

CRAFTING INTERNATIONAL LEGAL ORDERS: HORIZONTAL LEGAL
INTEGRATION AND THE BORROWING OF FOREIGN LAW
IN BRITISH COURTS

by

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DISSERTATION ABSTRACT

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Title: Crafting International Legal Orders: Horizontal Legal Integration and the Borrowing of Foreign Law in British Courts

My dissertation project seeks to understand when and how national judges play an active and significant role in how international legal orders do or do not affect their polities. Specifically, I look at when and how British judges play a role in how European Union law through the European Court of Justice and European human rights law through the European Court of Human Rights affect the British polity. These international legal orders contain both vertical and horizontal aspects. Vertical aspects include the highest court and its judges defined by the treaty, which operates as the international, hierarchical authority on the treaty and is tasked with ensuring the compliance of the member states of the treaty. Horizontal aspects include member state courts and judges who interact with other member state courts and judges as equals voluntarily to share an understanding of the law.

Britain is interesting because it may seem like a counterintuitive place to find such dynamics. Britain has a strong resistance to international authority, a deeply entrenched idea of Parliamentary Supremacy, and a dualist legal tradition where Parliament translates international law into domestic law prior to its use by the courts, which contributes to a lack of expectation of British judges engaging in international

judicial activism, making Britain a hard case. In this context, we should expect that international law only matters to the extent that domestic actors are forced to incorporate it by a strong international legal order with vertical supremacy and unambiguous authority.

To the contrary, my dissertation shows that British judges are quite active in many international legal orders in ways that do not merely reflect the degree of established vertical legal authority. Through dynamics that are quite autonomous from British politicians' difficult interactions with international authority, British judges play a very active role in managing and integrating international law into British politics. To see these dynamics and understand how international law has affected British politics, we must pay special attention to horizontal legal integration. Horizontal legal integration occurs when judges intentionally and selectively borrow legal concepts and precedents from other national or international jurisdictions.

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CHAPTER I

SITUATING BRITISH JUDGES IN INTERNATIONAL LEGAL ORDERS

A. INTRODUCTION

This dissertation project seeks to understand when and how do national judges play an active and significant role in how international legal orders do or do not affect their polities. Specifically, this dissertation looks at when and how do British judges play a role in how European Union (EU) law through the European Court of Justice (ECJ) and European human rights law through the European Court of Human Rights (ECtHR) affect the British polity. What role do British judges play in European legal integration? International legal orders are hierarchically structured legal systems that bind together courts from many different states to follow certain international laws, norms, and procedures outlined in a treaty. This dissertation will provide a comparison of two international legal orders: the European Court of Justice and the European Court of Human Rights. These two European legal orders engage in a process of legal integration of national member state's courts into a stratified international legal order. Legal integration is a process of uniting distinct or differing levels of courts to create a cohesive legal system. Legal integration can occur domestically or internationally. Domestic forms of legal integration involves creating a united legal order of differing levels of courts such as the integration of the then newly created United States Supreme Court over the existing state courts after the signing of the United States Constitution in 1787 or the

creation of the Supreme Court of the United Kingdom in 2009 which is the highest appellant court and the highest court in matters of English and Welsh law, Northern Ireland law, and Scottish civil law. International forms of legal integration, such as the focus of this project on European legal integration, involve legal integration across multiple states' courts within the EU under the authority of the ECJ and within the Council of Europe member states under the authority of the ECtHR.

The process of legal integration, whether domestic or international, contains two dimensions: vertical and horizontal. Vertical legal integration is a top-down process where the establishment of a hierarchical legal order of courts and laws, causes lower courts in the vertical legal order to make more similar decisions over time as they increasingly come under the formal authority of a higher court. An example of vertical legal integration is within the EU, where the supranational court, the ECJ, has brought member state courts under its authority on all matters touched upon by EU law. Over time the member states' judiciaries of the EU become more integrated as EU law expands and penetrates member states and as they accept the authority of the ECJ as the highest European Union court. Horizontal legal integration involves courts making more similar decisions over time because the courts interact, borrow, and imitate each other informally. Horizontal legal integration occurs when judges intentionally and selectively borrow legal concepts and precedents from other national or international jurisdictions. An example of horizontal legal integration can be seen in the ECtHR, which was created by the European Convention on Human Rights (ECHR or the Convention) which specifically compelled member state courts to take into consideration the jurisprudence of other member state courts when deciding human rights issues, meaning member state

courts should be aware of each other's jurisprudence. The causes and role of horizontal legal integration are often ignored in the literature or seen as a side effect of vertical integration particularly in the ECJ literature (See for example Garrett 1995; Mattli and Slaughter 1995; White 1996; Alter 1998; Carrabba and Murrah 2005; Josselin and Marciano 2007; Panke 2010; Carruba et al. 2012), which is why this dissertation has striven to show how horizontal legal integration affects these international legal systems and to discuss the implications of this argument.

Britain was chosen as a "hard case" because several of its national features make it seem an unlikely place for international judicial activism, where judges actively incorporate international treaty law and the jurisprudence of international legal institutions into the domestic arena autonomous of domestic governance institutions. Britain has a strong resistance to international authority, a deeply entrenched idea of Parliamentary Supremacy, and a dualist legal tradition where Parliament translates international law into domestic law prior to its use by the courts, all of which could make it surprising for British judges to engage in international judicial activism. The United Kingdom has rejected actions by international institutions that it interprets as diminishing its sovereignty including the Euro, a federalized Europe, new constitutional rules, and the loss of authority and stature within the international community as powers are transferred to a supranational or international authority.

In this context, we might expect that international law only matters to the extent that domestic actors are forced to incorporate it by a strong international legal order with vertical supremacy and unambiguous authority. To the contrary, my dissertation shows that British judges are active in many international legal orders in ways that do not

merely reflect the degree of established vertical legal authority. Through dynamics that are quite autonomous from British politicians' difficult interactions with international authority, British judges play a very active role in managing and integrating international law into British politics. To see these dynamics and understand how international law has affected British politics, we must pay special attention to horizontal legal integration.

Most of the empirical literature and theoretical attention to legal integration within Europe focuses on the European Union and the European Court of Justice, which is indeed by far the most important instance of international legal integration in history. But this dissertation argues that to understand how British judges act within European Union law, and with what domestic effects, we need to start elsewhere. At the origins of these distinct legal dynamics are the common law and the British Commonwealth, within which a British tradition of judicial borrowing of foreign law first emerged. These dynamics continued with the European Convention of Human Rights and its court in Strasbourg, where British judges continued a pattern of practices of international judicial activism. This dissertation will trace horizontal legal integration in the United Kingdom as they become a part of international legal orders from the British Commonwealth to the ECtHR to the ECJ chronologically. Once we see how British judges worked out strategies and practices of borrowing foreign law in these other contexts, we can understand how attention to horizontal integration leads to a rather novel image of judicial action in the European Union and the Council of Europe context as well.

B. THE ARGUMENT

The European legal integration literature explores the transformation of treaties among sovereign states into a vertically integrated legal order conferring rights on individuals with the ECJ as the primary case of interest (Stone Sweet 2004). Except for a few notable exceptions (see Alter and Meunier-Aitsahalia 1994; Slaughter 1994; Conant 2001; Nyikos 2007; Jupille and Caporaso 2009) little of the European legal integration scholarship focuses on or even acknowledges the aspects of horizontal legal integration that occur within Europe. Instead, the European integration literature has focused on explaining why and how the ECJ acquires formal, vertical, legal supremacy over national courts or occasions where national courts rebel against the authority of the ECJ by not following the precedent set down by the ECJ (Garrett 1992; Garrett and Weingast 1993; Garrett 1995; Mattli and Slaughter 1995; Alter 1998; Mattli and Slaughter 1998; Keleman 2011). This dissertation projects seeks to make an effort to begin to fill the horizontal gap and explore how horizontal legal integration can contribute to our understanding of international legal orders.

Anyone who reads the EU treaties or attempts to study the ECJ notices that EU law was meant to create a powerful, stratified, vertical legal order with the compliance of the member states courts under the authority of the ECJ (Stone Sweet 2000). This is a basic claim of the European legal integration scholarship, which has overwhelming empirical support of which I have highlighted some of the plentiful research on the matter in chapter II and V. What is neglected from this story is how the vertical legal order created the atmosphere and space to allow room for horizontal legal integration within the EU and how horizontal interactions then influence how the international legal order

functions. This dissertation strives to understand how British judges play an active role in how the ECJ and the ECtHR do or do not affect their polities. Britain becomes the focus of this study, given that it provides a context where we should expect that international law only matters to the extent that domestic actors are forced to respect it by a strong vertical, international legal order.

When we look at the plentiful vertical legal integration scholarship produced on the ECJ, the capacity of British judges to engage in active domestic management, promotion, and/or resistance looks weak. Neorationalist scholars writing on the ECJ suggest that judges do not matter much in any state when it comes to international issues, since state executives jealously monitor all delegations of power beyond the state and act to rein in any legal developments of which they do not approve (Garrett 1992; Garrett and Weingast 1993; Cooter and Drexler 1994; Garrett 1995; Garrett et al. 1998; Kelemen 2006). Neorationalist theories argue that European legal integration only progresses as much as political leaders in the member state see it as in their best interests to do so and that member states government could, if they chose to, ignore the ECJ decisions or amend the integrating legal order through new treaties, but have ultimately accepted and encouraged the legal order because it mitigates the incomplete contracting and monitoring problems that would otherwise hinder the integration of the market and the benefits from trade liberalization. This scholarship emphasizes the importance of hierarchically organized states, particularly the importance of the executive, to act as a gatekeeper and shape what is imported into domestic law through controls on national courts (Moravcsik 1993; Moravcsik 1995). For neorationalists, judges should be attempting to apply European law at the national level in minimal, carefully

circumscribed ways in line with the degree of enthusiasm expressed by the national government.

While neofunctionalist scholars who study the ECJ assign more to the ability of judges to take independent action, they hold the expectation that national judges matter to the extent that they can ally with and be empowered by a vertical international legal order that is capable of asserting its own authority (Stein 1981; Weiler 1991; Burley and Mattli 1993; Mattli and Slaughter 1995; Alter 1996; Slaughter et al. 1998). Under the neofunctionalist account, the primary actor propelling legal integration is the ECJ judges and national member state judges have willingly accepted the authority of EU law. National court judges accept the authority of the ECJ not out of an obligation to treaty obligations, but rather to achieve a benefit from acceptance. National member state judges can accept the authority of the ECJ because it provides the national court with a benefit such as powers of judicial review (Carrabba and Murrah 2005; Popelier et al. 2011; Lavranos 2004; Goodwin-Gill and Lambert 2010), the preliminary ruling procedure (Carrabba and Murrah 2005; Stöbener et al. 2006), and upholding the authority of national judges in judicial legal systems that promote the dualist perspective of law (Müller 2004; Carrabba and Murrah 2005). Here national judges should matter with respect to the ECJ, but not much more in other international settings, and their action should be substantially dependent on support from vertical, international legal orders with authority.

By focusing on vertical legal integration, neorationalists and neofunctionalist have identified two actors that can potentially limit the actions of national judges: domestic politicians, who may be capable of limiting their national judge's interactions with

international law, and international judges, who may attempt to exercise their authority over national judges through the international legal order's institutions. By shifting the analytical focus to horizontal legal integration, this dissertation presents evidence of a realm of action where national judges have the capacity to limit the actions and challenge the authority of domestic politicians on the one hand and international judges on the other. This research project will pursue the argument that there are distinct dynamics of horizontal legal integration and that horizontal legal integration in conjunction with vertical legal integration can contribute to a more complete understanding of the complex politics and power dynamics in the process of international legal integration. As we see in more detail below, British judges engage in a process of "dodge and massage" where vertical integration is "dodged" in favor of horizontal integration and national judges "massage" their relationship to the international legal order.

This project is not meant to attack or undermine the breadth and depth of vertical legal integration scholarship, neorationalist and neofunctionalist, which has made numerous contributions to the field, rather this dissertation is an attempt to show that there is an understudied component to this phenomenon, horizontal legal integration, that when combined with the plentiful vertical legal integration scholarship provides a nuanced and more complete understanding of international legal orders than previous studies have achieved. This dissertation shows that British judges are active in many international contexts in ways that do not merely reflect the degree of established vertical legal authority. In dynamics that are autonomous from British politicians' difficult interactions with international authority, British judges play an active role in managing and integrating international law into British politics. In order to see these dynamics and

understand how international law has entered British politics, we must pay special attention to horizontal legal integration.

When we take this horizontal dynamic into account, we see that horizontal integration can be used a tool by national judges to reaffirm their participation and comment to the international vertical legal order as is the case with the ECJ or to absolve national judges from being obligated to follow the jurisprudence of an international vertical legal order as is the case with the ECtHR. Instead of national judges acting in accordance with the expectations of neorationalism and neofunctionalism, national judges engage in what I call the tactics of “dodge” and “massage.” National judges “dodge” by avoiding the use of the jurisprudence from the international court within the international legal order. Within the EU, the “dodge” is done to avoid using civil law jurisprudence that is difficult for British judges to comprehend; within the Council of Europe, the “dodge” is done because there is contention over the meaning of the Convention ascribed by ECtHR judges and British judges. National judges “massage” by turning to horizontal jurisprudence to provide logics to use in their jurisprudence to fulfill their binding obligations to international legal orders whose international courts are being dodged. Within the EU, British judges “massage” their relationship to the ECJ by using the logics of horizontal actors employing EU law; within the Council of Europe, British judges “massage” their relationship to the Convention obligations, circumventing the ECtHR, by using horizontal actors logics employing the Convention that are in alignment with British judges’ perceptions of the meaning of the Convention. This dissertation will show how the supranational “dodge and massage” contributes space for national judges to absorb and reject European law.

C. SIGNIFICANCE

The contribution of this dissertation is threefold. First, this project places the focus on the role of the national judge. Neorationalist scholars argue that national judges matter very little in the context of international legal orders and focus their attention on the ability of executives and legislatures to act as gatekeepers controlling the flow of international law into the domestic landscape (Moravcsik 1993; Moravcsik 1995). Neofunctionalists give national judges some consideration, but only as the allies of international judges, the primary actor propelling European legal integration forward, operating under the authority of a strong vertical, international legal order (Weiler 1994; Slaughter et al. 1998). A central claim of my argument is that national judges do have a pronounced impact on the international legal orders that they are a part of. The importance of borrowing of foreign law is that it empowers national judges by providing them with a wider range of possible arguments to draw upon when constructing the logic of their national jurisprudence. What is surprising is that this empowerment operates both vis-à-vis domestic institutions and international institutions. National judges are empowered by the possibility of borrowing foreign law and asserting their authority within domestic institutions. As national judges borrow and widen their margins of maneuverability, they assert their influence over the law within domestic institutions. National judges can appeal to international treaties and the international legal orders created by them as sources of authority to which other domestic institutions have consented to follow and as rival logics for national judges to draw upon. National judges are empowered by international law and institutions as they provide national judges with a horizontal set of filters, which can be applied to national and international law.

National judges are empowered by the international legal order as it creates space for the national judges to oversee the integration of international and national law within their political sphere. As both national and international actors look to national judges in the process of legal integration to protect their interest; this creates a larger reservoir of space for national judicial independence and for the emergence of a third perspective, that of the national judge, which might look distinct from the preferences of both national and international actors.

Second, the international legal order scholarship is preoccupied with vertical relationships based on hierarchical powers. By looking at the more complete picture of both vertical and horizontal relations within these international legal orders we can better access how legal integration is progressing within the international legal order. Once we start to look at the horizontal side of the international legal orders, we can see the degree of freedom national judges have in determining the flow of international law into the domestic landscape. Third, the two empirical case studies with national judges and horizontal legal integration taken into consideration produce results contrary to what we might have expected from the scholarly literature. Based upon neorationalist and neofunctionalist literature, I anticipated a strong and negative reaction to the authority of the ECJ and EU law as the British are thought to reject any authority that impinges upon Parliamentary Supremacy. Instead I found British judges to be respectful of the ECJ and reliant on horizontal integration as a means of grasping the civil law nuances of EU law. I expected more enthusiasm for the ECtHR with its narrower scope of issues and more ambiguous authority over the national environment in comparison to the ECJ. Instead I found British judges to be downright hostile towards the ECtHR and utilizing horizontal

integration as a means to shield themselves from the vertical jurisprudence of the ECtHR. This project shows a reversal of expectations about the interactions of these two courts with the British and provides a different picture of European legal integration.

D. METHODOLOGY: HOW TO HIGHLIGHT HORIZONTAL JUDICIAL INTEGRATION

This dissertation project examines a single country study of a hard case, the United Kingdom, and how horizontal integration functions in two distinct international legal orders: European Court of Justice in integrating European Union law and the European Court of Human Rights as the judicial arm of the Council of Europe. The United Kingdom was chosen as a hard case for any expectation of international judicial activism for several interrelated reasons. First, the high degree of Parliamentary Supremacy in Britain cements virtually all power in hands of parliament. The lack of a unified, written constitution and the traditional role of the British Parliament leave little opportunity for either international delegations of power to international legal orders or British judicial activism, yet alone both phenomenon happening simultaneously. Second, Britain has become infamous for its strong political resistance to any form of international authority. This is particularly acute within the European Union context. British political actors are unusually sensitive and vigilant about incursions on British sovereignty and have significant domestic electoral incentives to remain so. Third, Britain has a history of politically weak courts, where courts were intended to be apolitical enforcers of Parliament's will without historical powers of judicial review. British courts have been well established as independent and respected, while

simultaneously remaining outside the political fray, where judges are explicitly understood to not be political actors. Finally, the UK was selected because the extant literature on the use of foreign law within the British legal system is deeply divided. According to Atiyah and Summers, formal legal systems such as the English system, rigidly confine themselves to the boundaries of the written law as produced by the British Parliament (Atiyah and Summers 1987). As such formal legal systems are difficult to change, meaning to absorb new jurisprudence or substantive reasoning, and instead are faithful translators of the law into practice based upon the legal language of parliamentary laws and statutes. Here foreign law should play little role in the jurisprudence of British judges due to the strict adherence to Parliamentary Supremacy (Atiyah and Summers 1987). In opposition to this scholarship, is a relatively recent group of scholars who see the UK as one of the most frequent consumers of foreign law and innovators in the art of the use of foreign jurisprudence (Mak 2011; Markesinis et al. 2006).

The two international legal orders, the ECJ and the ECtHR, were chosen for their common European origins and their unique attributes. The EU's ECJ has a relatively small membership of twenty-eight member states, was designed to be a stratified vertical legal order, had an aggressive vertical supremacy early on, and the British were not a founding member. The ECtHR has a larger membership of forty-seven member states, was designed to include both vertical and horizontal legal orders, had a slow start of achieving vertical supremacy, and the British were influential in its creation and early years. While there are significant differences in these international legal orders, this

dissertation will argue that horizontal legal integration plays an important role in each case.

This dissertation project seeks to explore how horizontal integration can contribute to the cohesiveness of an international legal order. To do this, the dissertation explores the case law of the British courts Law Lords, JCPC, and the Supreme Court of the UK. I also spent the Michaelmas term of 2012 and part of the Hilary term of 2013 with the Supreme Court of the UK. While with the court, I conducted semi-structured interviews with Supreme Court of United Kingdom Judges, retired Law Lords, law clerks, and barristers. Semi-structured interviews were used to make the interviewee aware of the subjects of interest, while allowing them to tell me a story of their experiences, permitting the conversation to evolve in the direction of the judge's interests in the international legal orders. While my discussions with law clerks were relatively short and informal, all of the interviews with judges were extensive. I sat in on several dozen court cases before the Supreme Court of the United Kingdom and the JCPC to hear the oral arguments of the cases and interaction between the judges and barristers. In the United Kingdom I interviewed fifteen high court judges, twenty-four law clerks, and twelve Barristers.

I collected documents on the judges, courts, and cases from a number of archives in Britain, including the Parliamentary Archives housed in the British Parliament, the Supreme Court of the United Kingdom's Library, Her Majesty's Stationery Office, the Ministry of Justice Archives in Westminster, the National Archives of the UK, and the British Library Archives. After leaving the UK, I spent an additional three weeks in Luxembourg at the European Court of Justice and at the ECJ Library which contains

extensive archives of writings of individual judges, which provide evidence for how justices think about foreign law and the efforts of supranational judges to spread EU jurisprudence both at home and abroad.

E. OUTLINE OF DISSERTATION CHAPTERS

The dissertation proceeds with five chapters. Chapter II explores the theoretical foundations of the project and positions the dissertation within a larger body of scholarship. This chapter explores the domestic and international conditions of judicial power and discusses the opportunities for judges to engage in judicial activism. The expansive literature on the interaction between the ECJ and member state courts is discussed to provide numerous expectations of the various theories as to how judges might act when engaging an international legal order. Chapter II concludes with efforts to construct theories of horizontal legal integration and distinguish them from the extant literature on vertical legal integration.

Chapter III traces the historical origins of British foreign borrowing of jurisprudence from the common law traditions of the British Commonwealth. Through the creation of the British Empire, Britain established a system of one-way borrowing that was largely the imposition of common law ideas from Britain to the colonies of her empire. This effort to translate the common law into the legal systems of the indigenous populations of the colonies, led to renewed interest in defining the common law and a new interest in what other legal systems had to offer. Judicial borrowing by the British began in the late seventeenth century with the borrowing of American common law on a new legal issue facing England, slavery. The importation of the common law throughout

the globe resulted in many independent common law legal systems around the globe that evolved overtime to engage in judicial borrowing and sharing of unique views on the common law, now shared by many of the Commonwealth of Nations member states. As decolonization and loss of Empire proceeded for the British, the Commonwealth of Nations was conceived and started in 1949 as a means of maintaining close economic, political, cultural, and legal ties between the British and their former colonies. The historical origins of judicial borrowing stemming from the British Empire have shaped the way in which British judges have engaged with supranational law emerging from pan-European legal institutions.

Chapter IV examines the first case study on the ECtHR and how British judges manage the integration of European human rights law. The ECtHR has attempted to establish a European human rights and constitutional law vertical legal order, but with ambiguous success. British judges are broadly allied with the spirit of universal human rights for Europe and were instrumental in the writing of the Convention; however, British judges have been uncomfortable with the idea of a Constitutional Court of Europe emerging and often disagree over the ECtHR's interpretation of the Convention. Thus British judges have engaged in selectively promoting and selectively resisting Convention law, engaging in a process of "dodge and massage." Dodging the ECtHR jurisprudence when British judges disagree with their interpretation in favor of horizontally massaging their obligation to uphold the Convention by citing member state jurisprudence that supports the British idea of how the Convention should be interpreted. The Human Rights Act of 1998 passed by the British Parliament exhibited both these dynamics: it incorporates the Convention directly into UK law, which strongly confirms

the British commitment to its principles and simultaneously affords British judges the authority to interpret the Convention for themselves, effectively reducing the direct power of the ECtHR and its judges as the sole arbitrator of the Convention. The Convention intentionally compels the creation of a horizontal human rights legal order within the member states, by asserting that all member states should look to how Convention rights are applied judicially in the other member states and directly pointing to the vital role that horizontal integration plays within the European human rights legal order.

Chapter V explores the second case study on the ECJ and how British judges manage EU law. The ECJ is the only international legal order in history that has succeeded in constructing a robust legal system of international vertical authority. British judges, unlike British political actors and the media, have generally appeared supportive of the ECJ as neofunctionalist arguments have asserted, but that does not mean that British judges have simply become thoroughfares for EU law. British judges have difficulty in understanding and applying the ECJ case law and thus “dodge” relying on ECJ jurisprudence as the source of their judicial logic when applying EU law in British national courts. However, British judges do not want to be seen to be derelict in applying EU law which they feel represents a binding legal obligation since their accession to the EU in 1973. British judges “massage” their ECJ relationship by heavily utilizing Advocates General opinions and other member state’s high court decisions to provide the required EU legal logic in deciding their cases and in doing so bring a vast array of EU logic into the British domestic law system. Like with the ECtHR, British judges draw upon foreign borrowing to both “dodge” certain ECJ interpretations and to “massage”

ECJ decisions to fit their own views within the British context. Without attention to horizontal integration we cannot capture the role that national judges play in the EU legal system.

Chapter VI concludes the dissertation and discusses the implications of the research. This chapter stresses the hard case approach in understanding how the British, despite parliamentary supremacy and other constraints, has judges who embrace international legal orders and that attention to horizontal legal integration uncovers the active and politically significant role which British judges have played within these international legal orders. This research posits that the same examination of cases which are not “hard cases” may reveal at least as much judicial activism in engagement of national judges with international legal orders. This research also provides insights into the study of international organizations and suggests that beyond international legal orders more attention to the influences of horizontal dynamics within international organizations might be a fruitful future avenue of research within the discipline.

CHAPTER II

JUDGES IN A WORLD OF INTERNATIONAL VERTICAL AND HORIZONTAL LEGAL INTEGRATION

A. INTRODUCTION

This dissertation project strives to understand when and how do national judges play an active and significant role in how international legal orders do or do not affect their national polities. Specifically, this dissertation will examine when and how do British judges play a role in how European Union law through the European Court of Justice and European human rights law through the European Court of Human Rights affect the British polity. The dissertation focuses on how horizontal integration, the voluntary borrowing of foreign law, affects how international legal orders operate. By exploring the nature of horizontal borrowing, this alters how we see the politics of international legal orders. In the case of the ECJ, the horizontal integration is a tool to help British judges in their task of absorbing the difficult to understand civil law jurisprudence of the ECJ. British judges dodge the hard to understand ECJ jurisprudence and massage the relationship with the ECJ by citing EU law from other member states. In the case of the ECtHR, the horizontal integration is a means of diminishing the authority of the ECtHR by pointing to other member state's courts where different logics are employed to achieve the provisions of the Convention. British judges dodge the ECtHR jurisprudence, while massaging their requirement to uphold the Convention by citing other member state jurisprudence on the Convention.

After a discussion of the British judicial actors involved, this theory chapter explores two key issues: the role of the judge and the European legal integration. The first few sections cover the role of judges as they evolve from domestic to international actors and the issue of legitimacy they face as they begin to engage in horizontal judicial borrowing. The remainder of the chapter focuses on the European legal integration literature and disentangling the vertical and horizontal aspects of international legal orders. These latter sections note the degree of attention in the literature paid to the ECJ, a reiteration of the way in which this project conceptualizes international legal orders, the role of convergence and divergence in European legal integration, and the expectations of how judges act in the international arena according to neorationalists and neofunctionalists. It then introduces the concept of the “dodge and massage,” and discusses how to theorize horizontal legal integration.

B. THE CAST OF CHARACTERS: THE EVOLVING BRITISH JUDICIARY

This section chronicles the evolutionary changes of the British judiciary and introduces the relevant judicial actors from the United Kingdom who populate this story. Three judicial institutions of the United Kingdom regularly appear throughout this dissertation and this section aims to provide a common frame of reference and illuminate their historical origins: the Law Lords, the Judicial Committee of the Privy Council, and the Supreme Court of the United Kingdom. The historical progression of the highest national judges, from the Law Lords to the Judicial Committee of the Privy Council to the creation of the Supreme Court of the United Kingdom, plays heavily in the story told here. The distinction between the three judicial institutions is also reflected in the

terminology of this dissertation where “British judges” refers to commonalities shared by judges in all three judicial institutions, while reference to one or two of the British judicial institutions reflects the specific attributes of the judges within a particular judicial institution. In 2009 the Supreme Court of the United Kingdom took over the functions and duties of the two other courts while detaching itself from the Parliament, particularly the House of Lords, gaining increased independence as an institution and for British judges and removal from a political atmosphere.

i. LAW LORDS

The Lords of Appeal in Ordinary, commonly referred to as the Law Lords were created by the Appellant Jurisdiction Act of 1876 (Paterson 1982). This act of parliament altered the judicial functions of the House of Lords and invested within it control over judicial powers of the British state. The judicial functions of the House of Lords includes serving as a court of first instance for the trial of any peers of parliament, all cases of impeachment, and as the court of last resort of the United Kingdom through the Law Lords. The Appellant Committee of the House of Lords composed of Law Lords is the highest court of appeal within the United Kingdom and sat within the chambers of the House of Lords in Parliament to hear cases; the remainder of the House of Lords would not be present for the appeals cases heard (Paterson 1982). Thus all Law Lords are made members of the House of Lords and exercise the judicial functions of the House of Lords, while not all members of the House of Lords are Law Lords.

The Appellant Committee of the House of Lords is composed of the Lords who are legally qualified to act as judges and serve as official Law Lords of the British state.

To legally qualify a Lord must have previously served as a Barrister for a minimum of fifteen years or to have held a high judicial office for a minimum period of two years such as a judge of the Court of Appeal, High Court or Court of Session (Paterson 1982). Law Lords are nominated for their position by the Prime Minister in consultation with the Head of State, currently Queen Elizabeth II. They are often chosen from among the members of the House of Lords or elevated to a Lord upon their confirmation by the House of Lords (Paterson 1982). Over the years, the Appellant Committee of the House of Lords has expanded incrementally from three Law Lords in 1882 to twelve in 1994 (Paterson 1982). While serving in the Appellant Committee of the House of Lords, Law Lords were permitted to speak and vote on political issues within the House of Lords as any other member of parliament, but could not sit in judgment of a case that involved an issue they had publicly spoke on or voted on in the House of Lords. To remain an active Law Lord, capable of hearing cases on a wide variety of subjects, this meant abstaining or refusing to speak on almost all activity within Parliament, except for rare cases when a Law Lord wished to speak on an issue close to their heart (Paterson 1982). Upon retiring as an active Law Lord, mandatory at the age of seventy-five, the Law Lord could once again resume an active role in House of Lords as a peer for life. The Law Lords directly controlled the docket of cases they would hear and maintained an active appeals court while Parliament was in session (Paterson 1982).

Two notable positions held by members of the Law Lords are the Lord Chancellor and the Senior Law Lord. The Lord Chancellor is a member of the Cabinet of the Prime Minister and responsible for the overseeing the independence of the courts of Britain including the Law Lords. The Lord Chancellor is the presiding officer of the House of

Lords, the head of the judiciary in England and Wales, and the presiding judge of the Chancery Division of the High Court of Justice. The Lord Chancellor's judicial functions include being an active Law Lord and judge in the Judicial Committee of the Privy Council (Paterson 1982; Johnson 2004, pg 143). The Lord Chancellor occupied a position within all three branches of government simultaneously as a member of the Prime Ministers Cabinet in the executive branch, a voting member of the House of Lords as the presiding officer of the first house of the legislature, and as the head of the judicial branch and a Law Lord (Paterson 1982). The master of ceremony for the Law Lords was the Senior Law Lord who was determined by which Law Lord was the longest serving. The Senior Law Lord and the Lord Chancellor are most often not the same person, so while hearing a case as the Appellant Committee of the House of Lords, the Senior Law Lord is in control of the proceedings of the chamber rather than his otherwise boss, the Lord Chancellor. The Law Lords remained the highest judicial authority until the creation of the Supreme Court of the United Kingdom in 2009.

ii. JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

The Judicial Committee of the Privy Council (JCPC) was established by the Judicial Committee Act of 1833 as the highest court of appeals of Commonwealth matters concerning the British Empire. The JCPC does not hear cases of domestic concern, with the exception of appeals from ecclesiastical courts and devolution cases involving Scotland, Northern Ireland, and Wales; the JCPC hears cases involving the legal matters of colonies of the British Empire and since the dissolution of the British Empire former Commonwealth states which are now politically independent. Judgments

of JCPC, since the breakup of the British Empire, are no longer binding, but are a source of persuasive law meant to be followed not from a binding legal obligation but because of the appeal of the logic of the judgment. If a state of the Commonwealth is willing to bring a case before the JCPC, then they are almost always willing to abide by its decision, given that both decisions are voluntary. The JCPC hears cases from thirty-one jurisdictions today while in the past nearly a quarter of the world's population was bound to its decisions.¹ At one time, the JCPC heard cases from Australia, Canada, Sri Lanka, Hong Kong, India, Ireland, New Zealand, Pakistan, Singapore, South Africa, and others. The judges who sat in the JCPC depended on the nature of the case in question and were selected by the Lord Chancellor choosing from among the available Law Lords, Judges of the Court of Appeal of England and Wales, the Judges of the Inner House of the Court of Session in Scotland, the Judges of the Court of Appeal of Northern Ireland, and respected judges from high courts within the British Commonwealth. The purpose of the JCPC was not to apply British law to the various British Commonwealth states, but to provide an interpretation of the common law that then was applied to the foreign case. The JCPC duties and judges are now held by the Supreme Court of the United Kingdom since 2009 and the third chamber of the Supreme Court is now used to house the JCPC.

