideas and reflect on their own analysis of the law. Judges themselves often claim a role for foreign jurisprudence far removed from the notion of persuasive authority. Thus Emeritus Justice Laurie Ackermann, formerly a Justice of the Constitutional Court of South Africa, has described the purpose of recourse to foreign jurisprudence as ‘seeking information, guidance, stimulation, clarification, or even enlightenment ... [o]ne is doing no more than keeping the judicial mind open to new ideas’.⁶⁰³ Justice Breyer, of the US Supreme Court is well-known to support such an approach:

...I would say that I understand that a judge cannot read everything. But if the lawyers find an interesting and useful foreign case, and if they refer to that case, the judges will likely read it, using it as food for thought, not as binding precedent. I think that is fine.⁶⁰⁴

⁶⁰³ Laurie H Ackermann, ‘Constitutional Comparativism in South Africa: A Response to Sir Basil Markesinis and Jörg Fedtke’ (2005) 80 *Tulane Law Review* 169, 183.

⁶⁰⁴ Norman Dorsen, ‘A conversation between U.S. Supreme Court justices’, above n 598, 524 (Justice Breyer).

Aharon Barak, former President of the Supreme Court of Israel, similarly described the possibility that comparative law 'awakens judges to the potential latent in their own system' and 'allows for greater self knowledge'.⁶⁰⁵ As Saunders has explained:

...foreign law has potential to contain, rather than expand, the discretion of a judge, identifying directions that others have taken and enabling evaluation of their consequences, while leaving the judge free to craft a domestic solution ... A 'comparative legal approach' can give judges insight into their own prejudices and assist in eliminating personal preferences.⁶⁰⁶

Similar explanations were given by the UK judges. The only Court of Appeal judge to have been interviewed, Lady Justice Arden, explained that she had 'most often' used foreign jurisprudence:

...as part of my own thinking about the case [looking] at what other courts have done and ... at the examples they have come up with. Or fact situations they have had to deal with and then test it and look at the difficulties there might be if the rule was X rather than Y.⁶⁰⁷

When asked whether there was something particular about the nature of foreign jurisprudence that makes it more useful than other persuasive sources for this purpose, Lady Justice Arden replied:

⁶⁰⁵ Aharon Barak, 'Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002) 116 *Harvard Law Review* 16, 111-110; Aharon Barak, 'Comparison in Public Law' in Basil Markesinis and Jörg Fedtke, *Judicial Recourse to Foreign Law: A New Source of Inspiration?* (University College London Press 2006), 288.

⁶⁰⁶ Cheryl Saunders, 'Comparative Constitutional Law in the Courts: Is There a Problem?', above n 569, 114-115.

⁶⁰⁷ Interview with The Rt. Hon. Lady Justice Arden, Lord Justice of Appeal (Royal Courts of Justice, London, 7 December 2011).

... there's a big difference between a judgment and an article, which is not related to any specific case, because the point about a decision is that it has been used to alter people's rights and therefore it has had a considerable effect. It has been tested in the fire of actual practical use.⁶⁰⁸

The feeling continues in the Supreme Court. Lord Mance explained that foreign jurisprudence 'gives you insights and helps ensure that you've thought about all possible aspects of a problem'.⁶⁰⁹ Lord Collins—perhaps the most enthusiastic user of foreign jurisprudence at the Supreme Court—justified his use of foreign jurisprudence in similar terms:

[It is] useful just to see, in formulating my conclusions, how other people have done it and whether there is anything to be learned from other people. Not only where there are gaps ... because in theory there are never gaps. Something that is done abroad won't be persuasive authority in the sense that you'll follow it, you'll just see what conclusion they have come to.⁶¹⁰

This sort of motive was clearly the driving force in *Jones v Kaney*,⁶¹¹ the case in which Lord Collins all but reprimanded counsel for their failure to cite what he considered to be relevant foreign authorities. So unusual were his comments, it is worth quoting the passage at some length:

It is highly desirable that at this appellate level, in cases where issues of legal policy are concerned, the court should be informed about the position in other common law countries. This court is often

⁶⁰⁸ Ibid.

⁶⁰⁹ Interview with The Rt. Hon. Lord Mance, Justice of the United Kingdom Supreme Court (The Supreme Court, London, 6 December 2011).

⁶¹⁰ Interview with The Rt. Hon. Lord Collins of Mapesbury, above n 536.

⁶¹¹ *Jones v Kaney* [2011] UKSC 13; [2011] 2 A.C. 398.

helped by being referred to authorities from other common law systems, including the United States. ... On this appeal the claimant did not rely on the United States material, although it is helpful to his case. The defendant's counsel drew attention to some of the United States cases on the basis of research which (it was said) was 'slightly hampered by the renovation of the Middle Temple's American room'. But there is an outstanding collection of United States material in the Institute of Advanced Legal Studies in London University, and (provided the barristers or solicitors concerned are prepared to make the expenditure) all of the material is readily available online. Lord Wilberforce said in *Buttes Gas & Oil Co v Hammer (No 3)* ... 'When the judicial approach to an identical problem between the same parties has been spelt out with such articulation in a country, one not only so closely akin to ours in legal approach, the fabric of whose legal doctrine in this area is so closely interwoven with ours, but that to which all the parties before us belong, spelt out moreover in convincing language and reasoning, we should be unwise not to take the benefit of it'.⁶¹²

The vast American jurisprudence on 'precisely the same arguments of policy which [had] been argued before [the UKSC]' were, to Lord Collins, of obvious assistance. This was despite the fact that the culture relating to expert evidence was different in the United States, because 'the underlying principle is the same'.⁶¹³ Thus, as Bell concluded, the Commonwealth and United States jurisprudence in *Jones v Kaney* was effectively cited as a way of 'checking that no relevant argument had been ignored'.⁶¹⁴

⁶¹² Ibid [74].

⁶¹³ Ibid [77].

⁶¹⁴ John Bell, 'Comparative law in the Supreme Court 2010-11' [2012] CJICL 20, 21.

However, examples like *Jones v Kaney* are relatively rare; the same methodological difficulties of identifying cases that have used foreign jurisprudence in this way arise here as with gap-filling above. Where foreign jurisprudence has been used as an analytical lens, it will not necessarily be obvious from the text of the judgment. Lady Justice Arden explained that ‘comparative law in that sense is very useful but it is not obvious on the face of the judgment, because it wouldn’t be relevant to cite it’.⁶¹⁵ This kind of use is therefore a good example of reasons why this thesis attempts to look beyond explicit citations. If foreign jurisprudence is referred to but frequently omitted from the list of citations in a judgment, it represents an implicit rather than explicit use of foreign jurisprudence. It is therefore not a use that will be captured by a quantitative analysis of the cases. It is also a use that, if ignored, would significantly distort any conclusions about the way that foreign jurisprudence is used in UK courts.

Yet this sort of purpose is important. In the human rights context it is worth remembering that UK judges have been, until recently, relatively unfamiliar with human rights adjudication and with the duties imposed upon them by the HRA 1998. For example, prior to the HRA, the balancing act required by the qualified rights had almost exclusively been the jurisdiction of the supranational court. A positive duty to ‘take into account’ one particular pool of otherwise persuasive jurisprudence, to read domestic law compatibly with an international convention

⁶¹⁵ Interview with The Rt. Hon. Lady Justice Arden, above n 607.

and to declare any incompatibilities that could not be so remedied,⁶¹⁶ have all led domestic courts to grapple with greater depth and detail on questions hitherto unfamiliar to the role of the judge. It would not be surprising if judges were to consider the jurisprudence of other similar systems, particularly those with similar human rights instruments, in order to draw any assistance that they may provide when theorising about a particular problem at home. It is one of the major justifications for comparativism is therefore that it can aid not only in applying the under-theorised jurisprudence, but can also encourage the domestic court to adopt a more theorised approach to human rights.

6.3 Reassurance

Closely connected to the gap-filling and analytical lens theories is the idea that foreign jurisprudence can provide reassurance. Slaughter has argued that '[r]eferences to the activity of fellow courts in other states can act as ... a security blanket ...'⁶¹⁷ and Justice Barak talked of comparative law 'granti[ng] comfort to the judge and giv[ing] him the feeling that he is treading on safe ground'.⁶¹⁸ This purpose is distinct from the gap-filling and analytical lens theories because it constructs judicial comparativism as a sort of yardstick: by seeing that courts in other jurisdictions have come to the same or similar

⁶¹⁶ Sections 3 and 4 HRA 1998, respectively.

⁶¹⁷ Christopher McCrudden, 'A Common Law of Human Rights?', above n 592, 519, quoting Anne Marie Slaughter, 'A Typology of Transjudicial Communication', (1994) 29 *University of Richmond Law Review* 199, 116.

⁶¹⁸ Aharon Barak, 'Constitutional Human Rights and Private Law', (1996) 3 *Review of Constitutional Studies* 218, 242; Michael Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford University Press 2013), 91: 'English judges consider the use of the decisions from other common law jurisdictions to be 'useful', to give them reassurance, illumination, inspiration, or comfort'.

conclusions about a particular problem, a judge can feel more confident in his own conclusions, which are reached independently of the jurisprudence from those jurisdictions.⁶¹⁹ In other words, the gap-filling and analytical lens theories capture uses of foreign jurisprudence in the very early stages of a judgment, while uses of foreign jurisprudence for the purpose of reassurance is likely to come a little later, once the judge has come to at least some tentative conclusion. Despite this difference, it is a purpose that is considered in this section because the circumstances that give rise to using foreign jurisprudence in this way are likely to be similar to those suggested to give rise to uses for gap-filling or to provide an analytical lens. If a judge requires reassurance it is likely to be because the domestic law is unsettled or underdeveloped. The then President of the Supreme Court, Lord Phillips, explained the relevance of foreign jurisprudence in this way:

I think we like to look elsewhere: if we've got an area where we are uncertain; an area where we are developing the law; an area where, particularly, where we would like to develop the law in a particular direction, then you are particularly keen to see if you can get any support for what your thinking is from foreign jurisdictions.⁶²⁰

This sort of explanation also tends towards a view of foreign jurisprudence as an instrumental tool, used to legitimate ones own decision. It lends support to those who feel that the legitimacy of judicial comparativism is often

⁶¹⁹ Similar findings are reported by Elaine Mak, 'Reference to Foreign Law in the Supreme Courts of Britain and the Netherlands: Explaining the Development of Judicial Practices' (2012) 8(2) Utrecht Law Review 20, 33-34.

⁶²⁰ Interview with The Rt. Hon. Lord Phillips of Worth Matravers, former President of the United Kingdom Supreme Court (The Supreme Court, London, 23 November 2011).

compromised by the tendency on the part of judges to ‘cherry pick’ decisions of foreign jurisdictions according to those that best support their own conclusions. The most cynical view of this is that in using foreign jurisprudence in this way, judges neglect to take a balanced view of the position in foreign jurisdictions. For the reasons given elsewhere, that argument is not accepted as an explanation for the Supreme Court’s approach to foreign jurisprudence. For the instant purpose, it is important to note just that the Supreme Court might use foreign jurisprudence in areas of uncertainty or where the law is under development. In those situations, Lord Phillips continued, ‘to see how similar jurisdictions, dealing with similar problems have developed their jurisprudence is a valuable thing to do’.⁶²¹

Using foreign jurisprudence as a type of checking mechanism was common among the explanations of the other Justices interviewed. Although Lord Kerr felt it ‘... difficult to be prescriptive about the use to which [foreign jurisprudence] is put’, it was possible to ‘envisage two main strands’:⁶²² The first strand, was that ‘even if it does not necessarily provide a template that one would wish to follow’, analysis conducted by a foreign court, or the court’s line of reasoning ‘does provide a yardstick against which you can measure your own process of reasoning’. Lord Kerr’s second strand echoed Lady Justice Arden’s explanation that it was helpful to get an empirical view of the effect of certain developments,⁶²³ ‘in relating to the experience of the courts about the impact of

⁶²¹ Ibid.

⁶²² Interview with The Rt. Hon. Lord Kerr of Tonaghmore, above n 578.

⁶²³ Interview with The Rt. Hon. Lady Justice Arden, above n 607.

particular laws'.⁶²⁴ Lord Collins agreed: 'You might be, I suppose, encouraged or emboldened by what someone else has done...'.⁶²⁵

For most of the Justices, it seemed that the extent to which foreign jurisprudence is used in this way would likely be connected to the arguments made by counsel. For example, Lord Reed explained that counsel using foreign jurisprudence essentially present the Court with

... material from analogous legal systems. The argument is that the point has been considered by a superior court in that jurisdiction, and what they had to say about it is at least interesting and may give [the court] an idea about how the common law should be developed in this country.⁶²⁶

Therefore, foreign authorities are cited 'in order to persuade us to develop the common law in a particular way. ... to show us that another leading common law court ... has taken [a] step without the heavens falling in'.⁶²⁷ In human rights cases specifically, the justification is that the Court is concerned with considering the underlying values. As Baroness Hale put it:

It is obviously of interest to us in this court if a foreign court has been interpreting a human rights instrument, which is not unlike the European Convention, to look at its approach. That is because human rights are all about values—underlying values—and it's good to see how similar societies, similar legal systems, see those underlying values. ... If ... you find that the same result has been

⁶²⁴ Interview with The Rt. Hon. Lord Kerr of Tonaghmore, above n 578.

⁶²⁵ Interview with The Rt. Hon. Lord Collins of Mapesbury, above n 610.

⁶²⁶ Interview with The Rt. Hon. Lord Reed, Justice of the United Kingdom Supreme Court (The Supreme Court, London, 8 May 2012).

⁶²⁷ Ibid.

reached on the same set of facts, by a completely different route, it gives you some view of the underlying values.⁶²⁸

6.4 Conclusions

In the early or formative stages of a judgment, particularly where the domestic law is unsettled or under-developed, the stock argument about judicial discretion is an obvious problem. If the domestic jurisprudence is unsettled, or there is an absence of clear guiding principles, the discretion of the judge is in any event approaching its outer limits,⁶²⁹ and reference to foreign jurisprudence for the purpose of ‘gap-filling’ is likely to attract attention. As the United States debate shows, using foreign jurisprudence for this purpose is likely to invite the accusation that a judge has made opportunistic citations of foreign jurisprudence in order to support a point that is otherwise not supportable in domestic law. However, it has been argued in this chapter that the ‘gap-filling’ thesis does not explain the UK Supreme Court’s use of foreign jurisprudence. Certainly, none of the Justices interviewed fully accepted the theory.

Rather, it is more realistic to consider that foreign jurisprudence provides the Supreme Court with a fresh perspective—an analytical lens—through which to reflect on its own reasoning about a problem. In this way, foreign jurisprudence is used mainly as a heuristic device. This is what appeared to be happening in the House of Lords control order cases, *MB* and *AF (No3)* and this is what

⁶²⁸ Interview with The Rt. Hon. Baroness Hale of Richmond, Justice of the United Kingdom Supreme Court (The Supreme Court, London, 8 May 2012).

⁶²⁹ Cheryl Saunders, ‘Comparative Constitutional Law in the Courts: Is There a Problem?’, above n 569, 114.

seemed to drive Lord Collins' insistence on the consideration of American decisions in *Jones v Kaney*.⁶³⁰ The evidence from the interviews supports this construction. None of the Justices interviewed felt this use of foreign jurisprudence to be problematic, largely because no particular reliance is placed on these materials in any event. Lord Collins, who was the heaviest user of foreign jurisprudence at the Supreme Court prior to his retirement, was 'sure that [he had] never been turned by foreign law'.⁶³¹ At best he 'might have been confirmed in [his] feelings'.⁶³²

As Saunders has suggested, the reality is simply that 'such cases must be determined ... with or without the insights offered by comparative law' and 'in at least some such cases, foreign experience can help to elucidate the issues and options for their resolution'.⁶³³ In some circumstances this may translate into using foreign jurisprudence as a heuristic device: a yardstick, against which to measure a Justices' own thinking about a problem. The purpose served by foreign jurisprudence in these circumstances is simply to provide an opportunity for reflection or 'part of the process of reaching a more fully theorised ... agreement'.⁶³⁴ In fact Lord Kerr gave reasons along these lines for dismissing the significance that might be attributed to the use of foreign jurisprudence:

⁶³⁰ *Secretary of State for the Home Department v MB*, above n 587; *Secretary of State for the Home Department v AF and another*, above n 588; *Jones v Kaney*, above n 611.

⁶³¹ Interview with The Rt. Hon. Lord Collins of Mapesbury, above n 610.

⁶³² *Ibid.*

⁶³³ Cheryl Saunders, 'Comparative Constitutional Law in the Courts: Is There a Problem?', above n 569, 114.

⁶³⁴ Christopher McCrudden, 'Judicial Comparativism and Human Rights', above n 577, 374. (This follows discussion drawn from Cass R Sunstein, *Legal Reasoning and Political Conflict* (Oxford University Press 1996) in which Sunstein described the process of deciding cases on

... to add to the authorities that we consider by casting around in domestic courts is probably not going to be a profitable exercise. Ultimately ... the outcome of these cases depends critically on your own powers of analysis. Reference to authority, be it domestic, supranational, international or whatever, is always going to be by way of supplement to your own reasoning in the case. Hopefully to confirm the views that you have formed and, occasionally, to shape those views. But I see that very much in a secondary—an extremely important but nevertheless secondary—role.⁶³⁵

These uses of foreign jurisprudence are also likely to be the more obscure in the judgment, since it would not usually be relevant to cite them explicitly, unless they had contributed something of substance to the instant case. This finding goes some way towards explaining the anomalies in the data set discussed in chapter five, where it was explained that the data collected on explicit citation did not show some Supreme Court Justices—known for their enthusiasm for comparative law—as heavy users of foreign jurisprudence. Where judges use foreign jurisprudence as a heuristic device, as an analytical lens, yardstick or benchmark against which to measure thinking, or when seeking for reassurance, it is easy to understand the lack of explicit citations.⁶³⁶ It was perhaps purposes of this kind that prompted Lady Justice Arden’s comment (although not speaking for the Supreme Court) that there is ‘far more

their facts without necessarily agreeing on any particular theory supporting the decision as giving rise to ‘incompletely theorised’ agreements’.

⁶³⁵ Interview with The Rt. Hon. Lord Kerr of Tonaghmore, above n 578.

⁶³⁶ The point has also been recognised by Michael Bobek, *Comparative Reasoning in European Supreme Courts*, above n 618, 72: ‘The reasons for the absence of an express reference may be multiple ... [including] the [possibility that] comparative argument was from the very beginning intended for internal use only, ie as a tool of internal persuasion within the court, but never even intended to be displayed in the reasoning of the court’.

use of comparative law than appears on the face of the judgments ... it's informing the judges behind the scenes'.⁶³⁷ Just as there is no obligation to use persuasive authorities, neither is there an obligation to cite them.

Foreign jurisprudence may provide the Supreme Court with a valuable perspective—an analytical lens—through which Justices may reflect on their own reasoning about a problem. This is in keeping with one of the major justifications for comparativism: that it can also encourage the domestic court to adopt a more theorised approach to human rights. As McCrudden recognised, '[e]ven where the *result* of the foreign judicial approach has not been adopted, it has often been influential in sharpening the understanding of the court's view of domestic law'.⁶³⁸ Foreign jurisprudence may 'perform a cognitive function ... the confrontation of both legal systems may force some consideration and better understanding of the nature of domestic law'.⁶³⁹

⁶³⁷ Interview with The Rt. Hon. Lady Justice Arden, above n 607.

⁶³⁸ Christopher McCrudden, 'Human Rights and Judicial Use of Comparative Law' in Esin Örüçü (ed), *Judicial Comparativism in Human Rights Cases* (United Kingdom National Committee of Comparative Law 2003) 17; Christopher McCrudden, 'A Common Law of Human Rights?', above n 592, 512.

⁶³⁹ Luc Heuschling, 'Comparative Law in French Human Rights Cases' in Esin Örüçü (ed), *Judicial Comparativism in Human Rights Cases*, above n 638, 44; Rabinder Singh, 'Interpreting Bills of Rights' [2008] *Statute Law Review* 82.

7 Foreign Jurisprudence used for consistency

In chapter six it was argued that the Supreme Court Justices use foreign jurisprudence as a heuristic device. Foreign jurisprudence might therefore elucidate issues or provide a useful yardstick against which judges can reassure themselves about their own conclusions, especially where domestic jurisprudence is unsettled or underdeveloped. That purpose represents a receptive use of foreign jurisprudence, where the Supreme Court uses the decisions of domestic courts as part of a wider pool of resources. It is a one-way transaction, based on the functionalist theory of 'usefulness and need'.⁶⁴⁰ In this chapter, it is argued that there is also a second category of purposes for which judges have recourse to foreign jurisprudence: that foreign jurisprudence is used as a tool to ensure consistency or uniformity when grappling with a common problem and to communicate the Supreme Court's interpretation of it.

The use of foreign jurisprudence for consistency as explained here is similar to but distinct from the use of foreign jurisprudence for reassurance described in chapter six. In that chapter it was explained that where a judge uses foreign jurisprudence for reassurance, those sources represent a sort of yardstick against which their own feelings about the case can be measured. By seeing that courts in other jurisdictions have come to the same or similar conclusions about a particular problem, a judge can feel more confident in his own conclusions, which are reached independently of the jurisprudence from those

⁶⁴⁰ E.g. Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, Oxford University Press 1998), 17.

jurisdictions at first. By contrast, where a judge uses foreign jurisprudence for consistency, the primary aim of the exercise is to identify the position in those other jurisdictions, in order to then aim for an interpretation or conclusion that is in line with it.

7.1 Using foreign jurisprudence to promote uniformity

It has often been mooted that courts may use foreign jurisprudence as a tool to promote greater harmonisation or integration within a group of countries. This may be in response, for instance, to a common agreement or a shared heritage. One of Slaughter's conclusions was that the use of foreign jurisprudence would be likely where there was an 'awareness of a common enterprise'.⁶⁴¹ That awareness 'could flow either from a particular self-conception or a common substantive focus'.⁶⁴² For example:

... the courts of some subset of countries may see their primary function as the protection of individual rights against the government. From this perspective, it is not surprising that one of the most active areas of transjudicial communication outside the European Community is among courts specifically charged with the interpretation and application of international instruments concerning human rights.⁶⁴³

⁶⁴¹ Anne-Marie Slaughter 'A Typology of Transjudicial Communication', (1994) 29 *University of Richmond Law Review* 199, 128; Ian Cram, 'Resort to foreign constitutional norms in domestic human rights jurisprudence with reference to terrorism cases' [2009] *CLJ* 118, 121-122.

⁶⁴² Anne-Marie Slaughter 'A Typology of Transjudicial Communication', above n 641, 128.

⁶⁴³ *Ibid.*

In these situations, foreign jurisprudence is used as part of an information gathering exercise,⁶⁴⁴ with the aim of seeking to maintain uniformity with other jurisdictions.

In the context of human rights this discussion tends to draw from the on-going debate about universalism. For some, this is problematic. It is said that the citation of foreign jurisprudence assumes reliance on a fictional shared understanding. Posner, for example, has remarked that 'to cite foreign law as authority, is to flirt with the discredited (I had thought) idea of a universal natural law; or to suppose fantastically that the world's judges constitute a single, elite community of wisdom and conscience'.⁶⁴⁵ If the citation of foreign jurisprudence does suppose that there is some common understanding about human rights, the unyielding debate between universalism and cultural relativism will continue to pose questions and carry implications for those judges that tend towards comparativism. A connected issue is that judicial comparativism may pose greater risks in such circumstances since the inclusion of common principles in these texts may act to disguise divergent views about their application as well as any theory supporting them.⁶⁴⁶

The debate is further complicated by the shift in focus away from universal instruments and towards regional systems of more selective integration. For

⁶⁴⁴ Elaine Mak, 'Why do Dutch and UK judges cite foreign law?' [2011] CLJ 420, 443.

⁶⁴⁵ Richard Posner, 'No thanks, we already have our own laws: The court should never view a foreign legal decision as a precedent in any way', *Legal Affairs*, July/August 2004. <http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp> accessed 12 August 2013.

⁶⁴⁶ Christopher McCrudden, 'Judicial Comparativism and Human Rights' in Esin Örüçü and David Nelken (eds), *Comparative Law: A Handbook* (Hart Publishing 2007) 371, 373.

example, the Universal Declaration on Human Rights greatly influenced the drafters of the ECHR, which is arguably the primary text for human rights regulation in the European Legal Order. As McCrudden has pointed out, one of the attractive aspects of regional instruments 'is that states that appear to share more common cultural and ethical roots can come together to establish human rights regimes that go beyond the state, but stop short of the global'.⁶⁴⁷ For McCrudden, this 'gives rise to the question as to whether *regionally shared conceptions of human rights* are emerging, for example, a European *ius commune*'.⁶⁴⁸ This understanding would presumably lead UK domestic judges to consider relevant European jurisprudence in cases which engage a Convention point ahead of, say, Commonwealth jurisprudence. Yet the evidence suggests that the reality is quite the reverse, largely a product of the existence of jurisprudence from the ECtHR. As Lord Mance has written:

When interpreting legislation to give effect to international treaties, the need for international consistency provides a strong justification [for the use of foreign jurisprudence]. In areas such as fundamental rights, international instruments invite international discourse, though sometimes raising the question how far different social backgrounds and standards justify differences in application. Within Europe, the frameworks of the European Union and the European Convention on Human Rights encourage uniformity. Indeed, the role of the Court of Justice and the European Court of Human Rights in establishing the 'true' effect of the European Treaties and European Convention

⁶⁴⁷ Ibid.

⁶⁴⁸ Ibid 373 (original emphasis).

means that such uniformity may be achieved even without consensus among national courts.⁶⁴⁹

The hint in the last sentence is that aspirations towards adopting uniform positions also play a role in limiting the use of foreign jurisprudence.

7.2 Uniformity under the Human Rights Act

It is a common feature of judicial reasoning under the HRA that the Convention must be understood and applied uniformly amongst all contracting states. The better known formulation is found in the *Ullah* case where Lord Bingham stressed that while member States could legislate so as to provide for:

... rights more generous than those guaranteed by the Convention, national courts should not interpret the Convention to achieve this: the Convention must bear the same meaning for all states party to it.⁶⁵⁰

Accordingly his Lordship felt that the task of domestic courts was 'no more, [and] no less' than keeping pace with Strasbourg. This restrained approach has been adopted in a line of cases since *Ullah*. In *R (Clift)* Lord Hope added that [a] measure of self-restraint is needed, lest we stretch our own jurisprudence beyond that which is shared by all the States Parties to the Convention'.⁶⁵¹ Lord Brown gave endorsement to this cautious approach in *Al-Skeini*, further

⁶⁴⁹ Lord Mance, 'Foreign Laws and Languages' in Burrows, Johnston and Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford University Press 2013), 87.

