Human Rights in the UK and the Influence of Foreign Jurisprudence

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1

Introduction

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'.[1] 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'.[2] In the late twentieth century, the citation of foreign case law in domestic courts grew immeasurably and, in the early 1990s, 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'.[3]

As this book will show, the courts have moved decisively away from this isolation. Foreign jurisprudence is now used extensively by the courts in a range of areas and is deeply integrated into judicial reasoning. The main use of foreign jurisprudence is as a heuristic device: it provides judges with a different analytical lens through which to reflect on their own reasoning about a problem. Judges may also use foreign jurisprudence when interpreting a common legislative scheme and in support of their conclusions. However, foreign jurisprudence is used differently according to the audience to whom reasons are addressed. In human rights cases, for example, foreign jurisprudence can assist the Supreme Court to enter into dialogue with supranational courts such as the European Court of Human Rights. Recourse to foreign jurisprudence can also weave international human rights law into the common law, enabling the Supreme Court to develop the domestic law of human rights that many hoped the Human Rights Act 1998 would foster.

The influence of foreign jurisprudence is reflected in a vast literature on comparative law,[4] including on judicial recourse to comparative law

[1] 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.

[2] Basil Markesinis (ed), *Foreign Law & Comparative Methodology: A Subject and a Thesis* (Hart Publishing, 1997) 2.

[3] Bingham, 'There is a World Elsewhere' (n 1).

[4] See, eg, Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, Tony Weir trans, 3rd edn (Oxford University Press, 1998); Esin Örücü and David Nelken (eds),

in particular. As one Justice of the Supreme Court, Lord Mance, recognised: 'Increasing attention has been paid over recent years to the basis on which judges use foreign authority'.[5] The research in this field also reflects a general interest in judges and judicial reasoning more generally.[6] 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 the 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'.[7] By providing an analysis of foreign jurisprudence in human rights cases before the UK Supreme Court,[8] this study contributes a fresh perspective to the vast literature in the field, describing the use of foreign jurisprudence by domestic courts as a phenomenon that has given rise to a 'migration of constitutional ideas',[9] or similar characterisations on the theme, such as 'judicial internationalisation',[10] 'judicial cosmopolitanism'[11] and 'trans-judicialism'.[12]

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).

[5] Lord Mance, 'Foreign Laws and Languages' in Andrew Burrows, David Johnston and Reinhard Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford University Press, 2013) 87.

[6] 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 363–68. More recently, see, eg, Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing, 2013).

[7] 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.

[8] The Supreme Court was established by Part 3 of the Constitutional Reform Act 2005, assuming the judicial functions of the House of Lords as the highest appellate court in the UK (other than for Scottish criminal cases). It started work on 1 October 2009.

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

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

[11] John L Murray CJ, 'Judicial Cosmopolitanism' [2008] 2 *Judicial Studies Institute Journal* 1; Posner (n 10).

[12] Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 39 *University of Richmond Law Review* 99; Anne-Marie Slaughter, *A New World Order* (Princeton

This non-exhaustive list broadly describes the simple practice of judges from one jurisdiction citing jurisprudence from another jurisdiction.[13] There is also significant and important research concerning the opportunities offered by comparative law in a 'shrinking world',[14] forming part of 'global dialogue' or 'transjudicial dialogue'.[15] As Bell has 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.[16]

The claim made by many of these works is that judges from different jurisdictions are in conversation with each other as to the interpretation and development of certain legal norms. Markesinis and Fedtke wrote of foreign law's 'overt' influence in Canada, Germany and South Africa, and its 'covert' influence in France and Italy.[17] Much has been written about the comparative approach of the Israeli Supreme Court, which is now well known for its reliance on foreign jurisprudence.[18] The New Zealand courts regularly engage with the jurisprudence of foreign domestic courts. In fact, some have suggested that the willingness to refer to foreign decisions 'is not the exception in New Zealand, but the rule'.[19] Foreign jurisprudence has even found its way into a handful of judgments from the US Supreme Court,

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.

