

# Transnational Judicial Dialogue and Evolving Jurisprudence in the Process of European Legal Integration

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## Abstract

European legal integration can be envisioned as containing two dimensions of legal integration: vertical and horizontal. Vertical legal integration is a top down process where the establishment of a hierarchical legal order of courts and laws causes national courts to make more similar decisions over time as they increasingly come under the formal authority of a higher court. The European legal integration literature speaks mainly to vertical, formal, legal integration where the ECJ and EU law have asserted themselves as a formal authority over the national courts of the member states and compel the integration of the national courts. Horizontal legal integration involves national courts making more similar decisions over time because the national courts interact, borrow, and imitate each other informally. Vertical legal integration can compel national courts to take into account EU law and ECJ precedent, but it cannot control for variances in interpretation. The focus of this paper is not just on how the power dynamics of courts and laws have changed in Europe, but also how the legal realm of Europe has shifted to a greater frequency of shared legal outcomes. There have been hints in the European integration literature about horizontal legal integration in many vertical integration studies (See Jupille and Caporaso 2009; Burley and Mattli 1993; Mattli and Slaughter 1995). This paper will pursue further the notion that there are distinct dynamics of horizontal and informal legal integration and that horizontal legal integration in conjunction with vertical legal integration can contribute to a more complete understanding of the process of European legal integration. In this paper I argue that the historical progression of increasingly autonomous and powerful national courts (court empowerment) in Western Europe has allowed a process of transnational judicial dialogue to occur. Transnational judicial dialogue is composed of horizontal, transnational interactions between national high courts judges, where judges across countries voluntarily draw upon each other's rulings, logics, and academic writings and incorporate them into their own logics and rulings. I argue that this process of transnational judicial dialogue has furthered legal integration through the transmission of jurisprudence and legal concepts between different member state national judiciaries through informal, horizontal legal integration.

## Introduction

My research examines the dynamics of European legal integration and the fusion of national and supranational legal realms into a multi-dimensional legal apparatus. Specifically I hope to contribute to this general field through examination of the effects of European legal integration on domestic legal systems of the member states and an increased focus on how legal concepts/ideas are transmitted to and impact once in the domestic legal realm. The focus of my research is not just on how the power dynamics of courts and laws have changed in Europe, but also how the legal realm of Europe has shifted to a greater frequency of shared legal outcomes and concepts. The European legal integration literature explores the transformation of treaties among sovereign states within the European Union (EU) into a vertically integrated legal order conferring rights on individuals (Stone Sweet 2004). The European legal realm has been transformed into stratified legal order where supranational institutions (the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR)) assert themselves above national legal orders and domestic courts within the domain of the EU. EU law is by no means a complete and all-encompassing legal system, much of EU law is still being written and the

process of legal integration is ongoing. Through EU supranational institutions and the process of *acquis communautaire* a set of shared laws is created and transmitted to the member states and a formal process of adjudication (in the form of a court, ECJ) is established for disputes between member states, EU institutions, and/or private interests. EU law originates in three spheres: produced by the international treaties that established the European Coal and Steel Community (ECSC) to the EU and the European Convention on Human Rights (ECHR), from the EU institutions (European Commission, European Parliament (EP), Council of Ministers, and the ECJ), and from the Council of Europe.

However, there is also evidence that EU law is not the only form of “foreign law” being transmitted into the domestic legal systems of the member states. The German legal concept of proportionality penetrated the British legal system in the early 1970’s and has been fully incorporated at all levels of the British judiciary (Jupille and Caporaso 2009, pg 210-212) . The root of the Italian concept of *danno biologico* “damage per se” originates from the British notion of “special damage” and began to emerge in the Italian jurisprudence after World War II as a means to deal with damage caused by soldiers during WWII and has recently been seen in German court cases in the late 1990’s (Markesinis 2005, pg 2-5). Since 1909, German courts have borrowed concepts and jurisprudence on issues relating to limited liability of companies from American, English, and Austrian jurisprudence (Markesinis, Fedtke, and Ackermann 2006, pg 73). These three examples illustrate the mobility of foreign law around Europe and across the Atlantic without an international or supranational institution compelling it; a process of legal homogenization prior to and independent of the EU. These two forms of legal integration can be complementary and mutually reinforcing.

The empirical literature often tends to convolute these two phenomena, in my research I will attempt to disentangle them and their causes. How much of foreign law in the domestic legal realm is the result of transmission from the EU institutions down and how much is the result of domestic judicial actors seeking new answers to new or commonly shared problems? To what degree have EU legal institutions been successful at transmitting EU law to member states and how have member states judiciaries used EU law? How does foreign law enter into the domestic legal realm and what are its impacts once there? What causes convergence in interpretations and court case outcomes across national borders in Europe? Is it a result of EU law and institutions, the voluntary spread of foreign law, or some combination of the two?

