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‘ There is A World Elsewhere’ — Lord Bingham and Comparative Law

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<H1> I. Introduction<H1>

Courts make use of comparative law. Some form of comparative law has always been part of the judicial process, and its use has been on the increase over the last two decades. Lord Bingham has been a pioneer in developing comparative law in modern court practice.[1]

In jurisdictions where the form of judgments allows it, judges make open reference to comparative law sources, and in particular to judgments by foreign courts.[2] Where the form of judgments does not open for citation of foreign law sources, there may be an advocate-general or *rapporteur* who makes direct references, or the use of comparative law sources may be acknowledged in less formal ways.

The breakdown of the closed and hierarchical national system of legal authority[3] goes some way in explaining why comparative law is increasing in importance. The role

[1] Sir Thomas Bingham, ‘“There is A World Elsewhere”: The Changing Perspectives of English Law’ (1992) 41 ICLQ 513, reprinted in T Bingham, *The Business of Judging* (OUP Oxford 2000) 87. He says that ‘in showing a new receptiveness to the experience and learning of others, the English courts are not, I think, establishing a new tradition, but reverting to an old and better one’, at 527.

[2] B Markesinis and J Fedtke *Engaging in Foreign Law* (Hart Publishing, Oxford 2009) is the new leading treatise on comparative law method, and deals extensively with comparative law in the courts. We have otherwise made use of the different complimentary perspectives and material from many fields and jurisdictions in G Canivet, M Andenas and D Fairgrieve (eds), *Comparative Law before the Courts* (BIICL London 2004). The book accounts for the many different reasons for the new and important role of comparative law, and how comparative law sources are received and recognized in different ways in different jurisdictions, sometimes in different ways even within a single national jurisdiction. See also generally M Reimann and R Zimmermann, *The Oxford Handbook of Comparative Law* (OUP Oxford 2006), especially the chr by S Vogenauer, ‘Sources of Law and Legal Method in Comparative Law’ at 869–898.

[3] Contemporary written constitutions offer one example where comparative law is expressly received as a formal source of law. In the South African Constitution of 1996, Art 39 (c) states that when interpreting the Bill of Rights, a court, tribunal or forum may consider foreign law. Also several of the new constitutions in the former communist countries provide other and interesting examples in this respect.

of comparative law, and method of comparative law, however, remains controversial. There are discussions of the policy and method of comparative law among judges, among lawmakers and among scholars, and sometimes between the legal professions. Enthusiasm is increasingly in evidence, as in Justice Breyer's address to the 2003 annual meeting of the American Society of International Law: nothing could be 'more exciting for an academic, practitioner or judge than the global legal enterprise that is now upon us'.[4] There is an emerging body of scholarship providing support for the use of comparative or foreign law, and also critical perspectives.[5]

In this chapter, we will use Lord Bingham's judgments to approach some of the problems, and also in developing a typology of some current applications of comparative law in the courts.

We look at the dialogues between different national and international courts. An international market place for judgments is emerging, where also the form and style of judgments may be influenced by the increased use of comparative law.

Comparative law plays a role in resolving fundamental issues such as the relationship between national and international law, in implementing international and European human rights law, in developing constitutional review, in review of administrative action, and in developing effective remedies. Comparative law also plays a role in developing the substantive law in different areas, including in finding normative solutions to questions of a more technical kind. One can hardly expect always to find the ideal solutions to problems of globalisation within one's own jurisdiction. Nonetheless, there is still disagreement on when comparative law can be invoked, where it is convenient to do so, and how it should be done.

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[4] S Breyer, 'Keynote Address' (2003) 97 *ASIL Proceedings* 265.

[5] B Markesinis, 'Goethe, Bingham and the Gift of an Open Mind', above p xx, and J Stapleton, 'Benefits of Comparative Tort Reasoning: Lost in Translation', above p xx, cover the ground well here in the course of setting out their different views. The titles of their articles indicate their respective positions. B Markesinis, 'Judicial Mentality: Mental Disposition or Outlook as a Factor Impeding Recourse to Foreign Law', 80 TUL. L.REV. 1325, 1361–62 (2006) also argues in favour of a more consequent use of comparative law. If one judge uses foreign law in support of an outcome, it may not be satisfactory for another judge, arguing for another outcome, to pass it by in silence. See also generally M Reimann and R Zimmermann, *The Oxford Handbook of Comparative Law* (OUP Oxford 2006), especially the ch by S Vogenauer, 'Sources of Law and Legal Method in Comparative Law' (pp 869–898).

Similar questions are posed to courts in jurisdictions across the world, but there is much variation in the solutions found. For instance, some courts still find that the autonomy of their legal system prevents them from expressly acknowledging the use of foreign judgments. This is one of the issues where there has been a rapid development in the practice of courts, including the French courts,[6] the Italian *Corte di cassazione*, the International Court of Justice and the European Court of Justice, which in different ways have relaxed the restrictions on citing judgments by courts from other jurisdictions.

Our discussion of the cases and typology of current applications of comparative law will illustrate the methodological problems of the use of comparative law in the courts. There are cases which reflect a general recognition of comparative law as a persuasive authority or source of law, which apply normative models from other jurisdictions where national law is undetermined, and which use comparative law in reviewing factual assumptions about the consequences of legal rules, or assumptions about the universal applicability of rules or principles.

Comparative law has been seen to provide courts with persuasive and non binding arguments. At the current stage, there is an argument about the consequences of a call for more consistency. One question is if courts are ever bound to make use of comparative law sources, for instance in certain situations when an authority is based on comparative law sources.

Comparative law is becoming a practical academic discipline. The role of academic scholarship, and its response to the developments in practice, is another issue we return to towards the end.

We will commence this chapter by pointing to some of Lord Bingham's achievements in the field of comparative law.

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II. Lord Bingham's contribution<H/1>

[6] See G Canivet, 'Variations sur la politique jurisprudentielle : les juges ont-ils un âme?', p xxx above, and B Stirn, 'Le Conseil d'Etat, so British', p xxx above.

Lord Bingham's contribution to comparative law is on several levels. One is as a comparative law source on matters of substantive law, as a persuasive authority outside his own jurisdiction. Lord Bingham has been a pioneer in developing the judicial dialogues that attracts the interest of comparative lawyers and international relations scholars.[7] The Law Lords have gradually lost their previous position, as the court followed in many common law jurisdictions around the world, sitting as the Appellate Committee of the House of Lords or the Judicial Committee of the Privy Council (which also has lost its formal position as final court of appeal for many of the Commonwealth jurisdictions).[8] When the Law Lords today are cited and followed in other countries, it is in most instances not as formal or binding authority but when their 'speeches' or 'advice' persuade.[9] Lord Rodger has made this point before and has drawn attention to some consequences for the form of judgments. Whereas the House of Lords and the Privy Council 'once could command assent merely by their position (…) in a world, where courts may pick and choose among a variety of authorities … the form in which the judges have expressed their view may well play a significant role in determining which of those view ultimately win acceptance'.[10] Lord Bingham's judgments on personal liberty and anti-terror measures have left his imprint on the constitutional law of many countries, and also beyond the commonwealth and common law world. His decisions on tort law, including those on public authority liability, have left a further legacy. Where other judges are cited for their literary allusions or striking paradoxes and statements, Lord Bingham persuades through his reasoning.[11] More than the authority of the positions he has held, his influence depends on the clarity and convincing force of his judgments, often supported by his academic scholarship.

The reasons given in judgments, and also the form and style of supreme court judgments, have taken on a new importance in Europe with the new roles of national

[7] See, e.g., A–M Slaughter, *A New World Order* (Princeton University Press Princeton 2004) and 'Comparative Law in the Lords and in the US Supreme Court', above p xx, N Krisch 'The Open Architecture of European Human Rights Law' (2008) 71 Modern Law Review 183, and B Stirn, 'Le Conseil d'Etat, so British? ', above p xx.
[8] See R Cooke, 'Future of the Common Law', above p xx.
[9] See S Elias, 'Courts and Human Rights in the UK and NZ', above p xx, A Gleeson, 'The value of clarity' , above p xx, M Kirby, 'The Lords, Tom Bingham and Australia', above p xx, B McLachlin, 'Judicial Independence: A Functional Perspective', above p xx, D Ipp, 'Recent Reforms in Australia to the Law of Negligence with Particular Reference to the Liability of Public Authorities', above p xx.
[10] Lord Rodger 'The Form and Language of Judicial Opinion' (2002) 118 LQR 226, 247.
[11] See B Markesinis and J Fedtke, 'Authority or reason? The Economic Consequences of Liability for Breach of Statutory Duty in a Comparative Perspective', (2007) EBLR 5 at 66-7, which compares Lord Bingham's style of argument to that of Lord Hoffmann, and also M Andenas in (2007) EBLR 1 at 2-3.

constitutional courts in many countries, and the importance of the EU Court of Justice and the European Court of Human Rights.[12] Reasons that convince the courts in what is effectively the next instance, can safeguard against what is in effect an overturning. Lord Bingham's judgment in *Boyd*[13] provides an instructive example of this.[14]

The European Court of Human Rights held that the United Kingdom was in violation of Article 6 § 1 of the European Convention on Human Rights in *Findlay*.[15] A soldier successfully challenged the court-martial procedure on grounds of lack of independence and impartiality. The UK court-martial procedure was subsequently, in 1996, reformed in new legislation. In 2002, in *Morris*,[16] the European Court of Human Rights held that the new legislation still violated the independence and impartiality requirements.

Another case, *Boyd*,[17] reached the House of Lords in 2002, before new legislation could be introduced in response to *Morris*. Lord Bingham analyses the case law of the European Human Rights Court, and the UK 1996-legislation. He makes clear that it is for UK courts to accept the decisions of the European Human Rights Court. However, he finds that the legislation satisfies the requirements of independence and impartiality as developed in the case law of the European Human Rights Court. Then, in *Cooper*,[18] a unanimous Grand Chamber of the European Court of Human Rights overturns their previous ruling in *Morris*, making extensive use of Lord Bingham's analysis, including express references in its own discussion of the law, and agreeing with his conclusions.

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[12] See the discussion of different instances of dialogues between the European and the national judicial level in N Krisch 'The Open Architecture of European Human Rights Law' (2008) 71 Modern Law Review 183.
[13] *Boyd, Hastie and Spear Saunby and Others* [2002] UKHL 31.
[14] See the discussion of the reception of Lord Bingham's judgment in L Garlicki 'Cooperation of courts: The role of supranational jurisdictions in Europe', (2008) 6 International Journal of Constitutional Law 509.
[15] *Findlay v the United Kingdom* (1997) 24 EHRR 221.
[16] *Morris v the United Kingdom* (2002) 34 EHRR 1253.
[17] *Boyd, Hastie and Spear Saunby and Others* [2002] UKHL 31. <http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd020718/boyd-1.htm>
[18] *Cooper v the United Kingdom*, (2004) 39 EHRR 8.