⁶⁵⁰ *R (Ullah) v Special Adjudicator; Do v Immigration Appeal Tribunal* [2004] UKHL 26, [20]; *Kay and others v London Borough of Lambeth* [2006] UKHL 10.

⁶⁵¹ *R (Clift) (FC) v Secretary of State for the Home Department* [2006] UKHL 54, [49] (Lord Hope).

suggesting that ‘no more, but certainly no less’ could be read as ‘no less, but certainly no more’.⁶⁵²

A major justification for this approach is based on ‘the general desirability of a uniform interpretation of the Convention in all member states’,⁶⁵³ designed to avoid confusion and relativism. The net result of this interpretation is that UK courts have taken a deferential approach to the case law of the ECtHR in Strasbourg. Masterman argued that the loyalty domestic courts were showing to the Strasbourg line would have the result of binding domestic courts to Strasbourg.⁶⁵⁴ In similar terms, Lewis described the approach as ‘the mirror principle’ and felt the result to be that domestic human rights law would effectively be ‘nothing more than Strasbourg's shadow’.⁶⁵⁵

This is not difficult to understand. It reflects ‘the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg Court’.⁶⁵⁶ There is little incentive to use foreign jurisprudence if the Strasbourg court has handed down an authoritative judgment. As Masterman suggested, the jurisprudence of jurisdictions not signatory to the ECHR is ‘unlikely to point to the direction in

⁶⁵² *R (Al-Skeini and others) v Secretary of State for Defence* [2007] UKHL 26; [2008] 1 AC 153, [106]. Cf *In Re P and Others* [2008] UKHL 38; [2008] 3 WLR 76, [50] (Lord Hope).

⁶⁵³ *In Re P and Others* [2008] UKHL 38, [36].

⁶⁵⁴ Roger Masterman, ‘Section 2(1) of the Human Rights Act: Binding domestic courts to Strasbourg?’ [2004] PL 725.

⁶⁵⁵ Jonathan Lewis, ‘The European Ceiling on Human Rights’ [2007] PL 720, 730; Lord Justice Laws, ‘The limitations of Human Rights’ [1998] PL 254; Roger Masterman, ‘Taking the Strasbourg jurisprudence into account: developing a ‘municipal law of human rights’ under the Human Rights Act’ [2005] 54 ICLQ 907; Stephen Grosz, Jack Beatson and Peter Duffy, *Human Rights: The 1998 Act and the European Convention* (Sweet and Maxwell 2000) 20.

⁶⁵⁶ *Ullah*, above n 650, [20] (Lord Bingham).

which the common law should be developed to ensure compatibility with the Convention rights'.⁶⁵⁷

Even where it would be of interest to the Supreme Court to review the position of the other states signatory to the Convention, it is clear that the Court prefers to accept the results of the Strasbourg Court's research on the point. The practical reasons were considered in chapter five: the Supreme Court simply doesn't have time 'to go to the other European countries and look at the way they've addressed [an issue]'.⁶⁵⁸ Baroness Hale also explained the lack of citations from the domestic courts of other European states along these lines, suggesting that it was simply 'easier' to look at the Strasbourg Court's findings about the state of the national law in the various contracting states than for the Supreme Court to undertake its own analysis:

It is not easy for us to find out what Europe is doing on a particular point; it is much easier for Strasbourg. ... We may know about it [but] I don't think that we, as a matter of policy, would ask ourselves what is going on in France or Germany or whatever. ... We might decide to do it in a particular case, but mainly we rely on what Strasbourg tells us about the way in which things are developing elsewhere.⁶⁵⁹

The approach is surprising, given the well-recognised problems with the quality and consistency of the Strasbourg Court's decisions. As Amos has written, the

⁶⁵⁷ Roger Masterman, 'Taking the Strasbourg jurisprudence into account: developing a 'municipal law of human rights' under the Human Rights Act' [2005] 54(4) ICLQ 907, 923.

⁶⁵⁸ Interview with The Rt. Hon. Lord Phillips of Worth Matravers, former President of the United Kingdom Supreme Court (The Supreme Court, London, 23 November 2011). The full quote was given in chapter five.

⁶⁵⁹ Interview with The Rt. Hon. Baroness Hale of Richmond, Justice of the United Kingdom Supreme Court (The Supreme Court, London, 19 October 2011).

Strasbourg case law ‘can be unclear, confusing, and admitting of many possible interpretations’.⁶⁶⁰ The best examples are those where the Strasbourg Court has simply got it wrong, such as in the well-known *Osman v United Kingdom* case.⁶⁶¹ In other cases, the judges have commented on the lack of clarity or the mixed messages given by the complexity of several judgments.⁶⁶² Another possibility is that Strasbourg’s review of the European jurisprudence is itself outdated. It is implicit in the construction of the ECHR as a ‘living instrument’ that interpretations and the consensus among member states may evolve.⁶⁶³ The Strasbourg Court has thus explained that the Convention ‘is first and foremost a system for the protection of human rights’ and that ‘the Court must [therefore] have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved...’⁶⁶⁴ Nevertheless, it is the language of ‘uniformity’ and ‘consensus’ that has so far led domestic courts to defer to the Strasbourg Court. The risk was clearly put by Sedley: ‘in trying to stay level, we shall fall behind’.⁶⁶⁵ If consistency and uniformity are the aim, the Supreme Court should be willing to engage in

⁶⁶⁰ Merris Amos ‘The Principle of Comity’ [2009] Yearbook of European Law 503, 525; See also Lord Hoffmann, ‘Human Rights and the House of Lords’ (1999) 62 MLR 159, 162-164, expressing ‘doubts ... about the suitability, at least for this country, of having questions of human rights determined by an international tribunal made up of judges from many countries’.

⁶⁶¹ *Osman v United Kingdom* (2000) 29 EHRR 245; See also Lord Steyn, ‘2000–2005: Laying the Foundations of Human Rights Law in the United Kingdom’ 2005 EHRLR 349, 361.

⁶⁶² E.g. *R (Countryside Alliance) v Her Majesty’s Attorney General* [2007] UKHL 52, [139]; *R (Al Skeini) v Secretary of State for Defence* [2007] UKHL 26, [67], and other examples cited by Merris Amos ‘The Principle of Comity’, above n 660, 525.

⁶⁶³ *Tyrer v United Kingdom* (1978) 2 EHRR 1 [31]. It was argued in a previous thesis that the ‘living instrument’ places a duty on domestic court to keep track of the development in Convention jurisprudence: Helene Tyrrell, *Strasbourg Jurisprudence in Domestic Courts under the Human Rights Act*, Durham thesis, Durham University, available at <<http://etheses.dur.ac.uk/271/>> accessed 1 November 2013.

⁶⁶⁴ *Stafford v United Kingdom* (2002) 35 EHRR 32, [68].

⁶⁶⁵ Stephen Sedley, *Ashes and Sparks: Essays on Law and Justice* (Cambridge University Press 2011), 384.

research to that end, including the use of foreign jurisprudence as necessary. This would at least be relevant where the Strasbourg jurisprudence is unhelpful or unclear. As Warbrick has written: ‘...to collaborate fully with the Court, national tribunals have to keep on top of the developments in the Court’s practice, and even anticipate how it might resolve an issue’.⁶⁶⁶

There has been some evidence of the willingness to engage with foreign jurisprudence in this way in Convention cases, especially when seeking to confirm the conclusions of the Strasbourg jurisprudence. A good example of this is the Supreme Court’s decision in *Cadder*.⁶⁶⁷ *Cadder* was, in effect, an appeal against the High Court of Justiciary in *HM Advocate v McLean*.⁶⁶⁸ Both cases involved persons detained under section 14 of the Criminal Procedure (Scotland) Act 1995 and admissions made by the detainee during police interviews without prior access to legal advice. In *McLean*, the High Court of Justiciary had concluded that reliance on admissions made by a detainee in such circumstances was not incompatible the detainee’s right to a fair trial under Article 6 of the ECHR. The appellant in *Cadder* contended that *McLean* had been wrongly decided. The question for the Supreme Court was therefore whether the use of material obtained in a police interview without legal representation did in fact render a subsequent trial unfair.

⁶⁶⁶ Colin Warbrick, ‘The View from the Outside’, in Helen Fenwick, Roger Masterman and Gavin Phillipson (eds.) *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press 2007) 37.

⁶⁶⁷ *Cadder v HM Advocate* [2010] UKSC 43

⁶⁶⁸ *HM Advocate v McLean* [2009] HCJAC 97, 2010 SLT 73.

Pursuant to their duty under section 2(1) HRA 1998, the Justices of the Supreme Court took into account the relevant Strasbourg jurisprudence as a starting point: *Salduz v Turkey*.⁶⁶⁹ In common with the detainees in both *McLean* and *Cadder*, Salduz had not had the benefit of legal advice when in police custody. The Grand Chamber of the ECtHR in that case held (unanimously) that there had been a violation of Articles 6(1) and 6(3)(c) ECHR. Turning to the question of whether the Supreme Court must follow *Salduz v Turkey*, the Supreme Court applied the 'clear and constant' test derived from *Alconbury*.⁶⁷⁰ The court felt the test to be satisfied by evidence that *Salduz v Turkey* had been followed in a subsequent line of cases. To illustrate this point, Lord Hope referred to a list of authorities provided by JUSTICE (intervening). Although the five cases cited from that list were decisions of the ECtHR,⁶⁷¹ it appears from a later section of the judgment (quoted below) that the full list provided by JUSTICE had also included foreign jurisprudence from the domestic courts of other member states. It was by reference to a selection of this material that Lord Hope drew further support:

As JUSTICE has shown by the materials referred to in its written intervention, the majority of those member states which prior to

⁶⁶⁹ *Salduz v Turkey* 36391/02 [2008] ECHR 1542.

⁶⁷⁰ *R (Alconbury) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 [26] (Slynn LJ), '...Although the Human Rights Act 1998 does not provide that a national court is bound by [Strasbourg] decisions it is obliged to take account of them so far as they are relevant. In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights'.

⁶⁷¹ *Cadder v HM Advocate (Scotland)* [2010] UKSC 43, [2010] 1 WLR 2601, [47] (Lord Hope). The cases referred to are as follows: *Sükran Yildiz v Turkey* (Application No 4661/02) (unreported) given 3 February 2009; *Amutgan v Turkey* (Application No 5138/04) (unreported) given 3 February 2009, [17-18]; *Plonka v Poland* (Application No 20310/02) (unreported) given 31 March 2009, [35]; *Pishchalnikov v Russia* (Application No 7025/04) (unreported) given 24 September 2009, [70]; *Dayanan v Turkey* (Application No 7377/03) (unreported) given 13 October 2009, [32]-33]; *Fatma Tun_ v Turkey* (Application No 18532/05) (unreported) given 3 October 2009, [14]-[15].

Salduz v Turkey did not afford a right to legal representation at interview (Belgium, France, the Netherlands and Ireland) are now recognising that their legal systems are, in this respect, inadequate.⁶⁷²

Lord Hope went on to review the approach of a selection of foreign domestic courts more closely:

In the Netherlands the Supreme Court has held that a suspect arrested by the police must be offered the opportunity to consult a lawyer before being interviewed and that an arrested minor was entitled to have the assistance of a lawyer while being interviewed In France the Conseil Constitutionnel has held that articles 62 and 63 of the Code of Criminal Procedure, which authorise the questioning of a person remanded in police custody ... but do not allow the person held against his will to have the benefit of legal assistance while undergoing questioning, are unconstitutional because they could not be reconciled with articles 9 and 16 of the Declaration of 1789 des droits de l'homme et du citoyen. ... The Conseil d'Etat in its turn has drawn the government's attention to the fragility, in the light of article 6 of the Convention, of article 706 -88 of the Code de procédure pénale, which prevents access to legal assistance at this stage...⁶⁷³

Lord Hope concluded that 'if Scotland were not to follow the example of the others it would be almost alone among all the member states in not doing so'.⁶⁷⁴

Moreover, the system of detention under sections 14 and 15 of the 1995 Act was devised in view of a balance to be struck between the public interest and

⁶⁷² *Cadder v HM Advocate (Scotland)* [2010] UKSC 43, [49] (Lord Hope).

⁶⁷³ *Ibid.* The decisions referred of the Netherlands Supreme Court, French Conseil Constitutional and Conseil d'Etat are, respectively: *LJN BH3079 NJ* (Netherlands Law Reports) 30 June 2009; *Decision No 2010-14/22 QPC* (unreported) 30 July 2010; Section de L'intérieur, *Projet de loi relatif à la garde à vue*, 7 October 2010 (No 384.505).

⁶⁷⁴ *Cadder v HM Advocate*, above n 672, [49] (Lord Hope).

the rights of the accused that was irreconcilable with the Convention rights.⁶⁷⁵

This view had been reached ‘without any attempt at comparative jurisprudence on [the] issue’ and as a result of ‘shutting their eyes to the way thinking elsewhere was developing’.⁶⁷⁶

The Supreme Court was by many considered to have taken too slavish an approach to the Strasbourg case law in *Cadder*, with enormous repercussions for the Scottish legal system and the many victims whose cases were overturned.⁶⁷⁷ Lord Hope explicitly recognised the unpopularity of the decision in a lecture given to the Scottish Young Lawyer’s Association in April 2011:

As Lord Bingham has said, our task is to apply the law, not to decide cases according to our personal preferences. Of course, the decision was not popular, especially among those who must answer to the electorate. But, as Justice Stephen Breyer of the US Supreme Court has said, do not imagine that our decisions are popular. It is not our job to be popular.⁶⁷⁸

Nevertheless, Lord Hope did alter his approach to the issue in another Article 6 case later in the same judicial year: *Ambrose v Harris*.⁶⁷⁹ In *Ambrose* the issue

⁶⁷⁵ Ibid [51] (Lord Hope).

⁶⁷⁶ Ibid. Lord Rodger’s judgment in *Cadder* did not replicate this review of foreign jurisprudence although it is clear that Lord Rodger’s reasons are given as supplementary to those outlined by Lord Hope. Indeed, on the separate but important issue as to the consequences of allowing the appeal, both Lord Hope and Lord Rodger drew heavily from a judgment of Chief Justice Murray of the Irish Supreme Court - the relevant section is reproduced in each of their judgments, see e.g. [99]-[103] (Lord Rodger).

⁶⁷⁷ E.g. Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing 2013), 244.

⁶⁷⁸ Lord Hope of Craighead, ‘Scots law seen from south of the border’ [2012] *Edinburgh Law Review* 58, 74.

⁶⁷⁹ *Ambrose v Harris (Procurator Fiscal, Oban)* [2011] UKSC 53.

was whether the questioning of a suspect by police prior to being taken into custody constituted a violation of the suspect's right to a fair trial under Article 6 of the Convention. Lord Hope felt that the consequences of the Supreme Court establishing such a rule would be 'profound' and relied on the absence of clear Strasbourg jurisprudence to avoid that result: 'if Strasbourg has not yet spoken clearly enough on this issue, the wiser course must surely be to wait until it has done so'.⁶⁸⁰ The others in the majority took the same approach. Lord Clarke also noted the implications for the investigation of crime,⁶⁸¹ and agreed that 'Strasbourg jurisprudence, to date, does not support the ... contention ... that the European court has gone as far as to say that the right [to a fair trial] emerges as soon as a suspect is to be questioned by the police in whatever circumstances'.⁶⁸²

The interesting feature of the majority reasoning in *Ambrose* is that the absence of Strasbourg guidance was supplemented by an analysis of relevant jurisprudence from Canada and America.⁶⁸³ When expressing his reasons for rejecting Lord Kerr's dissenting view, Lord Hope denied that there was 'any support in the Strasbourg cases, or in such international authorities as we have been shown',⁶⁸⁴ and explained his own analysis of the Canadian and American jurisprudence in those terms. In particular, Lord Hope relied on the well-known

⁶⁸⁰ *Ibid* [15].

⁶⁸¹ *Ibid* [116]: 'such a requirement could hamper proper and effective investigations in situations which are often dynamic, fast moving and confused'.

⁶⁸² *Ibid* [115].

⁶⁸³ *R v Grant* [2009] 2 SCR 353 and *Miranda v Arizona* (1966) 384 US 436 respectively.

⁶⁸⁴ *Ambrose v Harris*, above n 679, [59].

American case—*Miranda v Arizona*.⁶⁸⁵ Lord Hope devoted five paragraphs to the *Miranda* judgment,⁶⁸⁶ finding that the basis for the ruling in that case was that police custody creates particular pressures which mean that the person's will is more likely to be overcome when he is being questioned under conditions of that kind. The observation from the relevant Strasbourg jurisprudence, *Salduz v Turkey*, was that 'the rationale of the generally recognised international human rights standards relates in particular to the protection of the accused against abusive coercion on the part of the authorities' which Lord Hope felt 'fit[ted] in with this line of reasoning'.⁶⁸⁷ Thus Lord Hope's view was that 'this feature is likely to be absent when questions are being put at the locus or in the person's home...'.⁶⁸⁸

Further, Lord Hope appeared to imply support for the *Miranda* judgment into the Strasbourg Court's jurisprudence; although recognising that the Strasbourg court had not referred to *Miranda* in any of its judgments, Lord Hope felt it could be 'assumed that the court will not have overlooked it in its search for generally accepted international human rights standards'.⁶⁸⁹ Lord Hope continued:

It is not unreasonable to think that *Miranda's case* and subsequent cases that the ruling in that case have given rise to in the United States will influence the thinking of the Strasbourg court.⁶⁹⁰

Lord Kerr, in his dissent, analysed the foreign jurisprudence rather differently:

⁶⁸⁵ *Miranda v Arizona*, above n 683.

⁶⁸⁶ *Ambrose v Harris*, above n 679, [50]-[54].

⁶⁸⁷ *Ibid* [54].

⁶⁸⁸ *Ibid*.

⁶⁸⁹ *Ibid* [52].

⁶⁹⁰ *Ibid* [53].

... [o]ne must be careful about making assumptions about the *Miranda* experience or believing that it can be readily transplanted into European jurisprudence in any wholesale way. The implications of that decision must be considered in the context of police practice in the United States of America. Nothing that has been put before this court establishes that it is common practice in America to ask incriminating questions of persons suspected of a crime other than in custody. Indeed, it is my understanding that as soon as a person is identified as a suspect, police are trained that they should not ask that person any questions until he or she has been given the *Miranda* warnings.⁶⁹¹

A cynical observation is that the use of foreign jurisprudence in *Ambrose* was a vehicle for the Supreme Court's reluctance to decide the case in a way that was perceived to be advancing on the Strasbourg jurisprudence. Some support for that suspicion is given by Lord Kerr's later explanation about the majority reasoning *Ambrose* case, extra judicially:

I have no objection to a mode of analysis which takes account of the fact that Strasbourg has not spoken, provided that this is by way of incidental observation or subsidiary reasoning, rather than being the sole basis for the decision to refuse to recognise the right. And, while this is not quite how the majority expressed themselves, their approach can perhaps be said to be consistent with that way of dealing with the question. I make that tentative claim because there can be detected in the judgments of my colleagues, particularly from their consideration of jurisprudence from America and Canada, clear indications that, irrespective of Strasbourg's silence, they did not

⁶⁹¹ Ibid [167].

consider that article 6 could have the breadth of application that was claimed for it.⁶⁹²

As Lord Kerr points out, it is that continued reference to the absence of clear Strasbourg case law that made the use of comparative jurisprudence unconvincing. Indeed, as explained above, the majority reasoning (and Lord Hope in particular) tended towards reading the conclusion in *Miranda* into the Strasbourg jurisprudence. Thus Lord Kerr concluded that he would be 'much more comfortable with the decision' if the 'absence of Strasbourg jurisprudence on the point [could] be relegated to a subsidiary status'.⁶⁹³

The example indicates that, although the scope for using foreign jurisprudence is likely to be more limited in Convention cases, the Supreme Court is at least willing to make use of those sources where they can provide assistance in confirming the conclusions of the Strasbourg Court and confirming the consensus on a position. The feeling lingers, however, that the focus remains on the status of the Strasbourg jurisprudence as a primary concern. Thus where there is relevant Strasbourg jurisprudence, the Supreme Court is likely to pay less attention to foreign jurisprudence. Where the Supreme Court is content to follow Strasbourg jurisprudence, as in *Cadder*, it may draw support from foreign jurisprudence in its reasoning. *Ambrose* demonstrates that the Court is most likely to review foreign jurisprudence where there is no clear Strasbourg

⁶⁹² Lord Kerr, 'The modest underworker of Strasbourg?', Clifford Chance Lecture (London 25 January 2012) <http://www.supremecourt.gov.uk/docs/speech_120125.pdf> accessed 13 October 2013, 17.

⁶⁹³ *Ibid* 18.

jurisprudence, although this may be driven by the inclination to keep pace with the Strasbourg position.

7.3 Absence of a supranational court

Identifying a consensus among foreign jurisdictions on a particular issue will be especially important where there is no relevant supranational court jurisprudence. The hypothesis is relatively straightforward. Where an instrument is given an authoritative interpretation by a supranational court, domestic courts faced with questions of interpretation will usually have a tendency to look to that jurisprudence in the first instance. The approach taken by UK courts to the ECtHR' case law provides a good example. By contrast, where there is no supranational court to give an authoritative interpretation of a convention, domestic courts do not have an obvious body of jurisprudence to consult. Courts are nevertheless still concerned to maintain consistency in the interpretation of an international convention, since the very purpose of these instruments is to harmonise standards on a particular issue. As Dickson has explained:

The courts take account of Strasbourg's thinking on human rights because they have been directed by Parliament to do so. Parliament has likewise transposed other international human rights standards into UK law and the courts are obliged to apply them too. The only difference is that for these other standards there is no international court the decisions of which the UK Parliament can direct UK courts to take into account. At best these other standards are overseen by treaty-monitoring bodies which are not courts, or by national courts in other countries which have transposed the standards into their

domestic law. Parliament has chosen not to direct UK courts to take account of what those treaty-monitoring bodies or national courts may have said about the standards, although Article 32 of the Vienna Convention on the Law of Treaties 1969 does say that in the interpretation of treaties ‘recourse may be had to supplementary means of interpretation’ when, after applying the approach to interpretation set out in Article 31, the meaning is still ‘ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable’. The House of Lords often looked at these other sources of its own motion, especially when interpreting treaties the effectiveness of which depended on the same interpretation being adopted by all States Parties to the treaty (eg treaties on international transport).⁶⁹⁴

Consider, for example, the preamble to the 1951 Convention Relating to the Status of Refugees (‘Refugee Convention’), which recognises that ‘a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without *international co-operation*’ (emphasis added).⁶⁹⁵ Similarly, the preamble to the United Nations Convention on the Rights of the Child includes ‘Recognizing the importance of *international cooperation* for improving the living conditions of children in every country’ (emphasis added).⁶⁹⁶ The limitations associated with using foreign jurisprudence where there is relevant Strasbourg jurisprudence are presumably non-existent in these circumstances.

⁶⁹⁴ Brice Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press 2013), 34-35. See also Shaheed Fatima, *Using International Law in Domestic Courts* (Hart Publishing 2005) 141.

⁶⁹⁵ Convention Relating to the Status of Refugees, Geneva, July 28, 1951, 189 U.N.T.S. (entered into force 4 October 1967), preamble.

⁶⁹⁶ Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, (entered into force 2 September 1990), preamble.

It is worth clarifying that this use is connected to, but distinct from, the ‘gap-filling’ theories discussed in chapter six. It was explained that one of the most obvious reasons for using foreign jurisprudence is to draw assistance where domestic jurisprudence is unhelpful or non-existent. Thus one of the reasons that comparativists give for the use of foreign jurisprudence is based on ‘gap-filling’—offering a useful perspective where the indigenous jurisprudence is lacking or unsettled.⁶⁹⁷ The argument in this section is different; far from resorting to foreign jurisprudence where there is a dearth of domestic jurisprudence, it is suggested that in some cases foreign jurisprudence may appropriately be of equal or greater importance than the domestic case-law, irrespective of the nature or absence of domestic jurisprudence.

7.3.1 Background from non-human rights cases

As most human rights issues before the Supreme Court are likely to fall within the framework of the ECHR (and consequently, the HRA 1998), the use of foreign jurisprudence under conventions with no supranational court is likely to be most relevant in non-human rights cases. As Baroness Hale explained in the interview:

If we are interpreting an international treaty, which has got nothing to do with human rights, and which may not have a supranational body

⁶⁹⁷ See e.g. Harold Cooke Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (2nd edn, Cambridge University Press 1949), 40; Cheryl Saunders, ‘Comparative Constitutional Law in the Courts: Is There a Problem?’ in Jane Holder and Colm O’Cinneide (eds) *Current Legal Problems* (2006) Vol 59, (Oxford University Press 2007), 114; Rudolph von Jhering, quoted in Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, Oxford University Press 1998), 17.

which is the final arbiter, that's the situation in which what other countries are doing with that treaty is particularly important. ... in a way, it's the non-human rights cases that may be more important.⁶⁹⁸

Baroness Hale considered that in such cases it was 'quite important to know what the other countries who are signatories to that Convention are doing'.⁶⁹⁹

Others among the Supreme Court Justices agreed. Lord Reed considered that in these cases 'a bit of knowledge of a foreign system can be helpful in not looking at international convention in too parochial a way'.⁷⁰⁰ Both Lord Mance and the then President of the Supreme Court, Lord Phillips, felt that greater weight is 'undoubtedly' attached to comparative material in these cases.⁷⁰¹ Lord Phillips added:

if you are looking at any law under an international convention, you'll look very closely at decisions in other countries. There are not all that many cases and so you'll be looking around the world to see where there had been similar jurisprudence.⁷⁰²

A number of examples can be found to corroborate this in the case law of the Supreme Court. One of the most recent is the judgment in *Schutz (UK) Ltd v Werit UK Ltd*.⁷⁰³ *Schutz* involved an issue of statutory interpretation where the statutory language had been designed to conform with an international convention. The basic issue was whether the actions of one party constituted

⁶⁹⁸ Interview with The Rt. Hon. Baroness Hale of Richmond, above n 659.