## Conceptual Framework

The conceptual framework of my research rests on one primary assumption and four key concepts. The primary assumption on which my work resides is the notion that judges do create law, policy, and influence the political landscape. The four key concepts include: legal integration, shared outcomes, transnational judicial dialogue, and empowerment. This section will break down the assumptions and key concepts and discuss how these ideas influence the reserach project.

### Primary Assumption

In my research, I assume that judges do create law, policy, and influence the political landscape and that judicial lawmaking occurs. There is a wide body of empirical literature to support this idea originating in an American context and more recently being applied to

judiciaries in Europe (For British examples see Reid 1972; Cappelletti, Kollmer, and Olson 1989; Mason 1996; Zimmermann 1997; O'Scannlain 2004). This is also an implicit assumption in most European legal scholarship (See Burley and Mattli 1993; Garrett 1995; Slaughter, Stone Sweet, and Weiler 1998; Stone Sweet 2000; Shapiro 2005; Markesinis, Fedtke, and Ackermann 2006; Jupille and Caporaso 2009). While this assumption does have a large effect on the development of key concepts utilized in this study, which will be discussed in turn in the following sections, its primary contribution is providing an argument for why judges can have such a profound effect on the political sphere. If judges are not capable of judicial lawmaking then the only times their decisions have widespread political implications is when policy makers *choose* to follow their judicial decisions. If judges are capable of judicial lawmaking and it has an effect on the other branches of government, then changes in the judicial realm can have a marked impact. Whether judges *should* engage in judicial lawmaking is an entirely separate matter which I do not engage in and is the purview of philosophies of law.

### What Comprises Legal Integration?

I begin my research by breaking down the process of European legal integration into two dimensions: vertical and horizontal integration. Vertical legal integration is a top down process where the establishment of a hierarchical legal order of courts and laws causes national courts to make more similar decisions over time as they increasingly come under the formal authority of a higher court. The bulk of the European legal integration literature speaks mainly to vertical, formal, legal integration where the ECJ, ECtHR, and EU law have asserted themselves as a formal authority over the national courts of the member states and compel the integration of the national courts from the top down. Vertical legal integration can compel national courts to take into account EU law and ECJ precedent, but it cannot control for variances in interpretation as national court judges utilize supranational law for domestic purposes.

Horizontal legal integration involves national courts making more similar decisions over time because the national courts interact, borrow, and imitate each other informally. The causes and role of horizontal legal integration are often ignored in the literature or seen as a side effect of vertical integration. There have been hints in the European integration literature about horizontal legal integration in many vertical integration studies (See Jupille and Caporaso 2009; Burley and Mattli 1993; Mattli and Slaughter 1995). The horizontal integration process explains some of what others have ascribed to a vertical integration process. My research will pursue further the notion that there are distinct dynamics of horizontal and informal legal integration and that horizontal legal integration in conjunction with vertical legal integration can contribute to a more complete understanding of the process of European legal integration. The focus of my research is on legal convergence, it is important to note that legal differences still persist. While I anticipate a continuation of convergence in the future it is not inconceivable that an unforeseen event or critical juncture could shift the trajectory of convergence.

### Achieving Shared Outcomes

A common set of laws and common hierarchical veil of formal processes does not ensure shared legal outcomes across EU member states courts. Consistency of legal outcomes involves not only a common set of laws shared, but also similarity of legal processes, institutional structure, and judicial interpretation. By focusing purely on law in the process of “legal”

integration, European legal integration scholars have theoretically limited integration to the downloading of a common set of rules, rather than a process that can ensure common outcomes of cases across national borders within the EU. Both Christians and Christian fundamentalist read the same Bible, but their interpretation of the text is radically different, just as the interpretation of a law may be radically different across different judiciaries in different member states despite the use of the same law.

Sharing common laws entails having the same laws on the books which under the process of *acquis communautaire* has occurred readily in the EU. Shared outcomes involves judges deciding case outcomes the same and with similar logics. The distinction between sharing common laws and achieving shared outcomes is not a new idea. This distinction was initially raised by law scholars skeptical of the influences and powers of the ECJ (Merryman 1981). Merryman's scholarship illustrates the difficulties of achieving shared outcomes and argues that despite the activism of the ECJ in the 1970's it is not yet nor is likely to ever be an institution capable of consistently producing shared outcomes in the member states (Merryman 1981). Instead, Merryman suggests that cultural changes in western civilization including the growth of individual rights and notions of human rights which are learned ideas largely taken for granted in post-WWII generations, can create a shared way of thinking which can produce shared outcomes (Merryman 1981). While it is clear that judges do interpret cases and jurisprudence in idiosyncratic ways shared ideas, culture, experiences, and education can get judges closer to shared outcomes.