Lord Bingham's contribution to comparative law is also to the method of the discipline. Lord Bingham is a pioneer in the use of comparative law as a judge,[19] and he has made important scholarly contributions also in this field.[20] In English courts, Lord Denning and Lord Goff are examples of judges making use of comparative law, and inviting counsel and other judges to do the same. Lord Bingham has built on their contributions, gone further in making use of comparative law, and has also provided criteria for when comparative law sources are relevant. In *Fairchild*,[21] he states his basic conviction that 'in a shrinking world (in which the employees of asbestos companies may work for those companies in any one or more of several countries) there must be some virtue in uniformity of outcome whatever the diversity of approach in reaching that outcome.'[22] In the same paragraph of the judgment, he also sets out his view on the use of comparative law in the development of the common law:

> <EXT>Development of the law in this country cannot of course depend on a head-count of decisions and codes adopted in other countries around the world, often against a background of different rules and traditions. The law must be developed coherently, in accordance with principle, so as to serve, even-handedly, the ends of justice. If, however, a decision is given in this country which offends one's basic sense of justice, and if consideration of international sources suggests that a different and more acceptable decision would be given in most other jurisdictions, whatever their legal tradition, this must prompt anxious review of the decision in question.<EXT>

In the Supreme Court of the United States, Justice Kennedy addressed similar issues in *Roper and Simmons*.[23] The case concerned a very different matter and area of law. But the criteria were not that different. Justice Kennedy states that international and comparative law provides 'respected and significant confirmation' for the majority's view while not controlling the outcome:

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[19] See, H Muir Watt, 'Comparative law and the decision in Fairchild' , above p xx, and A–M Slaughter, 'Comparative Law in the Lords and in the US Supreme Court' , above p xx.
[20] See in particular, Sir Thomas Bingham '"There is A World Elsewhere": The Changing Perspectives of English Law' (1992) 41 ICLQ 513, reprinted in T Bingham *The Business of Judging* (OUP Oxford 2000) 87.
[21] *Fairchild v Glenhaven Funeral Services Ltd,* [2002] UKHL 22.
[22] At para 31.
[23] *Roper v Simmons* 543 US 551 (2005).

> <EXT>It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. See Brief for Human Rights Committee of the Bar of England and Wales et al. as Amici Curiae 10–11. The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.<EXT>

In both cases, the courts considered overturning a previous decision. Both courts had good reasons of legal principle and policy for doing so. In *Roper*, Justice Kennedy finds that comparative law provides 'confirmation for our own conclusions.' Lord Bingham reasons along the same lines in *Fairchild*. 'Anxious review' is called for when (1) a national decision offends one's basic sense of justice, and (2) there is a more acceptable decision in most other jurisdictions.

Both courts decided to overturn the previous decision. *Fairchild* was a unanimous decision, whereas the US Supreme Court had only a narrow majority for setting aside its previous decision. The *Roper* minority provided arguments against the use of comparative law in US courts in general (with one justice strengthening the argument for comparative law in general but disagreeing with the majority's conclusions in the particular case). The other view in the House of Lords was first expressed in the subsequent decision of *Barker*[24] where an activist panel invented a new concept of 'proportionate liability' to limit the effect of *Fairchild*. These cases will be discussed further below, but what is of particular interest in the introduction to this chapter is the parallel approach that Lord Bingham and Justice Kennedy took in *Fairchild* and *Roper*. In spite of the many differences between the cases, the method used was similar.

[24] *Barker v Corus (UK) plc* [2006] UKHL 20.

Lord Bingham and Justice Kennedy also address the question of whether the use of comparative law is disloyal to the national legal system. Both answer no to this, and provide both a principled and practical argument. In *Fairchild*, the issues appear legal and technical although the outcome would have social implications. Lord Justice Bingham stated in the early 1990s that '(p)rocedural idiosyncracy is not (like national costume or regional cuisine) to be nurtured for its own sake'.[25] In *Fairchild*, Lord Bingham sets out the social end economic issues. Comparative law is both of assistance in dealing with the social and economic issues but even more so when it comes to the more technical legal solutions. In *Roper*, the question was whether it was unconstitutional to impose capital punishment for crimes committed while under the age of 18. The case went to the core of the question of the extension of constitutional rights protection. On another level, both cases concerned the arguments a court can take into account when it considers to set aside the authority of a previous decision. The question in *Roper* and *Fairchild* is about how comparative law fits into the system of sources of law as the closed and hierarchical national system of legal authority associated with Kelsian (or Hartian) positivist traditions is breaking down. We will return to this question below, and also revisit the use of comparative law in the most closed and hierarchical national systems.

We will argue that Lord Bingham's use of comparative law provides tools for courts in dealing with the opening up of the national legal system and its sources. At the same time, his arguments in favour of, and method for the use of, comparative law remain valid within a closed national legal system in a positivist tradition.

An equally important aspect of Lord Bingham's use of sources which do not derive from domestic law, is his willingness to make use of European human rights law to develop the common law. In his judgments, the case law of the European Human Rights Court or the European Union Court of Justice is not seen as belonging to separate systems of law. When it can be used in the development of the common law, a strong case for doing so is recognized.

[25] *Dresser UK Ltd v Falcongate Ltd* [1992] QB 502, 522.

In *Van Colle and Smith,*[26] Lord Bingham sets out the case for developing the common law action for negligence in the light of the case law of the European Human Rights Court. In paragraph 58 of the judgment, he develops the general argument for doing so:

> <EXT>Considerable argument was devoted to exploration of the relationship between rights arising under the Convention (in particular, the article 2 right relied on in *Van Colle*) and rights and duties arising at common law. Should these two regimes remain entirely separate, or should the common law be developed to absorb Convention rights? I do not think that there is a simple, universally applicable answer. It seems to me clear, on the one hand, that the existence of a Convention right cannot call for instant manufacture of a corresponding common law right where none exists: see *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406. On the other hand, one would ordinarily be surprised if conduct which violated a fundamental right or freedom of the individual did not find a reflection in a body of law ordinarily as sensitive to human needs as the common law, and it is demonstrable that the common law in some areas has evolved in a direction signalled by the Convention: see the judgment of the Court of Appeal in *D v East Berkshire Community NHS Trust*, [2003] EWCA Civ 1151, [2004] QB 558, paras 55-88. There are likely to be persisting differences between the two regimes, in relation (for example) to limitation periods and, probably, compensation. But I agree with Pill LJ in the present case (para 53) that "there is a strong case for developing the common law action for negligence in the light of Convention rights" and also with Rimer LJ (para 45) that "where a common law duty covers the same ground as a Convention right, it should, so far as practicable, develop in harmony with it".

This is another expression of the role of comparative law in a national system, following his views developed in extra-judicial writing,[27] in his dicta on the 'virtue in

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[26] *Chief Constable of the Hertfordshire Police (Original Appellant) and Cross-respondent) v Van Colle (administrator of the estate of GC (deceased)) and another (Original Respondents and Cross-appellants)* and *Smith (FC) (Respondent) v Chief Constable of Sussex Police (Appellant)* [2008] UKHL 50.

[27] T Bingham in B Markesinis, *The Coming Together of the Common Law and the Civil Law*, (Hart Oxford 2000) 27 at 34 where he cites M Andenas, 'English Public Law and the Common Law of Europe' in M Andenas (ed), *English Public Law and the Common Law of Europe* (1998).

uniformity of outcome' in *Fairchild*,[28] and that '(p)rocedural idiosyncracy is not (like national costume or regional cuisine) to be nurtured for its own sake' in *Dresser*.[29] The issue is more pressing in *Van Colle,* as the outcome otherwise could establish in the common law a restrictive rule which would likely to be contrary to the case law of the European Court of Human Rights.<EXT>

Parallel issues come up again in *JD v East Berkshire.*[30] In paragraph 50 Lord Bingham states that:

> <EXT>(T)he question does arise whether the law of tort should evolve, analogically and incrementally, so as to fashion appropriate remedies to contemporary problems or whether it should remain essentially static, making only such changes as are forced upon it, leaving difficult and, in human terms, very important problems to be swept up by the Convention. I prefer evolution**.<EXT>**

A final aspect of Lord Bingham's contribution to comparative law as a judge, is in the application of foreign law as the law of the case. This covers two main categories of situations: one is where Private International Law requires the application of foreign law, and the other is in appeals from civil law jurisdictions.

We first turn to Private International Law. National law recognizes party autonomy in commercial contracts, so that parties can choose the national law that shall govern the contract. Tort claims or insurance cases are other cases where foreign law may apply, and in tort cases and many insurance cases there is no contractual provision for which jurisdiction should apply. The Commercial Court, where Lord Bingham started his judicial career, has one foreign party to most of its cases, and only foreign parties to half of them.[31] The choice of English law is usual but parties choose the jurisdiction of the Commercial Court also for contracts where they agree to apply the laws of another

[28] *Fairchild v Glenhaven Funeral Services Ltd,* [2002] UKHL 22.
[29] *Dresser UK Ltd v Falcongate Ltd* [1992] QB 502, 522.
[30] *JD (FC) (Appellant) v East Berkshire Community Health NHS Trust and others (Respondents) and two other actions (FC),* [2005] UKHL 23.
[31] See R Aikens, 'Reforming Commercial Court Procedures', above p xx.

country.[32] Cases may involve extensive evidence on foreign law, and method and legal context places great demands on the judge.

Lord Bingham has heard many appeals from civil law jurisdictions.[33] Here it is not the civil law features of Scottish law we have in mind, although that too may require comparative law skills. In the Privy Council, Lord Bingham has for instance heard a number of appeals where *Code Napoleon* inspired statutes have been the decisive source of law.

Gujadhur v Gujadhur from the Court of Appeal of Mauritius[34] illustrates the challenges. Both procedural and substantive questions depended on Mauritian legislation based on French models (and limitation rules adopted from the Code of Quebec). The case concerned the beneficial ownership of shares, and the law on 'caducité' could determine the outcome. This is a technical expression of French law which refers in general terms to a juridical act which has ceased to have effect by reason of some subsequent event. There is no single English equivalent. The question was whether the *contre-lettre* establishing the beneficiary ownership ('contrary' to the registered ownership) had become *caduque*. In addition to dealing with Mauritian legislation and case law, Lord Bingham referred to article 1321 of the French Code Civile, applied French case law (a decision by the Cour d'appel de Paris) and sought assistance in French doctrine.

We have here looked at Lord Bingham's contribution to comparative law at several levels. Summing up, it is not surprising that his judgments are comparative law sources, as persuasive authority, all over the world. Lord Bingham has strengthened the judicial dialogues that have become a feature of our legal systems. We have just pointed to some experiences of a Law Lord that can explain, legitimate and provide experience in the use of foreign law. We showed how Lord Bingham's judicial work required the application of foreign law in many cases. We pointed to the private

[32] See the discussion in L Collins, 'Tom Bingham and the Choice of Law', above p xx.
[33] Also other European supreme courts hear cases of a similar character, e.g., from jurisdictions within the country which apply the law of other countries or traditions, and the US Supreme Court is the federal supreme court of states with laws deriving from non common law traditions.
[34] *Ghaneshwar Gujadhur, Lajpati Gujadhur, Rajkumar Gujadhur, Sheoshankar Gujadhur and Dimeshwar Gujadhur (Appellants) v Gunness Gujadhur and Sewpearee Singh* (Respondents) [2007] UKPC 54.

international law cases of the Commercial Court, and the Privy Council cases from civil law jurisdictions, which require the use of 'foreign' law, and with it, its methods and wider legal contexts. There is no approach or technique that can save the judge from this. The use of European Union law and European human rights law is similar. It requires that the judge moves beyond the national tradition, and its method, in which he is trained. There is considerable variation between judges, and one of Lord Bingham's contributions here is in his clear and convincing analysis of the sources from other legal orders. He looks at the different legal orders with respect and from the inside. It is not a matter of distinguishing or limiting the case law of other legal orders so that they have no effect on the common law. This is also a matter of reciprocity, and gaining the respect and confidence can be important. Lord Bingham's judgment in *Boyd*,[35] as discussed above, provides an instructive example. He combined his analysis of the case law of the Human Rights Court on independence and impartiality, and of the new UK legislation, convincing a unanimous Grand Chamber European Human Rights Court in *Cooper*[36] to overturn its previous *Morris* ruling. Even more important is Lord Bingham's willingness to make use of European human rights law to develop the common law concepts. As the case law of the European Human Rights Court or the European Union Court of Justice does not belong to a separate system of law but is part of English law, there is in Lord Bingham's view a strong case for using it in the development of the common law. Under certain circumstances that can apply beyond European human rights law and European Union law, and to foreign law as developed in other national jurisdiction and by their national courts. We have pointed to Lord Bingham's pioneer judgments here, and will now turn to a more general discussion of comparative law in the courts which will assist in a fuller appreciation of Lord Bingham's contribution.