⁶⁹⁹ Ibid.

⁷⁰⁰ Interview with The Rt. Hon. Lord Reed, Justice of the United Kingdom Supreme Court (The Supreme Court, London, 8 May 2012)

⁷⁰¹ Interview with The Rt. Hon. Lord Mance, Justice of the United Kingdom Supreme Court (The Supreme Court, London, 06 December 2011); Interview with The Rt. Hon. Lord Phillips of Worth Matravers, above n 658.

⁷⁰² Interview with The Rt. Hon. Lord Phillips of Worth Matravers, above n 658.

⁷⁰³ *Schutz (UK) Ltd v Werit UK Ltd* [2013] UKSC 16; [2013] Bus LR 565.

the 'making' of a patented item according to section 60(1) of the Patents Act 1977 (which would infringe the patent at issue) or simply 'repairing' the item (which would not infringe the patent). Lord Neuberger considered various factors which ought to be taken into account in ascertaining the proper interpretation word 'makes' in the 1977 Act, one of the significant ones being the conformity with an international convention. Lord Neuberger (with whom Lord Walker, Baroness Hale, Lord Mance and Lord Kerr agreed) explained that:

...the fact that the word 'makes' is in a section of the 1977 Act which is intended to conform with the provisions of an international convention is particularly significant where ... the convention contains a set of principles which are intended to apply consistently across signatory states.⁷⁰⁴

Lord Neuberger went on to cite a number of German authorities, on the basis that they were 'not only decisions of a highly expert, experienced and respected court on the very point which is raised in this case',⁷⁰⁵ but also because they were decisions of a court of another signatory state to the Convention being interpreted. For those reasons, Lord Neuberger explained that the Supreme Court 'should therefore accord them considerable respect, and sympathetically consider the extent to which we should adopt any points of principle or practice which they raise'.⁷⁰⁶ And although this did not amount to an obligation to 'follow the approach of the German courts', Lord Neuberger concluded that it was 'sensible for national courts at least to learn from each other' and that they

⁷⁰⁴ Ibid [37] (Lord Neuberger).

⁷⁰⁵ Ibid [39] (Lord Neuberger).

⁷⁰⁶ Ibid.

should 'seek to move towards, rather than away from, each other's approaches'.⁷⁰⁷

This practice of citing foreign jurisprudence in international convention has been consistent in the jurisprudence of the United Kingdom's highest court for some years. There are numerous examples of this prior to the transfer of jurisdiction to the new Supreme Court. One such example was recalled by Baroness Hale during the interview of October 2011: In *Deep Vein Thrombosis v Air Travel Group Litigation* the House of Lords were interpreting the Warsaw Convention (regulating the 'international carriage of persons, baggage, or cargo performed by aircraft for reward'),⁷⁰⁸ in order to determine whether Deep Vein Thrombosis fell within the scope of that instrument. The case is not a human rights case but does provide useful insights into the use of foreign jurisprudence under international conventions where there is no supervisory body.

In that case the House of Lords referred to case law from Canada, Australia and the United States of America.⁷⁰⁹ In fact, the UK jurisprudence played a relatively minor part and accounted for just nine of the twenty-six cases cited in the judgments. By contrast, the House of Lords referred to thirteen cases from the United States, two from Canada and two from Australia. There is some

⁷⁰⁷ Ibid.

⁷⁰⁸ Convention relating to Unification of Certain Rules in International Carriage by Air, signed in Warsaw on 12 October 1929, effective on 13 February 1933.

⁷⁰⁹ *In re Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72; [2006] 1 AC 495.

evidence that German jurisprudence was considered, although not cited.⁷¹⁰ Indeed, Lord Scott of Foscote (with whom the other members of the House of Lords agreed) expressly acknowledged the importance of adopting an interpretation of the Convention that was consistent with the interpretation adopted by other signatory countries. Heavy reliance was placed on a decision of the Australian High Court and the House of Lords' conclusions were consistent with the outcome of that case.⁷¹¹

This approach is not without its dangers. One significant possibility is that courts reasoning by reference to foreign jurisprudence on the interpretation of an international convention run the risk of distorting the language of the convention itself. Lord Scott of Foscote gave a clear explanation of this risk in the *DVT* case, which is worth reproducing:

The language of the Convention itself must always be the starting point. The function of the court is to apply that language to the facts of the case in issue. In order to do so and to explain its decision, and to provide a guide to other courts that may subsequently be faced with similar facts, the court may well need to try to express in its own language the idea inherent in the language used in the Convention. So a judge ... will often describe in his or her own language the characteristics that an event or happening must have in order to qualify [under an international convention provision]. But a judicial formulation ... should not, in my opinion, ever be treated as a substitute for the language used in the Convention. It should be

⁷¹⁰ Lord Scott of Foscote recognised that claims under the article of the Warsaw Convention in question (Article 17) based on the airline's failure to warn passengers about DVT had been 'rejected in Australia, Canada, Germany and the United States': *In re Deep Vein Thrombosis and Air Travel Group Litigation*, *ibid* [19].

⁷¹¹ *Povey v Qantas Airways Ltd* [2003] VSCA 227; [2005] HCA 33

treated for what it is, namely, an exposition of the reasons for the decision reached and a guide to the application of the Convention language to facts of a type similar to those of the case in question.⁷¹²

Baroness Hale agreed with Lord Scott's judgment and added a few words only to associate herself with those cautionary remarks about 'the dangers of interpreting words of the decision of a court, which is interpreting the words of the Convention, as if the court's words were those of the Convention'.⁷¹³ The sentiment was repeated by Lord Hope in the more recent Supreme Court judgment, *JS (Sri Lanka)*, discussed in further detail below. In that case, Lord Hope noted:

There is always a risk, as one court after another seeks to formulate the principles that are to be applied in the interpretation of an international instrument of making things worse, not better. A misplaced word here or there can make all the difference between an interpretation that will be respected internationally because it accords with the true purpose of the instrument and one that will not.⁷¹⁴

The observations made in this chapter are therefore subject to these important qualifications. The argument made here is not that courts are applying the foreign jurisprudence in international convention cases with less scrutiny than in other areas. The point is simply that in these cases, domestic courts have a tendency to consider the foreign jurisprudence more readily. Indeed, it is perhaps in recognition of that tendency that the Justices have expressed awareness of the risks described above.

⁷¹² *In re Deep Vein Thrombosis and Air Travel Group Litigation*, above n 709, [12] (Lord Scott of Foscote).

⁷¹³ *Ibid* [49] (Baroness Hale).

⁷¹⁴ *R (JS (Sri Lanka)) v Secretary of State for the Home Department* [2010] UKSC 15, [41].

7.3.2 Refugee Convention Cases

One of the international conventions that the Supreme Court considers most often is the 1951 Convention Relating to the Status of Refugees ('Refugee Convention'),⁷¹⁵ which provides a useful example. Because there is no supranational body acting as the final arbiter on the interpretation of the Refugee Convention, it is not surprising to see citations of foreign cases in these judgments. Baroness Hale explained the usefulness of foreign jurisprudence in such cases:

... there's no supranational body which is the final arbiter of what [the Refugee Convention] means, so again it is of very great interest to know what other countries are doing in relation to certain problems. ... I think we take some trouble to look at those...⁷¹⁶

Lord Bingham's judgment in *Fornah* (decided by the House of Lords) put the matter in similar terms:

Since the Convention is an international instrument which no supranational court has the ultimate authority to interpret, the construction put upon it by other states, while not determinative ... is of importance.⁷¹⁷

Of the 246 judgments handed down by the Supreme Court between the start of its work in October 2009 and the end of the judicial year in July 2013, the

⁷¹⁵ Convention Relating to the Status of Refugees, Geneva, July 28, 1951, 189 U.N.T.S. (entered into force 4 October 1967).

⁷¹⁶ Interview with The Rt. Hon. Baroness Hale of Richmond, above n 659.

⁷¹⁷ *Fornah v Secretary of State for the Home Department* [2006] UKHL 46; [2007] 1 AC 412, [10]; See also *R v Secretary of State for the Home Department, Ex p Adan* [2001] 2 AC 477.

Refugee Convention has been cited in 13 (5% of all the Supreme Court's judgments). Of the 13 cases in which the words 'Refugee Convention' are found, 5 concern the interpretation of the Convention's provisions.⁷¹⁸ It is interesting but not surprising (given the approach to the interpretation of international conventions described above) to note that foreign jurisprudence is cited each of these 5 cases. The first of these cases was *JS (Sri Lanka)* in which the main issue was the interpretation and application of article 1F(a) of the Refugee Convention.⁷¹⁹ Article 1F(a) provides that a person would not be recognised as a refugee under the Convention where there are serious reasons for considering that he 'has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments'.⁷²⁰ It was the first in series of cases at the Supreme Court concerning Article 1F.

The respondent in *JS (Sri Lanka)* was a Sri Lankan Tamil who, for a number of years, was a member of the Liberation Tigers of Tamil Eelam. The Secretary of State had refused his claim for asylum on the basis of the membership with an organisation responsible for war crimes and crimes against humanity. The Secretary of State appealed against the decision of the Court of Appeal, which had quashed the decision that Article 1F(a) applied in this case. The questions for the Supreme Court were whether the respondent could be regarded as

⁷¹⁸ *R. (JS (Sri Lanka)) v Secretary of State for the Home Department* [2010] UKSC 15; *HJ (Iran) (FC) v Secretary of State for the Home Department* [2010] UKSC 31; *R (ST (Eritrea)) (FC) v Secretary of State for the Home Department* [2012] UKSC 12; *RT (Zimbabwe) and others v Secretary of State for the Home Department* [2012] UKSC 38; *Al-Sirri (FC) v Secretary of State for the Home Department* [2012] UKSC 54.

⁷¹⁹ *R (JS (Sri Lanka))*, above n 714.

⁷²⁰ Article 1F(a) Convention Relating to the Status of Refugees, Geneva, July 28, 1951, 189 U.N.T.S. (entered into force 4 October 1967).

having committed a crime within the meaning of article 1F(a) and, more specifically, if an individual is a member of an organisation who are committing war crimes, what—beyond membership of such an organisation—must be established before an individual is himself personally to be regarded as a war criminal.⁷²¹ The leading domestic authority was the decision of the Immigration Appeal Tribunal (IAT) in *Gurung v Secretary of State for the Home Department*,⁷²² which had been endorsed (obiter) by the Court of Appeal in another case.⁷²³ The effect of the IAT's decision in *Gurung* was that a person was a war criminal (i.e. could be excluded from refugee status under Article 1F) if the individual was a member of an 'extremist terrorist organisation', despite not having personally participated in the criminal activities of the group.⁷²⁴ Thus counsel for the Home Secretary sought to persuade the Supreme Court that the respondent's membership of the Liberation Tigers of Tamil Eelam was a factor justifying exclusion from refugee status according to Article 1F(a).

In the course of the arguments, counsel in both the Court of Appeal and the Supreme Court made extensive references to the case law of foreign jurisdictions. Counsel for Home Secretary argued that there had been a significant degree of international consensus as to the correct approach to article 1F(a) of the Refugee Convention prior to the Court of Appeal's decision

⁷²¹ *R (JS (Sri Lanka))*, above n 714, [1].

⁷²² *Gurung v Secretary of State for the Home Department* [2003] Imm AR 115.

⁷²³ *MH (Syria) v Secretary of State for the Home Department* [2009] EWCA Civ 226; [2009] 3 All ER 564.

⁷²⁴ Although the IAT in *Gurung* recognised that mere membership of a terrorist organisation was not sufficient to bring an individual within Article 1F, it added that if an organisation had become predominantly terrorist in character 'very little more will be necessary', *Gurung v Secretary of State for the Home Department* [2003] Imm AR 115, [102]-[105].

and that the Court of Appeal had not paid enough attention to that material. The Canadian courts were said to have ‘the most developed jurisprudence in relation to article 1F(a) in the common law world’ and Court of Appeal had ‘failed to explain why it was *departing* from the approach in those cases’ (emphasis added) as applied in *Gurung*.⁷²⁵ In reply, counsel for the respondent sought to rule out the Canadian jurisprudence (on the basis of age) and drew the Supreme Court’s attention to (more recent) Commonwealth cases, which had endorsed the Court of Appeal’s approach.⁷²⁶

The Supreme Court ultimately distanced itself from the approach of one of the Canadian cases, *Ramirez*,⁷²⁷ in which it had been suggested that mere membership may be sufficient for an organisation whose aims, methods, and activities are predominantly terrorist in character. It was instead concluded that each case should be considered according to its specific facts. In this respect, the *JS (Sri Lanka)* case is a good example of the risk awareness described above; the tendency to consult the approach of other jurisdictions does not extend to a tendency to follow it as well. As Lord Hope pointed out, ‘[t]here is always a risk, as one court after another seeks to formulate the principles that are to be applied in the interpretation of an international instrument, of making things worse, not better’.⁷²⁸

⁷²⁵ *R (JS (Sri Lanka))*, above n 714, 33 A-B.

⁷²⁶ *R (JS (Sri Lanka))*, above n 714, 35 D-E.

⁷²⁷ *Ramirez v Canada (Minister of Employment and Immigration)* (1992) 89 DLR (4th) 173.

⁷²⁸ *R (JS (Sri Lanka))*, above n 714, [41].

Nevertheless, it is noteworthy that the Supreme Court drew some support for ‘departure’ from the *Ramirez* approach by reference to other Canadian cases as well as jurisprudence from other jurisdictions. As Lord Kerr explained:

The Canadian cases ... seem for the most part to at least imply that the participative element involves either a capacity to control or at least to influence events. They appear to contemplate a minimum requirement that the mind of the individual be given to the enterprise so that some element of personal culpability is involved. A notable exception to this theme is to be found in the obiter statements ... in *Ramirez v Canada* ... where it is suggested that voluntary knowing participation can be assumed from membership of a brutal organisation. These statements have not been relied on by the Secretary of State in this case and, in my judgment, wisely so. The broad thrust of authority in this area is to contrary effect.⁷²⁹

Lord Brown also drew from a decision of the German Federal Administrative Court when considering the issue as one of ‘complicity’ from an international criminal law perspective (the clear outcome of this case is that the Rome Statute of the International Criminal Court is now the starting point for considering whether an applicant was disqualified from asylum by virtue of article 1F(a) of the Refugee Convention). Lord Hope endorsed this point, again referencing the German Administrative Court.⁷³⁰

⁷²⁹ *R (JS (Sri Lanka))*, above n 714, [57].

⁷³⁰ *Ibid* [49] (Lord Hope): ‘Lord Brown JSC puts the test for complicity very simply ... I would respectfully endorse that approach. The words “serious reasons for considering” are, of course, taken from article 1F itself. The words “in a significant way” and “will in fact further that purpose” provide the key to the exercise. Those are the essential elements that must be satisfied to fix the applicant with personal responsibility. The words “made a substantial contribution” were used by the German Administrative Court, and they are to the same effect’.

Lord Brown also cited a United States case to support his conclusions that ‘article 1F disqualifies those who make “a substantial contribution to” the crime, knowing that their acts or omissions will facilitate it’, agreeing that ‘article 1F responsibility will attach to anyone “in control of the funds” of an organisation known to be “dedicated to achieving its aims through such violent crimes”, and anyone contributing to the commission of such crimes “by substantially assisting the organisation to continue to function effectively in pursuance of its aims”’.⁷³¹

Lord Brown continued:

This approach chimes precisely with that taken by the Ninth Circuit in *McMullen v Immigration and Naturalization Service* (1986) 788 F 2d 591: “[Article 1F] encompasses those who provide [the gunmen etc] with the physical, logistical support that enable modern, terrorist groups to operate”.⁷³²

Despite the conclusion that each case ought to be considered on its specific facts, the Supreme Court judgment in *JS (Sri Lanka)* provides a useful illustration of the use of foreign jurisprudence in cases concerning the interpretation of international conventions with no supranational court. Several others follow in this theme. For example, although the Supreme Court judgment in *ST (Eritrea)* made less use of foreign jurisprudence than in *JS (Sri Lanka)*, the foreign cases cited were again used to address questions of interpretation.⁷³³ Considering the balance that the framers of the Convention

⁷³¹ *R (JS (Sri Lanka))*, above n 714, [35]. Note *McMullen v Immigration and Naturalization Service* (1986) 788 F 2d 591 had also been cited in the *Gurung* case.

⁷³² *Ibid.*

⁷³³ *R (ST (Eritrea)) v Secretary of State for the Home Department* [2012] UKSC 12. In *ST (Eritrea)* the question was whether the appellant was entitled to the protection of article 32 of the

intended to strike between the protection of victims of oppression and the wish of sovereign states to maintain control over their territory, Lord Hope cited jurisprudence from Australia and the United States.⁷³⁴ In doing so, Lord Hope was mindful that ‘however generous and purposive its approach to interpretation may be, the Court’s task remains one of interpreting the document to which the contracting parties have committed themselves by their agreement’. Moreover,

... parties to an international agreement are not to be treated as having agreed something that they did not agree, unless it is clear by necessary implication from the text *or from uniform acceptance by states* that they would have agreed or have subsequently done so’ (emphasis added).⁷³⁵

These cases provide clear examples of the Supreme Court using foreign jurisprudence as a means of limiting their discretion: it is by reference to those sources that the Court ensures that it does not inflate the agreements reached between the various contracting parties. This awareness and tendency to exercise restraint in these sorts of cases is demonstrative of the judges’ role as interpreters rather than lawmakers.

However there are circumstances in which it may be appropriate to interpret such instruments purposively, such that it reflects a change in attitudes or

Refugee Convention, which prevents contracting states from expelling refugees who are lawfully in their territory. Counsel for the appellant argued that the Convention had to be interpreted in the light of its purpose, and that the purpose of Art.32 was to ensure that a refugee who had been admitted to the appeal process of a contracting state was not removed to a country that could not provide the full panoply of rights to which a refugee was entitled under the Convention.

⁷³⁴ The cited cases are: *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225; *Rodriguez v United States* (1987) 480 US 522.

⁷³⁵ *R (ST (Eritrea))*, above n 733, [41] (Lord Hope).

traditions among the contracting parties. It is in these cases that identifying uniformity and consensus is most important and the Supreme Court has shown willingness to use foreign jurisprudence in this way: the *HJ (Iran)* case provides the clearest example.⁷³⁶ The issue in *HJ (Iran)* was the test to be applied when considering whether a gay person (claiming asylum under the Convention) has a ‘well-founded fear of persecution’ in his or her home state, based on membership of that particular social group, so as to come within the meaning of the term ‘refugee’ for the purposes of the Refugee Convention.⁷³⁷ The two appellants were gay men from Iran and Cameroon, claiming to have a well-founded fear that they would be persecuted if they were to be returned to their home countries. The respondent Secretary of State had refused asylum in both cases and appeals against that decision had been dismissed by the IAT. In the Court of Appeal, the Secretary of State accepted that practising homosexuals are a particular ‘social group’ for the purposes of article 1A of the Convention. The issue was then how those with a ‘well-founded fear of persecution’ could be identified. The Secretary of State considered that the issue was whether the applicant could reasonably be expected to tolerate the need for discretion in their home country. In other words, the two appellants could reasonably be expected to conceal their identities as gay man and so avoid the persecution feared. Counsel for the appellants argued that a requirement to conceal sexual identity in order to avoid harm was incompatible with the Convention.

⁷³⁶ *HJ (Iran) (FC) v Secretary of State for the Home Department* [2010] UKSC 31.

⁷³⁷ Article 1A(2) Convention Relating to the Status of Refugees, Geneva, July 28, 1951, 189 U.N.T.S. (entered into force 4 October 1967) provides that the term ‘refugee’ shall apply to a person that “... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”.

As Lord Hope recognised, the difficulty was that the High Contracting Parties did not perceive persecution for reasons of homosexuality as a problem when the Convention was being drafted.⁷³⁸ Nevertheless the reality before the Supreme Court was that there is now a ‘huge gulf in attitudes to and understanding of gay persons between societies on either side of the divide’ and that ‘more and more gays and lesbians are likely to have to seek protection here, as protection is being denied to them by the state in their home countries’.⁷³⁹ Yet it was ‘crucially important that they are provided with the protection that they are entitled to under the Convention—*no more ... but certainly no less*’ (emphasis added).⁷⁴⁰ The issue, therefore, was identifying the protection that this social group were entitled to.

In the arguments on this point, counsel had cited cases from Australia, Canada, the United States, South Africa and New Zealand. The Court of Appeal had,⁷⁴¹ in particular, been referred a decision of the High Court of Australia.⁷⁴² Lord Justice Buxton had accepted that the judgments in that case contained a number of statements to the effect that, if an applicant's way of life would be subjected to persecution in his home country, he cannot be denied asylum on the basis of a conclusion that he could avoid that persecution by modifying that

⁷³⁸ *HJ (Iran) (FC)*, above n 736, [2] (Lord Hope): ‘It was the practice for leaders in these countries simply to insist that homosexuality did not exist’. See further S Chevlan, ‘Put your hands up (if you feel love)’ [2011] JIANL 56, 57.

⁷³⁹ *Ibid* [3] (Lord Hope).

⁷⁴⁰ *Ibid* [3] (Lord Hope).

⁷⁴¹ *Z v Secretary of State for the Home Department* [2004] EWCA Civ 1578, [2005] Imm AR 75

⁷⁴² *Appellant S395/2002 v Minister for Immigration* (2003) 216 CLR 473.

way of life. In the Supreme Court, therefore, counsel for the appellant sought to persuade the Justices that the comparative jurisprudence illustrated the ‘proper approach’.⁷⁴³ By contrast, counsel for the Secretary of State acknowledged that the comparative case law was ‘informative’ but argued that it was not ‘dispositive’.⁷⁴⁴ Examples of inconsistent case law from Australia were given to show that the approach in other jurisdictions was neither unanimous nor uniform. Indeed Lord Walker noted that the Supreme Court had been given ‘23 bundles of authorities containing 250 different items’.⁷⁴⁵ Lord Hope devoted a section of his judgment to explaining this; five paragraphs under the heading ‘Comparative Jurisprudence’ deal with the approach in Australia, South Africa, New Zealand, Canada and the United States.⁷⁴⁶ His Lordship ultimately agreed that the comparative jurisprudence did not ‘reveal a consistent line of authority’ and that it did not indicate ‘an approach which is universally accepted internationally’.⁷⁴⁷ Nevertheless, the respect paid to these sources is evident. By way of example, a judgment of the New Zealand Refugee Status Appeals Authority was said to have contained ‘impressive analysis of the relevant principles’.⁷⁴⁸

After lengthy analysis, all members of the Supreme Court agreed that the Court of Appeal had misunderstood a particular Australian case that had provided the thrust of support for adopting the ‘reasonable tolerability’ test. As Lord Collins

⁷⁴³ *HJ (Iran)*, above n 736, 603 [A].

⁷⁴⁴ *Ibid* 617 [H].

⁷⁴⁵ *Ibid* [87] (Lord Walker).

⁷⁴⁶ *Ibid* [30]-[34] (Lord Hope).

⁷⁴⁷ *Ibid* [30] (Lord Hope).

⁷⁴⁸ *Ibid* [30] (Lord Hope); *Refugee Appeal No 74665/03* [2005] INLR 68

put it, the test ‘was based on a misunderstanding of the passage in the judgment of McHugh and Kirby JJ in *Appellant S395/2002 v Minister for Immigration* (2003) 216 CLR 473’. Reviewing the passage again, Lord Collins concluded that

the idea of reasonable toleration was plainly being mentioned in the context of what amounts to persecution and not in the context of what they described as ‘taking avoiding action’ or where members of the group ‘hide their membership or modify some attribute or characteristic of the group’ to avoid persecution.⁷⁴⁹

Moreover, drawing on a number of other comparative cases, Lord Collins clarified that a person concealing sexual identity because of a well-founded fear of persecution does not cease to have that well-founded fear even if the concealment is successful.⁷⁵⁰ Lastly, Lord Collins pointed out that ‘a similar, though not identical, approach has been adopted in Canada and the United States’.⁷⁵¹

Lord Rodger, in particular, paid significant attention to the comparative jurisprudence, also recognising the Court of Appeal’s misunderstanding of the judgment in *S395/2002*. Like the other members of the Court, Lord Rodger considered the requirement to actively avoid persecution from the perspective of the Australian case. It was of assistance that the point made by the English

⁷⁴⁹ Ibid [102]-[103] (Lord Collins).

⁷⁵⁰ Ibid [103] (Lord Collins). The cases referenced on this point were: *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 216 ALR 1; *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18; *Refugee Appeal No 74665/03* [2005] INLR 68 (NZ Refugee Status Appeals Authority, Mr Haines QC).

⁷⁵¹ Ibid [104] (Lord Collins).

authority had been made ‘with considerably more elaboration’ in the Australian judgment:

[McHugh and Kirby JJ] begin by pointing out ... that ‘persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality’. In the remainder of para 40 they point out that, if the position were otherwise, the Convention would not protect those who chose to exercise their right, say, to express their political opinion openly.⁷⁵²

In fact Lord Rodger’s reasoning appears to rely heavily on the Australian jurisprudence—his Lordship reproduces large sections of the judgments in the course of his analysis,⁷⁵³ before expressly confirming the weight of that authority:

The decision of the High Court is accordingly *powerful authority, which I would respectfully follow*, for the proposition that, if a person has a well-founded fear that he would suffer persecution on being returned to his country of nationality if he were to live openly as a gay man, then he is to be regarded as a refugee for purposes of the Convention, even though, because of the fear of persecution, he would in fact live discreetly and so avoid suffering any actual harm. The High Court has followed the same line of reasoning in subsequent cases (emphasis added).⁷⁵⁴

Further, Lord Rodger acknowledged that the ‘same approach has been followed in New Zealand’.⁷⁵⁵ His Lordship concluded the point on this evidence:

⁷⁵² Ibid [55] (Lord Rodger). The Australian case referred to is *Appellant S395/2002 v Minister for Immigration* (2003) 216 CLR 473.

⁷⁵³ Ibid [55], [66]-[72] (Lord Rodger)

⁷⁵⁴ Ibid.

⁷⁵⁵ Ibid [72] (Lord Rodger).

