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RESEARCH ARTICLE

Judicial constitutional comparativism at the UK Supreme Court

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Abstract

In 2008, Lord Reed in his paper 'Foreign precedents and judicial reasoning: the American debate and British practice' noted the lack of full scholarly consideration of judicial comparativism in the UK. Ten years later, judicial reference to foreign judgments is still a very common phenomenon in this jurisdiction, however very little has been written about it. This paper assesses the UK Supreme Court's constitutional law jurisprudence in light of the main themes and arguments underlying the international debate concerning judicial comparativism. I argue that: (i) the use of foreign law is constitutionally legitimate where clear statutory language is respected; (ii) transferability concerns are mitigated by the interwovenness of the global common law system; and (iii) methodology concerns are mitigated by the UK Supreme Court's flexible, humble approach, which applies careful scrutiny to the foreign authorities put before it. Foreign judgments, I conclude, are never followed blindly or arbitrarily, and perhaps this is why there is no domestic debate about judicial comparativism, not even in the constitutional sphere.

Keywords: constitutional law; judicial reasoning; legal methodology; UK Supreme Court; judicial comparativism

Introduction

Ten years ago, Robert Reed, then a judge of the Inner House of the Court of Session, reflected on the judicial use of foreign case law in the UK, suggesting that what had been 'a matter of controversy for several years in the United States' had not attracted much attention in the UK.[1] Recognising that the use of foreign law in this jurisdiction was a developing practice,[2] he suggested that it was treated as: (i) authority; (ii) empirical fact; or (iii) a source of ideas. He concluded that 'the use of foreign law as a source of ideas and of experience where domestic law is thought to be unsatisfactory or problematical … appears … to raise no issue of legitimacy',[3] and that if it is done carefully, it should be encouraged. Lord Reed also noted the lack of full scholarly consideration of judicial comparativism in the UK, and observed that the courts 'continued to refer to foreign cases from time to time in a generally unself-conscious way'.[4] In a recent lecture, Lord Reed gave further insights into the factors he deemed to

[†]I would like to thank Richard Rawlings, Cheryl Saunders, Alison Young and the journal's anonymous reviewers for their very helpful comments on an earlier version of this paper.

[1]R Reed 'Foreign precedents and judicial reasoning: the American debate and British practice' (2008) 124 Law Quarterly Review 253.

[2]Despite some authors detecting a trend, see for example AM Slaughter 'A typology of transjudicial communication' (1994) 29 University of Richmond L Rev 99; AM Slaughter *A New World Order* (Princeton: Princeton University Press, 2004); M Rosenfeld *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Abingdon: Routledge, 2009) pp 246–247, it is not clear whether the use of foreign law has actually increased: R Hirschl 'The view from the bench – where the comparative judicial imagination travels' in *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014) p 37.

[3]Reed, above n 1, at 269.

[4]Reed, above n 1, at 253.

influence judges to turn to comparative law, and particularly how the UK's membership of the Council of Europe and the EU has facilitated judicial exchange with European civil law jurisdictions.[5] The lecture is much more condensed than his 2008 paper and it does not add much to my argument, however I pick up on a couple of interesting points raised in the lecture throughout this paper.

In the ten years since Lord Reed's paper was published, the use of foreign law in domestic judgments has further established itself as a very common phenomenon in this jurisdiction, both in private and in public law cases. Prominent examples range from tort law[6] and contract law[7] to criminal law[8] and human rights.[9] It is estimated that the House of Lords referred to foreign law in around one third of all cases during its final years,[10] and judicial comparativism remains a very common feature in UK Supreme Court (UKSC) judgments today. It is therefore surprising that very little has been written about this phenomenon in the UK specific context.[11] This paper seeks to fill that vacuum. It explores the main themes and arguments underlying the international discussion on judicial constitutional comparativism (with an emphasis on the American debate), and considers their pertinence for the UK legal system. The research is based on a systematic analysis of all relevant decisions in the UKSC since 2009. The main argument is as follows: (i) the use of foreign law is constitutionally legitimate; (ii) detected transferability concerns are mitigated by the interwovenness of the global common law system; and (iii) methodology concerns are mitigated by the UKSC's flexible, humble approach, which demonstrates careful scrutiny of the foreign authorities put before it.

I use the term 'judicial comparativism' as the noun for the 'use of foreign law', which in turn refers to the use of non-binding foreign domestic law, ie not international law, foreign domestic law that it is mandatory to consider under private international law, or foreign case law interpreting international law.[12] Further, I use 'foreign law' synonymously with 'case law' and 'authorities'. There are, as Saunders points out, variations as to the 'nature of the foreign source on which a court draws', eg anything from a constitutional or legal norm to an interpretative approach or a mere 'happy turn of phrase'.[13] I use an all-encompassing definition, considering a judgment as 'using' foreign law if it refers to legal enactments or practices outside UK by way of general information or as at least partial support for the reasoning behind the domestic decision. I use an equally wide definition for constitutional law, relying on the concept of constitution as function, encompassing such legal rules that (a) define and limit public power, (b) focus on rights individuals have within or against the state, or (c) both,[14] regardless of their formal designation.

Judicial constitutional comparativism understood in this way ranges considerably in scope and style. At the UKSC level we find it manifested in, inter alia: (i) a couple of sentences in a case about notification requirements for sexual offenders;[15] (ii) short historical/academic references in a

[5]R Reed 'Comparative law in the Supreme Court of the United Kingdom', Centre for Private Law, University of Edinburgh, 13 October 2017.

[6]The most famous example being *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32, which was criticised for its extensive reference to foreign law in T Weir 'Making it more likely v Making it happen' [2002] CLJ 519 at 521; see also *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177, which referred to American law, and *White v Jones* [1995] 2 AC 207, which relied on German law. For an overview see K Stanton 'Comparative law in the House of Lords and Supreme Court' (2013) 42(3) Common Law World Review 269.

[7]See for example the seminal *Hadley v Baxendale* [1854] 9 Ex Ch 341, which was heavily influenced by American law and the French Civil Code.

[8]See for example the landmark decision in *R v Jogee* [2016] UKSC 8, in which Australian law featured heavily.

[9]Examples include *Guardian News & Media Ltd v City of Westminster Magistrates' Court* [2012] EWCA Civ 420, *Moohan and Another v The Lord Advocate* [2014] UKSC 67 and *A v British Broadcasting Corporation* [2014] UKSC 25.

[10]See M Nounckele 'De la légitimité de la comparaison par les juges – etude de la jurisprudence de la House of Lords de 1996 à 2005' (study prepared at the University of Louvain-la-Neuve, 2011).

[11]A very notable exception to this in the context of human rights jurisprudence is Hélène Tyrrell *Human Rights in the UK and the Influence of Foreign Jurisprudence* (Oxford: Hart, 2018).

[12]For an example of the latter see *A and Others v Secretary of State for the Home Department* [2005] UKHL 71.

[13]C Saunders 'Comparative constitutional law in the courts: is there a problem?' (2006) 59(1) CLP 91 at 99.

[14]I do not distinguish between formal or written constitutions and uncodified ones, see ibid, at 98 on this point.

[15]*R (on the application of F) and Thompson v Secretary of State for the Home Department* [2010] UKSC 17 at [57].