III. Comparative law and dialogues between courts<H/1>

Courts make use of comparative law, and make open reference to it, to an unprecedented extent. This *Liber Amicorum* provides many different complementary perspectives, in particular on this topic, and much material from many areas. There are

[35] *Boyd, Hastie and Spear Saunby and Others* [2002] UKHL 31.
[36] *Cooper v the United Kingdom*, (2004) 39 EHRR 8.

different reasons for the new and important role of comparative law. We will enquire into some of them. The conclusions of our enquiry concern the consequences this development has had for the system of sources of law and for legal argument. They also point to the role that courts are playing in a legal system no longer adhering to 20th century positivist and national paradigms, and not restricted in the same way as before by traditional national doctrines of statutory interpretation or precedent. In the new more open legal systems, it is left to courts to weigh and balance ever more complex sources of law. The courts will also have competing claims to legitimacy. The sources of law may still be supported on a unitary, nationally based, rule of recognition. But the way in which courts deal with the more complex issues of validity of norms and their hierarchy, has one outcome. That is an opening up of the legal system, mainly through the recognition of sources of law from outside the traditionally closed national system.

Comparative law has become a source of law. Comparative law also offers assistance with many of the new issues of method that courts have to resolve in the more open legal systems. The first issue is: how does one deal with comparative law? When is it relevant, what weight should it have, how does one sort out the many practical problems that arise? Comparative law can also assist courts in dealing with other fundamental issues such as international law, European law, their relationship with national law, or for that matter, the relationship of courts with the legislatures as parliamentary supremacy (in the sense of the national legislature's supremacy) is eroded.

Comparative law is itself one of several new types of challenges that courts have to deal with. A situation with sources of law with competing claims to legitimacy, leaves a whole set of issues to be determined by the courts.[37] The traditional form of a unitary rule of recognition (if it ever applied fully anywhere)[38] kept the picture simple. The

[37] What Hart termed the 'secondary rules', representing the constitutional arrangements of any particular society, are undergoing fundamental change. The 'primary rules' are also changing in a way that reflects the change of the secondary rules, developing rights of individuals, harmonizing the laws of European countries over a very wide field etc. See H L A Hart, *Concept of Law* (OUP Oxford 1961) 151 about 'secondary rules'.

[38] See the brief setting out of the case against a universal rule of recognition, or Austin's illimitable and indivisible sovereign, or traditional statehood concepts, in M Andenas and J Gardner 'Introduction: Can Europe have a Constitution' in (2000) 11 KCLJ 1.

possible recourse to a clear hierarchy, resolving conflicts between norms, seemed to leave the major issues for determination by the legislature. The present, more complex constitutional systems of validity of norms and their hierarchy, leave courts with many new issues. There are certain constitutional issues that traditionally have been left to practice. On the macro level, this applies to the relationship between legal orders. On the micro level, it applies to remedies protecting private parties against the state. These are issues that have come to the fore in most jurisdictions, with courts rapidly developing the law. The macro level developments include for instance the role of international and European law in national law, or the role of the case law of one international court before another international court. At the micro level, examples are the intensity of judicial review of administrative action and of legislation, tort liability of administrative authorities, and injunctive remedies against the state.

This opens up for the use of and increases the utility of comparative law. It is not surprising that courts are to an increasing degree involved in dialogues with one another across the traditional jurisdictional divides. A horizontal exchange between national courts is becoming active, both on an informal level with meetings and systems for the provision of information. At another horizontal level, international courts and tribunals, including the International Court of Justice, the European Human Rights Court and the European Court of Justice, are involved in dialogues with one another.[39] At a vertical level, the dialogues between the international and national courts are developing and are also formally recognized in a way they were not a few years ago. One may talk about an international market place for judgments,[40] where the form of judgments may be influenced by the accessibility and increased use of comparative law.[41]

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[39] There is an increasing literature taking account of this dialogue, and Anne–Marie Slaughter has been a pioneer in studying its role and placing it in a broader context, in particular as seen from a US perspective, see A-M Slaughter, 'A Typology of Transjudicial Communication' 20 *University of Richmond Law Review* 99 (1994) and A-M Slaughter, *New International Order* (2005);. Judicial dialogue is a main theme of the introduction and several of the articles in G Canivet, M Andenas and D Fairgrieve (eds), *Comparative Law before the Courts* (BIICL London 2004).

[40] See Lord Rodger, 'The Form and Language of Judicial Opinion' (2002) 118 LQR 226, 247 and Lord Goff of Chieveley, 'The Future of the Common Law (1997) 46 ICLQ 745, 756–7 on the accessible form of common law judgments. M Adams, J Bomhoff and N Huls (eds), *The Legitimacy of Highest Courts' Rulings* (The Hague: Asser Press, 2008) provide important contributions to this analysis.

[41] There is an increasing access to foreign court judgments and other legal sources in the citations made by courts and in legal scholarship. The court web sites that provide translations of important judgments are increasing in number and quality.

The constitutional role of the courts has developed in practically all jurisdictions. Judicial review of administrative action is more intense, and practically no field is exempt where previously there would have been many formal or functional immunities.[42] Court review of parliamentary legislation is also becoming more intensive, whether it is based on domestic law, 'constitutionnalité', or European or international law, 'conventionnalité'. The increased constitutional role of courts is a universal feature. The dynamic way in which comparative law is used, is only one of several developments, providing tools for, and legitimacy to, the development. <H/1>

IV. The use of foreign judgments in supreme courts<H/1>

English courts have long been open to consider how legal problems are solved in other jurisdictions. Lord Cooke of Thorndon has stated that 'the common law of England is becoming gradually less English. International influences— from Europe, the Commonwealth and even the United States, sometimes themselves pulling in different directions— are gradually acquiring more and more strength.'[43]

Since the 1960s, English courts have paid more and more respect to decisions by courts from other common law jurisdictions. For some 30 years many important English cases include detailed discussions of the case law of a number of the most influential common law jurisdictions, in particular of Australia and New Zealand.[44]

During the 1990s, Lord Goff of Chieveley, the Senior Law Lord, made extensive use of European materials, in particular German case law.[45] In extra judicial writings, Lord Goff, and other leading English judges, committed themselves to the use of

[42] Formal legal immunities have different standing in different traditions. Head of state or government and parliamentary immunities are still controversial and play a role in some jurisdictions. But otherwise areas of state activity, or 'vital' state interests, do not any longer merit immunities of the formal kind or the functional. In the common law, one cannot easily assert that an issue is 'not justiciable'.

[43] Lord Cooke of Thorndon 'The Road Ahead for the Common Law' see below, p xx.

[44] Some parallel may be found in the German speaking courts use of one another's decisions.

[45] In the case of *White v Jones* [1995] 2 AC 207, Lord Goff, recognizing the challenges posed by comparative law, opined that 'in the present case, thanks to material published in our language by distinguished comparatists, German as well as English, we have direct access to publications which should sufficiently dispel our ignorance of German law and so by comparison illuminate our understanding of our own.' (263).

comparative law in their judicial work.[46] Lord Woolf, while he was Master of the Rolls, said that 'there was a time when English lawyers, if they were prepared to seek help from another jurisdiction, would only look to other common law jurisdictions. This is now changing. The House of Lords and the judiciary in general now recognise that civil jurisdictions have much to offer … there is, I believe, a real process of harmonisation between the civil and common law legal systems'.[47] Lord Bingham, while he was Lord Chief Justice, said that judges in English courts were developing the practice to 'use case law from other European countries in much the same way as we use Commonwealth authorities'.[48] This was supported by numerous other judges of the highest courts.[49] Lord Bingham also observed that 'in showing a new receptiveness to the experience and learning of others, the English courts are not, I think, establishing a new tradition but reverting to an old and preferable one'.[50]

In the case law, an important breakthrough came in *Fairchild v Glenhaven Funeral Services Ltd.*[51] Lord Bingham, by then the Senior Law Lord (president of the highest United Kingdom court), conducted a comparative law survey on a point of causation which we have cited above.[52]

Lord Bingham has continued to make use of comparative materials in later cases. Comparative law assisted in determining the effect of continuing the incremental development of the common law on tort liability of public authorities in *JD v East*

[46] Lord Goff of Chieveley, 'The Future of the Common Law' (1997) 46 ICLQ 745. Lord Goff has also been a pioneer in the establishing regular meetings between senior judiciaries in different jurisdictions to discuss developments in the law of mutual interest. M Guy Canivet has in his term as the President of the French Supreme Court made an unprecedented contribution to the development of informal cooperation between courts and judges, also more formalized through associations of judges. The French Conseil d'Etat has similarly developed such exchanges over a number of years.
[47] Foreword to Steiner and Ditner, *French for Lawyers* (London 1997).
[48] Introductory speech at the launch of W V Gerven *Tort Law: Scope of Protection* (Hart Oxford 1998) in Gray's Inn, May 1998.
[49] Sir Jonathan Mance, 'Comparative Law', University of Texas Journal of International Law, forewords in Sir Basil Markesinis' books by Sir Stephen Sedley, Lord Phillips, and the book review in the ICLQ by Sir Konrad Schiemann of one of Sir Basil's books.
[50] Sir Thomas Bingham, '"There is A World Elsewhere": The Changing Perspectives of English Law' (1992) 41 ICLQ 513. Reprinted in T Bingham *The Business of Judging* (OUP Oxford 2000) 87.
[51] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32; *McFarlane v Tayside Health Board* [2000] 2 AC 59, 73 and 80-81; *Henderson v Merrett Syndicates* [1995] 2 AC 145, 184.
[52] [2002] UKHL 22, [2003] 1 A.C. 32, para 32. Lord Rodgers also observed that '[t]he Commonwealth cases were supplemented, at your Lordships' suggestion, by a certain amount of material describing the position in European legal systems… The material provides a check, from outside the common law world, that the problem identified in these appeals is genuine and is one that requires to be remedied' (para 165).

Berkshire.[53] The experience from other countries showed that floodgates were not about to open in the way that had sometimes been asserted. Lord Bingham surveys the experiences from other countries:

> <EXT>It would seem clear that the appellants' claim would not be summarily dismissed in France, where recovery depends on showing gross fault: see Markesinis, Auby, Coester-Waltjen and Deakin, *Tortious Liability of Statutory Bodies* (1999), pp 15-20; Fairgrieve, "Child Welfare and State Liability in France", in *Child Abuse Tort Claims against Public Bodies: A Comparative Law View,* ed Fairgrieve and Green (2004), pp 179-197, Fairgrieve, "Beyond Illegality: Liability for Fault in English and French Law", in *State Liability in Tort* (2003), chap 4.<EXT>

The survey also allowed Lord Bingham to consider a precedent which was in the process of being gradually overturned. Central policy considerations of that judgment had been considered and rejected in another jurisdiction:

> <EXT>Nor would they be summarily dismissed in Germany where, it is said, some of the policy considerations which influenced the House in *X v Bedfordshire* were considered by those who framed §839 of the BGB and were rejected many years ago: see Markesinis *et al., op. cit.,* 58-71.<EXT>

The conclusion on the empirical analysis was clear: 'Yet in neither of those countries have the courts been flooded with claims'.