For present purposes I take the decision of the [New Zealand Refugee Status Appeals] authority ... as clear support for the High Court of Australia's approach that an applicant cannot be denied asylum on the basis that he would, in fact, take effective steps, by suppressing his sexual identity, to avoid the harm which would otherwise threaten him.⁷⁵⁶

Similar support was drawn from the comparative case law when dismissing the approach taken by the Court of Appeal. Lord Rodger's view was that it was not possible to proceed 'on the basis that a man or woman could find it reasonably tolerable to conceal his or her race indefinitely to avoid suffering persecution. Such an assumption about gay men and lesbian women is equally unacceptable'.⁷⁵⁷ Lord Rodger felt that most significantly, 'it is unacceptable as being inconsistent with the underlying purpose of the Convention', citing Canadian jurisprudence as authority for that point.⁷⁵⁸ A similar analysis was conducted by Lord Dyson, agreeing that '[l]ike Lord Rodger JSC, I would follow this approach which has been substantially followed in Australia'. His Lordship's final reason for rejecting the reasonable tolerability test is instructive:

... there is no support for the Court of Appeal approach in any other jurisprudence. This is important in view of the implicit rejection of it in a number of other jurisdictions, including at least Australia and New Zealand, and the fact that it is desirable that, so far as possible, there

⁷⁵⁶ Ibid.

⁷⁵⁷ Ibid [76] (Lord Rodger).

⁷⁵⁸ Ibid [76] (Lord Rodger); *Atta Fosu v Canada (Minister of Citizenship and Immigration)* 2008 FC 1135.

should be international consensus on the meaning of the Convention.⁷⁵⁹

7.4 Conclusions

It has been argued in this chapter that the Supreme Court may use foreign jurisprudence as part of an information gathering exercise, particularly where there is a desire to interpret a common legislative scheme consistently among contracting states. As a starting point it is clear that the Supreme Court approaches the Strasbourg jurisprudence in this way. Notions of consistency and uniformity are prevalent in the HRA jurisprudence and are in fact a significant barrier to explicit citations of foreign jurisprudence where relevant Strasbourg decisions exist. As chapter five suggested, this is in part because the Supreme Court relies on the Strasbourg court to inform them about developments in contracting states, through its jurisprudence. The risk in this approach is that the Supreme Court is placing heavy reliance on the Strasbourg Court's own review of the position in the various contracting states to the Convention. If the goal is to identify a common consensus or maintain the uniformity of interpretation, it will be important to remember that reliance on the Strasbourg jurisprudence may not always provide the most valuable or up to date analysis.

⁷⁵⁹ Ibid, [127] (Lord Dyson).

The influence of the Strasbourg jurisprudence is all the more evident when the approach in Convention cases is compared with cases turning on the interpretation of instruments that have no associated supranational court. In such cases the Supreme Court considers that one of the primary aims is to establish a common understanding or position among contracting states. Dickson has made a similar point. After an analysis of the Convention cases in which the Supreme Court (and House of Lords before it) adopted the 'mirror principle' approach to the Strasbourg jurisprudence, Dickson points out that it is in non-HRA cases that the Supreme Court is more willing to assert itself:

A good example of judicial creativity in *non-Convention* human rights law is the decision of the Supreme Court in *HJ (Iran) v Secretary of State for the Home Department*, where the Justices held that gay men who would risk persecution if they were returned to their home country and did not conceal their sexuality were entitled to be considered for asylum in the United Kingdom.⁷⁶⁰

In such cases it is clear that the Court is willing to pay significant attention to the foreign jurisprudence. In doing so, the Court keeps similar concerns in mind to those usually offered as a reason for restraint or deference in Convention claims. Indeed, the importance of ensuring that the Court does not interpret the relevant provision so as to provide for rights over and above the common understanding of other member states is arguably of even greater importance than in the Convention context. In these cases there is no supranational court to correct over-generous interpretations and prevent courts from imposing obligations on contracting states that they did not mean to undertake.

⁷⁶⁰ Brice Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press 2013), 43 (emphasis added).

The use of foreign jurisprudence in cases concerning international conventions with no supranational court therefore proceeds on the basis of identifying a consensus as to interpretation. It is clear that identifying a consensus on a particular issue is one of the most obvious reasons for which judges might draw from foreign jurisprudence.⁷⁶¹ A consensus is more than a simple accumulation of authorities, it represents 'a dense network of checking and rechecking results'.⁷⁶² Where there is no supervisory body for a particular instrument, identifying and maintaining a consensus position serves to ensure that the instrument will continue to be interpreted in the same way in different jurisdictions. Many of the Supreme Court Justices interviewed spoke on the subject in these terms, highlighting the importance of consensus in such cases.

Lord Mance explained:

It is a very traditional and well recognised fact that courts try to achieve a purposive uniform international construction if they can, ... in that context, there is an imperative to arrive at a uniform interpretation that will mean that there is no particular advantage of suing in one country rather than another...⁷⁶³

In fact, Lord Mance explained that the 'imperative' extends so far that judges will be 'prepared to suppress certain hesitations about the actual intention in order to achieve uniformity'.⁷⁶⁴

⁷⁶¹ Vlad F. Perju, 'The Puzzling Parameters of the Foreign Law Debate' (2007) 1 Utah Law Review 167, 175; Jeremy Waldron, 'Foreign Law and the Modern *Ius Gentium*' (2005) 119 Harvard Law Review 129, 139.

⁷⁶² Jeremy Waldron, 'Foreign Law and the Modern *Ius Gentium*', *Ibid.*, 145.

⁷⁶³ Interview with The Rt. Hon. Lord Mance, above n 701.

⁷⁶⁴ *Ibid.*

It is against that background that the risks outlined in several judgments (discussed above) are best understood. To repeat Lord Scott of Foscote's clear statement of this, 'a judicial formulation ... should not ... ever be treated as a substitute for the language used in [a] Convention'. Lord Mance felt this to be obvious during the interview: 'if you disagree, of course, then you disagree'.⁷⁶⁵ The Refugee Convention cases discussed in this chapter bear this attitude out well. While foreign jurisprudence was cited in each of those cases and were of evident assistance to the Supreme Court, it is clear that the tendency to have recourse to those materials in the first instance did not necessarily give rise to a tendency to apply them as well.

It is worth pointing out that 'foreign jurisprudence' in these cases also extends beyond foreign cases. When interviewed, Lord Collins felt this to be an important clarification, explaining that it was 'not so much foreign law but foreign practice' which would be of greater weight in an international convention case: 'if it is an international convention you ought to have uniformity of *practice* if possible'.⁷⁶⁶ However, it is clear that further complications may arise where there are many signatories to a Convention—since it is likely to be more difficult to establish an interpretation based on state practice in those circumstances. This is in addition to the fact that, despite a shared agreement or a common membership of a legal system, a legal order does not necessarily require homogeneity. Moreover, it is important to distinguish between what countries

⁷⁶⁵ *Ibid.*

⁷⁶⁶ Interview with The Rt. Hon. Lord Collins, retired Justice of the United Kingdom Supreme Court (The Supreme Court, London, 22 May 2012).

are doing under the Convention and what they are doing as a matter of discretion over and above Convention obligations, in order to avoid the well-articulated risks of re-writing the instrument.⁷⁶⁷ As Lord Brown put it in a Refugee Convention case before the House of Lords:

It is one thing to invite this House to construe the Convention as a living instrument generously and in the light of its underlying humanitarian purposes; quite another to urge your Lordships effectively to rewrite it.⁷⁶⁸

Given the Court's ability to maintain this awareness and balance in these cases, it is not obvious (other than for purely practical reasons) why there is such reluctance to engage in research of this kind into the jurisprudence of the European member states. Moreover, taking a more proactive approach to the interpretation of the Convention could provide the Court with an opportunity to conduct its own review, providing the findings as support for its reasoning where required. After all, the use of foreign jurisprudence as reasons for a decision was among the clearest explanations given by the Justices interviewed. As Baroness Hale explained:

In a sense, you are trying to give the best possible explanation that you can for the conclusions that you have arrived at. ... obviously if that is a set of reasons that satisfy you, you hope that it will satisfy your colleagues and you hope, if it is a Strasbourg case—or a case that could go to Strasbourg—that it satisfies Strasbourg. ...⁷⁶⁹

⁷⁶⁷ *R (Hoxha) v Special Adjudicator* [2005] 1 WLR 1063.

⁷⁶⁸ *Ibid* 1088.

⁷⁶⁹ Interview with The Rt. Hon. Baroness Hale of Richmond, above n 659.

8 Foreign Jurisprudence Used Instrumentally

One of the most frequent criticisms made of the judicial use of foreign jurisprudence is that it performs mainly a legitimisation function, supporting a judge's conclusions where the relevant authority could not have done so. Such criticisms are usually linked to the fear that judges are liable to 'cherry pick' the jurisprudence most helpful for that instrumental purpose. The US debate on that theme and Justice Scalia's well-known denunciation of the use of foreign decisions for those reasons were considered in chapter four. In the UK, the problem is much less pronounced and comparatively little attention has been paid to the judicial use of foreign jurisprudence in the English courts. Nevertheless, as Cram has written, 'resort to comparative legal materials nonetheless poses similarly awkward questions concerning judicial forays into the policy-making realm of the constitution and the erosion of parliamentary sovereignty...'.⁷⁷⁰

The risks are obvious: if a judge is not able to support a conclusion with domestic statute or common law, the conclusion has the potential to provide for an outcome that was not intended by Parliament. Thus reliance on foreign jurisprudence might be thought to provide a smoke screen for a judge's own discretion or law making. However, the interviewed Justices largely dismissed the idea that they might engage in the 'cherry picking' of sources to suit preconceived conclusions. Lord Kerr answered the charge as follows:

⁷⁷⁰ Ian Cram, 'Resort to foreign constitutional norms in domestic human rights jurisprudence with reference to terrorism cases' [2009] CLJ 118, 125.

I wouldn't accept that criticism at all. ... We don't really look for validation or endorsement from foreign jurisprudence. That would be a most curious way of adjudication, quite honestly: to reach a view and then to cast about to try to find some other court that has reached the same view. ... I just find that completely alien to my own personal experience.⁷⁷¹

Lord Mance was also dismissive of the idea, maintaining that the use of foreign jurisprudence was not 'selective' and that, if it were used, it would be necessary to also ensure that one had accounted for foreign jurisprudence that worked against one's conclusions:

... I think the criticism which is often made, 'you look abroad only to find what suits what you already think' in other words, very selectively, is unfair actually. ... I don't think one would think, if one was conscious of two streams of authority, of simply selecting the one which you liked. That wouldn't be respectable. If you're going to address foreign law, you have to address it warts and all, and if you disagree with some aspects of it, you have to face up to that. I think the criticism of selectivity is a little unfair ... even if you were simply faced with authorities that were all against the position you wanted to... you wouldn't suppress them, you'd face up to them. You'd say, 'the following were cited (normally they would have been cited but I think even if they came to your notice without being cited, and any were directly in point, you'd still feel the need to address it.) And this is part of one's desire to produce something which is intellectually sustainable and which you yourself respect. So I think selectivity, well it's a cynical view of judging and I don't think it really corresponds to the way we think or operate.'⁷⁷²

⁷⁷¹ Interview with The Rt. Hon. Lord Kerr of Tonaghmore, Justice of the United Kingdom Supreme Court (The Supreme Court, London, 9 May 2012).

⁷⁷² Interview with The Rt. Hon. Lord Mance, Justice of the United Kingdom Supreme Court (The Supreme Court, London, 06 December 2011).

Others among the interviewed Justices were less determined to dismiss the idea of selective citation. Lord Phillips, for example, felt this approach would be ‘fairly natural’ and commented on this as part of his explanation of the reasons for using foreign jurisprudence:

... if we’ve got an area where we are uncertain, an area where we are developing the law, an area where ... we would like to develop the law in a particular direction, then you are particularly keen to see if you can get any support for what your thinking is from foreign jurisdictions. ... [O]ne is always glad to find some foreign jurisprudence that actually supports one’s own decision.⁷⁷³

The use of foreign jurisprudence is not necessarily ‘selective’ but it nevertheless may be used instrumentally, for some particular purpose. The purpose is most frequently articulated as the giving of reasons: recall Baroness Hale’s interview comments, cited earlier:

In a sense, you are trying to give the best possible explanation that you can for the conclusions that you have arrived at. ... obviously if that is a set of reasons that satisfy you, you hope that it will satisfy your colleagues and you hope, if it is a Strasbourg case – or a case that could go to Strasbourg – that it satisfies Strasbourg.⁷⁷⁴

⁷⁷³ Interview with The Rt. Hon. Lord Phillips of Worth Matravers, former President of the United Kingdom Supreme Court (The Supreme Court, London, 23 November 2011).

⁷⁷⁴ Interview with The Rt. Hon. Baroness Hale of Richmond, Justice of the United Kingdom Supreme Court (The Supreme Court, London, 19 October 2011). Lady Hale made similar suggestions in the context of the *Horncastle* case discussed further below from n 841. Baroness Hale, ‘Argentoratium Locutum: Is the Supreme Court supreme?’, Nottingham Human Rights Lecture 2011 (Nottingham, 1 December 2011) <http://www.supremecourt.gov.uk/docs/speech_111201.pdf> accessed 18 October 2013: ‘the Court went to a great deal of trouble to explain to Strasbourg why we thought they were wrong, and that a fair trial could still be had in those circumstances’.

8.1 Confirmatory function / bolstering conclusions

The use of foreign jurisprudence for the purpose of giving reasons can nevertheless give the impression that the sources are used for legitimisation, bolstering a predetermined conclusion. That is to say that foreign jurisprudence is used as a supporting tool, for a conclusion that a judge or court is inclined to reach notwithstanding the existence of the foreign jurisprudence. In particular, this may occur where the court is supporting a conclusion that is likely to be controversial, either because the issue in the case is morally charged or because the outcome would be surprising on the basis of other relevant jurisprudence. In this way, foreign jurisprudence may be used as evidence to justify a particular conclusion.

In this way the use of foreign jurisprudence for confirmation or bolstering is to be distinguished from the categories of 'reassurance' and 'consistency' discussed in chapters six and seven respectively. Using foreign jurisprudence for reassurance would be an internal exercise, designed to lend comfort or confidence to the judge (and as such may not attract explicit citation). Using foreign jurisprudence for consistency entails gathering evidence from elsewhere as a starting point (usually on a point of interpretation) and ensuring that the approach in the instant case is in line with the approach taken in those other jurisdictions. Using foreign jurisprudence for confirmation or to bolster conclusions is quite different in the sense that it performs a defensive or justificatory function. Here foreign jurisprudence represents evidence that the

conclusions in the instant case are reasonable, especially where they are likely to be surprising or unpopular.

The use of foreign jurisprudence for this purpose might also extend to the Strasbourg Court. During the interview, Baroness Hale cited a House of Lords judgment as an example.⁷⁷⁵

A good example, I suppose, is the *Pretty* case, in which the House of Lords quoted a case that they had had in Canada. I think that that was bolstering the conclusion that they had already wanted to reach. I suspect that was what it was, and in fact it was also quoted in Strasbourg.⁷⁷⁶

The facts of the case are well known. Dianne Pretty suffered from the degenerative and incurable motor-neurone disease and sought assurances from the Director of Public Prosecution that her husband would not be prosecuted under section 2(1) of the Suicide Act 1961 for aiding and abetting her suicide. Mrs Pretty claimed a right to her husband's assistance in committing suicide and, if the 1961 Act effectively prohibited that assistance, that the Act would be incompatible with the ECHR. The House of Lords made extensive use of a judgment from the Supreme Court of Canada: *Rodriguez v Attorney General of Canada*.⁷⁷⁷ *Rodriguez* involved a woman with a similar disease who had also sought to end her life with medical assistance. The Canadian Supreme Court had upheld the equivalent provision of the Canadian Criminal Code, although several of the Justices of that court had concluded that

⁷⁷⁵ *R (Pretty) v Director of Public Prosecutions and Secretary of State for the Home Department* [2001] UKHL 61.

⁷⁷⁶ Interview with The Rt. Hon. Baroness Hale of Richmond, above n 774.

⁷⁷⁷ *Rodriguez v Attorney General of Canada* [1994] 2 LRC 136.

the relevant section of the Canadian Charter of Fundamental Rights Canadian did confer a right to personal autonomy, extending even to decisions on life and death. Counsel for Mrs Pretty naturally sought to rely upon those statements by analogy with Article 8 of the ECHR. The House of Lords, however, found that the case better supported the alternative conclusion: that the Suicide Act was not incompatible with the Convention.

The curious feature of the case is that *Rodriguez* was cited extensively at all. The issue had been clearly determined by relevant Strasbourg jurisprudence, which the House of Lords were bound to 'take into account' under the HRA 1998. Lord Bingham reviewed the relevant Strasbourg jurisprudence and concluded that it did not support the Mrs Pretty's contention.⁷⁷⁸ Yet Lord Bingham also felt it necessary to review the Canadian case closely, copying several passages into his own judgment.⁷⁷⁹ Lord Bingham explained the relevance of the Canadian case on the basis that it was the 'most detailed and erudite discussion known to me of the issues in the present appeal'.⁷⁸⁰ Lord Steyn made the contribution of the foreign jurisprudence more obvious:

Given the fact that Mrs Pretty's case is based on the European Convention I have concentrated on European developments. It is, however, noteworthy that in the United States and Canada arguments similar to that of Mrs Pretty ultimately failed...⁷⁸¹

⁷⁷⁸ *Pretty v DPP*, above n 775, [24].

⁷⁷⁹ *Ibid* [19]-[23].

⁷⁸⁰ *Ibid* [19] (Lord Bingham).

⁷⁸¹ *Ibid* [55] (Lord Steyn); citing *Vacco v Quill* (1997) 521 US 793; *Washington v Glucksberg* (1997) 521 US 702; *Rodriguez v Attorney-General of Canada* [1994] 2 LRC 136

The language of Lord Steyn clearly implies that the foreign jurisprudence is considered as an additional point, which supported the decision reached primarily on the European jurisprudence. It serves to bolster the conclusion that had already been determined.

Lord Hope offered a subtle variation, explaining that the Canadian case may have been of greater importance if it provided evidence of an international consensus, which could make a 'strained' reading of Article 8 appropriate.

... Mrs Pretty has a right of self-determination. In that sense, her private life [according to Article 8 ECHR] is engaged even where in the face of a terminal illness she seeks to choose death rather than life. But it is an entirely different thing to imply into these words a positive obligation to give effect to her wish to end her own life by means of an assisted suicide. I think that to do so would be to stretch the meaning of the words too far. ... A strained reading might have been appropriate if there was evidence of a consensus of international opinion in favour of assisted suicide. But there is none. As Sopinka J said in *Rodriguez v Attorney General of Canada* [1994] 2 LRC 136, 176A, no new consensus has emerged in society opposing the right of the state to regulate the involvement of others in exercising power over individuals ending their lives.⁷⁸²

The implication is that Lord Hope might have been tempted to 'stretch' the meaning of Article 8, but for the lack of evidence of international consensus. Put another way, it was the lack of that evidence in the foreign jurisprudence which bolstered the conclusion to dismiss Mrs Pretty's appeal.

⁷⁸² Ibid [100]-[101] (Lord Hope).

The *Pretty* case provides a useful example of foreign jurisprudence being used instrumentally to support a conclusion that is in keeping with the relevant Strasbourg authority (the Strasbourg Court unanimously found no violation with the Convention when Mrs Pretty's case was appealed).⁷⁸³ However, a more interesting issue arises where the Supreme Court uses foreign jurisprudence in a claim where the Strasbourg case law is clear and constant but where it nevertheless wishes to reach a different conclusion. In these cases, the purpose is to support a conclusion at odds with the otherwise relevant Strasbourg authority. These uses are surprising given the relatively deferential attitude towards the Strasbourg Court, caused in part by the HRA 1998.

8.2 The 'clear and constant' Strasbourg jurisprudence.

As discussed briefly in chapter four, section 2(1) HRA 1998 provides that domestic courts 'must take into account' the relevant Strasbourg jurisprudence when addressing 'a question which has arisen in connection with a Convention right'.⁷⁸⁴ In the absence of any normative guidance about the precise meaning of the words 'take into account', domestic courts have guided themselves to 'follow any clear and constant' Strasbourg jurisprudence 'in the absence of special circumstances'.⁷⁸⁵ In fact, as a result of that provision, the courts have often been criticised for taking too slavish an approach to the Strasbourg case

⁷⁸³ *Pretty v United Kingdom* (2346/02) [2002] ECHR 423.

⁷⁸⁴ Section 2(1) Human Rights Act 1998.

⁷⁸⁵ *R v Secretary of State for the Environment, Transport and the Regions ex p. Alconbury Developments Limited and others* [2001] UKHL 23; *R (Ullah) v Special Adjudicator; Do v Immigration Appeal Tribunal* [2004] UKHL 26 [20] (Lord Bingham); *R (Animal Defenders International) v Secretary of State For Culture, Media and Sport* [2008] UKHL 15.

law. It is said that the judicial interpretation of section 2(1) as requiring domestic courts to 'follow' or 'keep pace' with the 'clear and constant' Strasbourg jurisprudence,⁷⁸⁶ has led to a treatment of the Strasbourg case-law as something more than persuasive authority. Fenwick's conclusion was that 'the obligation under s.2 as interpreted ... comes close to affording binding force to the jurisprudence',⁷⁸⁷ and Amos added that '[i]n the majority of cases, the obligation to take into account Strasbourg jurisprudence is construed as an obligation to follow it as well'.⁷⁸⁸ Kearns has suggested that loyalty to the jurisprudence of the Strasbourg Court is 'a practice that is becoming gradually habitual for our judiciary ... the effects of which would be difficult to reverse'.⁷⁸⁹ Krisch agreed, writing that 'the dominant position among the judges is ... one of close attention and loyalty to Strasbourg judgments'.⁷⁹⁰ Perhaps the most well-known example of this attitude in the case law comes from the *AF* case where Lord Rodger's short concurring paragraph adds just this:

Even though we are dealing with rights under a United Kingdom statute, in reality, we have no choice: *Argentoratum locutum, iudicium finitum* - Strasbourg has spoken, the case is closed.⁷⁹¹

⁷⁸⁶ *R (Anderson) v Secretary of State for the Home Department* [2001] UKHL 23; [2003] 1 AC 837, [18] (Bingham LJ); *R (Alconbury) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 [26] (Slynn LJ); *Ullah*, above n 785, [20] (Bingham LJ).

⁷⁸⁷ Helen Fenwick, *Civil Liberties and Human Rights* (Cavendish 2007) 193.

⁷⁸⁸ Merris Amos, *Human Rights Law* (Hart Publishing 2006), 18.

⁷⁸⁹ Paul Kearns, 'United Kingdom Judges in Human Rights Cases', in Esin Örüçü (ed), *Judicial Comparativism in Human Rights Cases* (United Kingdom National Committee of Comparative Law, Birmingham 2003) 82.

⁷⁹⁰ Nico Krisch, 'The Open Architecture of European Human Rights Law' (2008) 71 MLR 183, 202-3.

⁷⁹¹ *Secretary of State for the Home Department v AF and another* [2009] UKHL 28; [2010] 2 A.C. 269, [98] (Lord Rodger).

But there are signs of change. The fluctuations in the top court's approach to the section 2 duty and the Strasbourg jurisprudence were noted in chapter four, drawing from the possession proceedings cases.⁷⁹² The willingness to reject the Strasbourg jurisprudence has also filtered down to the Court of Appeal. In *R (on the application of the Children's Rights Alliance for England)*, as a postscript to his decision, Laws LJ added the following:⁷⁹³

...I hope the *Ullah* principle may be revisited. There is a great deal to be gained from the development of a municipal jurisprudence of the Convention rights, which the Strasbourg court should respect out of its own doctrine of the margin of appreciation, and which would be perfectly consistent with our duty to take account of (not to follow) the Strasbourg cases.⁷⁹⁴

This appears to be in tune with a more recent example from the Supreme Court in *Sugar v BBC*.⁷⁹⁵ In that case Lord Wilson outlined his view of the manner in which the *Ullah* interpretation of the duty under section 2 HRA 1998 had developed:

It was in *Ullah* that, in para 20, Lord Bingham suggested that it was the duty of the House to keep pace with the evolving jurisprudence of the European Court of Human Rights ('the ECtHR') 'no more, but certainly no less'. It was in *Al Skeini* that, in para 106, Lord Brown suggested that its duty was to keep pace with it "no less, but certainly no more". I would welcome an appeal ... in which it was appropriate for this court to consider whether, of course without acting extravagantly, it might now usefully do more than to shadow the

⁷⁹² Chapter four from n 310.

⁷⁹³ *R (Children's Rights Alliance for England) v Secretary of State for Justice*, [2013] EWCA Civ 34.

⁷⁹⁴ *Ibid* [62]-[64].

⁷⁹⁵ *Sugar v British Broadcasting Corporation* [2012] UKSC 4.

ECtHR in the manner hitherto suggested—no doubt sometimes in aid of the further development of human rights and sometimes in aid of their containment within proper bounds.⁷⁹⁶

In part, these fluctuations in the approach to the Strasbourg jurisprudence since *Ullah* may simply reflect the political context. The Supreme Court does not operate in a political vacuum. As Paterson has pointed out, the political dynamics surrounding the 2010 general election, the threats to the Human Rights Act from the political right, the Brighton Declaration and the more recent prisoner voting saga may all have had an impact on the Supreme Court's relationship with the Strasbourg jurisprudence.⁷⁹⁷ Indeed some commentators have suggested that the Strasbourg Court has itself altered its approach in light of the UK proposals for reform of the European Court of Human Rights and the political outcry over some of its most unpopular decisions.⁷⁹⁸

The future of the relationship between Strasbourg and the top court and the prevalence of the *Ullah* principle is likely to depend to some extent on the further development of human rights reform, both at the domestic and supranational level. As Masterman has written on a well-known blogsite:

⁷⁹⁶ Ibid [59] (Lord Wilson).

⁷⁹⁷ Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing 2013), 232.

⁷⁹⁸ Helen Fenwick, 'An appeasement approach in the European Court of Human Rights?' UK Const. L. Blog (5 April 2012) <<http://ukconstitutionallaw.org/2012/04/05/helen-fenwick-an-appeasement-approach-in-the-european-court-of-human-rights/>> accessed 22 July 2014; Alan Paterson, *Final Judgment*, *ibid*: 'Certainly Strasbourg has shown signs of being aware of the Tories' distaste for Strasbourg (e.g. over prisoners' coting rights, and the deportation of alleged terrorists).'