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seminal case on disclosure in closed material proceedings;[16] (iii) rather vague points on proposed changes to legislation in other countries in a case concerning the definition of the term 'terrorism';[17] and (iv) the direct application of foreign law in *HJ (Iran) v Secretary of State for the Home Department*.[18]

1. The absence of a domestic debate

In the US context, Choudhry observes that the migration of constitutional ideas 'has deeply divided an already divided Court, along the same ideological lines which has polarized its jurisprudence'.[19] That this is so is not surprising. If you do take the view that the US Constitution is to be interpreted in line with the Founders' intention, there is not much room for external legal sources in adjudication. Opponents of originalism, on the other hand, will be much more inclined to look to foreign judgments for inspiration, which originalists will for obvious reasons disapprove of.[20] Judicial comparativism in this sense adds another dimension to an already highly politicised disagreement on many substantive legal issues and, particularly because the Supreme Court of the United States always sits en banc, there is no avoiding the issue.

There is at the UK judiciary no discussion remotely comparable to the one in the United States. Indeed, Lord Reed's 2008 paper is one of the very few examples where judges have addressed the phenomenon of judicial comparativism at great length.[21] The few extra-judicial lectures there are convey an overwhelmingly positive attitude towards judicial comparativism, and a lack of engagement with potential methodological or constitutional concerns arising. Judicial comparativism is perceived and presented as a natural part of legal reasoning in a common law jurisdiction. In the 1980s, Lord Goff's remarked that if 'we add to co-operation between judge and jurist a greater readiness to learn from the legal systems of other countries, not only in the common law world, but also in the civil law countries, then the common law may be about to embark upon the most fruitful period of development in its long, eventful, history'.[22] More recently, and more poetically, the late Lord Toulson said that the:

> common law is our habitat. It is like the water in which we swim. We are not always as conscious as we should be of what is to be found in it. It has served us very well and continues to do so. Its methodology enables it to be shaped and developed to meet the needs of justice in a changing world, politically, economically, technologically or socially. In adapting it, the court's horizons should never be narrow. As Pope Gregory advised St Augustine, our attachment to places should not inhibit our search for good things.[23]

The only potential issue that is raised in the context of the practice of judicial comparativism is what some senior judges have recently identified as the 'overhasty' reliance on Strasbourg jurisprudence instead of foreign common law authority.[24]

[16] *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39 at [68] (Lord Reed, dissenting).

[17] *R v Gul* [2013] UKSC 64 at [61] and [62].

[18] *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31. Note that direct applications are rare and, arguably, this case is more about a domestic interpretation of international law.

[19] S Choudhry 'Migration as a new metaphor in comparative constitutional law' in S Choudhry (ed) *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2002) p 1.

[20] Lael Weis compares the influence of the originalism doctrine in Australia and the United States in 'What comparativism tells us about originalism' (2013) 11(4) International Journal of Constitutional Law 842.

[21] Other examples more limited in scope include J Mance 'Foreign laws and languages' in A Burrows, D Johnston and R Zimmermann (eds) *Judge and Jurist: Essays in Memory of Lord Rodgers of Horsferry* (Oxford: Oxford University Press, 2013); R Walker 'Developing the common law: how far is too far?' Victoria Law Foundation's Annual Oration, Banco Court, Melbourne, September 2012; R Toulson 'International influence on the common law' The London Common Law and Commercial Bar Association, London, 11 November 2014. See also R Goff 'Judge, jurist and legislature' (1986) 2(1) The Denning Law Journal 79.

[22] Goff, above n 21, at 94.

[23] Toulson, above n 21, at para 42.

[24] This is in line with the underlying sentiment in common law constitutional rights cases, see for example *A v British Broadcasting Corporation*, above n 9, and *Kennedy v The Charity Commission* [2014] UKSC 20.

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Apart from a few noteworthy papers,[25] academic discussion of this phenomenon in the UK context is equally limited.[26] As I note above, the lack of engagement with this phenomenon is surprising. Compared to Europe, England particularly is much more open to judicial comparativism than Germany, and even more so than France.[27] This is in line with the observation that in the common law world in general, judicial comparativism has established itself as an integral part of legal reasoning,[28] the common law being considered 'beyond the reach of any given national authority'.[29] There are certain factors that contribute to this dynamic. First of all, the UK follows the adversarial system. For the practice of judicial comparativism, this means that where counsel present foreign case law in their submissions, these are likely to be taken into consideration by the court. The focus is on persuasiveness.[30] Indeed, members of the UKSC have said that they will take into account all such material that is relevant for deciding a case, including foreign case law.[31] Equally, they will cite all persuasive arguments including those based on foreign law in their judgments.[32] I will not try to predict how the current practice of judicial (constitutional) comparativism may be influenced by Brexit and the ever-looming threat of the scrapping of the Human Rights Act 1998.[33] I will say, however, that judicial comparativism with reference to foreign common law authorities is likely to increase given the 'space' that will be freed up when engagement with judgments from non-UK courts ceases to be mandatory (as will most likely be the case for judgments from the Court of Justice of the European Union) and/or highly persuasive (as would be the case for judgments from the European Court of Human Rights).

One can only speculate as to why there is no discussion about the occurrence and the validity of judicial constitutional comparativism in this jurisdiction. One reason may be that the borrowing from other common law jurisdictions has always been a prominent feature in domestic judgments, particularly in the private law context, and that the common law is perceived as one body of law developed by eminent common law courts around the world. At first, this appears to be a convincing point, however it does not stand closer scrutiny. Or, at least, it does not accommodate the debates in other common law jurisdictions such as Australia.[34] Another perhaps more convincing reason is that common law 'imported' into this jurisdiction is essentially domestic at its core, due to it originally having been 'exported' to places like Australia, the United States of America and Canada, so that it isn't strictly speaking foreign. However, in many cases the law will have changed beyond recognition since the original 'export' or will be autochthonous altogether, so this argument ultimately has to be rejected, too. Thirdly, and perhaps most convincingly, one could argue that, as will be demonstrated below, apart from very few exceptions there have not been any direct transplantations of foreign ratio decidendi

[25]Even those are written from a comparative, rather than a purely domestic angle: see C McCrudden 'Common law of human rights? Transnational judicial conversations on constitutional rights' (2000) 20 OJLS 499; S Fredman 'Foreign fads or fashions? The role of comparativism in human rights law' (2015) 64 ICLQ 631.

[26]The latest contribution on this phenomenon in the context of adjudication based on the rule of law and the separation of powers is S Wheatle *Principled Reasoning in Human Rights Adjudication* (Oxford: Hart, 2017) ch 7.

[27]Hirschl, above n 2, p 37.

[28]HR Zhou 'A contextual defense of "comparative constitutional common law"' (2014) 12(4) IJCL 1034.

[29]HP Glenn *On Common Laws* (Oxford: Oxford University Press, 2005) p 69.

[30]This was confirmed by an interview with Supreme Court Justices: see J Bell 'Comparative law in the Supreme Court 2010–11' (2012) 1(2) CJICL 20. For a slightly different interpretation of the word 'persuasive' see Reed, above n 1, at 269.

[31]E Mak 'Comparative law before the Supreme Courts of the UK and the Netherlands' in M Andenas and D Fairgrieve (eds) *Courts and Comparative Law* (Oxford: Oxford University Press, 2015) p 411.

[32]Ibid, p 416. Note that this is different from other jurisdictions where foreign law may very well be taken into account, but will not be specifically referred to in a judgment.

[33]The Conservatives in their 2015 manifesto pledged to scrap the HRA 1998 and replace it with a 'British Bill of Rights', details of which have not crystallised beyond what was originally formulated in the Conservatives' 2014 proposal, which has been unfavourably received: 'Protecting human rights in the UK, The Conservatives' proposal for changing Britain's human rights laws' (2014). Two years ago, the then Lord Chancellor Elisabeth Truss announced that the Government would go ahead with their plans to honour their manifesto pledge, however last year it was announced that any legislative changes to the UK's human rights regime would be put on hold until after Brexit. This was confirmed by the Conservatives' manifesto for the 2017 General Election.