It seems obvious that this kind of empirical and comparative analysis is much to be preferred over the bold assertions of negative consequences which have on occasion been resorted to when courts have wished to reject extensions of tort liability or of duties on public authorities.

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[53] *JD (FC) (Appellant) v East Berkshire Community Health NHS Trust and others (Respondents) and two other actions (FC)*, [2005] UKHL 23.

There have been parallel developments in many other national jurisdictions.

During his tenure as Premier Président of the French Cour de Cassation (French Supreme Court in civil and criminal matters), Guy Canivet, stated:
<EXT>

> Citizens and judges of States which share more or less similar cultures and enjoy an identical level of economic development are less and less prone to accept that situations which raise the same issues of fact will yield different results because of the difference in the rules of law to be applied. This is true in the field of bioethics, in that of economic law and liability. In all these cases, there is a trend, one might even say a strong demand, that compatible solutions are reached, regardless of the differences in the underlying applicable rules of law.[54]<EXT>

In French administrative law, foreign law sources are becoming an increasing reference point for judicial decision-making. In doctrinal terms it remains a somewhat overlooked factor.[55] In the case of *Kechichian*,[56] which concerned administrative liability for failure to supervise banks and was heard by the Plenary Chamber of the *Conseil d'Etat*, Commissaire du Gouvernement Alain Seban started his detailed and impressive *conclusions*,[57] with a survey of comparative law, covering Germany, the United States and England,[58] concluding with the remark that 'despite the different legal and administrative traditions, the same features may be found [in the three systems].' Noting the English courts' tendency to broaden the tort of misfeasance in public office,[59] the Commissaire du Gouvernement concluded that the comparative law survey highlighted the 'liberalism of French administrative law.'

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[54] In an address at the British Institute in November 2001 under the chairmanship of Lord Bingham. He has developed the analysis in 'The Use of Comparative Law Before the French Private Law Courts' in G Canivet, M Andenas and D Fairgrieve (eds), *Comparative Law before the Courts* (BIICL London 2004) 181.

[55] One could expect doctrine to provide this kind of comparative material that courts find useful in their decision– making. In fact, it is the courts that lead the way. It is for doctrine to follow in the countries that we have studied.

[56] See further discussion of this case in D Fairgrieve, *State Liability in Tort* (OUP Oxford 2003) ch 4, s 3.2.1.2. See also M Andenas and D Fairgrieve, 'Misfeasance in Public Office, Governmental Liability and European Influences' (2002) 51 ICLQ 757.

[57] The court subsequently adopted the solution which *CG* Seban proposed in his *conclusions*.

[58] Including an analysis of the most recent House of Lords decision in *Three Rivers DC v Bank of England* [2001] UKHL 16.

[59] See further ch 4, s 2.2.1.

Similarly, in two decisions concerning wrongful life actions[60] brought independently before the *Conseil d'Etat* and *Cour de Cassation*, both courts were referred to comparative law solutions respectively in the *conclusions* of Commissaire du Gouvernement Pécresse,[61] and Avocat Général Sainte-Rose.[62]

The *Conseil d'Etat* has had the first occasion for this court to expressly cite a foreign judgment of a national court in its own decision. In the case of *Techna SA*,[63] the *Conseil d'Etat* made reference to a decision by the English High Court concerning labelling requirement under EU law, and held that the relevant European directive should be suspended in France. It explicitly cited the English case as support in giving the reasons underpinning the need to suspend the directive.[64]

Several other European jurisdictions provide parallels. The German *Bundesgerichtshof* makes use of decisions by other national and international courts, and cites them expressly, often making use of the academic literature. That also applies to the German *Bundesverfassungsgericht*. Foreign law is sometimes recognized in the interpretation of provisions of Dutch law in the opinion of Advocates General, but rarely in the judgment itself.[65] Express references to foreign law do not occur in the general Spanish courts, and some judges accredit this to Spanish fascism and isolationism and prescribe the use of foreign law as a remedy against this experience.[66] Judges of Italian courts would informally acknowledge their use of comparative law but previously not expressly refer to foreign law or court judgments.[67] In a 2007 judgment on the termination of life of individuals in a

[60] Parallel cases came before supreme, administrative and constitutional courts in many countries. Courts were aware of the decisions of courts in other jurisdictions, and made use of them, even in the courts where there is no tradition of acknowledging such use.
[61] CE 14 February 1997, *Epoux Quarez*, RFDA 1997.375, 379-380.
[62] Cass Ass Plen 17 November 2000, *Perruche, Gazette du Palais*, 24-25 Jan 2001; D 2001 *Jurisprudence* 316.
[63] N° 260768 *Techna SA* 29 Oct 2003.
[64] R Errera, 'The Use of Comparative Law Before the French Administrative Law Courts' in G Canivet, M Andenas and D Fairgrieve (eds), *Comparative Law before the Courts* (BIICL London 2004) 153.
[65] A S Hartkamp, 'Comparative Law Before the Dutch Courts' in G Canivet, M Andenas and D Fairgrieve (eds), *Comparative Law before the Courts* (BIICL London 2004) 229 at 231–2.
[66] J M Canivell, 'Comparative Law Before the Spanish Courts' in G Canivet, M Andenas and D Fairgrieve (eds), *Comparative Law before the Courts* (BIICL London 2004) 209 at 216.
[67] A Sandulli, 'Comparative Law Before the Italian Public Law Courts' in G Canivet, M Andenas and D Fairgrieve (eds), *Comparative Law before the Courts* (BIICL London 2004) 165. Sandulli explains

vegetative state, the Italian *Corte di cassazione* cites the draft EU Constitutional Treaty, the case law of the European Court of Human Rights, the House of Lords, the *Bundesgerichtshof*, and the Supreme Court of the United States and several state supreme courts.[68] The only individual judge referred to is Lord Goff in the *Bland* case:[69] because the argument was 'particolarmente articolata nel parere di Lord Goff of Chieveley'. In the subsequent decision of the *Corte costituzionale*, reference is made to the international conventions and the case law of the European Court of Human Rights, also cited by the *Corte di cassazione*. There is however no reference made to the different national supreme court decisions cited by the *Corte di cassazione*.

The tradition of transnational jurisprudence is growing in strength and in the controversy it attracts in the United States. We have already cited Justice Breyer's address to the 2003 annual meeting of the American Society of International Law marks this important development.[70] He said there that 'comparative analysis emphatically is relevant to the task of interpreting constitutions and human rights'. He continued that nothing could be 'more exciting for an academic, practitioner or judge than the global legal enterprise that is now upon us'.[71]

Justice Breyer has indeed made use of comparative law and commented upon it in several judgments. In *Knight v Florida* he stated that the 'Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances'.[72] In *Printz v United States* he went into some further detail:

> <EXT>Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own … But their experience may nevertheless cast an

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that it this the autonomy of national law and constitution which will bare the Italian courts, and the Corte costituzionale in particular, from citing judgments from foreign courts.

[68] Sentenza n. 21748 del 16 ottobre 2007 (Sezione Prima Civile, Presidente M. G. Luccioli, Relatore A. Giusti).

[69] *Airedale NHS Trust v Bland* [1993] AC 789.

[70] S Breyer, 'Keynote Address' (2003) 97 *ASIL Proceedings* 265.

[71] See also S Breyer, 'Economic Reasoning and Judicial Review', above in this *Liber Amicorum*.

[72] 528 US 990, 997 (1999).

> empirical light on the consequences of different solutions to a common legal problem— in this case the problems of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity.[73] <EXT>

In *Lawrence et al v Texas*[74] the use of foreign law makes a notable break-through. In this case the majority overruled an earlier Supreme Court decision in *Bowers v Hardwick*[75] which had upheld Georgia's sodomy law as constitutional. For the first time the court (as individual justices such as Kennedy himself had previously done) relied on international human rights law and practice. Justice Kennedy observed:

> <EXT>When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and private spheres. The central holding of *Bowers* has been brought into question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.<EXT>

'The sweeping references' in the majority opinion by Chief Justice Burger in *Bowers,* to the history of Western civilization and to Judeo-Christian moral and ethical standards, provided a particular justification to take account of other authorities pointing in an opposite direction. Justice Kennedy refers to the United Kingdom *Wolfenden Report* (1963) and the subsequent law reform, decriminalizing homosexuality.[76]

Justice Kennedy then refers to the case law of the European Court of Human Rights:

> <EXT>Of even more importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual

[73] 521 US 898, 921 (1997).
[74] 539 US 558 (2003).
[75] 478 US 186 (1986).
[76] *The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution* (HMSO London 1963) and the Sexual Offences Act 1967, §1.

> conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. *Dudgeon v United Kingdom*, 45 Eur. Ct. H. R. (1981). Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.<EXT>

Justice Kennedy completes his use of comparative law by investigating how *Bowers* had been received in other jurisdictions:

> <EXT>To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v United Kingdom*. See *P. G. & J. H. v United Kingdom*, App. No. 00044787/98, (Eur. Ct. H. R., Sept. 25, 2001); *Modinos v Cyprus*, 259 Eur. Ct. H. R. (1993); *Norris v Ireland*, 142 Eur. Ct. H. R. (1988). Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. See Brief for Mary Robinson et al. as Amici Curiae 11—12. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.<EXT>

In *Lawrence*, also Justice Scalia found occasion to express his views on foreign law. Justice Scalia, in the minority with Chief Justice Rehnquist[77] and Justice Thomas, said that the majority had signed up to what he called the homosexual agenda. He observed:

[77] Chief Justice Rehnquist has also expressed different views. In a 1989 speech he stated that 'Now that constitutional law is solidly grounded in so many countries, it is time that the United States Courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.' W H Rehnquist, 'Constitutional Court – Comparative Remarks' (1989), reprinted in P Kirchhof and D P Kommers (eds) *Germany and Its Basic Law: Past, Present and Future* (1993)

> <EXT>The court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is . . . meaningless dicta. Dangerous dicta, however, since this court . . . should not impose foreign moods, fads, or fashions on Americans.<EXT>

However, it has been pointed out by Harold Koh that 'Justice Scalia himself has been far from consistent in insisting upon the irrelevance of foreign and international law.'[78] Justice Scalia too has looked to other jurisdictions when they offered support, in Scalia's case for limiting constitutional rights.[79]

In his minority opinion in *Roper*, Justice Scalia continues his attack on the use of foreign law: 'to invoke alien law when it agrees with one's thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry.'[80] Consistency is often a problem, as Harold Koh makes clear. It is not surprising that both those in favour and those against the use of comparative law in the courts will require consistency. It can serve as an argument for *less use* of comparative law (Scalia J), but also as an argument for *more extensive use* of comparative law.

