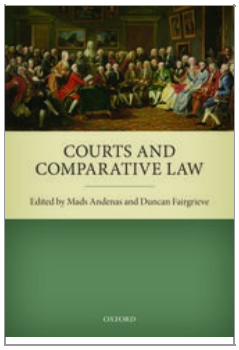

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Print publication date: 2015
Print ISBN-13: 9780198735335
Published to Oxford Scholarship Online: October 2015
DOI: 10.1093/acprof:oso/9780198735335.001.0001

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In Search of a Common Language for Open Legal Systems

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DOI:10.1093/acprof:oso/9780198735335.003.0001

[–] Abstract and Keywords

This introductory chapter discusses the current challenges to comparative law and domestic courts' unprecedented use of comparative law. It explains the use of comparative law in the following cases: to provide support for a rule or an outcome; for normative models in comparative law where national law is undetermined; to review factual assumptions about the consequences of legal rules; to review assumptions about the universal applicability of a particular rule; to overturn authority in domestic law; to develop principles of domestic law; and to resolve problems of the application of European and international law, including European Human Rights law.

Keywords: comparative law, domestic courts, typology, national law, international law

I. Current challenges to comparative law and comparative law as a challenge

Comparative law challenges some traditionalists who regard legal method in a dualist paradigm, relying on the autonomy of their legal system. At the same time, the ever more extensive use of

comparative law challenges comparative law as an academic discipline and as a method.

In 1965, Otto Kahn-Freund opened his inaugural lecture as Professor of Comparative Law with a paradox his Oxford audience much enjoyed: 'the Professor of Comparative Law suffers from the problem that the subject he professes has by common consent the somewhat unusual characteristic that it does not exist'. He went on to explain that comparative law is 'not a topic but a method', or rather 'the common name for a variety of methods of looking at law, and especially of looking at one's own law'.[1] One of his successors, Sir Basil Markesinis, never enjoyed the paradox, and characterized the great English comparatists of the 20th century as having eventually led their students and successors into an isolated and enclosed intellectual ghetto with little prospect of escape.[2]

In 2004, yet another Oxford professor, and a pupil of Kahn-Freund's, Mark Freedland, added the following: 'One of the main attributes of that heritage is the idea or perception that comparative law is not in any way a separate or ring-fenced area of legal studies; it has open borders, so that legal scholars can enter or leave the state of comparative law without elaborate identity papers.'[3]

Gently self-deprecating comparative law academics, and their academic and less academic opponents, may still query the existence of the academic discipline. At any academic comparative law stage there would be six professors in search of an author, with a focus on the variety more than any common method of looking at law, concluding that methodological problems make practical applications very difficult, **(p.4)** warning the audience 'Don't Try This at Home'. While some academic comparative lawyers still play in the ghetto (as Markesinis criticized), comparative law has got more than just a helping hand from the courts.

Courts have become the laboratories of comparative law, and try out different methods in their practical work. The forerunner to this book, *Comparative Law Before the Courts*, edited by Guy Canivet, the premier Président of the Cour de cassation of France, with the two of us, was published in 2004 when many courts were restrictive in, or completely excluded, the citation of foreign judgments or other external sources of law.

The seminars leading up to the 2004 book and the book itself were supported by the senior law lord, Lord Bingham, and a predecessor, Lord Goff, who wrote in the Foreword: 'It is heartening to see that comparative law is gaining in utility and relevance in the decisions of the courts.'[4] Canivet, Goff, and Bingham themselves were accomplished comparative law scholars. Their supreme courts were pioneers in their active use of comparative law as a source of law at a time when many courts would not make any reference to comparative law in their judgments, although most of these nonetheless would make use of comparative sources in their preparatory reports and opinions and also encourage parties to make submissions on comparative law points.

The ten years since the book have seen an increased use of comparative law by courts, and in a way which cannot be understood merely as 'a variety of methods of looking at law, and especially of looking at one's own law', in the reductionist manner some have interpreted Sir Otto Kahn-Freund's statement.