[34]For an overview see A Stone 'Comparativism in constitutional interpretation' (2009) UMelbLRS 15.

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and, equally, there aren't any judgments in which foreign law is relied on and in which the outcome can be considered drastic or outrageous. Thus, there has not been any 'improper use' of foreign authority. Finally, as opposed to the United States, in which there is a fierce open debate about judicial constitutional comparativism,[35] there is in our jurisdiction no culture of direct confrontation between judges; indeed, extrajudicial conversations or lectures tend to avoid controversial topics, and judges make a considerable effort not to be associated with any particular legal or political ideology.

While the above explains the lack of discussion between judges, it does not help us explain the apparent lack of scholarly debate on this issue. In any case, what we see instead of scholarly articles or public debates,[36] and what allows us to draw conclusions as to judges' individual and collective attitudes towards the use of foreign law, is their reasoning in judgments. The nature of judgments in the UK allows every judge on the bench to contribute in their own way and to take into account the sources they deem relevant, which is why we can observe different approaches to judicial comparativism at the same court.[37]

2. The arguments of the international debate in overview

One of the earliest records of a very negative attitude towards the use of comparative law in domestic judgments is contained in the Junius Letters, which denounced what was perceived as the consequential *impurity* of the law:

> In contempt of the common law of England, you have made it your study to introduce into the court where you preside, maxims of jurisprudence unknown to Englishmen. The Roman code, the law of nations, and the opinions of foreign civilians, are your perpetual theme; but whoever heard you mention Magna Carta or the Bill of Rights with approbation or respect? By such treacherous arts, the noble simplicity and spirit of our Saxon laws were first corrupted.[38]

Today the practice of the use of foreign law in constitutional adjudication is the subject of a heated debate[39] that goes beyond the notion of purity.[40] The majority of scholarly works focus on two questions: legitimacy and methodology.[41] As with most academic exchanges, there is a now a discernible spectrum of opinion, ranging from the supporters of an envisaged *ius gentium*[42] or a 'democratic world order of Kantian world citizens'[43] that judges can draw down from to settle complex constitutional questions on the one hand, to characterisations of judicial comparativism as a 'pretext for judges

[35]For a comprehensive account of the debate and its implication for constitutional law decisions by the US Supreme Court see the illuminating SA Simon 'The Supreme Court's use of foreign law in constitutional rights cases' (2013) 1(2) Journal of Law and Courts 279.

[36]In the United States, the most famous of all exchanges on the topic is the Conversation between Justices Scalia and Breyer, see 'A conversation between US Supreme Court justices. The relevance of foreign legal materials in US constitutional cases: a conversation between Justice Antonin Scalia and Justice Stephen Breyer', Washington College of Law, 13 January 2005.

[37]For example, the late Lord Toulson was undoubtedly one of the most prolific judicial comparativists, and some of his judgments will be discussed in this paper.

[38]Junius Letter (*London Evening Post*, 1770) reprinted in E Heward *Lord Mansfield* (London: B Rose, 1979) p 129.

[39]The leading scholarly works include VC Jackson 'Constitutional comparisons: convergence, resistance, engagement' (2005) 119 HLR 109; RP Alford 'Misusing international sources to interpret the constitution' (2004) 98 American J Int Law 57.

[40]Judicial comparativism is a phenomenon found in almost all prominent jurisdictions, and it has triggered intensive academic exploration, see for example DS Law 'Judicial comparativism and judicial diplomacy' (2015) 163(4) University of Pennsylvania Law Review 927, where practices at the Japanese Supreme Court, the Korean Constitutional Court, the Taiwanese Constitutional Court, and the Hong Kong Court of Final Appeal are scrutinised.

[41]See for example TK Graziano 'It is legitimate and beneficial for judges to compare?' in Andenas and Fairgrieve, above n 31.

[42]J Waldron 'Partly laws common to all mankind' in *Foreign Law in American Courts* (New Haven: Yale University Press, 2012).

[43]M Rosenfeld and A Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) Introduction.

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to impose their own subjective values'[44] which is perceived as particularly problematic due to judges' ignorance of foreign constitutional nuances. The underlying scepticism of the latter stance going back all the way to Montesquieu.[45]

(a) Supportive

Supportive views of judicial comparativism tend to focus on the bigger picture without addressing the points of criticisms raised by the opposing view. Thus, judicial comparativism has been welcomed as a phenomenon which partially balances what is seen as a net gain in power for executives, with an accompanying curbing of fundamental rights, due to increasingly globalised political systems.[46] The overarching promise judicial constitutional comparativism holds is the same as the one found in comparative constitutional law scholarship, namely one of 'self-reflection or betterment through analogy, distinction, and contrast'.[47] The underlying suggestion is that, as emphasised by Baudenbacher, globalisation has led to a homogenisation of legal problems, and judicial comparativism can facilitate and coordinate legal responses to those problems.[48] Particularly in the context of human rights, the notion of a common enterprise between likeminded jurisdictions has emerged.[49] Constitutional principles and rights, as Wheatle recently observed, operate at a high level of abstraction, and are therefore 'particularly attractive' for comparative judicial exchanges.[50] Similar to Lord Reed's characterisation of foreign law as an empirical fact, Barak has equated the role and the value of comparative law in his judgments with that of 'an experienced friend'.[51] Thus, we could achieve 'mutual understanding' and 'reciprocal improvement'.[52]

(b) Dismissive

The comparativism-sceptical camp tends to focus on three main arguments against the perceived advantages of judicial comparativism. One common criticism is that judicial comparativism avoids the national constitutional/institutional mechanisms to bring about legal change, a responsibility and power often located within the political branches rather than the judiciary. Thus, there is a lack of democratic legitimacy.[53] In his conversation with Justice Breyer, the late Supreme Court Justice Antonin Scalia reckoned:

> I have no problem with change. It's just that I do not regard the Constitution as being the instrument of change by letting judges read Canadian cases and say, "Yeah, it would be a good idea not to have any restrictions on abortion." That's not the way we do things in a democracy. Persuade your fellow citizens and repeal the laws.[54]

[44]Fredman, above n 25, at 632, citing Justice Scalia in *Roper v Simmons* (2005) 543 US 551 (US Supreme Court) at [627].

[45]A Cohler and others (eds and trans) *Charles de Secondat, Baron de Montesquieu, The Spirit of Laws* (1989) p 8: 'the political and civil laws of each nation […] should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another'.

[46]MS Flaherty 'Judicial globalization in the service of self-government' (2006) 20(4) Ethics & International Affairs 477 at 479.

[47]R Hirschl 'On the blurred methodological matrix of comparative constitutional law' in Choudhry (ed), above n 19, p 41.

[48]C Baudenbacher 'Judicial globalization: new development or old wine in new bottles' (2003) 38(3) Texas International Law Journal 505 at 505.

[49]AM Slaughter 'A typology of transjudicial communication' (1994) 29 University of Richmond L Rev 99 at 102.

[50]Wheatle, above n 26, p 149.

[51]A Barak *The Judge in A Democracy* (Princeton: Princeton University Press, 2006) p 198. See also *Printz v United States* 521 US 898.

[52]CH Mendes 'A global constitution of rights: the ethics, the mechanics and the geopolitics of comparative constitutional law' in U Baxi, F Viljoen and O Velhena (eds) *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria University Press, 2014) p 55.

[53]In the American context, the most vocal supporter of the argument used to be the late Justice Scalia, see for example 'Commentary' (1996) 40 St Louis University Law Journal 1119; see also Z Larsen 'Discounting foreign imports: foreign authority in constitutional interpretation and the curb of popular sovereignty' (2009) 45 Willamette Law Review 767.