Sir Basil Markesinis has used the consistency argument in support of further use of comparative law. Sir Basil argues that a judge using comparative law in one case, should not in a similar case disregard it without telling his audience why in this newer case the foreign experience was of no relevance. And where one judge mentions foreign law, other judges who come to another result than that the first judge supported on comparative law, the other judges should try and counter in a specific manner this material rather than pass it by in silence.[81] The form of giving reasons in judgments, may allow judges making use of the same authorities or sources of law, and legal and factual arguments, and then reaching different conclusions. In many cases this will be done without making clear why, for instance the appellate court disagrees with the first instance court, or one judge with another in the same court. Judgments may also include or exclude sources or arguments, and the discretion may be perceived to be

[78] H H Koh 'International Law as Part of Our Law' AJIL 43, 47 (2004). See also H H Koh 'Foreword: On American Exceptionalism' Stanford Law Review 55 (2003).
[79] See *McIntyre v Ohio Election Commission* 514 US 334, 381 (1995).
[80] *Roper v Simmons*, 543 US 551, 627 (2005) (Scalia J, dissenting).
[81] B Markesinis, Judicial Mentality: Mental Disposition or Outlook as a Factor Impeding Recourse to Foreign Law, 80 TUL LREV 1325 (2006) at 1361–62 and at 1371.

particularly wide when one is dealing with merely persuasive and non binding authorities or arguments. This may lead to inconsistencies which are unsatisfactory in many instances. At a stage where comparative law provide mostly persuasive and non binding authorities or arguments, this will often mean that the courts or judges who do not find support in comparative law for their preferred outcome, will disregard comparative law arguments in their reasons. It is difficult to disagree with Sir Basil's call for more consistency. In particular, the call for consistency is powerful in cases where one judge mentions foreign law. Reasonable consistency requires that other judges who come to a different result from that the first judge supported on comparative law, addresses and counter in a specific manner also the first judge's arguments based on comparative law.

We have above discussed Justice Kennedy's majority opinion in *Roper*.[82] Justice Kennedy states that international and comparative law provides 'respected and significant confirmation' while not controlling the outcome. It does not lessen the 'fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.' This builds on Justice Breyer's opinions in *Knight* and *Printz*. It is a cautious continuation of the line of comparative judgments. However, *Roper*, and Justice Scalia's minority opinion there, highlights the problems of making use of comparative law as a supernumerary argument.

Roper is interesting also for the middle position of Justice O'Connor. She disagreed with the majority but still recognized the relevance of foreign law (even if it did not determine the outcome in her view), and thus satisfying the requirements of Sir Basil Markesinis. When Justice O'Connor turns to the discussion of foreign and international law, she recognized that it, 'without question', has been a global trend toward abolishing capital punishment for under-18 offenders: 'very few, if any, countries other than the United States now permit this practice in law or in fact'. She then turns to how the majority find confirmation for its own conclusions in foreign law. As she disagrees

[82] *Roper v Simmons* 543 U S 551 (2005).

on these conclusions, she 'can assign no such confirmatory role to the international consensus'.

Justice O'Connor then provides us with a clear dictum on the role of comparative law:

> <EXT>Nevertheless, I disagree with Justice Scalia's contention, post, at 15—22 (dissenting opinion), that foreign and international law have no place in our Eighth Amendment jurisprudence. Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency. See Atkins, 536 U.S., at 317, n. 21; Thompson, 487 U.S., at 830—831, and n. 31 (plurality opinion); Enmund, 458 U.S., at 796—797, n. 22; Coker, 433 U.S., at 596, n. 10 (plurality opinion); Trop, 356 U.S., at 102—103 (plurality opinion). This inquiry reflects the special character of the Eighth Amendment, which, as the Court has long held, draws its meaning directly from the maturing values of civilized society. Obviously, American law is distinctive in many respects, not least where the specific provisions of our Constitution and the history of its exposition so dictate. Cf. post, at 18—19 (Scalia, J., dissenting) (discussing distinctively American rules of law related to the Fourth Amendment and the Establishment Clause). But this Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement—expressed in international law or in the domestic laws of individual countries—that a particular form of punishment is inconsistent with fundamental human rights. At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus. The instant case presents no such domestic consensus, however, and the recent emergence of an otherwise global consensus does not alter that basic fact.<EXT>

International and foreign law has been a recurring theme at the confirmation hearings of US Supreme Court justices. Chief Justice Roberts stated at his 2005 Senate confirmation hearings that 'If we are relying on a decision from a German judge about

what our constitution means, no president accountable to the people appointed that judge and no senate accountable to the people confirmed that judge. And yet he's playing a role in shaping the law that binds the people in this country'.[83] Justice Alito said at his 2006 confirmation hearings that 'I think the framers would be stunned by the idea that the Bill of Rights is to be interpreted by taking a poll of the countries of the world.'[84]

The Supreme Court of the United States is much cited internationally. It has had a notable impact on the constitutional law of most jurisdictions, in particular through its due process and freedom of press jurisprudence. Guido Calabresi, sitting as a judge of the Second Circuit of the US Court of Appeals in *US v Manuel Then*, cited the German and Italian constitutional courts and added that 'these countries are our "constitutional offspring", and how they have dealt with problems analogous to ours can be very useful to us when we face difficult constitutional issues. Wise parents do not hesitate to learn from their children.'[85]

Justice Sandra Day O'Connor has also extra-judicially restated her support for the use of comparative law. She has stated that 'I suspect that with time we will rely increasingly on international and foreign law in resolving what now appear to be domestic issues. Doing so may not only enrich our own country's decisions; it will create that all-important good impression. When U.S. courts are seen to be cognizant of other judicial systems, our ability to act as a rule-of-law model for other nations will be enhanced.'[86]

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[83] Committee on the Judiciary US Senate. *Confirmation hearing on the nomination of John G. Roberts, Jr. to be chief justice of the United States*. In: S.Hrg.109-158. 109th Cong. 1st Sess. (2005) Washington, DC: U.S. Government Printing Office.

[84] Committee on the Judiciary US Senate. *Confirmation hearing on the nomination of Samuel A. Alito, Jr. to be an associate justice of the United States*. In: S. Hrg. 109-277. 109th Cong. 2nd Sess. (2006) Washington, DC: U.S. Government Printing Office. S G Calabresi '"A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law' 86 BOSTON U L REV 1335 (2006) sets out the case against using foreign law in the Federalist Society tradition that these two judges belong to.

[85] *US v Manuel Then*, 2nd Circuit, 56 F.3d 464 (1995).

[86] Remarks by Sandra Day O'Connor Southern Center for International Studies, Atlanta, Georgia,October 28, 2003, at< http://southerncenter.org/OConnor_transcript.pdf>.

Aharon Barak, then the Chief Justice of the Supreme Court of Israel, criticised in 2002 the position of US Supreme Court justices who did not cite foreign judgments: 'They fail to make use of an important source of inspiration, one that enriches legal thinking, makes law more creative, and strengthens the democratic ties and foundations of different legal systems.' Partly as a consequence, the United States Supreme Court 'is losing the central role it once had among courts in modern democracies'.[87]
<H/1>

V. Foreign Law<H/1>

We have discussed Lord Bingham's contribution to comparative law in the application of foreign law as the law of the case. Other supreme courts hear cases where Private International Law requires the application of foreign law. Just as the Law Lords hear appeals from civil law jurisdictions, several other European supreme courts hear cases from jurisdictions within the country which apply the law of other countries or traditions, and the US Supreme Court will hear cases as the federal supreme court of states with laws deriving from non common law traditions.

This has long traditions. Before the 19th century nation state, courts would in most countries regularly apply another law than the local law. In the British Empire, the Privy Council, as a centralized court of last instance, applied the laws of a much large number of jurisdictions than it does today.

Private International Law has a new importance in a globalized economy where the trans-national contract is no longer an extraordinary occurrence. The courts will as a consequence be ever more strongly exposed to foreign law. The application of judgments from other jurisdictions is also for this reason becoming more usual. There are similarities in the use of law from European or international law jurisdictions, as we turn to below in the next subsection about indirect entry points for judgments of other jurisdictions. Each time a court deals with European Union law, European human rights law, World Trade Law, international human rights law or the law of any other treaty regime, that court has to apply the legal method of the other jurisdiction, and

[87] A Barak, 'Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy' 116 Harvard L. Rev. (2002) 16, at 158.

consider the legal questions in their correct context, which could be of a wider legal order or of a more narrow and self-contained treaty regime.

One may draw certain conclusions about courts' ability to deal with comparative law from this. The hermeneutical and epistemological challenges to the legal method are considerable where foreign law has to be applied as the law of the case, and not less so in than in the other instances where courts use comparative law to develop the law of their jurisdiction.

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VI. Some indirect entry points for judgments from other jurisdictions<H/1>

We can complement the analysis with the several new indirect entry points for judgments of other jurisdictions. Some of these are new or have increased in importance in recent years. The emergence of international human rights standards, the European Convention of Human Rights and the European Union are important such entry points. Already in *Bulmer v Bullinger*,[88] Lord Denning cites judgments of German and Dutch courts on the application of Article 234 EC on references from national courts to the European Court of Justice.[89] This, as we discuss elsewhere in this chapter, is not something the European Court of Justice would have done, not recognising the practice of national courts as a source of European Union law.

In our own work on tort liability of public authorities we have analysed how the application of the law of the European Convention of Human Rights and the European Union provide indirect entry points for judgments from other jurisdictions.[90] We have noted the influence of European Community law, which has both focused attention upon the illegality-fault relationship in English law,[91] and provided an example of alternative ingredients for determining state liability, most

[88] [1974] Ch 401.
[89] See also Lord Goff of Chieveley 'The Future of the Common Law (1997) 46 ICLQ 745, 757 on the use of a French judgment to determine whether a question was *acte claire* under the Art 234 EC procedure.
[90] M Andenas and D Fairgrieve, 'Misfeasance in Public Office, Governmental Liability and European Influences' (2002) 51 ICLQ 757.
[91] See D Fairgrieve, *State Liability in Tort* (OUP Oxford 2003) ch 3, s 3.3.1.

notably with the 'sufficient seriousness' test.[92] It is interesting to note that not only have the courts adopted the Community law test for state liability with equanimity, avoiding the protectionist language that has often marked the domestic law, but the application of Community law has also led certain judges to go through remarkable metamorphoses. This is illustrated by Lord Hoffmann's views on state liability. In the well-known case of *Stovin v Wise*,[93] Lord Hoffmann was in a restrictive frame of mind regarding the conditions of public authority liability. This case concerned an allegedly negligent failure of a local authority to exercise a statutory power to direct a private landowner to remove an obstruction from his land in order to improve visibility at a dangerous road junction. In rejecting the claim, Lord Hoffmann held that 'the trend of authorities has been to discourage the assumption that anyone who suffers loss is prima facie entitled to compensation from a person (preferably insured or a public authority) whose act or omission can be said to have caused it. The default position is that he is not.'[94] He later described *Stovin* as one of an established line of cases denying financial compensation for claimants who had failed to receive a benefit from public services.[95]

In a different case, looking again at the topic of state liability but this time through the lenses of Community law, Lord Hoffmann was in more liberal mode. When the *Factortame* litigation returned to the House of Lords on the issue of liability for damages, he upheld the lower court's decision that the enactment of the Merchant Shipping Act 1988 constituted a sufficiently serious breach of Community law.[96] In a crucial part of his judgment, Lord Hoffmann declared that 'I do not think that the United Kingdom....can say that the losses caused by the legislation should lie where they fell. Justice requires that the wrong should be made good.'[97]

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[92] P Craig, 'The Domestic Liability of Public Authorities in Damages: Lessons from the European Community?' in J Beatson and T Tridimas, *New Directions in European Public Law* (Oxford, 1998). See ch 4, s 2.2.3. See generally W V Gerven, J Lever and P Larouche *Tort Law* (Oxford 2000) ch 9.
[93] [1996] AC 923.
[94] Ibid, 949.
[95] 'Human Rights and the House of Lords' (1999) 62 MLR 159, 163.
[96] *R v Secretary of State for Transport ex p Factortame Ltd (No 5)* [2000] 1 AC 524.
[97] At 548.

