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# The Law of the Land

Neil Duxbury\*

This article considers the status of foreign precedents in national courts. It examines possible reasons for courts referring to them and concludes that, absent some incorporating convention, judges cannot ever be said to have an obligation to refer to them. But it also shows that there is nothing unprincipled about (notwithstanding that there are some good reasons, especially in the context of constitutional adjudication, for cautioning against) national courts choosing to treat foreign precedents as persuasive authority. It is also suggested that no satisfactory argument can be adduced to support the proposition that a national court must never rely on foreign precedent as the sole reason for modifying the indigenous common law – though it seems very unlikely that judges would ever need (still less want) to rely on foreign precedent in this way.

## I. Introduction

Imagine you are a land lawyer – perhaps one who has turned to this article because of its title and who is about to be disappointed – and I ask you: ‘what is the law concerning collateral advantages for mortgagees?’ Depending on context, and who you are, it might be that you can straightforwardly infer which law it is that I am asking about, much as you are confident which time zone I have in mind when I ask you for the time. But it might not be so straightforward. ‘There are some common law rulings on collateral advantages,’ you might answer, ‘and there are EU competition law rules as well; and I suppose there must be different rules again in other jurisdictions. It depends what you have in mind.’ Faced with the stark question, ‘what are the legal rules on *X*?’ sometimes one might sensibly reply that it is important be more specific because the legal rules on *X* aren’t the same the world over. Behind that reply rests a more general point: laws belong. Rather than simply being out there, forming that proverbial omnipresence in the sky, legal rules exist and apply within legal systems; they provide reasons for action which individuals *somewhere* – not everywhere – would do better to comply with instead of following whatever personal reasons they would apply when acting.<sup>1</sup>

Some laws are, of course, international laws. But when citizens of national jurisdiction *A* are subject to, or able to take advantage of, the laws of national or international jurisdiction *B*,

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<sup>1</sup> See J. Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System*, 2<sup>nd</sup> ed (Oxford: Clarendon Press, 1980), 195; *The Authority of Law: Essays on Law and Morality*, 2<sup>nd</sup> ed (Oxford: OUP, 2009), 117. Throughout this study, references to an agent’s action should be taken to encompass inaction as well.

it is because jurisdiction *A* has chosen to incorporate (as either directly applicable in the domestic courts or applicable once translated into national legislation) some or all of the content of jurisdiction *B* into its own system. Absent any such incorporation, citizens of jurisdiction *A* can be confident – leaving aside the controversial question of whether state actors within jurisdiction *A* have an obligation to comply with a customary international norm if the jurisdiction rejects its authority – that laws which form no part of the jurisdiction do not regulate what they do in that jurisdiction. People do not have to defer to those judgments of law-making and law-applying authorities which have no role in the sovereign jurisdictions to which they themselves are subject.

This last observation holds good for the people within a jurisdiction who are responsible for making and applying the law just as it does for people within the jurisdiction generally: laws which are genuinely foreign<sup>2</sup> do not regulate actions taken exclusively within their own jurisdiction, either as private citizens or as legal officials. Yet some of these officials might take an interest in particular foreign laws. Rarely if ever, Montesquieu thought, will the laws of one nation be suitable for another.<sup>3</sup> But there is nothing fanciful about the notion that legislators might look abroad for guidance on how, or whether, to devise new laws:<sup>4</sup> legislative proposals to alter the status of an activity under the criminal law, for example, often come with accounts of other jurisdictions' experiences after making comparable changes.<sup>5</sup> If a legislature is sovereign, however, it could never, when it looks to a foreign jurisdiction, be doing anything other than treating the laws of that jurisdiction as information. Even if a national legislature were to determine that a problem on which it is about to legislate has been handled adroitly by another legislature, and that it should do exactly what that legislature has done, it would still have to enact its own version of the foreign legislature's law.

Just as legislators might consider how a matter on which there is an impetus to legislate has been handled by other legal systems, judges might acknowledge that a foreign precedent, or

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<sup>2</sup> When I refer to genuinely foreign laws or (most commonly) precedents, I mean foreign laws or precedents which cannot be said to have been incorporated into a particular national jurisdiction. I forgo adding 'genuinely' when it is obvious that I could only be referring to unincorporated foreign laws.

<sup>3</sup> *The Spirit of the Laws*, trans & ed A. M. Cohler et al (Cambridge: CUP, 1989 [1748]), 8.

<sup>4</sup> See, eg, the 'Prepared Remarks of Attorney General Alberto R. Gonzales at the University of Chicago Law School' (9 Nov 2005), at [http://www.justice.gov/archive/ag/speeches/2005/ag\\_speech\\_0511092.html](http://www.justice.gov/archive/ag/speeches/2005/ag_speech_0511092.html) (accessed 3 April 2014) ('It is ... entirely appropriate for our elected representatives in the Congress or the State legislatures to consider how lawmakers in other countries have approached problems when our representatives write the laws of the United States'). Gonzales offered the observation as a preliminary to his main point: that judges err when they treat 'foreign legal judgments' as 'somehow relevant in defining the terms and limits of our Constitution' (*ibid*); similarly *Foster v Florida*, 537 US 990, 990 n (2002) (Thomas J, concurring).

<sup>5</sup> For example, since Sweden enacted legislation prohibiting the purchase of sexual services (the legislation, introduced in 1999, was amended in 2005), various national legislatures have passed similar laws, citing the Swedish legislation as their model: see *The Ban Against the Purchase of Sexual Services: An Evaluation, 1999-2008*, government report SOU 2010/49 (trans M. L. Key) (Stockholm: Swedish Institute, 2010), 38-41.

a collection of foreign precedents, casts light on a legal problem in a way that domestic precedent does not. But whereas, for legislators, foreign law is never anything more than information, some judges understand foreign precedents to have a more elevated status. It is not unknown for judges within particular jurisdictions to treat the decisions of a foreign court as binding. In the 1940s, for example, the High Court of Australia declared itself bound by House of Lords precedents<sup>6</sup> – though two decades of keeping to this convention proved to be as much as it could bear.<sup>7</sup> The status of Privy Council decisions as precedents in Australian courts endured for longer<sup>8</sup> (and in New Zealand for longer still).<sup>9</sup> But the instances at the heart of this study are not those where the established judicial convention within a jurisdiction is to accept the decisions of a foreign court as binding precedents. I am concerned, rather, with those instances where courts countenance foreign judicial decisions not as binding, but apparently not merely as information either.

Neither judges nor academics have been entirely at ease with national courts making use of genuinely foreign precedents.<sup>10</sup> Part of the explanation for this unease is no doubt that the point of a court's relying on them is not entirely clear – precisely what status do these precedents have in national courts if they are less than binding but more than informative? But the reason for this unease also has to do with the fact that these precedents are the laws of elsewhere, and that the national court which relies on them might be somehow supplanting or undercutting the law of the land. The court which entertains these precedents might, moreover, be drawing – very likely drawing selectively – on reasoning and doctrines which it

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<sup>6</sup> *Piro v W. Foster & Co Ltd* (1943) 68 CLR 313, 320 (Latham, CJ) ('[I]n cases of clear conflict between a decision of the House of Lords and of the High Court, this court, and other courts in Australia, should follow a decision of the House of Lords ...').

<sup>7</sup> The convention was brought to an end by *DPP v Smith* [1961] AC 290, when the House of Lords determined that the test of criminal fault in murder cases is not whether the accused actually intended to kill or to cause serious bodily harm but whether a reasonable person would conclude from the evidence that death or serious injury was the natural and probable consequence of the accused's action: see *Parker v The Queen* (1963) 111 CLR 610, 632–3 (Dixon, CJ) ('Hitherto I have thought that we ought to follow decisions of the House of Lords, at the expense of our own opinions and cases decided here, but having carefully studied *Director of Public Prosecutions v Smith* ... I think that we cannot adhere to that view or policy. There are propositions laid down in the judgment which I believe to be misconceived and wrong. They are fundamental and they are propositions which I could never bring myself to accept'). Although New Zealand's judiciary never formally adopted the same convention, the practice there until *Bognuda v Upton & Shearer Ltd* [1972] NZLR 741 was to follow House of Lords' decisions fairly slavishly: see B. J. Cameron, 'Legal Change over Fifty Years' (1987) 3 Canterbury L Rev 198, 209–11.

<sup>8</sup> Australia Act 1986 (Cth and UK) (abolishing Australian appeals from State Supreme Courts). Federal appeals to the Privy Council had already been abolished by the Privy Council (Limitation of Appeals) Act 1968 (Cth), and appeals from the High Court by the Privy Council (Appeals from the High Court) Act 1975 (Cth).

<sup>9</sup> Supreme Court Act 2003 (NZ). Over thirty Commonwealth locations still accept the Privy Council's appellate jurisdiction: see <http://www.jcpc.gov.uk/about/jurisdiction.html> (accessed 15 Jan 2014). Its decisions are more accurately described as those of a shared appellate rather than a foreign tribunal (not the least because senior judges from other Commonwealth jurisdictions are sometimes appointed to serve on the Judicial Committee).

<sup>10</sup> In this study, the term 'national court' should be understood to include municipal as well as federal courts in nations with state jurisdictions.

does not really understand, and which might address legal problems which are subtly but significantly different from whatever it is that the court has to resolve. In this study, I address the question of what status genuinely foreign precedents could ever have in national courts. I examine the reasons that judges might have for referring to them – along with arguments to the effect that judges should be more receptive to referring to them – and try to show that, although judicial citation to foreign precedent has its hazards, there is no principled case to be made against national courts relying on precedents from foreign jurisdictions as persuasive authority. However, I reject the argument that national courts could sometimes be obliged to take account of genuinely foreign precedents. Perhaps the most difficult question – the one to which this study builds – is that of whether a national court could ever be justified in ruling on a matter purely in accordance with foreign judicial reasoning.

## II. Why might judges look to foreign precedent?

When courts take account of foreign decisions as more than informative but less than binding, it is commonly said that they are treating them as secondary or *persuasive* authority. The concept of persuasive authority might seem like an inapt combination of terms, since ‘being persuaded is fundamentally different from doing, believing, or deciding something because of the prescriptions or conclusions of an authority’.<sup>11</sup> I might not be persuaded by the reasoning behind what you say yet still act in accordance with what you say because you speak as an authority, just as I might be persuaded by what you say while knowing that your words carry no authority.<sup>12</sup> ‘[I]f this is so,’ Schauer argues, ‘then the very idea of a persuasive authority is self-contradictory, for persuasion and authority are inherently opposed notions.’<sup>13</sup>

There is certainly something to be said for this argument when applied to some of the sources that courts sometimes cite: a remark made *obiter* by a judge, say, or a work by a legal academic, is not a persuasive *authority* if we understand an authority to provide a reason for action which excludes a person’s own reasoning regarding how to act in a particular situation. But if the source is a foreign precedent, the argument is less convincing. Consider the idea that something could be authoritative in one place but merely persuasive somewhere else. *X*, a member of entity *A* – a legal system, family, church, private club, corporation, jurisdiction or

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<sup>11</sup> F. Schauer, ‘Authority and Authorities’ (2008) 94 Virginia L Rev 1931, 1943.