... the Bill of Rights debate ... has arguably had a damaging effect on political perceptions of the HRA and the link the Act creates between domestic law and the Convention jurisprudence. The relationship between domestic courts and the European Court of Human Rights that *Ullah* embodies is out of touch with the widely-held view that the content of our domestic human rights law should not be 'dictated' to us by the European Court.⁷⁹⁹

For now, Masterman has posited a series of circumstances that the case law has establish might underpin a departure from the apparent application of the *Ullah* principle. Some of these include: where applying the Strasbourg jurisprudence would compel a conclusion which would be 'fundamentally at odds' with the United Kingdom's separation of powers;⁸⁰⁰ where there are 'special circumstances';⁸⁰¹ and where the court can think of a 'good reason' that the Strasbourg jurisprudence not be applied.⁸⁰² Other more interesting opportunities are where the area is governed by common law and the court is minded to exercise its discretion to depart from the Strasbourg line;⁸⁰³ where the court wishes enter into a 'dialogue' with the ECtHR (on the basis that the applicable case law may be wrong or badly-informed or both);⁸⁰⁴ and the

⁷⁹⁹ Roger Masterman, 'The Mirror Crack'd' UK Const. L. Blog (13th February 2013) <<http://ukconstitutionallaw.org/2013/02/13/roger-masterman-the-mirror-crackd/>> accessed 12 August 2013.

⁸⁰⁰ *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [76].

⁸⁰¹ *Ibid* [26].

⁸⁰² *R v Secretary of State for the Home Department, ex parte Amin* [2004] 1 AC 653, [44].

⁸⁰³ *Rabone and another v Pennine Care NHS Trust (Inquest and others intervening)* [2012] UKSC 2, [113]-[114].

⁸⁰⁴ *R v Horncastle and another* [2009] UKSC 14; [2010] 2 AC 373, [11].

domestic court prefers to follow non-Strasbourg authority.⁸⁰⁵ In all such situations, the Supreme Court must be prepared to decide the case without the benefit of clear Strasbourg jurisprudence.

8.3 Supporting conclusions where the relevant Strasbourg jurisprudence is unclear or unhelpful.

Several factors may encourage domestic courts to decide matters independently of Strasbourg. The most obvious, perhaps is that Strasbourg jurisprudence may be out-dated; implicit in the construction of the ECHR as a 'living instrument',⁸⁰⁶ is the presumption that domestic courts may properly conclude that Convention jurisprudence has lost its relevance with age. The Convention itself does not require reliance on its own jurisprudence. As Klug pointed out, this is virtually a mirror image of the classical common law approach: instead of a doctrine of precedent, the Strasbourg Court has operated a doctrine of evolutionary law in which the most recent case law is usually the most persuasive.⁸⁰⁷

According to Feldman, 'should there be reason to believe that the European Court would not follow one of its own previous decisions, that would be a good

⁸⁰⁵ *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [27]-[28]. The remainder of Masterman's list can be read at R. Masterman, 'The Mirror Crack'd' UK Const. L. Blog (13th February 2013) <http://ukconstitutionallaw.org/2013/02/13/roger-masterman-the-mirror-crackd/> accessed 12 August 2013.

⁸⁰⁶ *Tyler v United Kingdom* (1978) 2 EHRR 1 [31].

⁸⁰⁷ Francesca Klug, 'The Human Rights Act – A 'Third Way' or 'Third Wave' Bill of Rights' [2001] EHRLR 361, 366.

reason for domestic courts and tribunals to interpret a provision differently'.⁸⁰⁸

Other commentators too have noted the need to keep 'constantly up to date'.⁸⁰⁹

... [I]t would appear to be insufficient simply to identify a previous decision of the ECtHR on the matter in issue and to follow it; some consideration would also be required, if that decision were not a recent one, of whether it held good in the face of changes in society that had occurred in the meantime.⁸¹⁰

The possibility that the HRA and the Convention might have this effect was not at first popular with the judiciary. In *Anderson*, for example, Lord Brown opined that it would seem somewhat presumptuous for us, in effect, to pre-empt [the] decision [of the Strasbourg Court].⁸¹¹ Similarly in *N* Lord Hope explained that 'It is for the Strasbourg Court, not for us, to decide whether its case law is out of touch with modern conditions'.⁸¹²

However the courts have shown willingness to undertake these sorts of exercises. The decision in *Re P* is a good example of the willingness to construct conclusions on the basis of the way the Strasbourg jurisprudence was thought to be developing.⁸¹³ The issue in that case was the effect of a blanket

⁸⁰⁸ David Feldman, 'The Human Rights Act 1998 and constitutional principles' [1999] 19(2) LS 165, 192.

⁸⁰⁹ Merris Amos, *Human Rights Law*, above n 788, 18.

⁸¹⁰ Neil Sheldon, 'The Effect of the Human Rights Act on Domestic Precedent' [2001] JR 208, 210.

⁸¹¹ *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [66].

⁸¹² *N v Secretary of State for the Home Department* [2005] UKHL 31; [2005] 2 WLR 1124, [25] (Lord Hope).

⁸¹³ *In Re P and Others* [2008] UKHL 38; [2009] 1 AC 173.

ban on unmarried adoptions in Northern Ireland.⁸¹⁴ It was argued that the discrimination against unmarried couples violated Article 14 of the Convention (read in conjunction with Article 8). No case had yet reached Strasbourg on the precise issue of discrimination that was raised in *Re P*. Two cases raising similar issues had been handed down, which the House considered in turn: In *Fretté v France* the Strasbourg court had decided by a majority of four to three that it was within the margin of appreciation allowed to member states of the Council of Europe to discriminate against homosexuals as applicants to be adoptive parents.⁸¹⁵ A few years later, however, ‘the court appear[ed] to have changed course’.⁸¹⁶ In *EB v France* the Grand Chamber decided the rejection of an application by a single homosexual woman did constitute discrimination according to Article 14.⁸¹⁷ On the back of this analysis, Lord Hoffman concluded that it was now not at all unlikely that if the issue in this case were to go to Strasbourg, the court would hold that discrimination against a couple who wish to adopt a child on the grounds that they are not married would violate Article 14. Indeed in reaching his conclusions, Lord Hope noted that the more recent case in *EB* was consistent with the point made by the South African Constitutional Court.⁸¹⁸

⁸¹⁴ Article 14 of the Adoption (Northern Ireland) Order 1987 1 provided that an adoption order could only be made on the application of more than one person if the applicants were a married couple.

⁸¹⁵ *Fretté v France* (2002) 38 EHRR 438

⁸¹⁶ *In Re P and Others*, above n 813, [25] (Lord Hoffman)

⁸¹⁷ *EB v France* (2008) 47 EHRR 509.

⁸¹⁸ *In Re P and Others*, above n 813, [54] (Lord Hope).

Another obvious excuse for divergence is created by the operation of the 'margin of appreciation' doctrine. The judges of the Strasbourg Court are 'acutely conscious that on several key issues, the European-wide consensus which generally provides the mainspring of their decision-making does not exist ... precisely because of the prevalence of divergent moral standards and religious traditions in the affiliated states'.⁸¹⁹ The approach of the European Court has therefore been that the lesser the consensus among Contracting States,⁸²⁰ the better placed national authorities are to decide on the matter and the more deferential the European Court has to be in its review.⁸²¹ The doctrine arguably signifies that there are issues on which there is no relevant Strasbourg authority at all.⁸²²

It is relatively clear that judges are willing to view the matter in this way, for example by reaching a conclusion that arguably goes further than the Strasbourg court had previously done. This appeared to justify the House of Lords' conclusion in *Re P*,⁸²³ concerning the joint adoption of a child by an unmarried couple discussed above. In Lord Hoffman's view, it would make 'no difference' if the Strasbourg Court were to revert to its earlier position and say that these are delicate questions which should therefore be left to the national margin of appreciation. Accordingly, his Lordship did not feel that the House

⁸¹⁹ Ian Leigh and Laurence Lustgarten 'Making Rights Real: The Courts Remedies, and the Human Rights Act' (1999) 58 CLJ 509, 544.

⁸²⁰ *Fretté v France* (2004) 38 EHRR 438, [41]: Where the law 'appears to be in a transitional stage, a wide margin of appreciation must be left to the authorities of each State'.

⁸²¹ George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 OJLS 705, 722.

⁸²² Eg Francesca Klug 'A Bill of Rights: Do we need one or do we already have one?' [2007] PL 701, 708.

⁸²³ *In Re P and Others*, above n 813.

should be inhibited from declaring the 1987 Order incompatible ‘by the thought that [they] might be going further than the Strasbourg Court’.⁸²⁴ Repeating the tenets delivered by Lord Bingham in *Ullah* (that the duty of domestic courts is to ‘keep pace’ with Strasbourg jurisprudence ‘no more, no less’) Lord Hoffman emphasised that ‘[t]hese remarks were not ... made in the context of a case in which the Strasbourg Court has declared a question to be within the national margin of appreciation’.⁸²⁵ His Lordship explained that ‘none of these considerations can apply in a case in which Strasbourg has deliberately declined to lay down an interpretation for all member states, as it does when it says that the question is within the margin of appreciation’.⁸²⁶ For that reason, his Lordship concluded that ‘the question is one for the national authorities to decide for themselves and it follows that different member states may well give different answers’⁸²⁷ and ‘it is for the court in the United Kingdom to interpret articles 8 and 14 and to apply the division between the decision-making powers of courts and Parliament in the way which appears appropriate for the United Kingdom’.⁸²⁸ Lord Mance evidently agreed, adding that:

It would be contrary to the Strasbourg court’s purpose, and circular, if national authorities were to take the view that they should not consider any question other than whether a particular solution was within the United Kingdom’s margin of appreciation. Under the 1998 Act, United Kingdom authorities (legislators and courts) have

⁸²⁴ Ibid [37].

⁸²⁵ Ibid [31].

⁸²⁶ Ibid [36].

⁸²⁷ Ibid.

⁸²⁸ Ibid [37].

domestically to address the impact of the domestically enacted Convention rights in the particular context of the United Kingdom.⁸²⁹

A third opportunity for divergence is given by the nature of the Strasbourg authority itself. Although some commentators have argued that Strasbourg's decisions are so important as to be considered as authority even in instances in which they did not 'argue the point through in a coherent and thorough manner',⁸³⁰ the prevailing attitude among the judiciary has been that there is 'room for dialogue' where an English court 'considers that the ECtHR has misunderstood or been misinformed about some aspect of English law' and 'it may wish to give a judgment which invites the ECtHR to reconsider the question'.⁸³¹ As Warbrick argued, there is 'space for national courts to reconsider Strasbourg cases which appear 'wrong', either because they are founded on a misunderstanding of national law or because they are poorly reasoned'.⁸³²

There are some recent examples of this approach at the Supreme Court. In *R (Smith) v Secretary of State for Defence*,⁸³³ for example, Lord Collins referred to twelve decisions of foreign domestic courts: one decision from Canada, one from Australia and ten from the United States. The references to foreign

⁸²⁹ *Ibid* [129].

⁸³⁰ Ian Loveland 'Making it up as they go along? The Court of Appeal on same sex spouses and succession rights to tenancies' [2003] PL 222, 233.

⁸³¹ *R v Lyons (No 3)* [2002] UKHL 44; [2003] 1 AC 976, [46].

⁸³² Although Warbrick was also careful to suggest that 'a strong case would need to be made that this were the case', Colin Warbrick, 'The View from the Outside' in Helen Fenwick, Roger Masterman and Gavin Phillipson (eds.) *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press 2007) 37.

⁸³³ *R (Smith) v Secretary of State for Defence & another* [2010] UKSC 29.

jurisprudence are surprising at first glance, since the case concerned the meaning of 'jurisdiction' in the ECHR and it is not obvious that the jurisprudence of those countries not signatory to the Convention are likely to provide assistance on the interpretation of a term in that instrument. Lord Collins explained in the interview, however, that the jurisprudence was helpful to confirm his feelings about the result since the matter had been 'treated in a very superficial way by Strasbourg'.⁸³⁴

Some commentators have suggested that departing from Strasbourg jurisprudence on these grounds usually indicates a desire to avoid the conflicting Strasbourg jurisprudence *per se*. For instance Amos has argued that the means by which conflicting Strasbourg jurisprudence is usually avoided is by a finding that the reasoning of the Court (or Commission) was inadequate,⁸³⁵ while Elizabeth Wicks identified one of the prevalent judicial approaches under section 2 HRA to be 'assessing relevance by reference to own perception of merits'.⁸³⁶ In other words, 'the Strasbourg jurisprudence is being used merely to substantiate domestic reasoning: it is not taken into account as a factor in reaching the decision; merely as a factor in justifying the decision'.⁸³⁷ This kind

⁸³⁴ Interview with The Rt. Hon. Lord Collins of Mapesbury, retired Justice of the United Kingdom Supreme Court (The Supreme Court, London, 22 May 2012). The Supreme Court has since departed from *Smith (No 1)* in *Smith (No 2): Smith and others (FC) v The Ministry of Defence* [2013] UKSC 41. In that case, the Supreme Court made little to no discernible reference to foreign jurisprudence, taking their lead from the more recent Strasbourg jurisprudence handed down by the Grand Chamber: *Al-Skeini v United Kingdom* (2011) 53 EHRR 589.

⁸³⁵ Merris Amos, 'The Principle of Comity' [2009] Yearbook of European Law 503; Merris Amos, 'The dialogue between United Kingdom courts and the European Court of Human Rights' [2012] 61(3) ICLQ 557.

⁸³⁶ Elizabeth Wicks, 'Taking Account of Strasbourg? The British Judiciary's Approach to Interpreting Convention Rights' [2005] EPL 405, 419.

⁸³⁷ *Ibid* 423.

of explanation is difficult to deny, considering cases like *Re P* where the court appeared to construct the matter so as to reach the desired conclusion. Lord Hoffman, for example, evidently felt that the blanket rule in *Re P* was 'quite irrational'.⁸³⁸ Lord Hoffman could see no basis for it and referred to a recent decision of the South African Constitutional Court, which had made similar points.⁸³⁹ Crucially, this reference to the South African Court came prior to Lord Hoffman's analysis of the relevant Strasbourg jurisprudence and therefore represents an example of the willingness to reject the Strasbourg jurisprudence, leaning on foreign jurisprudence when doing so.

8.4 'Departing' from Strasbourg

This evaluative approach to Strasbourg jurisprudence has developed a step further. UK Courts are willing not only to reject that jurisprudence as determinative of a particular issue but also to reject its conclusions outright. This represents a departure from the deferential start to the relationship with the Strasbourg Court, and the sense that the UK courts appeared to be acting as 'merely agents or delegates of the ECHR and Council of Europe'.⁸⁴⁰ These cases are illuminating on both the relationship between the Strasbourg and UK courts, as well as on a more general point about the use of foreign jurisprudence in domestic human rights cases.

⁸³⁸ *In Re P and Others*, above n 813, [16] (Lord Hoffman).

⁸³⁹ *Du Toit v Minister for Welfare and Population Development* (2002) 13 BHRC 187.

⁸⁴⁰ Lord Irvine of Lairg, 'A British Interpretation of Convention Rights', Lecture at University College of London's Judicial Institute (London, 14 December 2011).

8.4.1 *R v Horncastle*: departure and dialogue

Since Strasbourg jurisprudence is not binding (section 2 HRA 1998 only obliges domestic courts to take it into account), it is not technically appropriate to talk of ‘departing’ from the Strasbourg Court’s case law. In this context therefore, ‘departure’ serves only to represent cases in which the decision of the UK court is not in line with the relevant or ‘clear and constant’ Strasbourg jurisprudence. It in these cases the Supreme Court has tended towards giving reasons for declining to follow the Strasbourg case law. This may simply be an attempt to enter into a ‘dialogue’ with the Strasbourg Court, or it may be illustrative of the hesitancy to ‘depart’ from its jurisprudence without clear reasoning. Many would describe the first case considered here, *Horncastle*, as an example of the former. Indeed, Lord Phillips appeared to have this in mind when explaining that the detailed reasons would be ‘likely to give the Strasbourg court the opportunity to reconsider...’.⁸⁴¹ What follows is an alternative perspective; *Horncastle* is considered as a case that is illustrative of both the strength attached to the (clear and constant) Strasbourg jurisprudence, and of the willingness to depart from it. The use of foreign jurisprudence in the reasoning is illuminating on both points.

Horncastle was the first Convention rights case in which the Supreme Court ‘departed’ from seemingly clear and constant Strasbourg jurisprudence.⁸⁴² The

⁸⁴¹ *R v Horncastle and another* [2009] UKSC 14; [2010] 2 AC 373, [11] (Lord Phillips).

⁸⁴² *Ibid.* *Horncastle* was the seventh case to raise Convention rights issues in the Supreme Courts first term after *R (E) v Governing Body of JFS & Anor (Rev 3)* [2009] UKSC 1; *R (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3; *R (BA (Nigeria)) v Secretary of State for the Home Department* [2009] UKSC 7; *R (A) (FC) v London Borough of Croydon and one other action* [2009] UKSC 8; *R (Barclay and Others) v Secretary of State for Justice and others*

case concerned two defendants convicted of serious offences on the basis of evidence from an absent witness ('hearsay' evidence). In the first, the witness had died after making a full written statement; in the second, the witness feared for her life if she were to attend the hearing. In each case the evidence had been admitted pursuant to the provisions of the Criminal Justice Act 2003.⁸⁴³ In both cases, it was argued that the appellant's conviction was based to a 'sole or decisive' extent on the statements of the absent witnesses. On this basis, it was submitted that the lack of an opportunity to cross-examine the witnesses violated the appellants' rights under Article 6 of the ECHR, rendering their convictions unsafe.

The relevant Strasbourg jurisprudence was a decision of the Chamber in *Al-Khawaja and Tahery v United Kingdom*.⁸⁴⁴ *Al-Khawaja and Tahery* concerned similar facts to the first two cases in *Horncastle*. Mr Al-Khawaja claimed that the admission of a statement given by a complainant who had later died was in violation of his rights under article 6(3)(d) of the ECHR. Mr Tahery claimed the same in relation to the admission of a statement given by a witness that later refused to give the evidence because of fear. In each case the UK Court of Appeal had held that the statements were admissible and that the convictions

[2009] UKSC 9; *R (A) v B* [2009] UKSC 12. While the Supreme Court also appeared to avoid applying the Strasbourg jurisprudence (*Tsfayo v United Kingdom* [2009] 48 EHRR 18) in *R (A) (FC) v London Borough of Croydon* [2009] UKSC 8, it was clear that the Court did not have to decide the related point in order to dispose of the appeal (Lord Walker [67]). Thus it was not necessary to fully reason that point and a number of the Justices preferred to 'leave the point open', not least because the Strasbourg jurisprudence was not 'clear and constant' but was 'still developing' (Lord Walker [67]; also Lord Hope [62]).

⁸⁴³ Section 116(1)(2)(a) of the Criminal Justice Act 2003; section 116(1)(2)(e) of the Criminal Justice Act 2003, respectively.

⁸⁴⁴ *Al-Khawaja and Tahery v United Kingdom* (2009) 49 EHRR 1.

were safe.⁸⁴⁵ The ECtHR sitting as a Chamber disagreed and held that there would always be a breach of Article 6 if a conviction is based ‘solely or decisively’ on hearsay evidence.⁸⁴⁶ Counsel for the defendants placed heavy reliance on *Al-Khawaja and Tahery* but also provided extensive lists of Strasbourg jurisprudence supporting the argument that the ECtHR had ‘established a clear and constantly applied principle to the effect that the admission of a statement from an absent witness whose testimony provides sole or decisive evidence at a criminal trial will breach article 6(1)(3)(d)’.⁸⁴⁷

There is nothing in the judgment given by Lord Phillips (giving the judgment of the Court) to suggest that the Supreme Court felt that the Strasbourg jurisprudence was not clear and constant. Instead, Lord Phillips acknowledged the argument that the Supreme Court ‘should treat the judgment of the Chamber in *Al-Khawaja* as determinative of the success of these appeals’ and responded by providing reasons for declining to do so.⁸⁴⁸ It is worth setting out the paragraph in full:

The requirement to ‘take into account’ the Strasbourg jurisprudence will normally result in the domestic court applying principles that are clearly established by the Strasbourg court. There will, however, be rare occasions where the domestic court has concerns as to whether a decision of the Strasbourg court sufficiently appreciates or

⁸⁴⁵ *R v Al-Khawaja* [2005] EWCA Crim 2697; [2006] 1 WLR 1078; *R v Tahery (Alireza)* [2006] EWCA Crim 529.

⁸⁴⁶ *Al-Khawaja and Tahery*, above n 844. The United Kingdom subsequently requested that the decision be referred to the Grand Chamber. On 5 June 2009 the panel of the Grand Chamber adjourned consideration of that request pending the judgment of the Supreme Court in the present case.

⁸⁴⁷ *R v Horncastle*, above n 841, 421-422.

⁸⁴⁸ *Ibid* [10].

accommodates particular aspects of our domestic process. In such circumstances it is open to the domestic court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between the domestic court and the Strasbourg court. This is such a case.⁸⁴⁹

It is clear, then, that Lord Phillips was not suggesting that the Strasbourg case law was anything other than clear and constant. Rather, the Supreme Court would ‘decline to *follow*’ (emphasis added) it on the basis that the Strasbourg court had not ‘sufficiently appreciate[d] or accommodate[d] particular aspects of our domestic process’.⁸⁵⁰

To speak of ‘following’ implies that to do otherwise would amount to a departure. This much is reinforced by the addition of a condition that the court ‘gives reasons’ for doing so.⁸⁵¹ And Lord Phillips did indeed give detailed reasons for declining to follow the Strasbourg jurisprudence. After outlining the common law approach to fair trial in some detail, Lord Phillips set out examples of hearsay exceptions in other Commonwealth jurisdictions:

Other established common law jurisdictions, namely Canada, Australia and New Zealand have, by both common law and statutory development, recognised hearsay evidence as potentially admissible, under defined conditions, in circumstances where it is not possible to call the witness to give evidence, even where the evidence is critical to the prosecution case. ... *This demonstrates that*, under the

⁸⁴⁹ Ibid [11].

⁸⁵⁰ Ibid.

⁸⁵¹ Ibid.

common law and statutory exceptions to the hearsay rule recognised in those jurisdictions *there is no rigid rule excluding evidence if it is or would be either the 'sole' or 'decisive' evidence*, however those words may be understood or applied.⁸⁵²

The strength of these examples were further supported by a detailed analysis of the position in those jurisdictions, prepared by Lord Mance and annexed to the judgment.⁸⁵³

Not all the comparative jurisprudence supported the admission of hearsay evidence. It was explained that in the United States, the 'right under the Sixth Amendment "to be confronted with the witnesses against him" has recently been interpreted in an absolute sense';⁸⁵⁴ the effect was 'to exclude any "testimonial" evidence whatever in respect of which there has been or can be no cross-examination'.⁸⁵⁵ But rather than take this as a balance against the position taken by the Commonwealth jurisdictions set out in Lord Mance's annex, Lord Phillips used the extremity of the United States to show that the Strasbourg Court had not itself gone that far:

Article 6(3)(d) has not been interpreted by the Strasbourg Court in the same way that the US Supreme Court has now interpreted the Sixth Amendment. The Strasbourg Court has accepted that there are circumstances that justify the admission of statements of witnesses who have not been subject to 'confrontation' with the defendant.⁸⁵⁶

⁸⁵² Ibid [41] (emphasis added).

⁸⁵³ Ibid Annexe 1.

⁸⁵⁴ Ibid [44] (Lord Phillips).

⁸⁵⁵ Ibid [45] (Lord Phillips).

⁸⁵⁶ Ibid [46] (Lord Phillips).

From that basis, Lord Phillips called once more upon the Commonwealth jurisprudence to make the argument clear:

The possibility remains, however, that by propounding the ‘sole or decisive test’ the Strasbourg Court has condemned as rendering a trial unfair the admission of hearsay evidence in circumstances where the legislature and courts of this jurisdiction and of other *important Commonwealth jurisdictions* (Canada, Australia and New Zealand) have determined that the evidence can fairly be received. This is a startling proposition...⁸⁵⁷

It was on this basis that Lord Phillips felt it necessary to embark upon a ‘careful analysis of the Strasbourg jurisprudence’.⁸⁵⁸ The detailed analysis of the Strasbourg case law incorporated judgments before *Al-Khawaja* and made important distinctions between the approach of civil law and common law jurisdictions. Lord Phillips used the example of the French Criminal Procedure, referred to by Lord Rodger in an earlier House of Lords decision,⁸⁵⁹ and spent four paragraphs illustrating the differences.⁸⁶⁰ The conclusion was that the Strasbourg jurisprudence in relation to article 6(3)(d) had ‘developed largely in cases relating to civil law rather than common law jurisdictions and this [was] particularly true of the sole or decisive rule’.⁸⁶¹ Further, ‘that case law appears to have developed without full consideration of the safeguards against an unfair trial that exist under the common law procedure’.⁸⁶² Thus the Supreme Court held that ‘it would not be right for this court to hold that the sole or decisive test

⁸⁵⁷ Ibid (emphasis added).

⁸⁵⁸ Ibid.

⁸⁵⁹ *R (D) v Camberwell Green Youth Court* [2005] UKHL 4; [2005] 1 WLR 393, [10] – [11].

⁸⁶⁰ *R v Horncastle*, above n 841, [59]-[62].

⁸⁶¹ Ibid [107].

⁸⁶² Ibid.

should have been applied rather than the provisions of the 2003 Act, interpreted in accordance with their natural meaning'.⁸⁶³ Lord Phillips continued:

In so concluding I have taken careful account of the Strasbourg jurisprudence. I hope that in due course the Strasbourg court may also take account of the reasons that have led me not to apply the sole or decisive test in this case.⁸⁶⁴

On this analysis, the Supreme Court appears to have used the Commonwealth jurisprudence as a springboard for (a) taking a robust approach to the Strasbourg jurisprudence, and (b) declining to follow the Strasbourg Court. There are, however, a couple of qualifications to note. As Lord Brown stated, the Supreme Court was not faced with a decision of the Grand Chamber in this case. It was for that reason that Lord Brown felt able to reject the appellant's argument that the Court should follow the 'clear and constant' Strasbourg jurisprudence,⁸⁶⁵ (as the House of Lords had done in *Secretary of State for the Home Department v AF (No 3)* when faced with a judgment of the Grand Chamber (in *A v United Kingdom*)).⁸⁶⁶ Moreover, Lord Brown not only felt that 'the court's ruling in *Al-Khawaja* [was] not as authoritative as a Grand Chamber decision' but that it was also 'altogether less clear than was the decision in *A*'.⁸⁶⁷ Indeed, the Grand Chamber went on to reconsider *Al-Khawaja* and accepted that the admission of hearsay evidence would not inevitably lead to a breach of

⁸⁶³ *Ibid* [108].