¹ The thirty-one jurisdictions currently under the authority of the JCPC include: Antigua and Barbuda, The Bahamas, Grenada, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Tuvalu, the New Zealand associated states of Cook Islands, the New Zealand associated states of Niue, Jersey, Guernsey, the Isle of Man, Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, the Falkland Islands, Gibraltar, Montserrat, St Helena, Ascension and Tristan da Cunha, the Turks and Caicos Islands, the Pitcairn Islands, the British Antarctic Territory, South Georgia and the South Sandwich Islands, the United Kingdom's Sovereign Base Areas in Cyprus, Dominica, Mauritius, and Trinidad and Tobago, Kiribati, and Brunei.

iii. SUPREME COURT OF THE UNITED KINGDOM

The demise of the Law Lords as an arm of the House of Lords occurred as a surprise to many (Malleon 2007). Its roots lay in the use of powers of judicial review by Law Lords in the mid-1990's (Malleon 2007, pg 133), though some scholars recognize the use of judicial review since the end of World War II (Sterett 1994, pg 424). The powers of judicial review, coupled with the delegation of authority on devolution to the British courts in 1997 and the passing of the Human Rights Act of 1998 allowing the Law Lords to rule on issues concerning the European Convention of Human Rights, gave rise to a concern that the Law Lords as a Committee of Parliament were too close (both physically and in terms of substance) to the political mire of the British Parliament (Malleon 2007, pg 134). Removing the judicial responsibilities from the House of Lords and depositing them in a newly created judicial branch was the proposed solution by Prime Minister Tony Blair (Malleon 2007, pg 134-135). Under the authority of the Labour government, the Department of Constitutional Affairs in July 2003 released a consultation paper titled *Constitutional Reform: A Supreme Court for the United Kingdom*, which proposed the creation of a new judicial branch independent of Parliament (Anderson 2004). Quickly the consultation paper became infamous not only for its sweeping changes, but for its lack of consultation. The Ministry of Justice, the Lord Chancellor, and the Law Lords had known nothing of the proposed changes until after the publication of the consultation paper (Anderson 2004).

Substantial debate followed over the proposed changes in the Constitutional Reform Act of 2005 (Malleon 2007, pg 134-136). The Constitutional Reform Act of 2005 created the Supreme Court of the United Kingdom in 2009 and transferred the

judicial and legislative powers of the Lord Chancellor to the newly created Supreme Court and the House of Lords respectively, the Lord Chancellor retained their Cabinet position and executive powers only (Johnson 2004, pg 143). The main reason cited for the drastic changes under Prime Minister Tony Blair's government was the fear that the European Court of Human Rights was going to declare all judgments rendered by the Law Lords as a violation of Article Six of the European Convention on Human Rights, right to a free trial, since the Law Lords were a part of both the legislature and the judiciary and that the Lord Chancellor could potentially exercise powers of the executive, legislature, and judiciary simultaneously (Johnson 2004; Anderson 2004; Le Sueur 2004; Jackson and Resnik 2010; Lee 2011). The demise of the Law Lords and the incorporation of the JCPC into the Supreme Court of the United Kingdom is the most visible consequence of how the interactions between a supranational court and domestic institutions could result in substantial changes within the domestic judicial environment.

The newly created Supreme Court of the United Kingdom became the highest appellant court and the court of last resort of the United Kingdom. The Supreme Court was also granted the authority to resolve all disputes of devolution within the UK, a difficult task given discussions of Scotland leaving the UK (Le Sueur 2004). Unlike the Law Lords, the Supreme Court is no longer housed within Parliament but across from it on the opposite side of Parliament Square. The Supreme Court absorbed all the judicial functions of the Law Lords, the House of Lords, the Judicial Committee of the Privy Council, and the judicial functions of the Lord Chancellor which are now the responsibility of the President of the Supreme Court (Le Sueur 2004). There are twelve Supreme Court Judges. Upon the creation of the Supreme Court, ten Law Lords were

commissioned as Supreme Court Justices, one Law Lord retired, one Law Lord became Master of the Rolls within the House of Lords, and two new Supreme Court Judges were appointed (Lee 2011). The Supreme Court functions in a similar way as the Law Lords previously did, with the exception that the Supreme Court judges are no longer members of the House of Lords, they must surrender their seat while serving, have direct control of their own judicial budget, and the President and Deputy President along with the Judicial Appointments Commission select all new judges of the Supreme Court removing any potential for the politicization of the new court (Lee 2011).

C. DOMESTIC CONDITIONS OF JUDICIAL POWER

i. INTRODUCTION

This section addresses the domestic conditions of judicial power from general conditions that affect most courts, such as their classical role as conflict solvers with a given society to powers of judicial review and role as lawmakers, to specific domestic conditions of British courts including the doctrine of Parliamentary Supremacy, a traditionally weak role for courts, and strong resistance to international authority. The literature on domestic conditions of judicial power shows that it is surprising that the phenomenon of horizontal borrowing occurs with any frequency given the tradition of judges as very domestically-framed interpreters of the law. The story told by this literature charts judges' origins as purely domestic actors, utilizing domestic law to solve conflicts within a given society. With the addition of judicial review and a conception of judge as law maker, added to the powers and tools at a judge's disposal allowing for the possibility of a broader role for the national judge beyond the domestic arena. British

ideas such as Parliamentary Supremacy, traditionally weak courts, and strong political resistance to international authority seem to reaffirm a classical national judge image.

ii. CLASSIC IMAGES OF JUDGES IN DOMESTIC ARENAS

Historically, state centric domestic law has dominated Western notions of law, but this trend has been changing over the twentieth century to recognize a wider range of sources of law and differing relationships between people and laws (Glenn 2003, pg 839). Judges are first understood to be interpreters of domestic laws and constitutions. Domestic law or national law is created within the state by domestic actors and institutions of governance, such as executives and legislatures. Domestic law is all about intrastate rules and obligations (Slaughter and Burke-White 2006, pg 327). The classic image of the judges is that all of the judges' authority and influence is limited to the domestic context. The initial view of the judiciary is that courts emerged as an institutionalized form of triad which provided voluntary, internal conflict resolution, where the court arbitrated between disagreeing parties, rather than allowing individuals to take matters into their own hands and thus reducing violence within society (Shapiro 1981, pg 1). The triad is formed when two parties in conflict call upon a third party to assist them in resolving the dispute (Shapiro 1981, pg 1-2). In the modern state, the voluntary nature of consent in triad is replaced by the notion of the equal applicability of the law to all individuals through the rule of law, and the third party is replaced by the legal officials of the state, the judge (Shapiro 1981, pg 5-8). As officials of the state, judges bring a third party interest into the legal arena, the state's interest, which occasionally calls the neutrality of the judge into question. Courts that work effectively,

maintain the respect of society and the state and do not merely impart the interests of the state, but rather strive to maintain the unity of the state by balancing the interests of different state institutions and between the state and society (Shapiro 1981, pg 2). From its role as a triad to preservers of unity, judges are assumed to be domestic actors applying domestic rules. Particularly in the United States, with our strong sense of constitutional law and focus on the founding fathers' intentions through an originalist interpretation of the law, the notion of the role of judges beyond the domestic landscape is difficult to fathom (Baum 2006; Feldman 2008). Judges are after all chosen by and employed by institutions of the state for the benefit of that state and the society within it.

iii. DOMESTIC SOURCES OF JUDICIAL POWER

As judges gained more power and independence over time, judges begin to create judge-made law through their powers of interpretation and implementation. A testament to the influence of judges is their ability to make law through the creation of rules and procedures, by striking down statutes and executive orders made by the other branches of governance through judicial review, and the influence of interpretation and implementation which can create policy and involve political decisions. The ability to affect policy and politics through judge-made law increases our understanding of the power of judges in a democracy and can potentially challenge notions of the judiciary as the weakest branch of governance, but does not challenge the idea of the domestically bound judge. If anything it reaffirms the domestic focus of the judge as a watchdog of the executive and legislature and ensures that politics and political outcomes are conducted in a means consistent with the laws and values of the society. Despite an ever

expansive literature showing the importance of judicial independence (Kirby 2001; EU Accession Monitoring Program. 2001; Couso 2005; Cross 2008; Vanberg 2008; Helmke and Rosenbluth 2009; Lee 2011), judge-made law (Dicey 1978; Sauveplanne 1982; Wolfe 1994; Karsten 1997; Vereshchagin 2007; Dougan et al. 2012; Rivlin 2012), and judicial activism (Forte 1972; Miller 1982; Holland 1991; Wolfe 1997; Schwartz 2002; Ferejohn et al. 2007; Voeten 2007; Lee 2011) these powers are often studied purely in terms of the domestic context and influence.

The idea that judges make law is still a fairly controversial notion, given the countermajoritarian nature of judiciaries and the inability of any institution to challenge the highest court of the state in a democracy. The judge as a lawmaker presents a problem for democracy. Courts are counter-majoritarian institutions, where judges are usually not elected but appointed. Judges serve for long terms making accountability nearly impossible to enforce and can only be removed under extraordinary circumstances. However, isolation gives judges the capacity to make unpopular decisions without fear of retaliation in the voting booth, allowing judges the freedom to not worry about being popular and instead focus on interpreting the law. A particularly interesting idea that has emerged in comparative law is that stable democracy requires strong countermajoritarian courts to flourish (Brown 2000).

While this is contentious, there is a wide body of empirical literature to support this claim that judges do make law. It originates in an American context and more recently has been applied to judiciaries in Europe (for British examples of judge-made law see Reid 1972; Cappelletti et al. 1989; Mason 1996; Zimmermann 1997; O'Scannlain 2004). This is also an implicit claim in most European legal scholarship (See Burley and

Mattli 1993; Garrett 1995; Slaughter et al. 1998; Stone Sweet 2000; Shapiro 2005; Markesinis et al. 2006; Jupille and Caporaso 2009) and in most Commonwealth law scholarship (Shapiro 1981; Brand 1992; De Witte and Forder 1992; Zimmermann 1997; Coquillette 1999; Opeskin 2001; Watson 2008; De Cruz 2007). While discussing the virtues and vices of judge-made law could occupy an entire dissertation, my purpose here is to point to this phenomenon as an important background condition to my argument, by giving national judges the authority to exercise their independence from legislatures and executives, and to provide evidence that many scholars and judges assert this claim to be true. By asserting that judges do create law, I am pointing to the first step in judges having the authority to look horizontally and determine whether foreign law is relevant to domestic law. Lord Reid, one of the most distinguished judges and a Law Lord of the Lords of Appeal in Ordinary in Britain, stated:

“There was a time when it was thought almost indecent to suggest that judges make law – they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin’s cave there is hidden the Common Law in all its splendour and that on a judge’s appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the pass word and the wrong door opens. But we do not believe in fairy tales anymore. So we must accept the fact that for better or worse judges do make law.” (Reid 1972, pg 22).

If judges are not capable of judicial lawmaking, then the only times their decisions have widespread political implications is when policy makers choose to follow their judicial decisions. If judges are capable of judicial lawmaking and it has an effect on the other branches of government, then changes in the judicial realm can have a marked impact on other aspects of the polity. Whether judges *should* engage in judicial lawmaking is an

entirely separate matter which I do not engage in and is the purview of philosophies of law.

Part of the reason there is such latitude for judges, particularly high court judges, to create law lies in the fact that many of the cases they hear do not possess one obviously right answer or clear cut solution. Uncontentious cases do not win appeals and never make it to the highest courts of the land where judges decide on cases with highly contentious and often political consequences. “In the most important cases there is always a choice...all rules have a penumbra of uncertainty where the judge must choose between alternatives” (Hart 1961, pg 12). Only in cases where there is no clear solution, multiple interpretations of the law that may all appear to be valid, and/or the potential through implementation to bring a law into conformity with constitutional provisions, do we find openings for judges to be active lawmakers. By extending judicial powers to include judicial review and judge-made law it allows an expansion of judicial discretion which later is used to justify the use of foreign law in national courts. In doing so, judges evolve from domestic actors who confine themselves to domestic solutions to problems faced by society to become a part of international legal orders and an ever globalizing body of law and legal ideas.

iv. THE DOMESTIC CONTEXT OF BRITISH JUDGES

As discussed in the introductory chapter, British judges face a series of domestic constraints that further add to the classic image of the judge as a purely domestic actor: Parliamentary Supremacy, historically politically weak courts, and strong political resistance to international authority by other branches of the British government.

Parliamentary Supremacy is a constitutional idea that posits that the legislative branch has authority over all other branches of governance within the state (Hatchard and Slinn 1999; Strom et al. 2003). With this authority comes the power to repeal any previous legislation or legal acts, allowing Parliament the privilege of repealing any written law, even a constitution, and discarding previous ideas of precedent. In contrast, British judges are bound by the written law, all historical documents endowed with constitutional authority, and precedent (Corrado 2005). The idea of Parliamentary Supremacy is opposed to the idea of a separation of powers, that powers of judicial review and the judge as lawmaker are not necessary in the domestic context for judges, since they do not serve as a check on excesses of power in the executive and legislature. The strong tradition of Parliamentary Supremacy in Britain has contributed to a system of politically weak courts (Hatchard and Slinn 1999). Given Parliamentary Supremacy, British courts have been traditionally defined as apolitical enforcers of Parliament's will (Lambert and Husain 2010). While British courts have a tradition of being respected courts with judges exercising judicial independence (Shapiro 1981), they do not have a strong tradition of judicial review or judicial activism. British judicial scholars have recognize the use of judicial review and judicial activism since end of World War II with a noticeable surge in this activity since the 1990's (Sterett 1994, pg 424; Malleson 2007, pg 133). Both of these factors are interrelated to the strong political resistance to international authority, most obviously in the EU context (Aspinwall 2003; Geddes 2004; Giddings and Drewry 2004; Moravcsik 1991; Risse et al. 1999). British political actors are unusually sensitive and vigilant about any potential international incursions on Parliamentary Supremacy. These three factors contribute to a British judicial environment where we should expect

judges to confine themselves to domestic issues and not infringe upon the politics of the elected branches authority. Given British domestic conditions placed upon judges, we might well expect that international law only matters to the extent that domestic actors are compelled to acknowledge it by a strong vertical legal order with unambiguous authority.

v. CONCLUSION

The literature on the domestic conditions of judicial power creates a powerful image of the national judge as a purely domestic actor. Even a cursory glance at the domestic conditions of power of British judges solidifies their image as the quintessential domestic actor. British judges have historically been weak beyond what the classical image of judges as domestic actors suggest given the idea of Parliamentary Supremacy and strong political resistance to international authority. We should expect British judges should be all the more bound by the domestic framing of their authority. An image that is difficult to shake even for scholars who focus on the international legal environment. The next section will shift our focus to the international conditions of judicial power and begin to unravel how we can come to think of even British judges as playing a significant role in international legal politics.

D. INTERNATIONAL CONDITIONS OF JUDICIAL POWER

i. INTRODUCTION

This section explores the reasons why the role of judges might evolve from domestic interpreters of law to horizontal borrowers of foreign law. In doing so, judges

evolve from domestic actors who confine themselves to domestic solutions to become a part of international legal orders and an ever globalizing body of law and legal ideas. Judges are first understood to be interpreters of domestic laws and constitutions as the previous section has articulated. Overtime as judges gain more power and independence, judges begin to create judge-made law through their powers of interpretation and implementation. By extending judicial powers to include judicial review and judge-made law it allows an expansion of judicial discretion which later is used to justify the use of foreign law in national courts. This section adds to the story how judges go from purely domestic actors to the leap to the international arena. To make this leap judges must first be exposed to potential sources of foreign law. The acceptance of international treaty law as a source of foreign law, brought into the domestic legal arena by executives and legislatures begins the judge's foray into the realm of international law. Here judges look beyond international treaty law to uncover sound judicial reasoning's from foreign law and begin to engage in horizontal borrowing of foreign law.

ii. POTENTIAL SOURCES OF FOREIGN LAW THAT A JUDGE MIGHT ENCOUNTER

Foreign law is composed of all law created outside the state discussed or law created by multiple states which may include the state in question. Foreign law can be produced by a variety of actors and institutions. The creation of foreign law can and does involve domestic actors and/or institutions, though by definition not exclusively domestic actors and/or institutions. Examples of this behavior include British judges who helped to write the European Convention of Human Rights and the American Attorney General

Robert H. Jackson who helped write the Nuremburg Charter. Though domestic actors and institutions can take part in the creation of foreign law, foreign law is presumably different from what would have been created if it was intended for purely domestic consumption and audiences. Foreign law thus includes international, transnational, supranational, and the domestic law of other states. Sources of foreign law include international treaties, international customary law such as traditions of maritime actions, general principles of law recognized by their inclusion in many nations laws such as human rights law, judicial decisions of domestic and international courts, notions of comity or legal reciprocity by recognizing the validity and effect of the judicial acts of other states, and the writing of legal scholars which may illuminate the meaning of a foreign law or particular judicial logic (von Glahn 1986, pg 15-26).

iii. EARLY ENCOUNTERS WITH FOREIGN LAW THROUGH TREATIES

International treaty law is meant to trump domestic law and statutes by its very design, but not domestic constitutions which remain the highest authority in most domestic legal arenas. International treaties have proliferated since the nineteenth century making them among the first forms of foreign law which judges were regularly exposed to. International law created by treaties to which a state is a signatory represent a binding legal obligation (Kirby 2008, pg 184). A binding legal obligation creates a repetitive character, starting under a sense of obligation to give accent to a treaty signed by their national government above national statutes (Kirby 2008). Under a binding legal obligation, if a judge does not incorporate the legal jurisprudence into their domestic decisions then that judge could be perceived as being derelict in performing his or her

duties and a higher court make seek to overturn their decisions. Therefore, this binding legal obligation of international treaty law compels a judge, no matter what views they hold on the legitimacy of foreign law, to utilize foreign law in this instance. When a state ratifies a treaty, the courts of that state become obligated by the international law created in the treaty to uphold the provisions of the treaty within their state. From the perspective of international lawyers, national courts are the natural choices to serve as the “enforcers” of the international law given their ability to impose domestic sanctions for violation of international law (Knop 2000, pg 501-502). If a treaty law is not binding, then judgments grappling with it are arbitrary in their application of the treaty and in creating jurisprudence evoking the treaty and uniform standards of international law cannot be achieved (Knop 2000, pg 503). By meeting the treaty obligations, a state signals the credibility of the state in all future international actions (Levit 2004, pg 176). The goal of binding treaty law is to solidify the meaning of a particular jurisprudence so that it is interpreted in a similar manner across states. However, with multiple states each with their own differing legal traditions, this creates a potential for diversity to fragment meaning as international treaty law is mixed with various domestic legal systems in different ways.

There are three prominent views of the relationship between international law and national law: liberal internationalism, monism, and dualism (Waters 2008; Kirby 2008). Liberal internationalism creates a system of international cooperation and governance based upon a web of international treaties and international organizations to oversee the treaties (Jahn 2005; Hurd 2005; Waters 2008; Hudson 2008). As international law expands its reach into fields and topics that were once the exclusive domain of national

law, national actors begin to call into question the value of international law and international organizations who support it (Legro 1997; Waters 2008). Liberal internationalism directly posits an internationalist dream, where national courts are part of a hierarchical enforcement of international law, faithfully and without deviations of interpretation and process (Martinez 2003, pg 461-477). While this may be an idealistic dream of the way things ought to be, interpretation and process alter the law as numerous studies show us (Sterett 1994; Alvarez 2005; Conant 2006; Alter 2008; Cross 2008; Garrett 2008; Garth 2008; Harrington 2008; Hirschl 2008; Novkov 2008; Schauer 2008; Segal 2008; Shapiro 2008; Simmons 2008; Jackson 2010). Immanuel Kant in his essay *Perpetual Peace* posited the creation of a “federalism of free nations” (Kant 1897), where “independent rights-respecting, democratic nation-states interact with one another in a zone of comity, cooperation, and law” (Martinez 2003, pg 462). This federalism of free nations is the inspiration behind potential avenues of global governance that might be provided in a world of liberal internationalism.

In contrast to liberal internationalism, monism and dualism look at the practical means by which a treaty might be implemented and brought into domestic law. Monism asserts that domestic and international law when taken together form a cohesive legal system (Jackson 2008). This approach goes beyond the liberal internationalism approach suggesting that once a treaty has been signed it is to be revered the way a national constitution should be revered. The literature on monism is mainly confined to the application of human rights (Archibugi 1995; Checkel 1999; Moravcsik 2000; Zolkos 2004; Elliott and Quinn 2005; Cichowski 2006; Conant 2006; Goldhaber 2007). Ideally any state which signs the Convention should incorporate the Human Rights proscribed in

it without having to directly incorporate them into national law. Any citizen of the state who felt their human rights were being violated by a national law could apply for redress in a national court, asking the judge to strike down the national law in accordance with the treaty obligations.

Dualist scholars argue that international and domestic legal systems exist side by side but are different spheres of action that do not interact (Kirby 2008, pg 184; Slaughter 1994; Knop 2000; Opeskin 2001; Neuman 2003; Levit 2004; Posner 2005; Waldron 2006; Jackson 2007; Scheppele 2008; Jackson 2010). Here the influence on national constitutions by international law is highly contested (Kirby 2008, pg 184). Judges could utilize international law as a backdoor to incorporate aspects of treaties not signed by the state and thus circumvent the powers of the executive and legislature (Kirby 2008, pg 185). Thus judges are creating the possibility of the citation of foreign law not within the context of a treaty, but to fulfill a substantive mission or common outcome such as the achievement of human rights. According to dualism, international law must first be translated into domestic law with the constraints of the domestic system taken into consideration and to ensure the removal of domestic law that is incongruent with the international law being incorporated. International law is not directly applicable upon signing a treaty, only applicable once it has been directly incorporated into domestic law. Under UK law which ascribes to a dualist perspective, “an international treaty can only form the source of directly enforceable rights and obligations once it has been incorporated and so transformed into domestic legislation” (Lambert and Husain 2010, pg 127 supra note 8; Opeskin 2001).

To illustrate the impact of the binding legal obligation of international treaty law, a discussion of how it interacts with the ECJ and the ECtHR is in order. Within the European Union, member states are under a binding legal obligation to apply EU law and the decisions of ECJ to national contexts touched upon by EU law. The plethora of EU treaties represents a huge set of binding legal obligations. These legal obligations have led the ECJ to create a hierarchical, supranational organization of courts within the European Union on matters concerning EU law. In doing so, the ECJ has created an international legal order with relatively unambiguous authority, where the binding legal obligation is taken for granted. Like the ECJ, the ECtHR was created by a treaty, the Convention. Together with the case law of the ECtHR, the treaty was intended to create a binding legal obligation for all member states of the Council of Europe to follow on issues of human rights and fundamental freedoms. While the success of the ECJ in creating a binding legal obligation is strong, for the ECtHR it remains contentious. The Convention creates a legal order with multiple institutions as sources of authority by intentionally creating an international legal order where both the vertical authority (the ECtHR) and many horizontal authorities (all member state's high courts) are recognized as valid interpreters of the Convention and sources of inspirational jurisprudence on matters concerning the Convention. The Convention essentially limits the ability of the ECtHR to be the hierarchical authority of its own international legal order in the way that the ECJ is, since the Convention recognizes national courts as interpreters of the Convention as well as ECtHR judges. This small kink in the creation of the international legal order envisioned by the Convention leaves the authority of the ECtHR haunted by ambiguity. So while the Convention does create a binding legal obligation, this

obligation is divided among the ECtHR's authority and the authority of every member state's high court to determine what the meaning of the Convention law is. National courts can more readily side step the issue of the ECtHR's binding legal obligation by citing other member states courts as sources of authority.

iv. HOW TREATIES OPENED THE DOOR TO HORIZONTAL BORROWING

The use of treaty law by a court which belongs to a state that is a signatory is an uncontroversial use of foreign law; the use of foreign law that merely exists within the international community and does not represent a binding legal obligation is where controversy over the use of foreign law resides (Kirby 2008). Why use other sources of foreign law? The logic behind this use of other sources of foreign law is in the capacity of that foreign law to persuade a judge of a certain legal logic. Persuasive law is jurisprudence that is used because of its capacity to persuade, sometimes referred to as persuasive authority (Glenn 1987; Glenn 2003; McCrudden 2000; Slaughter 2000). Persuasive authority is defined as a source of law that a court might use in deciding a case, but unlike binding law, it is not required to be used in reaching a decision and is based on the content or source of the law being considered useful by the judge deciding the case (Glenn 2003, pg 851). Persuasive authority as a term seems to fail to describe the phenomenon in question by coupling the act of persuasion with authority. Authority is about the right to exert power, yet if a law is operating because it is persuasive it does not have authority. Thus persuasive authority seems to be a bit of a contradiction and deceptive in its terms. Therefore, while I agree with the meaning of the term put forth by scholars, I shall simply refer to it as persuasive law henceforth. In order to use foreign

law that is not binding, the judge must believe the persuasive capacity is high. Trust in the foreign jurisprudence is a central tenet of its ability to persuade (Glenn 2003, pg 851). Persuasive law can also be viewed as “coordinate persuasion” which involves multiple actors engaging in judicial collaboration (Glenn 2003, pg 851); “transjudicial communication” as a process of communication between various legal actors (Slaughter 1994, pg 101); or “judicial parallelism” in comparing multiple systems of law to discover best practices and potential avenues for convergence (Goode 1998, pg 52-53). For a set jurisprudence to have persuasive capacity, the law must overcome barriers of translation and applicability to the domestic actors (Knop 2000, pg 504). The translation of foreign law for national consumption involves both concerns of interpretation and transmission, with the potential for legal actors to engage law with creativity and uncertainty. The current models of persuasive law focus on the impact of the globalization of law as a notions of “the spread of human rights, the arbitration of international disputes, and the transformation of legal practices” (Coombe 1995, pg 796). These are topics preoccupied with a growing convergence in law, rather than the spread of foreign law that occupies this study.

Persuasive law can emerge from many sources. The *Ius Commune* which is the continental common law system provides a Judeo-Christian legal tradition from which to draw upon (Glenn 2003, pg 852-853). The *Lex Mercatoria* is a body of European commercial law that served as a medieval form of international laws of commerce which could serve as persuasive law (Glenn 2003, pg 854-855). The British-led Commonwealth law system can also be a source with high persuasive capacity, particularly in former British colonies and in Britain itself. Potentially, natural law may be a source of high

persuasive capacity. As chapter III will discuss, the interaction of various common law systems in the Commonwealth will show a long tradition of judicial borrowing for the British that set up patterns of judicial behavior that influenced the British interaction with future international legal orders including the ECJ and ECtHR.

In the context of the ECJ, European Union law has been established through treaties and the efforts of the ECJ to be a binding legal obligation; therefore, EU law need not be persuasive law to be applied. However, there may be a benefit in being both to alleviate the concerns of national judges that the international law being applied is both required and logically “right.” While the ECJ does represent a binding legal obligation, the institution is not endowed with limitless power or limitless authority to produce judgments on any topic. A close reading of the various treaties of the EU provides a sense that the scope of areas touched upon by EU authority is increasingly expanding; yet there are topics which continue to persist in a national context. Should the ECJ rule on an issue that largely remains the purview of the member state governments, then national courts could conceivably acknowledge that the ECJ has exceeded its authority and that said jurisprudence is to be regarded as persuasive law to be used optionally.

Within the ECtHR, the issue of binding law or persuasive law is even more complex. The ECtHR shares its binding legal obligation with potentially all member states courts that might rule on an issue. Since the ECtHR has forty-seven member state national courts, this can produce a wide assortment of choices as to what judicial logic must be applied to meet the binding legal obligation. When there is an abundance of different choices as to what jurisprudence to follow, then the vast array of choices can all be regarded as persuasive law with the binding obligation that you must apply one of the

options. The more judicial judgments are made by various courts within the ECtHR legal order, the more human rights law becomes a plentiful source of persuasive law to be used when needed.

v. CONCLUSION

The goal of this section is to articulate how, despite the classic domestic framing of judicial authority, the changing role for judges creates opportunities for judges to become active borrowers of law from abroad even when there is no mandate from the institutions of governance to do so. This section told a story of judicial evolution that provides the theoretical foundations for this dissertation project and describes a phenomenon of horizontal borrowing that is both surprising given the tradition of judges as domestic interpreters and an interesting contribution to what we think we know about the role of judges. The story began with the domestic conditions of judicial power and framed judges as only domestic actors. Over time judges are exposed to more and more instances of foreign law. One area of foreign law where there is significantly less controversy is in the use of international treaty law which helps bridge the foreign-domestic law divide and opens up opportunities for judges to explore other sources of foreign law and horizontal borrowing outside the binding obligation of treaty law.

E. QUESTIONING THE LEGITIMACY OF FOREIGN LAW

i. INTRODUCTION

The previous two sections led us from the idea of a classical image of the national judges as a purely domestic actor to reshaping the role of the judge to act within the

international arena, first to uphold treaty obligations and secondly to begin to engage in horizontal borrowing of foreign law. What is missing from this story is a discussion of the legitimacy of the use of foreign law, which this section will provide. Exposure to foreign law generates questions as to the nature of judicial legitimacy and begins a heated debate as to whether the use of foreign law is legitimate or not. Since courts lack the power of the sword and the purse, the influence of a court relies on its ability to be perceived of as legitimate by the citizens it serves. Use of foreign law may challenge that legitimacy. Despite contestation of the legitimacy of foreign law, international treaty law that is ratified by the legislature of the state in question becomes an accepted and binding form of foreign law that judges accept as overriding domestic law, but not domestic constitutions. The acceptance of international treaty law as legitimate source of legal principles further begins to open a window into the legitimacy of foreign law and many judges including British judges begin to look to other sources of foreign law in determining the outcomes of cases.

ii. JUDGES AND THEIR LEGITIMACY

All institutions of governance need some form of political capital in order to have others accept their decisions and to have those decisions take effect. There are three ways of achieving this political capital: through the power of the purse, such as control of budgetary allocations of resources; through the power of the sword, such as control over agents of state coercion and the monopoly of state violence; and through the power of legitimacy, such as the authority or right to make a decision (Weber 1921). Courts are often seen as weak institutions because they rely on legitimacy to have their decisions

obeyed, rather than the financial and coercive powers that executives and legislatures enjoy. Legitimacy rests on a normative concept of the right, both morally and legally, to make decisions (Gibson 2006, pg 525). Institutions that are seen as legitimate “are those with a widely accepted mandate to render judgments for a political community” (Gibson 2006, pg 525). For laws to be legitimate, this means “that there is something rightful about the way the laws came about...the legitimacy of the laws rests on the way it comes to be: if that is legitimate, then so are the results, at least most of the time” (Friedman 1998, pg 256). But there is a distinction between the creation of the law and the interpretation and implementation of the laws, all three of these actions can be done by judges, but they can also be performed by other actors of the state.