[54]'A conversation', above n 36.

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The second major point of criticism is a court's inability to grasp and accommodate distinctive constitutional identities and ways of legal thinking. This 'contextual' objection is discussed in the works of Tushnet, who reasons that 'constitutional law is deeply embedded in the institutional, doctrinal, social, and cultural contexts of each nation, … we are likely to go wrong if we try to think about any specific doctrine or institution without appreciating the way it is tightly linked to all the contexts within which it exists'.[55] The essence of this particular point of criticism was voiced elegantly by Legrand, who said that:

> They [rules and concepts] may provide one with much information about what is apparently happening, but they indicate nothing about the deep structures of legal systems. Specifically, rules and concepts do little to disclose that legal systems are but the surface manifestation of legal cultures and, indeed, of culture tout court. In other words, they limit the observer to a 'thin description' and foreclose the possibility of the 'thick description' that the analyst ought to regard as desirable.[56]

Scalia used the thought-provoking example of a US judge reassessing whether 12 years are extraordinary for a person to be on death row.[57] If, he argued, one chose to look to England for inspiration, in the past one would have found that a death sentence was carried out within two weeks, which would make the US counterpart look extraordinary. However, Justice Scalia argued that it is only extraordinary due to the domestic problem of erroneous executions, which is why the justice system allows repeated habeas corpus applications. Thus, simply comparing the two different timeframes on their face would lead to a very superficial comparison which does not take socio-legal considerations into account. Indeed, the irresponsible use of foreign authority could lead to detrimental case law in that from a holistic point of view, human beings might be better positioned with the longer time-period despite contrary considerations such as human dignity and degrading treatment.[58]

The third of the most raised criticisms relates to cherry-picking: 'If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever […] looking at foreign law for support is like looking over a crowd for support and picking out your friends'.[59] The risk of this being the case is said to be heightened by the fact that parties will advance only such foreign authorities that are favourable, the balance being even further tilted where only one of the parties engages in comparative legal reasoning. Further, as Saunders has pointed out, there is in this context no equivalent to the obligation that rests on counsel to provide to the court all relevant decisions, favourable and unfavourable, to the contention argued.[60]

I will assess these concerns regarding (a) the lack of legitimacy or constitutionality, (b) non-transplantability, and (c) dissatisfactory methodology in the UK context. There is some degree of affinity particularly between concerns (b) and (c), however I have chosen to treat them separately in order to tease out their respective considerations more fully.[61]

[55]M Tushnet *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights Comparative Constitutional Law* (Princeton: Princeton University Press, 2008) p 10.

[56]P Legrand 'European legal systems are not converging' (1996) 45 ICLQ 52 at 56.

[57]'A conversation', above n 36.

[58]Graziano tries to refute this by saying that the existence of the private international law regime demonstrates a manifestation of the belief that national judges can access and grasp foreign law in a reliable and meaningful way: 'It is legitimate and beneficial for judges to compare?' Andenas and Fairgrieve, above n 31, p 32. However, this point is weakened by the fact that in private international law cases there is a much higher level of scrutiny of foreign law.

[59]Chief Justice Roberts, United States Senate Judiciary Committee (Hearing on the Nomination of John Roberts to be Chief Justice of the Supreme Court, Transcript, Day Two, 13 September 2005).

[60]Saunders, above n 13, referencing the Code of Conduct of the Bar of England and Wales, para 710(c).

[61]Reed, above n 1, combined these two aspects under the heading 'methodology'.

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3. Legitimacy: lack of formal constraints and general constitutional limits

Scalia suggested that the onus is on those engaging in judicial constitutional comparativism to justify it, and to speak to its legitimacy.[62] As opposed to jurisdictions such as South Africa, where judges are encouraged by the constitution to consider foreign law,[63] there is no similar official encouragement or deterrent in the UK. Where then do we find arguments supporting legitimacy?

It seems useful to first determine what exactly it is that we are dealing with. As a starting point, it is generally accepted, even by those who favour or sympathise with judicial constitutional comparativism, that foreign case law is not synonymous with legally binding precedent. Beyond the distinction between binding authority and voluntary reliance on foreign law, Zhou's categorisation into 'normative' and 'non-normative' comparative legal methodology seems straightforward and helpful, the former pointing to the use of foreign law in a way that justifies taking a specific decision, and the latter signifying a mere source of practical wisdom.[64] His use of 'normative' is arguably similar to McCrudden's use of the term 'persuasive authority'.[65] However, on closer scrutiny, and Zhou points to this by reference to an observation by Smits, there is not much of a distinction there:

> Often the method of reasoning is far more subtle because it is not the foreign decision or statute as such that is used as the basis for the reasoning, but rather the argument used in it which is taken over by the national court or legislature.[66]

In the UK context this phenomenon can be observed in *Derbyshire County Council*, a House of Lords case in which Lord Keith referred extensively to American jurisprudence, saying that:

> while these decisions were related most directly to the provisions of the American Constitution concerned with securing freedom of speech, the public interest considerations which underlaid them are no less valid in this country.[67]

Many other factors make the exact characterisation of judicial comparativism difficult to determine. For example, judicial comparativism comes in so many shapes and forms, it is difficult to speak of two distinct categories, ie 'normative' and 'non-normative', in the first place. In what is not an exhaustive list, Saunders has pointed to foreign law being used: (i) to assist to frame the question, (ii) to identify options or more generally to survey the field; (iii) to support a step in the argument; (iv) to suggest an answer; (v) to confirm a conclusion;[68] and (vi) to explore the consequences of a particular result.[69] Foreign law is rarely considered 'a match-winner, a magical ace of trumps',[70] however it can have a very decisive influence particularly where domestic authority appears to provide no clear answer, and where the proposed 'foreign solution' is deemed acceptable in more than one significant, respectable jurisdiction. For example, in *Guardian News*[71] the ratio decidendi of the case, adopting access to court documents as the default position unless stronger contrary arguments could be made out, seemed to be directly taken from the South African Constitutional Court's ruling in *Independent*

[62]'A conversation', above n 36, at 522–525.

[63]See MA Burnham 'Cultivating a seedling charter: South Africa's court grows its constitution' (1997) 3 Michigan Journal of Race and Law 29.

[64]Zhou, above n 28, at 1038.

[65]McCrudden, above n 25, at 502–503.

[66]JM Smits 'Comparative law and its influence on national legal systems' in M Reimann and R Zimmermann (eds) *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) pp 526–527. For a similar argument focusing on the relationship between authority and substantive reasons see RS Summers 'Two types of substantive reasons: the core of a theory of common law justification' (1977) 63 Cornell Law Review 707.

[67]*Derbyshire County Council v Times Newspapers* [1993] AC 534 at 548D.

[68]This function was identified as one of the main ones by UKSC justices in interviews, see Mak, above n 31, p 416.

[69]Saunders, above n 13, at 99–100.

[70]T Bingham *Widening Horizons* (Cambridge: Cambridge University Press, 2010) pp 7–8.

[71]*Guardian News*, above n 9.

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Newspapers (Pty) Ltd.[72] This Court of Appeal judgment is an exemplifier of the concept of *collective persuasive authority*. Toulson LJ (as he then was) reasoned:

> I base my decision on the common law principle of open justice. In reaching it I am fortified by the common theme of the judgments in other common law countries to which I have referred. *Collectively they are strong persuasive authority*. The courts are used to citation of Strasbourg decisions in abundance, but citation of decisions of senior courts in other common law jurisdictions is now less common. I regret the imbalance. *The development of the common law did not come to an end on the passing of the Human Rights Act 1998. It is in vigorous health and flourishing in many parts of the world which share a common legal tradition. This case provides a good example of the benefit which can be gained from knowledge of the development of the common law elsewhere*.[73]

Given the apparent difficulty in determining the exact extent to which foreign law has an impact on a domestic judgment, I think it is best to adopt a very broad definition of judicial comparativism, and crucially one that includes the possibility of using foreign law in a decisive way.