[13] See also Mak (n 7); 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.

[14] Basil Markesinis, *Comparative Law in the Courtroom and in the Classroom* (Hart Publishing, 2003).

[15] Slaughter, 'A Typology' (n 12) 99; Slaughter, *A New World Order* (n 12); David S Law and Wen-Chen Chang, 'The Limits of Global Judicial Dialogue' [2011] *Washington Law Review* 523.

[16] John Bell, 'Comparative Law in the Supreme Court 2010–11' [2012] *Cambridge Journal of International and Comparative Law* 20.

[17] Basil Markesinis and Jörg Fedtke (eds), *Judicial Recourse to Foreign Law: A New Source of Inspiration?* (University College London Press, 2006).

[18] See, eg, 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.

[19] Jeremy Waldron, '*Partly Laws Common to All Mankind*': *Foreign Law in American Courts* (Yale University Press, 2012), 18. Waldon cites *Taunoa v Attorney General* [2007] NZSC 70, [2008] 1 NZLR 429 as an example. In determining questions about the application of the New Zealand Bill of Rights Act, the New Zealand Supreme Court cited cases from the US, Canada, South Africa, the UK, the European Court of Human Rights and the UN Human Rights Commission. The number of US cases alone outnumbered the number of New Zealand cases cited.

which is usually given as the paradigmatic example of insularity.[20] The use of foreign jurisprudence in UK domestic courts, however, has been given relatively little attention by researchers in the past. While some studies have addressed the topic in the context of private law,[21] the human rights context has attracted less attention.[22]

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 a strong sense in the literature that judicial comparativism is more prevalent in human rights cases than in other fields,[23] although it is also said that the extent to which judges draw from foreign jurisprudence in human rights cases varies greatly between jurisdictions. This is despite the fact that empirical evidence about the correlation between the citation of foreign jurisprudence and the type of issue is rare. As Bobek has written:

> 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

[20] *Atkins v Virginia* (2002) 536 US 304; *Grutter v Bollinger* (2003) 539 US 306; *Lawrence v Texas* (2003) 539 US 558; *Roper v Simmons* (2005) 543 US 551. These high-profile decisions on the death sentence, criminalised sodomy and abortion are responsible for much of the literature on recourse to foreign jurisprudence in the context of US constitutional interpretation. See, eg, 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 Constitutionalise' (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'; Basil Markesinis, 'National Self-Sufficiency or Intellectual Arrogance? The Current Attitude of American Courts towards Foreign Law' [2006] *CLJ* 301; Angioletta Sperti, 'United States of America: First Cautious Attempts of Judicial Use of Foreign Precedents in the Supreme Court's Jurisprudence' in Groppi and Ponthoreau (n 7).

[21] See, eg, 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 (ed), *Precedent in Law* (Clarendon Press, 1987) 217; Albert Kiralfy. 'The Persuasive Authority of American Rulings in England' (1948–49) XXIII *Tulane Law Review* 209; Bingham, 'There is a World Elsewhere' (n 1) 513; Keith Stanton, 'Comparative Law in the House of Lords and Supreme Court' (2013) 42 *Common Law World Review* 269; Andrew Burrows, 'The Influence of Comparative Law on the English Law of Obligations' in Andrew Robertson and Michael Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart Publishing, 2016).

[22] As Groppi and Ponthoreau have pointed out, studies cataloguing the different approaches adopted by constitutional or supreme courts in their use of foreign jurisprudence are relatively rare: Groppi and Ponthoreau (n 7) 3.

[23] See, eg, Groppi and Ponthoreau (n 7) 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?'

> assumption that the greatest amount of comparative reasoning is indeed carried out in the area of human rights adjudication.[24]

Groppi and Ponthoreau's edited volume made a significant contribution to this question by reference to data gathered from a number of courts from jurisdictions working in the common law and civil law traditions. One of the main conclusions of that volume was that citations of foreign case law are most common in human rights decisions,[25] but this is a finding which has yet to be substantiated in the UK context.