Legitimacy is the “normative belief by an actor that a rule or institution ought to be obeyed” (Hurd 1999, pg 381). This means that legitimacy is conditional upon convincing people that they should do what the institution says. Legitimacy is subjective and is determined by the actor’s perception of the institution. This perception is based upon the substance of the decision itself, from the procedure used to make the decision, or by an understanding of the source from whence it was constituted (Hurd 1999, pg 381). Thus procedures are rules of the court that are tied to its legitimacy. This perception is internalized by the actor and helps the actor define what their interests are, which may be and often is different from what they would think their interests are without the perception (Hurd 1999, pg 381). Legitimacy is therefore best understood as a social construction of reality. Legitimacy can be understood as “a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions” (Suchman

1995, pg 574). This quote posits an understanding of the appropriateness of the court and cultural standards of appropriateness that may be shared by many, constituting a community. Internalization occurs when the “actor’s sense of its own interests is partly constituted by a force outside itself, that is, by the standards, laws, rules, and norms present in the community, existing at the intersubjective level” (Hurd 1999, pg 388). Compliance with the decisions of the institution becomes habitual after internalization because of the degree of social control exercised by the idea or act having legitimacy.

For courts in particular, the acquisition of legitimacy is tied to the notion of obtaining diffuse support within the polity and within society more broadly. Diffuse support is a “reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging to their wants” (Easton 1965, pg 273). Diffuse support is about gaining a sense of loyalty to the institution, securing faithfulness, devotion, and obedience to the decisions of the institution (Gibson 2006, pg 525). A sense of loyalty which is not contingent on the decisions of the institution being liked, only accepted. By creating a reservoir of good will, society and the polity will have the assurance that in the long run, the institution will make appropriate public policy in the best interests of that society. Without the reservoir of good will, the institution will not have the authority to go against the preferences of the majority nor to do what is simultaneously right and unpopular. The legitimacy of courts may be based upon their ability to provide their primary function of resolving conflicts in society peacefully, allowing diffuse support to emerge so long as they continue to perform this function well (Shapiro 1981, pg 17). Diffuse support can also emerge through a respect for the education and experience of a judge. In Britain “the judge can

claim the legitimacy and confidence of long experience and the respect of those with and for whom he has previously acted” according to current United Kingdom (UK) Supreme Court Judge, Lord Mance (Mance 2001, pg 426). The efforts of the judge through achieving high degrees and service to the community are enough to garner respect for the occupation and the institution which that occupation serves.

Legitimacy is important when there is conflict over the decision of a case. When a decision is pleasing to most, there is no need to discuss the legitimacy of the decision or the institution rendering it. When a decision is contentious, then the legitimacy is called into question. Legitimacy is important when there is an “objection precondition” where the institution is “recognized as appropriate decision-making bodies *even when one disagrees with the outputs of the institution*” (Gibson 2006, pg 525). Examples of this can be found when courts intercede in determining election results such as in the US case *Bush v. Gore* and in a similar case with an opposite decision in *Vanukovych v. Yushenko* in Ukraine (United States Supreme Court 2000; Ukrainian Supreme Court 2004). Courts need the ability to go against the majority and public opinion in order to serve their function, such as in the protection of minority rights in society despite overwhelming majority consent. Within the European context, it is hoped that courts are the instruments which can step in and do what is right no matter how unpopular and no matter powerful the actors perpetrating the act are. The strengthening of European courts in the post-WWII environment was an effort to prevent the emergence of another Adolf Hitler who could violate the people’s rights as egregiously as was done in the Holocaust.

A greater awareness of judicial institutions is linked to a greater willingness to extend legitimacy to courts (Casey 1974; Caldeira and Gibson 1995; Gibson et al. 1998).

There are also studies which argue that a judicial institutions legitimacy is not affected by decisions that are unpopular, particularly in courts that rely heavily on precedent and the notion of *stare decisis* such as British courts (Caldeira and Gibson 1995). *Stare decisis* is a process of following the previous case law and applying the logic of the prior decision to the case at hand. The maintenance of legitimacy is bound to traditions upheld by the court and the predictability that the court can provide. There is a positive bias in favor of courts in part due to norms of justice being the right means of obtaining a decision and the positive symbols of courts such as the robes, gavels, and wigs (Gibson et al. 2003). Ironically, exposure to cases which are controversial may increase the legitimacy of the court by the use of positive symbols of justice (Kritzer 2001; Yates and Whitford 2002). These studies are positing the idea that the more knowledge one possesses about a judicial institution, the more likely the institution is thought to be legitimate. Most of these studies rely on the United States Supreme Court as their empirical example and suggest that it applies to other contexts; however, Caldeira and Gibson apply it to European courts including the ECJ finding that this idea holds true for how citizens think of their national courts but not for international courts like the ECJ (Caldeira and Gibson 1995). This idea runs counter to understandings of legitimacy in other institutions of governance. The more knowledge a person has about the US Congress, the more likely they are to not support the institution (Hibbing and Theiss-Morse 1995; Kritzer and Voelker 1998). Courts are seen by many as special and unique and even above reproach in a democracy, even when there are black marks against them (Markovits 1995; Brown 2000).

iii. THE CONTESTED LEGITIMACY OF FOREIGN LAW

Opponents of the use of foreign law focus on the primacy of domestic law, lack of requisite knowledge of foreign systems, circumventing democracy and national sovereignty, an unorthodox expansion of judicial discretion, and lack of legitimacy of foreign law sources as reasons to avoid its use. The opponents tend to be vocal and adamant in their objection to its uses such as US Supreme Court Justice Scalia, US Court of Appeals Court of Appeal Judge Richard Posner, and High Court of Australia Judge Michael McHugh (Kirby 2006; Jackson 2007; Posner 2002; Posner 2005). In Mexico and the Philippines, judges often reject the idea of the use of foreign law, mostly out of the fear of legal imperialism by US law (De Cruz 2007). Other developing states may share the same fear of legal imperialism. Those with an originalist interpretation of the law favor the primacy of domestic law and traditional ideals; several states have legislated against going beyond domestic law. The US Congress has legislated against the use of foreign law with the exception of the UK and within the context of the framers intent. Originalists strive to interpret the constitution with regard to the framers intent and apply their intent to modern situations. However this originalist intent can be view as a hindrance to the legitimacy and democratic principles of state as Jackson points out,

It is one thing to say that a polity that votes to entrench a constitution should be bound by it and that courts, enforcing the bargain as it was understood soon after its enactment, are acting consistently with democracy. But it is quite another matter to say so with respect to a text adopted a hundred years or more earlier, without the participation of major elements of the adult community, as is the case in both the United States and Australia. To say that democracy requires the court to give effect to the document only as it was understood at the time of enactment—

especially to invalidate laws enacted by today's more inclusive majorities (Jackson 2007, pg 182).

In the UK, the use of foreign law outside the commonwealth was against the law for judges until the Practice Statement of 1966.

The 1966 House of Lords Practice Statement was meant to bind lower courts under *stare decisis* to the highest courts (Lords of Appeal in Ordinary and then the UK Supreme Court), while allowing the Law Lords to contradict precedent when necessary by the use of new legal ideas and foreign law. The Practice Statement was the initial step in an effort to institute a set of reforms of the judiciary through Parliament by the Conservative Party in Britain. The Practice Statement was meant to allow British judges the necessary freedoms to alter precedent and to explicitly revoke past decisions that are no longer consistent with current ideas or were based on flawed judicial logic. The Practice Statement has also been understood by judges to implicitly allow for new ideas to enter British legal thought from abroad.

In the United States, the use of foreign law is controversial and there is a lively debate on whether to use foreign law in domestic judgments or not. US opponents of foreign law argue that it unduly expands judicial discretion, that the American legal profession is not formally trained in the use of foreign law, its application to the domestic context (with the exception of treaty law) is unnecessary, and foreign law creates issues of understanding the source and context of foreign case law. Foreign law is seen by some as a danger to “democracy, popular sovereignty, and to preserve American exceptionalism” (Jackson 2007, pg 162). Opponents of foreign law point to the importance of judges’ role as domestic actors who are confined to the laws of their state. US defenders of utilizing foreign law in domestic decisions stress its long roots in

American legal history, ability of foreign law to illuminate legal reasoning without doing harm, and to understand what other legal experts think in different places (Jackson 2007, pg 163; Tamanaha 2010). Despite the US Supreme Court's aversion to foreign law, the degree to which other courts from around the world cite and use US decisions has become a point of pride for the Justices of the US Supreme Court (Liptak 2008, pg 2). US Supreme Court Justice Sandra Day O'Connor in a speech right before her retirement advocated that the US must absorb as well as create foreign law if it is to remain an influential and respected court among judiciaries of the world (Liptak 2008, pg 2). This suggests that in the current scheme of globalized politics, courts who remain locked into their purely national courts may be failing to keep up with the new world order. A court may enhance its legitimacy in the new world order by linking itself to other prominent courts of democracies (Slaughter 1994, pg 119; Knop 2000, pg 520).

International law has had a Grotian moment, an opportunity to build upon the jurisprudence of the past and adapt to a globalizing world, where domestic legal systems are influenced by law from beyond the state (Kirby 2006, pg 329). A Grotian moment is a "paradigm-shifting development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance" and are accepted by domestic institutions (Scharf 2010, pg 439; See also Sterio 2010). Foreign law can be used to clarify treaty obligations of a state and create uniformity among signatories. States do not operate in a vacuum, why should courts operate in a vacuum? In a democracy, it is expected that the executive and legislature would look abroad to find solutions to common problems and see what are the political ramifications of potential solutions, after all there is little reason to try a solution that has failed to solve the

problem everywhere else. But even with a strong tradition of judicial deference, there remains the idea that judges should be faithfully applying democratically-designed domestic principles, laws, and rules, and should not be looking to other states to see what the best solutions to a political decision are. Judges are interpreters of the law, not the architects of national policy and many still see them as purely domestic actors, despite their regular interaction with international law.

International law “would be grievously injured if national courts, out of a sense of their own superiority or proclaimed ignorance, were to reject the rules and influence of the international legal order” (Kirby 2006, pg 362). By joining the international legal community, courts can protect themselves against legal isolationism by exposing themselves to new ideas. Engagement with foreign law informs the knowledge of the law, while doing no harm (Jackson 2007, pg 163). Being a part of the international legal community exposes judges to new ideas and concepts that can inform their work and prevent judges from falling into the passions of the moment of what is trendy in domestic legal ideas. A judge engaging in the use of international law “is no longer an indulgence or an esoteric legal specialty”; instead an engagement with a globalizing legal arena has become a “duty” (Kirby 2006, pg 363). Foreign law allows judges to understand what other educated legal scholars and professionals think (Jackson 2007, pg 162-163). Use of foreign law may illuminate common legal dominators shared among advanced liberal democracies (Jackson 2007, pg 163). In the post-WWII environment, Germany Basic Law provides for international law to take precedent over domestic statutes. Article 7 of the Costa Rican constitution declares that international law trumps domestic statutes. The European Convention on Human Rights (ECHR) asks national courts to look to other

signatories to the convention when considering human rights cases. By looking at foreign courts, judges can discern the best practices and find better answers to common problems (Jackson 2007, pg 164; Jettinghoff ; Rasmussen 1986; Atiyah and Summers 1987). Judges can look to other courts to rule out ideas that have not worked in practice (Jackson 2007, pg 179).

Comparative knowledge of other legal systems may also enhance a judge's ability to decide impartially on the issue at hand (Jackson 2007, pg 180). There are benefits to the act of comparing, forcing legal actors to confront what they take for granted and what the community has internalized as right (Knop 2000, pg 531). Borrowing from Hannah Arendt, Jennifer Nedelsky creates an international community-based theory of judgment which "involves taking into account the perspectives of others in the community and imaging how we might persuade them to agree with our judgment" (Knop 2000, pg 532; See Nedelsky 2000). This means that judges can take into account what is legitimate in one court and use the foreign law of that court to change what is accepted as legitimate in their own jurisdiction. Foreign law allows a judge to be a part of multiple communities (epistemic communities) and therefore to judge against one's own community when necessary (Nedelsky 2000). The more knowledge a judge considers, the better reasoned and articulated their opinions will be (Knop 2000, pg 532). For judges, and particularly for British judges, citing case law and statutes in their decisions is a means of explaining the legal logic and providing evidence that the judges are being guided by law rather than politics or personal ideology (Slaughter 1994, pg 119). Thus...

In most cases also where foreign law is being discussed, such exercise appears to lend legitimacy to the values espoused by judges when carrying out their judicial functions, particularly in instances where the law is

ambiguous. Thus, recourse to foreign law in the British courts - and to continental jurisprudence in particular - helps reinforce legitimacy and 'guides the exercise of judicial discretion'; the use of foreign law in this context seems to be about the protection of judges themselves, in that it provides a form of reassurance and checks on their own power (Lambert and Husain 2010, pg 140).

By citing foreign law, British judges are adding to their court's legitimacy by reassuring Parliament and the public that their legal decisions are based upon logic rather than judicial idiosyncrasies.

iv. CONCLUSION

This section has added to the story on the role of judges by exploring the legitimacy of courts, which can be called into question through the use of foreign law or as a path where judges might find strength in foreign law. This question of legitimacy becomes increasingly important as the image of judges transitions from that of domestic to international actor. In the British context, the idea of the legitimacy of judges using international law in their decisions calls into question the authority of Parliamentary Supremacy and through the use of ECJ and ECtHR jurisprudence further signals to the public the scope of British involvement within the European project. The remaining sections of this chapter will delve into the theories and expectations about judges created by British integration into European legal orders.

F. SITUATING HORIZONTAL BORROWING IN LITERATURE ON EUROPEAN LAW

Most of the literature and theoretical attention to legal integration focuses on the EU and its court, the ECJ. This is a natural focus for political scientists to take, because the ECJ is by far the most significant and successful instance of international legal integration in history. The ECJ is the only international legal order that even comes close to the type of unambiguous authority necessary to force domestic actors to respect and follow it. While the ECJ is not the only case out there on international legal orders, it represents the largest, analytic and empirically based literature to draw upon in establishing claims for what we should anticipate as potential ways in which national judges can influence the relationship between international legal orders and their domestic polity. Therefore, the remainder of this theory chapter will draw heavily upon the EU literature supplementing it with the human rights and international public law literature. The EU literature will be utilized to extrapolate claims about how national judges interact with international legal orders, which we can test against both the ECJ and ECtHR case studies.

G. THE MEANING OF INTERNATIONAL LEGAL ORDERS

This section aims to be clear about the meaning of the terms first introduced in the introductory chapter, which will continue to be used throughout the dissertation. International legal orders are hierarchically structured, legal systems that bind together courts from many different states to follow certain international laws, norms, and procedures outlined in a treaty. These international legal orders contain both vertical and

horizontal aspects. Vertical aspects of the legal order include the highest court and its judges defined by the treaty, which operates as the international, hierarchical authority on the treaty and is tasked with ensuring the compliance of the member states of the treaty. Here the international court creates a stratified legal system as member state courts rely on the international court for interpretation of the treaty and incorporate the international jurisprudence of the international court into their domestic legal system. Vertical legal integration is a well-studied phenomenon, as we shall see within this chapter and throughout the empirical chapters. Horizontal aspects of the legal order include member state courts and judges who interact with other member state courts and judges as equals. Horizontal integration is based upon voluntary mimicry between actors not hierarchically bound within the international legal order such as judges of the member state courts interacting with each other. Horizontal legal integration is an under-studied phenomenon within international legal integration and is the primary contribution to the literature of this dissertation. The following sections of this theory chapter will discuss vertical and horizontal integration in the context of legal convergence, expectations of how judges act in the international arena according to neorationalism, neofunctionalism, and through a process of “dodge and massage” developed in this project, and finally an exploration of how to theorize horizontal legal integration.

H. CONVERGENCE IMPLICATIONS OF JUDGES ACTING INTERNATIONALLY

i. INTRODUCTION

When judges act within the international arena there is the possibility that their exposure to foreign law leads to convergence of legal ideas, bringing domestic law in

alignment with international law. This section explores what convergence and divergence mean in the context of legal integration. By fine tuning our understanding of these concepts we can begin to discuss the ways in which legal integration in both vertical and horizontal forms, could produce convergence or divergence in the jurisprudence of national judges. On the one hand, there is an expectation that integration will bring about convergence, while on the other, new rules and procedures might mix with the traditional legal system to create more variation within the law thus producing divergence. This section will then turn to a discussion on how convergence and divergence are understood to operate in a European legal context.

ii. CONVERGENCE AND DIVERGENCE

Legal convergence occurs when two or more legal systems, starting from different and sometimes very different state rules, evolve to be quite similar over time, meeting in some middle ground (Schlesinger 1995, pg 477). Legal divergence occurs when two or more legal systems remain distinct or potentially move to extremes apart. Legal convergence emphasizes the importance of time, “showing a process by which two or more legal systems ‘become,’ rather than ‘are,’ more alike” (Mattei and Pes 2008, pg 268-269). Convergence is a complex phenomenon that can occur in a substantive, procedural, and/or institutional level within legal systems that are not monolithic entities (Sacco 1991). Convergence as a concept “betrays a deterministic logic” where a strong evolutionary movement of law from two extremes moves both towards a reasoned middle ground (Mattei and Pes 2008, pg 269). Divergence often concerns itself with a lack of

evolutionary change and a static, implacable legal system that does not incorporate change.

A famous example of this extreme convergence is between the English and French court's interpretation of the binding nature of national court decisions which started from extreme divergent positions. English courts, between the late nineteenth century and the Practice Statement of 1966, found the binding decision of precedent so unshakeable that a single decision of the Law Lords no matter how "mistaken" was to be followed by every lower court and all future Law Lords. Once precedent was established it could not be altered unless the British Parliament passed a new act on the matter that changed how future cases should be dealt with. This is because in the English system only such as strict reading of *stare decisis* could be seen as consistent with the legal and political history by which Parliament alone has the power to change the law through Parliamentary Supremacy. The other extreme is found in the French system through the *Cour de Cassation*, the French court of last resort known in English as the Court of Cassation. The Court of Cassation used to be able to only annul decisions of lower courts and send the case along with the decision of annulment back to the lower court in question. The lower court was not legally bound by the decision of the Court of Cassation which on multiple occasions started "a tournament of table tennis between the two that was extremely difficult to resolve" (Mattei and Pes 2008, pg 269). The lower court receiving the annulment could conceivably render the same verdict under the same logic since it was not bound to the higher courts precedent. In French legal and political history, judges were bound by the written code law and not by other judges; therefore judges should always independently interpret statutes without regard for precedent.

Today the Law Lords and Supreme Court Judges of the UK have freed themselves from the absurd duty of following every precedent no matter how misguided or wrong and French judges are now bound to follow the annulments of the Court of Cassation without any avenues for judicial discretion for lower courts only. The British and the French have reached a reasoned middle ground between allowing precedent to be so overwhelming followed, that travesties of justice are repeated with the knowledge that they are flawed decisions and allowing precedent to have virtually no meaning at all, rendering higher courts too feeble to assert any authority over lower courts. After small incremental changes over time, from two distinct ideologically motivated policy extremes, the British and the French settled on a moderate, middle ground interpretation of precedent.

Convergence should not be narrowly interpreted to mean that all advanced legal systems will converge on one natural reasoned middle ground or that ideological and political choices in law will overtime fade or that everyone is moving towards the middle, after all some legal systems such as the US adopted the reasoned middle ground position about precedent in the early 1800's, that it took France and Britain more than a century to arrive at. Legal systems can move at different paces towards the same results. Judicial review which began in *Marbury v. Madison* in the United States (United States Supreme Court 1803), has spread to Europe and the Commonwealth beginning in 1920, to Latin America after WWII, and then to Eastern Europe after the fall of the Berlin Wall, which has created a convergence of judges as the interpreters of their constitutions with the right to strike down statutes that impinge upon constitutional provisions (United States Supreme Court 1803). Even developing states are thrust into the idea of independent

courts of law and judicial review as they are sometimes introduced in the conditionality clauses of development loans as a requirement that the state must provide the powers of judicial review to their high courts in return for receiving the loan. When judicial review is merely a power dictated to a state's courts by a foreign power, there is nothing natural about the evolutionary spread of judicial review (Mattei and Pes 2008, pg 270).

Fukuyama would find this end of legal history view as an example of how pervasive power dynamics become the outcome of 'natural' evolutions (Fukuyama 1992).

iii. KNOWING WHEN AND HOW CONVERGENCE MATTERS

Most integration scholars, as the name might suggest, only anticipate the use of foreign law to produce convergence of law (Knop 2000, pg 506 Footnote 8). This literature focuses on how the use of international law would lead to homogenization through uniformity, universality, and at its worst legal colonization (Knop 2000, pg 506). Through a process of vertical, international legal integration, courts should adopt the rulings of the new "highest" court in the legal order and disseminate the new law to all lower courts. Evidence of convergence under this logic is states who have adopted the same laws. Scholars who follow this logic are quick to point out any signs of divergence in the law as failure (See Alter 2001; Hafner 2004; Stöbener et al. 2006; Toshkov 2008; Jupille and Caporaso 2009; Popelier et al. 2011; Davies 2012). Yet a common set of laws and common hierarchical veil of formal processes does not ensure shared legal outcomes within an international legal order. Consistency of legal outcomes involves not only a common set of laws shared, but also similarity of legal processes, institutional structure, and judicial interpretation (Merryman 1981). By focusing purely on law in the process of

legal integration, European legal integration scholars have theoretically limited integration to the downloading of a common set of rules, rather than a process that can ensure common outcomes of cases across national borders within the EU. Rather than looking to see if legal systems have the same set of laws, one could look for legal cases that were decided in similar ways and that this latter form connects to a better understanding of convergence. Both Christians and Christian fundamentalist read the same Bible, but their interpretation of the text is radically different, just as the interpretation of a law may be radically different across different judiciaries in different member states despite the use of the same law. Since the same laws can be interpreted differently as the Christian/Christian fundamentalist example suggests, having both similar laws and similar outcomes can better produce convergence.

Vertical legal integration provides a clear logic for the spread of international law through a European legal order. A vertical legal order is well suited to the spread of law to all lower member state courts as they increasingly come under the power of a higher vertical authority. Horizontal legal integration may be better suited to producing the same judicial outcomes because judges are persuaded by the logic of a decision and mimic it. A third measure of convergence might incorporate both vertical and horizontal legal integration by measuring the use of the same concepts of a decision rather than the same laws or same outcomes of cases. In this middle ground understanding of convergence, we would see courts appealing to the same laws and the same concepts when dealing with similar cases but not necessarily the same convergent outcomes of the cases, allowing for national eccentricities to persist

Merryman's scholarship illustrates the difficulties of achieving shared outcomes and argues that despite the activism of the ECJ in the 1970's it is not yet nor is likely to ever be an institution capable of consistently producing shared outcomes in the member states (Merryman 1981). Instead, Merryman suggests that cultural changes in Western civilization, including the growth of individual rights and notions of human rights which are learned ideas largely taken for granted in post-WWII generations, create a shared way of thinking which can produce shared outcomes (Merryman 1981). While it is clear that judges do interpret cases and jurisprudence in idiosyncratic ways, it is also true that shared ideas, culture, experiences, and education can get judges closer to shared outcomes. The homogenization of law in terms of hierarchical principles and processes is not enough to integrate the legal realm. Vertical integration can compel national courts to change their laws and behavior, but it cannot make them homogenous in interpretation in an organic way, while horizontal legal integration cannot compel national courts to behave a certain way it can potentially lead to homogenization of interpretation voluntarily.

Divergence from the international high court may not be a sign of failure at all, but of the creativity of legal actors and the ability of the judge to use foreign law to produce new meanings. Divergent outcomes may not be a death nail to the idea of convergence, since law and legal concepts may be spreading greatly producing the middle ground convergence of shared ideas and legal concepts while not always creating shared case outcomes. The national judge acting as a translator of foreign law engages in both fidelity to the national and foreign legal code producing new meaning in both contexts and creating a relationship between the two legal spheres. As the judge engages

in translation, interpretation, implementation, compliance, and enforcement, the judge is altering and creating new legal meaning in both the domestic and international legal orders. This is particularly disconcerting to international lawyers, who look to national courts to “solidify” meaning of international law rather than complicate it (Knop 2000, pg 517). Though this process we must recognize the potential for judges to induce more diversity, potentially “fragmenting” meaning (Knop 2000, pg 517), as it applied to new legal systems creating particularization of the law. Foreign law is not authoritative but has “intrinsic logical power” making it a part of a larger community of courts grappling with an issue (Slaughter 1997, pg 187).

When British courts cite the ECJ it should be heralded as a great accomplishment whether the British court followed the jurisprudence of the ECJ or not. The act of citing the ECJ shows that British judges considered the relevant EU case law and that the ideas expressed had reached them. After all the British judges could have confined themselves to only domestic Acts of Parliament, instead they attempted to view the whole picture and fulfill their treaty obligations by interpreting Acts of Parliament in the context of relevant law, which may result in a verdict that is different than if they had only confined themselves to domestic law and yet still different than if the British judges had only dutifully followed ECJ case law. New precedent could have been created that is flavored by both domestic and international law, perhaps providing inspiration for future changes to both legal systems and creating a body of law that is ever changing to meet the needs of the society it serves.

iv. CONVERGENCE AND DIVERGENCE IN EUROPEAN LEGAL

INTEGRATION

There is a growing legal studies literature recognizing that unlike monetary, commercial, agricultural, currency, and immigration and asylum integration, there is something distinct in legal integration (See for examples Anderson 2004; Conant 2006; Goodwin-Gill and Lambert 2010; Legrand 1996; Pollack 2013; Popelier et al. 2011; Slaughter et al. 1998; Shapiro 2005; Weiler 1991). This distinction arises from judicial actors behaving in ways that are not predicted by the more widespread theories based upon material constraints, political actors preferences, and institutional features. Judges are frankly more autonomous and capable of a wider range of idiosyncratic behavior, even when constrained by institutional features than most of the actors social scientists concern themselves with. This legal studies “judge” literature then diverges into two camps: divergence scholars that see the autonomy of judges providing no inducements to join the European legal order, an act that would be akin to successfully herding cats according to some divergence scholars (Munday 1983; Legrand 1996; Bulmer and Lequesne 2005; Cotterrell 2007) and those who see the European legal order as producing a set of tools which judges can draw upon to enhance their judgments and produce convergence (Gessner and Schade 1990; De Witte and Forder 1992; Markesinis 1994; Mather 2000; Paraskevopoulos 2001; Glenn 2003; Slaughter 2004).

v. EUROPEAN JUDGES AS PRODUCERS OF DIVERGENCE

Legrand and other divergence scholars argue that convergence within a codified civil law tradition of the EU is not possible for common law actors such as the British

(Legrand 1996). With the exception of Britain and a few common law ideas imported into the post-WWII constitution of Germany by the Americans, Europe is dominated by a civil law tradition. EU law cannot change the fact that “a lawyer brought up within a system of judge-made law (common law) has a legal outlook utterly different from one who has grown up within a codified system” (Munday 1983, pg 191). While there are aspects of the common law within EU law, it is a predominately codified civil law system based upon the common European traditions of Roman law. Both of the two legal systems in Europe, common and civil law, there is “an irreducible element of autochthony constraining the epistemological receptivity to globalization” (Legrand 1996, pg 79). Essentially each legal system contains its own understanding of what is the law, what constitutes legal knowledge, and what is truth. Therefore “a common law lawyer, trained in England, in the context of a particular cognitive approach to systems, rules, facts, rights and the presence of the past, will simply never be able to appreciate a system, a rule, a fact, a right or the past as her Continental counterpart understands them” and vice a versa (Legrand 1996, pg 79). EU law attempts to bridge the gap between common and civil legal systems insufficiently, largely expecting common law practitioners to learn and adapt to civil law traditions without regard for the complexities of learning an entirely new legal language, meaning, thinking, and way to operationalize the law (Cotterrell 2007). The divergence scholarship largely assumes convergence is possible throughout Europe, provided governments and judges are willing, with the exception of Britain. For the divergence scholarship, Britain is their favorite, “easy” case.

vi. EUROPEAN JUDGES AS PRODUCERS OF CONVERGENCE

Slaughter and other convergence thinkers argue that the EU legal order produces convergence of law through national legal systems interacting with the ECJ and to a lesser extent through exposure to each other's respective national legal systems (Slaughter et al. 1998). This convergence is made possible by the EU creating a new space for judicial dialogue to occur. Scholars in this convergence vein vary greatly in the degree of convergence they see and foresee in the future. Ranging from scholars who see convergence as a slow process of sharing and social learning that is ongoing (Markesinis 1994; Weiler 1994; Slaughter et al. 1998; Paraskevopoulos 2001) to those who see rapid evidence of unprecedented levels of convergence in a few decades (Gessner and Schade 1990; De Witte and Forder 1992; Anderson 2004). As Markesinis states

There is thus a convergence of solutions in the area of private law as the problems faced by courts and legislators acquire a common and international flavour; there is a convergence in the sources of our law since nowadays case law *de facto* if not *de jure* forms a major source of law in both common and civil law countries; there is a slow convergence in procedural matters as the oral and written types of trials borrow from each other and are slowly moving to occupy a middle position; there may be a greater convergence in drafting techniques than has commonly been appreciated ...; there is a growing rapprochement in judicial views. (Markesinis 1994, pg 30).

Convergence scholars argue that slowly national judges embrace EU law and incorporate it into their own understandings of the law and national case law. Judges engage EU law to both draw useful principles of law and to become a part of the European legal community and influence the creation of future EU laws (Slaughter 1994).

Anderson is among the convergence scholars who focus on the convergence of the UK within the European legal order. Anderson argues that

...the attitude of the Law Lords to the ECJ over the first 30 years of UK membership of the European Union has for the most part been one of loyal and uncritical compliance with all those rulings from which they have been able (in accordance with common law principles of *stare decisis*) to extract a legal rule applicable to the case before them (Anderson 2004, pg 204).

Anderson argues that UK judges are faithful to the ECJ because they willingly accept the supremacy of EU law and due to their high regard for precedent under the principle of *stare decisis*, British judges apply ECJ precedent with “notable strictness” (Anderson 2004, pg 205). According to Anderson, British judges accept and use EU law because the British Parliament has declared it valid and due to the traditions of *stare decisis* which make the precedent of higher courts such as the ECJ over national courts binding.

For convergence scholars the boundaries between the civil law and common law tradition may not be so insurmountable (Merryman 1981; Sauveplanne 1982; Glendon et al. 1994; Onuf 2004; De Cruz 2007; Mattei and Pes 2008; Watson 2008; Glenn 2010; Rivlin 2012). Several states around the globe embrace aspects of both civil law and common law traditions creating a hybrid system such as South Africa, Germany, Quebec region of Canada, and the US state of Louisiana, providing successful examples of how both legal systems can coexist harmoniously within a single community. A key enterprise of the comparative law literature is the debate as to whether the common law and civil law tradition are converging or not (Cappelletti et al. 1989; Schlesinger 1995; Zweigert and Kötz 1998; Mattei and Pes 2008). If indeed the two traditions are converging as part of some natural harmonious middle ground or due to cross-

fertilization between influential Western powers of law, this bodes well for the prospects of integrating Britain within the European legal order.

vii. CONCLUSION

As national courts come under the authority of a higher, vertical, international court there is the presumption that convergence becomes inevitable as a result of the higher court asserting its authority over lower courts. However, there is also the possibility that integration could lead to divergence in the law as the interaction between national and international courts produces new ideas and new meaning that when coupled with national ideas of the law could create unforeseen consequences including the fragmentation of the law and the creation of new legal ideas. A difference of this dissertation project is that this project does not view different outcomes for similar cases across the international legal order as a failure to produce convergence as vertical legal integration scholars view it. The middle ground convergence of producing shared concepts and logics in similar cases across the international legal order while producing divergent outcomes is seen in this project as a step in the process of integration whether vertical or horizontal. This middle ground convergence is important because it means the legal ideas are spreading and interacting with the various international and national courts.