Having determined the scope for this discussion, I base my discussion as to constitutional restrictions, ie rules that affect legitimacy, on the excellent roadmap provided by Saunders. She distinguishes between different ways in which legitimacy can be denied. The first one is where under any given domestic constitutional system 'the sources on which a court may draw for constitutional adjudication are regarded as closed'.[74] In the UK, not only is there no codified constitution suggesting so, but instead there seems to be a complete lack of rules or guidance on judicial comparativism, whether in the private or in the public law context.[75] Thus, one conclusion as to legitimacy could simply be that the absence of positive law or rules restricting the use of foreign law, and the apparent absence of concern in judicial practice, legitimises it per se.

However, this would ignore the nuances of the UK constitution.[76] Two of the guiding constitutional principles, as recently confirmed in the seminal *Miller* judgment,[77] are of course the concepts of parliamentary sovereignty and the separation of powers. Accordingly, the courts cannot overstep their judicial functions, ie they must avoid taking on the role of legislators,[78] and they must interpret primary legislation faithfully to Parliament's intention.[79] This interpretation of the UK constitution can be equated with a certain notion of popular sovereignty, Saunders' second category, according to which law is understood as an exercise of will, or in which constitutional interpretation demands

> fidelity to the intention of the framers or to the expectations of the national community of the time, [and which] may present impediments to the use of foreign sources, as well as confining the process of constitutional interpretation in other ways.[80]

I suggest that the inclination as to whether one is a proponent or an opponent of the use of foreign law in constitutional cases is highly likely to coincide with one's general views on the nature of the constitution. In other words, and this is crucial, the first question always goes to the general power of the

[72] *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* 2008 (5) SA31 at [43].

[73] *Guardian News*, above n 9, at [88] (emphasis added).

[74] Saunders, above n 13, at 108.

[75] For example, there is not even a Practice Direction at the UKSC level.

[76] Apart from being a problematic suggestion as a matter of principle.

[77] *R (on the application of Miller and Another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, particularly at [252] and [43].

[78] Some would argue, by abstaining from laying down the law in a way that goes far beyond the facts of the particular case before it: see for example J Finnis 'Judicial power: past, present and future', Gray's Inn Hall Lecture, 20 October 2015, pp 4–5.

[79] The formal description of this Diceyan account was followed in *British Railways Board v Pickin* [1974] AC 765, however it is today considered much more nuanced, see Elias LJ 'Annual Lord Renton Lecture', 24 November 2009.

[80] Saunders, above n 13, at 109.

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courts to shape (constitutional) law, and only the second step determines whether such shaping can be informed by reference to foreign law. Those who tend to view the constitution as a legal construct, infused with universal values and notions of justice, will inevitably find it less problematic to look beyond state borders (or courtrooms) to find the 'best' interpretation of principles. Indeed, in the international context, some seem to take pride in demonstrating an 'educated, cosmopolitan sensibility, as opposed to a narrow, inward-looking, and illiterate parochialism'.[81] In the UK, the leading normative account in favour of judicial constitutional comparativism is provided by Allan, who has suggested that constitutional theory is best understood as being underpinned by principles of liberal constitutionalism, which can be found in all liberal Western democracies.[82] There is, therefore, a 'natural unity' that facilitates judicial comparativism.[83] Allan is of course one of the main authors of the theory of common law constitutionalism,[84] which is why it is unsurprising that he takes this view. The opposite view is best encapsulated by JGA Griffith[85] and Adam Tomkins.[86]

Despite the absence of the formal restrictions or entitlements one would potentially find in a capital-C constitution, the courts have had to define their constitutional role in a system informed by differing views on the relationship between themselves and Parliament. They have, over the centuries, developed the constitutional values and rules of this jurisdiction in many ways, their impact being manifested in the doctrines of common law constitutional rights, such as the recently (re-) confirmed right of access to the courts[87] and the gradual limitation and increasing justiciability of the royal prerogative,[88] to only name a few. The fine balance to be struck between the courts' restrictions under parliamentary sovereignty and its law-making capacity under the common law is to some extent guided by a criterion that kills two birds with one stone. As Lord Goff has pointed out,

> the real principle which both restricts the judicial power to legislate and ensures a sufficient degree of stability in the law is far more subtle than a rigid rule precluding change, or indeed the doctrine of precedent (whatever its form). It is enshrined in one word – *gradualism*.[89]

One can then ask: where are the limits to the judicial capacity to inform constitutional law by reference to foreign law? *Nicklinson*[90] provides the beginning of an answer: clear statutory language. In this landmark case, the UKSC was asked to consider whether the law relating to assisted suicide was in violation of the European Convention on Human Right, and whether the prosecution policy with regard to those individuals alleged to have assisted or encouraged suicide by the Director of Public Prosecutions was unlawful. The case provides the counter example to the situation where courts are accorded 'law-making discretion when … the constitution [here, primary legislation with constitutional implications for the right to euthanasia] is ambiguous, vague, internally inconsistent, or insufficiently explicit';[91] s 2 of the Suicide Act 1961 was as clear as it could be. Consequently, the reasoning

[81]Choudhry, above n 19, p 4. The post-WWII era has seen the emergence of a constitutional model characterised by cross-fertilisation, see L Weinrib 'The postwar paradigm and American exceptionalism' in Choudhry, above n 19.

[82]TRS Allan *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001) Preface.

[83]Ibid, p 4.

[84]For an overview of this theory see T Poole 'Back to the future? Unearthing the theory of common law constitutionalism' (2003) 23(3) OJLS 435.

[85]JGA Griffith 'The political constitution' (1979) 42 MLR 1.

[86]A Tomkins *Our Republican Constitution* (Oxford: Hart, 2005). See also R Ekins 'Legislative freedom in the United Kingdom' (2017) 133 Law Quarterly Review 582.

[87]*R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51; see also *R v Lord Chancellor, ex p Witham* [1998] QB 575 and *R v Secretary of State for the Home Department, ex p Leech* [1994] QB 198.

[88]*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; R Moules 'Judicial review of prerogative orders in council: recognising the constitutional reality of executive legislation' (2008) 67(1) CLJ 12.

[89]Goff, above n 21, at 83.

[90]*R (Nicklinson and Another) v Ministry of Justice; R (AM) v DPP* [2014] UKSC 38.

[91]J Goldsworthy 'Questioning the migration of constitutional ideas: rights, constitutionalism and the limits of convergence' in Choudhry, above n 19, p 119.

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exposed in *Carter v Canada*, a case heavily relied on by the appellants which led to the judicial legalisation of euthanasia in Canada, was disregarded. The UKSC could not, in contrast to the Supreme Court of Canada, review primary legislation, and they even abstained from issuing a declaration of incompatibility under the HRA 1998, in a decision which Elliott labelled an example of 'remedial deference'.[92] Thus, whether or not 'balancing public interests against individual human rights might seem to be a paradigmatically domestic exercise',[93] the starting point will always be the power of domestic constitutional players before any (foreign) legal sources capable of bringing about legal change are considered. Framed this way, the UKSC's approach has the positive side effect of pre-emptively excluding any potential criticism from the public or the press, the latter of which has recently shown strong aversion against the possibility of UK courts referring to judgments from supranational courts, particularly after Brexit. I use the expression 'side effect' here, as I do not think that pleasing the press is – nor should it be – a significant factor a judge should take into account when constructing domestic judgments with the help of foreign authorities. Rather, the focus has to be on a gradual, systematic development of the common law in response to new factual situations and intellectual challenges.