In the literature focusing on "overturning" decision, there is not a single example of overturning by a national high court in the literature that did not also have a description about the differences in institutional design, process, or most commonly, interpretation by the judges in their empirical details. The homogenization of law is not enough to integrate the legal realm. Vertical integration can compel national courts to change their laws and behavior, but it cannot make them homogenous in interpretation in an organic way, while horizontal integration cannot compel national courts to behave a certain way it can potentially lead to homogenization of interpretation voluntarily.

There have been instances of national court cases in different member states where the cases are comparable, dealing with the same context and same EU laws, but the outcome reached on the cases is different due to variation in national institutions, processes, and/or interpretations. An example of this type of conflict occurred over interpretation of the Single European Act of 1986 (SEA) and various European Parliament legislation on family unity and the legality of deporting individuals who were married to or the parent of EU citizens while not having citizenship themselves in three member state cases: *Chahal v United Kingdom* (1996), *Ahmed v Austria* (1997), and *HLR v France* (1998). These three cases created mutually exclusive outcomes despite drawing from the same legal framework. All three cases involve decisions to deport an individual who had legally immigrated to a member state and married a member state citizen who acquired their citizenship through birth. The immigrant in each case was convicted of a non-violent crime (car theft) that was in violation of their status as non-citizens. In *Chahal v United Kingdom* (1996) the court decided that the individual had rights due to their material status to an EU citizen and would serve time in prison and then be allowed to stay if they desired to. In *Ahmed v Austria* (1997) the court decided that the individual's rights to be united with their family were forfeited by the illegal action and they were deported. *HLR v France* (1998) may be one of the most hilarious court cases, manages to cite the competing precedent of *Chahal v United Kingdom* (1996) and *Ahmed v Austria* (1997) and declares them both wrong deciding to

send the individual to prison and deport them after the sentences is served. While this is only one example, it is illustrative of the limits of convergence effects of vertical integration and may be where horizontal integration can have its most profound impact.

### Transnational Judicial Dialogue

Transnational judicial dialogue<sup>1</sup> is composed of transnational interactions between national high courts judges, where judges across countries voluntarily draw upon each other's rulings, logics, and academic writings and incorporate them into their own logics and rulings. Transnational judicial dialogue is transnational because it involves the judges of one country reading the rulings and academic writings of another judge in another country. It has become commonplace in many jurisdictions for judges to refer to the decisions of the courts of foreign jurisdictions. It is a dialogue in the sense the judges are reading and applying the logics of foreign judges into their own rulings and logics and directly addressing the cases and law of foreign judges in their academic writings. Transnational judicial dialogue is a mechanism by which courts do become more similar in their interpretations.

I argue that the historical progression of increasingly autonomous and powerful national courts (court empowerment) in Europe have allowed a process of transnational judicial dialogue to occur. I argue that this process of transnational judicial dialogue has furthered legal integration through the transmission of jurisprudence and legal concepts between different member state national judiciaries through informal, horizontal legal integration. Once foreign law has penetrated the domestic legal realm it is influenced by domestic notions of jurisprudence and can interact within the domestic realm in unintended ways (Jupille and Caporaso 2009). The transmission of legal concepts and shared outcomes across Europe is not solely the result of vertical legal integration through the ECJ. Horizontal integration through judges choosing to engage in transnational judicial dialogue voluntarily has resulted in the spread of legal concepts across national borders and increasingly similar judicial responses to cases before national constitutional courts despite national differences.

In their book *Judicial Recourses in Foreign Law*, Markesinis et al see judicial dialogue as not “envisaging the possibility that foreign law could be used as *binding precedent* by judges but rather as a source of inspiration, especially when national law is dated, unclear, or contradictory” (Markesinis, Fedtke, and Ackermann 2006, pg 5). These authors discuss seven possibilities where judicial dialogue can be useful to judges (Markesinis, Fedtke, and Ackermann 2006, pg 109-138):

1. When the court has to discover ‘Common principles of law’
2. When local law presents a gap, ambiguity, or is in obvious need of modernization, and guidance would be welcome
3. When a problem is encountered in many similar systems and it is desirable to have a harmonized response

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<sup>1</sup> Transnational judicial dialogue stems from an older term “International Judicial Dialogue” which appears to be around sixteen years old and was first used by Andrew L. Strauss (Strauss 1995). I use a different term because I wish to refer only to the discussion that could take place between members of different national courts, not relationships between international courts and domestic courts. Transnational judicial dialogue was first coined by a Michigan Law Professor Christopher McCrudden (McCrudden 2000).