<sup>12</sup> ‘[I]f an agent is genuinely persuaded of some conclusion because she has come to accept the substantive reasons offered for that conclusion by someone else, then authority has nothing to do with it. Conversely, if authority is genuinely at work, then the agent who accepts the authoritativeness of a directive need not be persuaded by the substantive reasons that might support the same conclusion.’ *Ibid* 1943.

<sup>13</sup> *Ibid*.

whatever – thinks that the stipulations regarding  $\phi$  in entities  $B$ ,  $C$  and  $D$  (being entities of the same type as entity  $A$ ) are more sensible than the stipulations about  $\phi$  which hold good in entity  $A$ .  $X$  might try to convince the overseers of entity  $A$  to revise their stipulations about  $\phi$  in light of the stipulations on  $\phi$  which prevail in entities  $B$ ,  $C$  and  $D$ . And were entities  $A$ ,  $B$ ,  $C$  and  $D$  somehow to merge then it might become necessary to devise some stipulations on  $\phi$  which are common to them all. But for so long as entity  $A$  remains a discrete entity, the stipulations on  $\phi$  which are authorities in entities  $B$ ,  $C$  and  $D$  – although they might provide  $X$  with reasons for belief (that it is worth trying to persuade the overseers of entity  $A$  to revise their stipulations on  $\phi$ ) – do not provide  $X$  with reasons for action within entity  $A$ : they are authority from entities  $B$ ,  $C$  and  $D$  which might prove persuasive in entity  $A$ .

We can conceive of foreign precedents in much the same way. A genuinely foreign precedent can be simultaneously persuasive and authoritative: merely persuasive here, but an authority – a binding precedent – in the place from where it hails. ‘Persuasive authority’ in the guise of foreign precedent is authority from one jurisdiction which is considered persuasive (but not an authority) in the court of another jurisdiction. Indeed, one reason that a judge might have for being wary of taking foreign precedents into account – we will see in section III that this is but one reason among many – is that, unlike other types of persuasive authority, they do not have secondary status everywhere: somewhere, they bind. A judge might think that the best way to avoid blurring lines – to be sure that nobody can be under the misapprehension that another jurisdiction’s precedent is binding here as well – is simply to refuse to consider (or at least to refuse to consider explicitly) the decisions of foreign courts.

The courts of a national jurisdiction are not bound by a foreign jurisdiction’s precedents unless the courts or legislators in the national jurisdiction have incorporated the foreign jurisdiction’s precedents into the law of the land, thereby establishing that those precedents are to be followed in the national courts. Of course, when we speak of any precedent – foreign or indigenous – as ‘binding’, we are not using that word in its literal sense. When we refer to a precedent as binding we mean that it is the *prima facie* correct decision on a particular set of facts, thereby establishing a presumption that a court deciding on the same facts will follow the precedent – a presumption which the court might rebut by determining that today’s case actually concerns distinguishable facts, or that the court which set the precedent made a mistake as to the law. A national court is not presumptively bound by a genuinely foreign precedent: it need not reckon with a foreign precedent even if the precedent concerns facts materially identical to those to be decided on in the national court, or even if the precedent-setting court has reached a thoughtful, carefully-articulated and convincingly-

reasoned decision on a matter of law which is essentially the same in both jurisdictions. But then, if one jurisdiction's precedents cannot bind another jurisdiction's courts, what do they ever count for in those courts? Elsewhere they are a reason for a particular course of action, but here they are but a reason for believing in the desirability of a particular course of action. Does this not mean that the national court which takes account of foreign precedent is simply treating it as the national legislature might treat foreign laws – as valuable information? How could a precedent be less than binding yet more than informative?

Judges quite often speak in favour of looking to foreign precedents for salutary lessons.<sup>14</sup> The argument, note, is not that a national court is presumptively bound to follow foreign precedent, but that it might be remiss of a national court to fail explicitly to reflect on that precedent, given how it bears on the legal matter at hand. That decisions from other systems can have particular epistemic significance is certainly a proposition worth taking seriously. If a national court has to interpret a treaty provision, or apply a contentious common law principle, and it is brought to the court's attention that the court of another state party to that treaty, or of another common law jurisdiction, has already considered at length and in the same language how that provision or principle might best be understood, it would be somewhat odd (though not improper) if that national court were to refuse so much as to take a glance at the foreign court's ruling. Imagine, indeed, that you were struggling to decide an especially hard case and you had access to a sophisticated search engine which could not only discern the exact legal issue from your rudimentary search terms but which could also provide a straightforward and, if necessary, well translated summary of the legislation and major case law capturing how the issue has been addressed in as many other jurisdiction as you cared to consider. It would be surprising were you not at all inclined to look.

But even if the accessibility of the information did make you more inclined to look at it, what would this prove? Epistemic significance is not legal authority: that you are curious about what others do, and perhaps even feel that you have no excuse not to find out what others do, does not mean that you are obliged to take their laws and decisions seriously once you have discovered them. Some decision-making cultures do impose an obligation of this sort. The tribunals within some organisations co-opt agents from similar organisations so that those

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<sup>14</sup> See, eg. *Smith v Littlewoods* [1987] AC 241, 280-1 *per* Lord Goff ('Our legal concepts may be different, and may cause us sometimes to diverge; but we have much to learn from each other in our common efforts to achieve practical justice founded upon legal principle'); Lord Bingham, 'The Judges: Active or Passive' (2006) 139 *Proc Brit Acad* 55, 69; G. V. La Forest, 'The Use of American Precedents in Canadian Courts' (1994) 46 *Maine L Rev* 211, 219; M. Kirby, 'Citation of Foreign Decisions in Constitutional Adjudication' (2009) 43 *Suffolk Univ L Rev* 149, 154-5; S. Day O'Connor, 'Keynote Address' (2002) 96 *American Soc Int'l Law Proceedings* 348, 350; R. Bader Ginsburg, "'A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication' (2005) 99 *American Soc Int'l Law Proceedings* 351, 351-2.

agents can, among other things, advise on whether the decision-making criteria and processes employed by the host tribunal are commensurate with the standards applied elsewhere: an example would be the appointment of external examiners to examinations boards in UK university faculties.<sup>15</sup> But courts do not work this way. Judges do sometimes have research assistants who can help them find foreign sources, and they will even occasionally invite counsel for the parties to present the court with an overview of the foreign precedents addressing the issue on which it will rule.<sup>16</sup> Whether a judge seeks or is willing to entertain lessons from genuinely foreign precedents, however, is entirely within his or her discretion.<sup>17</sup>

Various explanations can be given as to why judges might choose to countenance foreign precedents. A common law judge might decide that foreign precedent is one of a miscellany of resources – like juristic writings, Roman law and very old cases – which courts, if they are to do their best to supply gaps in legal doctrine, ought not to treat as off-limits.<sup>18</sup> The interpretations and development of the law in one jurisdiction may prove especially influential in other jurisdictions when all of the jurisdictions share the same basic law (the history of European private law is a case in point: the continental European *ius commune* was very much a common law of Europe, with lawyers, jurists and judges readily drawing on legal texts and decisions from other jurisdictions when interpreting and developing the law within their own<sup>19</sup>). Judges elsewhere might have considered at length an issue that a national court is

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<sup>15</sup> Although an examinations board is unlikely, and certainly ought not, to treat the advice of external examiners as dispositive at the time when the board meets. If, at the examinations board, an external examiner were to recommend on the basis of practice elsewhere that the exam rules should be altered then, even if the board unanimously accepted the recommendation, the exam rules still have to be altered so as to implement the recommendation with prospective effect. A board which allows the external examiner's recommendations to determine decisions at the meeting is settling students' results on the basis of previously unannounced rules.

<sup>16</sup> See B. Markesinis, 'National Self-Sufficiency or Intellectual Arrogance? The Current Attitude of American Courts Towards Foreign Law' (2006) 65 CLJ 301, 315 ('[I]n *Fairchild v Glenhaven* [(2003) 1 AC 32] ... their lordships ... asked Counsel for both sides to address them on the attitudes taken by the Supreme Courts of Continental Europe on the issue there at hand'); also Stephen Breyer, 'Keynote Address' (2003) 97 *American Soc Int'l Law Proceedings* 265, 267.

<sup>17</sup> Though national courts are sometimes legally encouraged to consider foreign law (see, eg, RSA Bill of Rights 1996, s 39(1)), and are sometimes legally obliged to take into account a supra-national court's rulings concerning the application of a treaty to which the national jurisdiction is a signatory (see, eg, Human Rights Act 1998, s 2(1)).

<sup>18</sup> See, eg, T. H. Bingham, "'There is a World Elsewhere": The Changing Perspectives of English Law' (1992) 41 ICLQ 513, 527-8; also M. Kirby, 'The Lords, Tom Bingham, and Australia', in M. Andenas and D. Fairgrieve (eds), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford: OUP, 2009), 713, 721-2; and B. Dickson, 'A Hard Act to Follow: The Bingham Court, 2000-8', in L. Blom-Cooper et al (eds), *The Judicial House of Lords 1876-2009* (Oxford: OUP, 2009), 255, 272-3.

<sup>19</sup> See, eg, J. Bell, 'The Relevance of Foreign Examples to Legal Development' (2011) 21 *Duke Jnl of Comparative & Int'l Law* 431, 434-8; D. Ibbetson, 'English Law and the European *Ius Commune* 1450-1650' (2006) 8 *Camb YB Eur Leg Stud* 115, 124 ('[F]rom quite early on, [the sixteenth century continental European *ius commune*] was ... characterised by a willingness to cite cases decided in courts in different jurisdictions; and by the middle of the sixteenth century reports of cases were being printed in considerable numbers. A court in Holland, for example, might cite cases from France, Germany, Italy, Spain, or indeed anywhere in continental Europe. An

addressing – perhaps hesitantly addressing – for the first time, and so a judge adjudicating on the issue in the national court might see no harm but possible good in being open to learning from the deliberations and decisions of foreign tribunals. A national court might consider it necessary to examine judicial rulings made in another jurisdiction before exercising its *forum non conveniens* discretion (ie, before determining if it will adjudicate on a matter which might be more appropriately resolved in another country’s courts). A court might recognise that a matter on which it is being asked to rule is also being litigated in a foreign court, and that it therefore might be politic of the court to consider if, or how, any ruling it might issue could impact on litigation and legal decision-making in another jurisdiction.<sup>20</sup> When a national court recognises that a particular decision might have implications for the legal process itself – such as when judges contemplate overruling a precedent with prospective effect even though prospective overruling is not an accepted convention of the jurisdiction – the court might see good sense in considering how similar decisions have played out in other jurisdictions.<sup>21</sup> Foreign decisions might spur judicial boldness – when deciding an issue in a particular way, a national court might take account of the fact that courts abroad have ruled on the same issue in essentially the same way to no ill consequence<sup>22</sup> – just as they might alert judges to paths best not taken.<sup>23</sup> A national court might draw attention to foreign authorities to demonstrate that the court’s approach to a legal problem is – contrary, perhaps, to what is commonly assumed – much the same as that of courts elsewhere.<sup>24</sup> Foreign precedents might sometimes be entertained in court because a judge is inclined to *bricolage* – to rummaging around just about anywhere for materials which might support particular arguments – or because a judge simply thinks it churlish to refuse to look at foreign precedents if counsel has gone to the trouble to find them.