As I said in the introduction, the UK courts have struck a commendable balance under this jurisdiction's unique constitutional set-up. The starting point in the judgments analysed is to see how far domestic law goes, and only if there is a reasonable suggestion or realisation that they 'have taken a wrong turn, as sometimes happens in any fallible human system, attention to foreign authorities may help […] to judge whether [they] have gone wrong and, if so, to find the right path'.[94] There are other functions and motivations for judicial constitutional comparativism, and I give a list below in Part 5. To conclude this part of the paper, as former South African Constitutional Court Justice Laurie Ackermann observed universally, 'the right problem must, in the end, be discovered in one's own constitution and jurisprudence, but to see how other jurisdictions have identified and formulated similar problems can be of great use'.[95]

4. Non-transplantability: the common law as a unified system and vehicle

According to Hirschl, judicial comparativism is an 'identity-constructing' phenomenon. Courts are far more inclined to rely on case law from jurisdictions with which they associate common values and legal traditions.[96] This is confirmed by the vast majority of UKSC judgments. By far the most often relied on jurisdictions are Australia, the United States, Canada, South Africa and New Zealand. What transpires from all these cases is the respect for and familiarity with judgments from comparable courts in other common law jurisdictions. The interwovenness between these legal systems and the historical integration and dependency on each other at least partially defeats the 'unfamiliarity' argument. This is facilitated by the way in which English common law was originally 'exported' to these jurisdictions.[97] Taking Australia as an example, 'in the earliest years of the High Court it was unthinkable that there could be any difference in the common law as it was made and applied in the courts of England and Wales and the common law as it was to be applied in Australia', which led to years of following judgments not just from the House of Lords or the Privy Council, but also the Court of Appeal.[98] The first time the High Court decided not to follow a

[92]M Elliott 'The right to die: deference, dialogue and the division of constitutional authority' Public Law For Everyone, 26 June 2016. See also A Young *Democratic Dialogue and the Constitution* (Oxford: Oxford University Press, 2017) p 211.

[93]Fredman, above n 25, at 633; see also L Hoffmann 'Human rights and the House of Lords' (1999) 62 MLR 159.

[94]R Toulson 'International influence on the common law', The London Common Law and Commercial Bar Association, London, 11 November 2014, para 41.

[95]LWH Ackermann 'Constitutional comparativism in South Africa: a response to Sir Basil Markesinis and Jörg Fedtke' (2005) 80 Tulane Law Review 169 at 184.

[96]Hirschl, above n 2, p 76.

[97]For a closer exploration of the role of the former Empire and colonies in this regard see Wheatle, above n 26, pp 150–163.

[98]KM Hayne 'The High Court of Australia and the Supreme Court of the United Kingdom: the continued evolution of legal relationships' (2012) 1(2) CJICL 13 at 13.

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judgment by the House of Lords was in 1963 in *Parker v The Queen*.[99] Referencing UK authorities remains very common, however its character has shifted tremendously, so much so that today the relationship between the UKSC and the Australian High Court is one of equals.[100] Both courts will refer to each other not out of any perceived obligation but freely, where reasoning is considered valuable. Similar developments have shaped the relationship between the UK and other (former) Commonwealth jurisdictions. This is not surprising. In every common law jurisdiction we find 'some English reported decisions and institutional writers at the root of the corpus of common law, and in jurisdictions other than American ones English decisions constitute quite a substantial part of the trunk'.[101] Indeed, even Scalia was ready to accept the importance and relevance of old English authorities due to the fact that so many long-standing US legal practices have their origin in English law, which renders exploration of the latter not 'wholly outside American law'.[102] In the context of common law constitutional rights, for example, we see that cases concerned with areas in which the common law has traditionally been strong, such as procedural protection, foreign common law authorities will have heightened authority because Commonwealth countries will be at least partially built on UK authority. For instance, in *Guardian News*, the Court of Appeal decision mentioned above, the Canadian Supreme Court judgment in *Attorney General of Nova Scotia v MacIntyre*[103] is referred to, which in turn relied on two key UK authorities, *Scott v Scott*[104] and *McPherson v McPherson*.[105]

To summarise, judicial comparativism is facilitated by linguistic, historical and cultural proximity which enhances the chance of transferability.[106] The 'genealogical relation' between legal systems such as Canada, Australia, the United States and the UK makes it more natural for the UKSC to draw inspiration from these systems rather than to rely on civil law jurisdictions.[107] Foreign law with English law roots is what makes references to Privy Council decisions useful, too. For example, as Bell has pointed out, *R v Chaytor*,[108] a UKSC case, relied on two Privy Council decisions from Jamaica and New Zealand to remedy a perceived gap in domestic law in the context of criminal proceedings brought against Members of Parliament for offences in connection with their claims for parliamentary expenses.[109]

Instead of saying that there are 'as many common laws as there are common law jurisdictions',[110] the common law is increasingly regarded as a system of rules woven together by transcendent fundamental principles. In the end, the phenomenon of judicial comparativism is perhaps, more than anything else, about the principled development of the common law, the latter being understood as a transnational body of law rather than a purely domestic legal source.

The case law supports this view. In *A v BBC*, Lord Reed, seeking to show that the exceptions developed in *Scott v Scott* are not exhaustive and that the principle of open justice is developed in response to societal changes, suggested that it can also be advanced by

> having regard to the approach adopted in other common law countries, some of which have constitutional texts containing guarantees comparable to the Convention rights, while in others *the approach adopted reflects the courts' view of the requirements of justice.*[111]

[99] *Parker v The Queen* (1963) 111 CLR 610.
[100] Hayne, above n 98, at 15.
[101] JW Harris 'The Privy Council and the common law' (1990) 106 Law Quarterly Review 574 at 581.
[102] *Borough of Duryea, Pa v Guarnieri* (131 S Ct 2488, 2498-99 [2011]).
[103] *AG (Nova Scotia) v MacIntyre* [1982] 1 SCR 175.
[104] *Scott v Scott* [1913] AC 417.
[105] *McPherson v McPherson* [1936] AC 177.
[106] M Bobek *Comparative Reasoning in European Supreme Courts* (Oxford: Oxford University Press, 2013).
[107] *Guardian News*, above n 9, at [30].
[108] *R v Chaytor* [2010] UKSC 52.
[109] Bell, above n 30, at 23.
[110] Harris, above n 101, at 574 commenting on *Cassell & Co Ltd v Broome* [1972] AC 1027 (Lord Diplock).
[111] *A v British Broadcasting Corporation*, above n 9, at [40] (emphasis added).

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Equally, there are cases in which a more cautious stance is taken due to differences in the constitutional systems contrasted. For example, in *Moohan* Lord Hodge rejected the relevance and applicability of foreign authorities placed before him by counsel, by pointing out the difference in the constitutional set up of the Canadian federation, as well as the subsequent qualification of the legal reasoning counsel sought to rely on. Specifically, he said that he derived

> little assistance from *Sauvé v Attorney General* … The judgment has to be understood in the context of the Charter of Rights which in section 3 gives every citizen of Canada the right to vote in the election of members of federal and provincial legislatures and in section 15(1) gives every individual equal benefit of the law.[112]

Awareness of the underlying differences in the fabric of a jurisdiction's constitution are essential. To engage in judicial constitutional comparativism in a meaningful way that respects one's own legal system, one cannot blindly adopt dicta or ratio decidendi from other jurisdictions. Here, *Jackson*,[113] which is also discussed briefly in Lord Reed's paper,[114] comes to mind, in which Lord Steyn did not engage with the differences between the UK and the other jurisdictions referred to as regards the prominence, or indeed the existence in the first place, of the concept of parliamentary sovereignty. What if *Jackson* had been decided differently, in reliance on the Australian and South African authorities presented? What if, in analogy to important constitutional cases today, the underlying question regarding the royal prerogative in *Miller* had been determined predominantly on the basis of a comparative analysis of Commonwealth jurisdictions?