International courts have faced particular challenges. The new enforcement mechanisms and the multiplication of enforcement regimes put the international law system's coherence under

pressure. Fear of fragmentation made some scholars emphasize the role of international courts in developing substantive law and procedure in a way that made up for the lack of institutional reforms that could remedy the problem. A strong reliance on international law as a system with a hierarchy of norms is provided by 'The Report of the study group on the fragmentation of international law', finalized by Martti Koskenniemi at the 58th session of the United Nation's International Law Commission in 2006. The International Law Commission's Special Rapporteur on the Formation of Custom, Sir Michael Wood, has observed that while:

> [t]he formation and evidence of rules of customary international law in different fields may raise particular issues and it may therefore be for consideration whether, and if so to what degree, different weight may be given to different materials depending on the field in question … at the same time it should be recalled that, in the words of Judge Greenwood, '[i]nternational law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law'.[5]

(p.5) For international law to be an effective legal system, the ever-increasing number of bodies with a role to play in international law must take account of one another, and address possible conflicts, as well as those that cannot be resolved, and, in the course of doing so, contribute to the development of general principles and forms of hierarchies of norms and institutions. Such convergence may contribute to the stabilization and promotion of cohesion in the rapidly expanding international legal system.[6]

The International Court of Justice simply did not cite other courts, or national law, but has in recent judgments not only undertaken extensive surveys and analysis of national law and law from other international courts, but relied heavily on them.[7] The European Court of Human Rights has taken its long-standing use of comparative law further, and important judgments sometimes have longer sections under the heading 'Comparative Law'.[8] The European Court of Justice today makes open use of comparative law in the context of its extended tasks concerning fundamental rights and other general principles of EU law.[9]

Most national courts follow the same path of giving comparative law an ever more prominent place as a source of law, as the chapters to this book illustrate, and struggle with the methodological consequences. Comparative law as a source of law still has its opponents, including among judges, but is generally accepted in the different national jurisdictions. The argument today is about the method—how, and not if, courts should make use of the judgments and legal materials from other jurisdictions in reaching a decision. The United States is the exception.[10] The US Supreme Court has become the forum for one of the sharpest discussions on the utility and legitimacy of comparative law. Best known from the debate between Supreme Court Justices on the recourse to sources of foreign and international law that are 'external' to the domestic norms being interpreted, is Justice Scalia's criticism of the majority's use of comparative law as a modern fad and dangerous flirtation with 'alien law' in several opinions.[11] Although some form of comparative law has long been part of the judicial process, in the United States comparison was predominantly undertaken between the states and in the rest of the common law world between common law jurisdictions in different configurations. The inherent characteristics of the common law have perhaps served to mask the fact that it is indeed based on a series of comparative law exercises. Across the national borders dividing the Commonwealth, the seamless nature of the common law, from its origins in English law, through its permutations across to former colonies and beyond, provided a reason

and justification for courts to look to each other's jurisprudence, exchange solutions, and thereby create a network of persuasive authority. But there is a long tradition of borrowing from beyond the common law, although often **(p.6)** conveniently forgotten or at least pushed into the background. The late Lord Bingham, one of the greatest jurists of recent times, was a pioneer in the forensic use of comparative law and a tireless advocate of the idea of 'there is a world elsewhere'. Enjoying the controversy, Lord Bingham often referred to the judicial hero of English commercial lawyers, Lord Mansfield, and how he made good use of Pothier and other French sources in the creation of English commercial law.[12]

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.[13]

Justice Sandra Day O'Connor has also extra-judicially restated her support for the use of comparative law:

> 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.[14]

Aharon Barak, then the Chief Justice of the Supreme Court of Israel, criticized 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 US Supreme Court 'is losing the central role it once had among courts in modern democracies'.[15]

The discussion in the US Supreme Court continues to give rise to interesting scholarship. The case against the use of international and foreign law is set out by, among others, Curtis Bradley and Jack Goldsmith, who challenge the positive foundation in US law for such use.[16]

(p.7) Judith Resnik in Chapter 23 of this book develops a powerful counter-narrative to the objections made to the use of non-US sources. Pointing out that America is a country of migrants, as is US law, Resnik questions the veracity of labelling law 'domestic' or 'foreign', given that borders are porous and various routes serve to domesticate as well as exile 'foreign' law. Resnik eloquently illustrates the inherent difficulties in avoiding foreign sources in the US system, built as it is on liberal principles. Within the context of legislation effecting prohibitions on the resort to non-domestic law, she analyses the constitutional issues raised by attempts to direct judges as to sources of law, and poses the question whether constitutional principles allow judges to be subject to, or immune from, directions on the sources to consult when rendering judgments. Resnik argues that legislatures cannot try to limit judicial thought-

processes by banning consideration of a category of materials, labelled 'foreign.' She ultimately argues that the use of foreign sources is neither exotic nor less intrinsically disciplined than looking at other resources.