In the United Kingdom,[98] another avenue for the introduction of comparative law influences, and perhaps even the changing of mindsets, is the Human Rights Act 1998. The jurisprudence of the European Human Rights Court has clearly been influenced by civil law systems. This can be seen in various fields, including the articulation of the rules concerning just satisfaction. In terms of loss the European Human Rights Court has, in contrast with English law, made monetary awards for a wide variety of non-pecuniary loss, as well as taking a broad approach to the recovery of pure economic loss, and lost chances.[99] In its apparently open attitude to the heads of loss for which compensation can be awarded, the European Human Rights Court is probably closer to the French law tradition[100] than the common law. In formulating the rules governing damages under the HRA, the English courts must take account of this more liberal attitude.[101] In turn, this might well prompt a more general re-evaluation of the present stance of the courts in respect of pure economic loss and moral damage in light of practice under the HRA, through the first-hand application of concepts shaped by foreign law influences. In a broader sense, it has been argued that the HRA is challenging orthodox common law philosophy of state liability, with the introduction of a rights-based approach, rather than the traditional focus on defining tortuous wrongs by reference to duties,[102] and not rights.[103]
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VII. European and international courts<H/1>

Comparative law has also been given formal recognition in the case law of the European Court of Justice and the European Court of Human Rights. The approach is generally that 'autonomous' concepts are developed but they are building on national law.

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[98] An interesting study of the French experience is in O Dutheillet da Lamothe, 'European Law and the French Constitutional Council' in G Canivet, M Andenas and D Fairgrieve (eds), *Comparative Law before the Courts* (BIICL London 2004) 91.
[99] See e.g., *Allenet de Ribemont v France* (1995) 20 EHRR 557 (compensation inter alia for loss of business opportunities); *Pine Valley Developments Ltd v Ireland* (1993) 16 EHRR 379 (loss of value in land).
[100] J Bell, S Boyron and Whittaker *Principles of French Law* (Oxford 1998) 393.
[101] S 8(4) HRA.
[102] See e.g., N McBride and R. Bagshaw *Tort Law* (London 2001) ch 1.
[103] See T Hickman 'Tort Law, Public Authorities and the Human Rights Act 1998' in D Fairgrieve, M Andenas and J Bell, *Tort Liability of Public Authorities in Comparative Perspective* (BIICL London 2002).

Article 288 EC Treaty on tort liability of European Community institutions supports this approach. It states that 'in the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties'. In many instances the Court of Justice will refer to the 'legal traditions ', the 'constitutional traditions ',[104] the 'legal orders ', the 'legal notions ' or the 'legal principles ' common to 'all ' Member States or, at least, to 'several ' Member States. The Court may be supported by comparative surveys and analysis in the opinions for the Advocate General and in submissions by the Commission or other parties.[105] When the rule of EU law is established, the link back to the national jurisdictions is broken. The Court of Justice from then on relies on EU legal sources only. In general, there is very rarely any material about the national courts' application of Community law. The interest is limited to their practice on national law. The Court rarely cites doctrine, and internal court guidelines attempts to restrict this also in the opinions of advocates general.[106]

There are developments also in the European Court of Justice. In 2006, Advocate General Maduro in his Opinion in *Fenin*[107] makes use of the practice of several national courts on matters of EU competition law.

The relationship between the European Court of Justice and the European Court of Human Rights is another issue. The Court of Justice initially followed its general line and did not cite decisions by the European Court of Human Rights. Several Advocates General referred to decisions by the European Court of Human Rights before the Court of Justice itself in *Familiapress*[108] expressly followed the

[104] Which is used in the EU Charter of Human Rights and in the texts of the Treaty on the EU Constitution and the Lisbon Treaty.
[105] K Lenaerts 'Interlocking Legal Orders in the European Union and Comparative Law' in G Canivet, M Andenas and D Fairgrieve (eds), *Comparative Law before the Courts* (BIICL London 2004). See also W V Gerven, 'The Emergence of A Common European Law in the Area of Tort Law: The EU Contribution' in D Fairgrieve, M Andenas and J Bell, *Tort Liability of Public Authorities* (British Institute of International and Comparative Law London 2002) 125. The Court will also regularly be supported by surveys by its own research and documentation service.
[106] This is justified by resource reasons: it affects the length of the texts that are to be translated into ever more languages.
[107] Case C-205/03 P *Fenin* [2006] ECR I-06295.
[108] Case C/368/95 *Familiapress* [1997] ECR I-3689, para 26.

conclusions of the Court of Human Rights in *Lentia*[109] and in *Criminal Proceeding v X*[110] where the Court of Justice mentioned the interpretation of the Court of Human Rights in *Kokkinakis v Greece*.[111]

The European Court of Human Rights goes further, and it cites national case law on the European Human Rights Convention.[112] It cites decisions from international courts and tribunals (including the European Court of Justice[113]), and of other international bodies and committees. The United Nations Human Rights Committee has a special position in the UN human rights system, and the European Human Rights Courts has in a number of cases cited and taken due account of the Human Rights Committee's decisions.[114] There are interesting examples of dialogues with national courts in the Human Rights Court's recent practice.[115] Above, we have discussed *Cooper*,[116] where a unanimous Grand Chamber European Human Rights

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[109] *Lentia* ECHR (1994) 17 EHRR 93.
[110] Case C-129/95 *Criminal Proceedings v X* [1996] ECR I-6609.
[111] *Kokkinakis v Greece* (1994) 17 EHRR 297.
[112] The ECtHR also makes use of comparative law in determining the national margin of appreciation, and in some recent judgments undertake broader surveys under the heading 'Comparative Law', see eg *TV Vest AS & Rogaland Pensjonistpart v Norway* (Application no. 21132/05) Judgment 11 December 2008, where it recognises that the absence of a European consensus is relevant when considering the national margin of appreciation. This case also provides an interesting instance of a national judge arguing in a way which finds favour with the ECtHR, and his proportionality discussion lending support to the finding of a violation by the ECtHR. Many of the important judgments of the ECtHR have been decided with the assistance of surveys of national law, eg. *Lingens* (1986) 8 EHRR 407, but previously the references to such surveys were not made as expressly or at least not so extensively as they are today.
[113] In *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* (2006) 42 EHRR 1, the ECtHR discusses the case law of the ECJ in detail. It held that, in principle, the protection offered within the EC legal system meets a requirement of equivalency and gives rise to a 'presumption of conventionality.' In combination, the guarantees offered on the domestic level and by the ECJ, would in most cases any need for Strasbourg to intervene in the process of applying EU law.
[114] See for instance, *Kurt v Turkey* (1999) 27 EHRR 373, *Frette v France* (2002) 38 EHRR 438, *Py v France* [2005] ECHR 7, *Issa v Turkey* (2005) 41 EHRR, *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 494, *Öcalan v Turkey* (2005) 41 EHRR 985, *Riener v Bulgaria* [2006] ECHR 553, *Folgerø v Norway* (2008) 46 EHRR 47 and *Saadi v UK* (Application no. 13229/03) judgment 29 January 2008. J Sætrum has in a dissertation (not yet published, Oslo, 2009) found some 30 references to the UNHRCtte in the case law of the ECtHR. This is in fact a limited number of cases if one takes into account the many decisions of the UNHRCtee that have a direct bearing on the issues discussed by the ECtHR.

The UN Human Rights Committee cites the ECtHR much more often. This may have something to do with the recognition that the ECtHR has as a long established court. The relative reticence of the ECtHR in citing the UNHRCtee may in some part be due to the committee's lack of status as a 'court'
[115] See the studies of N Krisch 'The Open Architecture of European Human Rights Law' (2008) 71 Modern Law Review 183, and L Garlicki 'Cooperation of courts: The role of supranational jurisdictions in Europe', (2008) 6 International Journal of Constitutional Law 509.
[116] *Cooper v the United Kingdom*, (2004) 39 EHRR 8.

Court overturned a previous ruling in *Morris*, making extensive use of Lord Bingham's analysis in a House of Lords decision, and agreeing with his conclusions.[117]

Public International Law recognizes state practice as a primary source of law. This entails close study of court decisions as an expression of state practice. However, the International Court of Justice (ICJ) does not cite national court decisions or their application of public international law.[118] Neither has the ICJ traditionally cited decisions by other international tribunals. However, in *Bosnia and Herzegovina v Serbia and Montenegro* (2007), the ICJ refers to both the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). [119] Here the ICJ cites and relies on the ICTY on the intent required for the crime of genocide .[120] It also cites the ICTY and the ICTR on the requirement of 'substantiality' in establishing intent.[121]
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VIII. A short typology<H/1>

Courts function within a system of sources of legal authority. The domestic law paradigm remains strong, and the methodological problems in the use of comparative law add to the challenge. The role of comparative law remains open and controversial. It may be interesting to analyse some of the cases with a view to formulate a typology of the use of comparative law by courts. There are some clear situations that stand out

[117] *Eriksen v Norway* (1997) 29 EHRR 328 is one of several other examples where the ECtHR makes use of a national supreme court's ruling on the compliance of national law with the ECHR. Here the ECtHR cites the discussion in the Norwegian Supreme Court's ruling in Rt.1996.93, in support for rejection of the application against Norway. The form of the national judgment and the style of the argument, and also how it makes use of the ECtHR case law, and how directly it addresses the questions that are relevant for the ECtHR, are (not unsurprisingly) important for the impact it has on the ECtHR.

[118] National court decisions are often referred to in submissions to or argument before the court, and may be cited in the ICJ's references to parties' submissions. They are not referred to in the ICJ's own discussion of the law in the judgments. However, judges of the ICJ often refer to the importance that national court judgments have in the deliberations of the court. In the judgments, there are no references to academic literature (but often in the individual dissenting or concurring opinions).

[119] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Judgment of 26 February 2007, para. 88 and 198. The ICJ also refers to the European Court of Human Rights in the context of accounting for the parties' submissions but does not rely on or make any further use of these references.

[120] *Kupreškić et al.* (IT-95-16-T, Judgment, 14 January 2000, para 636.)

[121] *Krstić*, IT-98-33-A, Appeals Chamber Judgment, 19 April 2004, paras 8-11 and the cases of *Kayishema*, *Byilishema*, and *Semanza* there referred to.

in the recent case law, and many of them can be linked to important judgments by Lord Bingham.

The tentative typology is grouped into seven categories Comparative law can be provide or be used to: (1) support for a rule or an outcome, (2) normative models in comparative law where national law is undetermined, (3) review factual assumptions about the consequences of legal rules, (4) review assumptions about the universal applicability of a particular rule, (5) overturn authority in domestic law, (6) develop principles of domestic law, (7) resolve problems of the application of European and international law, including European Human Rights law.
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(1) Support for a rule or an outcome<H/2>

The existence of a solution in other jurisdictions may under certain circumstances provide persuasive arguments for that solution in one's own jurisdictions if one agrees with Lord Bingham's views on the 'virtue in uniformity of outcome' in *Fairchild*,[122] and that '(p)rocedural idiosyncracy is not (like national costume or regional cuisine) to be nurtured for its own sake' in *Dresser*.[123] See also his statement that 'it should be no easier to succeed here than in France or Germany', in *JD v East Berkshire.*[124] But where domestic sources support another rule or outcome, this kind of argument does not seem to have much weight. In practice, comparative law arguments will not often be used where domestic law is clear. There are certain particular situations such as those discussed below where comparative law carries more weight.