4. When foreign experience (aided by empirically collected evidence) help disprove locally expressed fears about the consequences of a particular legal solution
5. When the foreign law provides ‘additional’ evidence that a proposed solution has ‘worked’ in other systems
6. When the statute that is interpreted comes from another legal system or has its origins in an international instrument
7. When a court is confronted with a law regulating highly technical matters rather than value-laden issues

There has been a persistent skepticism about the degree of transnational judicial dialogue, most of the literature on the phenomenon comes from lawyers and law professors and is part of the tradition of legalism, which is mainly descriptive, concerned with how it is used and the legal ramifications of its use. There is also the emergence of a growing debate about its appropriateness and legitimacy (McCrudden 2000; Waters 2008). Judicial dialogue has often been characterized as dangerous particularly by American judges and academics which is ironic considering the US Supreme Court is one of the most influential and regularly cited by foreign judiciaries (Markesinis, Fedtke, and Ackermann 2006). There are dangers and obstacles to the use of foreign law including: lack of precise information, out of date information, translation of law and presentation of law in a way which makes it useful to foreign judges, the impact of the socio-economic and political environment of the transmitting and receiving countries, legal certainty or cherry picking of concepts and ideas, do courts have the time and skills to deal with other legal systems, and the depth of analysis of foreign ideas (Markesinis, Fedtke, and Ackermann 2006, pg 139-172).

The “mental disposition” of the judges has an effect on their decision to utilize foreign law (Markesinis, Fedtke, and Ackermann 2006). “Mental disposition” refers to the degree of open-mindedness of judges to explore and learn about foreign jurisprudence, since it is voluntary. Horizontal integration flowing from informally from transnational judicial dialogue does not have the capacity to compel integration the way in which vertical integration can, it is a voluntary process. But if judges are willing to learn about foreign jurisprudence and tackle common issues together through transnational judicial dialogue then they may be able to create an “informal network of domestic courts, interacting and engaging each other in a rich and complex conversation on a wide range of issues”(Waters 2008, pg 475). The ability of foreign law to penetrate the domestic legal sphere through transnational judicial dialogue is at the discretion of the judges.

### *A Notion of Empowerment*

The empowerment of courts refers to the degree of judicial autonomy and the ability to affect political and social change through judicial activism (Guiraudon 1998, pg 297), ability to act as quasi-legislators (Stone 1992), and capacity to act as full-time actors in social reform (Horowitz 1977; Schuck 1993). Long terms of service for judges, capacity for judicial review, and protections against interference through judicial independence, all limit the capacity of national government to dictate procedure and penetration of law for national high courts.

Judges do more than engage in judicial lawmaking, they settle disputes that arise from competing powers. If there are multiple levels of governance, particularly if they are constitutionally guaranteed through a system of federalism, there needs to be a party capable of

arbitrating the disputes between them (Shapiro 2005). Constitutional judicial review is a “particularly good surveillance device” and is “useful because it often avoids head-to-head conflicts between member states and particularizes complaints of violation rather than agglomerating them into general conflicts” (Shapiro 2005, pg 373). Most federalist style countries have powerful courts with constitutional judicial review such as the US, Canada, and Australia. After WWII, the three losing Axis powers (Germany, Italy, and Japan) all introduced newly written constitutions with provisions establishing constitutional judicial review. The EU operates under a system of federalism where countries are member states and the Council of Ministers and European Parliament are a form of “central” or “federal” government, albeit lacking certain powers and functions which we would normally attribute to a federal government. The ECJ was established in 1952 and spent first few years demonstrating its usefulness as an arbitrator of member state disputes before beginning to assert itself into constitutional matters in 1963 (Shapiro 2005, pg 374).

The judge as lawmaker presents a problem for democracy. Courts are counter-majoritarian institutions where judges are usually not elected but appointed. Judges serve for long terms making accountability nearly impossible to enforce and can only be removed under extraordinary circumstances. However, isolation gives judges the capacity to make unpopular decisions without fear of retaliation in the voting booth, allowing judges the freedom to not worry about being popular or being right.

If transnational judicial dialogue is capable of any meaningful effect it is because courts have become an instrument of change. Through the empowerment of national courts, transnational judicial dialogue became possible. Before the empowerment of national courts, judges were capable of communicating and influencing each other across national borders; there were no formal impediments to communication. However the capacity of judges to apply foreign legal concepts and/or influence the legal and political debate was institutionally limited by the lack of judicial power throughout Western Europe prior to the process of empowerment which gave judges the ability to engage in judicial activism and judicial review in the context of a constitutional court, act as quasi-legislators, and to act as full-time actors in social reform. Prior to the process of court empowerment, historically beginning with the rapid spread of constitutional courts across Europe since the first European constitutional court was created in Austria<sup>2</sup> in 1920, many institutional constraints such as parliamentary statutes preventing the citing of foreign law, cases, and legal concepts were not uncommon. Until the Practice Statement of the House of Lords of 1966<sup>3</sup>, the citing of foreign law in British courts was forbidden under British law (Markesinis, Fedtke, and Ackermann 2006, pg 4). The process of court empowerment lessens the ability of the executive and legislature to control, influence, and determine the scope and powers of the national high courts.