Jeremy Waldron provides strong support for the use of foreign law, but opens his chapter in the present book by observing that there is no theory or doctrine which provides a basis either for the use of foreign law or the rejection of such use.[17] He continues by arguing that we should not reject the idea of a theory of the citation of foreign law simply because we see foreign law being cited opportunistically. We should reject it only if we think inconsistent and unprincipled citation is inevitable under the auspices of the theory providing the foundations for such citations. He then goes on to develop a theory that the citation of foreign law can rest on the idea of the law of nations (*ius gentium*). He points to the fact that although the law of nations is often used as a synonym for international law, it once had a broader meaning, comprising something like the common law of mankind. It was not just law on issues between sovereigns but on legal issues generally—on contract, property, crime, and tort. It was a set of principles that had established itself as a sort of consensus among judges, jurists, and lawmakers around the world. Waldron argues for returning the phrase to this broader meaning. He demonstrates the utility of this from both positivist and natural law starting points. He uses an analogy between the law of nations and the established body of scientific findings. Existing science claims neither unanimity among scientists, nor infallibility. Individual scientists could not proceed with their own individual research without taking account of existing science. The law of nations is available to lawmakers and judges as an established body of legal insight, and has a similar function in that it reminds them that their particular problem has been confronted before and 'that they, like scientists, should try to think it through in the company of those who have already dealt with it'. The issues that follow from Waldron's argument are mainly in developing the methodology for establishing and making use of this body of legal insight.

Finally, and following from this argument, Waldron contrasts the positions of those who see law as will, and those who see law as reason. Those who approach the law as a **(p.8)** matter of will do not, of course, see any reason why expressions of will elsewhere in the world (abroad) should affect expressions of will at home. Those who see law as a matter of reason may well be willing to approach it in 'a scientific spirit that relies not just on our own reasoning but on some rational relation between what we are wrestling with and what others have figured out'.

Martha Minow refers to 'the swirling debate over whether the United States courts should consult international or comparative law' which has puzzled her as a law professor as no one disagrees that US judges have long consulted and referred to materials from other countries as well as international sources. She points out how the evidence of the long-standing practice is undisputed and well forecast by one of the Federalist Papers.[18] Nonetheless, citing foreign and international sources has provoked intense controversy in the course of the last decade. There seems to be a fear of temptation or loss of control. If merely looking at what others are doing causes the worry, the concern seems to be about caving in to peer pressure or being an outlier—some kind of contagion effect.

Minow takes the position that, while not minimizing concerns about peer pressure or influence, one should instead emphasize that 'confidence in who we are, what our values and traditions are, and how we interpret them over time stems from a source deeper than a refusal to look at what others do'.

In her conclusion, Minow points to soft law in the European Union and the complementarity of the International Criminal Court Statute as models for approaching the relationship between national and international legal systems. Her own scholarship on *Brown v Board of Education*[19] has shown the vast impact of US law on other systems from the early days after the *Brown* case to the current judgments of the European Court of Human Rights on discrimination against Roma in European countries.[20]

Our introduction to the 2004 *Comparative Law Before the Courts* had the title 'Finding a Common Language for Open Legal Systems'.[21] Legal systems will not give the same answers to legal questions; they will not even deal with one another in the same manner. The aim of the 2004 book was, as it is of the present book, to examine the use of comparative law by national and international courts, itself a fruitful subject of comparative law scholarship. Both books include authoritative contributions covering both common law and civil law jurisdictions from the viewpoint of practitioners and academic theorists. The starting point is that comparative law is increasingly recognized as an essential reference point for judicial decision-making. The challenge to judges and counsel is considerable. Legal scholarship has an important role in making comparative material available in a systematic manner. At the present stage there is perhaps even more of a need to discuss the role of comparative law in the judicial process. One extension of this discussion of legal method is how legal scholarship can assist. The discussion ranges from jurisprudential questions of the relevance and **(p.9)** weight of comparative law arguments, to the practical aspects of how to present those arguments to a court or where and how to access the source material. Parallel developments in different jurisdictions justify a comparative approach to the use of comparative law. There may be lessons to learn from other jurisdictions.

II. Polycentricity and pluralism

Shedding traditional adherence to 20th-century positivist and national paradigms, domestic courts are deliberately and explicitly making use of comparative law to an unprecedented extent. International courts move freely across the boundaries of the different treaty regimes, searching for and applying the underlying unities, also in relation to domestic law. Many factors can of course be seen as having influenced this process.[22] First amongst these is the breakdown of the traditionally closed and hierarchical national legal systems. Another factor is the increasingly complex issues with which modern courts are required to engage, beyond what follows from the breakdown of the closed national legal systems, whether they be fundamental rights, constitutional review, international law, or emerging areas such as biomedical regulation, in which ethical and moral issues are increasingly prominent. The polycentric nature of these issues poses challenges to the traditional judicial approaches and explains changes in terms procedures, personnel, and outlook.