The discussion in the United States Supreme Court has brought out into the open a disagreement about the validity of the general assumption about the virtue of uniformity of outcome. The majority in the line of cases we have discussed above, have based their argument on there being some current connexion between US law and international and foreign law. We have above also discussed Justice Scalia's arguments about 'foreign moods, fads or fashions'. The 'US exceptionalism' has counterparts in all countries where some judges and academics will more or less openly base resistance

[122] *Fairchild v Glenhaven Funeral Services Ltd,* [2002] UKHL 22.
[123] *Dresser UK Ltd v Falcongate Ltd* [1992] QB 502, 522.
[124] *JD (FC) (Appellant) v East Berkshire Community Health NHS Trust and others (Respondents) and two other actions (FC),* [2005] UKHL 23 which is quoted more extensively below.

to comparative law on assumptions about the superiority of their own system. Justice Scalia has counterparts arguing for English, French, German, Norwegian, Icelandic or Lichtenstein superiority or exceptionalism. Empirically, claims to national superiority are difficult to assess, as are other claims to autonomy or 'separateness' of legal systems.

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(2) Normative models in comparative law where national law is undetermined<H/2>

The least complicated situation could be the one where national law does not determine any particular outcome. The judge may be looking for ways of resolving a problem, and finding no solution based on the traditional sources of law, she seeks solutions in rules or normative arguments from other jurisdictions. Here the use of comparative law takes place in a process of developing or interpreting the law without any conflict with domestic law sources. The judge is operating in a field of open discretion or 'policy'.[125] A slight variation is found where national law leaves more than one solution, and foreign law may assist in choosing between them.

Assistance in finding normative solutions to situations where one's own system has none, may be found to be useful and is not often controversial. There should not be any strong, or any at all, limitations in the national legal system where it does not proscribe any solution.

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(3) Comparative law to review factual assumptions about the consequences of legal rules<H/2>

In the development of the law in different fields, one encounters the 'floodgates' argument. A new rule is considered, for instance giving access to information held by the administration, requiring that some authority has to give reasons for their decisions, giving procedural rights or standing to groups, or giving rights to compensation for

[125] See the parallel here in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Judgment of 26 February 2007, where the ECJ cites the ICTY and the ICTR on the requirement of 'substantiality' in establishing intent, and also to the European Court of Human Rights in the context of accounting for the parties' submissions (but does not rely on or make any further use of the ECtHR references).

breach of rights. The financial, administrative or behavioural consequences are considered. Some courts will reject the new rule with an assertion that the rule will open the floodgates for claims, with disproportionate consequences of different kinds. The assertions are often made in a seemingly authoritative way. However, judgments in such cases often contain speculations about risks without much foundation.[126] There is practically always a state financial or other interest on the one side, and a particularly weak individual (dyslexic pupil, victim of sexual abuse as a minor) or public interest (environment, human rights) on the other. The acceptance of risks and the different related assertions are more based on values, and giving more weight to the interests of the state in balancing with other interests, than openly admitted to.

Sir Basil Markesinis has compared the argument of Lord Bingham and Lord Hoffmann, two of the other most active comparativists in the House of Lords, in a number of cases.[127] Lord Hoffmann has in a number of cases asserted that granting rights or remedies to disadvantaged groups will lead to the opening up of the floodgates and also have unwanted consequences of other kinds.

Lord Bingham has long rejected this kind of broad assertion. In *JD v East Berkshire,*[128] he sought recourse to comparative law in dealing with similar assertions. If a rule has been applied in another jurisdiction, and has not opened the floodgates there, the court cannot base its conclusions on assertions to the contrary. Lord Bingham deals with the matter in paragraph 49 of the judgment in *JD*. This passage is interesting also in the extensive way that academic scholarship is used and relied upon.

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(4) Review assumptions about the universal applicability of a particular rule<H/2>

[126] Jane Stapleton, 'Benefits of Comparative Tort Reasoning: Lost in Translation', above, argues that there can be reasons for basing conclusions on risk assessments, and for not requiring too much for establishing them. She also points out that the possibility for misunderstandings when courts and scholars are dealing with judgments from other common law jurisdictions is considerable. When the other jurisdiction belongs to the civil law and judgments are in another language, her view on comparative law is that it is a rather hopeless enterprise, and in particular for courts.

[127] See in particular B Markesinis and J Fedtke, 'Authority or reason? The Economic Consequences of Liability for Breach of Statutory Duty in a Comparative Perspective', (2007) EBLR 5 at 66-7, and also M Andenas (2007) EBLR 1 at 2.

[128] *JD (FC) (Appellant) v East Berkshire Community Health NHS Trust and others (Respondents) and two other actions (FC),* [2005] UKHL 23.

In *Lawrence*,[129] the use of foreign law in part refuted the claims to universality in *Bowers*[130] (which the *Lawrence* majority used in support of overturning *Bowers*). In *Bowers*, Chief Justice Burger made 'sweeping references' to the history of Western civilization and to Judeo-Christian moral and ethical standards. He did not take account of sources pointing in another direction. Legal developments in other countries could then be used to undermine the claims in *Bowers* and to overturn in.

Claims to universality may be challenged by variations in a temporal dimension (for instance in interpreting an old constitutional text), or in a jurisdictional dimension (the case law of another country or international tribunal contradicts the claim). Comparative law may have a role to play in different ways in this context, and may provide powerful arguments against the universality claims made in an authority.

Another feature of *Lawrence* is the way in which Justice Kennedy makes use of the judgment of the European Court of Human Rights in *Dudgeon v United Kingdom*.[131] Justice Kennedy points out how the European Court of Human Rights followed not *Bowers* but its own previous decision in *Dudgeon* in a number of cases after *Bowers*, and that this applies to other countries. This has consequences for the value of the fundamental freedom involved, and for the possible governmental interests in its limitation.

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(5) **Additional support to overturn authority in domestic law<H/2>**

Fairchild[132] and *Roper*[133] may be instances of this category. Both cases are based on there being 'some virtue in uniformity of outcome whatever the diversity of approach in reaching that outcome.'[134] They may express a general principle that 'if consideration of international sources suggests that a different and more acceptable decision would be

[129] 539 US 558 (2003)..
[130] 478 US 186 (1986).
[131] (1983) 5 EHRR
[132] *Fairchild v Glenhaven Funeral Services Ltd,* [2002] UKHL 22.
[133] *Roper and Simmons* 543 U. S. 551 (2005).
[134] *Fairchild*, at para 31.

given in most other jurisdictions, whatever their legal tradition, this must prompt anxious review of the decision in question'.[135]

However, in *Fairchild*, the anxious review was also prompted by the fact that the existing authority offended 'one's basic sense of justice'. In *Roper and Simmons*, Justice Kennedy makes very clear that he had sufficient support in US constitutional law for overturning the previous authority. The dissenting judges disagree between themselves on the use of international and comparative law, but Justice Scalia is highly critical of this way of claiming support for a result which the majority says is also fully supported in domestic law. We have discussed the use of this argument above.

The other view in the House of Lords, as expressed in the subsequent decision of *Barker*,[136] is interesting in that the panel's invention of a new concept of 'proportionate liability' to limit the effect of *Fairchild*, did not make use of comparative law. It was clearly policy based, in spite of the references to authority and legal principle. It protected a strong economic interest, industrial employers, over traditionally weaker applicants, dead or sick workers and their families. *Barker* was overturned by legislation. *Barker* was an 'activist' decision in the sense that it had an outcome based on the kind of reasoning and solution that judicatures typically will concede to legislatures. *Barker* satisfied many of the criteria that English courts have developed for limiting judicial decision–making, in that it concerned allocative and financial matters, social priorities and a balancing with typical political factors. In the event, it was not unsurprising that it was regarded as an exercise of political discretion that the legislature overturned. – Sir Basil Markesinis' criticism that comparative law arguments here deserved consideration, particularly in light of the role that comparative law arguments had played in *Fairchild*, which *Barker* limited, seem well supported.

As mentioned, in *Lawrence*,[137] the use of foreign law in part refuted the claims to universality in *Bowers*[138] which the majority overturned. Comparative law may provide powerful arguments against universality claims of an authority, and support for the overturning of the authority.

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[135] Ibid.
[136] *Barker v Corus (UK) plc* [2006] UKHL 20.
[137] 539 US 558 (2003)..
[138] 478 US 186 (1986).

The *Lawrence* and *Roper* line of cases has seen the use of comparative law providing support for overturning precedents to strengthen the protection of individual rights. *Fairchild* appears as a technical causation case but has a more complicated background against a case law favouring employers over employees by limiting liability in different ways, and creating a clear tension with fairness and effective remedies. It is not surprising that the disagreement about the role of precedent and comparative law, and the discussion about an American exceptionalism, have to some extent been coloured by the views on the outcome of the cases.

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(6) Develop principles of domestic law<H/2>

Comparative law can support the development of principles of domestic law. The minority opinion in *JD v East Berkshire*,[139] as discussed above, falls into this category. In this case, Lord Bingham argues for evolution of tort law, 'analogically and incrementally, so as to fashion appropriate remedies to contemporary problems'. The European Human Rights Convention, as incorporated by the Human Rights Act 1999, provides the assistance in doing so here. The alternative outcome is to leave tort law 'essentially static, making only such changes as are forced upon it, leaving difficult and, in human terms, very important problems to be swept up by the Convention.'[140]

We discuss *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*[141] under the next heading. This judgment also fits in under the present heading in that the Privy Council here used South African, Canadian, United States, Zimbabwean and German authority to develop the constitutional principles of freedom of expression and proportionality, in the constitutional law of Antigua and Barbuda.

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[139] *JD (FC) (Appellant) v East Berkshire Community Health NHS Trust and others (Respondents) and two other actions (FC),* [2005] UKHL 23. See the quotation of para 49 from this judgments, above.
[140] Unfortunately, the majority, not following Lord Bingham, did fall into an error which it will take a decade to work English law out of.
[141] *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69.

(7) Resolve problems of applying European and international law, including European Human Rights law<H/2>

In *de Freitas*, the Privy Council, drawing on South African, Canadian and Zimbabwean authority, defined the questions generally to be asked in deciding whether a measure is proportionate.[142] This formulation was built on by the parties in *Huang v Secretary of State for the Home Department*,[143] and the applicants argued in favour of an overriding requirement which featured in a judgment of the Supreme Court of Canada. Dickson CJ in *R v Oakes* had included the need to balance the interests of society with those of individuals and groups.[144] In *Huang,* the House of Lords accepts the argument,[145] and refers to having recognized as much in its previous decision of *R (Razgar) v Secretary of State for the Home Department* (in Lord Bingham's speech).[146]

This is one of a long line of decisions where the House of Lords have made use of Commonwealth authorities in the application of European Human Rights law. In particular Canada offers a relevant experience of applying constitutional protection of individual rights in a common law tradition. This may surprise in other European jurisdictions but both counsel and judges have felt comfortable with these judgments. Decisions from other European national courts have been less easily applied.

We also have an opportunity to refer to *Bulmer v Bullinger*,[147] where Lord Denning cites judgments of German and Dutch courts on the application of Article 234 EC on references from national courts to the European Court of Justice.[148]

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[142] *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, at 80. They asked whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

[143] *Huang (FC) (Respondent) v Secretary of State for the Home Department (Appellant) and Kashmiri (FC) (Appellant) v Secretary of State for the Home Department (Respondent) (Conjoined Appeals)* [2007] UKHL 11.