Third, the diet of the top court has been increasingly balanced towards public law and human rights cases.[26] Judges adjudicating on human rights claims often have to consider the jurisprudence of supranational courts. For example, where Convention rights are at issue, UK courts must 'take into account' any relevant jurisprudence of the European Court of Human Rights (also referred to as 'the Strasbourg Court').[27] 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 Human Rights Act (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 useful variety of perspectives on the uses of foreign jurisprudence by domestic courts.[28]

'Human rights cases' covers case law that arises from claims under the HRA 1998 (rooted in the European Convention on Human Rights (ECHR)), cases engaging international human rights treaties such as the Refugee Convention or the Convention on the Rights of the Child, and 'common law rights' cases. Categorising cases like this is important for two reasons: first, a common theme in the scholarship on judicial comparativism is that the legitimacy of recourse to foreign sources depends on the context for which it is sought; and, second, different human rights instruments may require judges to engage with different sources. For example, the HRA 1998 requires judges to 'take into account' the Strasbourg

[24] Michael Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford University Press, 2013) 64.

[25] ibid 416.

[26] 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': Paterson (n 6) 17, Table 2.1.

[27] Section 2 HRA 1998.

[28] Other scholars have conducted valuable research on the judicial recourse to comparative law in other areas of law. See, eg, Stanton (n 21) 269, surveying the use of comparative law in tort cases; and Burrows (n 21).

jurisprudence.[29] While the Strasbourg case law itself does not fall into the definition of 'foreign' jurisprudence for the purposes of this study, it would not be surprising if a court were to extend the exercise to take into account the jurisprudence of other Council of Europe jurisdictions (the jurisprudence that the European Court of Human Rights would be likely to consider).[30] Equally, it would not be surprising if such references remained relatively infrequent, given the Strasbourg Court's own approach to surveying the interpretation of the Convention among Member States. The quantitative results indicate that the latter approach prevails.[31]

In cases that engage international human rights treaties, one might expect to see a greater number of references to foreign jurisprudence. The Vienna Convention on the Law of Treaties 1969 (hereinafter 'the Vienna Convention') encourages judicial comparativism in such cases. Article 31 provides the general rules of interpretation, including a direction to take into account 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. Article 32 of the Vienna Convention states that 'supplementary means of interpretation' may be employed in order to 'confirm the meaning resulting from the application of Article 31', or when the interpretative approach under Article 31 either leaves the meaning 'ambiguous or obscure' or 'leads to a result which is manifestly absurd or unreasonable'.[32]

Finally, the continued reference to common law rights has been an interesting feature of recent judicial reasoning at the Supreme Court.[33] In *Osborn*, Lord Reed felt it necessary to point out that human rights 'continue to be protected by our domestic law, interpreted and developed in accordance with the [Human Rights] Act when appropriate'.[34] In *Kennedy*, Lord Toulson again emphasised that the analysis had been 'based on common law principles and not on article 10 [ECHR]', which, in the context of the case, 'add[ed] nothing to the common law'.[35] Paying specific attention to these cases is important because the influence of foreign jurisprudence is likely to

[29] Section 2 of the HRA 1998.

[30] Mak (n 7) 143.

[31] Chapter 5 (see, eg, Figure 5.10).

[32] Vienna Convention on the Law of Treaties 1969. See also Brice Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press, 2013) 34–35; Shaheed Fatima, *Using International Law in Domestic Courts* (Hart Publishing, 2005) 141.

[33] Mark Elliott considered it possible to identify three strands to this 'common law resurgence': 'common law resilience', 'common law primacy' and 'common law dynamism'. See Mark Elliott, 'Beyond the European Convention: Human Rights and the Common Law' (2015) 68(1) *Current Legal Problems* 85, 92–95. See generally, Dickson (n 32) 20–34; Richard Clayton, 'The Empire Strikes Back' [2015] *PL* 3; Phillip Sales, 'Rights and Fundamental Rights in English Law' [2016] *CLJ* 86; Eirik Bjorg, 'Common Law Rights: Balancing Domestic and International Exigencies' (2016) 75(2) *CLJ* 220.