The complexity of decision-making has heightened the importance of knowing how other jurisdictions have dealt with similar problems. This has opened the door to the use of, and increases in, the utility of comparative law, through the development of formal and informal avenues for judicial dialogues, as well as an increasing engagement with doctrinal literature within the formal decision-making process.

As we will discuss from different perspectives below, and as several of the other contributors to the present book do, 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 and European law, and 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.[23] The traditional form of a unitary **(p.10)** rule of recognition (if it ever applied fully anywhere)[24] kept the picture simple. The 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 or principles level, this applies to the relationship between legal orders. On the micro or rules 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 the way for, 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. 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.

Several of the contributors to the present book 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. Courts may wish to explain their judgments not only to parties and the national legal community, but so that they are understood in other jurisdictions. National supreme courts may also consider the review that European and international courts and similar bodies could undertake, and how to explain their position better. In national courts one talks about 'appeal proofing'. This now also applies to supreme courts who may find their judgments reviewed, and to international courts wanting to convince other international courts, or domestic courts, to adopt their views on the law. 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,[25] where the form of judgments may be influenced by the accessibility and increased use of comparative law.[26] In jurisdictions where the form of judgments allows it, judges make open reference to comparative law sources, and in particular to judgments by foreign **(p.11)** courts.[27] We have pointed to the variation between national systems (and sometimes even within them). Where the form of judgments is not open for the 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.

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 globalization 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.

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,[28] the Italian *Corte di cassazione*, the International Court of Justice, and the European Court of Justice, which in different ways have relaxed their self-imposed 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 whether 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.

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. **(p.12)** 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.

III. A typology

Courts function within systems 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, although ever less controversial (with the prominent exception of the United States). It may be interesting to analyse some of the cases with a view to formulating a typology of the use of comparative law by courts. There are some clear situations that stand out in the recent case law.

The tentative typology is grouped into seven categories, building on our 2012 study included in Pier Giuseppe Monateri's *Methods of Comparative Law*.[29] Comparative law can be used in the following cases:

(1) to provide support for a rule or an outcome;

(2) for normative models in comparative law where national law is undetermined;
(3) to review factual assumptions about the consequences of legal rules;
(4) to review assumptions about the universal applicability of a particular rule;
(5) to overturn authority in domestic law;
(6) to develop principles of domestic law; and
(7) to resolve problems of the application of European and international law, including European Human Rights law.

1. Support for a rule or an outcome

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*,[30] as set out below, and that '[p]rocedural idiosyncracy is not (like national costume or regional cuisine) to be nurtured for its own sake' in *Dresser*.[31] See also his statement that 'it should be no easier to succeed here than in France or Germany', in *JD v East Berkshire*.[32] 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 **(p.13)** will not often be used where domestic law is clear. There are certain particular situations where comparative law carries more weight.

In *Fairchild*,[33] Lord Bingham 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'.[34] 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:

> 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.

In the Supreme Court of the United States, Justice Kennedy addressed similar issues in *Roper v Simmons*.[35] 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:

> 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.

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, and the judgments fit into category 5. But the general statements about the role of comparative law also have a bearing on the current category. *Fairchild* was a unanimous decision, whereas the US **(p.14)** 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*[36] where an activist panel invented a new concept of 'proportionate liability' to limit the effect of *Fairchild*. These cases will be discussed further in the paragraphs that follow, but what is of particular interest here 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.

Lord Bingham and Justice Kennedy also address the question of whether the use of comparative law is disloyal to the national legal system. Each of them 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'.[37] In *Fairchild*, Lord Bingham sets out the social and economic issues. Comparative law is of assistance in dealing with both 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 is considering whether 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.

The discussion in the US 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 already discussed, have based their argument on there being some current connexion between US law and international and foreign law. We have also referred to 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 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. Norwegian or Lichtenstein claims are made with no less self-assuredness than Scalia's. Empirically, claims to national superiority are difficult to assess, as are other claims to the autonomy or 'separateness' of legal systems.

(p.15) 2. Normative models in comparative law where national law is undetermined

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'.[38] 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.