[144] *R v Oakes* [1986] 1 SCR 103, at p 139.

[145] In para 19, where it also refers to *de Freitas.* The judgment had the form of an 'Opinion of the Committee', and was not reported as individual 'speeches', as is the tradition. This form, and the general form and content of the opinion clearly owes much to Lord Bingham.

[146] *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368, paras 17-20, 26, 27, 60, 77.

[147] [1974] Ch 401.

[148] See also Lord Goff of Chieveley, 'The Future of the Common Law' (1997) 46 ICLQ 745, 757 on the use of a French judgment to determine whether a question was *acte claire* under the Arte 234 EC procedure.

Another example is provided by *Techna SA*.[149] As discussed above, the French *Conseil d'Etat* made reference to a decision by the English High Court concerning labelling requirements under EU law, explicitly citing an English case in support of suspending a directive.[150]

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a. Some conclusions<H/2>

We have looked at some situations where courts make use of comparative law. They illustrate how comparative law is used in a context where domestic law paradigms remain strong. The cases and the typology illustrate some of the many methodological problems in the use of comparative law in the courts. There are cases which reflect a general recognition of comparative law as a persuasive authority or source of law. There are more and perhaps clearer cases of applying normative models from comparative law where national law is undetermined. There are clear cases where comparative law has been given weight, reviewing factual assumptions about the consequences of legal rules, or assumptions about universal applicability of rules or principles. Arguments based in this kind of analysis have been used to overturn authority in domestic law in a number of cases. Comparative law has also had a further role in developing principles of domestic law. It has a particular role in applying European and international law, including European Human Rights law.

The use and acknowledgement of comparative law sources is on the increase. The use in some of the cases has been criticised as opportunistic. This argument can be turned against the use of comparative law in general, or in favour of the development of a method for the use of comparative law. We have above discussed the positions of Justice Scalia[151] and Sir Basil Markesinis who have used the consistency arguments in these different ways.[152] We pointed out the more general feature that judges make use of the same authorities or sources of law, and legal and factual arguments, and then

[149] N° 260768 *Techna SA* 29 Oct 2003.
[150] R Errera, 'The Use of Comparative Law Before the French Administrative Law Courts' in G Canivet, M Andenas and D Fairgrieve (eds), *Comparative Law before the Courts* (BIICL London 2004) 153.
[151] For instance, in *Roper v Simmons* 543 US 551 (2005).
[152] B Markesinis, ' Judicial Mentality: Mental Disposition or Outlook as a Factor Impeding Recourse to Foreign Law', 80 TUL LREV 1325 (2006) at 1361–62 and at 1371.

reach different conclusions. In many cases this will be done without making clear why, for instance the appellate court disagrees with the first instance court, or one judge with another in the same court. Judgments may also include or exclude sources or arguments, and this discretion may be perceived to be particularly wide when one is dealing with merely persuasive and non binding authorities or arguments. This may lead to inconsistencies which are unsatisfactory in many instances. At a stage where comparative law provide mostly persuasive and non binding authorities or arguments, this has often meant that the courts or judges who do not find support for their preferred outcome in comparative law, will disregard comparative law arguments in the reasons they give. We find it difficult to disagree with Sir Basil's call for more consistency here. In particular, the call for consistency is powerful in cases where one judge mentions foreign law. We agree with Sir Basil that reasonable consistency requires that other judges who come to a different result from that the first judge supported on comparative law, addresses and counter in a specific manner also the first judge's arguments based on comparative law.

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IX. Consequences for scholarship<H/1>

Comparative law is no longer an impractical academic discipline. We have discussed how comparative law is more actively used, and its use more openly acknowledged, by courts, and this is also the case in teaching, scholarship and in statute law reform. This new awakening puts the academic discipline under some pressure. One response is in the growing scholarship on the purposes and methods of comparative law.

A generation ago, there were some disagreements about the purpose and method in academic comparative law. Looking back, the prevailing impression is nonetheless of an established academic discipline with a high degree of cohesion. There were parallel discourses across jurisdictions, mostly dominated by private lawyers, but with important contributions made by public and criminal lawyers.[153]

[153] Sir Thomas Bingham '"There is A World Elsewhere": The Changing Perspectives of English Law' (1992) 41 ICLQ 513, 527, reprinted in T Bingham *The Business of Judging* (OUP Oxford 2000) 87, sets out how the academic comparative law discipline and the courts have interacted in the English tradition, in particular after the Second World War.

Comparative law has lost whatever common language it had as an academic discipline. This is one consequence of the expansion of the discipline: it does not have the coherence of the academic discipline of a generation ago. It is a current and rather pressing challenge to engage comparative law scholars in a discourse on what can be agreed upon as the core issues. The growing scholarship on the purposes and methods of comparative law is a good beginning,[154] although the present phase demonstrates the wide range of views, some rather fundamentally opposed to one another,[155] many of which are represented in this *Liber Amicorum*. There is much left before the academic discipline can emerge from this phase with any degree of agreement on what are the fundamental issues as is required for a critical academic discourse to be meaningful. The active comparative law discourse needs to rediscover the core of a common language.[156] It requires this common language for scholarship and comparative law to have full impact on legal scholarship, lawmaking and legal practice. It needs a mainstream academic discipline to emerge.

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[154] Two magisterial volumes from 2006 provide extensive overviews of the rapidly expanding scholarship, see M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP Oxford 2006) and J M Smits (ed), *Elgar Encyclopedia of Comparative Law* (Edward Elgar Cheltenham 2006). See also W Twining, W Farnsworth, S Vogenauer and F Téson, 'The Role of Academics in the Legal System', in P Cane and M Tushnet (eds), *The Oxford Handbook of Legal Studies* (OUP Oxford 2003) 920.

[155] See the following authors representing some of the divergence in the current comparative private law scholarship: P Legrand, 'European Systems are not Converging' (1996) 45 ICLQ 52; M Bussani and U Mattei, 'The Common Core Approach to European Private Law' (1997/98) 3 Columbia Journal of Comparative Law 339; W V Gerven, J Lever and P Larouche, *Tort Law* (Oxford, 2000); B Markesinis, *Foreign Law and Comparative Methodology: a subject and a thesis* (Hart Oxford 1997); B Markesinis, *Always on the Same Path: Essays on Foreign Law and Comparative Methodology* (Hart Oxford 2001); B Markesinis, *Comparative Law in the Courtroom and Classroom* (Hart Oxford 2003); B Markesinis and J Fedtke, 'Authority or reason? The Economic Consequences of Liability for Breach of Statutory Duty in a Comparative Perspective', (2007) EBLR 5, B Markesinis, Judicial Mentality: Mental Disposition or Outlook as a Factor Impeding Recourse to Foreign Law, (2006) 80 TUL. L.REV. 1325, 1361–62; A Peters and H Schwenke, 'Comparative Law beyond Post-Modernism' (2000) 49 ICLQ 800; H Muir Watt, 'La Fonction Subversive du Droit Comparé' RIDC 2000.503; 3; A Rodger, Savigny in the Strand, 28–30 The Irish Jurist 1 (1995); R Sacco, 'Legal Formants, A Dynamic Approach to Comparative Law (I)' (1991) 39 American Journal of Comparative Law 1; (II) (1991) 39 American Journal of Comparative Law 343; A Watson, *Legal Transplants; an Approach to Comparative Law* (London 1993); R Zimmerman, 'Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science' (1996) 112 LQR 576; K Zweigert and H Kotz, *An Introduction to Comparative Law* (3rd edn Oxford 1998); G Alpa and V Zeno-Zencovich, *Italian Private Law* (Taylor and Francis (Routledge-Cavendish) London 2007); G Alpa, MJ Bonell, D Corapi, L Moccia, V Zeno-Zencovich, A Zoppini, *Diritto privato comparato. Istituti e problemi,* (Laterza, 2004); G Alpa and M Andenas, *Fondamenti del diritto privato europeo* (Guiffré Milano 2005); M Andenas, S Diaz Alabart, and B Markesinis, *Liber Amicorum Guido Alpa: Private Law Beyond the National Systems* (BIICL London 2007); *Tort Liability of Public Authorities in Comparative Perspective* (BIICL London 2002); D Fairgrieve, H Muir Watt, *Common law et tradition civiliste* (Presses Universitaires de France Paris 2006).

[156] B Markesinis and J Fedtke *Engaging in Foreign Law* (Hart Publishing, Oxford 2009) makes an important contribution in this respect.

The relationship between the traditional disciplines of law is more than ever in need of exploration. International law, European law and national legal orders are now perhaps best understood as open systems coexisting without any clear hierarchy. Beyond that, their relationship remains unresolved at the most fundamental levels. The relationship between disciplines within the different legal orders or systems is of increasing importance, and distinctions, such as those between private and public law, become difficult to maintain. There is a clear need to see this in context, and to provide an institutional framework and support for academic research and legal practice dealing with the many issues that arise.

There is another problem common to all countries. The well-established legal approaches, limited by narrow definition of disciplines and by national traditions, do not meet the present needs. In comparative law the encyclopaedic collection and organization of materials is still useful but not sufficient. The traditional teaching and scholarship in public international law, and indeed in the still relatively young disciplines of European law, are equally inadequate. The focus on one's own national approaches (for instance to public international law, human rights law and to EU law), which while practically important, needs to give way to a broader perspective. Fundamental assumptions about the nation state based on nineteenth century thinking still rule most of us. The way that international, European and domestic legal systems open up and recognize one another, requires critical analysis of the foundations and will continue to provide a fertile ground for research and policy discussion.

The Society of Comparative Legislation, when it was founded in 1894 (marking the beginning of the British Institute of International and Comparative Law over which Lord Bingham presides), was part of a European movement of comparative law. The aims and reception of comparative law has changed much up through the years. John Austin wrote in 1834 about 'general or comparative jurisprudence' as the process of ascertaining the 'principles common to maturer systems,' in order to establish a system of universal principles of positive law.[157] Sir Frederick Pollock, in 1905, attacked the 'high priests of a moribund utilitarian orthodoxy' for their rejection of comparative law. For 'comparative research within the last twenty or thirty years … have revolutionised

[157] *Austin on Jurisprudence* (London 1869) ii, 1107.

our legal history and largely transformed our current text-books'. He continued that 'the work of the present generation in the field of comparative jurisprudence is mostly work of detail … But there is no rest for knowledge, … and there will again be a time of large adventure'.[158]

Comparative law has again reached such a time of large adventure. Comparative research is on the threshold of once again revolutionizing legal history and transforming text-books. Pollock's enthusiasm of some hundred years ago is parallel to that of Justice Breyer's 2003 address cited at the outset of this article. He says that nothing could be 'more exciting for an academic, practitioner or judge than the global legal enterprise that is now upon us'.[159] In his 1992 article,[160] Lord Bingham says 'we should not expect too much too quickly' but warns that judges may seek more foreign adventures. There is still room for adventure.

[158] F Pollock 'The History of Comparative Jurisprudence' [1903] Journal of the Society of Comparative Legislation 74.
[159] S Breyer 'Keynote Address' (2003) 97 *ASIL Proceedings* 265.
[160] Sir Thomas Bingham '"There is A World Elsewhere": The Changing Perspectives of English Law' (1992) 41 ICLQ 513, reprinted in T Bingham *The Business of Judging* (OUP Oxford 2000) 87.