[34] *Osborn v The Parole Board* [2013] UKSC 61; [2014] AC 1115

[35] *Kennedy v The Charity Commission* [2014] UKSC 20; [2015] AC 455 [133].

be different in character to cases where primacy is accorded to the ECHR. In these cases, it would not be surprising if judges were to continue referring to the jurisprudence of other common law countries. Lord Toulson's approach in the Court of Appeal was illustrative of this point. In *R (Guardian News and Media Ltd)*,[36] he explained:

> I base my decision on the common law principle of open justice. In reaching it I am fortified by the common theme of the judgments in other common law countries to which I have referred. Collectively they are strong persuasive authority. The courts are used to citation of Strasbourg decisions in abundance, but citation of decisions of senior courts in other common law jurisdictions is now less common. I regret the imbalance. The development of the common law did not come to an end on the passing of the Human Rights Act. It is in vigorous health and flourishing in many parts of the world which share a common legal tradition. This case provides a good example of the benefit which can be gained from knowledge of the development of the common law elsewhere.[37]

In tackling these questions, this book addresses a broader political question about the source of human rights in the UK. This question is of heightened importance in the changing legal landscape. The extent to which the courts see human rights as European, as foreign or as a part of the UK common law can provide important lessons ahead of any revision to the human rights regime or any change to the relationship between the UK courts and foreign or supranational courts.

I. STRUCTURE OF THE BOOK

This book provides evidence of the influence of foreign jurisprudence in the UK Supreme Court, 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 HRA 1998 had on the use of foreign jurisprudence? Questions of this kind have been considered in the context of other jurisdictions,[38] but few researchers have focused on the UK.

The heart of this book is the empirical study. For this reason, Chapter 2 is devoted to an explanation of the research methodology. This decision also reflects the reality that empirical legal research can feel like a lonely business.

[36] *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420; [2012] All ER 551.

[37] ibid 88.

[38] See, eg, Groppi and Ponthoreau (n 7); 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.

I felt hugely supported by the warnings and advice given by researchers before me and it felt fair to explain my own choices in similar terms.

One of the main arguments in this book 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. It is explained in Chapter 3 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 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: 'it was always clear that the courts could also consider jurisprudence from other jurisdictions'.[39]

The non-binding status of these sources can give rise to criticisms—often raised in the US debates—that the use of foreign jurisprudence is instrumental and opportunistic.[40] The UK Supreme Court does appear to use foreign jurisprudence in this way, but this is not problematic. Chapter 4 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 the 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.[41] The aim in Chapters 5–8 is therefore to identify the way in which foreign jurisprudence is used at the Supreme Court and the purposes that these sources serve.

Chapter 5 sets out the reality of citations of foreign jurisprudence at the Supreme Court by reference to the empirical research. The data is important: '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'.[42] 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 that—because there are no formal rules governing the use of foreign jurisprudence—judges have developed

[39] Helen Fenwick, *Civil Liberties and Human Rights* (Cavendish Publishing, 2007) 192.

[40] See, eg, Richard Posner, 'No Thanks, We Already Have Our Own Laws' *Legal Affairs* (July/August 2004), www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp; Choudhry (n 20); Yash Ghai, 'Sentinels of Liberty or Sheep in Woolf's Clothing? Judicial Politics and the Hong Kong Bill of Rights' (1997) 60 *MLR* 459.

[41] Elaine Mak concluded that there was a lack of a systematic approach in the use of foreign legal materials at the UK Supreme Court: Mak (n 26) 449.