3. Comparative law to review factual assumptions about the consequences of legal rules

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 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.[39] 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 **(p.16)** related assertions are more based on values, giving more weight to the interests of the state in balancing these with other interests, than openly admitted to.

Sir Basil Markesinis has compared the arguments of Lord Bingham and Lord Hoffmann, who were two of the most active comparativists in the House of Lords, in a number of cases.[40] In a number of cases Lord Hoffmann had asserted that granting rights or remedies to disadvantaged groups would lead to the opening up of the floodgates and would also have unwanted consequences of other kinds.

Lord Bingham had long rejected this kind of broad assertion. In *JD v East Berkshire*,[41] 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 dealt 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.

In the case of *Smith*,[42] Sir Thomas Bingham MR looked at changes in the laws of other European countries, but here he argued that they were too recent for their effect to be evaluated. The case concerned the blanket ban on homosexuals in the armed forces. Sir Thomas Bingham considered different parliamentary materials, and observed that they did consider a less absolute rule, even though since 1991 neither homosexual orientation, nor private homosexual activity, precluded appointments as a civil servant, diplomat, or judge, and very few NATO countries barred homosexuals from their armed forces. This is the case where Sir Thomas Bingham established that the more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable. He

nonetheless concluded that the army policy could not be deemed legally irrational, because it was supported by both Houses of Parliament, there was no evidence which plainly invalidated that advice, and because changes elsewhere had been adopted too recently for their effect to be evaluated.[43]

4. Review assumptions about the universal applicability of a particular rule

In *Lawrence*,[44] the use of foreign law in part refuted the claims to universality in *Bowers*[45] (which the *Lawrence* majority used in support of overturning *Bowers*). In *Bowers*, Chief Justice Burger had made 'sweeping references' to the history of Western civilization and to Judeo-Christian moral and ethical standards. He did not take **(p.17)** account of sources pointing in other directions. Legal developments in other countries could then be used to undermine the claims in *Bowers* and to overturn it.

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*.[46] 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.

There is a parallel in the European Court of Human Rights in the *Smith* case (the English Court of Appeal decision is discussed in section III.2).[47] The Court placed much weight on the evidence from other countries. The UK government argued that no worthwhile lessons could be gleaned from recent legal changes in those foreign armed forces that now admitted homosexuals. The Court noted that few European countries operated a blanket legal ban on homosexuals in their armed forces. Also, the UK government had to show convincing and weighty reasons to justify their policy in the proportionality review, and had not done so.[48]

5. Additional support to overturn authority in domestic law

Fairchild[49] and *Roper*[50] 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'.[51] They may express a general principle that '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'.[52]

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 it 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 earlier (see text near n 11).

(p.18) The other view in the House of Lords, as expressed in the subsequent decision of *Barker*,[53] 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*,[54] the use of foreign law in part refuted the claims to universality in *Bowers*[55] which the majority overturned. Comparative law may provide powerful arguments against universality claims of an authority, and support for the overturning of the authority.

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.

6. Develop principles of domestic law

Comparative law can support the development of principles of domestic law. The minority opinion in *JD v East Berkshire*,[56] as discussed earlier, falls into this category. In this case, Lord Bingham argues for an 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'.[57]

(p.19) We discuss *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*[58] in section III.7. 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.

7. Resolve problems of applying European and international law, including European human rights law

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.[59] This formulation was built on by the parties in *Huang v Secretary of State for the Home Department*,[60] 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.[61] In *Huang,* the House of Lords accepts the argument,[62] 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).[63]

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 be a 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*,[64] where Lord Denning cites judgments of German and Dutch courts on the application of Article 234 EC on references from national courts to the ECJ.[65]

(p.20) Another example is provided by *Techna SA*.[66] As noted by Olivier Dutheillet de la Motte in Chapter 13 of this book, 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.[67]

IV. Some conclusions and consequences for scholarship

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 the 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 the application of European and international law, including European human rights law.

We have illustrated how the use and acknowledgement of comparative law sources is on the increase. In some of the cases its use has been criticized 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 discussed the positions of Justice Scalia[68] and Sir Basil Markesinis, who have used the consistency arguments in these different ways.[69] 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 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 provides mostly persuasive authorities or arguments that do not bind, 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 **(p.21)** where one judge mentions foreign law. We agree with Sir Basil that reasonable consistency requires that other judges who come to a different conclusion from that which the first judge supported by comparative law, address and counter in a specific manner the first judge's arguments.

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 purpose and method in academic comparative law circles. 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.