I. EXPECTATIONS OF THEORIES ON JUDGES ACTING INTERNATIONALLY

i. INTRODUCTION

This section will add to this story of the role of judges in the process of European legal integration by discussing the role of judges in European legal integration as theorized by neorationalism and neofunctionalism, and then introducing my own “dodge and massage” argument. My argument diverges sharply from the neorationalist account which argues that European legal integration only takes place to the extent that national political leaders consciously see it as in their interests. Neofunctionalist scholars have argued that judges have been much more active in the establishment of European legal integration than has been suggested by a simple account of the respect for treaty obligations, yet only in their capacity to ally themselves with judges from international legal institutions. My argument builds upon the work of neofunctionalists, but expands the argument by drawing attention to the fact that British judges have actively helped to establish the ECJ vertical authority by engaging the ECJ case law in horizontal ways. Judges are not just reacting when EU rules were imposed over British rules, but by actively perusing and borrowing from EU or national-level European law in cases where it was not obvious that this action was necessary.

ii. NEORATIONALIST ACCOUNTS

Neorationalist theories argue that European legal integration only progresses as much as political leaders in the member state see it as in their best interests to do so (Garrett 1992; Garrett and Weingast 1993; Cooter and Drexler 1994; Garrett 1995; Garrett

et al. 1998; Kelemen 2006). Neorationalists assert that member states government could, if they so chose, ignore the ECJ decisions or amend the integrating legal order through new treaties, but have ultimately accepted and encouraged the legal order because it mitigates the incomplete contracting and monitoring problems that would otherwise hinder the integration of the market and the benefits from trade liberalization. This scholarship emphasizes the importance of hierarchically organized states, particularly the importance of the executive, to act as a gatekeeper and shape what is imported into domestic law through controls on national courts (Moravcsik 1993; Moravcsik 1995). Under this statist logic, national parliaments should be exercising control over what national court judges choose to import in from supranational and foreign sources of jurisprudence. Politicians in Britain would agree with this account. “Primacy of EU law has existed since we joined the Union...[but] European law only takes precedence where member states have agreed Europe should have a competence” (Tony Blair, 2004). For neorationalists, judges should be attempting to apply EU law at the national level in minimal, carefully circumscribed ways in line with the degree of enthusiasm expressed by the national government. Neorationalists see little role for national judges to act within the international arena. When national judges apply EU law, they would also be cognoscente of the long term interests of their own state has in going along with the rules of EU while reasserting the national government’s ability to selectively choose how the EU law is applied. Thus in the British case we should expect that EU law is only applied when it has been incorporated into domestic law by the British Parliament, signaling what principles of EU law are relevant. The current call by Prime Minister David Cameron to hold a referendum after the next elections on continued membership in the EU should

also strongly signal to judges' a hesitation in applying EU law. But given notions of judicial independence, it is hard to imagine that national governments short of withdrawing from the EU or rewriting treaties have the capacity to control the spread and dissemination of foreign jurisprudence. Studies on the influence of national governments within the process of vertical legal integration all suggest that national governments do not have the capacity to control this process (Weiler 1994; Alter 1998; Josselin and Marciano 2007) and potential court curbing mechanism do not work on limiting the influence of the ECJ (Kelemen 2011). As we shall see in chapter V, there is ample evidence that British judges have applied EU law well beyond the scope of what many British politicians would have preferred.

National governments (both executive and legislature) do not have the time, energy, or will to constantly monitor national courts to prevent them from deciding what case law, whether foreign or domestic, is applicable to exercising of their occupation as judges. Judges do operate within constraints, mainly imposed upon them from the national government, but their ability to make choices as to the relevance of available case law, foreign and domestic, under the supervision of an often otherwise occupied national government is great. Member state governments could enact legislation that would declare all EU law null and void within their borders; however, this would be in violation of their treaty obligations and likely elicit a strong response from several EU institutions. Even by cherry picking and asserting that particular EU laws are valid, national governments are validating the source of EU law and opening a window for judges to use any EU law. From the perspective of national governments, acceptance of EU law as valid in the national courts is an all or nothing endeavor. As Lord Millet,

former Law Lord, told me, “I’m glad these things are vague, otherwise there would be no point to me interpreting them” (Lord Millett 2012).

iii. NEOFUNCTIONALIST ACCOUNTS

Contrary to the neorationalists, neofunctionalists argue that judges have had considerable influence on the process of European legal integration. The neofunctionalists’ account of legal integration asserts that the prime mover in EU legal integration is the judges of the ECJ and that national governments have accepted the courts lead as vertical allies (Stein 1981; Weiler 1991; Burley and Mattli 1993; Mattli and Slaughter 1995; Alter 1996; Slaughter et al. 1998). Under the neofunctionalist account, the primary actor propelling legal integration is the ECJ judges and national member state judges have willingly accepted the authority of EU law. National judges accept the authority of the ECJ not out of an obligation to treaty obligations, but rather to achieve a benefit from acceptance. National member state judges can accept the authority of the ECJ because it provides the national court with a benefit such as powers of judicial review (Carrabba and Murrah 2005; Popelier et al. 2011; Lavranos 2004; Goodwin-Gill and Lambert 2010), the preliminary ruling procedure (Carrabba and Murrah 2005; Stöbener et al. 2006), and more influence for judges in domestic legal systems that promote the dualist perspective of law (Müller 2004; Carrabba and Murrah 2005). As an example of the benefits the ECJ may provide to national courts, a further discussion of judicial review may provide illumination. Despite the spread of judicial review and constitutional courts throughout the world, the EU has several member states with high courts that do not possess the power of judicial review. In the Netherlands, the judiciary

by constitutional provision is barred from exercising judicial review of all statutes (acts of parliament) (Tushnet 2003). The Supreme Court of the Netherlands frequently submits questions via the preliminary ruling procedure to the ECJ asking to clarify if a domestic statute is in conflict with EU law, if the ECJ replies that it is indeed in conflict then the Supreme Court strikes down the statute through judicial review declaring it unconstitutional not based upon their assessment but by the authority of the ECJ (Fallon 2008). The neofunctionalist account promotes an understanding of the importance of international judges within the European legal order while also providing reasons why being a part of the EU could benefit national judges and entice them to ally with international judges.

iv. JUDGE LED EUROPEAN LEGAL INTEGRATION

The argument of this chapter diverges sharply from the neorationalist account which argues that judges will apply EU law in narrow ways taking their cues from government officials. Neofunctionalist scholars argue that international judges have been active in the establishment of European legal integration. My argument builds upon the work of neofunctionalists, but expands the argument by drawing attention to the fact that British judges have actively helped to establish the ECJ vertical authority by engaging the ECJ case law in horizontal ways. The aspects of vertical integration are well established, but the European legal order contains no mechanism to promote horizontal legal integration. “A practice of cross-citation to foreign courts, on the other hand, takes place outside any formal treaty context. If structured at all, it is more likely to flow from a common substantive mission, such as the protection of human rights, at a national,

regional, or international level” (Slaughter 1994, pg 101-102). Under EU law, unlike the European Court of Human Rights (ECtHR), there is no formal mechanism within the EU to suggest courts should look to other member state courts on matters of EU law. By citing EU law in their case decisions, including EU law that has been obtained horizontally through Advocates General opinions and member state case law, British judges are validating the EU law and thus validating the entire EU hierarchical legal order. British judges are not just reacting when EU rules were imposed over British rules, but by actively perusing and borrowing from EU law in cases where it was not obvious that this action was necessary.

v. *THE DODGE AND MASSAGE*

In the scholarship on international legal orders, the debate has usually been between neorationalists, who downplay the role of national judges focusing instead on the “gatekeeper” role of politicians (Moravcsik 1993; Moravcsik 1995), and neofunctionalists, who see national judges as the natural ally of international law and judges (Weiler 1991; Alter 1996; Slaughter et al. 1998). But when we understand how horizontal borrowing interacts with these international legal orders, we see how these relationships operate in many directions. In engaging with international legal orders, British judges take part in what I call the “supranational dodge and massage.” British judges “dodge” the use of international law for various reasons and then participate in a process of legal “massage” where knowledge gleaned from horizontal legal integration is used to understand and apply the international law. Sometimes national judges use borrowing in ways that strengthen the influence of international legal orders in the

domestic realm. We see this most obviously with the EU; where borrowing can play a role in helping national judges bring EU law into the vastly different British legal arena. National judges can “massage” EU law through the horizontal context of the common law in order to make EU law more comprehensible and palatable to the British. Sometimes borrowing horizontally allows national judges to “dodge” or reject international law within the EU and ECtHR, providing national judges with arguments that allow them to side step interpretations of international law that directly conflict with national law or employ logics which are inconvenient. For the international legal orders discussed in this project, both the “dodge and massage” occur together; however, upon additional case studies it may be possible that British judges might “dodge” without the efforts to “massage” as a signal that they intend to disregard the international court’s jurisprudence in favor of other sources of knowledge on European law. Efforts to “massage” an international legal order without the “dodge” may be used to incorporate foreign law without formally belonging to the international legal order, such as a backdoor to incorporate international law that is created by a treaty of which Britain is not a signatory.

Despite respect for ECJ case law and intentional design features of the ECJ to induce national judge’s participation such as the preliminary ruling procedure, British judges freely admit to the struggle to understand EU law, particularly the ECJ case law and preliminary ruling procedure decisions (Interviews). ECJ jurisprudence is difficult for British judges to make use of due to its codified civil law basis, its brevity, neglect of context and future applicability, and its lack of legal prescription in order to make legal decisions more palatable for public consumption. British judges overcome this difficulty

by using member state cases involving the relevant EU law and Advocates General opinions to decipher the meaning of EU law and standards. In engaging the ECJ, British judges execute the dodge and massage. British judges dodge the difficulties in understanding the decisions rendered by the ECJ in their case law and responses to the preliminary ruling procedure, limiting the implications and uses of EU law that is lacking extensive jurisprudence available. Then British judges massage the relationship by looking to Generals Advocate opinions and member state case law to understand and comply with the EU law, expanding the implications of EU law through an exploration of all relevant jurisprudence, even beyond the EU. Without horizontal sources for understanding EU law and ECJ case law, the British would not be such willing participants in the European legal arena. Horizontal explorations and justifications help the British judges both understand and alter the implications of ECJ law for Britain; without the horizontal options they would be forced into more incomprehensibility and a clash with the ECJ.

British judges were among the key architects in writing the European Convention on Human Rights and Winston Churchill proposed the creation of the European Court of Human Rights. The British also see themselves as leaders in the arena of human rights law. In their eyes the ideas British judges brought into the Convention for Europe were ideas already long in practice in Britain. In many ways the British see the ECtHR as their own creation—but it is a creation most British judges have become deeply disappointed in as many of my interviewees stressed (Lord Mackay of Clashfern 2012; Lord Scott of Foscote 2012; Lord Millett 2012). For British judges the ECtHR has either misinterpreted or simply added new protections to the Convention going well beyond the

human rights and fundamental freedoms protections described in the Convention. When the ECtHR goes beyond the Convention as interpreted by British judges, British judges dodge the ECtHR jurisprudence. Since the Convention requires national judges to take into consideration the vertical judgments of the ECtHR and the horizontal judgments of the member states, this provides national judges with options as what judicial logic to use. British judges then massage their compliance with the Convention by looking horizontally for alternative logics to the ECtHR than are in alignment of their understanding of the Convention. In the case of the ECtHR the horizontal sources of law are used as a counterbalance to the ECtHR's power and authority.

vi. CONCLUSION

This section explored the European legal integration scholarship, including neorationalism and neofunctionalism. This section has argued against the neorationalist politicians-as-gatekeeper's argument, emphasizing that politicians have neither the time nor the inclination to watch how British judges "use" EU law and could do very little to stop judges' use of EU law without jeopardizing relations with the international legal order. My argument also departs from the neofunctionalist account which argues that member state judges have been willing participants in the use of EU law in return for benefits such as the ability to strike down domestic laws through judicial review. My argument emphasizes that judges have been far more active in the process of European legal integration than neorationalist and neofunctionalist scholars have asserted. These judges are not engaging with EU law for a benefit or to meet treaty obligations, rather judges are finding innate value in EU law and using it to expand their knowledge of the

law. By using the supranational dodge and massage, British judges are employing the use of horizontal jurisprudence to either meet their obligations to an international legal order, in the case of the EU, or avoid vertical jurisprudence from an international court, in the case of the ECtHR.

J. THEORIZING HORIZONTAL LEGAL INTEGRATION

i. INTRODUCTION

This section discusses the literature on judicial borrowing and specific conditions of horizontal legal integration. The importance of judicial empowerment of national courts which is necessary for judges to have the opportunity to borrow jurisprudence horizontally from abroad, as a necessary background condition to facilitate horizontal legal integration. The emergence of ways to conceptualize horizontal legal integration, specifically transnational judicial dialogue, has occurred recently in the international public law debate. Transnational judicial dialogue is the mimicking of foreign law cases, and “learning from them and enriching one’s own legal system” through new legal ideas (Laffranque 2008, pg 1287). Finally, this section engages in a discussion of the types of judicial communication a judge could potentially use when engaging vertical and horizontal integration.

ii. JUDICIAL EMPOWERMENT OF NATIONAL COURTS

Under international legal systems, strong and independent national court judges are not required to facilitate the spread of the international treaty law. The decisions of the ECtHR and ECJ would affect British law whether or not UK judges were powerful,

because these vertical international legal orders impose treaty obligations on Britain. It is more of a struggle to have the British Parliament ratify the EU and ECHR treaties and, because of the practice of dualism, incorporate them into domestic law than to have British judges incorporate them into their legal logics. Unlike vertical integration, horizontal integration relies directly on the power, independence, and influence of judges to operate. For horizontal communication and mechanisms to function, judges must have the capacity to be active players in making choices about how to interpret foreign law and what foreign law is relevant to case before them.

The historical progression of increasingly autonomous and powerful national courts (court empowerment) in Europe has allowed a process of transnational judicial dialogue to occur. The empowerment of courts refers to the degree of judicial autonomy and the ability to affect political and social change through judicial activism (Guiraudon 1998, pg 297), ability to act as quasi-legislators (Stone 1992), and capacity to act as full-time actors in social reform (Horowitz 1977; Schuck 1993). Long terms of service for judges, capacity for judicial review, and protections against interference through judicial independence, all limit the capacity of national government to dictate procedure and penetration of law for national high courts. Court empowerment is a necessary but not sufficient background condition for transnational judicial dialogue to occur. While it is possible to write an entire dissertation on the process of court empowerment, the focus of my dissertation is on the process of legal convergence and showing that there is convergence on a distinctively horizontal plane that is not dependent on vertical integration in an EU context. I discuss court empowerment because the citing of foreign

law is largely at the discretion of the judges and for judges to have this discretion requires them to be a part of courts which are empowered.

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

If transnational judicial dialogue is capable of any meaningful effect it is because courts have become an instrument of change. Through the empowerment of national courts, transnational judicial dialogue became possible. Before the empowerment of national courts, judges were capable of communicating and influencing each other across

national borders; there were no formal impediments to communication. However the capacity of judges to apply foreign legal concepts and/or influence the legal and political debate was institutionally limited by the lack of judicial power throughout Western Europe prior to the process of empowerment which gave judges the ability to engage in judicial activism and judicial review in the context of a constitutional court, act as quasi-legislators, and to act as full-time actors in social reform. The first European constitutional court was created in Austria in 1920. Austria has the third oldest constitutional court in the world. The United States (US) Supreme Court is the oldest constitutional court, becoming a constitutional court in 1803 through the case of *Marbury v. Madison* (United States Supreme Court 1803). Austria has the second oldest constitutional court partly modeled after the US Supreme Court and created by the Judiciary Act of 1903. The Austrian Constitutional Court was the first separate constitutional court created; meaning the court only grapples with constitutional issues and does not serve as the highest general court as well.

Prior to the process of court empowerment with the rapid spread of constitutional courts across Europe since the 1920's, many institutional constraints such as parliamentary statutes preventing the citing of foreign law, cases, and legal concepts were not uncommon, such as the Practice Statement of 1966. The logic behind removing restrictions on the citing of foreign law was done mainly for reasons of practicality. Long judicial appointments that are difficult to terminate without substantial evidence of incompetence and/or mental degradation made the law unenforceable in practice. It was also inconsistently used as an excuse to not renew judicial appointments for a second term which was seen as a more negative politicization of the judicial process (Markesinis

et al. 2006, pg 4-5). The process of court empowerment lessens the ability of the executive and legislature to control, influence, and determine the scope and powers of the national high courts.

iii. EMERGENCE OF TRANSNATIONAL JUDICIAL DIALOGUE

Transnational judicial dialogue is composed of horizontal, transnational interactions between national high courts judges, where judges across countries voluntarily draw upon each other's rulings, logics, and academic writings and incorporate them into their own logics and rulings (McCrudden 2000). The process of transnational judicial dialogue has furthered legal integration through the transmission of jurisprudence and legal concepts between different member state national judiciaries through informal, horizontal legal integration. Transnational judicial dialogue is not limited to European legal integration and can include any judiciary in the world; however, scholarship on the concept has been limited to the European Union and Commonwealth countries almost exclusively (See Kirby 2008; Lambert 2009; Miller and Bratspies 2008; Morement 2006; Waters 2004b; Waters 2008). Transnational judicial dialogue stems from an older term "International Judicial Dialogue" which appears to be around fifteen years old and was first used by Andrew L. Strauss to describe dialogue between international courts and national courts (Strauss 1995). Transnational judicial dialogue was first coined by a Michigan Law Professor Christopher McCrudden (McCrudden 2000) but has since been used extensively to describe a wide assortment of cross border judicial communication (Waters 2004b; Morement 2006; Kirby 2008; Miller and Bratspies 2008; Waters 2008; Lambert 2009). The historical progression of increasingly autonomous and powerful

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

Transnational judicial dialogue is a mechanism by which courts do become more similar in their interpretations. There have been instances of national court cases in different member states where the cases are comparable, dealing with the same context and same EU laws, but the outcome reached on the cases is different due to variation in national institutions, processes, and/or interpretations. An example of this type of conflict occurred over interpretation of the Single European Act of 1986 (SEA) and various European Parliament legislation on family unity and the legality of deporting individuals who were married to or the parent of EU citizens while not having citizenship themselves in three member state cases: *Chahal v. United Kingdom*, *Ahmed v. Austria*, and *HLR v. France* (Markesinis et al. 2006; European Court of Human Rights 1996;

European Court of Human Rights 1997a; European Court of Human Rights 1998). These three cases created mutually exclusive outcomes despite drawing from the same legal framework. All three cases involve decisions to deport an individual who had legally immigrated to a member state and married a member state citizen who acquired their citizenship through birth. The immigrant in each case was convicted of a non-violent crime (car theft) that was in violation of their status as non-citizens. In *Chahal v. United Kingdom*, the court decided that the individual had rights due to their material status to an EU citizen and would serve time in prison and then be allowed to stay if they desired to (European Court of Human Rights 1996). In *Ahmed v. Austria*, the court decided that the individual's rights to be united with their family were forfeited by the illegal action and they were deported (European Court of Human Rights 1997a). *HLR v. France* manages to cite the competing precedent of *Chahal v. United Kingdom* and *Ahmed v. Austria*, and declares them both wrong, deciding to send the individual to prison and to deport them after the sentences is served (European Court of Human Rights 1998). While this is only one example, it is illustrative of the limits of convergence effects of vertical integration and may be where horizontal integration can have its most profound impact.

In their book *Judicial Recourses in Foreign Law*, Markesinis et al see judicial dialogue as not “envisaging the possibility that foreign law could be used as *binding precedent* by judges but rather as a source of inspiration, especially when national law is dated, unclear, or contradictory” (Markesinis et al. 2006, pg 5). There has been a persistent skepticism about the degree of transnational judicial dialogue. Most of the literature on the phenomenon comes from lawyers and law professors and is part of the tradition of legalism, which is mainly descriptive, concerned with how it is used and the

legal ramifications of its use. There is also the emergence of a growing debate about its appropriateness and legitimacy (McCrudden 2000; Waters 2008). Judicial dialogue has often been characterized as dangerous, particularly by American judges and academics, which is ironic considering the US Supreme Court is one of the most influential and is regularly cited by foreign judiciaries (Markesinis et al. 2006).

The “mental disposition” of the judges has an effect on their decision to utilize foreign law (Markesinis et al. 2006). “Mental disposition” refers to the degree of open-mindedness of judges to explore and learn about foreign jurisprudence, since it is voluntary in most contexts. There are some contexts particularly in areas touched upon by supranational EU law that instructs judges to look for common standards that moves beyond the voluntary aspects such as the provisions in the European Convention on Human Rights. Horizontal integration flowing informally from transnational judicial dialogue does not have the capacity to compel integration the way in which vertical integration can, it is a voluntary process. But if judges are willing to learn about foreign jurisprudence and tackle common issues together through transnational judicial dialogue then they may be able to create an “informal network of domestic courts, interacting and engaging each other in a rich and complex conversation on a wide range of issues”(Waters 2008, pg 475). The ability of foreign law to penetrate the domestic legal sphere through transnational judicial dialogue is at the discretion of the judges.

iv. JUDICIAL COMMUNICATION

In *A Typology of Transjudicial Communication*, Anne-Marie Slaughter creates a typology based upon the degree of reciprocal engagement in legal communication

(Slaughter 1994, pg 112-114). The typology includes three parts: direct dialogue, monologue, and intermediated dialogue. To this typology, I add indirect dialogue and polylogue. This expanded typology represents all the way in which judges might communicate that can be looked for within judgments as signs of vertical or horizontal integration. This typology is useful as tool to direct scholars as to what to look for in legal cases to determine if vertical and/or horizontal legal integration has taken place. It is important to note that these methods of communication can be used as part of a vertical legal order or as part of horizontal communication that they are universal tools at the disposal of judges to either contribute to or hinder integration of both a horizontal and vertical nature.

Monologue is a form of communication without awareness that any further communication will result (Slaughter 1994, pg 113). A monologue is knowledge that is expressed without thoughts of a continued intellectual exchange on the subject matter. An example of a monologue is a judge writing a legal decision on a case before them. This becomes a form of communication because while no response is expected, the expectation that it will be read by some audience is expected. Indirect dialogue begins as a monologue but someone responds. This is also referred to as modelling in the comparative law literature. Modeling is a process “whereby one actor observes, interprets, and copies the actions of another” (Opeskin 2001, pg 1243). Indirect dialogue is not initiated by the actor producing the monologue, it occurs when an actor responds without prompting. Here a judge might write a legal decision and receive a response from another judge. What was intended as a monologue unexpectedly becomes a dialogue between two or more legal actors.

In contrast to indirect dialogue is direct dialogue. Direct dialogue involves “communication between two courts that is effectively initiated by one and responded to by the other” (Slaughter 1994, pg 112). Under Article 177, an EU member state court can use the preliminary ruling procedure to ask a legal question of the ECJ, to which the ECJ will provide a response. Judges writing scholarly articles in a compilation on the same topic directly responding to each other’s arguments or conversing at conferences are direct dialogue. Intermediated dialogue is when a court is involved in communication but does not control the dissemination of its ideas and jurisprudence. Here the court is engaging in a monologue, while a second court uses the monologue to facilitate further dialogue with other courts. An example would be the European Court of Human Rights (ECtHR) creating databases of all signatories of the ECHR on relevant human rights cases in hopes of facilitating cross fertilization of legal ideas (Slaughter 1994, pg 113). ECJ also engages in this behavior by creating synthesis of national law and legal traditions of member states to aid in deciding ECJ cases.

Polylogue is rarely a term heard outside the theater. In the context of the theater, a polylogue is when two or more actors step outside the flow of time in a play to provide information to the audience or to directly engage in conversation with the audience. I use the term polylogue to describe when two or more legal actors use their direct dialogue to solicit dialogue with a wider audience. An example would be direct dialogue between German and British judges on ECJ supremacy with the hopes of sparking a debate among EU member state judges on the validity of EU constitutional supremacy over national constitutions (Alter 2001; Reid 2004).

v. CONCLUSION

This section has sought to discuss the tradition of horizontal judicial borrowing including transnational judicial dialogue. Transnational judicial dialogue is composed of horizontal, transnational interactions between national high courts judges, where judges across countries voluntarily draw upon each other's rulings, logics, and academic writings and incorporate them into their own logics and rulings (McCrudden 2000). Transnational judicial dialogue becomes possible due to continued domestic processes of judicial empowerment that strengthen the independence of national judges and allow them the freedom to choose whether or not to engage in judicial borrowing of foreign law. Added to this discussion is the inclusion of a typology of communication showing the potential ways of communication between judges and guiding researchers for what to look for as signs of vertical and horizontal legal integration.

K. CHAPTER CONCLUSION

This theory chapter sought to address two areas of theoretical concern for this dissertation project. First, what is the role of judges in domestic and international environments? This section chronicled the logic on how the role of judges evolves from their beginnings as purely domestic legal actors to engaging international treaty law to be able to become horizontal borrowers of law from abroad. This discussion of the evolving role of judges brings into question the legitimacy of the use of foreign law which is highly contested. Second, this chapter grapples with the European legal integration literature including both vertical and horizontal aspects. These sections discuss issues including the degree of attention paid to the ECJ, the conceptualization of integration,

convergence and divergence, neorationalist and neofunctionalist arguments, the dodge and massage argument to be presented in the empirical chapters, and how to theorize on horizontal legal integration.

The distinctive argument of this dissertation is that national judges employ the tactics of dodging and massaging their relationships to international legal orders as a means of controlling the impact and uses of international law within their domestic polity. In the EU, British judges dodge the hard to understand civil law judgments of the ECJ and massage their relationship to the ECJ by absorbing EU law from horizontal actors that have clearly outlined the principles of EU law. In the Council of Europe, British judges dodge the jurisprudence of the ECtHR that they find contentious, opting instead to massage their relationship to the Convention by utilizing horizontal jurisprudence that is alignment with the British interpretation of the Convention.

The dissertation proceeds with an introduction to the Commonwealth legal system, where British judges first began to explore the uses of judicial borrowing. In the Commonwealth legal system, the British are exposed to numerous opportunities to engage in horizontal borrowing of the common law from former colonial holding that have since become independent and have had different evolution of the common law in their domestic landscape. The goal of the next chapter is to explore where and how British judges learned to be horizontal borrowers of the law.

CHAPTER III

THE COMMONWEALTH AND THE ORIGINS OF FOREIGN BORROWING

A. INTRODUCTION

This chapter traces the historical origins of British foreign borrowing of jurisprudence from the common law traditions of the British Imperial Commonwealth to the modern horizontal network of the Commonwealth of Nations. Through the creation of the British Empire, Britain established a system of one-way borrowing that was largely the imposition of common law ideas from Britain to the colonies of her empire. This effort to translate the common law into the legal systems of the indigenous populations of the colonies, led to renewed interest in defining and reforming the common law and in what other legal systems had to offer in terms of legal ideas. The importation of the common law through colonialism resulted in many independent common law legal systems around the globe existing today, these common law systems evolved overtime to engage in judicial borrowing and sharing of unique views on the common law. As decolonization and loss of Empire proceeded for the British, the Commonwealth of Nations was conceived and started in 1949 as a means of maintaining close economic, political, cultural, and legal ties between the British and their former colonies. The historical origins of judicial borrowing stemming from the British Empire and continuing horizontally with the Commonwealth of Nations have shaped the way in which British judges have engaged with supranational law emerging from pan-European legal

institutions. The goal of this chapter is to utilize the history of the British Commonwealth and the Commonwealth of Nations to show the origins of British judges borrowing foreign law. From this historical experience, we can begin to see lessons learned in the common law tradition being applied by British judges to the European legal orders they would one day become a part of.

This chapter begins with a brief discussion of the vertical legal order of the Commonwealth where the initial borrowing of common law ideas occurred. This section explores the first known cases of judicial borrowing of the common law and European law and traces the sporadic patterns of borrowing of the eighteenth and nineteenth centuries. Afterwards, the chapter turns to the horizontal legal order of the Commonwealth. These sections explore the creation of a horizontal common law, the history of the horizontal Commonwealth, the renewed interest in the Commonwealth that followed WWII and recent examples of Commonwealth borrowing by the Supreme Court of the UK.

B. THE VERTICAL ORIGINS OF BRITISH JUDICIAL BORROWING

i. INTRODUCTION

The origins of the common law originate with the Norman invasion of the British Isles in 1066 (Caenegem 1988; Glenn 2010, pg 238; Rivlin 2012). The common law was created as judge-made law in hopes of bridging the divide between the Norman conquerors and the Anglican indigenous population of the British Isles (Brand 1992). The basis for the common law is the idea of precedent and included the involvement of the Normans, the Anglicans, and the common people through the idea of the “reasonable

man.” The common law eventually spread through conquest as the British Empire expanded throughout the globe under the practices of British colonialism (Dworkin 1986; Cooke 1997; Marshall 2003). By spreading the common law across the globe, the British were populating the world with legal systems that share the English language as well as a set of familiar legal concepts. Judicial borrowing involves both mimicry and learning from other sources of law beyond the domestic environment, when borrowing from other common law systems the costs of translation and understanding are reduced (Laffranque 2008, pg 1288). In essence, the British Empire created numerous legal systems in the world where British judges could engage in judicial borrowing without the fear of translation and limiting the possibilities of misunderstanding foreign law. This section will discuss the first known instances of judicial borrowing in the Commonwealth and sporadic judicial borrowing in eighteenth and nineteenth century England.

ii. A FIRST TIME TO BORROW COMMON LAW

There is a surprisingly old tradition of judicial borrowing by the British from the Commonwealth. Judicial borrowing can be understood as “to broaden one's vision; it does not necessarily need to result in copying foreign examples, but can result from learning from them and using international, European, and comparative law as tools in domestic legal adjudication” (Laffranque 2008, pg 1288). Judicial borrowing can be used to implement treaty obligations, ensure the protection of the rule of law and human rights, and effective application of European and Commonwealth law. The act of judicial borrowing can say a lot about the legal culture of a society and whether the judges embrace judicial isolationism or judicial globalism (Slaughter 2000). The European

Convention on Human Rights requires member state courts to take into consideration ECtHR and member state courts decisions involving the Convention (Laffranque 2008, pg 1289). It is thought that

A judge from a country with rich legal traditions, considerable size, and that is an experienced player in global legal world perhaps tends less to look at the practice of others. He or she has enough to study with all the relevant materials and doctrines in his or her own legal culture, whereas a judge from a state of young democracy, where legal reforms are still part of everyday work, would likely be more interested to look at the experience of his or her colleagues abroad (Laffranque 2008, pg 1291).

Yet the UK meets this criterion, except being a young democracy, and still regularly borrows. Judicial borrowing regularly occurs between imperial powers and their colonies such as the enshrinement of common law ideas in the American Bill of Rights (Glenn 1987, pg 261 and 296; Lester 1988, pg 537 and 541) and between Commonwealth states (Slaughter 2000, pg 1116). The Practice Statement of 1966 made the use of any relevant foreign law legal (Commonwealth law was already an exception that was not only legal but encouraged to be used) to use by judges in deciding their cases, but the use of foreign law by judges was regularly done prior to 1966. Since 1621 and the creation of the Committee for Petitions within the House of Lords, judges were forbidden by Act of Parliament to use foreign law outside of the Commonwealth for fear foreign ideas and jurisprudence would corrupt the long standing tradition of English law and lead to a lack of respect of precedent in an ever expanding British Empire (Plucknett 2010).