Faced with a controversy which has been addressed inadequately in the national courts, a judge might take the view that foreign precedents, being legal authorities somewhere in the world – sometimes in countries politically and culturally similar to her own – are particularly valuable as *tested* secondary sources. The operative principle in this instance runs to the effect

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early seventeenth century collection of legal decisions from the southern Netherlands boasts in its preface that it includes not only references to decisions in Spain, France and Belgium, but in the Supreme Courts of the whole of Europe’).

<sup>20</sup> See P. B. Stephan, ‘Courts on Courts: Contracting for Engagement and Indifference in International Judicial Encounters’ (2014) 100 Virginia L Rev 17, 26-7.

<sup>21</sup> See, eg, *Re Spectrum Plus* [2005] UKHL 41 at [18]-[25] (Lord Nicholls).

<sup>22</sup> See B. Markesinis and J. Fedtke, *Judicial Recourse to Foreign Law: A New Source of Inspiration?* (London: UCL Press, 2006), 127-35.

<sup>23</sup> See, eg, *R (Smith) v Secretary of State for Defence* [2010] UKSC 29 at [236] (Lord Collins).

<sup>24</sup> See, eg, *Kirin-Amgen Inc. v Hoechst Marion Roussel Ltd* [2004] UKHL 46 at [72]-[75] (Lord Hoffmann).

that when relying on secondary sources it is generally more sensible, all things being equal, to take account of opinions which have had real-world consequences and which other judges have treated as legally sound, in preference to, say, analyses which are intended to help people understand some aspect of the law or to make a case for legal reform.<sup>25</sup> Sometimes, judges might even look to genuinely foreign precedent for confirmation that there are, in fact, good reasons for *not* dealing with an issue as other jurisdictions do – for recognising, that is, something analogous to the ‘margin of appreciation’ doctrine as developed by the European Court of Human Rights (whereby the fact of a member State having its own distinctive morals and mores is treated by the Court as a reason for considering a national court better placed to decide on human rights issues concerning those morals and mores). There is one other general, and important, argument in support of national judges looking to the reasoning contained in genuinely foreign precedents which I shall leave to one side for now.

In cases concerning the common law, a court might cite among its reasons for overruling an indigenous precedent the fact that the precedent comes up short when considered against reasoning embodied in a foreign decision dealing with much the same legal principle. But it is difficult to imagine a national court departing from an existing precedent *for no other reason* than that the precedent fares poorly when compared with a foreign decision, for if this were a court’s sole motivation for overruling then it would likely meet with the objection that the new precedent, having no basis in the indigenous common law, is a consequence of judges legislating inappropriately. What a court certainly cannot do, in a jurisdiction which abides by the principle of legislative supremacy, is decline to apply a statutory provision because the application of a genuinely foreign legal source (be it a precedent or any other source) would yield a preferable outcome. But what about cases in which courts are entitled to strike down enacted laws as unconstitutional? Might a national court invalidate a statute by, say, placing on a constitutional provision a new interpretation which, though never before entertained by the courts of that jurisdiction, is consistent with interpretations which foreign courts have placed on similar or identical language used in other constitutions?

This is where the topic gets tricky. Would a constitutional court be within its rights to strike down a statute which has been challenged as unconstitutional if its reason for wishing to do so were that the statute comes up short when interpreted through the prism of a foreign

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<sup>25</sup> Much as courts, when they do choose to rely on analyses intended to help people understand the law or to urge legal reform, invariably take the provenance of a source into account: eg, a court might allow citation to opinions set forth in published (and even unpublished) works by recognised analysts, but it is near-impossible that a court would ever accord similar status to, say, disquisitions – even dispassionate disquisitions – on matters of law sent to counsel or judges by members of the public.

precedent dealing with the same provision or form of words in a different constitution? Might one reasonably object that the fate of a national law is, in this instance, being determined by the ruling of a foreign court? Or is it more accurate to say that although a national court is finding in the foreign precedent a compelling reason for putting a new interpretation on the national constitution, the determination as to how the constitution is to be interpreted (including whether foreign precedent should feature in that interpretation) is for the national court alone?

This last reading seems very obviously to be the correct one. But even though a genuinely foreign precedent does not have direct effect in constitutional adjudication, it is conceivable that a national court might rely on reasoning to be found in such a precedent when making its own ruling on national constitutional matters. Whether a court is right or wrong to take account of foreign judicial reasoning when making such rulings is the source of sharp differences of opinion which will be touched upon later. For now, it is simply worth noting that it is understandable that these differences should have arisen specifically in relation to constitutional adjudication. National courts might treat foreign precedent as a valuable source of information when they develop the common law – or even, sometimes, when they interpret statutes – but the reason for courts looking to this source of information in such instances is to produce decisions which are consistent with doctrines and rules already embodied in the law of the land. If a court relies on foreign precedent when reviewing the constitutionality of legislation, however, the stakes are significantly different: the precedent is still only information, but it may turn out to be information which prompts the court to determine that what the legislature enacted is, in fact, not the law of the land. Genuinely foreign precedents, whether we label them persuasive or secondary or some other type of authority, are but information in the hands of a national court. But just what the court can do with that information depends on the responsibilities attaching to the judicial function in the relevant jurisdiction.

### III. The *ius gentium* argument

In the early 1990s, the House of Lords did away with the convention precluding judges from relying on legislative history when trying to ascertain the meaning of ambiguous statutory language.<sup>26</sup> Or rather: it did away with the convention precluding judges from *explicitly* relying on legislative history. Who would know how often judges consulted (though certainly some did

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<sup>26</sup> *Pepper (Inspector of Taxes) v Hart* [1993] AC 593.

consult<sup>27</sup>) *Hansard* before the House of Lords altered the convention? A rule forbidding any form of judicial reliance on legislative history would be no more enforceable than a rule prohibiting judges from having wicked thoughts. A convention against judges and counsel making use of foreign precedents, likewise, could only ever be a convention against discoverable use.

Though there is the occasional judge who comes close to favouring this convention, it is not clear that any judge takes the view the courts should never make use of foreign precedents. Even Antonin Scalia, the most outspoken critic of the use of foreign precedents in the American courts, concedes that there are some instances in which judges can and perhaps should make use of foreign authorities (his specific objection concerns American judges relying on foreign legal sources when interpreting the US Constitution<sup>28</sup>) and that it would be foolish to argue that judges are under an obligation not to become informed about the decisions of foreign courts.<sup>29</sup> Though some lament that judges do consult foreign precedents, in short, nobody doubts that they can. The interesting question is whether judges might ever be considered somehow to be failing by *not* doing so.

The reasons outlined so far for consulting genuinely foreign precedents simply explain why a judge might think consultation appropriate. None of those reasons could be said to make consultation obligatory. But discussion of one reason for looking to foreign precedents has deliberately been deferred. This reason we might call the *ius gentium* argument. The point of this argument is to try to establish that judges occasionally do have some sort of obligation to take account of foreign precedents. The reasoning to be found in just one foreign authority is unlikely to carry considerable weight in a national court: ‘one swallow does not make a rule of international law.’<sup>30</sup> But if a collection of foreign authorities suggests that, on a matter being decided on by a national court, a different and more acceptable decision would be given in

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<sup>27</sup> See, eg, *Hadmor Productions v Hamilton* [1983] 1 AC 191, 201 (*per* Lord Denning, MR); also *Pepper v Hart*, 618 (*per* Lord Griffiths); Lord Oliver, ‘A Judicial View of Modern Legislation’ (1993) 14 Statute L Rev 1, 7; and HL Deb vol 418 col 1346 26 March 1981 (Lord Hailsham) (‘I always look at *Hansard*... I always look at everything I can in order to see what is meant... I never let on for an instant that I had read the stuff. I produced it as an argument of my own, as if I had thought of it myself... I could not do the work in any other way’).

<sup>28</sup> And even here he makes an exception: it is certainly acceptable for American judges to refer to old English law, he contends, when they are interpreting phrases in the US Constitution which the Framers clearly used with the old English legal meanings in mind (as with, eg, the Sixth Amendment right of the accused to be confronted by witnesses): see ‘The Relevance of Foreign Legal Materials in US Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer’ (2005) 3 Int’l Jnl Constitutional Law 519, 525.

<sup>29</sup> See A. Scalia, ‘Foreign Legal Authority in the Federal Courts’ (2004) 98 American Soc Int’l Law Proceedings 305, 307 (‘[F]oreign legal materials? Do I ever consider them relevant to constitutional adjudication?... I cannot say *never*. Only *hardly ever*’); *Olympic Airways v Husain*, 540 US 644, 658 (2004) (Scalia J, dissenting); ‘The Relevance of Foreign Legal Materials in US Constitutional Cases’, n 28 above, 534 (Scalia to Breyer: ‘I’m not preventing you from reading these cases.... [G]o ahead and indulge your curiosity! Just don’t put it in your opinions!’).

<sup>30</sup> *Jones v The Kingdom of Saudi Arabia* [2006] UKHL 26 at [22] (Lord Bingham).

cognate jurisdictions, should this not prompt the court to review whether it should try to bring national law in line with those authorities?<sup>31</sup> What significance, if any, ought judges attribute to the fact that the courts of these other jurisdictions understand and affirm a principle differently from the way in which it has been understood and affirmed by the courts of their own jurisdiction?

Jeremy Waldron attempts to answer this question in a book which grew out of his 2007 Storrs Lectures.<sup>32</sup> It is difficult to say exactly what his answer is. He certainly thinks that judges have an obligation to take account of *ius gentium* – of legal principles which have not been accepted within their own jurisdictions but which are accepted by many other legal systems – but it is not clear what he thinks being obliged to take account of *ius gentium* actually means. His basic proposition is that the more that judges of national courts are expressly willing to take foreign authority ‘at least as seriously as – and, if there are many other[ foreign precedents], sometimes more seriously than’ – indigenous legal reasoning, the more likely *ius gentium* will come to ‘exist as a body of law’ in those courts.<sup>33</sup> This proposition requires some unpacking.

Why, first of all, might judges do well to accord special significance to *ius gentium*? First, because the national court which is receptive to reasoning which judges of diverse jurisdictions have independently settled on as providing the best answer to a particular legal problem is likely to make a more informed decision on that problem than would be the case if the court did not take convergent foreign law into account. This argument is essentially an adaptation of that which Waldron advances in his writings which challenge the appropriateness of courts being able to review the legality of legislative enactments: since large, heterogeneous groups tend to make more intelligent decisions than do relatively small, homogeneous ones, judges in outlier jurisdictions are wise to accord weight to the reasons that have led courts in other jurisdictions to arrive at a common approach to a legal problem.<sup>34</sup>

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<sup>31</sup> *Fairchild v Glenhaven* [2003] 1 AC 32, 66 *per* Lord Bingham (‘Development of the law in this country cannot of course depend on a head-count of decisions and codes adopted in other countries around the world, often against a background of different rules and traditions. The law must be developed coherently, in accordance with principle, so as to serve, even-handedly, the ends of justice. If, however, a decision is given in this country which offends one’s basic sense of justice, and if consideration of international sources suggests that a different and more acceptable decision would be given in most other jurisdictions, whatever their legal tradition, this must prompt anxious review of the decision in question’).

<sup>32</sup> J. Waldron, *Partly Laws Common to All Mankind: Foreign Law in the American Courts* (New Haven: Yale UP, 2012). (Hereafter *PLCAM*.)

<sup>33</sup> *PLCAM* 84, 55; see also *ibid* 70.