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 small academic community that it had 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,[70] although the present phase demonstrates a wide range of views, some rather fundamentally opposed to one another.[71] There is much to be done before the academic discipline can emerge **(p.22)** from this phase with any degree of agreement on what are the fundamental issues in the field, as is required for a critical academic discourse to be meaningful. The active comparative law discourse needs to rediscover at least the core of a common language.[72] It requires this common language for scholarship and comparative law to have full impact on legal scholarship, law making, and legal practice. It needs a mainstream academic discipline to emerge, the academic world now having received more than a helping hand from the courts and their use of comparative law.

Notes:

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([1]) Otto Kahn-Freund, 'Comparative Law as an Academic Subject' (1966) 82 LQR 40, at 40.

([2]) Basil Markesinis, *Comparative Law in the Courtroom and the Classroom* (Oxford: Hart Publishing, 2003), at 25–6.

([3]) Mark Freedland, 'Introduction', in G Canivet, M Andenas, and D Fairgrieve, *Comparative Law Before the Courts* (London: BIICL, 2004) at xvi.

([4]) Lord Goff of Chieveley, 'Foreword', in G Canivet, M Andenas, and D Fairgrieve, *Comparative Law Before the Courts* (London: BIICL, 2004) at vi.

([5]) Special Rapporteur Sir Michael Wood, First Report on Formation and Evidence of Customary International Law ILC A/CN.4/663 p 8 [19], citing *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea)*, Judgment, 19 June 2012, Declaration of Judge Greenwood [8].

([6]) See Mads Andenas and Eirik Bjorge (eds.), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge: Cambridge University Press, 2015).

([7]) As described by Eirik Bjorge in Chapter 12 in this book.

([8]) See further Paul Mahoney and Rachael Kondak, Chapter 7 in this book.

([9]) See further Koen Lenaerts and Kathleen Gutman, Chapter 8 in this book.

([10]) See the lively discussion in the US, described by Judith Resnik in Chapter 23.

([11]) In *Lawrence et al v Texas*, 539 US 558 (2003), and subsequent cases. See Judith Resnik, Chapter 23 in this book; Martha Minow, Chapter 27 in this book; and J Waldron, Chapter 28 in this book.

([12]) For instance in Sir Thomas Bingham, 'There is a World Elsewhere: The Changing Perspectives of English Law' (1992) 41 ICLQ 513, reprinted in Bingham, *The Business of Judging* (Oxford: Oxford University Press, 2000) 87. Lord Bingham wrote 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.

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

([14]) Remarks by Sandra Day O'Connor, Southern Center for International Studies, Atlanta, Georgia, October 28, 2003, at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/SOUTHERN_CENTER_INTERNATIONAL_STUDIES_Justice_O'Connor.pdf>.

([15]) Aharon Barak, 'Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002) 116 (2002) Harvard L Rev 16: 97–106.

([16]) Curtis A Bradley and Jack L Goldsmith, 'Customary International Law as Federal Common Law: A Critique of the Modern Position' (1997) 110 Harvard L. Rev. 4: 815, at 822.

([17]) Jeremy Waldron, Chapter 28 in this book, reprinted from (2005) 119 Harvard L. Rev. 129, and the analysis in John Bell, 'Researching Globalisation: Lessons From Judicial Citations' (2014) Cambridge Journal of International and Comparative Law 22.

([18]) Marta Minow, Chapter 27 in this book.

([19]) See M Minow, *In Brown's Wake: Legacies of America's Constitutional Landmark* (New York: Oxford University Press, 2010).

([20]) Ibid., at 19–25.

([21]) Mads Andenas and Duncan Fairgrieve, 'Finding a Common Language for Open Legal Systems', in G Canivet, M Andenas, and D Fairgrieve, *Comparative Law Before the Courts* (London: BIICL, 2004) at xxvii.

([22]) See more general discussion in Mads Andenas and Duncan Fairgrieve, '"There is a World Elsewhere"—Lord Bingham and Comparative Law', in Mads Andenas and Duncan Fairgrieve (eds.), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford: Oxford University Press, 2009 and 2011), and John Bell, 'The Argumentative Status of Foreign Legal Arguments' (2012) 8 Utrecht L. Rev. 8, 17.

([23]) 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 wide field, etc. See HLA Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961) at 51 about 'secondary rules'.

([24]) 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 Mads Andenas and John Gardner, 'Introduction: Can Europe have a Constitution' (2001) 12(1) Kings College Law Journal 1.