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<sup>2</sup> Austria has the third oldest constitutional court in the world. The United States (US) Supreme Court is the oldest constitutional court, becoming a constitutional court in 1803 through the case of *Marbury v. Madison*. Australia has the second oldest constitutional court modeled after the US Supreme Court and created by the Judiciary Act of 1903. The Austrian Constitutional Court was the first separate constitutional court.

<sup>3</sup> The logic behind removing restrictions on the citing of foreign law was removed mainly for reasons of practicality. Long judicial appointments that are difficult to terminate without substantial evidence of incompetence and/or mental degradation made the law unenforceable in practice. It was also inconsistently used as an excuse to not renew judicial appointments for a second term which was seen as a more negative politicalization of the judicial process (Markesinis, Fedtke, and Ackermann 2006, pg 4-5).



## An Empirical Case: United Kingdom

This section will explore a single case, the United Kingdom. The goal of this section to show an example of transnational judicial dialogue, explore the degree to which the phenomenon is occurring, and how it can influence and shape law. This preliminary data tests the merits of further examination of the impact of transnational judicial dialogue. The goal of this section is to show that transnational references are occurring and have been occurring since at least the 1970's when the ECJ was still establishing its power and authority as the head of a vertical legal order. The second goal is to illustrate that transnational reference's of foreign law could be having some convergence effects.

### Why the UK?

The United Kingdom was chosen as the exploratory case for a variety of reasons. First, the United Kingdom was chosen because of their common law system, where judges are expected to be highly well read in the logics of legal decisions for precedent and are encouraged by the legislative branch to socialize with each other through a series of sponsored conferences allowing new ideas to be passed on quickly (Jupille and Caporaso 2009; Slaughter 1997). Common law systems value logic and precedent, the traditions of the law, rather than the primacy of the written law which is more valued in civic/code law (Shapiro 2005). The difficulty for transnational judicial dialogue in a common law system is that judges must be persuaded by the logic and relevance of the foreign law which may be easiest where precedent is vague or nonexistent. Second, the United Kingdom has strongly resisted vertical integration and therefore may provide more leverage on distinguishing between vertical and horizontal effects. The United Kingdom received the only exemption from binding itself to the ECJ decisions and precedent in the first Acts of Accession treaty in 1972. While this exemption can be seen as a throwaway clause that was instituted for political reasons, it does provide the British courts with an ability to resist decisions of ECJ with little consequences since they do have an easy out. Only recently have British courts declared themselves subject to EU laws and the authority of the ECJ in the case *R v Secretary of State for Transport ex parte Factortame Ltd* (1990) and the British parliament released itself from its exemption from the ECJ and accepted the authority of the ECHR in the Human Rights Act of 1998. These fairly recent trends towards supranational authority allow the possibility of distinguishing between before and after behavior. If a high degree of transnational judicial dialogue can be seen prior to the 1990's then it provides evidence of transnational judicial dialogue having potential horizontal effects which can be distinguished from the vertical effects of ECJ.

### Legislative Awareness:

It is remarkable that in certain aspects of UK law the legislature has recently suggested that transnational judicial dialogue should occur, given the citing of foreign law in British courts was forbidden under British law until the Judiciary Act of 1966. The UK parliamentary Human Rights Act of 1998 allows the judges the freedom to determine what cases are relevant and to regard these cases while making their decisions and writing their logics including legislative approval for citing foreign national courts, the ECJ, and the European Court of Human Rights (ECHR). The ECHR included a provision requiring domestic courts, when interpreting

European Convention rights, to take into consideration the jurisprudence of the ECHR and other relevant courts into account. The law is vague as to what other relevant courts are; however, it is not a stretch to imagine the ECJ and national high courts in the member states being considered the ‘relevant’ courts that must be taken into account. However there was still skepticism about the use of foreign law in the debates on the Human Rights Act of 1998 in the UK Parliament, “those most in favor of the Bill resisted amendments which would have *required* the UK to apply the decisions of the European Court of Human Rights, rather than merely have *regard* to them” (McCrudden 2000, pg 503 my emphasis). The expansion of the ECHR beyond judges of Western Europe to include Central and Eastern European judges may have been an influential factor urging as cautious tone the legislative debate. During the debate Lord Browne-Wilkinson argued that “we are now seeing a wider range of judges adjudicating such matters, a number of them drawn from jurisdictions 10 years ago not famous for their observance of human rights. It might be dangerous to tie ourselves to that...”<sup>4</sup>