The Commonwealth is the international environment where British judges first learn to borrow from their fellow common law judges around the globe. The early Commonwealth borrowing is largely in one direction, the imposition of the common law

from the British to their various colonies. The practice of spreading the British common law to colonies began in the early seventeenth century with British colonial holdings in the Americas in the Jamestown settlement (now the US State of Virginia) and Jamaica. Little is known about how the common law was imported to these early colonies, other than English judges were sent to preside over the colonial judicial systems in service to the King and the common law was meant to be directly applied to the colony with little to no alteration from the English system (Nelson 2008). The first cases of the imported common law overseen by British judges on behalf of a colonial holding began in the Americas in 1607 in the Jamestown Settlement (Nelson 2008, pg 3).

By the end of the seventeenth century, we can see judicial borrowing of the common law. The first known citation of a foreign common law by an English judge in an English court was in 1697 in *Chamberlain v. Harvey* which cited a 1619 Virginia case involving private property disputes of slaves (Nelson 2008, pg 23; Somers 1697). The earliest cases of judicial borrowing by British judges stem from a lack of precedent in the English common law and an attempt to find cases on the issue from another common law system that might provide guidance or at a bare minimum ways to start thinking about the common law in the context of a new legal dilemma. This early judicial borrowing was to fill a void in English common law. Slavery had not been an issue covered by the English common law and was not a concern in England until late in the seventeenth century, while slavery had been introduced in the English colonies of America almost immediately and had been rigorously defined in the American common law since the early seventeenth century.

**iii. SPORADIC BORROWING OF THE EIGHTEENTH & NINETEENTH
CENTURY**

In the eighteenth and nineteenth centuries borrowing of non-English common law did occur but it was sporadic and unpredictable, occurring because a particular judge had knowledge of another common law system from serving the King abroad as a colonial judge (Blackstone et al. 1786). Lord Mansfield C.J. (Law Lord and Lord Chief Justice from 1756-1788) was publicly criticized for his regular and abundant use of foreign law in many legal cases by a famous series of anonymous letters published under the pen name *Junius* (thought to be Whig politician Sir Philip Francis) in the *London Evening Post* in 1770, as follows:

In contempt of the common law of England, you have made it your study to introduce into the court where you preside, maxims of jurisprudence unknown to Englishmen. The Roman code, the law of nations, and the opinions of foreign civilians, are your perpetual theme; but whoever heard you mention Magna Carta or the Bill of Rights with approbation or respect? By such treacherous arts, the noble simplicity and spirit of our Saxon laws were first corrupted (Mance 2001, pg 419).

Lord Mansfield's use of foreign law in the eighteenth century may have been viewed by some as an abominable reformer of English law seeking to pollute it with foreign law even as the American Revolution was occurring. Lord Mansfield faced no sanctions from the House of Lords and enjoyed a long judicial career. Since Lord Mansfield's enthusiasm, the use of foreign law has become more common place and less inflammatory well before the Practice Statement of 1966 made it legal. The idea of diminished responsibility in criminal trials was borrowed from the Scottish civil law

code; the English conception of the Ombudsman (public advocate) was acquired from the Scandinavian countries; and the Practice Statement of 1966 was similar to age-old Continental practice of reserving the right not to follow any of its past judgments if they might produce an unjust verdict are all examples of judicial borrowing (De Cruz 2007, pg 17). Lord Mansfield use of foreign law in British legal cases illustrates that judicial borrowing involved not only common law borrowing in the eighteenth century but also judicial borrowing from continental European sources as well (Mance 2001, pg 419). Lord Mansfield's interests in foreign law stemmed from his desire to reform and update the common law, which had evolved little since its solidification in the twelfth century (Blackstone et al. 1786). To bring the common law into the modern era, he looked extensively at other common law jurisdictions and continental European law codes as inspiration. The eighteenth and nineteenth centuries saw an influx of civil law ideas into the common law and became known as the common law of obligations as a means to update and modernize the common law system (Ibbetson 1999; Cooke and Oughton 2000). The common law of obligations refers to a duty that must be performed in a given situation, a prescribed set of behaviors that are dictated by the law rather than the common law conception of what the reasonable man would do. The common law of obligations begins to incorporate aspects of the precision of the civil law's statute law into the common law. Lord Mansfield's interest in foreign law is largely due to his idiosyncratic desire to reform the English common law, as was the case with most judges who engaged with foreign law at this time period (Mance 2001, pg 419). Lord Mansfield is cited by the literature as among the first examples of a British judge borrowing European law since the common law became inoculated against Roman systems of law in

twelfth century (Brunner 1908, pg 42). These first instances of borrowing within the Commonwealth are infrequent and largely based on the personality and personal experiences of the judge involved.

Through colonization there were two means by which the common law was introduced (Blackstone et al. 1786). The first was when the colony contained a large English population such as Australia, Canada, and the Americas. Here the common law was declared the law of the land for all within the territory and English common law was simply transferred to the colony verbatim (Blackstone et al. 1786). In this first case, there was little reason for judges back in England to draw from the colonial common law because it was so close a carbon copy of the English system. The only reason to employ the colonial common law was when it faced a new legal issue that had never emerged in England such as the issue of slavery in the cases discussed above. Later as these systems evolved free of British control, their common law evolved in new trajectories and they became the favored sources of jurisprudence for British judges (Lord Mackay of Clashfern 2012).

The second, when the colony did have an English population, but was small in comparison to the indigenous population such as India, Hong Kong, and South Africa, the common law is introduced slowly and with regard to blending it with the indigenous law of the land (Blackstone et al. 1786). This spread of the common law led to the eventual creation of hybrid legal systems that blend some combination of common, civil, and traditional law (Sauveplanne 1982; Watson 2008; Glenn 2010). In the second type of colonial law importation, English judges were required to learn something about the pre-colonial law of the colony in order to combine the colonial common law with the

traditional law of the colony. In this second type, the combining of the colonial common law and the traditional law may have resulted in new legal ideas by judges, which might have been perceived as better solutions to legal issues than what previously existed in the English common law. When this second type occurred, judges choosing to return from the colonies to England might bring some new ideas back with them and apply them to cases as they resumed their duties in English courts.

English judges were sent to the colonial holding to preside over the colonial legal systems from the sixteenth century until the creation of the JCPC in 1833 (De Cruz 2007, pg 16). After the creation of the JCPC, English judges were often posted to colonial judiciaries, but the colossal task of assimilating the indigenous law of the country with the common law was transferred to the JCPC sitting in London (Marshall 1968). This included exposure to numerous legal systems to integrate them with the common law such as Hindu and Islamic laws (India), Singhalese and Tamil laws (Ceylon), Chinese law (Hong Kong, the Malay States, Straits Settlements, Sarawak and Borneo), Roman-Dutch law (Ceylon, South Africa and Rhodesia), aspects of the French Civil Code contained in the Canadian Civil Code of 1866 (Quebec), Norman customs (The Channel Islands) and African and Asian customary laws (South Africa, Hong Kong, and others) (De Cruz 2007, pg 16). The JCPC established a powerful vertical legal order than spanned the entire British Empire requiring the obedience of colonies to its judgments with absolute colonial authority. The JCPC only heard a small minority of colonial cases averaging about two to three dozen cases per year; colonial courts still handled the bulk of legal issues in the colony (Brand 1992). The JCPC reserved its small caseload for only

large scale colonial issues or cases where there was no common law precedent to guide colonial judges (Blackstone et al. 1786).

iv. CONCLUSION

Judicial borrowing under the British Empire was sporadic and very little effort has been made to uncover how often it occurred and under what circumstances. By the twentieth century, the English grip on their colonial holding was already slipping and a horizontal relationship began to emerge. Talk of forming a voluntary Commonwealth of Nations began during the Imperial Conferences in 1911 as former colonies of the British Empire were obtaining a peaceful independence from the British Empire (Hall 1971, pg 3). The Balfour Declaration of 1926, began to allow the colonial holding to decide if cases should be heard locally or at the JCPC stating that “questions affecting judicial appeals should be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected” (Inter-Imperial Relations Committee 1926, section IV. e). The Imperial Conference of 1911 was the first step in the end of the vertical legal order under the British Commonwealth. The next sections will turn our attention to the horizontal legal order of the Commonwealth.

C. THE BIRTH OF A HORIZONTAL LEGAL ORDER

i. INTRODUCTION

The aim of this section is to discuss the historical origins of the horizontal legal order of the Commonwealth that emerged during the decline and collapse of the British Empire. The early twentieth century marked a period of increased awareness of the

various common law systems that could be sources of horizontal inspiration. This section discusses the formation of the Commonwealth of Nations, how British colonies decided to remain committed to the use of the common law after British colonial forces had left, and a renewed respect in the post-World War II environment for what other common law systems had to offer in creating best practices of the common law.

ii. POST-INDEPENDENCE COMMON LAW

As the empire broke up, the powers of state devolved outwards creating a new “principle of association among the emerging states of the Commonwealth founded upon the voluntary cooperation, consultation and mutual support” (McIntyre 1977, pg 460). The loss of empire coincided with the rise of the movement for European unity and demanded a choice for the British as to their new purpose. On the one hand, the British could have joined the European projects forming in the post-WWII environment, the formation of the European Coal and Steel Community and the Council of Europe, in the latter of which Britain was a founding member. On the other hand, the British could devote themselves to the Commonwealth and take a prominent role as a leader, no longer the sole authority, but nonetheless an influential stable democracy among many nations attempting to achieve the same. While Britain did eventually strive to be a part of the European Community, their primary goal was a focus on establishing a Commonwealth community (McIntyre 1977, pg 464). The Commonwealth was a means of maintaining some of the purpose, prestige, and influence that the British held during the British Empire. For the states who decided to remain connected to the British, through a free association of the Commonwealth, it represented an opportunity to expand their authority

on the international stage, reframe their relationship to the British as one of equals, and for material advantages in the early Commonwealth trade agreements (McIntyre 1977, pg 470). These ideas colored the workings of the Commonwealth as well as inspiring new ways for the former colonies and the British to interact.

Under the British Empire, the highest court of appeal was the Judicial Committee of the Privy Council (JCPC) where members of the colonies could bring cases on the common law. The JCPC became a mechanism of continual interaction between British judges and other common law judges as well as other common law systems. As states obtained independence, the JCPC lost many of its colonial members, but retained authority on the meaning of the common law and its application within the thirty-one remaining jurisdictions. The Commonwealth of Nations does not bind any of the members to legal obligations but rather facilitates cooperation and consultation between the members and formal treaties between several members of the Commonwealth have emerged through this shared space. The Commonwealth of Nations creates a horizontal relationship between the states to protect democracy, human rights, and respect of the rule of law. The vertical legal order created by British colonizers is no more, under the horizontal legal order now in existence, member states are expected to share their knowledge of the common law in hopes that all members will benefit from advancements in the understanding and evolution of it. The high courts of Britain, Australia, Canada, New Zealand, and South Africa have all become leaders of the Commonwealth international legal order and the interpretation of the common law.

iii. COLONIES KEEP THE COMMON LAW

Most colonies decided to keep the common law system that had started under colonialism largely due to the appeal of the common law. The common law began as a law of procedure (Glenn 2010, pg 243), where judges would look for a similar case and apply the logic or if none was available use the basic ideas of the common law to create a logic and thus establish a tradition of *stare decisis* (precedent) as a matter of first impression (Caenegem 1988). A matter of first impression is when there is no precedent available to draw upon and the judge must create logic by which to base their decision on and may look to other states for inspiration (Munday 1983; Markesinis 1994). This tradition of *stare decisis* made up for the lack of a codified legal system by allowing each judgment to represent a rule of law to be followed in the future, creating a predictable pattern to the law. Common law borrowed much from the existing legal traditions: trials and procedure from Roman law, juries from Islamic law, traditions from chthonic law, representation and contestation from civil law, and their own invention of the writ (Glenn 2010, pg 243; De Cruz 2007). Beginning as a hodgepodge of legal procedures, ideas, and traditions, the common law evolved to be quite distinct from any of the legal systems it originally borrowed from. The common law system also became readily palatable to the British Isle with its focus on the “reasonable man” as a juror deciding the case (Glendon et al. 1994; Rivlin 2012). This also made the common law quite palatable to countries conquered by the British Empire since the “reasonable man” in this context became a local deciding the outcome in a common law trial (O'Scannlain 2004; Plucknett 2010). This was often a system of law for the common man who was more relatable than forms of law in colonies prior to colonization and serves to explain why British colonies clung

to the common law after independence (Laskin 1969; Axline 1978; Crawford 1982; Dworkin 1986; Cooke 1997; Armitage 2007). Roughly a third of the world's population lives in a state with a common law legal system today.

Once the British common law had been integrated into a new community, the colonized were hesitant to relinquish the common law even after independence from the British Empire and their own nationalist movements (Laskin 1969; Axline 1978; Crawford 1982; Dworkin 1986; Cooke 1997; Armitage 2007; De Cruz 2007). That fact that the colonized retained the common law after the British left becomes a critical moment for the history of British judicial borrowing. Had many of these new states relinquished the common law and reverted back to their traditional law or adopted European civil law codes, British judges might not have engaged in judicial borrowing if was not from a familiar feeling common law system. As the British Empire began to break up, the Commonwealth of Nations was conceived of as means to maintain close alliances with former colonies, engage in trade, and share a common culture and traditions. Officially taking shape with the London Declaration of 1949 and the Commonwealth Charter, the Commonwealth now encompasses fifty-three states from around the globe all united by a common history, language, traditions, and respect for democracy and the common law (Jennings 1957, pg 23). At the time of its creation the Commonwealth provided a large united group of trading partners which rivaled the opportunities presented by the in the works proposal of the creation of the European Coal and Steel Community (McIntyre 1977; Bodin 1992; Ferguson 2003).

*iv. RENEWED INTEREST IN THE COMMONWEALTH IN THE POST-WWII
ATMOSPHERE*

Under the new horizontal Commonwealth, British judges held no position of authority over the common law and the JCPC functions became voluntary even for the thirty-one jurisdictions that still send cases to it. Britain has engaged with foreign common law courts and has become both a producer and consumer of the common law. England as the source of the common law has done much to advance the quality of the common law jurisprudence and remains a much cited source of common law authority within the Commonwealth. The courts of Britain have also recognized the advancements made by member states of the Commonwealth and have engaged in judicial borrowing of the common law from other Commonwealth member states. As the horizontal legal order formed, British judges began to recognize the advancements made by other common law courts, including advancements made during the vertical era unbeknownst to British judges (Brand 1992; O'Scannlain 2004; Nelson 2008; Plucknett 2010).

Citation of other common law jurisdictions is widely done in Britain (Glenn 2010, pg 267) and often other common law jurisdiction are thought to have a capacity to persuade (Glenn 1987; Glenn 2003; Nelson 2006). The process of judicial borrowing is not random; it is more likely to occur between actors who share similar attributes and have improved channels of communication (Opeskin 2001, pg 1243). Despite formal recognition that there are distinct common laws within the Commonwealth, this does not seem to have impaired the cross fertilization of law between Commonwealth countries (Marshall 1968; Laskin 1969; Crawford 1982). By the twentieth century, Britain began

to focus on the exchange of ideas between Commonwealth states as the primary source of new legal ideas and as the first place to look when seeking foreign law (Cooke 1997).

The Law Commissions Act of 1965 provided recognition from Parliament on the importance of comparative law and created two Commissions, one English and one Scottish, to “obtain information from other [common law] legal systems of other countries, as appears likely to facilitate their function of systematically developing and reforming the law of their country” (Law Commissions Act 1965 section 3(1)). The purpose of the Commissions was to determine how common law principles were applied in other states and in consultation with foreign legal actors, discover the best practices of the common law which could be used to enhance the British common law system (Dworkin 1986). Comparison can involve a strong sense of neutrality and critical self-assessment to be applied to British courts (De Cruz 2007, pg 18).

The initial link between the JCPC and colonial common law systems helped to impart judges throughout the British Commonwealth with a global outlook on the basic principles of law, an interest in comparative and international law and “a conviction that wisdom was not necessarily local but that sometimes help could be found in difficult problems by looking beyond one's own borders” (Kirby 2006, pg 333). The Commonwealth also provided a global network of professional bodies and organized conferences to exchange ideas and experiences funded by the Commonwealth Secretariat (Kirby 2006, pg 334). An example of the Commonwealth Secretariat organizing such a conference was the Commonwealth International Law Conference in Bangalore, India, in February 1988. Even the JCPC has remained relevant for longer than might have been anticipated as several jurisdictions have only recently left. New Zealand, which has its

own established court system, only withdrew from the JCPC in 2003. Even some British judges would like to end this reliquary court. Lord Phillips, a current UK Supreme Court judge, was quoted by the *Financial Times* as saying: “in an ideal world' Commonwealth countries — including those in the Caribbean — would stop using the Privy Council and set up their own final courts of appeal instead” (Staff Writer 2009).

The use of foreign law can be seen as a danger due to the lack of training for judges on how and when to use it. Foreign law can be ambiguous and require knowledge of other legal systems and foreign languages. The use of foreign law can challenge the legitimacy of the laws in question since they emerge from a different community with different norms and values that have been institutionalized. Referring to the common law of former colonies alleviates some of these difficulties. When English legal authorities are not available or clear, the preferred sources of law from abroad are Commonwealth sources of law particularly those from Australia, Canada, and New Zealand which are familiar to British judges, according to interviews with British Law Clerks.

In the European context, the conversions as to the uses of foreign law are usually about "when, where, how, and with what weight?" (Jackson 2007, pg 161). Keeping the domestic context of the foreign law in question is very important to British judges who find inspiration from sources colored by a domestic, historical situation in which Britain has no direct comparison such as Germany, South Africa, and Israel. German law has become quite popular in its use in the UK (Micheler and Prentice 2000; Mance 2001), but when borrowing decisions from the Bundesverfassungsgericht (Federal Constitutional Court of Germany or BVerfG) a British judge must always remember that these judgments are influenced by an effort to avoid repeating the horrors of the Nazi regime.

Such as in 1994 when the BverfG decided section 130 of the German Penal Code which makes it illegal to engage in Holocaust Denial is not a violation of free speech which it is in the UK because in Germany Jews have the right to human dignity under the German Constitution which includes a recognition of the persecution they experienced during the Holocaust. Similarly, the Constitutional Court of South Africa has made many decisions to show a definitive break with the traditions of Apartheid and the Supreme Court of Israel makes its decisions against the backdrop of the Israeli-Palestinian conflict.

The colonies that were settled by many British immigrants “incorporated the entire corpus of English common law” into the territory and have remained the states most likely to be cited by the British such as Australia, Canada, and New Zealand (Opeskin 2001, pg 1259). Lord Carnwath, a current Supreme Court judge of the UK, when asked where to look for legal jurisprudence and inspiration when the domestic law does not provide the requisite material, replied, “In absence of relevant English authorities...[we look to] case law from Commonwealth and other common law jurisdictions dealing with comparable legal issues, particularly Australia, New Zealand, and Canada” (Lord Carnwath of Notting Hill 2012). Judicial borrowing is a means of adding to the common law to bring it in line with international norms or to fill voids where the common law is incomplete or uncertain (Opeskin 2001, pg 1265). Judicial borrowing cannot take “place without the provision of forums in which dialogue is promoted” and the Commonwealth of Nations provides an open forum to exchange ideas with judges trained in the common law (Opeskin 2001, pg 1271). In fact, most English speaking common law countries share a core set of ideas that are taught in law school,

with examples given from many common law jurisdictions used abundantly (De Witte and Forder 1992).

v. CONCLUSION

The common law's ability to evolve and incorporate aspects of the culture and traditions of the indigenous populations conquered by the British led to an enduring common law system globally despite the loss of empire. In this environment emerged the Commonwealth of Nations as an association of states that were former British colonies and Britain itself. The Commonwealth of Nations united its far-reaching membership of fifty-three states on the basis of a share history, language, traditions, and common law. The post-World War II environment brought a renewed interest in learning from the Commonwealth and recognition by the British Parliament of the importance of foreign common law knowledge.

D. HORIZONTAL COMMONWEALTH TODAY: RECENT EXAMPLES OF HORIZONTAL BORROWING

i. INTRODUCTION

This section aims to show some of the most recent cases of the Law Lords and the Supreme Court of the UK borrowing common law. Since the creation of the horizontal Commonwealth British judges have remained active in Commonwealth conferences and in interacting with common law judges. Lord Millett, a retired Law Lord whom I interviewed, had recently returned from Hong Kong, where he had served as a judge at the Court of Final Appeal in Hong Kong. Lord Millett recalled to me the case of *China*

Field Limited v. Appeal Tribunal (Buildings) (Hong Kong High Court 2009) where English common law was widely used and he was asked to write the judgment of the court (Lord Millett 2012). This section will discuss a series of British legal cases and the various uses of judicial borrowing in them from a wide variety of sources of the common law.

ii. CASES LOOKING TO THE COMMONWEALTH

The influence of other sources of common law is vast. The following descriptions of a few cases that relied heavily on common law sources are meant to illustrate the trust and degree of judicial borrowing between various common law judges. In *Various Claimants v. The Catholic Child Welfare Society* (United Kingdom Supreme Court 2012e, referred to as *Catholic Child Welfare Society*), a complex case on the issue of vicarious liability for child abuse by Catholic priests within the UK, the legal logic of the case relied heavily on Canadian case law. The subject matter of the case led to extensive press coverage, as well as the difficulties of grappling with a case involving Catholic priests, in a state with a thorny relationship with the Catholic Church. Vicarious liability allows for an organization to be held responsible for the actions of one of its members, which has become an increasingly important legal principle in child sexual abuse cases which have come to light in greater frequency recently in churches, schools, and boys and girls clubs. Unlike many individuals, the organizations behind them have the resources to pay restitution to the victims. In the decision of the *Catholic Child Welfare Society*, the Supreme Court relied heavily on the Canadian cases of *Bazley v. Curry* (Supreme Court of Canada 1999a) and *Jacobi v. Griffiths* (Supreme Court of Canada 1999b) to aid

in their judicial logic (United Kingdom Supreme Court 2012e). *Bazley v. Curry* created a two-stage test for vicarious liability which Lord Phillips, current Supreme Court of the UK judge, directly adopted with no noticeable modifications from the Canadian version (Supreme Court of Canada 1999a; United Kingdom Supreme Court 2012e). This shows a significant degree of trust in Canadian judges and the capacity of law to be persuasive. The Canadian case of *Bazley v. Curry* has become widely cited in the Commonwealth including previously in the UK in *Lister v. Hesley Hall Ltd* (United Kingdom House of Lords 2001a) a child sexual abuse case involving schools and elsewhere in cases such as the Australian cases *Hollis v. Vabu Pty Ltd* (High Court of Australia 2001) and *New South Wales v. Lepore* (High Court of Australia 2003). *Jacobi v. Griffiths* applied *Bazley v. Curry* to nonprofit organizations making organizations such as boys and girls clubs and religious groups subject to vicarious liability (Supreme Court of Canada 1999b). *Jacobi v. Griffiths* provides an argument for why the two-stage test for vicarious liability is applicable to nonprofit organizations including the Catholic Church (Supreme Court of Canada 1999b). In this direct borrowing of legal principles from the Canadian system we can see the level of judicial borrowing occurring within the Commonwealth and the degree of trust between British and Canadian judges.

In *New Cap Reinsurance v. A E. Grant, Lloyd's* (United Kingdom Supreme Court 2012b), is a case on the discharging of a liquidator's obligations. The British case cites numerous legislative acts and court cases from Australia in its logic. The Foreign Judgments (Reciprocal Enforcement) Act of 1933 is also used, the "Act to make provision for the enforcement in the United Kingdom of judgments given in foreign countries which accord reciprocal treatment to judgments given in the United Kingdom"

(Foreign Judgments (Reciprocal Enforcement) Act of 1933, chapter 13). The act is invoked because New Cap is an Australian company which may induce the judges to look to Australian jurisprudence for their procedures; however, all property being liquidated is located within the United Kingdom. *Rubin v. Eurofinance SA* (United Kingdom Supreme Court 2012d) is a case on international insolvency law. The case draws upon a wealth of foreign law including more than sixty references to Australian jurisprudence, half a dozen references to Canadian jurisprudence, and at least one citation of Irish, Swiss, German, Belgian, and French law, providing a lively international jamboree on various types of international insolvency laws (United Kingdom Supreme Court 2012d).

In the JCPC case *La Générale des Carrières et des Mines v. FG Hemisphere Associates LLC* (Judicial Committee of the Privy Council 2012, referred to as *La Générale*) the British judges utilized cases from numerous Commonwealth states and one non-Commonwealth common law state to determine the outcome. The case involves whether state debts can be enforced against state-owned companies. The non-Commonwealth state cited, while a common law system, is the US Supreme Court case *First National City Bank v. Banco Para el Comercio Exterior de Cuba* (United States Supreme Court 1983, referred to as *First National*) which found a completely state-owned company liable for debts incurred by a state if the state was unable or unwilling to provide redress (United States Supreme Court 1983, section 1). The Supreme Court of South Africa case *Shipping Corporation of India Ltd v. Evdomon Corporation and Another* (South Africa Supreme Court of Appeal 1993) was cited, though it expressed a different logic than the US case while coming to the same conclusion. The Canadian

Supreme Court's decision in *Roxford Enterprises S.A. v. Cuba* (Canadian Federal Court 2003) was also cited and utilizing *First National* in its arguments came to the same conclusion against the same state as the US case had (Canadian Federal Court 2003, paragraph 30). These three cases from various common law jurisdictions were all utilized in *La Générale*, a decision brought to the JCPC by the Royal Court of Jersey in the Channel Islands, one of the thirty-one remaining jurisdictions of the JCPC, against companies from the Democratic Republic of the Congo (Judicial Committee of the Privy Council 2012). These cases all show a reliance on other common law jurisdictions in accessing the limits of the common law. British judges are borrowing regularly from their fellow Commonwealth judges.

**iii. LOOKING TO THE COMMONWEALTH RATHER THAN EUROPEAN
SOURCES OF LAW**

In the case of *R (Prudential) v. Her Majesty's Revenue & Customs* (United Kingdom Supreme Court 2013a, referred to as *Prudential*) the Supreme Court heard oral arguments that included several EU member states as well the Commonwealth states of Australia, Canada, and New Zealand. In the written decision of the Supreme Court, however, only the Commonwealth states were discussed. The case of *Prudential* involved whether legal advice on tax law by chartered accounts was protected under the principle of legal advice privilege, protection from disclosure to a third party. The appeal was dismissed with a ruling that argued that in the common law, legal advice privilege does not apply to those not in legal professions such as accountants (United Kingdom Supreme Court 2013a). The case relied on showing that other common law jurisdictions

operated in this respect including Australia, Canada, and New Zealand (United Kingdom Supreme Court 2013a). Finding a common law consensus on the legal advice privilege was the critical piece of judicial logic in the decision.

Imperial Tobacco Ltd v. Lord Advocate of Scotland (United Kingdom Supreme Court 2012a, referred to as *Imperial Tobacco*) was a case involving EU law concerning consumer protection. The case concerned a new Scottish regulation requiring an end to displaying cigarettes in public spaces where children could see them. From the literature on EU consumer protection we can posit that there are numerous cases available from ECJ case law to draw upon including *Procureur du Roi v. Dassonville* (European Court of Justice 1974c) and *Deutscher Apothekerverband eV v. 0800 DocMorris NV and Jacques Waterval* (European Court of Justice 2004; Unberath and Johnston 2007). However, in 2011, Australia implemented a new set of consumer protection laws including adopting EU standards of consumer protection to facilitate trade with their largest trading partner the EU under the Australian Consumer Law (ACL) (Corones 2013). To understand EU law and why they had not violated it the Lord Advocate's case drew strongly on the ACL legislation and the Australian case of *Google Inc v. Australian Competition and Consumer Commission* (High Court of Australia 2012) the first High Court of Australia case involving the ACL (Corones 2013). The Supreme Court of the UK sided with the Lord Advocate, citing both the ACL and the Australian *Google* case in their logic and adopting the solution that once a customer has expressed interest in a type of cigarette and provided identification they may be shown the product to view it without being obligated to purchase and thus the consumer and children are both protected (United Kingdom Supreme Court 2012a, paragraph 4). *Imperial Tobacco* was a case

concerning EU law, yet the Commonwealth state of Australia was used to provide the logic of the decision held by the Supreme Court. When I asked the Barrister of the Lord Advocate of Scotland why he was using Australian cases, he looked puzzled. “Why not? It’s the common law,” he replied, as if to suggest the common law in any form was more relevant to the case than the jurisprudence of the ECJ (Barristers 2012).

Imperial Tobacco is not the only case in which the British rely on the Commonwealth to help them fulfill an obligation to a different international legal order. In determining how to incorporate the European Convention on Human Rights into domestic law, the Labour government modeled the Human Rights Act of 1998 on New Zealand’s Bill of Rights Act of 1990 (Dickson 2011, pg 351). Using foreign legislation as a model for how to incorporate European human rights values seems unusual when there are several European models available within the ECHR, including the French Declaration of the Rights of Man and the Citizen. Even using the British historical bill of rights, such as the first bill of rights, the Magna Carta in 1215, or the English Bill of Rights of 1689, would seem more self-evident. But the New Zealand’s Bill of Rights Act of 1990 has been much admired in Britain and was a modern example (Dickson 2011, pg 352). Even the Strasbourg Court seems to reciprocate when providing decisions on British cases, citing other Commonwealth states in support of their decision. Interestingly the Strasbourg’s *Hirst v. the United Kingdom No. 2* (European Court of Human Rights 2005) case contains its own acts of transnational judicial dialogue with the citation of Canadian and South African decisions (both Commonwealth states) in support of allowing convicted prisoners to vote (Voeten 2010, pg 561). This is unusual as the Strasbourg Court rarely relies on judgments of constitutional courts outside the Council

of Europe member states, except almost exclusively with cases involving the United Kingdom (Voeten 2010, pg 562). In United Kingdom cases, the ECtHR regularly cites cases from Commonwealth states as support for its decision whether for or against the United Kingdom (Voeten 2010, pg 562). By citing Commonwealth cases, for which the British have great respect, the Strasbourg Court is attempting to increase the persuasiveness of their case law for the British.

These cases illustrate the appeal of the common law even over cases involving European Union or European human rights law. These were opportunities to embrace the European legal orders and their vertical case law, where British judges decided to dodge the vertical legal order in favor of the familiarity of the horizontal Commonwealth jurisprudence.

iv. CONCLUSION

Citation of other common law jurisdictions is widely done in Britain as can be seen by the above case law (Glenn 2010, pg 267). The member states of the Commonwealth are thought to have a capacity to readily persuade their fellow member states through shared traditions of language, culture, ideas, and familiarity of legal reasoning (Glenn 1987; Glenn 2003; Nelson 2006). The case law above has shown that Commonwealth member states are willing to share ideas on a range of issues from criminal law to international solvency cases. The efforts made in cases show judges not just citing foreign law, but importing legal principles and ideas into their domestic jurisprudence in meaningful ways.

E. CHAPTER CONCLUSION

The aim of this chapter was to explore the first cases of judicial borrowing by the British that opened the door to foreign borrowing. The vertical integration of the British Empire and the horizontal integration of the Commonwealth play a significant role in establishing the historical development of the dynamics of judicial borrowing that we will see played out the following two empirical chapters on the European Court of Human Rights and the European Court of Justice. Under the vertical legal order of the British Imperial Commonwealth, British judges began the process of borrowing from colonies on issues that had not previously arisen in England, such as slavery cases. With the breakup of the British Empire and the creation of the Commonwealth of Nations, judicial borrowing began to become more common and institutionalized. Modern examples of judicial borrowing throughout the common law show judges who are quite comfortable using foreign law in many forms. The next chapter will explore the British relationship with its second international legal order, the European Court of Human Rights.

CHAPTER IV

HORIZONTAL INTEGRATION AS A MEANS OF MASSAGING AND DODGING THE EUROPEAN COURT OF HUMAN RIGHTS

Over the past thirty years, the European Court of Human Rights has developed an American-style body of constitutional law, comparable in its level of ambition, and in many ways more progressive. Unheralded by the mass press, this obscure tribunal in Strasbourg, France, has—become, in many ways, the Supreme Court of Europe (Goldhaber 2007, pg 1).