<sup>34</sup> See *PLCAM* 85-9. For Waldron’s application of this argument to make a case for legislative in preference to judicial supremacy see, eg, J. Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999), 69-87; *The Dignity of Legislation* (Cambridge: CUP, 1999), 92-123. On the limitations as well as the strengths of the argument – and particularly on the limitations of the argument formulated as a justification for national courts drawing on genuinely foreign precedent – see E. A. Posner and C. R. Sunstein, ‘The Law of Other States’ (2006) 59 *Stanford L Rev* 131, 164-72.

Secondly, the collective wisdom of foreign judges might be particularly instructive when an outlier jurisdiction's court has to answer a question which arises in a more or less identical form in other systems, such as when an expression which appears in a number of different constitutions or conventions has been interpreted by various national courts.<sup>35</sup> Thirdly, some legal problems will most likely be solved better if the courts of national jurisdictions are similarly minded regarding the principles governing those problems: the enforcement of, say, international trade agreements, or extradition treaties, depends not only on discrete jurisdictions accepting shared rules but also on there being comity among those jurisdictions over general legal principles concerning how the rules should be interpreted and applied.<sup>36</sup> (Much the same argument might be formulated in relation to courts within federal jurisdictions. It makes sense, for example, that United States circuit courts normally treat the decisions of other US circuit courts as persuasive precedents because it is better that federal laws are not interpreted differently in different regions, and that the circuit courts resolve differences that might otherwise have to be resolved by the Supreme Court.) From this claim we might extract a more general proposition: since international inconsistency in treaty interpretation is something to be avoided wherever possible, a national court would do well to try to determine if, and how, the courts of other signatory jurisdictions have already interpreted a mutually binding treaty before it sets forth its own interpretation.<sup>37</sup>

A similarly abstract principle in favour of resorting to *ius gentium* might be derived from John Rawls's argument that the concept of human rights, properly understood, illustrates the limits of State sovereignty.<sup>38</sup> Genuinely to recognise a right as a human right means recognising it as one which can be demanded by anyone living today. If the government of one country is criticised for human rights violations by the citizens of another country, it cannot effectively rebut those criticisms by answering that you don't understand our country, and so are in no

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<sup>35</sup> See *PLCAM* 147, 158, 160-4.

<sup>36</sup> See *PLCAM* 4, 116, 188. For examples of English and Scottish courts following decisions from the other jurisdiction which were not binding on the national court but which it was deemed sensible to follow on the basis of comity, see *Abbott v Philbin* [1961] AC 352, 373 *per* Lord Reid ('In the present case the Court of Appeal, though not bound to do so, very properly followed the decision of the Court of Session ... because it is undesirable that there should be conflicting decisions on revenue matters in Scotland and England'); *Dickson v HM Advocate* 2008 JC 181 at [27] (Lord Justice-General (Hamilton)).

<sup>37</sup> See R. Reed, 'Foreign Precedents and Judicial Reasoning: the American Debate and British Practice' (2008) 124 LQR 253, 262-3; also *Reyes v The Queen* [2002] UKPC 11 at [28] ('It is open to the people of any country to lay down the rules by which they wish their state to be governed and they are not bound to give effect in their Constitution to norms and standards accepted elsewhere, perhaps in very different societies. But the courts will not be astute to find that a constitution fails to conform with international standards of humanity and individual right, unless it is clear, on a proper interpretation of the constitution, that it does'); *King v Bristow Helicopters Ltd* [2002] UKHL 7 at [178] (Lord Hobhouse).

<sup>38</sup> See J. Rawls, *The Law of Peoples* (Cambridge, MA: Harvard UP, 2001), 79 ('Human rights are a class of rights that ... specify limits to a regime's internal autonomy').

position to know what rights our citizens have, and therefore have no place interfering in our affairs in the name of those rights.<sup>39</sup> This line of criticism could come from within as well as (or even instead of) from outside a jurisdiction: for example, a judge within a particular jurisdiction might question whether the State properly recognises a particular right as a human right – as one which people have in virtue of the common conditions of life today, irrespective of the circumstances of specific nations – given that other states which are similarly serious-minded about human rights are consistent in protecting that right somewhat differently. At least two landmark US Supreme Court decisions – one overturning a State anti-sodomy law, the other setting aside a death penalty verdict for a juvenile offender – might be read in this light: both pointedly acknowledged differences between the law as it stood (before the decisions) in the US and a consensus among many nations which could be discerned from examining foreign law.<sup>40</sup>

Both these decisions were severely criticised for relying on foreign precedents. Not all of the criticisms hit the mark. At least two of them – that judicial resort to foreign law is anti-democratic, and that it offends against sovereignty<sup>41</sup> – presuppose that foreign precedents were being treated as binding in preference to domestic law. But that was not the case. In the absence of some specific jurisdictional convention (such as the mid-twentieth century determination by the High Court of Australia that it had to follow House of Lords precedents), the point of a court resorting to foreign precedents is never to give those precedents binding effect within a national legal order; rather, it is to acknowledge their persuasiveness – much as any other secondary source might be persuasive – for the purpose of determining how best to interpret constitutional or statutory provisions or how to develop the common law.

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<sup>39</sup> See J. Raz, 'Human Rights in the Emerging World Order' (2010) 1 *Transnational Legal Theory* 31, 42-3.

<sup>40</sup> See *Lawrence v Texas*, 539 US 558, 573 (2002) (*Bowers v Hardwick*, 478 US 186 (1986), noted to be out of line with *Dudgeon v United Kingdom* (1981) 4 EHRR 149 – '[a]uthoritative in all countries that are members of the Council of Europe' – in which it was held that laws proscribing consensual homosexual conduct were invalid under the European Convention); *Roper v Simmons*, 543 US 551, 577-8 (2004) ('[I]t is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.... The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions'). For other US cases (most of them concerning Eighth Amendment jurisprudence) which might be read similarly, see F. I. Michelman, 'Integrity-Anxiety?' in M. Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton, NJ: Princeton UP, 2005), 241, 245-56.

<sup>41</sup> See, eg, S Res 92 109th Cong (20 March 2005) (Sen John Cornyn) ('[I]nappropriate judicial reliance on foreign judgments, laws, or pronouncements threatens the sovereignty of the United States, the separation of powers, and the President's and the Senate's treaty-making authority'); 'Transcript: Day Two of the Roberts Confirmation Hearings', *Washington Post* 13 Sept 2005, at <http://www.washingtonpost.com> (accessed 27 Feb 2014) (Judge John Roberts: 'If we're relying on a decision from a German judge about what our Constitution means, no president accountable to the people appointed that judge and no Senate accountable to the people confirmed that judge. And yet he's playing a role in shaping the law that binds the people in this country'); also K. Anderson, 'Through Our Glass Darkly: Does Comparative Law Counsel the Use of Foreign Law in US Constitutional Adjudication?' (2014) 52 *Duquesne L Rev* 115, 139 ('The period of time in which one could talk of a "global legal system" and global judicial networks ... is, on a genuinely global scale, done and over. With it largely, too, the flirtation by some Supreme Court Justices ... with citation to foreign courts in constitutional adjudication. Never say never, of course, but it does seem likely that future citations will seem more like one-off oddities').

But this does not mean that the critics should be dismissed. Decisions which draw on foreign judicial reasoning are open to a range of compelling objections. Even if it is conceded that genuinely foreign precedents can only ever be persuasive in a national court, dissatisfaction over those precedents controlling by stealth, as it were, is perfectly understandable when the court treats them as the principal reason for, say, placing on the constitution a new interpretation which leads it to strike down a domestic law.<sup>42</sup> The court which entertains foreign precedents commits itself to absorbing the costs (which includes the risks) of negotiating an extra – and potentially very tricky – source of information;<sup>43</sup> sometimes, judges will simply misread pertinent foreign sources.<sup>44</sup> A court might shy away from treating foreign precedent as relevant to the settlement of a dispute for the same reason that it might refuse to entertain legislative history, say, or civil servants’ private notes on clauses in bills: because the legal arguments presented to court would more likely be poorly structured and unwieldy if the information were admitted, and the court might be accused of being prejudicial were it to admit it in some cases but not others.<sup>45</sup> The reasoning of judges in other jurisdictions will often be addressed to points of law which are superficially similar to those with which the national

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<sup>42</sup> See, eg, ‘The Relevance of Foreign Legal Materials in US Constitutional Cases’, n 28 above, 537 (Scalia: ‘if you’re following an originalist approach, you ask, what did the framers believe constituted due process of law? And if I find something there I don’t like, that’s too bad; I am chained. Because of my theory of the Constitution, that’s what due process was and that’s what it is today, unless you amend the Constitution. Whereas if you believe “due process of law” is an invitation for intelligent judges and lawyers and law students to imagine what they consider to be due process and consult foreign judges, then ... you do not know what you’re saying when you swear to uphold and defend the Constitution of the United States. It morphs. It changes’).

<sup>43</sup> R. A. Posner, ‘No Thanks, We Already Have Our Own Laws: The Court Should Never View a Foreign Legal Decision as a Precedent in Any Way’, *Legal Affairs* July/August 2004, at [http://www.legalaffairs.org/issues/July-August2004/feature\\_posner\\_julaug04.msp](http://www.legalaffairs.org/issues/July-August2004/feature_posner_julaug04.msp) (accessed 25 Feb 2014) (‘Many courts in the United States do not permit an advocate to cite ... opinions that are not published in the official reports ... because those opinions receive less careful attention from the judges than the ones they publish. Allowing unpublished opinions to be cited ... would increase the amount of research that lawyers and judges would have to do, without leading to better decisions. In addition, the Supreme Court economizes on its time by giving little weight to decisions by the federal courts of appeals and the state supreme courts.... The court’s saying no to foreign citations would make even more sense than the implicit rule against citing more than very occasionally the decisions of other American courts. The judicial systems of the United States are relatively uniform, and their product readily accessible, while the judicial systems of the rest of the world are immensely varied and most of their decisions inaccessible, as a practical matter, to our monolingual judges and law clerks’).

<sup>44</sup> For example, in *Chahal v United Kingdom* (1996) 23 EHRR 413 the European Court of Human Rights commended the procedure set out in the Canadian Immigration Act 1976 (as amended by the Immigration Act 1988) for dealing with classified information in deportation cases. One of the reasons the ECtHR directed a stay of the claimant’s deportation from the UK was that the Home Secretary’s failure to reveal evidence behind the decision to deport infringed Art 13 of the ECHR. ‘[I]n such cases in Canada,’ the ECtHR observed, ‘a Federal Court judge holds an in camera hearing of all the evidence, at which the applicant is provided with a statement summarising, as far as possible, the case against him or her and has the right to be represented and to call evidence’ (*Chahal v UK* at para 144). The Canadian procedure – which, until 2002, was overseen by an administrative tribunal, the Security Intelligence Review Committee (SIRC), rather than by the courts – was not as straightforward as the ECtHR made out: SIRC-appointed counsel could (and would often successfully) petition for security-sensitive evidence to be classified as closed material. See also N. Phillips, ‘Closed Material’, London Rev Books, 17 April 2014, 29.