([25]) See Lord Rodger, 'The Form and Language of Judicial Opinion' (2002) 118 Law Quarterly Review 226, 247; and Lord Goff of Chieveley, 'The Future of the Common Law' (1997) 46 International and Comparative Law Quarterly 745, 756–7, on the accessible form of common law judgments, and also Maurice Adams, Jacco Bomhoff, and Nick Huls (eds.), *The Legitimacy of Highest Courts' Rulings* (The Hague: Asser Press, 2008) provides important contributions to this analysis.

([26]) 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 websites that provide translations of important judgments are increasing in number and quality.

([27]) Basil Markesinis and Jorg Fedtke, *Engaging in Foreign Law* (Oxford: Hart Publishing, 2009) is a leading treatise on comparative law method, and deals extensively with comparative law in the courts. See also generally Matthias Reimann and Reinhard Zimmermann, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006), especially the chapter by Stefan Vogenauer, 'Sources of Law and Legal Method in Comparative Law', at 869–98.

([28]) See Guy Canivet, 'Variations sur la politique jurisprudentielle: les juges ont-ils un âme?', in Mads Andenas and Duncan Fairgrieve (eds.), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford: Oxford University Press, 2009 and 2011) 17, and Bernard Stirn, 'Le Conseil d'Etat, so British', in Mads Andenas and Duncan Fairgrieve (eds.), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford: Oxford University Press, 2009 and 2011) 81.

([29]) Mads Andenas, and Duncan Fairgrieve, 'Intent on Making Mischief: Seven Ways of Using Comparative Law', in Pier Giuseppe Monateri (ed.), *Methods of Comparative Law* (London: Edward Elgar Publishing, 2012), Chapter 2, 17–79. See also Martin Bobek, 'Comparative

Reasoning in European Supreme Courts' (2013) 245.

([30]) *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22.

([31]) *Dresser UK Ltd v Falcongate Ltd* [1992] QB 502, 522.

([32]) *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 in the text by n 41.

([33]) *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22.

([34]) At para 31.

([35]) *Roper v Simmons* 543 US 551 (2005).

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

([37]) *Dresser UK Ltd v Falcongate Ltd* [1992] QB 502, 522.

([38]) 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 Court of Justice of the European Union (ECJ) cites the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) on the requirement of 'substantiality' in establishing intent, and also the European Court of Human Rights (ECtHR) in the context of accounting for the parties' submissions (but does not rely on or make any further use of the ECtHR references).

([39]) Jane Stapleton, 'Benefits of Comparative Tort Reasoning: Lost in Translation', in Mads Andenas and Duncan Fairgrieve (eds.), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford: Oxford University Press, 2009), 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.

([40]) See in particular Basil Markesinis and Jorg Fedtke, 'Authority or Reason? The Economic Consequences of Liability for Breach of Statutory Duty in a Comparative Perspective' (2007) 18 EBLR 1: 5–75, at 66–7, and also Mads Andenas, 'Introduction' (2007) 18 EBLR 1: at 2.

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

([42]) *R v Ministry of Defence, ex p Smith* [1996] QB 517.

([43]) See the extensive discussion in Paul Craig, 'Substance and Procedure in Judicial Review', in Mads Andenas and Duncan Fairgrieve (eds.), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford: Oxford University Press, 2009 and 2011) 73.

([44]) 539 US 558 (2003).

([45]) 478 US 186 (1986).

([46]) (1983) 5 EHRR.

([47]) *Smith and Grady v UK* [2000] 29 EHRR 493.

([48]) The difference between the Strasbourg Court and the UK courts in *Smith* is better understood when account is taken of the fact that the Convention was not at that time incorporated into UK law. Convention rights were relevant by way of background to the determination of rationality. See Paul Craig, 'Substance and Procedure in Judicial Review', n 43.

([49]) *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22.

([50]) *Roper v Simmons* 543 US 551 (2005).

([51]) *Fairchild*, n. 49, at para 31.

([52]) Ibid.

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

([54]) 539 US 558 (2003).

([55]) 478 US 186 (1986).

([56]) *JD (FC) (Appellant) v East Berkshire Community Health NHS Trust and others (Respondents) and two other actions (FC)* [2005] UKHL 23. See the quotation from para 49 from this judgment, in text by n 41.

([57]) Unfortunately, the majority, not following Lord Bingham, fell into an error which it will take more than a decade to work English law out of.

([58]) *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69.

([59]) Ibid., 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.

([60]) *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.

([61]) *R v Oakes* [1986] 1 SCR 103, at 139.

([62]) 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.

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

([64]) [1974] Ch 401.