The first signatories to our Convention, whilst clearly attaching it to the Universal Declaration, expressed their commitment to common values: democracy, respect for freedoms, the rule of law. But, above all, they created a mechanism—the first of its kind—a court to ensure the observance of their own engagements, thus abandoning part of their sovereignty (Spielman 2014).

I completely understand the Court’s belief that a national decision must be properly made. But in the end, I believe that where an issue like this [voting rights for convicted prisoners] has been subjected to proper, reasoned democratic debate and has also met with detailed scrutiny by national courts in line with the Convention, the decision made at a national level should be treated with respect (Cameron 2012).

A. INTRODUCTION

The European Convention on Human Rights (the Convention) came into effect in 1953 with the European Court of Human Rights (ECtHR or Strasbourg Court) established in 1959. The ECtHR was established to enforce the Convention and as a means of allowing individuals harmed by the violation of Convention rights to seek redress from a

legal institution outside the state, thus each state who signed the Convention surrendered part of their sovereignty to ensure the protections of human rights for its citizens. The argument of this chapter is twofold. First, as we cover the history of the relationship between the British and the ECtHR, we will see that the British began as the architects of the Convention, only to develop a more antagonistic relationship to the Strasbourg Court as time passed. The relationship between the British and the European Human Rights legal order may best be described as subject to great mood swings (Marston 1993, 796; Dickson 2011, pg 343). Britain has shown great enthusiasm for the founding documents which created this legal order, the Convention, and was the first state to ratify the treaty. Despite British calls for the creation of the ECtHR and distinguished service by several British judges to the ECtHR, Britain and the ECtHR have had a rocky history culminating in 2012 in an all-out battle of words over the authority of the Strasbourg Court and respect for Parliamentary Supremacy and the right of national parliaments to set policy. Second, as the British antagonism to the ECtHR grows, we begin to see a pattern of horizontal behavior being used to dodge the ECtHR, while this horizontal behavior is utilized to massage the Convention. The British still have affection for the Convention and wish to promote the values enshrined within the Convention, but many British judges drastically disagree with the interpretation of the Convention held by the ECtHR and the logic by which the ECtHR makes its decisions. This chapter continues the dissertation's focus on what national judges contribute to our understanding of this international legal order, though with a nod to neorationalists in pointing out key statements by politicians such as the Prime Minister Cameron's quote above and key pieces of legislation on human rights such as the Human Rights Act of 1998. In

exploring the aspects of horizontal legal integration involved with the Strasbourg Court, the case is best understood as an instance where horizontal legal integration allows the British to avoid obedience to an international legal order with which they find themselves in conflict. The Strasbourg's attempt to construct a vertical legal order over the common law system has led to an incomplete and partly dysfunctional vertical legal order but the flourishing of horizontal dynamics.

The first sections explore the history of the Convention, the Strasbourg Court, and Britain's relationship to both. The British were instrumental in the writing of the Convention and the creation of the Strasbourg Court. The Strasbourg Court had a rocky start complicated by a lack of cases in the early decades, the questionable status of its binding legal obligation on member states, initial trouble reassuring states that it would take their interests into consideration, continual problems of enforcement, and difficulty in establishing the principles of direct effect and primacy. The next section provides an overall sketch of UK cases before the Strasbourg Court showing that while the UK has a reasonably low rate of being found in violation of the Convention by the Strasbourg Court, the relationship is still wrought with tension. A discussion of some of the more recent issues that British have had with the Strasbourg Court are next explored including the issue of grappling with a controversial court on a politically correct topic such as human rights, the delay by the British in incorporating the Convention into domestic law, and the extensive backlog of cases in recent decades. From here the chapter builds upon this troubled relationship between the British and the Strasbourg Court to explain how the dodge and massage works in the context of the Strasbourg Court. In these later sections the Human Rights Act of 1998 is discussed in detail, case law examples of how the

British dodge the Strasbourg Court, and how British judges turn to the horizontal case law of other member state's courts to massage their relationship to the Convention.

B. THE ROLE OF THE BRITISH IN THE ORIGINS OF THE ECtHR

This section explores the origins of the ECtHR to show the level of involvement of British politicians and judges in the writing of the Convention and the creation of the Strasbourg Court. The Convention, formerly known as Convention for the Protection of Human Rights and Fundamental Freedoms, is the judicial arm of the Council of Europe. The Convention is an international treaty, ratified by all forty-seven Council of Europe members, which stretches from Iceland to Russia and encompasses more than 800 million people, across a varied and more diverse community than the EU represents. Ratification of the Convention is required of all Council of Europe members. The Convention came into effect in 1953 and created the ECtHR in 1959. The ECtHR is a civil court and has taken the lead in defining European values and identity (Goldhaber 2007, pg 3). While the ECtHR is styled as a human rights court in Europe, from an American perspective it is more a constitutional court, concerned with “fundamental norms that are grounded in a basic document” (Goldhaber 2007, pg 2). The ECtHR occupies its time with cases on the violation of human rights (such as the prevention of torture) and addressing issues of civil liberties (such as cases involving due process, equal protection, privacy, free and fair elections, and freedom of expression). Most cases before the Strasbourg Court involve individuals who feel their rights enshrined in the Convention have been violated by a state within the Council of Europe (Macdonald et al. 1993). The Strasbourg Court also grapples with interstate conflicts, but this is a rare

occurrence, since states want to avoid precedent that could be used against them in the future and rarely bring interstate conflicts before the Strasbourg Court (Hawkins and Jacoby 2008). The focus on individuals is a distinguishing feature of the Strasbourg Court from the International Court of Justice at the Hague, where cases may only be brought by states (Janis et al. 1995, pg 67). The first case before the ECtHR affirmed the right of individuals to bring cases before the Strasbourg Court in *Lawless v. Ireland* (European Court of Human Rights 1961).

In the post-WWII environment, former and future United Kingdom Prime Minister, Winston Churchill, called for the establishment of a regional court to help protect human rights and expand upon the 1948 Universal Declaration of Human Rights. Churchill argued

We hope that a European Court might be set up, before which cases of the violation of these rights in our own body of 12 nations might be brought to the judgment of the civilised world. *Such a Court, of course, would have no sanctions and would depend for the enforcement of their judgment on the individual decisions of States now banded together in this Council of Europe.* But these States would have subscribed beforehand to the process, and I have no doubt that the great body of public opinion in all these countries would press for action in accordance with the freely given decision (Churchill 1949, emphasis added).

Churchill's call for a European Court to protect human rights was clearly meant to produce a court with no teeth relying entirely on the states to enforce the decisions of the court. Since Churchill's call for a European Court to preside over human rights, the British have been invariably linked with the formation of the ECtHR (Janis et al. 1995, pg 65). As part of the same discussion, British Foreign Secretary Ernest Bevin tried to constrain the Council of Europe to focus on human rights and judicial powers in an

attempt to avoid the Council of Europe becoming preoccupied with social, economic, military, and diplomatic issues (Goldhaber 2007, pg 3). British Foreign Secretary Bevin argued that judicial powers were a “field where it could do no harm” and human rights were issues that in a basic sense, all states could agree to (Goldhaber 2007, pg 3). The origins of the ECtHR has deep British roots, including several British judges who contributed to the writing of the Universal Declaration of Human Rights and the Convention (Robertson 1977, pg 35).

During the writing of the Convention, Britain strongly insisted on a narrow scope for the Strasbourg Court’s jurisdiction to focus solely on human rights issues (Moravcsik 2000; Stiles and Wells 2007). Britain did eventually agree to the inclusion of the fundamental freedoms or constitutional provisions with the understanding that they would be written to be vague enough to be true of any functioning democracy (Stiles and Wells 2007; Dickinson 2012). The cases before the ECtHR are limited to only rights enshrined in the Convention, which includes basic human rights and the fundamental freedoms. In many respects the Convention is an intentionally vague constitution made up of protected rights, guarantees of personal freedoms, and legal protections against harsh treatment by the state. While the Goldhaber quote that introduces this chapter may be hyperbolic, the ECtHR is the only international court whose case load is made up of what European states would consider constitutional issues. The name of the ECtHR provides the illusion that all it does is human rights law, but the Convention is aimed at the protection of human rights and fundamental freedoms, those fundamental freedoms are what states refer to as constitutional protections. The fundamental freedoms protected under the Convention make the case load of the ECtHR incredibly diverse and

have led to numerous criticisms of the Strasbourg Court including Prime Minister David Cameron's quote above railing against the ECtHR's interpretation of what constitutes a free and fair election. During an interview, Lord Millett scoffed at the idea of variable renting fees being a human rights issue and suggested the "Strasbourg Court had lost sight of its intended purpose" (Lord Millett 2012).

Britain strongly advocated for an "optional" clause for individual petition, which would allow each state to decide whether it would allow individual petitions from their state (Anagnostou and Psychogiopoulou 2010). In 1957, the British Foreign Minister Ormsby-Gore told the British Parliament "the reason why we do not accept the idea of compulsory jurisdiction of a European court [ECtHR] is because it would mean that British codes of common and statute law would be subject to review by an international court" (Janis et al. 1995, pg 26). Individual petitions to the ECtHR were seen as a danger to the notion of British Parliamentary Supremacy, and by limiting individual petitions, the British could limit the impact of the Strasbourg Court. Britain did eventually accept the "optional" clause in 1966 allowing individual petition at the urging of the Labour government's Lord Chancellor Gardiner, who wrote, "I do think that this would cost us nothing and would show that a Labour Government is not anti-Europe as such and would hearten all those who want to see as many disputes as possible settled by some form of independent tribunal" (Hill 1998, pg 239). Britain was also influenced by the American civil rights movement to accept the right of individual petition and embrace legal opportunities for all (Goldhaber 2007, pg 181). Despite concerns over the autonomy and scope of cases that might appear before the Strasbourg Court, Britain decided to provide continued support and accept the authority of the ECtHR due to the initial conservative

position of the Court and the relatively few cases before the Court in the 1950's and 1960's, as we shall see in the next section (Hawkins and Jacoby 2008, pg 24). Two of the ten Presidents of the ECtHR have been British, including Lord McNair, the Strasbourg Court's first President from 1959-1965, and Sir Humphrey Waldock from 1971-1974, showing initial British enthusiasm for the court (Dickson 2011, pg 344).

C. THE ROCKY START OF THE ECtHR

i. INTRODUCTION

Unlike the European Court of Justice, the authority of the Strasbourg Court has been ambiguous. In the first decades of its existence, the Strasbourg Court had a rocky start and was plagued with difficulties. In the beginning, even Strasbourg judges expressed their concerns as to whether the court had a future, as this section will show. The rocky start of the ECtHR will be explored as cases to be put forth to the new Strasbourg Court were slow to materialize in the beginning, placing the existence of the Strasbourg Court on shaky ground. Early efforts by the Strasbourg Court to reassure states that they had nothing to fear from the court led to early case precedents that were later overturned by the Strasbourg Court. Churchill's advocacy for a court with no sanctions that would rely on a public shaming campaign to achieve compliance were realized, making the enforcement of the Strasbourg Court difficult to achieve without the total cooperation of the state in question (Churchill 1949). Through case law the ECtHR has attempted to achieve the powers of direct effect and primacy, though comparatively recently and with significantly less success than the ECJ.

ii. A COURT WITH NO CASES

The Convention says little about the Strasbourg Court's organization and judicial character, leaving the early Strasbourg judges to determine the procedures and competence of the court. There is one judge provided by each of the forty-seven member states of the Council of Europe. The Court began its role slowly, hearing an average of one case per year. From 1959 to 1975 the Court saw a mere twenty cases, from the period of March 1962 to June 1965 there were no cases at all (Mahoney and Prebensen 1993, pg 624; Macdonald et al. 1993). There was so few cases brought before the Court, that ECtHR Judge Henri Rolin wrote an article titled "Has the European Court of Human Rights a Future?" expressing his fears that the Strasbourg Court had no cases as well as no future as a court (Rolin 1965, pg 442). By 1986, the annual number of cases had risen to twenty and by 1991, the annual number had further risen to just under a hundred providing a secure future for the Strasbourg Court (Mahoney and Prebensen 1993, pg 624). Though in the interceding thirty-two years, the Strasbourg Court had heard so few cases as to make even its own judges question if there was any need for it to exist. It is no wonder that British Lord Chancellor Gardiner had thought allowing individual petitions would cost the British nothing, given that the Strasbourg Court in the beginning did almost nothing.

In 1998 the ECtHR was established as a full time court where applicants (states and individuals) submit their cases directly to the Strasbourg Court. The European Commission of Human Rights which previously provided basic arbitration and could negotiate mutual settlements between conflicting parties no longer exists. The European Commission of Human Rights had historically reduced the number of cases that came

before the ECtHR by providing arbitration before the ECtHR heard a case (Council of Europe 2010, pg 9). As shall be discussed in latter sections, by the twenty-first century cases before the Strasbourg court had ballooned (Council of Europe 2010, pg 10). As these numbers of cases suggest, the ECtHR slowly came of age, developing from a minor institution of the European supranational framework to eventual significance for individuals seeking redress of their constitutional and human rights violated by the member states.

iii. TO BE BINDING OR NOT TO BE BINDING, THAT IS THE QUESTION

The Strasbourg Court has the jurisdiction to deliver binding decisions for individuals and interstate applications alleging violations of the Convention. The Convention contains eighteen articles guaranteeing rights, similar to the US Bill of Rights, and fourteen protocols which expand on the original articles adding more rights which are protected by the Convention (Morrisson 1981). The ECtHR contributes to the Council of Europe's aim at promoting a sense of European unity through the creation of a legal community which shares "a common heritage of legal traditions, ideals, freedom and the rule of law" (ECHR Preamble). According to Article 46 of the Convention, the member states have a binding legal obligation to recognize and enforce the decisions of the Strasbourg Court. The Convention also intentionally compels the creation of a horizontal human rights legal order within the signatories of the Convention, by asserting that all member states should look to how Convention rights are applied judicially in the other member states (Alston et al. 1999). Article 47 and 53 complicate the binding legal obligation, by compelling member states to take into consideration when deciding a

Convention right the jurisprudence of the Strasbourg Court and any relevant cases of the member states courts in their domestic case law. Article 66 adds to this the principle of subsidiary, making it first the responsibility of member state courts to safeguard the fundamental rights and freedoms enshrined in the Convention prior to cases coming before the Strasbourg Court. Promoting the idea that national courts should seek to resolve cases prior to the intervention of the Strasbourg Court under Article 66. The Convention creates a legal order with multiple institutions as sources of authority by intentionally creating an international legal order where both the vertical authority (the ECtHR) and many horizontal authorities (all member state's high courts) are recognized as valid interpreters of the Convention and sources of inspirational jurisprudence on matters concerning the Convention. The Convention essentially limits the ability of the ECtHR to be only authority on the meaning of the Convention. The sharing of authority with member state judges makes the authority of the ECtHR haunted by ambiguity. So while the Convention does create a binding legal obligation, this obligation is divided among the ECtHR's authority and the authority of every member state's high court to determine what the meaning of the Convention law is. Thus allowing courts to more readily side step the issue of the ECtHR's binding legal obligation in favor of imploring the logic of other member state courts in fulfillment of the binding legal obligation.

iv. REASSURING STATES CREATES A PROBLEM OF PRECEDENT

Most all cases before the Strasbourg Court are disputes between a member state and an individual citizen within that state, claiming that the state has harmed the individual by violating a Convention right. The Strasbourg Court has been increasingly

willing in the past few decades to find against states in favor of individual citizens, but in its early decisions the Strasbourg Court was eager to reassure states that it would be receptive to their concerns and encourage states to allow individual petitions (Janis et al. 1995, pg 71). In *Lawless v. Ireland*, the Strasbourg Court decided that Ireland did violate Articles 5 (right to liberty and security) and 6 (right to a fair trial) of the Convention by detaining a member of the Irish Republican Army (IRA) for five months without due process (European Court of Human Rights 1961). It was justified, however, under Article 15 (right of a state to protect its security during a public emergency), declaring that in “a public emergency threatening the life of the nation” the state may temporarily engage in behavior inconsistent with the Convention (European Court of Human Rights 1961). While these early decisions were few, they almost entirely sided with the member states against individuals, even in cases such as *Lawless v. Ireland* where the evidence against Ireland was substantial (European Court of Human Rights 1961). If this case had been decided by the Strasbourg Court later in its development, the Strasbourg Court would have found against the state. This is what happened in *Neumeister v. Austria* (European Court of Human Rights 1968), where the Strasbourg Court overturned the precedent of *Lawless* and established that due process of Article 5 (right to liberty and security) could not be violated under any conditions. Several early flips in precedent led to the Strasbourg Court being seen as too unpredictable in its decision making.

v. *ISSUES OF ENFORCEMENT*

Judgments of the ECtHR may involve a state being required to pay compensation to an individual, when they have been found in violation, but these fines are often modest

by national standards (usually a few thousand Euros at most) (Mahoney and Prebensen 1993, pg 636). Enforcement of a ruling of violation against a member state and the potential fine is enforced by the supervision of the Committee of Ministers of the Council of Europe, which has a duty to supervise that the violating state has taken the appropriate measures of redress (Mahoney and Prebensen 1993, pg 635). Occasionally, states have been slow to change their national laws that are not in congruence with the Convention such as *Marckx v. Belgium*, Belgium did not have the relevant legislation amended until 1987 and *Colozza v. Italy* (1985) which is still on the Committee of Minister's agenda as a case were redress has not yet been done by the state (Mahoney and Prebensen 1993, pg 636; European Court of Human Rights 1964; European Court of Human Rights 1985). If a state fails to redress the issue, then the Committee of Ministers attempts to gain compliance through a public shaming of the state by publicly pronouncing the failure of the state to uphold basic human rights, which in the post-WWII environment in Europe does lead to compliance of most states, but not all (Mahoney and Prebensen 1993, pg 636). Some states have been notoriously hard to shame into compliance such as Russia, while other states have started their own public shaming campaign against decisions made by the Strasbourg Court that are contentious including Italy and the UK (Mahoney and Prebensen 1993, pg 636). The opening quote by Prime Minister Cameron is an example of the British efforts at shaming the Strasbourg Court and expressing that Britain will continue to deny convicted prisoners' the right to vote in the future. It is more common that a state amends their laws but fails to provide the proscribed financial compensation to the injured party. Examples are *Kruzlin v. France* (European Court of Human Rights 1990b), where a year and half went by before France agreed to make

payment; *Union Alimentaria Sanders S.A. v. Portugal* (European Court of Human Rights 1989) where compensation was made after a year and a reprimand by the Committee of Ministers; and twelve Italian cases (*Motta, Manzoni, Ficara, Viezzer, Angelucci, Maj, Girolami, Ferraro, Triggiani, Mori, Colacioppo, and Adiletta and Others*), all decided in 1991, where compensation was not made until a year later and a resolution by the Committee of Ministers (Resolutions DH(92) 26-27, 30-39) (Mahoney and Prebensen 1993, pg 636 supra note 96).

Through its case law, the Strasbourg Court interprets the rights and freedoms enshrined in the Convention and have made the Convention a “living document” capable of being applied to situations that did not exist or were not foreseeable at the time of its creation. An example is the recent case of France banning the wearing the Islamic full face veil, the niqab, which was challenged and brought before the ECtHR as an infringement of Article 9, the right to respect for freedom of thought, conscience, and religion in *S.A.S v. France* (European Court of Human Rights 2014). The case was decided in favor of the French government and argued that the wearing of the full veil interfered with two of the legitimate exceptions to Article 9, one being public safety and the other being the protection of the rights and freedoms of others (European Court of Human Rights 2014). The binding force of judgments of the ECtHR means that states are obligated to take the necessary measures to redress the violation of rights and to ensure that legislation is amended to prevent future violations of the same nature. However, the Strasbourg Court can neither alter laws of the state nor can it instruct the state on how to change a law that has violated the Convention as the Strasbourg Court itself declared in *Marckx v. Belgium* (European Court of Human Rights 1964). The

ECtHR can tell a state that a particular law of that member state is in violation of the Convention, but only the member state's government or judges can strike down or alter the offending law. National governments and judges are not always willing to do so and may continue to uphold a law that has been declared invalid, failing to provide the enforcement of the Strasbourg Court.

vi. *ECTHR ON DIRECT EFFECT AND PRIMACY*

In its case load, the ECtHR has attempted to establish the principles of direct effect and primacy. Direct effect means that the judgments of the ECtHR are accorded immediate effect by national courts similar to the ECJ's *Van Gend en Loos v. Nederlandse Administratie der Belastingen* (European Court of Justice 1963). The ECtHR established the principle of direct effect in a series of cases against the member state of Belgium. In *Marckx v. Belgium* (European Court of Human Rights 1964), the ECtHR ruled that Belgium had violated Articles 8 (right to respect for private and family life) and 14 (prohibition of discrimination) of the Convention. In Belgium after the ECtHR ruling, a national court judge applied the national law that had been in violation to another case on the grounds that the legislature of Belgium had taken no action to amend the law (Martinico and Pollicino 2012, pg 170). This resulted in a new case twenty-three years later; *Vermeire v. Belgium* (European Court of Human Rights 1987b) was then brought before the ECtHR as a new violation of the Convention. The ECtHR ruled that "the freedom of choice allowed to a State as to the means of fulfilling its obligation under Article 53 [duty of a state to abide by a ECtHR decision] cannot allow it to suspend the application of the Convention while waiting for such a reform to be

completed” (European Court of Human Rights 1987b, paragraph 26). The ECtHR went on to affirm that their judgments have immediate effect provided their provisions had “a precise and unconditioned scope,” meaning universal applicability (Martinico and Pollicino 2012, pg 170). Establishing direct effect through a Belgian case that was not followed by Belgium for twenty-three years did little to establish the authority of the Strasbourg Court.

The principle of primacy means that the Convention is superior to national law and should be used as the guiding principle when national and Convention law are in conflict, much like the ECJ’s principle of supremacy laid out in *Costa v. ENEL* (European Court of Justice 1964). In *Dumitru Popescu v. Romania* (European Court of Human Rights 2007), the Strasbourg Court established the primacy of Convention law over national law. Through these cases the ECtHR has chosen to “emulate the style and points of argument characteristic of the so-called glorious period of the ECJ’s jurisprudence” (Martinico and Pollicino 2012, pg 171). Compared to the ECJ’s establishment of these principles back in the early 1960’s, the Strasbourg Court has only recently attempted to declare these principles.

vii. CONCLUSION

The ECtHR had a weak start with few cases materializing in the first few decades of the Strasbourg Court. By the early 1990’s the Strasbourg Court had a respectable case load, however, and today it suffers from a large backlog of cases, securing a future for itself. There is also considerable resistance to the acceptance of the legitimacy of the ECtHR and a persistent challenge to the binding legal obligation of the Strasbourg Court

on the meaning of the Convention, as the Convention compels member states to look to other member state courts jurisprudence. Once the ECtHR was established, it followed the path of the ECJ in claiming its primacy and direct effect over national governments and courts and working to maintain the enforcement of its decisions by national courts through a shaming campaign in the Committee of Ministers. The ECtHR has been less successful at establishing a strong vertical legal order than the ECJ. The next section looks at how Strasbourg has decided cases involving the UK.

D. UK CASES BEFORE STRASBOURG

In the beginning, the UK appeared to be an eager participant in the Convention in working to draft the treaty and being the first state to ratify it in 1951 (Robertson 1977, pg 15). In the early 1950's in order to ensure compliance between national law and the Convention, the UK undertook a voluntary review of all laws since the Magna Carta in 1215 and annulled more than fifty statutes that were deemed incompatible with the Convention (Robertson 1977, pg 30 supra note 11). The right of individual appeal to ECtHR was accepted in the UK in 1966 (Robertson 1977, pg 16). The United Kingdom has since extended the right of individuals to petition the ECtHR to their overseas territories to which they have voluntarily extended the Convention (Robertson 1977, pg 273). So despite some doubts and hesitation over the ability of individuals to petition the Strasbourg Court, the initial relationship was quite positive and amicable. It is also crucial to point out that at this stage the ECtHR was experiencing its shaky beginnings with a definitive lack of cases and need to prove itself to member states. Equally important to note is that during this time period, not one UK case appeared before the

ECtHR. In 1975, *Golder v. the United Kingdom* became the first UK case before the ECtHR (European Court of Human Rights 1975). It concerned Article 6 (right to a free trial) where the ECtHR found the UK to be in violation of this article and the ECHR. This case clearly demarcates the end of the honeymoon period between the British and the Strasbourg Court.

Table 4.1 below provides a basic snapshot of the cases brought before the ECtHR involving either citizens of Britain making individual appeals to the Strasbourg Court for redress or the government of the UK as a party to the case. Compared with other states, Britain has fared relatively well, with the vast majority of cases being dismissed (See inadmissibility judgments in Table 4.1).

Table 4.1. The ECtHR and UK Relationship 1959 to January 2010

UK Statistics	Number of Cases
Total Number of Judgments	422
Violation by UK Judgments	257
No Violation by UK Judgments	79
Other Judgments	86
Inadmissibility Judgments (Case Denied Hearing)	12,854
Pending Applications before ECtHR	1,620

Source: Council of Europe (2010, pg 110).

Of the 422 cases heard by the ECtHR, 257 of them or 61% have resulted in a violation judgment against the UK; while this sounds high it actually places the UK as one of the states with lowest percentages of violations (Council of Europe 2010, pg 121-125). The ECtHR has found a state guilty of at least one violation of the Convention in 83% of the cases it has heard; overwhelming the ECtHR sides with individuals in cases it hears (Council of Europe 2010, pg 11). States with the highest percentages of violation rates include Bosnia and Herzegovina, Liechtenstein, Monaco, Montenegro, and Ukraine (Council of Europe 2010, pg 121-125). Most of the cases from the United Kingdom

heard by the ECtHR involve Convention Article 6 (right to a free trial), 5 (right to liberty and security), 8 (right to respect for private and family life), and 3 (inhumane or degrading treatment) (Council of Europe 2010, pg 120). Of the applications awaiting judgment as to whether to receive a hearing or not, more than 25% of them are cases against Russia with Turkey, Ukraine, and Romania each having about 10% of the pending cases (Council of Europe 2010, pg 11). Despite some rocky aspects between Britain and the ECtHR, Britain has had relatively few cases before the Strasbourg Court and has a comparatively low violation record which should suggest that Britain has a positive relationship with the Strasbourg Court in comparison to other Council of Europe member states. Though saying that you have a better human-rights record than Russia or Bosnia is not saying much, stating that you have a better record than Germany, Spain, Portugal, Belgium, Switzerland, Norway, and France is.

The British have been slow to put themselves under the authority of the ECtHR. British case law prior to the Human Rights Act of 1998, which will be discussed in greater detail below, seemed to ignore the case law of the ECtHR while applying a British interpretation of the Convention in national cases. British case law is also not declared invalid where it conflicts with the ECtHR case law, a decided kink in the authority of the Strasbourg Court. After the passing of the Human Rights Act of 1998, British judges were then obliged to take the case law of the ECtHR into consideration in all Convention decisions made by the national courts. This background knowledge begins to illuminate the difficulties in the relationship between the ECtHR and the UK.

E. BRITISH ACTORS FIND FAULT WITH THE ECtHR

i. INTRODUCTION

The aim of this section is to address some of the difficulties that arise in the relationship between British judges and the ECtHR. There are three issues that readily emerge in this relationship. First, any discussion of the ECtHR is colored by the politically correct nature of human rights. By this I mean that while it is acceptable to criticize the Strasbourg Court any political actor must be careful to avoid the danger of being seen as against the protection of human rights. The British have been quick to criticize the Strasbourg Court as controversial, while defending the UK's record of upholding human rights. The English press has been particularly quick to criticize the Strasbourg Court over its dealings with the IRA. Second, after initial enthusiasm for the Convention, the British delay incorporating the Convention into domestic law for decades. The Human Rights Act of 1998 finally incorporates the Convention, as is necessary in a dualist state, into domestic law and allows British judges to engage in the process of determining whether cases before it have violated the Convention without engaging the Strasbourg Court. Third, the large backlog of cases now faced by the Strasbourg Court has called its effectiveness into question as wait times exceed the time it would take to bring a case to the highest court within the domestic context.

*ii. POLITICALLY CORRECT NATURE OF HUMAN RIGHTS COUPLED WITH
A CONTROVERSIAL CONSTITUTIONAL COURT*

Human rights are seen as basic foundations of democracy. To be against the provision of human rights is to be a tyrant and in Europe to be against them is to liken yourself to Adolf Hitler and other notorious characters known for their blatant disrespect for human life (Goldhaber 2007, pg 4). Basic human rights are one thing that we can all agree a democracy should protect and enforce. The “courts have taken the lead in incorporating the Convention” spreading human rights protection across forty-seven member states and leading to the creation of the ECtHR (Stone Sweet 2008, pg 687). The primary purpose of the ECtHR is to see that the Convention is upheld by all member states of the Council of Europe and to interpret and apply the Convention. This creates an atmosphere where to be against the Convention and by extension the ECtHR is to be against the provision of human rights (Flogaitis et al. 2013). This explains the positive reaction in the media, public, and politicians to the ECtHR (Cichowski 2006). Unlike the ECJ, it is a difficult balancing act to criticize the ECtHR without getting dangerously close to being seen as against the protection of human rights.

If this were the only view, almost no one in Britain would level criticisms against the ECtHR. However, the ECHR is more than just protection of human rights, it offers a wide array of constitutional rights which may be seen to work in conjunction or conflict with codified domestic constitutional rights such as the French Declaration of the Rights of Man and of the Citizen or as the only written document of constitutional rights for jurisdictions with no written Constitution such as the United Kingdom. Differences of opinion on the nature and scope of constitutional rights is highly varied and culturally

enshrined (Bojin 2013, pgs 59-60). What constitutes a right varies by state, not only between Eastern and Western Europe but between all Council of Europe member states (Bojin 2013, pgs 59-60). Given that the ECtHR handles cases from forty-seven European states, it is unsurprising that in order to promote the rights enshrined in the Convention, the Strasbourg Court must ruffle the feathers of states, from their politicians to media (Kerr 2013, pg 104). Lord Kerr, a current Supreme Court of the UK Judge since 2009, compared criticism of the ECtHR to death and taxes in its inevitability (Kerr 2013, pg 104). The key to criticism in this area is to directly criticize the ECtHR. The English press has taken this to heart. After the British lost the case of *McCann and Others v. the United Kingdom* (European Court of Human Rights 1995, referred to as *McCann*) for the illegal shooting of an IRA operative during the terrorist attack on Gibraltar, a London tabloid published the telephone number of the Strasbourg Court with the article and they were inundated with calls (Goldhaber 2007, pg 179). After the *McCann* case the *Daily Mail* in London ran articles on the subject matter titled “Britain Defeated” and “Another Surrender to Europe,” while lamenting on the cession of British law to “remote foreign judges” (Goldhaber 2007, pg 179).