There was also a debate as to the desirability of introducing a strict notion of *stare decisis*. A strong supporter of the Act, Lord Browne-Wilkinson said

the doctrine of *stare decisis*, the doctrine of precedent, whereby we manage to tie ourselves up in knots forever bound by an earlier decision of an English court, does not find much favour north of the Border, finds no favor across the Channel, and is an indigenous growth of dubious merit<sup>5</sup>

The result of the debate was to leave the British judiciary to decide how much weight it gave to decisions of the ECHR and other courts in its own judgments. Speaking for the Conservative Opposition, Lord Kingsland stated that “in short, as the jurisprudence of the convention is not binding, judges can really range over the substance of the Bill in any way they want.”<sup>6</sup> The question as to what the Court will decide to take into account seems to some an obvious question. Lord McCluskey stated

In future no lawyer will be able to advise a client on any matter which might involve a public authority without studying not just the European jurisprudence of Germany, France, Spain...but also American case law, Canadian case law, and even Indian case law and Australian and New Zealand case law<sup>7</sup>

If this is indeed what occurs in the future it will be unsurprising as it has already begun to occur today. For many years there has been a considerable growth in the frequency of foreign law being cited in British court cases. Lord Markesinis notes that “in recent times some [judges in England] have broken from the ranks and manifested an open interest in...foreign law attempting, whenever possible, to make use of [it] in their judgments.”<sup>8</sup> An example of this is the British case *Barry v Midland Bank* a case concerning equal pay for foreigners, where Judge Peter Gibson, Lord Justice (LJ), cited the German case *Bundes-arbeitsgericht* in his logic (McCrudden 2000, pg 505).

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<sup>4</sup> HL Debs, vol. 583, col. 513 (18 November 1997).

<sup>5</sup> HL Debs, vol. 583, col. 513 (18 November 1997).

<sup>6</sup> HL Debs, vol. 583, col. 515 (18 November 1997).

<sup>7</sup> HL Debs, vol. 582, col. 1268 (3 November 1997).

<sup>8</sup> HL Debs. vol. 582. col. 1262 (3 November 1997).

Preliminary Research

The dataset compiled for this project looks at the frequency of citing foreign law in British high court cases and the origin (country) of the foreign law. The dataset compiled contains 1402 legal cases from the British national high court taken from an electronic source called West Law. More than 10,000 British legal cases have been recorded electronically on West Law ranging from 1970 to the present. While these court cases do not represent the potential universe of possible court cases (I hope to in the future have court cases dating back before 1970) they were an easily accessible sample of court cases that could be readily quantified due to their electronic state. All court cases meeting my parameters from West Law (campus version) were included in this quantitative accounting. The parameters used were that the court cases were British national high court cases dealing with issues of citizenship, immigration, and/or human rights between 1970 and 2005 which produced 1402 British legal cases. 1970 is the start of the West Law database and became the natural starting point of my dataset, although in future studies I intend to go back to the 1920's if possible when judicial institutional change began in Europe with Austria's Supreme Court. The dataset stops at 2005 in order to exclude the effects of the Constitutional Reform Act of 2005, which radically reorganized the structure of British courts and officially created the Supreme Court of the United Kingdom and formally endowed it with the power of judicial review.

Markesinis et al have argued that transnational judicial dialogue is most likely to occur in cases where national law is insufficient to produce a decisive and clear legal outcome or logic (Markesinis, Fedtke, and Ackermann 2006). With this in mind I have intentionally looked at legal areas where the domestic law is vague and issues which would likely be differed to the courts due to their hot button political nature. Issues of citizenship, immigration, and human rights are all legal issues that have been differed to courts given their constitutional complexity and hot button political nature (Elliott and Quinn 2005). These three issue areas overlap to an extensive degree, making the inclusion of one without the others difficult to construct a dataset. Human rights is an area of constitutional laws that almost by its very definition requires judges look beyond borders, after all 'human' does apply to all of us and are envisioned as rights common to every person regardless of national borders. Immigration since 1973 has become a hot button issue everywhere in Europe and a concern of legislation in the European Parliament (Brubaker 1989; Butt Philip 1994; Guiraudon 1997; Favell 1998; Duvell 2007). Immigration represents an area where Western Europe faces a common problem which is difficult to solve and there is limited experience dealing with the problem. When dealing with immigration cases where there is no applicable precedent to draw upon, judges may be more willing to look to foreign law. Citizenship is an area of constitutional law rooted in national constitutions and national traditions and may not be an area where judges are willing to look to foreign law. However, these three areas are intertwined in many legal cases and separating it out may prove a great obstacle.