These two cases also remind us that within the wider notion of constitutional law, there is clearly a difference between constitutional law in the strict sense, ie rules related to the division of power between the different branches of government, and constitutional law in the loose sense, ie rules related to the relationship between the governing and the governed, often through the provision of constitutional rights or human rights. The latter dimension of constitutional law is much more susceptible to judicial comparativism than the former, and, in my opinion, less controversial due to stronger notions of universality.

As a final note to this part of the paper, it should be recognised that there is a growing tendency to also rely on judgments from civil law jurisdictions in constitutional cases, particularly from German courts.[115] In his recent lecture, Lord Reed briefly discussed the *Behaj* case,[116] in which the UKSC, having to determine the scope of the doctrine of foreign act of state, surveyed judgments from several civil law jurisdictions, including Germany, France and the Netherlands. This phenomenon, as the lecture brings across nicely, is influenced, albeit not exclusively determined, by institutional factors, ie the UK is connected to continental legal systems through the shared legal systems of the EU and the European Convention on Human Rights.[117] This is not the time for crystal ball gazing; whether and how this trend will be influenced by Brexit remains to be been.

5. Methodology: humility, thoroughness and flexibility

Is the UK judiciary guilty of cherry-picking and selection bias? Lord Carnwath recently said in a lecture that 'it is perhaps a fair criticism of the senior judiciary in this country that we have not developed a very principled or consistent approach to […] the use of comparative material from other

[112] *Moohan and Another v The Lord Advocate* [2014] UKSC 67 at [36].
[113] *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262.
[114] Reed, above n 1, at 272–273.
[115] Reed, above n 5, pp 6–11.
[116] *Belhaj v Straw* [2017] UKSC 3.
[117] It would be worthwhile to explore in depth what may be another nuance or dimension of judicial comparativism, namely the bolstering of national law through the exchange of ideas to 'unite' against supranational entities.

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jurisdictions'.[118] The current approach is indeed, on the face of it, marked by a lack of consistency in that different triggers have led to the use of foreign law in different ways. The following list of the main functions of the use of foreign law summarises the upcoming analysis. Accordingly, judicial constitutional comparativism is engaged in:

(i) to demonstrate universality (*HJ (Iran)*);[119]
(ii) to confirm a conclusion reached (*Horncastle*);[120]
(iii) to compare purely for informative purposes (*Michael*);[121]
(iv) to clarify or point out weaknesses in past domestic decisions, or to use the 'doctrine of other common law jurisdictions as a possible guide to the development of our own' (*Montgomery*);[122] and/or
(v) to look for inspiration to approach complex legal or logical questions (*Hodkin*).[123]

One popular theme or notion is that of some level of *universality*, albeit in a selected number of jurisdictions, which justifies domestic reliance on the identified *common law majority*. Some emphasis on 'universality' is apparent in *HJ (Iran)*,[124] in which the UKSC said they were referred to decisions from Australia, New Zealand, South Africa, the United States and Canada but could not detect a consistent line of authority that would indicate a universally accepted approach. Similarly, in *Application by Guardian News and Media Ltd*, a case about anonymity orders, Lord Rodger in a unanimous judgment for the court stated that

> Unfortunately, no real additional help with the question of anonymity orders can be obtained from examining the practices of courts in Europe when issuing judgments. In all the principal systems, at least, steps can apparently now be taken, where appropriate, to anonymise reports of matrimonial disputes and disputes relating to children. Apart from that, however, what is striking is the variety of approaches.[125]

Secondly, judicial comparativism has been engaged in where it *supports the court's own conclusion*. Thus, in *Horncastle*,[126] the UKSC found that hearsay evidence could be admitted under s 116(2)(a) of the Criminal Justice Act 2003 where the absent witness failed to give evidence as a result of fear, thereby departing from the ECtHR judgement in *Al-Khawaja and Tahery v the United Kingdom*.[127] Presumably to further strengthen and validate the legal position in the UK, the court referred to 'other established common law jurisdictions, namely Canada, Australia and New Zealand' that also have

> by both common law and statutory development, recognised hearsay evidence as potentially admissible, under defined conditions, in circumstances where it is not possible to call the witness to give evidence, even where the evidence is critical to the prosecution case.[128]

Lord Phillips also explained why the position was different in the United States, briefly contrasting the Sixth Amendment with Art 6 ECHR.

[118] R Carnwath 'People and principle in the developing law', Eighth Biennial Conference on the Law of Obligations: Revolutions in Private Law, University of Cambridge, 19 July 2016, p 2.
[119] *HJ (Iran)*, above n 18.
[120] *R v Horncastle* [2009] UKSC 14. Note that this is comparable to what Wheatle brands reputational value, above n 26, p 149.
[121] *Michael and Others v The Chief Constable of South Wales Police and Another* [2015] UKSC 2.
[122] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11. The quote is taken from Reed, above n 5, p 3.
[123] *Hodkin v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77.
[124] *HJ (Iran)*, above n 18, at [30].
[125] Application by Guardian News and Media, in *HM Treasury v Ahmed* [2010] UKSC 1 at [53].
[126] *R v Horncastle*, above n 120.
[127] Applications nos 26766/05 and 22228/06.
[128] *R v Horncastle*, above n 120, at [41].

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Thirdly, there are also judgments in which foreign law is referred to *without any apparent use made of it or the latter influencing the judgment in any way*. For example, in *Michael*, a case about the scope of police negligence at common law and a potential failure to protect life under the ECHR, the Court provided an overview of the usual common law jurisdictions, seemingly without drawing any conclusions from this comparative exercise.[129] Similarly, in *Bailey*, a commercial law case, Lord Sumption remarked that 'English law is generally averse to the discretionary adjustment of property rights, and has not recognised the remedial constructive trust favoured in some other jurisdictions, notably the United States and Canada'.[130] Both cases can be characterised as foreign law being informative rather than influential or determinative.

Fourthly, foreign law is used *to clarify or point out weaknesses in past domestic decisions*. For instance in *Montgomery*,[131] a case concerning issues of negligence in pre-natal care and the management of the appellant's labour, the UKSC's reasoning could benefit from an exposed logical difficulty with regard to an exception developed under the Bolam test that had been identified by the Australian High Court in *Rogers v Whitaker*.[132] While this was not determinative for the case as a whole, it demonstrates nicely how courts from jurisdictions with similar concepts can assist each other in assessing and potentially improving legal principles.