<sup>45</sup> See J. Steyn, ‘*Pepper v Hart*; A Re-examination’ (2001) 21 OJLS 59, 66; *R (Public and Commercial Services Union) v Minister for the Civil Service* [2010] EWHC 1027 (Admin) at [53]-[55] (Sales J).

court is concerned, but which nevertheless have a different context.<sup>46</sup> A proper grasp of those points of law might require knowledge, and perhaps linguistic skills, that the national court's judges generally do not have. It is not entirely inconceivable, furthermore, that judges in national courts might occasionally be wary of referring to the reasoning of foreign courts for fear that their explicitly considering *and rejecting* that reasoning may diminish or undermine a foreign precedent (and possibly the judges responsible for it) in the jurisdiction from which it hails.

Even though reliance on precedent is always a form of piggybacking, the court which is heavily indebted to foreign precedent, particularly when ruling on a controversial matter, risks the accusation of failing to do its own homework: that other countries' courts have tackled a problem already, and have apparently tackled it well, does not mean that our courts need not – indeed, they may be failing to take a sufficiently serious approach to their task if they do not – devise their own distinctive answer to that problem. Looking elsewhere entails, moreover, determinations as to how far, and where, to cast the net. How many foreign precedents does it take to make *ius gentium*? Does the provenance of a precedent matter? Will all jurisdictions' precedents count towards the tally?<sup>47</sup> And how significant is the mere *fact* of convergence?<sup>48</sup> The fact that the precedents of many jurisdictions converge is not necessarily evidence that an outlier jurisdiction must somehow be getting things wrong;<sup>49</sup> nor, given that we can settle on

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<sup>46</sup> So it is, eg, that the High Court of Australia has been disinclined to interpret domestic human rights legislation by applying jurisprudence developed by the UK courts in relation to s 3(1) of the Human Rights Act 1998: see *Momcilovic v The Queen* [2011] HCA 34, Gummow J para 155 ('Australian courts must approach the questions presented by the [Charter of Human Rights and Responsibilities Act 2006, s 32(1)] with a clear recognition of ... the fact that ... both the structure and the text of other human rights systems reflect the different constitutional frameworks within which they operate. In particular, in considering decisions made by the House of Lords about the UK [Human Rights] Act, or decisions of the Privy Council about human rights charters in force in nations that were once British colonies, there are important differences of both context and text that must not be ignored'); see also French, CJ para 49, Heydon J paras 447-51, and Crennan & Keifel JJ para 546. The Supreme Court of New Zealand has similarly declined to follow UK authority on s 3(1) when applying s 6 of the New Zealand Bill of Rights Act 1990: see *Hansen v The Queen* [2007] NZSC 7, McGrath J paras 243-7.

<sup>47</sup> In 1999, a US Supreme Court judge, Stephen Breyer, cited decisions of the Privy Council, the European Court of Human Rights and the supreme courts of Canada, India and Zimbabwe to make the case that lengthy delays before execution constitute inordinately cruel punishment: *Knight v Florida*, 528 US 990, 996 (1999) (Breyer J, dissenting). The reference to Zimbabwe – Breyer took his lead from the Privy Council: *Pratt v Att Gen (Jamaica)* [1994] 2 AC 1, 30-1 – he came to regret: see 'The Relevance of Foreign Legal Materials in US Constitutional Cases', n 28 above, 528 (Breyer: 'I may have made what one might call a tactical error in referring to a case from Zimbabwe – not the human rights capital of the world [Zimbabwe had been a *de facto* one-party State at least since the elections of March 1990. In April the following year, Robert Mugabe signed constitutional amendments restoring corporal and capital punishment, and removing landowners' rights of recourse to the courts in cases of compulsory purchase of their land by the government].... Justice Thomas – disagreeing with me – wrote his own brief opinion arguing that I could not find American precedent supporting my view, so I must have looked to Zimbabwe out of desperation. He had a certain point').

<sup>48</sup> See E. A. Young, 'Foreign Law and the Demoninator Problem' (2005) 119 Harv L Rev 148, 151-6.

<sup>49</sup> Waldron himself proceeds from this premise when arguing that systems committed to legislative supremacy should keep faith with some version of that principle, notwithstanding that most jurisdictions have opted for constitutional arrangements which allow their courts to review the legality of legislation: see, eg, Waldron, *Law*

the same outcome for different reasons, is it necessarily evidence that a collection of jurisdictions are united in their approach to a legal difficulty. There is the risk, furthermore, of cherry-picked convergence, of a court having paid attention – perhaps having been directed – only or mainly to foreign precedents which accord with a particular outcome. The court which unexpectedly relies on these precedents might be accused of introducing into a case an unfair element of surprise (though once the court has signalled that it is willing to entertain these precedents, this line of objection will carry little or no weight). Lawyers know that a court will take account of domestic precedents, and that their chances of winning a case are diminished if the opposing side uses those precedents more effectively than they do. But if a court omits to invite counsel to make use of foreign precedents and then reaches a decision which is significantly shaped by them, lawyers for the losing side might rue having devised a legal strategy which would have looked very different had they anticipated that the reasoning of foreign judges would have swayed the court as it did.

#### IV. Authority? Of what?

The main difficulty with the *ius gentium* argument is the supposition that a collection of foreign precedents which converge on the same principle is capable of becoming *a body of law* in a nation's courts. In his Storrs Lectures, Waldron makes the case for 'a positive law conception' of *ius gentium* – for *ius gentium* understood as 'law that has a positive existence among the nations'.<sup>50</sup> Of course, it is 'not an enacted body of law' – '[n]obody *made* it law' – and '[o]rdinary folks', who generally 'assume that law is written down somewhere', may be understandably perplexed by references to *ius gentium* having its 'own positivity'.<sup>51</sup> But positivity it has: 'convergent currents of foreign statutes, foreign constitutional provisions, and foreign precedents sometimes add up to a body of law that has its own claim on us' as 'law *in the world*'.<sup>52</sup> When a country is out of step with 'a consensus in world legal opinion', the consensus 'is binding' on the out-of step jurisdiction 'as a sort of law'; 'seldom' will that consensus be tantamount to 'the peremptory authority of a binding rule, but it is legal authority nonetheless.'<sup>53</sup>

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*and Disagreement*, n 34 above, 16, 256-7 (arguing against the UK following other countries in adopting a US-style system of strong judicial review).

<sup>50</sup> *PLCAM* 43.

<sup>51</sup> *PLCAM* 51, 49, 56, 43 (emphasis omitted).

<sup>52</sup> *PLCAM* 3, 6.

<sup>53</sup> *PLCAM* 48-9, 62.

When Waldron writes of *ius gentium* being binding, he means not that national courts are bound to follow convergent foreign decisions as if they are on a par with the precedent of a higher court (though he clearly thinks that national courts sometimes are bound in this way), but that they may be obliged to take account of such decisions when interpreting national laws and constitutions or determining whether to follow, distinguish or overrule indigenous precedents. Obligated how? Waldron offers two answers. A court might ‘be bound’, he claims, ‘to take into account the nonbinding precedents that are drawn to its attention’, since ‘failure to do so ... may be ... a ground for appeal.’<sup>54</sup> Yet he also observes that while the failure of lawyers and judges to consider foreign precedents ‘may be seen as an embarrassment ... it will hardly be fatal to a brief or an opinion.’<sup>55</sup> Since ‘foreign law will ... seldom be more than one persuasive factor among others’,<sup>56</sup> it is difficult to envisage a petition for appeal being upheld for no reason other than that a lower court refused to consider foreign precedents drawn to its attention.

Waldron’s second answer builds on Ronald Dworkin’s proposition that ‘fairness requires the consistent enforcement of rights’, which means ‘treating like cases alike.’<sup>57</sup> The argument, put simply, is that *stare decisis* might be plausibly formulated as running across space as well as across time. It is integral to judicial precedent following that a court makes a decision which is on all fours with some earlier decision on materially identical facts. But it is also often the case that when a court follows a precedent it is seeking to make a decision which is congruent with the decision of another court. If it is accepted as desirable that courts treat like cases alike across courts as well as over time, should courts not ‘aim towards increasing uniformity with other courts’ worldwide?<sup>58</sup> According to Richard Brunaugh, ‘there is no violation of the plain principle of fairness, indeed there is satisfaction of it’, if a court within our jurisdiction, dealing with a particular set of facts, today declares itself persuaded by – and brings domestic legal doctrine into line with – other jurisdictions’ precedents which consistently deal with the same facts differently from how, to date, they have been dealt with in the precedents of our own jurisdiction.<sup>59</sup> Fairness, on this account, is satisfied because cases concerning materially identical facts are being treated alike irrespective of where the facts arise.

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<sup>54</sup> *PLCAM* 62. Waldron recognises that jurisdictions tend not to have settled conventions on who might seek out foreign precedents: it could be judges, or counsel (either on their own initiative or on the direction of the court), or both: see *PLCAM* 178.

<sup>55</sup> *PLCAM* 140; and see also *ibid* 246 n 75.

<sup>56</sup> *PLCAM* 162.

<sup>57</sup> R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978), 116, 113.

<sup>58</sup> C. Flanders, ‘Toward a Theory of Persuasive Authority’ (2009) 62 *Oklahoma L Rev* 55, 86.

<sup>59</sup> R. Brunaugh, ‘Persuasive Precedent’, in L. Goldstein (ed), *Precedent in Law* (Oxford: Clarendon Press, 1987), 217, 238.

But a court has a reason for not treating cases alike if the rules governing how it is to deal with those facts demand a different outcome than do the rules which attend to those facts in other jurisdictions. The courts of jurisdiction *A* are right to resist issuing a ruling which brings them into line with the courts of jurisdictions *B, C, D, et al* if the likely consequence of doing so is that the courts of jurisdiction *A* are then unable to accord proper respect to the jurisdiction's distinctive legal rules and arrangements.<sup>60</sup> It would be a mistake for courts of different jurisdictions to treat cases concerning the same set of facts as like cases, in other words, if those courts, in dealing with those facts, have to apply laws with different content – laws which regulate the same facts differently.

According to Waldron, 'treating like cases alike' is 'precisely' what Dworkin means by 'integrity in legal reasoning'.<sup>61</sup> Perhaps not precisely, but certainly more or less: integrity means not simply deciding today's case in a manner consistent with earlier decisions on materially identical facts, but taking account 'of the arguments of principle necessary to justify those [earlier] decisions'.<sup>62</sup> Accounting for arguments of principle means understanding not only their centrality to specific precedents but also their 'principled coherence with the whole structure of law'<sup>63</sup> – their place, that is, in a larger 'scheme of abstract and concrete principles that provides a coherent justification for' the legal rules and institutions of a particular jurisdiction.<sup>64</sup> In *Law's Empire*, Dworkin presented integrity as jurisdictionally confined – as holding within, rather than among, political communities.<sup>65</sup> Might it be plausibly re-cast as an argument for equal treatment across political communities?

Since integrity presupposes sovereignty – government speaking with one voice (a voice which need not be in harmony with the voices of other governments)<sup>66</sup> – the case for re-casting seems strained. Judges committed to integrity will interpret legal sources so as to present the law of the jurisdiction in its most attractive light. But the inclusion of foreign precedents among those sources could raise the possibility of that law being made to look distinctly unattractive. Even if a judge, moreover, in disagreement with other judges, were to observe that a ruling of a

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<sup>60</sup> See Bell, n 19 above, 458-9.

<sup>61</sup> *PLCAM* 135.