⁸⁶⁴ *Ibid*.

⁸⁶⁵ *Ibid* [120].

⁸⁶⁶ *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269, *A v United Kingdom* (2009) 49 EHRR 625, *Regina v Horncastle*, above n 841, [118].

⁸⁶⁷ *R v Horncastle*, above n 841, [120].

Article 6 where statements of this kind were used.⁸⁶⁸ These features make it difficult to conclude definitely that the Supreme Court in *Horncastle* is using foreign jurisprudence to support departures from clear and constant Strasbourg jurisprudence, but it at least provides certain clues. As Dickson has written, it now appears possible to predict the situations in which the Supreme Court will feel itself bound to follow Strasbourg and where it will be more comfortable adopting conclusions at odds with the Strasbourg jurisprudence:

The case law ... appears to suggest that there are two situations in which the Supreme Court will feel itself bound to follow Strasbourg jurisprudence. The first is where there has been a recent decision of the Grand Chamber expressly addressing the very point at issue, as in *AF*... The second is where there has been a series of recent Chamber decisions, not yet fully endorsed by the Grand Chamber, in which the attitude of the European Court to the very point at issue has been made clear, as in *Pinnock*. If the relevant Strasbourg decisions are in cases taken against the United Kingdom, they will inevitably carry even greater weight. In a case such as *Horncastle*, which falls into neither of the two categories, the Supreme Court can persist in adopting a national approach to the point at issue, arguing the validity of that approach as authoritatively as it can in the hope that if and when the matter later comes before the Grand Chamber the national position will be endorsed. This is precisely what occurred in the aftermath of *Horncastle*: when the Grand Chamber re-examined *Al-Khawaja and Tahery* it effectively accepted the Supreme Court's criticism of the Chamber's judgment. ... This episode is an excellent example ... of the much-vaunted 'judicial dialogue' which is meant to characterize the relationship between the

⁸⁶⁸ *Al-Khawaja and Tahery v the United Kingdom* [2011] ECHR 2127. The Grand Chamber found no violation of Article 6 in Mr Al-Khawaja's case, although the safeguards remained insufficient to prevent a violation in Mr Tahery's case.

highest courts in domestic legal systems and the European Court in Strasbourg.⁸⁶⁹

It has been argued here that foreign jurisprudence played an important role in the Supreme Court's mission when 'arguing the validity of that approach as authoritatively as it can'.⁸⁷⁰ Moreover, the Grand Chamber responded in kind when it returned to the issue in *Al-Khawaja and Tahery v United Kingdom*.⁸⁷¹ Under the heading 'Relevant comparative law', 25 paragraphs of the Grand Chamber's judgment are devoted to a review of the position in Scotland, Ireland, Australia, Canada, Hong Kong, New Zealand, South Africa, and the United States.⁸⁷²

8.4.2 Supporting dissenting judgments

A slightly different but even more obvious example of using foreign jurisprudence to support conclusions is to be found in dissenting judgments. For

⁸⁶⁹ Brice Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press 2013), 59. Dickson makes reference to the judgment in *Manchester City Council v Pinnock* [2010] UKSC 45, which is part of a long line of Article 8 cases including *Qazi v Harrow LBC* [2003] UKHL 43; *Kay v Lambeth London Borough Council* [2006] UKHL 10; *Doherty v Birmingham County Council* [2008] UKHL 57; and the more recently decided *Frisby v Birmingham County Council* [2011] UKSC 8. Space precludes extensive analysis of these decisions in this thesis. The position up to *Doherty* was considered in an early thesis: Helene Tyrrell, *Strasbourg Jurisprudence in Domestic Courts under the Human Rights Act*, Durham thesis, Durham University, available at <<http://etheses.dur.ac.uk/271/>> accessed 1 November 2013. After a period of extended dialogue with the Strasbourg court, *Pinnock* confirmed that the Strasbourg jurisprudence on the Article 8 issue was 'now... unambiguous and consistent' and that it should be followed. The principle that settled Strasbourg jurisprudence should be followed was confirmed again by the Court of Appeal in *RB v Secretary of State for Justice* [2011] EWCA Civ 1608. For a recent account of judicial reasoning under section 2 HRA 1998 see Helen Fenwick, 'What's Wrong With S.2 of the Human Rights Act?' UK Const. L. Blog (9th October 2012) <<http://ukconstitutionallaw.org/2012/10/09/helen-fenwick-whats-wrong-with-s-2-of-the-human-rights-act/>> accessed 12 February 2013.

⁸⁷⁰ *Ibid.*

⁸⁷¹ *Al-Khawaja and Tahery v United Kingdom* (Applications Nos. 26766/05 and 22228/06) (2012) 54 EHRR 23.

⁸⁷² *Ibid.* [63]-[87]; See also Brice Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press 2013), 215 although Dickson erroneously records the number of paragraphs devoted to this comparative jurisprudence as 125.

example, in *HM Treasury v Ahmed* foreign jurisprudence appears to have been so persuasive that Lord Brown dissented from the majority view.⁸⁷³ In *Ahmed*, the Supreme Court was required to consider the lawfulness of the Terrorism Order 2006 and the Al-Qaida and Taliban (United Nations Measures) Order 2006 article 3(1)(b). The Orders had been made by the Treasury under the United Nations Act 1946 to give effect to resolutions of the United Nations Security Council designed to prevent the financing of acts of terrorism. The effect of the Orders was to deprive designated persons of all resources, save for basic expenses. The Terrorism Order empowered the Treasury to give a direction that an individual was so designated if it had reasonable grounds for suspecting that the individual 'is or may be' a person who committed, attempted to commit, participated in or facilitated the commission of acts of terrorism. The Al-Qaida Order provided that persons on a list compiled by the sanctions committee of the Security Council (the '1267 Committee') were designated persons. The questions common to both Orders were: whether the Orders were *ultra vires* the 1946 Act; and whether the Orders were incompatible with the Convention rights under the HRA 1998.⁸⁷⁴

While the Supreme Court held, unanimously, that the Terrorism Order should be quashed as *ultra vires* the 1946 Act, Lord Brown dissented on the conclusion that article 3(1)(b) of the Al-Qaida Order must also be quashed as *ultra vires*. A crucial difference between the dissenting and majority judgments on this point

⁸⁷³ *HM Treasury v Mohammed Jabar Ahmed and others (No.2) (FC)* [2010] UKSC 2; [2010] 2 AC 534

⁸⁷⁴ *Ibid* [41].

was to do with the principle of legality. Unlike the majority, Lord Brown found it difficult to accept that the Al-Qaida Order achieves any more than was mandated by the relevant Security Council Regulation. Concluding on this, Lord Brown states that it was

... instructive in this regard to see how certain other Commonwealth countries have given effect to these same UNSCRs. Australia, New Zealand and Canada all have legislation akin to our 1946 Act.⁸⁷⁵

Lord Brown added that

The way Australia, New Zealand and Canada have dealt with these UNSCRs to my mind tends to support the conclusions I have reached about the impugned Orders.⁸⁷⁶

It is interesting to note that where a judge has been inclined to use foreign jurisprudence in this way, it is more likely that other members of the court will also engage with those sources. Thus when considering the way decisions under the listing system administered by the 1267 Committee are dealt with, Lord Hope appeared to derive assistance from a number of cases from Canada and the United States,⁸⁷⁷ and the approach adopted by Australia and New Zealand was also considered in relation to the principle of legality.⁸⁷⁸ However Lord Hope emphasised the limitations of these sources:

⁸⁷⁵ Ibid [199] (Lord Brown).

⁸⁷⁶ Ibid [200] (Lord Brown).

⁸⁷⁷ Ibid [69]-[71]: Lord Hope cites: *Abdelrazik v Canada (Foreign Affairs)* 2009 FC 580; *KindHearts for Charitable Humanitarian Development Inc v Geithner (unreported)* 18 August 2009, US District Ct, Northern Ohio; *Diggs v Shultz* (1972) 470 F 2d 461 (DC Cir).

⁸⁷⁸ Under the principle of legality 'the court must, where possible, interpret a statute in such a way as to avoid encroachment on fundamental rights, sometimes described as constitutional rights'. *HM Treasury v Ahmed*, above n 873, [111]; See also *R v Secretary of State for the Home*

Caution must ... be exercised in drawing any firm conclusions from these cases. The decision of the courts in Canada and the United States were not made under reference to an international human rights instrument such as the European Convention.⁸⁷⁹

Lord Phillips was equally reluctant to follow their conclusions:

These decisions fall short of supporting the proposition that the principle of legality raises a general presumption against Parliament delegating to the executive the power to make regulations that call for legislative design.⁸⁸⁰

In these cases, the impulse to give reasons to an audience is arguably at its greatest. *Horncastle* is a clear example. Because the Supreme Court had reached a conclusion at odds with the Strasbourg jurisprudence, there was a greater impulse towards extending the reasons given by way of explanation for such a time as when the case was to come under review in Strasbourg. In other words, the Court was using foreign jurisprudence in part to defend its conclusions to Strasbourg. This theory draws parallels with those that explain citations of foreign jurisprudence as part of a pedagogical impulse. Slaughter has given the example of 'the court of a fledgling democracy' which 'might look to the opinions of courts in older and more established democracies as a way of binding its country to this existing community of states'.⁸⁸¹ Along these lines, Justice Breyer of the US Supreme Court has suggested that said, '[f]oreign courts refer to our decisions ... and if we sometimes refer to their decisions, the

Department ex p Pierson [1998] AC 539 (Lord Browne-Wilkinson); *R v Secretary of State for the Home Department ex p Simms* [2000] 2 AC 115, 131 (Lord Hoffman).

⁸⁷⁹ *HM Treasury v Ahmed*, above n 873, [71] (Lord Hope).

⁸⁸⁰ *Ibid* [122] (Lord Phillips).

⁸⁸¹ Anne-Marie Slaughter 'A Typology of Transjudicial Communication', (1994) 29 *University of Richmond Law Review* 199, 134.

references may help those struggling institutions'.⁸⁸² When interviewed, Baroness Hale thought it unlikely that this was in the forefront of the minds of Justices. However, she continued that 'it may be unconscious'.⁸⁸³

The thesis here is that the Supreme Court does use foreign jurisprudence in part to communicate with an audience, but that this is usually a defensive mechanism. It continues to be used as part of the general practice of giving reasons for a conclusion, which is clearest where the conclusion is likely to be controversial or unpopular:

If you are finding against the Government and a thing about which the Government feels strongly, you obviously hope that your reasoning will be sufficient to convince them ... that is particularly because the Government can't go to Strasbourg. If you are finding against the claimant in a human rights case, well you are partly trying to convince the claimant but you are also trying to convince Strasbourg.⁸⁸⁴

8.5 Conclusions

One of the main criticisms made by those who object to the use of foreign jurisprudence in domestic courts (and particularly in the United States) is that the practice is essentially opportunistic. That is to say, that comparativism is

⁸⁸² Norman Dorsen, 'A conversation between U.S. Supreme Court justices' (2005) 3(3) *International Journal of Constitutional Law* 519, 523 (Justice Breyer)

⁸⁸³ Interview with The Rt. Hon. Baroness Hale of Richmond, above n 774.

⁸⁸⁴ *Ibid.*

mainly results-driven:⁸⁸⁵ judges use that jurisprudence which is likely to support their own predetermined conclusions,⁸⁸⁶ or a means of 'judicial fig-leaving', designed to obscure the reality of judicial choice.⁸⁸⁷ Thus some have seen the use of foreign jurisprudence as 'giving yet another way that judges will be able to support the political choices that judges anyway wish to make'.⁸⁸⁸ Along these lines, Posner has argued that:

Judges are likely to cite foreign decisions for the same reason that they prefer quoting from a previous decision to stating a position anew: They are timid about speaking in their own voices lest they make legal justice seem too personal and discontinuous ... Citing foreign decisions is probably best understood as an effort, whether or not conscious, to further mystify the adjudicative process and disguise the political decisions that are the core, though not the entirety, of the Supreme Court's output'.⁸⁸⁹

Justice Scalia of the US Supreme Court has described the thought process as:

⁸⁸⁵ E.g. Ian Cram, 'Resort to foreign constitutional norms in domestic human rights jurisprudence with reference to terrorism cases' [2009] CLJ 118, 139-141; Elizabeth Wicks, 'Taking Account of Strasbourg?' above n 836, 410. See also Justice Antonin Scalia, 'The Bill of Rights: Confirmation of Extent Freedoms or Invitation to Judicial Creation?' in Grant Huscroft and Paul Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing 2002); James Allan, 'A Defence of the Status Quo' in Tom Campbell et al (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press 2003). Cf. Christopher McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20(4) OJLS 499, 527: 'One possible explanation is that the use of foreign judgments is simply results-driven ... [leading to a] suspicion that the selective use of foreign judgments is inevitably associated with a rights-expanding agenda. But this would be mistaken'; Roger Alford, 'Four Mistakes in the Debate on "Outsourcing Authority"' (2006) 69 Albany Law Review 653: '[one] mistake in the debate on outsourcing authority is to assume that the outcome of constitutional comparativism will be an expansion of individual liberties'.

⁸⁸⁶ See text from 8.1, p 271 above.

⁸⁸⁷ Richard Posner, 'No Thanks, We Already Have Our Own Laws' Legal Affairs July/Aug 2004 http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp accessed 01 February 2011; Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006), 7.

⁸⁸⁸ Christopher McCrudden, 'Judicial Comparativism and Human Rights' in Esin Örüçü and David Nelken (eds), *Comparative Law: A Handbook* (Hart Publishing 2007) 371, 387.

⁸⁸⁹ Richard Posner, 'No thanks, we already have our own laws', above n 887.

I want to do this thing; I have to think of some reason for it. I have to write something that—you know, that sounds like a lawyer. I have to cite something.⁸⁹⁰

In other words, that judges draw from foreign jurisprudence in order to re-assure themselves (and their audience) about the merits of their judgment.

In the UK human rights context it is difficult to disagree that foreign jurisprudence is used in this instrumental way. However the crucial difference is that the practice is not illegitimate. In human rights cases especially, it is important that the Supreme Court is able to determine cases according to their assessment of the legal settlement in the UK. As Feldman has put it: ‘comparative study should not lead to attempted mimicry of others, but should inform the journey towards a national system *which meets our distinctive needs*’.⁸⁹¹ This reflects the optimism shared by many around the passage of the HRA, that it would foster a domestic law of human rights, rather than lead domestic courts to copy the corpus of Strasbourg jurisprudence into domestic law. This much is clear from the disappointment voiced by the architect of the HRA. Lord Irvine, the Lord Chancellor at the time of the passing of the HRA 1998, recently argued that the courts had misinterpreted section 2 of the Act and had been taken too deferential an approach to the ECtHR’ case law.⁸⁹² He continued that the Supreme Court ‘should not abstain from deciding the case for themselves simply because it may cause difficulties for the UK on the

⁸⁹⁰ Norman Dorsen, ‘A conversation between U.S. Supreme Court justices’, above n 882, 531 (Justice Scalia)

⁸⁹¹ David Feldman, ‘The Human Rights Act 1998 and constitutional principles’ [1999] 19(2) LS 165, 205.

⁸⁹² Lord Irvine of Lairg, ‘A British Interpretation of Convention Rights’ (Lecture at University College of London’s Judicial Institute, 14 December 2011).

international law plane'.⁸⁹³ In fact, Lord Irvine suggested in that speech that it was the 'constitutional duty' of the Supreme Court's judges to reject Strasbourg decisions that are flawed.⁸⁹⁴

The well recorded judicial mantra to 'follow' or 'keep pace' with the 'clear and constant' Strasbourg jurisprudence is under development. Loyalty to Strasbourg case law is no longer a given and there is some evidence that courts are approaching the Strasbourg jurisprudence with increasing confidence, willing to take a more critical view of those decisions. The interesting and novel development is the use of foreign jurisprudence to support departure from the otherwise 'clear and constant' Strasbourg case law. The two cases discussed in the last section, *Horncastle* and *Ahmed* provide two such examples. It is also worth noting that in both instances the Court was determining issues arising under Article 6 of the ECHR. This is partly because Article 6 remains the most frequently invoked Convention right.⁸⁹⁵ It is also, as Dickson has pointed out, because Article 6 is 'one of the Convention's provisions in respect of which the European Court still permits Member States a fairly wide margin of appreciation in many contexts'.⁸⁹⁶ As a result, Dickson agrees that 'the UK Supreme Court appears to be conscious of this and is therefore prepared to be more assertive in this field than in others'.⁸⁹⁷

⁸⁹³ Ibid.

⁸⁹⁴ Ibid.

⁸⁹⁵ Brice Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press 2013), 226.

⁸⁹⁶ Ibid.

⁸⁹⁷ Ibid.

... [T]here are signs that the Supreme Court Justices may be more prepared than their predecessors to ‘stand up’ to the European Court on points of domestic law which they feel the judges in Strasbourg do not fully understand. Having largely won over the Grand Chamber of the European Court during the ‘dialogue’ surrounding the use of hearsay evidence in criminal cases (the *Horncastle* and *Al-Khawaja* affair), the Supreme Court may have gained some confidence in its ability to trim the sails of the Strasbourg Court.⁸⁹⁸

The more general conclusion is that the relationship with the Strasbourg jurisprudence is changing. Not only are UK courts increasingly willing to reject Strasbourg jurisprudence as determinative of a particular issue, they are willing to reject the position adopted by the Strasbourg Court altogether—even where it is established by ‘clear and constant’ case law. While English courts may have a tendency to follow decisions of the ECtHR, it is crucial that they do so as a matter of choice, not obligation.⁸⁹⁹ This review of the deferential *Ullah* approach finds support in Strasbourg. Although Sir Nicolas Bratza, the then President of the ECtHR, felt that clear principles from the Grand Chamber (as in the *AF* case) should generally be followed, he also considered ‘dialogue through judgments’ to be ‘of equal importance’:⁹⁰⁰

Even if it is not bound to accept the view of the national courts in their interpretation of Convention rights, it is of untold benefit for the Strasbourg Court that we should have those views. ... [I]t is right and healthy that national courts should continue to feel free to criticise

⁸⁹⁸ Ibid 374.

⁸⁹⁹ David Feldman (ed) *English Public Law* (Oxford University Press 2004) 390.

⁹⁰⁰ Nicolas Bratza, ‘The relationship between the UK courts and Strasbourg’ [2011] *European Human Rights Law Review* 505, 512.

Strasbourg judgments where those judgments have applied principles which are unclear or inconsistent or where they have misunderstood national law or practices. ... But I also believe that it is important that the superior national courts should, as Lord Phillips put it in the *Horncastle* judgment, on the rare occasions when they have concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of the domestic process, 'decline to follow the Strasbourg decision, giving reasons for adopting this course.' If, as has happened in the case of *Al-Khawaja*, Strasbourg is given the opportunity to reconsider the decision in issue, what takes place may indeed as Lord Phillips put it, 'prove to be a valuable dialogue between this court and the Strasbourg Court.' I firmly believe that such dialogue can only serve to cement a relationship between the two courts...⁹⁰¹

The main issue—often obscured by the section 2 HRA debate—is that the *prima facie* duty of UK domestic courts under the HRA 1998 is to act compatibly with the Convention. A duty to 'take into account' the Strasbourg jurisprudence can assist with that but is not itself the main objective. For example, it is obvious that a lack of relevant Strasbourg jurisprudence would not prevent the courts from resolving a case according to the rights set out in the Convention. As Lord Kerr has pointed out (extra judicially):

Where a court of the UK is faced with a claim to a Convention right, it seems to me clear that it cannot refuse to examine its viability, simply because there is no relevant Strasbourg jurisprudence.⁹⁰²

⁹⁰¹ Ibid.

⁹⁰² Lord Kerr, 'The modest underworker of Strasbourg?', Clifford Chance Lecture (London 25 January 2012) <http://www.supremecourt.gov.uk/docs/speech_120125.pdf> accessed 13 October 2013, 7.

Lord Kerr supported this assertion with three reasons, which are worth setting out in full:

There are three reasons for this: the first practical, the second a matter of principle and the third the requirement of statute. The practical reason is that many claims to Convention rights will have to be determined by courts at every level in the United Kingdom without the benefit of unequivocal jurisprudence from ECtHR. It is simply not a practical option to adopt an attitude of agnosticism just because Strasbourg has not yet spoken. The second reason, the reason of principle, is elementary. The Human Rights Act gives citizens of this country direct access to the rights which the Convention enshrines through their enforcement by our courts. It is therefore the duty of every court not only to ascertain 'where the jurisprudence of the Strasbourg court clearly shows that it currently stands' (which is how Lord Hope characterised it in *Ambrose*); it is also, in my view, the court's duty to resolve the question whether a claim to a Convention right is viable where there is no clear current view from Strasbourg to be seen. The duty to adjudicate on a claim to a Convention right cannot be extinguished or avoided by the fact that the jurisprudence of the ECtHR has so far failed to supply the answer. The final reason, the statutory imperative, is also elementary. Section 6 of the Human Rights Act leaves no alternative to courts when called upon to adjudicate on claims to a Convention right. This section makes it unlawful for a public authority, including a court, to act in a way which is incompatible with a Convention right. That statutory obligation, to be effective, must carry with it the requirement that the court determine if the Convention right has the effect claimed for, whether or not Strasbourg has pronounced upon it.⁹⁰³

⁹⁰³ Ibid 7-8.

It is encouraging that the Supreme Court has been increasingly willing to move away from the deferential *Ullah* type stance and stand up to the Strasbourg Court where there are misgivings about the helpfulness of its jurisprudence. The jurisprudence of foreign domestic courts may provide an important alternative perspective. Certainly, cases like *Horncastle* demonstrate that the adoption of a conclusion at odds with the Strasbourg jurisprudence can be supported in this way, providing a layer of reasoning to the Court's judgment which may assist the Strasbourg court in its own review. Viewed in this way, the jurisprudence of foreign domestic courts is more valuable than has so far been considered. By taking those sources into account, the Justices may begin to take a more theorised approach to human rights cases, working with the Strasbourg Court in human rights cases, rather than under it.

9 Conclusions

The relative lack of attention given to the use of foreign jurisprudence at the UK Supreme Court (or in UK domestic courts generally) might give the impression that the use of these sources is limited or of little substantive relevance to judicial reasoning. The research findings, both from the quantitative data analysis of judgments and the qualitative interviews, create a rather different picture.

Of the 246 cases handed down by the Supreme Court in the first four years, explicit citations of foreign jurisprudence are found in 77, just over 30% of the total. The balance is broadly the same whether a case considered a human rights issue or not: of the total 246 cases decided by the Supreme Court in the time period, 144 do not engage human rights issues and explicit citations of foreign jurisprudence can be found in 42 of those, or 29%. The remaining 102 can be described as human rights cases and explicit citations of foreign jurisprudence can be found in 35 of those, or 34%. In other words, the Supreme Court is likely to cite a decision of a foreign court in around one in three cases, no matter what the subject. The proportion is not insignificant. Yet a close analysis of the cases does not reveal clear explanations as to why these sources are used: the Justices rarely articulate the reasons for citing foreign jurisprudence in their judgments.⁹⁰⁴

⁹⁰⁴ Also noted in Ian Cram, 'Resort to foreign constitutional norms in domestic human rights jurisprudence with reference to terrorism cases' [2009] CLJ 118, 140.

Since foreign jurisprudence is being used by the Supreme Court in such a significant proportion of cases, it is worth considering the contribution that these sources make. To that end, this thesis presents findings on when, how and why the UK Supreme Court uses foreign jurisprudence, as well as whether the Court should be making greater use of it.

9.1 Absence of guiding principles

The simplest reason for the use of foreign jurisprudence is that the practice is nowhere prohibited: the Justices of the Supreme Court (and other judges generally) use foreign jurisprudence because they can. It is worth repeating Lord Mance's words, quoted in chapter four:

When judges look to comparative and international material, they may do so for information, inspiration, or confirmation, just as they use domestic decisions that are not binding on them...⁹⁰⁵

The Supreme Court is therefore free to derive such assistance as it may find from foreign jurisprudence, in much the same way that they could derive assistance from any other non-binding authority. In fact, there is no guidance on using foreign jurisprudence at all. The UK has no provision similar to section 39(1) of the South African constitution, which provides that the Constitutional Court must consider international law and may consider foreign law. While the HRA provides that domestic courts 'must take into account' the Strasbourg jurisprudence, the Act is silent on the use of jurisprudence from other

⁹⁰⁵ Lord Mance, 'Foreign Laws and Languages' in Burrows, Johnston and Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford University Press 2013), 87-88.

jurisdictions. Indeed it was the absence of any guidance that legitimised the use of these sources in most cases. As Lord Mance has written, ‘without the constraints of a constitution or code, the legal systems of England and Scotland have a particular freedom to look to other systems’.⁹⁰⁶

The lack of clear guiding principles has given rise to some debate about the legitimacy of using foreign jurisprudence in the first place. As Cram has suggested, resort to foreign jurisprudence has the potential to pose ‘awkward questions concerning judicial forays into the policy-making realm of the constitution and the erosion of parliamentary sovereignty’.⁹⁰⁷ However, the risk has not so far manifested itself before the UK Supreme Court and it was clear from the interviews that the Justices did not themselves consider there to be any serious threat on that level. Moreover, it was not found that the Supreme Court’s use of foreign jurisprudence supported the most prevalent criticisms about the practice. Decorative or ornamental citations, for example, are unlikely. In fact, the impression from the interviews was that such uses (of any source) were liable to obscure the reasoning of a judgment. Moreover, as explained in chapter five, the impression given by some of the Justices interviewed was that the Supreme Courts’ judgments should be as concise as possible.⁹⁰⁸

⁹⁰⁶ Ibid 87.

⁹⁰⁷ Ian Cram, ‘Resort to foreign constitutional norms...’, above n 904, 125.

⁹⁰⁸ E.g. Interview with The Rt. Hon. Lord Walker of Gestingthorpe, former Justice of the United Kingdom Supreme Court (The Supreme Court, London, 15 May 2012): ‘English judgments ... are far too long’; Brice Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press 2013), 3-4, commenting on the development of working methods at the Supreme Court, in order to ‘operate in a more modern and accessible way’.