Having identified these four functions, I will conclude this section by pointing to the potentially most important one. It is not axiomatic that the use of non-binding, persuasive authority is always arbitrary 'since choice of an external authority which effectively persuades is perhaps the only true alternative to arbitrary conduct, [and is] in many cases more effective than adherence to binding, but unpersuasive, law'.[133] It is targeted, rather than arbitrary, and highly selective at that. This does not, as the more cynical view suggests, necessarily mean that case law is chosen in order to arrive at a particular substantive conclusion. A good demonstration of this is the 2013 UKSC judgment in *Hodkin*.[134] Here the function is to *use foreign law as a source of inspiration for a legal method or approach to tackle complex issues*. The appellant wanted to be married at the church she regularly attended, a church belonging to the Church of Scientology. According to *R v Registrar General, ex p Segerdal*, a church within the Church of Scientology was not a 'place of meeting for religious worship' within the meaning of s 2 of the Places of Worship Registration Act 1855.[135] Consequently, a valid ceremony of marriage could not be conducted there. In order to determine the meaning of 'religious worship', which is inevitably controversial, the Court engaged in judicial comparativism, which pointed to the development towards a broader understanding of the term, influenced by anti-discrimination law. The US case law taken into consideration revealed, inter alia, consequentialist considerations, such as the fact that 'adherence to the traditional definition would deny religious identification to the faiths adhered to by millions of Americans'.[136] The judgment then relied on other relevant considerations demonstrated in US and Australian jurisprudence, such as techniques of legal reasoning (while at the same time pointing out the academic criticism of the shortcomings of these approaches),[137] and the consequences of legal immunity. Lord Toulson's judgment for the majority is impressively thorough and humble.[138] Ultimately, he overruled *Segerdal*[139] by, first, adopting a wider definition of religion, in line with Wilson and Deane JJ's interpretation in the Australian

[129] *Michael*, above n 121.

[130] *Bailey and Another v Angove's PTY Ltd* [2016] UKSC 47 at [27].

[131] *Montgomery*, above n 122.

[132] *Rogers v Whitaker* (1992) 175 CLR 479.

[133] HP Glenn 'Persuasive authority' (1987) 32(2) McGill LJ 261 at 264.

[134] *Hodkin*, above n 123.

[135] *R v Registrar General, ex p Segerdal* [1970] 2 QB 697 (CA).

[136] *Hodkin*, above n 123, at [36].

[137] Ibid, at [37]–[39].

[138] Ibid, at [53]: 'The point which I seek to illustrate is that it is not appropriate that the Registrar General or courts should become drawn into such territory [ideas about the nature of God] for the purpose of deciding whether premises qualify as a place of meeting for religious worship'.

[139] *Segerdal*, above n 135.

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High Court case in *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)*,[140] which Lord Toulson found 'most helpful'.[141] In *Hodkin*, this meant that the first hurdle for the appellants was passed as the evidence was 'amply sufficient to show that Scientology is within it [the definition of religion]'.[142] The main point that can be taken away from *Hodkin* for the purpose of this paper is that judicial comparativism in constitutional law can indeed be engaged in in a meaningful way, and selectivity does not need to have an impact on the overall quality of this exercise where the authorities chosen help the courts in constructing a coherent approach to complex legal questions. The sensibility and thoroughness shown does not appear to be novel: Lord Reed noted in his paper, with reference to *A v Secretary of State for the Home Department*,[143] that the 'House of Lords has shown itself to be aware of the danger of selectivity'.[144]

Perhaps therefore, instead of saying there is a lack of a principled or consistent approach, it is better to say that the UKSC has approached judicial constitutional comparativism flexibly and, importantly, almost always humbly and thoroughly. Humility is an important virtue in judicial decision-making as it suggests an openness to new ideas and different ways of thinking in the context of complex questions, rather than automatically assuming a court is necessarily served best by relying exclusively on its own reasoning. It shifts the focus away from the UKSC towards the substantive legal issue. Thoroughness, on the other hand, means that there is a genuine engagement with judicial approaches and decisions placed before the UKSC. As touched upon in the previous section, the UKSC does for example take differences in the constitutional set up into account, particularly where the latter mandates a certain substantive outcome. Thus, in *Michael*, Lord Toulson recognised that 'the discussion in the [South African] judgment is interesting, but the decision itself is of little help, not only because it left the matter undetermined but because it was based on the provisions of the South African constitution and Bill of Rights'.[145] Further, as regards the treatment of foreign law and its underlying examination of evidence, *Nicklinson* represents cases in which foreign law put forward by counsel was put to the test. To reiterate, the appellants challenged the compatibility of the Suicide Act 1961 with Art 8 ECHR. Reliance was placed on the very few countries and states in which euthanasia or assisted suicide was lawful at the time, with a particular emphasis on *Carter v Canada* and the Royal Society of Canada (RSC) Expert Panel on End-of-Life Decision Making 2011 in combination with the domestic reports. Those were subjected to heavy scrutiny by the UKSC. Specifically, the RSC panel was suspected to be one-sided due to the lack of cross-examination of its members as well as the composition of the panel, which was composed of several authors who were also expert witnesses for the plaintiffs. In the words of Lord Sumption

> There are obvious difficulties about reaching a concluded view on untested, incomplete and second-hand material of this kind. The authority of these sources is also diminished by other considerations. The Commission's report, although measured and, as far as one can tell, objective, was inspired by a campaign to change the law.[146]

The UKSC closely assessed the level of scrutiny and the quality of the evidence relied on in the judgment instead of simply concluding that a decision from a very respected foreign court which is generally seen as reaching valid conclusions on rights issues should be given weight per se. Collectively, humility and thoroughness meant that the Court did not pursue judicial comparativism in a meagre or superficial way.[147]

[140](1983) 154 CLR 120.
[141]*Hodkin*, above n 123, at [57].
[142]*Hodkin*, above n 123, at [60].
[143]*A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.
[144]Reed, above n 1, at 265.
[145]*Michael*, above n 121, at [84].
[146]*Nicklinson*, above n 90, at [224].
[147]Thus, the UKSC clearly avoids what Goldsworthy, above n 91, p 118 refers to as 'pseudo-interpretation'.

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Conclusion

It is rare that the UKSC relies on foreign constitutional jurisprudence 'to frame and articulate their own position on a given constitutional question'[148] *entirely* – it is usually but one factor taken into consideration en route to judgment. This is in line with what Lord Reed suggested in his paper a decade ago: the use of foreign law does not mean that one needs to treat 'the foreign decision as necessarily being in itself a factor in favour of deciding the issue in the same way' and there does not need to be 'any preconception that the success or otherwise of the solution adopted by the foreign court in its own country is a guide to how well such a solution would work in our own'.[149] Foreign law is, in the vast majority of cases, nothing more than a source of inspiration, a yardstick for a persuasive stance in the common law world, or a pointer to potential risks and advantages under different approaches.

In this paper, I outlined the factors contributing to the very common use of foreign authorities. I also summarised the main concerns voiced in the international debate, and I tested these concerns in the UK context, on the basis of UKSC judgments. I argued that judicial constitutional comparativism is legitimate where parliamentary sovereignty – as manifested in unambiguous statutory wording – is respected. This means that if judges are faithful to their general constitutional function and powers under domestic public law, whether inspiration is drawn from foreign law – through the common law – does not make a difference. What matters instead is that clear parliamentary intention is not ignored, neither on the basis of domestic law, nor on the basis of foreign authority. I also argued that the meaningful engagement with foreign case law in the UK is facilitated by an emerging transnational body of common law jurisprudence, and that the shared history and ways of thinking in many common law jurisdictions facilitates the exchange of ideas on constitutional concepts.

I concluded that the UKSC's engagement in judicial constitutional comparativism is commendable. It is flexible, ie there is no one prescribed method or style, and thorough, ie different constitutional philosophies, differences in legal systems and in the judicial treatment of evidence, and different societal values are taken into account. Foreign law is never simply followed blindly, arbitrarily or with a hidden agenda. Perhaps this is why there is no domestic debate about judicial comparativism, not even in the constitutional sphere.

[148]Hirschl, above n 2, p 42.
[149]Reed, above n 1, at 265.

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