<sup>62</sup> Dworkin, n 57 above, 113; and see also R. Dworkin, *Law's Empire* (London: Fontana, 1986), 165-6 ('[T]reating like cases alike ... requires government ... to act in a principled and coherent manner toward all its citizens.... This particular demand ... is not in fact well described by the catch phrase that we must treat like cases alike. I give it a grander title: it is the virtue of political integrity').

<sup>63</sup> R. Dworkin, *Justice in Robes* (Cambridge, MA: Belknap Press, 2006), 250.

<sup>64</sup> Dworkin, n 57 above, 116-7.

<sup>65</sup> See Dworkin, n 62 above, 185, also 213 ('The model of principle ... makes the responsibilities of citizenship special: each citizen respects the principles of fairness and justice instinct in the standing political arrangement of his particular community, which may be different from those of other communities').

<sup>66</sup> See Dworkin, n 62 above, 165, 186.

foreign court deals with a matter differently and better than does the law which can be applied by the national court, that observation would not by itself pose a challenge to the interpretations which others place on the law of the land: to point out, perhaps by way of lament, that (say) the libel laws of this country are different from the ones which apply elsewhere is no more a disagreement over what counts as the law within the jurisdiction than is a pedestrian's complaining to a police officer, on being stopped and fined for jaywalking in Warsaw, that the same action would have been perfectly legal on the streets of London or Stockholm.

This does not mean, however, that genuinely foreign precedents must be irrelevant to legal interpretation. Judges who disagree theoretically about the law might be disagreeing over whether foreign precedent is relevant to determining the truth of particular legal propositions – over whether ‘the pertinent grounds of law’<sup>67</sup> are exhausted by the jurisdiction’s rules and precedents, that is, or whether, in order to determine if those legal propositions ‘figure in or follow from the principles of justice that provide the best constructive interpretation of the community’s legal practice’,<sup>68</sup> a court ought to be asking if, in other jurisdictions, similar propositions are derived from the essentially same principles. Near the end of his life, Dworkin wrote of how the possibility of integrity holding on the world stage at some time in the future did not strike him as completely unrealistic – though he was careful to add that this time has not yet and may well never come.<sup>69</sup> In any event, he maintained, the *ius gentium* argument should be taken seriously whether or not trans-jurisdictional integrity should ever come to pass. If a State purports to adopt policies which accord its citizens dignity – which treat its citizens’ fates as equally important and which respect everyone’s responsibility for his or her own life – then that State is obliged to take towards those citizens an *attitude* which shows it to respect their dignity.<sup>70</sup> The dignity-based claims which citizens bring against the State will often fail, and inevitably there will be disagreements about what concrete political rights people have. But it is important to distinguish claims based on citizens’ political rights failing (and the State ‘fail[ing]

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<sup>67</sup> *Ibid* 5.

<sup>68</sup> *Ibid* 225.

<sup>69</sup> See R. Dworkin, ‘A New Philosophy for International Law’ (2013) 41 *Philos & Pub Affs* 2, 29 (‘A coercive political community must respect the dignity of those over whom it exercises dominion by showing equal concern and respect for them all. Justice would therefore require a world government to show that equal concern for everyone alive. It is hard to predict the results of a world government accepting that responsibility. There are different conceptions of what equal concern requires.... [N]othing in my argument supposes ... a duty to form a world government or to assume each for itself the responsibilities for equality that a world government would have. Still, that space must be watched. I have been describing a future, so far imaginary.... If that future materializes, then at some point the question will be pressing whether there is then sufficient coercive authority in a world institution to engage some international responsibility of equal concern’).

<sup>70</sup> See R. Dworkin, *Justice for Hedgehogs* (Cambridge, MA: Belknap Press, 2011), 335.

to achieve a correct understanding'<sup>71</sup> of citizens' rights) and the State not making a 'good-faith effort'<sup>72</sup> to reach sound judgments about those rights. This 'right to an attitude', to see the State try to make a good-faith effort, is, in Dworkin's view, a 'basic human right'<sup>73</sup> – owed to the citizens of all States which claim to respect human dignity. A State which makes the good-faith effort might still be making judgments about the protection of political rights which would be considered questionable in other parts of the world – the policy which 'show[s] good faith effort in a poor country' might 'show contempt in a rich one'<sup>74</sup> – but for some poor judgments there can be no excuse: 'some judgments – those that match the world's consensus about the most basic human rights – will be obvious.'<sup>75</sup>

The inference to be drawn from this last observation is clear enough: the State which accepts that its attitude should be that its citizens deserve be treated with dignity, but which has so far dealt with (say) a particular human rights matter in a manner strikingly different from that adopted by countries which hold themselves out as having the same basic attitude towards their citizens, is likely sooner or later to see the wisdom, perhaps even the inevitability, of succumbing to *ius gentium* – of bringing its own laws on the matter in line with the laws of those other countries. A qualified version of this argument was explicitly endorsed by Dworkin in an article published just before his death:

If a significant number of states, encompassing a significant population, has developed an agreed code of practice, either by treaty or by other form of coordination, then other states have at least a *prima facie* duty to subscribe to that practice as well, with the important proviso that this duty holds only if a more general practice to that effect, expanded in that way, would improve the legitimacy of the subscribing state and the international order as a whole.<sup>76</sup>

The *prima facie* duty is attributable to the gravitational force of the practice: the more out-of-line a nation starts to look as some practice which it rejects is accepted and followed around the rest of the world, the more of a moral oddity that nation's preferred practice is likely to seem.<sup>77</sup> So it is that it is right, according to Dworkin, that 'the constitutional courts of separate nations are ... drawn to notice and to attempt to achieve some integrity with the constitutional principles of other nations.'<sup>78</sup> But to speak here of a duty, even a *prima facie* duty, seems slightly askew. If I have a *prima facie* duty to do something then I have to do that thing

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<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid* 336.

<sup>73</sup> *Ibid* 335.

<sup>74</sup> *Ibid* 338.

<sup>75</sup> *Ibid* 336.

<sup>76</sup> Dworkin, n 69 above, 19.

<sup>77</sup> See *ibid* 19-20.

<sup>78</sup> *Ibid* 21.

unless I can provide convincing reasons for not doing it. This is not quite the same as saying that I don't have to do something but that, if I fail to do it, lots of people will be disappointed in me. The *ius gentium* argument concerns the latter scenario: decisions which give rise to international disappointment. Suppose the way in which your community deals with some issue is different from the way in which it is handled in lots of other communities – many citizens of those other communities might say *shockingly* different. 'Given what they all do', somebody within your community says, 'are we sure we're handling this issue satisfactorily?' Or even, from outside the community: 'are you truly happy with what you do there, given how we all approach that issue?' If the outlier community (nation, constitutional court) changes its position so as to fall into line with others on the relevant issue, it does so not because of a duty – even a *prima facie* duty – to do so, but because it sees sense in changing its position after being invited to think again. No doubt, in some instances, 'invited' will mean 'pressured' or 'intensely lobbied' – and no doubt, in some instances, the petitioning might be so effective that only the most defiant outlier would resist reconsidering the issue at stake. But petitioning cannot, by itself, establish the presumption that the outlier *must* consider its own position in light of what others do. Resistance to peer pressure – powerful, noble peer pressure – might leave the outlier's status among the wider community diminished, but it wouldn't be quite right to say that the outlier has no choice but to think again: it is still entitled to stick to its own way of dealing with an issue and to ignore – and to provide no explanation for why it chooses to ignore – the reasoning of (many) others. There may be an expectation that national courts do take account of *ius gentium*, and considerable exasperation expressed when they do not, but they are not bound to do so.

Let us say that it were the case that courts sometimes are obliged to take account of *ius gentium*. What would they be taking into account? We saw at the outset of this section that Waldron characterises *ius gentium* as a body of positive law. But his commitment to this claim quickly wavers. Of course, '[o]nce incorporated' into 'the body of the law' in a national jurisdiction, *ius gentium* 'takes on a life of its own' as part of the positive law.<sup>79</sup> Absent incorporation, however, *ius gentium* 'has no artillery of its own.... It is perhaps best understood as an additional common *source* of national law rather than a distinct body of law in its own right.'<sup>80</sup> Convergent foreign precedents clearly cannot, in and of themselves, be properly characterised as part of an outlier jurisdiction's positive law. Imagine that the courts of other jurisdictions are essentially of one mind in their interpretations of a constitutional or statutory

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<sup>79</sup> *PLCAM* 72.

<sup>80</sup> *PLCAM* 59 (emphasis in original).

provision which has more or less the same form of words from one legal system to the next. This form of words is used in the provision enacted in your jurisdiction, too. But the courts of your jurisdiction have interpreted those words very differently from how the courts of those other jurisdictions have interpreted them. You might wish that your courts would bring themselves in line with other jurisdictions' courts. But you still appreciate that the out-of-step interpretation, the interpretation favoured by your courts, is the better guide to action within your jurisdiction. And if a court within your jurisdiction were to rule against you by treating as precedent the foreign rather than the national courts' interpretation of the relevant words, you might complain that you were unable to choose your actions by first determining how the law would apply to the possible choices: so far as you understood at the time that you acted, the liabilities which the law of the land attached to your actions were not to be settled by interpretations that courts outside the jurisdiction placed on laws outside the jurisdiction – whatever the similarities between those laws and national law, and no matter how convincing foreign courts' interpretations of those laws might be.

In a moment, I will show that this argument misses something. But let us first consider how Waldron deals with it. He thinks that the obvious flaw in the reasoning is that it amounts to old-style, law-as-coercive-orders legal positivism.<sup>81</sup> The law, understood from this perspective, should be discoverable in advance because, when you act, you want to know if your actions are likely to incur negative legal consequences. If a court determines the liabilities attaching to your actions by relying not on what the applicable law is understood to mean within the jurisdiction but on what similar laws have been taken to mean in other jurisdictions, then citizens might object that they have been cheated of a basic rule-of-law premise: that they should be able to act confident that no deleterious consequences will attach to their actions – that they will not be in trouble – so long as they do not contravene the law of the land.<sup>82</sup> If a legal positivist is to stand a chance of showing that the convergent precedents of jurisdictions *A*, *B*, *C* and *D* can form part of the law of jurisdiction *X* then, according to Waldron, he or she must abandon the 'crude and obsolete' positivism of Austin and Holmes in favour of 'Hart's version of legal positivism'.<sup>83</sup> The conclusion to be drawn from Hartian positivism does not 'preclude the idea of *ius gentium*, defined as positive law', since it determines that the question of whether it is appropriate for national courts to take account of foreign precedents 'depends

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<sup>81</sup> See *PLCAM* 54.

<sup>82</sup> See A. D. Woolley, 'What is Wrong with Retrospective Law?' (1968) 18 *Philos Q* 40, 53.

<sup>83</sup> *PLCAM* 54.

on what the judges [of those courts] do, on what rule of recognition they actually follow'.<sup>84</sup> But Hart's reasoning serves only to highlight the problem that Waldron is up against: normally, it implicit in the rule of recognition of a jurisdiction that foreign precedents, convergent or otherwise, are only persuasive authority – that they are not to count as positive law in that jurisdiction's courts. It might be that there is nothing, in principle, to stop courts adapting the rule of recognition so that foreign precedents are upgraded to the status of primary legal source. But recall what Waldron wants to establish: that courts might sometimes be obliged to take account of convergent foreign precedents. Hart's version of legal positivism enables him to establish that a court will be so obliged only if the obligation forms part of the jurisdiction's rule of recognition.