9.2 The individual approaches of the Justices

The early hypothesis was that the tendency to use of foreign jurisprudence would very likely be related to the background and inclination of individual Justices.⁹⁰⁹ However, the hypotheses about the individual approaches of the different Justices were not consistently supported by the quantitative data analysis. While some results showed either a greater or lesser likelihood that a certain Justice would cite foreign jurisprudence, some Justices that had a reputation for their enthusiasm about foreign jurisprudence did not actually come out as heavy users of foreign jurisprudence. For example, one surprising finding from the data analysis was that there were very few citations of German jurisprudence: just five cases—including three human rights cases—cited German jurisprudence out of the possible 246 handed down between 2009 and 2013. Given the reputation that Lord Mance (in particular) has for enthusiasm for German law, it was expected that the number would be much greater.⁹¹⁰ In fact Lord Mance did not cite foreign jurisprudence any more than the average at the Supreme Court; explicit citations of foreign jurisprudence were found in around 17% of the cases in which Lord Mance had contributed a written judgment, while most of the Justices hovered around the 20% mark. For the same reason, it was surprising to see that Lord Rodger did not come out as one of more frequent users of foreign jurisprudence, with citations of foreign

⁹⁰⁹ A point recognised by other recent works: John Bell, 'Comparative law in the Supreme Court 2010-11' [2012] CJICL 20; Elaine Mak, 'Why do Dutch and UK judges cite foreign law?' [2011] CLJ 420.

⁹¹⁰ It is noted that reference was made jurisprudence from the German Constitutional Court in *R (on the application of HS2 Action Alliance Limited) v The Secretary of State for Transport and another* [2014] UKSC 3. The judgment was handed down in the days prior to the submission of this thesis.

jurisprudence in just 15% of his written judgments. Lord Rodger's enthusiasm for using comparative law is well documented, including through recent contributions by Lord Mance and Tetyana Nesterchuk (a former judicial assistant) in a volume of essays published in Lord Rodger's memory.⁹¹¹ The implication of these results was that that foreign jurisprudence must be used more extensively than is possible to tell on the face of the judgments. It was for this reason that the interviews were important; if not all uses of foreign jurisprudence are attributed in the judgments, research based only on explicit citations is not likely to reflect an accurate account of the extent to which foreign jurisprudence is used at the Supreme Court, or the reasons for which these sources are used.

The interview evidence confirmed the hypothesis that the Justices take individualised approaches to the use of foreign jurisprudence.⁹¹² As a starting point, some Justices were known to have a greater interest in comparative law than others. More specifically, some Justices were known to have an interest in certain jurisdictions. Aside from Lord Mance's reputation for interest in German law, reference was frequently made to Lord Collins, who was well known for using American authority and had access to those databases. Other Justices expressed confidence in other languages or frequently engaged with the judges from top courts in other countries. The prevalence of citations of foreign

⁹¹¹ Lord Mance, 'Foreign Laws and Languages' and Tetyana Nesterchuk, 'The View from Behind the Bench', in Burrows, Johnston and Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford University Press 2013).

⁹¹² Similar findings were reported by Mak in 2012 (after the interview period for this study): Elaine Mak, 'Reference to Foreign Law in the Supreme Courts of Britain and the Netherlands: Explaining the Development of Judicial Practices' (2012) 8(2) *Utrecht Law Review* 20, 30.

jurisprudence from other common law countries was often explained on this basis.

Although many of the Justices agreed that linguistic ability would be a factor in the selection of foreign jurisprudence, ability in a foreign language does not necessarily correlate with the likelihood that a particular Justice would use foreign jurisprudence in the first place. Some of the Justices feel that a more significant barrier to using foreign jurisprudence is a practical one. Thus Lord Kerr expressed the view that the ‘wealth of material’ that was typically put forward to the Court would be more likely to prevent references to foreign jurisprudence than a lack of confidence in any given language.⁹¹³ Lord Walker, however, felt that the issue was more likely to be to do with different judgment styles in different jurisdictions,⁹¹⁴ in that shorter judgments from civil law jurisdictions would not always clearly set out the reasoning.⁹¹⁵ Finally, there is a more general problem surrounding the research framework involved in finding relevant foreign jurisprudence: ‘the main barrier is not knowing where to start on the research’.⁹¹⁶

An effective time saving measure is to refer to the works of leading academics in the relevant field. A good example of academic work being used in this way

⁹¹³ Interview with The Rt. Hon. Lord Kerr of Tonaghmore, Justice of the United Kingdom Supreme Court (The Supreme Court, London, 9 May 2012). Indeed, Lord Kerr pointed out that it was always possible to get a translation of a particular judgment.

⁹¹⁴ Interview with The Rt. Hon. Lord Walker of Gestingthorpe, above n 908.

⁹¹⁵ On different legal styles of common and civil law systems, see e.g. Basil Markesinis ‘A Matter of Style’ (1994) 110 LQR 607.

⁹¹⁶ Interview with The Rt. Hon. Lord Sumption, Justice of the United Kingdom Supreme Court (The Supreme Court, London, 28 May 2012).

can be drawn from the *HJ (Iran)* case,⁹¹⁷ considered in chapter seven. In that case, Lord Dyson did not ‘find it necessary to examine the Australian authorities to which [the Supreme Court] were referred’. Instead, it was ‘sufficient’ to refer to an academic paper exploring the impact of the troublesome Australian and UK jurisprudence. Lord Dyson was satisfied that the paper showed ‘the reasoning of the majority judgments is being generally applied in Australia...’⁹¹⁸ Lord Walker also noted comparative academic work on this point and reproduced a lengthy paragraph from the paper to which Lord Dyson referred in the judgment.⁹¹⁹ The implicit suggestion is that cases which have not been digested by academic work are not as likely to be used as those that have. Again, this is heavily reliant on the enthusiasm that an individual Justice has for reading about the law in foreign jurisdictions or how well stocked their bookcases might be.⁹²⁰ The feeling is that some Justices are simply more inclined to use foreign jurisprudence than others and take a view as to the potential obstacles accordingly. This relationship between the individual approach of a Justice and the use of foreign jurisprudence also contributes an explanation for decline in the use of foreign jurisprudence between 2011 and

⁹¹⁷ *HJ (Iran) (FC) v Secretary of State for the Home Department* [2010] UKSC 31.

⁹¹⁸ *Ibid* [112] (Lord Dyson). Citing J Millbank, ‘From discretion to disbelief: recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom’ (2009) 13 *IJHR* 391.

⁹¹⁹ *HJ (Iran)*, *ibid* [92].

⁹²⁰ Lord Reed explained: ‘There is a practical problem about finding foreign jurisprudence. ... I’ve got ... a French textbook on human rights law, which obviously cites French case law. But not many people have got foreign textbooks on their shelves’, Interview with The Rt. Hon. Lord Reed, Justice of the United Kingdom Supreme Court (The Supreme Court, London, 8 May 2012).

2013;⁹²¹ Lord Collins, the heaviest user of foreign jurisprudence at the Supreme Court, gave just two written judgements in 2011 before retiring.⁹²²

9.2.1 Foreign jurisprudence as a heuristic device

Another clear finding is that different Justices use foreign jurisprudence for different reasons. In the main, foreign jurisprudence was explained as a heuristic device. That is to say, foreign jurisprudence provides the Justices of the Supreme Court with a fresh perspective—an analytical lens—through which to reflect on their own reasoning about a problem. This is what appeared to be happening in the House of Lords control order cases, *MB* and *AF (No3)*,⁹²³ and this is what seemed to drive Lord Collins' insistence on the consideration of American decisions in *Jones v Kaney*.⁹²⁴ In the latter case, the vast American jurisprudence on 'precisely the same arguments of policy which [had] been argued before [the UKSC]' were, to Lord Collins, of obvious assistance. This was despite the fact that the culture relating to expert evidence was different in the United States, because 'the underlying principle is the same'.⁹²⁵ Thus, as Bell concluded, the Commonwealth and United States jurisprudence in *Jones v*

⁹²¹ Explicit citation of at least one foreign decision was found in around 47.6% of human rights cases in the 2010-11 judicial year. In 2011-12 the figure was at 34.5% and fell further to 25% in 2012-13.

⁹²² Lord Collins cited foreign jurisprudence in 42.9% of his written judgments between 2009-13. In 2010, that figure was at its peak, at 63.6%.

⁹²³ *Secretary of State for the Home Department v MB* [2007] UKHL 46; *Secretary of State for the Home Department v AF and another* [2009] UKHL 28.

⁹²⁴ *Jones v Kaney* [2011] UKSC 13.

⁹²⁵ *Ibid* [77].

Kaney was cited 'as a way of checking that no relevant argument had been ignored'.⁹²⁶

None of the Justices interviewed felt this use of foreign jurisprudence to be problematic, largely because no particular reliance is placed on these materials. As Saunders has suggested, the reality is simply that 'such cases must be determined ... with or without the insights offered by comparative law' and 'in at least some such cases, foreign experience can help to elucidate the issues and options for their resolution'.⁹²⁷ The purpose served by foreign jurisprudence in these circumstances is simply to provide an opportunity for reflection or forms 'part of the process of reaching a more fully theorised ... agreement'.⁹²⁸

This sort of purpose is important. In the human rights context it is worth remembering historically the relative unfamiliarity of UK judges with human rights adjudication and with the duties imposed upon them by the HRA 1998. For example, prior to the HRA, the balancing exercise required by the qualified rights had been the jurisdiction of the supranational court. A positive duty to 'take into account' one particular pool of otherwise persuasive jurisprudence, to read domestic law compatibly with an international convention and to declare any incompatibilities that could not be so remedied, have all led domestic courts to grapple with greater depth and detail on questions previously unfamiliar to

⁹²⁶ John Bell, 'Comparative law in the Supreme Court 2010-11', above n 926, 21.

⁹²⁷ Cheryl Saunders, 'Comparative Constitutional Law in the Courts: Is There a Problem?' in Jane Holder and Colm O'Connell (eds) *Current Legal Problems* (2006) Vol 59, (Oxford University Press 2007), 114.

⁹²⁸ Christopher McCrudden, 'Judicial Comparativism and Human Rights' in Esin Özüçü and David Nelken (eds), *Comparative Law: A Handbook* (Hart Publishing 2007) 371, 374.

the role of the judge. One of the major justifications for comparativism is therefore that it can also encourage the domestic court to adopt a more theorised approach to human rights. As McCrudden recognised, '[e]ven where the *result* of the foreign judicial approach has not been adopted, it has often been influential in sharpening the understanding of the court's view of domestic law'.⁹²⁹ 'Foreign law may perform a cognitive function ... the confrontation of both legal systems may force some consideration and better understanding of the nature of domestic law'.⁹³⁰

However, heuristic uses of foreign jurisprudence are also likely to be the more obscure in the judgment. Where foreign jurisprudence is used as part of an information gathering exercise, as an analytical lens, yardstick or benchmark against which to measure thinking, it is easy to understand the lack of explicit citations. This finding also goes some way towards explaining the anomalies in the data set discussed above,⁹³¹ where it was explained that the data collected on explicit citation did not show some Supreme Court Justices—known for their enthusiasm for comparative law—as heavy users of foreign jurisprudence. This finding also addresses one of the main criticisms about the use of foreign jurisprudence: that these sources perform mainly a legitimisation function. If the Justices are not always citing the foreign jurisprudence used, it is difficult to

⁹²⁹ Christopher McCrudden, 'Human Rights and Judicial Use of Comparative Law' in Esin Örüçü (ed), *Judicial Comparativism in Human Rights Cases* (United Kingdom National Committee of Comparative Law 2003) 17; Christopher McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20(4) OJLS 499, 512.

⁹³⁰ Eg Luc Heuschling, 'Comparative Law in French Human Rights Cases' in Esin Örüçü (ed), *Judicial Comparativism in Human Rights Cases*, above n 638, 44; Rabinder Singh, 'Interpreting Bills of Rights' [2008] Statute Law Review 82.

⁹³¹ Above, text from n 909.

conclude that these sources are simply used opportunistically, in order to bolster predetermined conclusions. If that were always the case, all references to foreign jurisprudence would be explicit and detectable on the face of the judgments.

9.2.2 Foreign jurisprudence used for consistency

The heuristic uses described above are distinct from the ‘gap-filling’ thesis offered by much of the literature. That is, that foreign jurisprudence may offer a useful perspective where the indigenous jurisprudence is lacking or unsettled. While it is fairly clear that counsel tend to approach foreign jurisprudence in this way, it was not possible to find clear evidence that the Justices do so. The only evidence might be the tendency to review foreign jurisprudence in human rights cases where the Strasbourg jurisprudence was unhelpful or non-existent. However, even in those instances, other explanations were more realistic. Thus the use of American and Canadian jurisprudence in *Ambrose v Harris* was more likely used to bolster the majority’s reluctance to decide the case in a way that was perceived to be advancing on the Strasbourg jurisprudence.⁹³² Indeed, it is a common feature of judicial reasoning under the HRA that the ECHR must be understood and applied uniformly amongst all contracting states. In human rights cases engaging Convention issues, considerations of this kind have therefore led the court to keep pace with the Strasbourg jurisprudence. Since the court also relies on the Strasbourg jurisprudence to set out the position of

⁹³² *Ambrose v Harris (Procurator Fiscal, Oban)* [2011] UKSC 53; Lord Kerr, ‘The modest underworker of Strasbourg?’, Clifford Chance Lecture (London 25 January 2012) <http://www.supremecourt.gov.uk/docs/speech_120125.pdf> accessed 13 October 2013, 17.

the various contracting states, it is not surprising that foreign jurisprudence is used less often in cases of this kind. Even where it would be of interest to the Supreme Court to review the position of the other states signatory to the Convention, it is clear that the Court prefers to accept the results of the Strasbourg Court's research on the point.

The approach is surprising, given the well-recognised problems with the quality and consistency of the Strasbourg Court's decisions. As Amos has written, the Strasbourg case law 'can be unclear, confusing, and admitting of many possible interpretations'.⁹³³ If consistency and uniformity are the aim, the Court may find it necessary to draw assistance from the jurisprudence of foreign domestic states as a means to establishing the common position where the Strasbourg jurisprudence is lacking or unclear. There is some evidence that the Supreme Court has approached foreign jurisprudence in this way—the *Cadder* case discussed in chapter seven provides a good example.⁹³⁴ The example indicates that although the scope for using foreign jurisprudence is likely to be more limited in Convention cases where the case law of the supranational court is prioritised, the Supreme Court is willing to make use of those sources where they can provide assistance in confirming the conclusions of the Strasbourg Court and confirming the consensus on a position. The feeling lingers, however, that the very existence of the Strasbourg jurisprudence prevents research into

⁹³³ Merris Amos 'The Principle of Comity' [2009] Yearbook of European Law 503, 525; See also Lord Hoffmann, 'Human Rights and the House of Lords' (1999) 62 MLR 159, 162-164, expressing 'doubts ... about the suitability, at least for this country, of having questions of human rights determined by an international tribunal made up of judges from many countries'.

⁹³⁴ *Cadder v Her Majesty's Advocate (Scotland)* [2010] UKSC 43.

foreign jurisprudence in the terms that the Court might otherwise have sought to undertake.

The influence of the Strasbourg Court's jurisprudence is evident when one contrasts the approach in those cases with the approach where there is no supranational court jurisprudence to refer to. In these cases, foreign jurisprudence is important precisely because there is no supranational court to provide authoritative guidance on the interpretation of the relevant instrument. It is therefore up to the contracting states to work in harmony, balancing the interpretation of the instrument according to common developments with a measure of self-regulation, so that the courts do not attach a meaning to the instrument that was not envisaged by all contracting parties. Far from resorting to foreign jurisprudence where there is a dearth of domestic jurisprudence, in these cases foreign jurisprudence may appropriately be of equal or greater importance than the domestic case-law, irrespective of the nature or absence of domestic jurisprudence. The 1951 Convention Relating to the Status of Refugees ('Refugee Convention') provides a useful example.⁹³⁵ As there is no supranational body acting as the final arbiter on the interpretation of the Refugee Convention, it is not surprising to see citations to foreign cases in these judgments. Various examples of this approach were readily discoverable in the jurisprudence of the Supreme Court as well as the earlier case law from the House of Lords. The quantitative analyses of the Supreme Court judgments further support the claim. Of the 246 judgments handed down by the Supreme

⁹³⁵ Convention Relating to the Status of Refugees, Geneva, July 28, 1951, 189 U.N.T.S. (entered into force 4 October 1967)

Court between the start of its work in October 2009 and the end of the judicial year in July 2013, the Refugee Convention was cited in 13 (5% of all the Supreme Court's judgments). Of the 13 cases in which the words 'Refugee Convention' are found, five concern the interpretation of the Convention's provisions.⁹³⁶ Foreign jurisprudence is cited in each of these five cases. Many of the Supreme Court Justices interviewed spoke on the subject in these terms, highlighting the importance of consensus in such cases. At times, it was suggested that the 'imperative' extends so far that judges will be prepared to suppress certain hesitations in order to achieve uniformity.

However, it is clear that further complications may arise where there are many signatories to a Convention—since it is likely to be more difficult to establish an interpretation based on state practice in those circumstances. This is in addition to the fact that, despite a shared agreement or a common membership of a legal system, a legal order does not necessarily require homogeneity. Moreover it is important to distinguish between what countries are doing under the Convention and what they are doing as a matter of discretion over and above Convention obligations, in order to avoid the well-articulated risks of re-writing the instrument.⁹³⁷ As Lord Brown put it in a Refugee Convention case before the House of Lords:

⁹³⁶ *R (JS (Sri Lanka)) v Secretary of State for the Home Department* [2010] UKSC 15; *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31; *R (ST (Eritrea)) v Secretary of State for the Home Department* [2012] UKSC 12; *RT (Zimbabwe) and others v Secretary of State for the Home Department* [2012] UKSC 38; *Al-Sirri v Secretary of State for the Home Department* [2012] UKSC 54.

⁹³⁷ *R (Hoxha) v Special Adjudicator* [2005] 1 WLR 1063.

It is one thing to invite this House to construe the Convention as a living instrument generously and in the light of its underlying humanitarian purposes; quite another to urge your Lordships effectively to rewrite it.⁹³⁸

Given the Court's ability to maintain this awareness and balance in these cases, it is not obvious (other than for purely practical reasons) why there is such reluctance to engage in research of this kind into the jurisprudence of the European member states. Moreover, taking a more proactive approach to the ECHR could provide the Court with an opportunity to conduct its own review, providing the findings as support for its reasoning where required. After all, the use of foreign jurisprudence as reasons for a decision was among the clearest explanations given by the Justices interviewed.

9.2.3 Instrumental uses, standing up to Strasbourg

In keeping with the finding that foreign jurisprudence is most significantly used to support reasons for a decision, there is evidence that some Justices of the Supreme Court are inclined to use foreign jurisprudence to support conclusions that are at odds with the relevant jurisprudence. In other words, the Justices use foreign jurisprudence instrumentally, as a tool to legitimate a particular result. It is these types of uses that have attracted the most criticism.⁹³⁹ For example, it

⁹³⁸ Ibid 1088.

⁹³⁹ Eg Ian Cram, 'Resort to foreign constitutional norms...' , above n 904, 139-141; Elizabeth Wicks, 'Taking Account of Strasbourg? The British Judiciary's Approach to Interpreting Convention Rights' [2005] EPL 405, 410. See also Justice Antonin Scalia, 'The Bill of Rights: Confirmation of Extent Freedoms or Invitation to Judicial Creation?' in Grant Huscroft and Paul Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing 2002); James Allan, 'A Defence of the Status Quo' in Tom Campbell et al (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press 2003). Cf. Christopher McCrudden, 'A Common Law of Human Rights?', above n 929, 527.

is often suggested that judges use that jurisprudence which is likely to support their own predetermined conclusions or, worst, as a means of ‘fig-leaving’, designed to obscure the reality of judicial choice.⁹⁴⁰

The claims in this thesis are not as expansive. While it is argued that the UK Supreme Court does use foreign jurisprudence instrumentally, it is not suggested that this instrumentalism is driven by political concerns. Rather, the Supreme Court’s instrumentalism is driven by a general desire to give reasons for conclusions, especially those that may be unpopular or controversial. This is especially important in human rights cases where, for example, the Supreme Court has reached a conclusion at odds with the relevant jurisprudence of the Strasbourg Court. In this way, foreign jurisprudence may provide a useful tool in increasing the confidence of the Supreme Court and encourage it to develop the domestic law of human rights, which meets the distinctive needs of the United Kingdom.

There is evidence that the Supreme Court is showing greater willingness to reject the Strasbourg jurisprudence where it is unhelpful or at odds with the constitutional arrangements in the United Kingdom. This is most obvious in cases where the Strasbourg jurisprudence has been thought to be out-dated; implicit in the construction of the ECHR as a ‘living instrument’,⁹⁴¹ is the

⁹⁴⁰ Richard Posner, 'No Thanks, We Already Have Our Own Laws' *Legal Affairs* July/Aug 2004 http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp accessed 01 February 2011; Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006), 7.

⁹⁴¹ *Tyler v United Kingdom* (1978) 2 EHRR 1 [31].

presumption that domestic courts may properly conclude that Convention jurisprudence has lost its relevance with age. The decision in *Re P* is a good example of the willingness to construct conclusions on the basis of the way the Strasbourg jurisprudence was thought to be developing.⁹⁴²

Another obvious excuse for divergence (also relevant in *Re P*) is created by the operation of the 'margin of appreciation' doctrine, which signifies that there are issues on which there is no relevant Strasbourg authority at all.⁹⁴³ It is relatively clear that judges are willing to view the matter in this way. A connected possibility is related to the nature of the Strasbourg authority itself. Although some commentators have argued that Strasbourg's decisions are so important as to be considered as authority even in instances in which they did not 'argue the point through in a coherent and thorough manner',⁹⁴⁴ the prevailing attitude among the judiciary has been that there is 'room for dialogue' where an English court 'considers that the Strasbourg Court has misunderstood or been misinformed about some aspect of English law' and 'it may wish to give a judgment which invites the [Court] to reconsider the question'.⁹⁴⁵

⁹⁴² *In Re P (A Child) (Adoption: Unmarried Couples)* [2008] UKHL 38; [2009] 1 AC 173

⁹⁴³ E.g. Francesca Klug 'A Bill of Rights: Do we need one or do we already have one?' [2007] PL 701, 708.

⁹⁴⁴ Ian Loveland 'Making it up as they go along? The Court of Appeal on same sex spouses and succession rights to tenancies'. [2003] PL 222, 233.

⁹⁴⁵ *R v Lyons (No 3)* [2003] 1 AC 976 [46]. A number of judges have recently given lectures that have been critical of the Strasbourg Court and its approach to its jurisprudence: Lord Sumption, 'The Limits of Law', 27th Sultan Azlan Shah Lecture (Kuala Lumpur, 20 November 2013); Lord Judge, 'Constitutional Change: Unfinished Business' (University College London, 4 December 2013); Lord Justice Laws, 'The Common Law Constitution' Hamlyn Lectures 2013, (Lecture 3: 'The Common Law and Europe' (London, 27 November 2013); Jack Straw, 'Aspects of Law Reform: an Insider's Perspective', Hamlyn Lectures 2012 (Lecture 2: The Human Rights Act and Europe); Baroness Hale 'Argentorum Locutum: Is the Supreme Court Supreme?' Nottingham Human Rights Lecture 2011 (Nottingham, 1 December 2011); Lord Irvine of Lairg, 'A British

It was argued in chapter eight that this evaluative approach to Strasbourg jurisprudence has developed a step further. The Supreme Court has shown willingness to reject Strasbourg jurisprudence as determinative of a particular issue even in cases where that jurisprudence is clear and constant. This represents a departure from the deferential start to the relationship with the Strasbourg Court, and the sense that the UK Courts appeared to be acting as ‘merely agents or delegates of the ECHR and Council of Europe’ of Strasbourg.⁹⁴⁶ *Horncastle* is the best example of this approach.⁹⁴⁷ The case is illustrative of both the strength attached to the (clear and constant) Strasbourg jurisprudence, and of the willingness to depart from it. There is nothing in the judgment given by Lord Phillips (giving the judgment of the Court) to suggest that the Supreme Court felt that the Strasbourg jurisprudence was not ‘clear and constant’. Instead, Lord Phillips acknowledged the argument that the Supreme Court ‘should treat the judgment of the Chamber in *Al-Khawaja* as determinative of the success of these appeals’ and responded by providing reasons for declining to do so.⁹⁴⁸ The Supreme Court would ‘decline to follow’ the relevant Strasbourg jurisprudence on the basis that the Strasbourg court had not ‘sufficiently appreciate[d] or accommodate[d] particular aspects of our domestic process’.⁹⁴⁹ The reasons for that conclusion relied heavily on foreign jurisprudence from the established common law courts. *HM Treasury v Ahmed*

Interpretation of Convention Rights’, Lecture at University College of London’s Judicial Institute (London, 14 December 2011).

⁹⁴⁶ Lord Irvine of Lairg, ‘A British Interpretation of Convention Rights’, *ibid.*

⁹⁴⁷ *R v Horncastle and another* [2009] UKSC 14.

⁹⁴⁸ *Ibid* [10].

⁹⁴⁹ *Ibid* [11].

provided another alternative example, from the perspective of dissenting judgments.⁹⁵⁰

It is important that the Supreme Court is able to determine cases according to their assessment of the legal settlement in the UK. As Feldman has put it: ‘comparative study should not lead to attempted mimicry of others, but should inform the journey towards a national system which meets our distinctive needs’.⁹⁵¹ This reflects the optimism shared by many, that the HRA 1998 would foster a domestic law of human rights, rather than copy the corpus of Strasbourg jurisprudence into domestic law. Indeed Lord Irvine has recently confirmed this to have been the intention at the time of the HRA’s passage through Parliament. Lord Irvine made it clear that the Supreme Court ‘should not abstain from deciding the case for themselves simply because it may cause difficulties for the UK on the international law plane’.⁹⁵² In fact, Lord Irvine suggested in that speech that it was the Supreme Court’s ‘constitutional duty’ of judges to reject Strasbourg decisions that are flawed.⁹⁵³ Lord Kerr lent support to this sentiment in a 2011 lecture:

... if we have been the modest underworker [of Strasbourg], we should stop it at once. We should kick the habit. We should stiffen our sinews and stride forward confidently. ... [E]ven if a case can be

⁹⁵⁰ *HM Treasury v Mohammed Jabar Ahmed and others (No.2) (FC)* [2010] UKSC 2.