The comparison between the Strasbourg Court and the ECJ in this dissertation has yielded an unexpected result: British judges have a fairly good relationship with the ECJ while having a fairly dismal relationship with the ECtHR. The empirical literature has largely argued the opposite stating that “on the whole the UK’s interaction with the Strasbourg organs has been a positive one. The relationship between the UK and the EU, however, has been and remains quite strained” (Dickson 2011, pg 344). This sentiment in a chapter accessing the influences of EU law and European human rights law on the

British is echoed by other studies which seek to compare the ECJ and ECtHR, though these studies are largely from a neorationalist perspective attempting to make claims about the relationship between international legal orders and member state governments (Glendon et al. 1994; Dunne and Wheeler 1999; Cichowski 2006; Conant 2006; Popelier et al. 2011; Martinico and Pollicino 2012). These studies find a positive relationship between the UK and the ECtHR and a negative relationship between the UK and the ECJ. While this comparison is not the purpose of this study, which is to explore the nature of horizontal integration and its role within the international legal order. But among judges I find the opposite of this scholarship to be true. When it comes to the ECJ, British judges express confusion and uncertainty, but not animosity. As chapter V will argue, British judges face a civil to common law divide where British judges employ horizontal knowledge of EU law through other member state courts case law and Advocates General opinions in order to comply with the European Union created legal order. As David Cameron's quote foreshadows, British judges are currently in conflict with the Strasbourg Court over voting rights for convicted prisoners as shall be discussed below.

iii. A FAILURE TO INCORPORATE THE CONVENTION INTO BRITISH LAW

The relationship between national courts and the ECtHR depends upon the status of the Convention within domestic law (Boyle and Thompson 2001). Dualist states are given a degree of choice in how and when treaties are incorporated into domestic law since international treaties are not recognized by national courts until they have been incorporated into domestic law by the legislature (Cichowski 2006, pg 59). The UK is a dualist state because of the reverence for the principle of Parliamentary Supremacy.

Monist states automatically incorporate international treaties into domestic law and make them enforceable by national courts upon ratification (Cichowski 2006, pg 59). Once incorporated into domestic law, the Convention can be seen to create a quasi-bill of rights for states that did not previously enjoy such a judicially enforceable set of constitutional rights such as Sweden or the United Kingdom (Cichowski 2006, pg 60). In some states, the Convention is given the status of a constitution, providing rights to individuals that supersede the laws of the state including Austria, Belgium, Cyprus, Czech Republic, France, Greece, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Romania, Spain, and Switzerland (Cichowski 2006, pg 60). The Swiss Federal Court and the Austrian Constitutional Court have expanded the rights protections of the Convention well beyond the case law of the ECtHR (Cichowski 2006, pg 61). At the same time, the Polish Constitutional Tribunal and the Spanish Constitutional Court have used the Convention to interpret domestic constitutional rights and expand upon them (Drzemczewski and Nowicki 2001; Polakiewicz 1996).

Other states give the Convention the same status as a national legislative act, which do not supersede previous national legislative acts unless directly expressed by the new act, such as Germany and United Kingdom (Cichowski 2006, pg 60). In Germany, the Basic Law under Article 59.2 gives the Convention federal law status and thus an individual cannot apply to German courts for redress of a German violation of the Convention, an action that is possible in state that gives the Convention constitutional status. The United Kingdom presents a similar situation to Germany. After years of debate (since 1951) the United Kingdom incorporated the Convention into domestic law through the Human Rights Act of 1998, making the United Kingdom the slowest

signatory state to incorporate the Convention into domestic law (Cichowski 2006, pg 61). Through the Human Rights Act of 1998, Parliament maintains its supremacy while empowering individuals and national courts vis-à-vis Parliament to uphold the Convention. Section 3 of the Human Rights Act of 1998 states that “so far as it is possible to do so; primary legislation and subordinate legislation must be read and given effect to in a way which is compatible with Convention rights” (Human Rights Act of 1998). It is also mandatory under the act for British courts to take into account all judgments involving the Convention including ECtHR and member state courts decisions. The long delay in accepting the Convention can be seen as testament to the Strasbourg Court, allowing it to determine all matters concerning the Convention or as a means of denying the authority of the ECtHR in British courts.

iv. A COURT WITH TOO MANY CASES

Alec Stone Sweet has called the ECHR a cosmopolitan legal order (CLO), “a transnational legal system in which all public officials bear the obligation to fulfill the fundamental rights of every person within their jurisdiction, without respect to nationality or citizenship” (Stone Sweet 2012, pg 53). A CLO has emerged with the incorporation of the ECHR into national law where the ECtHR becomes the “decentralized sovereign” coordinating the activities of all national member state courts on the issues of human rights and fundamental freedoms (Stone Sweet 2012, pg 53). The ECtHR can be a source of rights development and influencer of law making in terms of constitutional rights (Shapiro 1981). The ECtHR finds states guilty of violating the Convention in an overwhelming majority of cases it hears, 3,884 out of 5,441 case decisions, or 71%

between 1959 and 1998 and since 1998 an 83% violation rate (Cichowski 2006, pg 62). For example, ECtHR cases that have found states guilty of violating Convention rights have resulted in states engaging in administrative (*Pudas v. Sweden* (European Court of Human Rights 1987a)), legislative (*Hentrich v. France* (European Court of Human Rights 1994a)), judicial (*The Holy Monasteries v. Greece* (European Court of Human Rights 1994b)), and constitutional reforms (*Ringeisen v. Austria* (European Court of Human Rights 1971)) (See discussion in Cichowski 2006, pg 62). Despite its propensity to rule against states, the ECtHR has a remarkably high compliance rate (Glendon et al. 1994; Polakiewicz 1996). The ECtHR can be a powerful tool to secure constitutional rights for individuals when national actors comply.

The greatest impediment to this is the overwhelming backlog of cases now facing the ECtHR (Flogaitis et al. 2013). Between 1959 and 1998 the ECtHR delivered fewer than 1,000 judgements (Sajo 2013, pg 184). By 2010, the Strasbourg Court had delivered more than 12,000 judgments (Council of Europe 2010, pg 10). In 2011, the Strasbourg Court delivered almost 2,000 judgements (Council of Europe 2010, pg 10). Since 1998 there has been exponential growth in the Strasbourg Court's case load. In 2011 alone, the ECtHR received more than 64,500 applications (Sajo 2013, pg 184). In 2005, the ECtHR delivered more than 1,000 judgements, more than ten times the pace of the US Supreme Court and eight times the pace of the Supreme Court of the UK, which hears roughly 120 case per year (Goldhaber 2007, pg 7). How can any court could hear 2,000 cases in a single year? Article 27 of the Convention allows for a backlog loophole, where as little as three Strasbourg judges can sit on a single case and multiple chambers may be conducted at once. With forty-seven member states each contributing one judge, up to

fifteen chambers with three judges in each chamber could hear cases simultaneously. Fifteen chambers could hear 2,000 cases in approximately 134 days. The European Court of Human Rights President, Luzius Wildhaber of Switzerland, has called it a “worrying and frankly excessive amount” (Goldhaber 2007, pg 7).

The main reason for the exponential increase of case backlog of the ECtHR is the right of individual petition, which is a distinguishing feature of the ECtHR (Bojin 2013, pg 60). The right of individual petition is part of an effort by the ECtHR to more closely resemble national constitutional courts rather than an international court (Bojin 2013, pg 61). The massive increase as of 1998 is also the result of the collapse of the Soviet Union and an influx of new member states into the Council of Europe (Sajo 2013, pg 184-185). Member state courts by applying the Convention to their national cases might ease the burden of the ECtHR, by reducing the number of cases in which ECtHR grants a hearing by preemptively solving the violation issue, the Human Rights Act of 1998 can be seen to aid this process in Britain (Sajo 2013, pg 189-190). With a backlog of roughly a quarter of a million cases, petitioning for a redress of Convention violations within the member state’s own court system may prove to be much quicker (Council of Europe 2008).

v. CONCLUSION

This section has discussed three areas that have provoked contention between the British and the ECtHR. First, there is a difficulty in criticizing the Strasbourg Court due to the politically correct nature of human rights. Any political actor is hesitant to be seen as against human rights and a court to protect human rights seems a natural component of a healthy democracy. But the ECtHR does more than protect human rights; it has

enshrined constitutional provisions much like the American Bill of Rights. The Strasbourg Court enforces a wide range of constitutional principles among a large and varied membership. The British media have been quick to side against the Strasbourg Court, which often finds fault with the English treatment of members of the IRA. Second, the incorporation of the Convention into British domestic law occurred with a delay of more than forty years after the ratification of the Convention, signaling the difficulties of the relationship and an effort for the Convention to be addressed in British courts rather than exclusively in the Strasbourg Court. Third, despite an initial lack of use at its conception, the Strasbourg Court has since become one of the most overworked courts in the world. The Strasbourg Court faces a mounting backlog of cases while petitions to the Strasbourg Court continue to grow every year. This may mean that national courts begin to determine whether a violation of the Convention has occurred with increasing frequency, rather than the member states affording Strasbourg more resources to handle the backlog themselves.

F. BRITISH JUDGES DODGE AND MASSAGE THE STRASBOURG COURT

This section and those following it build upon the antagonisms described in the previous sections and direct our focus to horizontal legal integration in this international legal order of human rights and fundamental freedoms. When we look at the horizontal integration efforts of British judges coupled with these difficulties described above, we see a contested vertical relationship. The vertical authority of the ECtHR is ambiguous. This section and the following ones will explain and provide evidence of the horizontal dodge and massage in the context of the Strasbourg Court.

In engaging with international legal orders, British judges take part in what I call the supranational dodge and massage. This occurs when national courts dodge the use of international law, in this case due to fundamental disagreements between British judges and the Strasbourg Court on the meaning and application of the Convention. Then national judges participate in a process of legal massage where knowledge gleaned from horizontal legal integration is used to understand and apply the international law that is dodged vertically, in this case British judges rely on their own understanding and the jurisprudence of member state courts to apply the Convention. Borrowing horizontally allows national judges to “dodge” or reject international law within the ECtHR, providing national judges with arguments that allow them to side step vertical interpretations of international law that directly conflict with national law or employ logics which are inconvenient. Horizontal legal integration is then used as a tool to massage the relationship between the national judges and the international legal order. If British judges dodge ECtHR jurisprudence without massaging the relationship, then the Convention, British ratification by the parliament, and the purpose of being a part of the international legal order lose their legal meaning. British judges have far too much respect for Parliamentary Supremacy to undue their authority by completely ignoring an international legal order established by a ratified treaty.

British judges were among the key architects in writing the European Convention on Human Rights and Winston Churchill proposed the creation of the European Court of Human Rights. The British also see themselves as a leader in arena of human rights law and that the ideas British judges were instilling in the Convention for Europe, were ideas already in practice in Britain before the existence of the Convention. In many ways the

British see the ECtHR as their own creation, a creation British judges are deeply disappointed in (Lord Mackay of Clashfern 2012; Lord Scott of Foscote 2012; Lord Millett 2012). For British judges the ECtHR has either misinterpreted or aggressively interpreted new protections into the Convention, going well beyond the human rights and fundamental freedoms protections described in the Convention. When the ECtHR goes beyond the Convention as interpreted by British judges, British judges dodge the ECtHR jurisprudence. Since the Convention requires national judges to take into consideration the vertical judgments of the ECtHR and the horizontal judgments of the member states, this provides national judges with options as what judicial logic to use. British judges then massage their compliance with the Convention by looking horizontally for alternative logics to the ECtHR that are in alignment with their understanding of the Convention. In the case of the ECtHR the horizontal sources of law are used as a counterbalance to the ECtHR's vertical power and authority. As the British antagonism to the ECtHR grows, we begin to see a pattern of horizontal behavior being used to dodge the vertical jurisprudence of the ECtHR, while this horizontal behavior is utilized to massage the Convention. The British still have affection for the Convention and wish to promote the values enshrined within the Convention, but many British judges drastically disagree with the interpretation of the Convention held by the ECtHR and the legal logic by which the ECtHR makes its decisions. In exploring the aspects of horizontal legal integration involved with the Strasbourg Court, the case is best understood as an instance where horizontal legal integration allows the British to avoid obedience to an international court they find themselves in conflict with.

G. HOW THE HUMAN RIGHTS ACT OF 1998 CHANGED THE PLAYING FIELD FOR BRITISH JUDGES

i. INTRODUCTION

This section looks at how the British Human Rights Act of 1998 affected the relationship between British judges and the ECtHR. Prior to the Human Rights Act of 1998, judges used the Convention and decisions of the Strasbourg Court sparsely, mainly referring cases to apply to the Strasbourg Court for Convention rights. In the 1990's judges began citing ECtHR jurisprudence with greater frequency and British judges began to push for the incorporation of the Convention into domestic law. Incorporation allowed British judges to cite and interpret the Convention as part of domestic law and no longer relegate Convention cases to only Strasbourg. Since the Human Rights Act of 1998, British judges have developed their own philosophy of how to grapple with the jurisprudence, seeing the Strasbourg Court as a safety net to ensure that British judges do not interpret the Convention too narrowly. Judging by the number of British cases overturned by the Strasbourg Court in the first decade after the Human Rights Act was passed, the Strasbourg Court often finds the British judges too narrow in their interpretation of the Convention rights. The report of the Joint Committee on Human Rights in 2010 further found fault with the British for failure to produce compensation in a timely matter and a lack of regard of the Strasbourg Court's jurisprudence in their case law. The British have largely ignored the Strasbourg report and maintained their pattern of behavior, as we shall see below.

ii. ECTHR PRIOR TO THE HUMAN RIGHTS ACT OF 1998

Prior to the Human Rights Act of 1998, the use of the Convention in British case law was not particularly common, but was not ignored either (Dickson 2011, pg 350). It would be wrong to suggest that prior to the Human Rights Act of 1998 British courts have not engaged Convention rights and ECtHR jurisprudence. In fact, in several cases, such as *R v. Chief Metropolitan* (England and Wales Divisional Court 1991) and *Derbyshire County Council v. Times Newspapers* (United Kingdom House of Lords 1992), the courts already behaved exactly how the Human Rights Act of 1998 now requires judges to behave (Cichowski 2006, FN 11). Applying the Convention to a national case was often done as tie-breaker in situations where national law was unclear and could be interpreted in accordance with or without the Convention (Dickson 1997; Gearty 1997). The application of the Convention was also done in the national context to justify the judge's use of judicial review (Gordon and Wilmot-Smith 1996).

Despite being the first to ratify the treaty, the UK waited until the Human Rights Act of 1998 to directly incorporate the provisions of the Convention into domestic law, allowing individuals to directly invoke the Convention before English courts and to have their case of a violation of Convention rights decided before a national court rather than before the ECtHR. Several national cases prior to 1998 involved individuals being denied the ability to seek redress from the state for a Convention violation through its national courts and these individuals were told that it was the jurisdiction of the ECtHR only (See *R. v. Secretary of State for Home Affairs ex parte Bhajan Singh* (United Kingdom Court of Appeal Civil Division 1975) and *Pan American World Airways Inc. v. Department of Trade* (United States Supreme Court 1976; Ress 1993, pg 813)). Further,

Lord Bridge, British Law Lord from 1980-1992, in a speech to the House of Lords in 1991 stated that the Convention, like any other international treaty that has not been directly incorporated into national law by an act of Parliament, is not part of the law of the land and thus an individual cannot directly invoke the Convention in an English court (Ress 1993, pg 814). Here we see the British firmly applying the dualist logic and refusing to make the exception for the ECtHR, the way they did for the ECJ. Other dualist states within Europe include Germany, Ireland, Italy, Sweden, and Norway which have all behaved similarly to the Strasbourg Court as the British example (Stone Sweet 2012, pg 69). The Convention prior to 1998 is not entirely irrelevant to UK courts though, according to Lord Diplock, British Law Lord from 1968-1985, the courts are obliged to construe national laws in a manner which complies with the Convention (*Salomon v. Commissioners of Customs and Excise* (United Kingdom Court of Appeal Civil Division 1966)). Lord Diplock was not alone in thinking this, but interpreting the Convention and national law together was largely a task of the Law Lords and not meant to be done by all British judges (Ress 1993, pg 815).

It was not until the early 1990's that British judges began a push for the incorporation of the Convention into British national law. Lord Bingham, the British Lord Chief Justice of England and Wales from 1996-2000 and Law Lord from 2000-2008, began writing in the 1990's about the need to incorporate the Convention in order to allow British judges to resolve legal inconsistencies between national and Convention law (Bingham 1996). During a debate in the House of Lords on the matter, two serving Law Lords, Lord Browne-Wilkinson and Lord Lloyd, spoke passionately in favor of incorporating the Convention into national law (HL Debs. January 25, 1995b; HL Debs.

January 25, 1995a). Lord Browne-Wilkinson argued that the Convention which was penned in at least part by British judges was a document to be revered and made a part of the British legal tradition (HL Debs. January 25, 1995b). Lord Lloyd argued the Convention needed to be incorporated as part of the British historical tradition since it is a document already taught to English law students from the perspective of the English judges who labored to compose the document (HL Debs. January 25, 1995a). During this time period, the Labour government who had previously been opposed to incorporation relented and published a consultation document titled “Bringing Rights Home” in 1996 and incorporated it into its 1997 general election manifesto that the Convention would become a part of national law (Dickson 2011, pg 350). In determining how to incorporate the Convention into domestic law, the Labour government modelled the Human Rights Act of 1998 on the New Zealand’s Bill of Rights Act of 1990 (Dickson 2011, pg 351). The Human Rights Act of 1998 had been described as the “perfect device to allow judicial review of legislation, while retaining the final word for the Parliament itself” thus not violating the idea of Parliamentary Supremacy (Bernhardt 1993, pg 26).

iii. SINCE THE HUMAN RIGHTS ACT OF 1998

The Human Rights Act of 1998 incorporates the Convention into the domestic law of the UK and also instructs national judges to take into account the case law of the ECtHR when interpreting these rights. Section 3 of the Human Rights Act of 1998 “provides for the necessity to interpret domestic law ‘so far as it is possible’ in a way consistent with the Convention rights” (Martinico and Pollicino 2012, pg 52). In cases where there is an incompatibility between national law and the Convention, British

judges are not allowed to disregard national law, but are obligated to create a declaration of incompatibility that is to be presented to Parliament (Martinico and Pollicino 2012, pg 53). After such a declaration “if a Minister of the Crown considers that there are compelling reasons for proceeding...he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility” (Human Rights Act of 1998 Section 10). The issue with the declaration of incompatibility is that it touches neither on the validity or efficacy of the domestic statute (Martinico and Pollicino 2012, pg 116). It is important to note that these declarations are regularly addressed by the intervention of the executive or Parliament to amend the incompatible legislation (Murphy 2010, pg 496). Unlike national law that is found to be contrary to EU law, law deemed incompatible with the Convention is not disregarded or declared invalid (Murphy 2010, pg 478). A declaration of incompatibility does not affect the “validity, continuing operation or enforcement” of the national law, nor does it bind the parties before the British court to the Strasbourg Court decisions (Murphy 2010, pg 488). Instead it allows Parliament to fast track an amending bill to the national law to rectify the conflict in whatever way Parliament deems fit (Martinico and Pollicino 2012, pg 246). In the British context, the Strasbourg Court does not have the degree of primacy afforded to the ECJ.

Since 2000, when the Human Rights Act took effect, roughly thirty to thirty-five cases of the docket of the UK’s highest court, the Law Lords and the Supreme Court of the UK, involve the interpretation of Convention rights (Dickson 2011, pg 351). By incorporating the Convention into national law it allowed British judges to apply the articles of the Convention in their logic, meaning legal reasoning, freely and without

concern that the judgment would be seen in a poor light for usurping the powers of Parliament. It also allowed British judges to hear cases on the violation of Convention rights domestically, rather than the only route for redress being the Strasbourg Court. While this would become important for British citizens as the Strasbourg Court became buried under a backlog of cases which began in 1998, it also allowed the British courts to be a mechanism to circumvent the Strasbourg Court.

The mechanism to circumvent the Strasbourg Court is defined in the British case of *Ullah v. Special Adjudicator* (United Kingdom House of Lords 2002b, referred to as *Ullah*); Lord Bingham stated that the Law Lords are

required by s 2(1) of the Human Rights Act of 1998 to take into account any relevant Strasbourg case law. While *such case law is not strictly binding*, it has been held that courts should, in the absence of some special circumstance, follow any clear and constant jurisprudence of the Strasbourg court... This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by s 2 should not *without strong reason* dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under s 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of the interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it (United Kingdom House of Lords 2002b, paragraph 20 emphasis added).

British judges could now interpret and apply the Convention, through the Human Rights Act of 1998, without making reference to or citing the jurisprudence of the Strasbourg Court as it is “not strictly binding” so long as they have a “strong reason” which they

articulate in their jurisprudence. What exactly constitutes a strong reason is at the discretion of the judge and can potentially involve rejecting the ECtHR's precedent. Thus paving the way for the British judiciary to act independently of the Strasbourg Court and rely on their own understanding of the Convention. Through *Ullah*, British judges have a logic to follow when dodging ECtHR jurisprudence. British judges were granted the right to interpret the Convention for themselves, relying on the British idea of the Convention and other member states jurisprudence to justify their decisions in their domestic cases. This behavior is not typical of a treaty with an international court attached for enforcement purposes, rather this type of behavior is to be expected when utilizing international law without a hierarchical international court attached. Then again most treaties do not include a provision for an international court and a provision for the need to look horizontally to other member state courts to ensure consistent application of the treaty.

In *Al-Skeini and others v. Secretary of State for Defense* (United Kingdom House of Lords 2007a, referred to as *Al-Skeini*), Lord Brown discussed the implications of *Ullah*. Lord Brown stated that if a British Court was too narrow in its interpretation of a right, the Strasbourg Court would certainly step in to correct it (United Kingdom House of Lords 2007a, paragraph 107). This implies that if the UK Court applies a Convention right too narrowly, then the UK Court can rest assured that the Strasbourg Court will correct the matter (Kerr 2013, pg 112-113). If a true dialogue is to take place both the Strasbourg Court and the UK Supreme Court must be prepared to speak first as to the Convention rights (Wiater 2010). The act of Parliament incorporating the Convention into domestic law demands that the interpretation of the human rights and fundamental

freedoms enshrined in the Convention is no longer solely about the Strasbourg Court's jurisprudence. The notion of *Argentoratum locutum, iudicium finitum* or "Strasbourg has spoken, the case is closed" (United Kingdom House of Lords 2009b, paragraph 98) should be replaced with *Argentoratum locutum, nunc est nobis loquendum* or "Strasbourg has spoken, now it is our time to speak" (Kerr 2013, pg 115). This would allow for the emergence of a true dialogue between the judicial institutions and a prominent role for national judges in the acceptance and interpretation of international law.

In 2010, the report of the Joint Committee on Human Rights delivered to the Council of Europe, found two large faults with the United Kingdom's interactions with the Strasbourg Court. First, the Committee "deplored some very lengthy delays in the implementation of certain judgments" (Spielmann 2012, pg 1244). The British government has recently been slow to pay restitution, meaning waiting over a year, as determined by the ECtHR according to the report (Spielmann 2012, pg 1244). The report became the first step in the shaming of the UK to provide the required redress. Second and of greater importance, the report noted "the attitude of UK judges towards the principles decided in Strasbourg" and their neglect in applying the relevant ECtHR case law in their domestic cases (Spielmann 2012, pg 1244). The legal reasoning in the ECtHR's jurisprudence follows the standard judicial rational of writing judgments that explore the relevant case law, context, and attempts to provide a compelling, well-articulated legal reasoning. While some judgments can always be clearer, the ECtHR tries to write judgments with the intention of having member state courts utilize the judgment in their future legal reasoning (Thomassen 2013, pg 101). On occasion, British judges have found Strasbourg Court decisions too unclear to implement such as in *Al-*

Khawaja v. United Kingdom (European Court of Human Rights 2011), but more often failure to implement is as result of British judges claiming that the Strasbourg Court has exceeded its mandate (Spielmann 2012, pg 1245). The Human Rights Act of 1998 even goes as far as to compel lower British courts through the practice of *stare decisis* to follow the decisions of the highest British courts even when “they are inconsistent with subsequent Strasbourg authority” (Spielmann 2012, pg 1246). Since the Human Rights Act of 1998 has passed, there have been twenty-six declarations of incompatibility, of them eighteen have been remedied by Parliament and eight of them have been overturned and Parliament has declared that domestic law is superior (Spielmann 2012, pg 1235). When domestic law is determined superior, despite a conflict in jurisprudence with the Strasbourg Court, then all British judges are compelled to only apply the domestic law, leaving the Strasbourg Court with only the power of diffuse shamming to compel British obedience.

British judges have used the Human Rights Act of 1998 to allow themselves to be the authority on the Convention rather than the Strasbourg Court. This is in spite of the fact that on multiple occasions the ECtHR has overturned the decisions of British Law Lords and Supreme Court judges (See for recent examples *Ullah v. Special Adjudicator* (United Kingdom House of Lords 2002b), *Wainwright v. Home Office* (United Kingdom House of Lords 2003), *R (Petty) v. Director of Public Prosecutions* (United Kingdom House of Lords 2001b), *R (Purdy) v. Director of Public Prosecutions* (United Kingdom House of Lords 2002a), *Regina v. Chief Constable of South Yorkshire Police ex parte LS* (United Kingdom House of Lords 2004d), *R (Gillan) v. The Commissioner of Police of the Metropolis* (United Kingdom House of Lords 2006), *In re McKerr v. North Ireland*

(United Kingdom House of Lords 2004a), *R (Middleton) v. West Somerset Coroner* (United Kingdom House of Lords 2004b), *R (Sacker) v. Her Majesty's Coroner for the County of West Yorkshire* (United Kingdom House of Lords 2004c) and *R v. G* (United Kingdom House of Lords 2009a)). Do note the irony that as Lord Bingham claimed you get the same response from a British court as you do from the Strasbourg Court in *Ullah*; *Ullah* was overturned by the Strasbourg Court in 2004. Despite the Strasbourg Court overturning British cases, it does not mean that the British judges have applied the new Strasbourg logic, as shaming is still their greatest power to ensure compliance. While *Ullah* was overturned it is still regarded as the defining logic in how the Human Rights Act should be applied to British cases involving the Convention.

iv. CONCLUSION

This section has discussed the effects of the Human Rights Act of 1998 on British judges and their engagement with the Strasbourg Court. Prior to the Human Rights Act of 1998, judges used the Convention and decisions of the Strasbourg Court sparsely. In the 1990's British judges began to push for the incorporation of the Convention into domestic law. This allowed British judges to cite and interpret the Convention without relying on the Strasbourg Court for the meaning of the Convention. Since the Human Rights Act of 1998, British judges have developed their own philosophy of how to grapple with the jurisprudence. The active engagement of British judges did not improve the relationship between the courts as the report of the Joint Committee on Human Rights in 2010 found fault with the British judges for failure to produce compensation in a timely matter and a lack of regard of the Strasbourg Court's jurisprudence in their case

law. The Human Rights Act of 1998 placed the discretion of whether to employ Strasbourg jurisprudence in the domestic legal arena under the control of British Law Lords and Supreme Court judges of the UK. In doing so, British judges were free to engage in the dodge and massage, with the Human Rights Act of 1998 and *Ullah* frequently used as a justification of dodging.

H. DODGING THE STRASBOURG’S COURTS VERTICAL LEGAL INTEGRATION

i. INTRODUCTION

This section turns to the difficulties of this relationship from the perspective of the British, including the aggressive interpretation of the Convention by the Strasbourg Court to widen the scope of their jurisdiction, lack of respect for the “margin of appreciation” provided by the Convention to assure member states that the ECtHR would respect their sovereignty, and the difficulty in establishing a two way dialogue with the Strasbourg Court (Wiater 2010). The interactions between British judges, the British Parliament, and the Strasbourg Court on the case law on the rights of convicted prisoners to vote illustrates the ever expanding jurisdiction of the Strasbourg Court and the efforts by the British to push back and dodge Strasbourg jurisprudence. The British dodge by arguing that the Strasbourg Court is interpreting specifics into the Convention that do not exist and failing to acknowledge the states’ rights to the margin of appreciation. The margin of appreciation allows for states to secure Convention rights by different means and the maintenance of national variation in achieving shared goals. To win this argument, British judges intervene in the cases of other member states before the Strasbourg Court to convince them to alter their jurisprudence in favor of the state’s margin of

appreciation. Despite the failure to create a dialogue between the Strasbourg Court and British judges in the area of voting rights for convicted prisoners that could resolve the dispute to accommodate both sides' concerns, there have been other areas of case law where this has been achieved such as in the case of hearsay testimony. In the area of hearsay testimony a dialogue between both courts allowed for the creation of exceptions to previous Strasbourg Court case law and avoided another public dispute between the two courts.

ii. AGGRESSIVE INTERPRETATION AND WIDENING JURISDICTION

The ECtHR's most controversial doctrine is the idea of the Convention as a "living instrument" which on the one hand allows the Strasbourg Court to apply the Convention to new situations unforeseen by the architects of the Convention and on the other hand allows the Strasbourg Court to interpret new rights not defined in the Convention that represent a potential challenge to Parliamentary Supremacy (Thomassen 2013, pg 98). The Strasbourg Court in *Cossey v. United Kingdom* stated it will "ensure that the interpretation of the Convention reflects societal change and remains in line with present-day conditions" (European Court of Human Rights 1990a). The notion of a constitution being a "living instrument" is widely accepted in Western legal and political traditions (Thomassen 2013, pg 98). National constitutions are regarded as living documents with the meaning of the documents evolving over time, through case law in national constitutional and/or supreme courts. Yet an international treaty such as the Convention is not regarded in the same light as a national constitution, particularly by national actors.

British legal experts have consistently argued for an interpretation of British documents as a “living instrument” within national courts, affirming that this does not challenge British Parliamentary Supremacy; rather it reaffirms the acts of Parliament as democratic and fair. Lord Bingham, a retired Law Lord in office from 2000-2008, argued that strict reliance on Parliamentary Supremacy could allow the Parliament the right to confiscate the property of all ginger (red) haired women or withdraw the citizenship of all Jehovah’s Witnesses because these rights are not specifically protected (Bingham 2010, pg 162). Lord Bingham’s argument is strictly about national courts keeping the British Parliament in check and ensuring the law evolves with society. Professor Francis Jacobs, a British Professor of European Law and an Advocates General at the ECJ from 1988-2006, argued that Parliamentary Supremacy is incompatible both domestically and internationally with the notion of the rule of law since Parliament and its prerogatives are supreme not justice nor the law (Jacobs 2007, pg 5). Professor Jacobs’ argument and experience with European supranational courts allows for European legal challenges to Parliamentary Supremacy to rely on treaties as the supreme law. But not all look favorably on the notion of the Convention as a “living instrument,” many argue that when utilized beyond the state institutions that it is just an excuse to engage in unbridled judicial activism (Fraser 2013, pg 200). The idea of the Convention as a “living instrument” can lead to the notion that the Strasbourg Court has aggressively interpreted the Convention to suit their purposes and increase the scope of their jurisdiction.

To illustrate this point an example is in order. In *Hirst v. the United Kingdom No. 2* the ECtHR sided with Hirst that the UK had violated Article 3 Protocol 1 (free and fair

elections) of the ECHR by not allowing convicted prisoners the right to vote (McBride 2009; European Court of Human Rights 2005). According to the decision in *Hirst*, the ECtHR ruled against the UK because the decision to restrict a prisoner's right to vote is "general, automatic, and indiscriminate" (European Court of Human Rights 2005, paragraph 82). Hirst was convicted of the murder of his landlady while out on parole in 1979 (Davis 2013, pg 66). The grisly nature of the crime including the use of an axe to bludgeon her to death and his confession that while she lay dying he stopped to rest by making himself a cup of coffee during the attack made this a special circumstance case in the British courts (Davis 2013, pg 66). This ruling was seen in Britain in a particularly harsh light, given the extensive efforts of the British Parliament to discuss and legislate on the right of prisoners to vote (McBride 2009). The Forfeiture Act of 1870 prohibited convicted prisoners from voting (Davis 2013, pg 65). Since then, four Representation of the People Acts (1918, 1969, 1983, and 2000) reaffirm the ban after extensive Parliamentary debates and an effort limiting it to convicted prisoners rather than all prisoners which involves those awaiting trial (Davis 2013, pg 65). Despite the decision in *Hirst*, British judges ignored the Strasbourg jurisprudence and upheld the acts of parliament.