#### V. The reasons beneath the rules

If a national court were to rule that some convergent foreign precedents form a distinctive body of positive law determining liabilities attaching to particular actions taken within the jurisdiction, parties before the court who have taken those actions might reasonably complain that, at the time of acting, they could not discover the law applicable to what they did. It is not inconceivable, as we have seen, that a jurisdiction's rule of recognition could contain a (formal or informal) convention requiring the national courts to follow, say, the precedents of another jurisdiction's supreme court. But in the absence of any such convention, the national court which follows genuinely foreign instead of indigenous precedent departs from the rule of law.

But there is a difference between courts following foreign precedents – treating them as dispositive – and courts taking account of reasons provided in foreign precedents when determining how to apply the law of the jurisdiction. I stated a moment ago that there is something not quite right about the argument that there is a risk of negative liabilities being imposed retroactively when a national court relies on foreign precedents. The risk is obvious when reliance means following. But it is just as obvious that it is not a rule of law requirement that citizens are able to discover, before acting, how a court will interpret the law which is applicable to their actions. There is nothing untoward about a court treating genuinely foreign precedents as a relevant source of information when settling on how best to apply the law of the land. Even if the precedents form part of the material that the court relies on to interpret a constitution in a way which changes legal rules – causing critics to object that the court makes

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<sup>84</sup> *PLCAM* 55.

the change but foreign judges move the levers – the court cannot, so long as it treats the precedents only as information, be said to have departed from the rule of law. Foreign precedents, in these instances, serve as epistemic rather than as practical reasons, as reasons guiding beliefs rather than actions (decisions).<sup>85</sup>

The idea of foreign precedents as *persuasive authorities* implies, however, that they fall somewhere between the epistemic and the practical – that they are not merely information, but not legally binding either: to treat a source as persuasive authority is, according to Waldron, to give it ‘appropriate weight, though not binding weight.’<sup>86</sup> What could this mean? In answering this question, he invites us to reconsider *Riggs v Palmer*, the famous case in which a legatee under a will murdered the testator to precipitate his inheritance.<sup>87</sup> Although the relevant statutory provision did not preclude the legatee from inheriting under the will,<sup>88</sup> the New York Court of Appeals determined that statutes ‘may be controlled in their operation and effect by general, fundamental maxims of the common law’ such as that ‘[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong’.<sup>89</sup> Judge Robert Earl, delivering the majority opinion, noted that these ‘maxims ... have their foundation in universal law administered in all civilised countries’, and he cited sources to show that Roman, French and Canadian lawyers accept as one of ‘the general principles of natural law and justice’ the proposition that ‘one cannot take property by inheritance or will from an ancestor or benefactor whom [on]e has murdered.’<sup>90</sup> The majority co-opted these convergent foreign sources ‘not ... simply [to say] that we can learn something’ from them, Waldron argues, but

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<sup>85</sup> On the distinction between epistemic (or theoretical) reasons for belief and practical reasons for action, see J. Raz, *From Normativity to Responsibility* (Oxford: OUP, 2011), 41-5. The distinction has, I think, to be handled with care if it is to be used to explain foreign precedents as persuasive authorities. According to Lamond, a theoretical authority has ‘a level of knowledge and/or skill in some domain that gives [its] considered views about a matter within the domain far more credibility than the views of those possessing an average level of knowledge or skill’, and so a ‘theoretical authority in law is someone whose views are likely to be superior to the non-expert and are worthy of close attention because they are more likely to identify a solution that strikes a better balance among competing values’ (G. Lamond, ‘Persuasive Authority in the Law’ (2010) 17 Harv Rev Phil 16 at 18, 31). But the national court which makes use of a foreign precedent is a case of one expert consulting another: the national court’s views are not likely to be inferior or informed by less expertise (particularly if the issue concerns domestic law), and so the reason for the court looking to foreign precedent is unlikely to be that, all things considered, the position taken by the foreign court seems the more credible one. If ‘[t]he function [of theoretical authorities] is to assist others to form sound judgments over matters where they lack either the knowledge or the understanding to form a credible view of their own’ (*ibid* 20) then national courts, when they make use of foreign precedents, cannot, strictly speaking, be treating them as theoretical authority. Genuinely foreign precedents *are* theoretical authorities in the sense that they provide a reason for belief, but the national court which takes account of such a precedent cannot be said to do so because the foreign court’s expertise makes its reasoning more credible than the reasoning of the national court.

<sup>86</sup> *PLCAM* 62.

<sup>87</sup> *Riggs v Palmer*, 22 NE 188 (NY 1889).

<sup>88</sup> ‘No will in writing ... shall be revoked ... otherwise than by some other will in writing, or some other writing of the testator’. *Revised Statutes of the State of New York*, 3 vols, 7<sup>th</sup> ed (Albany, NY: Banks & Bros, 1882), III, 2286.

<sup>89</sup> *Riggs v Palmer*, n 87 above, 190.

<sup>90</sup> *Ibid*.

rather to identify ‘a body of jurisprudence ... in the world’ supporting ‘the principle that ... [one] should not profit from [one’s] wrongdoing’, and to ensure that this ‘principle ... was established ... as an integral part of New York state law (if it was not implicitly part of it already).’<sup>91</sup> The principle was accorded ‘the status of law’ – was treated as more than merely persuasive authority – notwithstanding that it was not set down ‘in a sanctified form of words’ as ‘an explicit rule’ of the jurisdiction.<sup>92</sup>

One has to be careful with *Riggs v Palmer*. The Court did not purport to decide the case by applying a general legal principle in preference to enacted law but rather it found that the principle was already a part of that law: the case, as Dworkin appreciated, was about statutory interpretation.<sup>93</sup> Were it possible to reconvene and consult the legislators responsible for the applicable statute and ask them how they wanted it to apply to legatees who murder testators, the majority claimed, we can be confident those legislators would answer that they intended that it should not apply so as to exonerate murderers.<sup>94</sup> The law in this instance, Judge Earl observed, is tantamount to that intention: ‘[i]t is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter’.<sup>95</sup> The dissenting judges pointed out that it was mere conjecture – judicial law-making rather than statutory construction – to determine that not allowing murderers to inherit from their victims was within the intention of the legislators.<sup>96</sup> They had a point. Indeed (a fact seldom noted), within a decade the New York Court of Appeals had departed from its ruling in *Riggs v Palmer*, holding that murderous heirs *can* inherit by will.<sup>97</sup> But the point to note for our purposes is that the majority in *Riggs v Palmer* were resorting to imaginative reconstruction as an interpretive canon in order make the case that the principle that legatees should not be allowed to profit from murdering testators was already contained in the law of the jurisdiction. And so the references to the foreign legal sources were simply emphatic: there is a familiar canon of construction which explains how the applicable statute is to be interpreted, Judge Earl was arguing, and the fact that laws elsewhere support this interpretation

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<sup>91</sup> *PLCAM* 67, 73.

<sup>92</sup> *PLCAM* 74, 57, 64.

<sup>93</sup> ‘[T]he majority ... in *Riggs v Palmer* ... [held] that, according to the better interpretive reconstruction, those who created the Statute ... did not intend to say something that allowed a murderer to inherit from his victim.’ R. Dworkin, ‘Reflections on Fidelity’ (1997) 65 *Fordham L Rev* 1799, 1816.

<sup>94</sup> See *Riggs v Palmer*, n 87 above, 189-90.

<sup>95</sup> *Ibid* 189.

<sup>96</sup> See *ibid* 191-2 (Gray J), 192-3 (Woodworth J); also *Shellenberger v Ransom*, 59 NW 935, 939 (Neb 1894) (Cobb, CJ).

<sup>97</sup> Though the claimant would be entitled to any property inherited by the murderer as a beneficiary under a constructive trust: see *Ellerson v Westcott*, 42 NE 540 (NY 1896); J. B. Ames, ‘Can a Murderer Acquire Title by His Crime and Keep it?’ (1897) ns 36 *American Law Reg & Rev* 225, 226-7.

is but one of the reasons to think that it ‘would be a reproach to the jurisprudence of our state, and an offense against public policy’ were a court to interpret the statute differently.<sup>98</sup>

When courts do take account of foreign precedents, they rarely if ever take account of them in isolation. As in *Riggs v Palmer*, the court will most likely be presenting foreign precedent along with a range of other exhibits – as part of a repertoire of arguments supporting a particular outcome. But what if a court *did* supply gaps in established rules by resorting to a principle which, though very much at large in the courts of other countries, was nowhere to be found in the law of the land? Why should it be wrong for a national court to do this? That a court would ever have a reason to do this is highly unlikely – a point to which we will return in a moment. But assume that a court did find itself confronted with a genuinely novel problem to which national law did not speak but to which foreign precedent did. Would it be objectionable for the court to state, in effect, that it was reaching its decision on the basis of foreign precedent because the difficulty before the court is convincingly resolved by that precedent but has not yet been addressed by the jurisdiction’s legislators and judges?

One objection to a national court deciding in this way – an objection which we have encountered already – is that genuinely foreign precedents are not part of the law of the jurisdiction, and that citizens of the jurisdiction therefore have no reason to take them into account when planning their actions. If a court were to attach negative liabilities to an individual’s past actions by following foreign precedent, that individual might complain that he thereby becomes a defenceless victim of retroactive judge-made law.

There are two reasons to look askance at this answer. The first is that it seems somewhat less compelling when the court’s objective in seeking out foreign precedent is not to attach negative liabilities to an individual’s actions but – to express a complicated idea somewhat crudely – to protect the individual *vis-à-vis* the State. Imagine that a court in a jurisdiction allowing the death penalty were to introduce an exception on the basis of cruel and unusual punishment by invoking a general principle – accepted only in foreign precedents – that no defendant should be executed for crimes committed during childhood.<sup>99</sup> While some people, such as those closely connected to the victim’s offender, might point out that the consequence of the court having adopted this principle from foreign sources offends against

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<sup>98</sup> *Riggs v Palmer*, n 87 above, 190.

<sup>99</sup> Readers familiar with US law might say that there are cases which conform to this scenario. In *Roper v Simmons*, n 40 above, and in *Thompson v Oklahoma*, 487 US 815 (1988), the Supreme Court ruled that the imposition of the death penalty on juveniles amounted to cruel and unusual punishment, and in both cases the Court made use of foreign legal materials. But in neither case was the Court’s ruling built on foreign sources alone. In both cases, for example, the Court emphasised that many US states imposed a minimum age for imposition of the death penalty (30 states by the time of *Roper*) and that none of those states permitted the execution of offenders who were younger than 16 at the time that the offence was committed.

their expectation that the offender be executed, the court's decision does not alter their legal liabilities or interfere with rights which they themselves have acquired under the law. The court's reason for adopting this principle, in short, would be to preserve rather than to deprive.<sup>100</sup>

The second reason the answer might seem unconvincing is that when, in a common law jurisdiction, today's court develops the law by modifying the rule-formulation of an earlier court, the new content that today's court adds to the common law is (absent a convention of prospective overruling) applied *ex post facto* to the facts of the case which invites the modification. Common-law courts are, 'with the consent of the State, ... constantly making *ex post facto* Law', because they are 'constantly in the practice of applying ... rules which were not in existence and were, therefore, not knowable by the parties when the causes of controversy occurred.'<sup>101</sup> If it is acceptable for a court to modify the existing common law so as to alter the legal status of an action already taken (or to interfere with a right already acquired) by a party to a case, why should it be unacceptable for a court to modify the law by relying on reasons supporting the modification which are to be found only in foreign precedents? To object that the modification would apply to facts which pre-date the court's decision, thereby creating a legal liability which the person who took the liability-incurring action could not have discovered (because it did not exist) at the time of acting, meets with an obvious retort: but then this is precisely how it is whenever judges develop the common law. If, say, a court's only reason for supplementing existing rules were that the reflective and considered opinions of a significant number of distinguished judges in jurisdictions with similar legal arrangements made a very convincing case for doing so, why should dislike of *ex post facto* law be a more compelling argument against the court's ruling in this way than if the court were simply creating new legal consequences by developing the common law?