⁹⁵¹ David Feldman, ‘The Human Rights Act 1998 and constitutional principles’ [1999] 19(2) LS 165, 205.

⁹⁵² Lord Irvine of Lairg, ‘A British Interpretation of Convention Rights’ (Lecture at University College of London’s Judicial Institute, 14 December 2011).

⁹⁵³ *Ibid.*

made that in the past we were excessively deferential to Strasbourg, there are recently clear and vigorous signals that we are no longer.⁹⁵⁴

9.3 Providing a given audience with reasons

The underlying theme running through the different approaches to foreign jurisprudence is that the Justices are, in part, using those sources to communicate with an audience. For the most part, this manifests itself as the giving of reasons. For example, Justices that appear to cite foreign jurisprudence out of courtesy to counsel are also extending reasons for their conclusions; if heavy reliance has been placed on foreign jurisprudence by counsel, it is natural that a Justice might address it when explaining their own conclusions in judgment. An extension of that possibility is that Justices are simply addressing the cited material as part of their explanation to the parties in the decided case.

Similar theories can be applied to the use of foreign jurisprudence in Convention cases, where the audience is the Strasbourg Court. This is especially clear where the Supreme Court had reached a conclusion at odds with the Strasbourg jurisprudence. In such cases there is a greater impulse towards the giving of reasons in anticipation of such a time as when the case may come before the Strasbourg Court for review. In other words, the Court is using

⁹⁵⁴ Lord Kerr, 'The modest underworker of Strasbourg?', Clifford Chance Lecture (25 January 2012) <http://www.supremecourt.gov.uk/docs/speech_120125.pdf> accessed 13 October 2013, 1.

foreign jurisprudence in part to defend its conclusions to Strasbourg. This communication forms part of what is commonly considered to be a growing 'dialogue' with the Strasbourg Court:⁹⁵⁵ the jurisprudence of foreign domestic courts may provide a useful perspective to the Strasbourg Court in its own review. Cases like *Horncastle* demonstrate that the adoption of a conclusion at odds with the Strasbourg jurisprudence can be supported in this way,⁹⁵⁶ providing a layer of reasoning to the Court's judgment, which may assist the Strasbourg court in its own review. The then President of the Strasbourg Court recognised the value of such dialogue, considering that it could 'only serve to cement a relationship between the two courts'.⁹⁵⁷ Viewed in this way, the jurisprudence of foreign domestic courts is more valuable than has so far been considered. By taking those sources into account, the Justices may begin to take a more theorised approach to human rights cases, working with the Strasbourg Court in human rights cases, rather than under it.

However, this communication is strictly between the Supreme Court and supranational courts, such as the European Court of Human Rights. The Justices were dismissive in interview about the idea that they would be affected in the way they write judgments by the thought of an international audience. When citing foreign jurisprudence, the Justices of the Supreme Court do not

⁹⁵⁵ E.g. Nicolas Bratza, 'The relationship between the UK courts and Strasbourg' [2011] *European Human Rights Law Review* 505; Merris Amos, 'The dialogue between United Kingdom courts and the European Court of Human Rights' [2012] 61(3) *ICLQ* 557; John Spencer, 'Squaring up to Strasbourg- *Horncastle* in the Supreme Court' [2010] *Archbold Review* 6; Lady Justice Arden, 'Peaceful or Problematic? The relationship between national Supreme Courts and Supranational courts in Europe' (2010) 29 (1) *Yearbook of European Law* 3; Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing 2013), 222-233.

⁹⁵⁶ *R v Horncastle*, above n 947.

⁹⁵⁷ Nicolas Bratza, 'The relationship between the UK courts and Strasbourg', *ibid* 512.

consider themselves to be in conversation with the Justices of other domestic courts. Foreign jurisprudence is cited only when helpful for the purposes of the instant case. The only obvious exception is where the Court is tasked with the interpretation of an international convention or instrument, for which there is no supervisory court. In those circumstances the Supreme Court is likely to review the foreign jurisprudence not only to learn of any common consensus as to the interpretation of the instrument, but also to ensure that it does not leap ahead of any international consensus. In doing so, it necessarily contributes to the body of jurisprudence that the courts of another contracting state will review in a similar case from that jurisdiction.

The popular theories of transjudicial dialogue (a growing tradition of international conferences and symposiums, which facilitate a direct exchange of ideas between judges and practitioners from all over the world) are not supported by this thesis. Any jurisprudence prompted by international meetings or conferences is likely to be drawn from a small family of courts, since the Justices tend to engage with a small number of jurisdictions, usually in the common law tradition. Moreover the significance of these events is limited. It is only in very rare cases that such dialogue substantially affects judicial reasoning. When it does, it is probably better explained as part of a prior willingness to draw from foreign jurisprudence than as a product of judicial exchanges per se. Indeed, during the interviews with the Justices of the Supreme Court, only two of the Justices attributed any real weight to these

meetings. Rarely was an example given where they could recall an instance of discussion with other judges having a significant effect on judgments.⁹⁵⁸

9.4 The effect of changing working methods

Finally, the research findings have also made obvious certain developments in the working methods of the UK's top court. Most obviously, the decline in the use of foreign jurisprudence between 2011 and 2013, mentioned above,⁹⁵⁹ could be explained as a product of the change in judgment styles at the Supreme Court. One of the most interesting research findings was that the Supreme Court is increasingly handing down single or plurality style judgments, which in turn appear to yield significantly fewer citations to foreign jurisprudence. Of the total 246 cases handed down by the Supreme Court between 2009 and 2013, there were 130 with plurality or effectively plurality judgments. Interestingly, only 33 of the remainder actually comprised of a full set of separate judgments; although the other 83 could not be classified as being a plurality or effectively plurality judgment, in each case at least one member of the court chose to associate himself (by the expression of agreement) with the judgment of another.

This is not altogether surprising, given the greater sense of collegiality at the new Supreme Court. For example, Paterson has described the establishment of

⁹⁵⁸ Cf. Penny Darbyshire, *Sitting in Judgment: The Working Lives of the Judges* (Hart Publishing 2013), 400: 'There is a far more intense international interchange of senior judges, in ideas, visits, exchanges, conferences and publications than outsiders appreciate'.

⁹⁵⁹ Above, text around n 921.

‘team-working’ practices under Lord Phillips and Lord Neuberger, as far greater than there had been at the House of Lords.⁹⁶⁰ This sense of collaborative work has most obviously manifested itself through changes to the Supreme Court’s working methods. As Mak has explained:

Since October 2009, the judges have been experimenting with a system in which one judge writes the lead opinion and the other judges on the panel may choose to concur with this judge, to write a separate opinion, or to write a dissenting opinion.⁹⁶¹

By changing its working methods in this way, ‘the Court aims to create more transparency’.⁹⁶² The reasoning is that ‘working with majority opinions leads to more consistency and gives clearer guidance to the lower courts on how to operate in the future’.⁹⁶³

Mak’s own interview evidence ‘indicated that the use of foreign legal materials need not be hampered by the increased use of majority opinions’ because ‘an individual judge might still choose to write a separate opinion about foreign law if this judge is not satisfied with the majority opinion’.⁹⁶⁴ However, the analysis of the data for this research indicates otherwise: the effect of plurality style judgments on the use of foreign jurisprudence appears to be fairly significant. The proportion of citations to foreign jurisprudence is smallest in plurality type

⁹⁶⁰ Alan Paterson: *Final Judgment*, above n 955, 141.

⁹⁶¹ Elaine Mak, ‘Why do Dutch and UK judges cite foreign law?’ [2011] CLJ 420, 430; Repeated in Mak’s most recent publication, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (Hart Publishing 2013), 130.

⁹⁶² *Ibid.*

⁹⁶³ *Ibid.*

⁹⁶⁴ *Ibid.*

judgments; greater in cases with more than one written judgment; and greatest in cases where a full set of separate judgments were given.

However, despite the general trend towards collective judgments and (it might be thought) more collective approaches to judgment writing, the different Justices continue to take individualised approaches to judicial reasoning. This is because, as Paterson points out, the Supreme Court ‘team’ is a rather unusual one.⁹⁶⁵ Lord Reed explained:

It is a curious team because the value of the team depends on everybody using their own individual intelligence and their own experience and so forth and bringing all that to the party...⁹⁶⁶

9.5 Reflections on Judicial Reasoning at the Supreme Court

When writing in memory of Lord Rodger of Earlsferry, Lord Mance opened his chapter titled ‘foreign laws and foreign languages’ with the following caption from Thomas Mann, *Josef und seine Brüder*:

Denn nur durch Vergleichung unterscheidet man sich und erfährt, was man ist, un ganz zu weden, der man sein soll (‘For only by comparing yourself with others do you learn what you are, in order to realise your full potential’).⁹⁶⁷

The quote captures some of the most important research findings presented in this thesis. The first of these is the most obvious: since there are no rules

⁹⁶⁵ Alan Paterson: *Final Judgment*, above n 955, 141.

⁹⁶⁶ Interview with The Rt. Hon. Lord Reed, conducted by Alan Paterson, *Ibid.*

⁹⁶⁷ Lord Mance, ‘Foreign Laws and Languages’, above n 911, 85.

governing the use of foreign jurisprudence in the UK, the Supreme Court has been willing to use comparative sources where it is thought to shed light on an issue or provide a useful benchmark (or 'yardstick') against which to measure domestic law. The discretionary nature of these sources means that individual judicial attitudes and approaches play a large part in their use.

These findings also shed light on judicial reasoning in human rights cases more broadly and judicial reasoning at the UK Supreme Court more generally. The willingness to use foreign jurisprudence heuristically, as an analytical lens or yardstick against which to measure a judge's own reasoning, hints at the attempt to ensure that the Court is not looking at matters in 'too parochial a way'.⁹⁶⁸ In this regard, the Supreme Court is not very different from other top courts around the world, increasingly ready to accept the protection of human rights and the balance of constitutional powers as part of their role. Similar themes of cooperation with other top courts permeate the explanations about using foreign jurisprudence to identify and maintain consistency with the evolving international consensus. Finally, the support to be derived from foreign jurisprudence where the Supreme Court is seeking to adopt a conclusion at odds with the otherwise relevant Strasbourg jurisprudence demonstrates a greater confidence on the part of the UK's top court than was previously evident at the House of Lords.

⁹⁶⁸ Interview with The Rt. Hon. Lord Reed, above n 920. This approach to foreign jurisprudence is likely to reflect the Court's use of other persuasive sources more generally, although a fuller study would be required for confirmation.

This is not a claim that the Supreme Court is evolving into a quasi-constitutional court; the Court continues to lack any power to find statutes incompatible with the constitution.⁹⁶⁹ Early in the life of the Supreme Court, Maleson accepted that it may never be a full constitutional court but argued that the Supreme Court did nevertheless have an ‘expanding role’ which was ‘rooted in continuity rather than radical change’.⁹⁷⁰ Moreover it was the continuity that would ‘facilitate rather than inhibit its development into a more powerful judicial body’.⁹⁷¹ The research findings set out in this thesis support that conclusion.

The use of foreign jurisprudence is not a new phenomenon. When referring to these non-binding sources, the Justices of the UK Supreme Court are simply continuing a long established tradition from the development of the common law. For example, it is not difficult to understand the tendency to make reference to foreign jurisprudence for the purpose of identifying international consensus as being closely connected to the impulse to compare with past precedents, rationalised on a ‘like for like’ type of reasoning. Neither did the Human Rights Act effect any change to the legitimacy of references to foreign jurisprudence. The initial tendency to defer to the Strasbourg jurisprudence was in part derived from the duty in section 2 of the Act, to ‘take into account’ those decisions, but the use of foreign jurisprudence is nowhere prohibited.⁹⁷² Indeed, it is the

⁹⁶⁹ Andrew Harding and Peter Leyland (eds), *Constitutional Courts: A Comparative Study* (Simmonds and Hill 2009) 3; Kate Maleson, ‘The Evolving Role of the Supreme Court’ [2011] Public Law 754, 757.

⁹⁷⁰ Kate Maleson, ‘The Evolving Role of the Supreme Court’, *ibid* 764.

⁹⁷¹ *Ibid*.

⁹⁷² Jane Wright, ‘Interpreting Section 2 of the Human Rights Act 1998: towards an indigenous jurisprudence of human rights’ [2009] PL 595, 614-615.

continued use of foreign jurisprudence that has provided the opportunity for the Supreme Court to reconsider the scope of the section 2 duty. It is not insignificant that the willingness on the part of the Supreme Court to depart from the clear and constant Strasbourg jurisprudence as in *Horncastle* was heavily supported by references to relevant foreign jurisprudence.⁹⁷³

These findings also speak to the characteristics of the new Supreme Court. While the Court might be described as more collegiate than the House of Lords, and plurality style judgments are common, it does not follow that the Justices are becoming homogenous. One of the clearest conclusions to be drawn from the varied explanations about the value of foreign jurisprudence and the methods through which they are used, is that the Justices continue to take individualised approaches to judicial reasoning.⁹⁷⁴ The result is that the value to be drawn from foreign jurisprudence is heavily reliant on the individual skills and interests of the Justices. This much is clear from the practical barriers to these sources, leading the Court to rely on the introduction of foreign jurisprudence by counsel or academic texts.⁹⁷⁵ As Bobek explains:

On the whole ... the judicial as well as extra-judicial pronouncements of the senior English judiciary on the use and the utility of comparative law for the decision-making of an English judge are

⁹⁷³ *Horncastle*, above n 947.

⁹⁷⁴ See also Elaine Mak, 'Reference to Foreign Law in the Supreme Courts of Britain and the Netherlands: Explaining the Development of Judicial Practices' (2012) 8(2) *Utrecht Law Review* 20, 30.

⁹⁷⁵ Similarly, Bobek has recently concluded that the limits on (persuasive) authority and citation in English courts are of 'functional, not political origin'. 'An open system, such as the English one, might gradually become overburdened ... with the amount of available materials, internal as well as external. Anything might be cited—too much becomes cited, if the technology permits. Michael Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford University Press 2013), 79.

rather positive. The occasional moderate sceptical voices are concerned with 'how can we do it' in terms of (linguistic) competence, time, costs, and resources, pointing out the difficulty an English judge faces when trying to understand the particularities of a foreign system of law. There are, however, no rejections, certainly not outright, of comparative inspiration qua persuasive authority in courts.⁹⁷⁶

If, as has been argued here, foreign jurisprudence can provide useful and significant contributions to judicial reasoning at the UKSC, it will be important that consideration is given to improving access to these sources. Recognising the value that Lord Rodger had added in this respect, Lord Mance recently wrote:

Too often in the highest court, issues arise which one feels must have been considered in other major legal systems. Too often, difficulties of obtaining appropriate information or an appropriate interlocutor to explore or explain a foreign system stand in the way of cross-fertilization of this sort. Lord Rodger's knowledge and experience straddled different legal systems and was, in that respect, unique. His departure invites the thought that the Supreme Court should itself aim to acquire a comparative legal and linguistic expertise ...⁹⁷⁷

Foreign jurisprudence remains a persuasive rather than binding source, but the opportunity to be persuaded is a valuable one. Unlike the US Supreme Court, where the debates about the legitimacy of citations to foreign jurisprudence are

⁹⁷⁶ Michael Bobek, *ibid* 83.

⁹⁷⁷ Lord Mance, 'Foreign Laws and Languages', *above n* 911, 96-97.

most polarised, the UK court is not a constitutional court. Rather than searching for compatibility with a domestic constitutional text, the UKSC's primary task in human rights cases is to ensure compatibility with international instruments—the ECHR in particular. It is this novel task that led UK courts to adopt a deferential stance towards the Strasbourg jurisprudence in the early years of the HRA. It is also for this reason that the jurisprudence of other foreign domestic courts remains important. It is worth remembering that the prevailing fear about judicial comparitivism in other jurisdictions has been that it provides an opportunity for judges to obscure the reality of judicial choice. The chief risk is that comparitivism might import foreign standards that were not intended or anticipated by the domestic legislature. In the UK the situation is reversed. The prevailing fear is that the provisions of a domestic statute—the HRA—are responsible for an overly deferential attitude to the European standards. The Supreme Court thus has the peculiar task of achieving compatibility with an international instrument, without compromising the United Kingdom's sovereignty. In this context, the jurisprudence of foreign domestic courts provides the Supreme Court with the opportunity to measure the Strasbourg case law and support departures from it where necessary. Paradoxically, it is the jurisprudence of foreign domestic courts that may enable the Supreme Court to realise its full potential: to develop the domestic law of human rights that many hoped the Human Rights Act would foster.

Annexe 1: Interview communication and design

Interview requests

Dear [judge title and name]

I am a PhD candidate at Queen Mary, University of London, working under the supervision of Professor Kate Malleson. My research focuses on the use of foreign jurisprudence in UK human rights cases.

I am writing to request a short interview with you to ask your views about the use of foreign jurisprudence in the Supreme Court, the status of such jurisprudence and the factors and/or methods involved in its use. A central aim of my research is to understand how members of the appellate courts approach the use of foreign jurisprudence and it would therefore be invaluable to my work to hear your perspective on this topic. The interview would last a maximum of 30 minutes.

If you could spare any time between [interview period], I would be extremely grateful. I append a list of my profile and research abstract so that you may have a better idea about my personal credentials and research area.

Yours sincerely

Hélène Tyrrell

Requests for permission to use quoted material

Dear [judge title and name]

I am writing to follow up on an interview that you kindly allowed me to conduct with you on [date of interview]. You may remember me: I am a PhD candidate at Queen Mary, University of London, working under the supervision of Professor Kate Malleson. My research is on the use of foreign jurisprudence in UK human rights cases.

At the time of the interview it was agreed that I would write to confirm approval for any quotes that I wished to use in my thesis. I re-confirmed this in my thank you letter, after the interview. I am now writing to make good on this promise and to ask for your permission to use the attached quotes in my PhD thesis and

future work. I have numbered the quotes and highlighted the words attributed to you (transcribed from my recording of the interview) for ease of reference. I have also included the paragraphs around the quotes where necessary to give an idea of the context in which they are used or the point that I have used them to illustrate. Any interview evidence from other judges present in these sections has been anonymised, pending permission of those quoted.

Your contributions are an invaluable addition to my thesis but it is not my aim to misrepresent or misinterpret any of the interview evidence. Therefore, if there are retractions or corrections to be made, please do not hesitate to let me know. I also append my (revised) research abstract, to provide context. It has recently been confirmed that the examiners for this thesis will be Professor Alan Paterson and Professor Ian Cram. I have not included the full draft of the thesis but I would be happy to send it (or this document) electronically if it would be helpful.

Yours sincerely

Hélène Tyrrell

Interview questions

The interviews followed a 'semi-standardised' or 'guided-semistructured' method. What follows is an outline of interview questions commonly put to the interviewees but does not account for deviation or elaboration.

Attitude to the use of foreign jurisprudence

1. How relevant do you think that foreign domestic case law is to your work as a judge in the Supreme Court and do you perceive that these have been of growing relevance?
2. What, for you, is useful about comparative material?
3. How has the Human Rights Act altered the relevancy or use of foreign jurisprudence?
4. From your impression, would you say that foreign jurisprudence is more or less useful in human rights cases?

5. Could you approximate a proportion of cases in which foreign jurisprudence is used (cited vs not cited)?

Purpose of foreign jurisprudence

6. Why is foreign jurisprudence used?
7. The literature discusses the possibility that judges use comparative material to fill 'gaps' in the domestic law. Would you agree?
8. There has also been an suggestion that a pedagogical factor is at play. Is it ever in your mind that other (foreign) courts will be using your judgments and does that alter your judgment at all?
9. Other suggestions might include using foreign jurisprudence as part of a legitimation exercise; to bolster a conclusion that the court seeks to reach; to reassure the judge; to engage in a 'transjudicial dialogue' *per se*. How do these explanations relate to your experience?
10. Is there a preference for citations from some jurisdictions above others?
11. What is the influence of the Judicial Community (regular meetings with judges from foreign courts, exchanges)? There has been much discussion about a 'transnational dialogue' evolving between judges from various jurisdictions. Do you feel that this is an accurate analysis?
12. What are the content and consequences of this dialogue, if it exists? Does it furnish judges with knowledge that they would otherwise not have?
13. Whatever its content, does direct interaction between judges pique curiosity about foreign jurisprudence, or encourage greater use of foreign jurisprudence, as some scholars have suggested? Or to put it another way, if unable to meet, would citation of foreign jurisprudence diminish?
14. If this dialogue does increase citation of foreign jurisprudence – what is the importance of it relative to institutional variables, such as judge's own legal training and backgrounds or the support personnel (JAs) who have interest / experience of foreign jurisprudence?

15. Is it appropriate to consider decisions of other European (domestic) courts in human rights cases?
16. How much of a problem is the linguistic barrier? Is this a significant hurdle to comparison with countries that do not operate or publish their judgments in English? If this did occur with greater frequency, would you be tempted to draw from foreign jurisprudence more often?
17. Is greater weight attached to comparative material where the court is considering a question that does not fall within the jurisdiction of a supranational court? For example, in human rights cases some direction is inevitably given from the Strasbourg Court, whereas the Refugee Convention (now widely regarded as a human rights instrument although it wasn't necessarily designed as such) has no supranational body. Similar instruments would be the Hague Convention, the Warsaw Convention and so on.
18. In some cases, comparative material is distinguished even though it is not binding. Why do you suppose that it?

Working Methods

19. How does comparative law come to your attention? Is it always the case that counsel will raise it, or do you actively seek it out?
20. Do you expect Counsel to consider relevant comparative material?
21. How much of your own research do you conduct beyond the material given to you by Counsel? What sources would you use to do that?
22. A related question is about the judicial assistants. Do you ask for assistance with research for cases? If so, would your judicial assistants bring comparative law to your attention, or would you ask them to do a search for any relevant foreign jurisprudence?
23. How often would you say that foreign jurisprudence is considered without explicit citation in the judgment? Or, to put it another way, do the law reports accurately reflect the extent to which foreign jurisprudence is used?

Annexe 2: Sample data, supporting figures 6-8

JUDICIAL REASONING AT THE UKSC 2009-2010

	Judgments handed down	Judgments citing foreign jurisprudence	%	Human Rights Judgments handed down	Human Rights Judgments citing foreign jurisprudence	%	Non-Human Rights Judgments handed down	Non-Human Rights Judgments citing foreign jurisprudence	%
ALL	51	17	33.3%	28	9	32.1%	23	8	34.8%
PLURALITY JUDGMENTS / JUDGMENT OF THE COURT / JUDGMENT WITH WHOM ALL AGREEE	26	3	11.5%	15	3	20.0%	11	0	0.0%
JUDGMENTS WHERE AT LEAST ONE MEMBER OF THE COURT AGREES (all but separate judgments)	14	6	42.9%	8	3	37.5%	6	3	50.0%
SERPERATE JUDGMENTS	11	8	72.7%	5	3	60.0%	6	5	83.3%

JUDICIAL REASONING AT THE UKSC 2010-2011

	Judgments handed down	Judgments citing foreign jurisprudence	%	Human Rights Judgments handed down	Human Rights Judgments citing foreign jurisprudence	%	Non-Human Rights Judgments handed down	Non-Human Rights Judgments citing foreign jurisprudence	%
ALL	58	23	39.7%	21	10	47.6%	37	13	35.1%
PLURALITY JUDGMENTS / JUDGMENT OF THE COURSE / JUDGMENT WITH WHOM ALL AGREEE	23	7	30.4%	7	2	28.6%	16	5	31.3%
JUDGMENTS WHERE AT LEAST ONE MEMBER OF THE COURT AGREES	27	12	44.4%	9	6	66.7%	18	6	33.3%
SERPERATE JUDGMENTS	8	4	50.0%	5	2	40.0%	3	2	66.7%

JUDICIAL REASONING AT THE UKSC 2011-2012

	Judgments handed down	Judgments citing foreign jurisprudence	%	Human Rights Judgments handed down	Human Rights Judgments citing foreign jurisprudence	%	Non-Human Rights Judgments handed down	Non-Human Rights Judgments citing foreign jurisprudence	%
ALL	58	14	24.1%	29	10	34.5%	29	4	13.8%
PLURALITY JUDGMENTS / JUDGMENT OF THE COURSE / JUDGMENT WITH WHOM ALL AGREEE	28	3	10.7%	10	2	20.0%	18	1	5.6%
JUDGMENTS WHERE AT LEAST ONE MEMBER OF THE COURT AGREES	21	6	28.6%	12	3	25.0%	9	3	33.3%
SERPERATE JUDGMENTS	9	5	55.6%	7	5	71.4%	2	0	0.0%

JUDICIAL REASONING AT THE UKSC 2012-2013

	Judgments handed down	Judgments citing foreign jurisprudence	%	Human Rights Judgments handed down	Human Rights Judgments citing foreign jurisprudence	%	Non-Human Rights Judgments handed down	Non-Human Rights Judgments citing foreign jurisprudence	%
ALL	79	23	29.1%	24	6	25.0%	55	17	30.9%
PLURALITY JUDGMENTS / JUDGMENT OF THE COURSE / JUDGMENT WITH WHOM ALL AGREEE	53	9	17.0%	15	2	13.3%	38	7	18.4%
JUDGMENTS WHERE AT LEAST ONE MEMBER OF THE COURT AGREES	21	10	47.6%	7	3	42.9%	14	7	50.0%
SERPERATE JUDGMENTS	5	4	80.0%	2	1	50.0%	3	3	100.0%

2009-2013 TOTALS

	Judgments handed down	Judgments citing foreign jurisprudence	%	Human Rights Judgments handed down	Human Rights Judgments citing foreign jurisprudence	%	Non-Human Rights Judgments handed down	Non-Human Rights Judgments citing foreign jurisprudence	%
ALL	246	77	31.3%	102	35	34.3%	144	42	29.2%
PLURALITY JUDGMENTS / JUDGMENT OF THE COURSE / JUDGMENT WITH WHOM ALL AGREEE	130	22	16.9%	47	9	19.1%	83	13	15.7%
JUDGMENTS WHERE AT LEAST ONE MEMBER OF THE COURT AGREES	83	34	41.0%	36	15	41.7%	47	19	40.4%
SERPERATE JUDGMENTS	33	21	63.6%	19	11	57.9%	14	10	71.4%

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