The data in Table One (below) is divided into categories based on time (1970-1979 and 1980-1989 and 1990-2005) and location of foreign law (country or institution). This data provides evidence of the degree to which transnational judicial dialogue is occurring and compares it over three time periods. The number of court cases points to a frequency count of whether a citation of a bill or foreign court case is referred to in any part of the judgment of a British case (abstract, summary, logic, notes, judge's opinions, and references). The first column of data on Table One shows foreign law citations by UK high court judges between 1970 and

1979. There are 368 total British court cases from this time period in my dataset. The second column of data on Table One shows foreign law citations by UK high court judges between 1980 and 1989 and surveys 499 total British court cases. The third column of data is from 1990-2005 and contains 535 total British court cases. There are two shortcomings of the West Law dataset that should be mentioned. First, I cannot be completely sure that all possible British court cases are included in the West Law database<sup>9</sup>. Second, the Knight Library provided only limited access to the data and it is possible that all of the data is present in West Law and that I have not been allowed access to it all.

### Interpreting the Data

In a sampling of 1402 court cases before the British high courts since 1970, I have found a remarkable degree of transnational judicial dialogue occurring at least on the part of United Kingdom citing court cases from other countries including outside the West and Europe. Table One shows that there are many countries' court cases cited in British court cases. How often transnational judicial dialogue occurs and how much of an impact it has is often questioned by the few scholars who have ever examined the process and is largely the result of no one ever compiling a database on its frequency. While my data is certainly in its infancy, it does illustrate that transnational judicial dialogue is occurring and at a not unsubstantial frequency. It also illustrates that what foreign courts are cited changes over time, including the frequency. This data can show how often a foreign judiciary is cited in a British high court case and changes in patterns of citing over time. The strength of the data is that it provides evidence that judges are exposing themselves to foreign law and incorporating it into their legal decisions providing merit to the further study of transnational judicial dialogue. The limits of this data are that while British judges may be citing foreign law it does not mean that all these acts are serious or significant. The table does not provide information on how the foreign law was used. Foreign law could have been referenced and then discarded as wrong as was the case in the deportation court case above, *HLR v France* (1998).

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<sup>9</sup> Given that immigration, citizenship, and human rights court cases make up about 15% of British high court cases (Elliott and Quinn 2005, pg 83), in a thirty five year period the court could have presiding over as many as 1575 court cases. Thus making my sample of 1402 court cases from 1970-2005 potentially 90% of cases heard in this time frame on these issues. Exact number of court cases in these areas of law is unknown. The British Parliament records all court cases heard each year and statistics on what issues are discussed, but does not keep records on precisely how many court cases were heard on what issues. This number is a best guess given the percentage of court cases heard on immigration, citizenship, and human rights from the actual total number of court cases heard which is known. While this data set is potentially incomplete (or potentially complete) it still provides enough information to begin to illuminate the degree of transnational judicial dialogue and possible effects.

**Table One: Transnational Judicial Dialogue by Time Period in the United Kingdom**

High Court of/Bill	Number of Court Cases with Foreign Citations 1970-1979	Number of Court Cases with Foreign Citations 1980-1989	Number of Court Cases with Foreign Citations 1990-2005
ECHR	32	207	128
ECJ	8	3	45
Human Rights Act 1998	N/A	N/A	328
Austria	21	26	23
Belgium	29	34	31
Bulgaria	0	5	9
Canada	3	14	19
Congo	N/A	N/A	7
Cyprus	6	9	11
Czech Republic	N/A	N/A	5
Denmark	8	16	3
Estonia	0	0	1
Finland	7	3	2
France	24	35	28
Germany	31	15	17
Greece	12	15	8
Hungary	1	0	0
India	1	3	14
Ireland	22	32	46
Italy	23	25	18
Latvia	0	0	3
Luxembourg	3	5	2
Malta	5	2	1
Netherlands	24	18	21
Norway	10	7	6
Poland	7	4	7
Portugal	7	6	2
Romania	0	0	11
Scotland	12	13	22
Slovakia	N/A	N/A	3
South Africa	10	12	0
Spain	12	9	5
Switzerland	12	11	8
Sweden	15	21	33
US	2	11	69

Source: West Law Legal Database, accessed between 2/16/2008 and 3/17/2008 and on 3/6/2009 and 4/19/2010.