One might answer that when judges develop the common law they develop it in accordance with the jurisdiction's established legal principles: common law development means

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<sup>100</sup> But note: although lawyers and judges who seek out convergent foreign precedents invariably do so in order to try to relieve citizens of particular liabilities (to establish that the death penalty *should not* be imposed on juveniles or on pregnant women, to decriminalise private consensual homosexual activity), it does not have to be this way. It would be a mistake, that is, to discount the possibility of finding convergent foreign precedents which, if taken into account in a national court, would suggest that domestic law should be revised or reinterpreted so as not to relieve citizens of particular liabilities but rather to remove vested rights. Consider how countries vary in their approach to double jeopardy: some forbid it, and those that do not forbid it allow for greater or lesser numbers of exceptions to a basic prohibitive rule. Although – as we will see in a moment – the rule-of-law based objection to the *ius gentium* argument misses something, the significance of that objection becomes clearer, I think, if one imagines a court (in a jurisdiction where a limited number of exceptions to double jeopardy protection are permitted) relying on convergent foreign laws to extend the range of instances in which defendants might be tried more than once for the same alleged offence.

<sup>101</sup> J. C. Gray, *The Nature and Sources of the Law*, 2<sup>nd</sup> ed (New York: Macmillan, 1921), 99-100.

not laying down new laws but rendering transparent or coherent something which is already there within the fabric of the national law yet which has been misread, or overlooked, or (because of, say, the incorporation of international treaty obligations) reconfigured. This answer has to contend with one of the standard criticisms levelled against the declaratory theory of the common law: while courts indeed often are building on what is already there, or putting the law back on track, when developing common law rules,<sup>102</sup> there are instances when a court's ruling genuinely adds to the common law something that cannot be said to have been contained within it already.<sup>103</sup> If it is accepted that judges make law, and that some of the law that they make applies *ex post facto*, the question remains: on what basis might it be argued that judges should never make alterations to the common law solely by virtue of the relevant and persuasive reasoning of foreign courts? It seems that this argument cannot be made convincingly by objecting that a court which decided purely by reference to foreign precedent would be making *ex post facto* law, for common law courts do – indeed, are expected to – make *ex post facto* law.

Perhaps it overstates things to say that it must *always* be wrong for a national court to treat genuinely foreign precedent as the reason for reaching a decision. Yet it seems unlikely – to revive a point touched upon a moment ago – that a national court would ever have cause to rely on foreign precedent in this way. It would be just as unlikely, whatever the reasons for reliance, that the court's decision to do so would not meet with severe criticism. Genuinely foreign precedent is persuasive authority in the courts of many nations. A national court which

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<sup>102</sup> Blackstone, 1 *Commentaries on the Laws of England* 70-1.

<sup>103</sup> For example, when, in the early 1990s, the House of Lords abolished a husband's common law immunity against criminal liability for rape within marriage – *R v R* [1992] 1 AC 599 (decided Oct 1991) – it held that marital rape was an offence even though, at the time of the defendant's action, it was not an offence. Though the morally right answer to the question, 'Can a man be guilty of raping his own wife?' is 'yes', this was not, at this time (or at any earlier time), the answer offered up by English law: see M. Hale, *Historia Placitorum Coronæ: The History of the Pleas of the Crown*, 2 vols, ed S. Emlyn (London: printed by E. & R. Nutt and R. Gosling for F. Gyles, T. Woodward, and C. Davis, 1736), I, 628-9; *R v Clarence* (1888) 22 QBD 23; D. Lanham, 'Hale, Misogyny and Rape' (1983) 7 Crim L J 148, 155; *PGA v The Queen* [2012] HCA 21, Heydon J paras 80-4 and Bell J paras 199-215. The exemption as it existed until 1991 seems best understood, applying Dworkin's terms, an embedded mistake (n 57 above, 121-2) – with no gravitational force in cases other than those to which it specifically applied, but authoritative in those specific cases nevertheless. Perhaps the morally right answer was, before that time, discoverable in general principles of justice consistently assumed in other departments of English law. But it is not at all obvious that it was. The House of Lords, rather than arriving at its answer by invoking a legal principle which already formed part of the law, determined that the common law position – that 'by marriage a wife gives her irrevocable consent to sexual intercourse under all circumstances' – had become 'quite unacceptable' (*R v R* at 616, *per* Lord Keith). (Parliament eventually made marital rape a statutory offence under the Criminal Justice and Public Order Act 1994, s 142.) To resort again to Dworkin's language: the marital rape exemption was considered indicative of the associative community's defective conception of equal respect and concern, and so the law was changed because the injustice of maintaining the husband's right was considered so severe and deep that it had to be cancelled (see Dworkin, n 62 above, 202-4). The crucial point, for our purposes, is that cancelling the right meant changing the law rather than showing that an acknowledgment of the iniquity of marital rape could already be deduced from the first principles of the established legal order.

treated a foreign precedent as practical authority would be determining that it has to take the precedent into account when making its own ruling irrespective of how convincing the national court found the reasoning embodied in the foreign court's judgment. For a national court to choose to treat a particular foreign precedent (or group of precedents) in this way – for there to be no alteration to the court's position on the status of foreign precedents other than its determination that *this* foreign precedent will be followed as if it were an indigenous precedent – is near inconceivable. Furthermore, if a national court did choose to decide in accordance with foreign precedent – because the precedent yielded a convincing answer to a problem not yet addressed by the law of the jurisdiction – then it would be open to the various criticisms outlined in section III: that it was being lazy, selective, showing a lack of faith in its own judgment, failing to see that foreign courts are invariably speaking to different legal problems in different legal cultures, demonstrating only a superficial grasp of other systems, and so on. Highly unusual would be the case decided on the basis of a legal principle which the ruling court considered to be accepted in foreign systems yet nowhere discoverable in the rules and decisions of the jurisdiction. And even if it is wrong to say that a national court could never be justified in treating foreign precedent as the sole basis for its decision, it seems obvious that a court would come in for criticism – most likely justifiable criticism – if it did use foreign precedent in this way.

There is one last puzzle which warrants brief consideration. Let us, for argument's sake, assume that a series of genuine and convergent foreign precedents could, exceptionally, amount to more than just persuasive authority in a national court – that a court discerns a compelling reason for interstitially modifying a rule of the jurisdiction and duly does so, even though the court can only find that reason articulated in the decisions of courts outside the jurisdiction. Why should that court not treat other secondary sources – the carefully developed and convergent reasoning of jurists, legal journalists, political philosophers or whomever – in exactly the same way?

One possible answer is that courts are somehow more an authority to be reckoned with by virtue of what they are as opposed to what they say.<sup>104</sup> Courts look to courts elsewhere – and, for that matter, to judges within the jurisdiction whose opinions on a legal point may have been expressed *obiter* or in dissent or in a lower court but who, owing to their renown or their expertise in particular areas of the law, are considered worthy of attention – because they recognise them to be in the same line of work, solving essentially the same problems by

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<sup>104</sup> See Flanders, n 58 above, 58, 62.

applying similar rules and reckoning with similar arguments. Someone not in the same line of work may be the more perceptive critic: the sports report in the morning newspaper tends to be more insightful than the post-match interviews with the players. But it is the participants, not the commentators, that one is likely to seek out if one wants advice on how to go about doing the job.<sup>105</sup> The opinions of foreign judges are likely to count for more in the national courts than are the opinions of academic lawyers (no matter which jurisdiction they belong to<sup>106</sup>) because foreign judges, though trading in other markets, are in the same business.

## VI. Conclusion

The point of this essay has not been to argue that courts should generally resist making use of foreign precedents, or that courts can learn a great deal from foreign precedents, or that foreign precedents sometimes converge to such a degree that it would be remiss of an outlier jurisdiction's court not to take them into account when deciding on the problem that those precedents address. I have tried to show that there are no strong reasons against national judges choosing to treat genuinely foreign precedents as persuasive authority, but that there are reasons to be sceptical about the concept of trans-jurisdictional integrity, and that there is a basis for rejecting the proposition that a rogue jurisdiction has a duty – even only a *prima facie* duty – to take account of the convergent precedents of other legal systems. I have also argued that it is a mistake to think that convergent foreign precedents acquire, purely by virtue of their commonality, the status of positive law. If foreign precedents are to have that status within a particular jurisdiction, the jurisdiction would have to incorporate them as part of the national law.

I have also tried to show – something which studies of foreign precedent generally overlook – that courts use foreign precedents in a variety of ways, and that resistance to

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<sup>105</sup> Which is not to say that one would only seek out the participants and never look to the commentary for guidance: see, eg, *White v Jones* [1995] 2 AC 207, 235 *per* Steyn LJ ('The question decided in *Ross v Caunters* was a difficult one.... It is therefore not altogether surprising that the appeal in the present case lasted three days, and that we were referred to about 40 decisions of English and foreign courts.... But we were not referred to a single piece of academic writing on *Ross v Caunters*.... In a difficult case it is helpful to consider academic comment on the point. Often such writings examine the history of the problem, the framework into which a decision must fit, and countervailing policy considerations in greater depth than is usually possible in judgments prepared by judges who are faced with a remorseless treadmill of cases that cannot wait. And it is arguments that influence decisions rather than the reading of pages upon pages from judgments').

<sup>106</sup> Because juristic analysis has, as persuasive authority, a status different from foreign precedent: not only do jurists often concern themselves with the laws of other jurisdictions – so that a foreign jurist may be recognised by a national court to be writing about the very law that the court will apply – but juristic writings are not legal decisions, and so it is unlikely (though not impossible) that the national court's objective when citing foreign juristic analysis is to apply another jurisdiction's reasoning in support of a particular decision in order to justify deciding similarly in the national jurisdiction.

reliance on foreign precedents is usually strongest when courts are engaging in constitutional adjudication as opposed to interpreting statutes or treaties or developing the common law. Whatever the reason a court has for citing foreign precedents – and it should be kept in mind that there is nothing to stop lawyers and judges taking account of foreign precedents without referring to them – the likelihood is that they are being cited to bolster an argument already supported by indigenous legal sources. I have made the case that it is perhaps not entirely inconceivable for a court to rely on foreign precedent as the *only* reason for modifying an existing common law rule (and that there is little if any mileage in the objection that courts make *ex post facto* law if they do rely on foreign precedent in this way). But I have also emphasised that the likelihood of a national court deciding a case solely by reference to foreign precedent is extremely remote, and that a court which did decide thus would be courting serious controversy.