([65]) See also Lord Goff of Chieveley, 'The Future of the Common Law' (1997) ICLQ 46: 745, 757 on the use of a French judgment to determine whether a question was *acte claire* under the procedure for references to the European Court of Justice.

([66]) No 260768 *Techna SA* 29 Oct 2003.

([67]) Roger Errera, 'The Use of Comparative Law Before the French Administrative Law Courts', in Guy Canivet, Mads Andenas, and Duncan Fairgrieve (eds.), *Comparative Law before the Courts* (London: BIICL, 2004) 153.

([68]) For instance, in *Roper v Simmons* 543 US 551 (2005).

([69]) Basil Markesinis, 'Judicial Mentality: Mental Disposition or Outlook as a Factor Impeding Recourse to Foreign Law' (2006) Tulane Law Review 80: 1325, at 1361–2 and 1371.

([70]) Two magisterial volumes provide extensive overviews of the rapidly expanding scholarship, see Matthias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006), and Jan M Smits, (ed.), *Elgar Encyclopedia of Comparative Law* (Cheltenham: Edward Elgar, 2006). See also William Twining, Ward Farnsworth, Stefan Vogenauer, and Fernando Téson, 'The Role of Academics in the Legal System', in Peter Cane and Mark Tushnet (eds.), *The Oxford Handbook of Legal Studies* (Oxford: Oxford University Press, 2003) 920.

([71]) See the following authors representing some of the divergence in the current comparative private law scholarship: Pierre Legrand, 'European Systems are not Converging' (1996) 45 ICLQ 52; Mauro Bussani, and Ugo Mattei, 'The Common Core Approach to European Private Law' (1997/98) 3 Columbia Journal of Comparative Law 339; Walter Van Gerven et al, *Tort Law* (Oxford: Oxford University Press, 2000); Basil Markesinis, *Foreign Law and Comparative Methodology: a Subject and a Thesis* (Oxford: Hart Publishing, 1997); Basil Markesinis, *Always on the Same Path: Essays on Foreign Law and Comparative Methodology* (Oxford: Hart Publishing, 2001); Basil Markesinis, *Comparative Law in the Courtroom and Classroom* (Oxford: Hart Publishing, 2003); Basil Markesinis, and Jörg Fedtke, 'Authority or Reason? The Economic Consequences of Liability for Breach of Statutory Duty in a Comparative Perspective' (2007) 18 EBLR 5; Basil Markesinis, 'Judicial Mentality: Mental Disposition or Outlook as a Factor Impeding Recourse to Foreign Law' (2006) 80 Tulane Law Review 1325, 1361–2; Anne Peters and Heine Schwenke, 'Comparative Law beyond Post-Modernism' (2000) 49 ICLQ 800; Horatia Muir Watt, 'La Fonction Subversive du Droit Comparé' (2000) 52 RIDC 503; Alan Rodger, 'Savigny in the Strand' *The Irish Jurist* 28–30 (1995): 1; Rodolfo Sacco, 'Legal Formants: a Dynamic Approach to Comparative Law (I)' (1991) 39 American Journal of Comparative Law and (II) (1991) 39 American Journal of Comparative Law 343; Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Athens, London: University of Georgia Press, 1993); Reinhard Zimmerman, 'Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science' (1996) 112 LQR 576; Konrad Zweigert and Helmut Kotz, *An Introduction to Comparative Law*, 3rd edn (Oxford: Clarendon Press, 1998); Guido Alpa and Vincenzo Zeno-Zencovich, *Italian Private Law* (London: Taylor and Francis (Routledge-Cavendish), 2007); Guido Alpa, et al., *Diritto privato comparato. Istituti e problem* (Rome, Bari:

Laterza, 2004); Guido Alpa and Mads Andenas, *Fondamenti del diritto privato europeo* (Milan: Giuffrè, 2005); Mads Andenas et al., *Liber Amicorum Guido Alpa: Private Law Beyond the National Systems* (London: BIICL, 2007); Duncan Fairgrieve, Mads Andenas, and John Bell (eds.), *Tort Liability of Public Authorities in Comparative Perspective* (London: BIICL, 2002); Duncan Fairgrieve and Horatia Muir Watt, *Common law et tradition civiliste* (Paris: Presses Universitaires de France, 2006); Martin Siems, *Comparative Law* (2014).

([72]) Basil Markesinis and Jorg Fedtke, *Engaging in Foreign Law* (Oxford: Hart Publishing, 2009), makes an important contribution in this respect.