The data presented in Table One are frequency counts. In the 1970's Austria's frequency count is twenty one. This means that reference to an Austrian legal case was found in twenty one different British legal cases in the time period. If the same Austrian legal case is mentioned

multiple times in one British legal case then that British case is only counted once. If different Austrian legal cases are found within the same British legal case then the British legal case is only counted once. A note of caution when interpreting the data, this method of frequency counting does allow the possibility that the same Austrian legal case may be used in twenty one different British cases creating a frequency count of twenty one. The frequency counts are references to foreign legal cases not foreign laws or legal concepts, meaning if the British judges uses foreign jurisprudence without formally referencing it by the addition of a case identifier (which is my method of gathering frequencies)<sup>10</sup> than it is not counted in my frequency chart. This means that my dataset should be under representing the use of foreign jurisprudence. After a period of using a legal concept, judges may no longer cite the source because it has been assimilated into the British legal system or judges may not cite the sources if it politically untenable. Often times the same British case will cite legal cases from many countries. A British legal case may contain reference to an Austrian, German, and Dutch legal case and would be recorded as a frequency count of one for each of these three countries. The actual number of British cases with foreign law tends to be lower the frequency counts as seen in Table Two because multiple countries' legal cases are cited in same British case.

**Table Two: Summary of Data by Time Period in the United Kingdom**

	1970-1979	1980-1989	1990-2005
Number of British Cases Surveyed	368	499	535
Number of British Cases with References to One or More Foreign Country's Judicial Cases	92	212	284
Total Frequency of References to a Foreign Sovereigns Judicial Cases	294	451	435

Table Two indicates that the number of British court cases containing foreign legal references is increasing over time ranging from 92 court cases in the 1970's to 284 court case in 1990's and early 2000's. This data supports my argument given the degree of transnational judicial dialogue in the 1970's before Britain was integrated into the vertical legal order. The increasing degree of transnational judicial over time also provides evidence of the impact of horizontal integration and perhaps the large role it has played in the integrating of European legal realm. The total frequency of references to foreign court cases is highest in 1980's both in terms of sheer numbers and as a percentage of the total court cases surveyed. Perhaps the judges in the 1980's were the most receptive to foreign law. The data in Table Two suggests that transnational judicial dialogue should be having an increased effect on British law and ways in which British cases are decided as frequencies increase. Depending on how much effect this phenomenon is having, which will be the subject of future research, this could account for increase legal integration through horizontal integration.

The data in Table One indicates that who is cited changes over time. Some country's court cases are cited more frequently over time such as Ireland or less frequently over time like Norway, while other countries ebb back and forth such as France. This may be dependent on

<sup>10</sup> The case identifier is a British code that is place after every reference to a court case, whether foreign or domestic. As an example (FCH 1230 1998) identifies the case as *HLR v France* (1998). FCH is the British code for France, 1230 is the case number of *HLR v France* (1998) assigned by the French and 1998 is the year of the case making each case identifiable from its case identifier without the name of the case being present. I search each court case for the case identifier code for each country to obtain my frequency counts.

relationships between these countries and the UK or legal developments over time. Table One also indicates that British judges cite a wide range of cases including those outside Europe. The citing of court cases from the Congo in the last time period may be in recognition of important legal changes in the Congo that British wish to support, a sign of diplomatic support. Many countries are cited with great frequency in Table One, several instances of more than twenty court cases and as many as sixty nine.

Table One also indicates that relationships with supranational courts have evolved over time. The ECJ is cited infrequently until the last time period indicating that perhaps the 1990 case *R v Secretary of State for Transport ex parte Factortame Ltd* was more than the British courts declaring themselves subject to EU law, but the begin of openness to ECJ precedent as binding in the British court. The ECHR was heavily cited in 1980's long before the Human Rights Act of 1998 was passed by the British Parliament, indicating the courts adherence to the convention occurred before political parliamentary support.

### UK Summary and Future Research

Thus far the empirical data can demonstrate the frequency and changes over time in the referencing of foreign legal cases. While this is only a start it does indicate that transnational judicial dialogue is occurring at a significant rate (meaning at a rate which would affect the jurisprudence of British law) and increasing over time. The data also indicates that which countries court cases are being cited changes over time. The limits of the data gather are that it does not tell how the data is being used and how seriously British judges take foreign court cases. Another limitation is that the data is only referencing foreign court case not all legal jurisprudence such as reference to legal terms and concepts without a citation, thus making this sample potentially under representative of the degree of transnational judicial dialogue.

Future research will attempt to combat these limitations and advance our understanding of transnational judicial dialogue. Further work on this dataset should include efforts to determine where and how the court cases cited are used and to measure other foreign jurisprudence in British court cases such as legal concepts. Archival research (judges' papers and journals) and interviews with living British judges will help to uncover what the judges were thinking when they utilized foreign legal material and how seriously they undertook this exploration and why. Judges particularly British judges tend to be old, white men in powdered wigs and thus judges from the 1970's and before would not expect to be living presently. Judges tend to be prolific writers leaving behind journals and various other documents and their clerks who tend to be young legal scholars may be a valuable source of cooperating evidence. The British case should then be compared with similar research in other European countries to determine larger patterns.

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