[42] Groppi and Ponthoreau (n 7).

their own practices. Whether or not foreign jurisprudence is used is dependent on the approach of each individual judge. For example, Lord Collins is known to have been a more enthusiastic user of foreign jurisprudence, particularly from the US. It is not surprising, therefore, that a large proportion of cases contained explicit citations of foreign jurisprudence prior to Lord Collins' retirement in 2011. The change in judgment styles may also have an impact on the use of foreign jurisprudence at the top court. In particular, the data illustrates an increase in single judgments at the Supreme Court, which may reduce the scope for the sort of judicial individualism that might have provided the space for reference to foreign jurisprudence.

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 book does not support theories of 'transjudicial dialogue' as expressed in much of the literature.[43] While citations of foreign jurisprudence are mostly drawn from a small family of courts, it is not found that the UK Supreme Court 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 it is helpful.

The use of foreign jurisprudence as a heuristic device is the subject of Chapter 6. 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' thesis accurately explains the use of foreign jurisprudence at the UK Supreme Court. 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 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'.[44]

The only evidence for the 'gap-filling' theory might be the tendency to review foreign jurisprudence in human rights cases where the Strasbourg

[43] See, eg, Slaughter, 'A Typology' (n 12); Slaughter, *A New World Order* (n 12); Groppi and Ponthoreau (n 7).

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

jurisprudence was unhelpful or non-existent. Foreign jurisprudence may nevertheless be used to confirm the Strasbourg position and the UK Supreme Court has shown a 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.[45] Chapter 7 explains that this is to do with a drive towards uniformity among the states signatory to the 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 1998 duty to 'take into account' the relevant Strasbourg case law might therefore have been a reduction in the number of references to the jurisprudence of other foreign courts. The logic would be 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 the Court prefers to accept the results of the supranational (Strasbourg) court's research on the point. Or if other foreign jurisprudence is cited, it would be for different reasons.

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 7 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 recourse to those sources leads 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 in questions engaging the ECHR.

[45] See, eg, 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] *European Public Law* 405; Francesca Klug and Helen Wildbore, 'Follow or Lead? The Human Rights Act and the European Court of Human Rights' (2010) 6 *European Human Rights Law Review* 621; Lord Irvine of Lairg, 'A British Interpretation of Convention Rights', Lecture at University College of London's Judicial Institute (London, 14 December 2011), https://www.ucl.ac.uk/drupal/judicial-institute/sites/judicial-institute/files/british_interpretation_of_convention_rights_-_irvine.pdf.

There is, however, some evidence that deference to Strasbourg may be on the decline. The Supreme Court is showing a greater willingness to reject the Strasbourg jurisprudence where it is unhelpful or at odds with the constitutional arrangements in the UK. This is most obvious in cases where the Strasbourg jurisprudence has been thought to be outdated. 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.[46] 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 8 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'.[47] 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 influence of foreign jurisprudence in judicial reasoning is more important than many have recognised. Foreign jurisprudence is far more intimately woven into the fabric of judicial reasoning and serves a wider range of functions than the words 'persuasive' and 'authority' might suggest. This is both legitimate and appropriate. The value of foreign jurisprudence can be quite different in flavour from other persuasive sources. The judgments of foreign domestic courts represent valuable empirical tools or heuristic devices. In human rights cases, the perspectives offered by foreign jurisprudence have the potential to support a stronger conception of domestic human rights. Paradoxically, it may be the jurisprudence of foreign domestic courts that assists the Supreme Court to realise its full potential: to develop the domestic law of human rights which many hoped the HRA 1998 would foster.

II. 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

[46] *Tyrer v UK* (1978) 2 EHRR 1 [31].

[47] *R (Prolife Alliance) v BBC* [2002] EWCA Civ 297; [2002] 2 All ER 756, 771–72; see also Masterman (n 45) 725; Wicks (n 45) 405.

than 'him', 'her', 'his' or 'her'.[48] This approach is not adopted in this book. 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 was, in the years for which data was gathered, 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 book, 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 5.

[48] Simon Heffer, *Strictly English* (Random House, 2010) xiii.