In the follow up to *Hirst, Greens and M.T. v. the United Kingdom* (European Court of Human Rights 2008) the ECtHR unsurprisingly sided against the UK that the state had continued to violate Article 3 Protocol 1 of the ECHR by not lifting the ban on voting by convicted prisoners and denying the prisoners the right to vote in the general UK elections and an EU Parliament election. In the decision, the ECtHR states that the violation is a direct result of not implementing the 2005 *Hirst* decision (European Court

of Human Rights 2008, paragraph 110). The ECtHR gave the UK six months to correct their legislation on banning convicted prisoners in order to bring it in line with the ECHR rights (European Court of Human Rights 2008, paragraph 115). Like Hirst, Greens and M.T. were both convicted violent criminals serving sentences for rape (Davis 2013, pg 66). In response, the House of Commons held a debate and vote on the right of convicted prisoners to vote in 2011 (Davis 2013, pg 65). By a margin of more than 200 votes from both sides of the aisle, the British House of Commons voted to uphold the UK's policy on not allowing convicted prisoners the right to vote in defiance of the ECtHR's rulings (Davis 2013, pg 65). British Prime Minister Cameron's speech cited in the beginning of this chapter is a direct reference to this controversy including his argument that the ECtHR should respect national laws reached through democratic deliberation and that the ECtHR is failing to respect Britain's margin of appreciation which is guaranteed in the Convention and reaffirmed by the Strasbourg Court in *Handyside v. United Kingdom* in 1976 (European Court of Human Rights 1976).

A similar case arose in 2012 in Italy, *Scoppola v. Italy No. 3*, when a convicted Italian prisoner argued that his rights (Article 3 Protocol 1) had been violated by Italy's ban on convicted prisoner's right to vote (European Court of Human Rights 2012). Italy's convicted prisoner ban on voting is remarkably similar to the UK's (Davis 2013, pgs 66-67). An unusual aspect of this case is that the UK's Advocate General for England, Wales, and Northern Ireland, Dominic Grieve, personally asked and was granted permission to address the ECtHR on the issue (Davis 2013, pg 67). Advocate General Grieve argued before the Strasbourg Court that member states are entitled to a wide margin of appreciation with regard to prisoner voting rights since the Convention

does not expressly state that all adults have to be included to constitute a free election and that matters of social policy are the purview of the state not the Strasbourg Court and thus the Strasbourg Court should rethink *Hirst* and *Greens* (Davis 2013, pg 67). The ECtHR reaffirmed its previous case decisions in *Scoppola* and asserted that a blanket ban regardless of sentence and crime is a violation of Article 3 Protocol 1 of the ECHR (European Court of Human Rights 2012, paragraph 96 and 106).

This leaves the UK Parliament and British judges in a direct standoff with the ECtHR. Given that there was a debate and vote in 2011 in the House of Commons it is unlikely that if the British Parliament discusses the matter further in the near future, that they will comply with the ECtHR rulings on a prisoners right to vote. Article 3 Protocol 1 of the ECHR requires states to hold free and fair elections regularly and by secret ballot, but does not explicitly guarantee universal suffrage nor even the right of women to vote, leading many British judges to question the scope and authority of the Strasbourg Court (Davis 2013, pg 67-68). Britain's continued defiance of the ECtHR may call the authority and legitimacy of the Court into question, particularly since Germany and the Netherlands are also in open conflict with the Strasbourg Court (See for the Netherlands dispute over Amicus Curiae briefs Gerards and Terlouw 2013; See for Germany the dispute over the Supremacy of the German Constitution over the Convention Zwart 2013). While on a visit to Britain in 1997, former German President Roman Herzog was asked what would happen if the German Constitutional Court was in direct conflict with an ECtHR ruling and replied "I think the German people would support their own court" (Davis 2013, pg 69). It appears that the British are supporting their own courts and Parliament on the matter (Davis 2013).

Interestingly Strasbourg's *Hirst* case contains its own acts of transnational judicial dialogue with the citation of Canadian and South African (both Commonwealth states) in support of allowing convicted prisoners to vote (Voeten 2010, pg 561). This is unusual as the Strasbourg Court rarely relies on judgments of constitutional courts outside the Council of Europe member states, except almost exclusively with cases involving the United Kingdom (Voeten 2010, pg 562). In these United Kingdom cases, the ECtHR regularly cites cases from Commonwealth states as support for its decision whether for or against the United Kingdom (Voeten 2010, pg 562). The ECtHR needs to strike a balance between exercising their authority and respecting national court decisions to maintain their legitimacy in the national arena (Thomassen 2013, pg 97). In this instance, the ECtHR failed to maintain that balance. In 2012, the member states of the Council of Europe met to discuss reforming the ECtHR at the Brighton Conference in the UK. The resulting Brighton Declaration calls for an increased awareness on the part of the ECtHR of the margin of appreciation (Dzehtsiarou 2013, pg 117). While the margin of appreciation was first used by the ECtHR in *Greece v. United Kingdom* (European Court of Human Rights 1960) in favor of the UK, Britain has led the charge in expanding its use by the ECtHR (Dzehtsiarou 2013, pg 119-120). Sometimes this charge has been quite vehement including British MP Philip Hollobone who stated "[h]ow has it come about that we, in a sovereign Parliament, have let these decisions be taken by a kangaroo court in Strasbourg, the judgments of which do not enjoy the respect of our constituents" (Dzehtsiarou 2013, pg 123). British Law Lord, Lord Hoffmann argued in 2009 that the Court has not taken the doctrine of the margin of appreciation far enough, being "unable to resist the temptation to aggrandise its jurisdiction and to impose uniform rules on

Member States. It considers itself the equivalent of the Supreme Court of the United States, laying down a federal law of Europe" (Lord Hoffmann 2009).

The Australians have also become involved in the issue of whether a convicted prisoner can vote. In *Roach v. Electoral Commissioner* (High Court of Australia 2007, referred to as *Roach*) is a High Court of Australia case grappling with whether convicted prisoners can vote. This case illustrates the way in which international human rights law can seep into judicial reasoning of national courts. In *Roach* the contention was over whether a law by the Australian Parliament allowing non-violent prisoners serving three years or less to vote was counter to the common law and the principles of the "unwritten" Australian constitutional ideals (High Court of Australia 2007). Australia like Britain does not have a single written constitution but rather has a set of documents which taken together provide the constitutional principles on which the law is based. The most important of these documents is the Constitution of the Commonwealth of Australia which was approved by referendum in 1900 and given assent by the British Parliament in 1900. The decision in *Roach* was written by Chief Justice Gleeson referenced the decisions of the British Law Lords (High Court of Australia 2007, citations 1, 27, 49, 50, 68, 104, and 141), the Canadian Supreme Court (High Court of Australia 2007, citations 14, 17, 18, 44, 102, and 139), and even the Strasbourg Court of which Australia is not a member state of the Council of Europe (High Court of Australia 2007, , citations 19, 103, and 140). British jurisprudence included accompanying case law by the Law Lords on the British Forfeiture Act 1870, Representation of the People Act 1983, and Criminal Justice Act 2003. Chief Justice Gleeson used the British case law to provide a legal argument for why violent criminals should not be allowed to vote, but created an

exception for non-violent criminals. The British Criminal Justice Act 2003 also created an exception for non-violent criminals who were serving reasonably short sentences that happened to coincide with an election. The Australian solution provides a more blanket response in allowing all non-violent prisoners serving less than three years to vote (High Court of Australia 2007).

Lord Hoffmann, a Law Lord from 1995 to 2009, just prior to his retirement spoke of how the ECtHR had gone too far in “correcting” UK judges on whether aspects of UK law were compatible with the Convention and was critical of the Strasbourg Court’s interference on matters which are within the margin of appreciation, or purview of the member states (Dickson 2011, pg 362). Lord Hoffmann went on to argue that

If one accepts, as I have so far argued, that human rights are universal in abstraction but national in application, it is not easy to see how in principle an international court was going to perform this function of deciding individual cases, still less why the *Strasbourg court was thought a suitable body to do so* (Hoffmann 2009, paragraph 23 emphasis added).

Lord Hoffman went on further to claim

The fact that the 10 original Member States of the Council of Europe subscribed to a statement of human rights in the same terms did not mean that they had agreed to uniformity of the *application* of those abstract rights in each of their countries, still less in the 47 states which now belong. The situation is quite different from that of the European Economic Community, in which the Member States agreed that it was in their economic interest to have uniform laws on particular matters which were specified as being within European competence. On such matters, the European institutions, including the Court of Justice in Luxembourg, were given a mandate to unify the laws of Europe. *The Strasbourg court, on the other hand, has no mandate to unify the laws of Europe on the many subjects which may*

arguably touch upon human rights (Hoffmann 2009, paragraph 24 emphasis added).

Lord Hoffmann's speech shows just how contested the authority of the Strasbourg Court has become in the United Kingdom and that when the Strasbourg Court exceeds its mandate it may be ignored or dodged by British judges. This speech also illustrates the sharp distinction being drawn between the ECJ and the ECtHR. The ECJ has the mandate to align the laws of the European Union member states into one community. The British may not like this, they may argue that it interferes with Parliamentary Supremacy, but they understand that this is a price of being a part of the European community. The ECtHR does not have a mandate to align the laws of the Council of Europe; rather it is designed to ensure that basic laws of human rights are employed across Europe. After all any reasonable person could come up with multiple ways to conduct free and fair elections that would meet the simplistic and non-descript language of the Convention. Even on the basic level, comparativists have not found different voting schemes (single member voting districts, proportional representation, and hybrid voting schemes) in democracies societies to vary in terms of creating free and fair elections. These are all ways to conduct free and fair elections. National differences in terms of who can vote such as the age of adulthood have not been determined by the Strasbourg Court and are dependent on the margin of appreciation afforded to state's as their national prerogative. Stating that no one under the age of twenty-one can vote in an election is "general, automatic, and indiscriminate" just like not allowing convicted prisoners to vote, but it is unlikely to appear on the Strasbourg Court's docket (European Court of Human Rights 2005, paragraph 82).

iii. CONVERGENCE AND DIALOGUE

Lord Kerr, a current Supreme Court of the UK Judge since 2009, has called for a “free and mutual flow of comprehensible and readily digestible information to allow greater insight and understanding” between the ECtHR and member state judges (Kerr 2013, pg 105). Lord Kerr goes on to say that the ECtHR and member state courts “perform different functions and it should not be a matter for concern that, in many instances, they will arrive at different conclusions” (Kerr 2013, pg 105). The ECtHR seeks supranational solutions that must be accepted across many states with differing interests and concerns. One of the primary goals of the ECtHR is to utilize the Convention to produce unity and coherence in all member state while still providing the latitude to adapt to modern conditions and unforeseen future problems that may arise in Convention application (Andenas and Bjorge 2013, pg 186). National courts on the other hand are deeply engrossed in domestic politics and culture and seek resolutions to face specific cases. Provided institutions remember their varying context and how these contexts can lead to the production of different outcomes of interest, Lord Kerr believes that it is “entirely possible to be relaxed about divergences of views” (Kerr 2013, pg 105). But this is not always possible to achieve. Lord Kerr notes that many of fellow UK Supreme Court Judges have “expressed an unwillingness to venture into an area where there had not yet been a definitive pronouncement from Strasbourg” for fear of being overturned (Kerr 2013, pg 106).

The following case law discusses how dialogue between the Strasbourg Court and British judges might be achieved. In *R v. Horncastle & Others* (United Kingdom Supreme Court 2009), the Supreme Court of the UK was charged with deciding whether

the Court of Appeal in England was right in declining to follow an ECtHR ruling, *Al-Khawaja and Tahery v. United Kingdom* (European Court of Human Rights 2011). In *Al-Khawaja* the ECtHR ruled against the UK, finding that using hearsay evidence, evidence made by a witness who does not appear in court such as a statement given to a police officer, while justifiable in some cases cannot be used as the sole evidence to achieve a conviction without violating Article 6 (free trial) of the ECHR (European Court of Human Rights 2011). In the case of *Al-Khawaja*, the witness had given a full signed account of events to police and was willing to testify, but died before the trial commenced of natural causes. In the *Horncastle* case, two eye witness accounts given to police were used. One eye witness account was given by a witness who died before the trial while the other eye witness account was given by a woman who refused to testify for fear of her safety. There was also evidence from business records of a large publicly owned firm given as evidence in the case along with the two eye witness statements that were delivered to the Court of Appeal by the collecting police officers. All hearsay evidence was presented in accordance with the UK's Criminal Justice Act of 2003 which subjected the evidence to extensive verification tests. If hearsay evidence is not allowed to serve as potential primary evidence in Britain, under the ECtHR ruling, there would be potentially thousands of criminal cases that could be overturned including cases where the victim made statements to police identifying their murderer but did not live long enough to testify in court. This presented a difficult dilemma for the Supreme Court: overturn the lower court's decision on the basis of the ECtHR ruling and potentially create a precedent that would launch thousands of appeals from incarcerated prisoners domestically, or reaffirm the lower court's ruling and engage in a standoff with the

ECtHR similar to *Hirst v. the United Kingdom No. 2* (European Court of Human Rights 2005) described above.

The Supreme Court decided to reaffirm the lower court's ruling in *Horncastle*. In the judgment, Lord Phillips expressed the great difficulty the Supreme Court faced in making this decision, their fear of releasing guilty prisoners for successfully silencing their witnesses, and extensively describing the tests placed on hearsay evidence in general and specifically in this case (United Kingdom Supreme Court 2009, paragraphs 14, 27-40, and 87-92). The judgment of *Horncastle* was sent to the Grand Chamber of the ECtHR for review and to persuade the ECtHR to develop a set of exceptions to *Al-Khawaja* where states would be allowed to allow hearsay evidence so long as certain requirements were met (Kerr 2013, pg 107). The Grand Chamber of the ECtHR responded thus...

It would not be correct, when reviewing questions of fairness, to apply the rule in an inflexible manner. Nor would it be correct for the Court to ignore entirely the specificities of the particular legal system concerned and, in particular its rules of evidence, notwithstanding judicial dicta that may have suggested otherwise (see, for instance, *Lucà*, cited above, at §40). To do so would transform the rule into a blunt and indiscriminate instrument that runs counter to the traditional ways in which the Court approaches the issue of the overall fairness of the proceedings, namely to weigh in the balance the competing interests of the defense, the victim, and witnesses, and the public interest in the effective administration of justice (European Court of Human Rights 2011, paragraph 146).

In the Grand Chambers of the ECtHR's response to the UK's case of *Horncastle*, it clearly concedes that *Al-Khawaja*'s was not meant to be interpreted or reported as a blanket disuse of hearsay evidence, but that there are exceptions and considerations to made for national standards of evidence. Despite the need for unity, the ECtHR

recognizes that it is not always possible or desirable. The doctrine of the margin of appreciation allows a state “a measure of deference in determining where interference with a protected right was ‘necessary in a democratic society’” (Andenas and Bjorge 2013, pg 186 and *Handyside v. United Kingdom* (1976)). The Strasbourg Court is willing to amend its decisions if the national court can convince the Strasbourg Court that their interpretation of a national law is incorrect or incomplete (Thomassen 2013, pg 97). From this dialogue the ECtHR learned to be more attentive to national constraints while the Supreme Court of the UK learned the necessity of addressing ECtHR case law and the importance of explaining why the case before them is an exception to ECtHR case law (Kerr 2013, pg 108). “The Strasbourg court is a dialogical partner with the member states, the legitimacy and persuasiveness of its decisions residing both in their quality and communicative power” (Andenas and Bjorge 2013, pg 188). Here the willingness of the ECtHR to listen to the British Judges concerns went a long way to adding to the legitimacy of the Strasbourg Court in Britain and preventing another point of contention between the Strasbourg Court and British judges.

Horncastle was almost another convicted prisoners right to vote situation. The British judges of the Supreme Court had refused to disrupt the traditions of allowing hearsay testimony so long as the testimony met the requirements of scrutiny established by acts of parliament. But the Supreme Court of the UK was clearly gearing up for a potential battle with the Strasbourg Court, unwilling to back down while trying to persuade the Strasbourg Court of the merits of recognizing the margin of appreciation of the British state who had taken great pains to ensure the standards of evidence were not compromised by allowing hearsay testimony (Hammarberg 2011).

iv. **CONCLUSION**

British judges feel that the Strasbourg Court have aggressively interpreted the Convention to widen the scope of their jurisdiction and in so doing has created a lack of respect for the margin of appreciation afforded to the national governments. The interactions between British judges, the British Parliament, and the Strasbourg Court on the case law on the rights of convicted prisoners to vote illustrates the ever expanding jurisdiction of the Strasbourg Court and the efforts by the British to dodge Strasbourg jurisprudence when they are in conflict with it. In the area of hearsay testimony, a dialogue between both courts allowed for the creation of exceptions to previous Strasbourg Court case law and avoided another public dispute between the two courts.

I. MASSAGING THE STRASBOURG'S COURTS THROUGH HORIZONTAL LEGAL INTEGRATION

The final discussion of this chapter is on the use of horizontal member state case law to massage British decisions on the Convention. British and Norwegian judges follow the Strasbourg Court's jurisprudence that anyone interviewed by the police has the right to have an attorney present, despite the large number of cases that might be overturned, not because they are convinced of the logic of the ECtHR but because they have looked at how other member states have tackled the issue and follow their lead. When the Strasbourg Court's jurisprudence is inconsistent within itself, British judges have looked to the other member states to determine how to achieve consistency of case law. As an example, the Strasbourg Court has determined that it is discriminatory to deny homosexuals the right to serve in the military, but finds it not discriminatory to deny

homosexuals the right to adopt or to have family status. British judges find it difficult to find discrimination allowable in family life while not allowable in military service.

When looking at how member state courts dealt with this matter, British judges found that states that allowed homosexuals to serve in the military they also allowed them family status as well.

This section explores how British judges utilize horizontal integration by citing other member states courts to massage the Convention and remain a part of the international legal order on human rights and fundamental freedoms. *Cadder v. Her Majesty's Advocate* (United Kingdom Supreme Court 2010, referred to as *Cadder*) is an example of the UK Courts handling a case that would otherwise be handled by the ECtHR. *Cadder* involved whether a person who was being interviewed by the police but not arrested, has the right to speak to a solicitor prior to the interview and failure to allow this could be considered a violation of the Convention. The stakes of this case were high given that potentially 76,000 criminal cases throughout the UK might be affected (Føllesdal et al. 2013, pg 182). Normally this would be just the sort of case heard by the Strasbourg Court, but the advocates of the case wished to bypass the extensive backlog of cases and a hearing before the Supreme Court of the UK does not prohibit the advocates of the case from bringing it before the Strasbourg Court at a later date (Føllesdal et al. 2013, pg 182). The Supreme Court sided in favor of *Cadder* stating that there was indeed a breach of the Convention in these cases. In the Supreme Court's decision, Lord Hope argued that "it would be untenable if the solution in the UK should be different from that of the other member states" of the Convention (Føllesdal et al. 2013, pg 182). The Strasbourg Court attempts to find solutions to problems that are "universally applicable"

in all the member states and achieve a harmonious unity, rather than a solution determined solely by national choices and standards (United Kingdom Supreme Court 2010, paragraph 40). To find unity the Supreme Court looked to the other member state's court for a common solution. In *Cadder*, Supreme Court judges of the UK looked to cases in Germany, Switzerland, France, Belgium, The Netherlands, and Ireland where all persons of interest in a case have the right to request an attorney be present though in many jurisdictions they do not have to be informed of this right by a police officer (United Kingdom Supreme Court 2010). Lord Hope summarized the position of the Supreme Court as follows "Pride in our own system is one thing; isolationism is quite another" (Føllesdal et al. 2013, pg 182).

A ruling in a similar case was handed down by the Norwegian Supreme Court, also a member state of the Council of Europe, within a month of the *Cadder* decision. The Norwegian case (HR-2010-01703-S) bore a striking resemblance to the decision written by Lord Hope and contained an utter rejection of the Norwegian government's case, which suggested that this was a case of Norwegian exceptionalism (Føllesdal et al. 2013, pg 183). Despite the high stakes of potentially reopening many cases due to the decisions in *Cadder* and the Norwegian case, both cases looked to the behavior of other member state courts to determine that complying with the Strasbourg Court was the best policy and not a matter of the margin of appreciation (Føllesdal et al. 2013, pg 183). Here the jurisprudence of other member states altered the balance of following the decisions of the ECtHR despite potentially reopening many cases, potentially more than on the issue of hearsay or convicted prisoners right to vote.

British judges may also turn to member state courts because they feel that the Strasbourg Court's jurisprudence is inconsistent within itself. Such an area of law is homosexual rights (Goldstein et al. 2000; Conant 2006). The jurisprudence of the Strasbourg Court requires member states to allow homosexuals to serve in the military (European Court of Human Rights 1999; European Court of Human Rights 2000), but has ruled against the right of homosexuals to adopt (*Frette v. France* 2002) or the right of family status (European Court of Human Rights 1983; European Court of Human Rights 1997c). In the cases of *Smith and Grady v. United Kingdom* and *Lustig-Prean and Beckett v. United Kingdom*, the Strasbourg Court found that dismissal from the military for homosexuality violated Article 8 of the Convention (right to privacy) and ordered the British to pay restitution to the dismissed military personal and to no longer ban homosexuals from serving in the military (European Court of Human Rights 1999; European Court of Human Rights 2000). The Strasbourg Court went further to claim that the United Kingdom had also violated Article 13 (right to an effective judicial remedy) of which the appellants of either case had not sought (Stone Sweet 2012, pg 75). In its decisions the Strasbourg Court stressed that "European countries operating a blanket legal ban on homosexuals in their armed forces are now in a small minority" with the United Kingdom one of the last Western European holdouts (Stone Sweet 2012, pg 75). The UK lifted the ban on homosexuals in the military in 2000 amid some protest movements within Britain (Stone Sweet 2012, pg 75 and supra note 39).

In *Frette v. France* (European Court of Human Rights 2002a), *Frette* claimed that he was denied the right to adopt due to his homosexuality and that this was a violation of Articles 14 (prohibition against discrimination) and 8 (right to privacy and family life).

The Strasbourg court ruled that there was no violation of the Convention in this case. The Strasbourg Court determined there was no violation of a right to privacy and family on the basis that Frette voluntarily provided social services with the information that he was a homosexual, which they are not allowed to ask and would constitute a violation (European Court of Human Rights 2002a, section 2). Furthermore Article 8 is about the “respect of family life” not the right to start a family which can be denied by the state (European Court of Human Rights 2002a, section 6). The Strasbourg Court argued that Article 14 does not provide anyone with the right to adopt and that social services had “pursued a legitimate aim, namely to protect the health and rights of children who could be involved in an adoption procedure” (European Court of Human Rights 2002a, section 4). The Strasbourg Court concluded that the assessment of the French social services was right to claim that “his particular circumstances as a single homosexual man allow him to be entrusted with a child” (European Court of Human Rights 2002a, section 2).

Both *X & Y v. United Kingdom* (1983) and *X, Y, & Z v. United Kingdom* (1997) are ECtHR cases involving violations of Articles 14 (prohibition against discrimination) and 8 (right to privacy and family life) and in both cases the ECtHR found no violation of these rights (Dutertre 2003). *X & Y v. United Kingdom* (European Court of Human Rights 1983) involves the deportation of a Malaysian national who is in a stable, long-term, homosexual relationship with a British citizen. The Strasbourg Court ruled the deportation of a foreigner with an expired visa is not a violation of the Convention because the right to private family life does not extend to individuals who are not legally family (European Court of Human Rights 1983, section 5). Since the UK did not recognize homosexual marriage, they were not a family. *X, Y, & Z v. United Kingdom*

(European Court of Human Rights 1997c) involves a transsexual providing sperm for the purposes of artificial insemination being allowed to be listed as the biological father on the birth certificate; the Strasbourg Court ruled that denying the biological father this right was not a violation of the Convention given “there is no common European standard with regard to the granting of parental rights to transsexuals, then generally speaking the law is in a transitional stage and states must be allowed a wide margin of appreciation” (European Court of Human Rights 1997c, section 4).

By insisting that homosexuals must be allowed to serve in the military, while also denying the right of homosexuals to adopt or have the protections of family life, the Strasbourg Court was creating a logic British judges found troubling (Conant 2006). Most member states who allow homosexuals in the military also allow them the right to marry and adopt. While the logic of the Strasbourg’s jurisprudence is that homosexuality has no bearing on military service, their logic on marriage and parenting seems to indicate that homosexuality does have an impact. In 2000, the Law Lords submitted a declaration of incompatibility given the ECtHR decisions in *Smith and Grady v. United Kingdom* (European Court of Human Rights 1999) and *Lustig-Prean and Beckett v. United Kingdom* (European Court of Human Rights 2000) the UK’s policy on other homosexual rights was inconsistent with the Convention despite the fact that the Strasbourg Court had continued to rule, even after, that it was not (European Court of Human Rights 2002a). Between 2000 and 2014 the British Parliament took steps to rectify the situation by extending a wide variety of rights to homosexuals including adoption, civil partnerships, marriage, anti-discrimination, and gender identity and expression. In the extension of homosexual rights beyond the military, British judges

looked to other member states which supported the full inclusion of homosexuals into society as guides including Belgium and the Scandinavian states (Conant 2006).

Sometimes “national courts decide to ignore the [Strasbourg] Court's interpretation of the Convention even when on point, and even where Convention rights have been domesticated through incorporation” (Stone Sweet and Keller 2008, pg 14). In *R (Faizovas) v. Secretary of State for Justice* (England and Wales Court of Appeal Civil Division 2009, referred to as *Faizovas*) the question of whether it was a violation of Article 3 (prohibition of torture or inhuman or degrading treatment) of the Convention for the police to handcuff a terminally ill patient while receiving chemotherapy treatment at a local hospital (Føllesdal et al. 2013, pgs 206-207). According to Strasbourg jurisprudence this was clearly a violation (See *Raninen v. Finland* (European Court of Human Rights 1997b), *Mouisel v. France* (European Court of Human Rights 2002b), *Filiz Uyan v. Turkey* (European Court of Human Rights 2009a), and *Paradysz v. France* (European Court of Human Rights 2009b)). In *Faizovas*, the Law Lords found that the use of the handcuffs was necessary to ensure the prisoner did not escape as the hospital was not secure (England and Wales Court of Appeal Civil Division 2009, paragraph 12). The British judges used the jurisprudence of cases from France and Finland to against the logic of the Strasbourg Court in *Filiz Uyan v. Turkey* 2009 (European Court of Human Rights 2009a, paragraph 2, 3, 15, and 32).

This section has argued that when British judges experience difficulty with the Strasbourg Court, they turn to the member state court's jurisprudence on the Convention to determine if there is a common European approach to follow. To overcome the difficulties of interacting with the Strasbourg Court, British judges use horizontal

member state case law to inform their decisions on the Convention thus massaging their relationship to the Convention.

J. CHAPTER CONCLUSION

This chapter has argued that British judges overtime have become less willing to follow the jurisprudence of the Strasbourg Court dodging it when there is contention as the convicted prisoner's right to vote illustrated. British judges massage their interaction with this international legal order through the use of other member state's jurisprudence horizontally and domestic knowledge of the Convention to apply it cases, thus circumventing the utilization of the jurisprudence of the ECtHR. The British judges are intentionally distancing themselves from the vertical legal order under the ECtHR. On occasion member state court's jurisprudence on the Convention is cited as support for the British interpretation of the Convention against the jurisprudence of the Strasbourg Court, thus using member state cases as further evidence of the problem they face in dealing with the Strasbourg Court. Unlike the treaties of the EU, the Convention intentionally compels the creation of a horizontal human rights legal order within the signatories of the Convention, by asserting that all member states should look to how Convention rights are applied judicially in the other member states. In the relationship to the Strasbourg Court, the use of horizontal jurisprudence is used to counter the authority of the Strasbourg Court and provide an alternative logic on the meaning of the Convention. Chapter V will direct our attention to how the dodge and massage works in the European Court of Justice context. Within the European Union legal order, British judges massage the relationship between itself and the ECJ through horizontal legal integration of Advocates General

opinions and the relevant case law of other EU member states in order to absorb EU law and integrate within the European legal order, overcoming their difficulty in understanding the civil law basis of EU law and thus dodging the jurisprudence of the ECJ in the process.

CHAPTER V

ABSORBING EUROPEAN COURT OF JUSTICE

JURISPRUDENCE THROUGH HORIZONTAL CHANNELS

The Treaty [of Rome] does not touch any of the matters which concern solely England and the people in it. These are still governed by English law. They are not affected by the Treaty. But when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back, Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute. (England and Wales Court of Appeal Civil Division 1974).

What is the really essential feature of the European Union? It is that, in the EU, the guiding principle is law—not force. (Liikanen 2013).

A central achievement of the European Union, a court [European Court of Justice] with unparalleled transnational power (Lord Mance 2011).

A. INTRODUCTION

The EU² international legal order was created in 1952 by the Treaty of Paris. Since its start as the European Coal and Steel Community, it has expanded from six to twenty-eight European member states. EU law began as a way to prevent war by binding production of the tools of war (coal and steel) and has since expanded to touch upon a wide range of law including immigration, economic and business law, environmental law, and criminal law. The ECJ has created a stratified vertical legal order through its

² The distinction between European Community and European Union, while useful in other contexts, will not be made in this chapter, European Union (EU) will be used throughout; European Community will only be used when referring to a specific legal case or treaty that uses that term, both are interchangeable in referring to the same set of European institutions of interest in this project.

case law and promotes an integrated vertical legal order. European legal integration is the penetration of EU community law into the national legal systems of the individual member states. There have been hints in the European integration literature about horizontal legal integration in many vertical integration studies (Jupille and Caporaso 2009; Burley and Mattli 1993; Mattli and Slaughter 1995). This chapter posits that there are distinct dynamics of horizontal integration operating within the strong vertical legal order established by the ECJ and that by examining horizontal legal integration within the EU we can see how it contributes to further European legal integration.

The argument of this chapter is that British judges engage in a dodge and massage relationship with the ECJ. This chapter argues that while the ECJ has created a strong vertical legal order over member state courts, the British have a hard time understanding and applying the ECJ case law and thus “dodge” relying on ECJ jurisprudence as the source of their judicial logic when applying EU law in British national courts. However, British judges do not want to be seen to be derelict in applying EU law which they feel represents a binding legal obligation since their accession to the EU in 1973. British judges “massage” their ECJ relationship, by heavily utilizing Advocates General opinions and other member state’s high court decisions to provide the required EU legal logic in deciding their cases and in doing so bring a vast array of EU law into the British domestic law system. Despite concern over the maintenance of Parliamentary Supremacy, British judges have embraced EU law and have formed horizontal ties with EU legal actors, particularly the Advocates General’s attached to the ECJ, and other member state’s courts to facilitate their absorption of EU law, horizontally. British judges dodge the direct vertical logic of applying EU law through the ECJ jurisprudence and horizontally

massage the relationship by citing Advocates' General opinions and member state court's jurisprudence that explain the meaning of EU law.

This chapter will proceed with a discussion of the creation of the ECJ's powerful vertical legal order. The ECJ has utilized the preliminary ruling procedure, and the principles of direct effect and supremacy to establish itself in a strong vertical position over national courts. The British have shown an unusual degree of support both in terms of parliamentary acts and legal cases in establishing their support for the vertical order created by the ECJ. The evolving relationship between the ECJ and British judges is then discussed. This chapter then builds upon this strong vertical background and argues that British judges have engaged in a practice of supranational dodge and massage. How the British judges perform the dodge and massage is explored as well as how it plays out in the case law. The final section of this chapter explores how the exposure to civil law from the ECJ and the ECtHR has impacted the survival of the common law in the only common law state in Europe, the United Kingdom.

B. A POWERFUL VERTICAL ORDER

i. INTRODUCTION

This section introduces the history of the ECJ and provides a brief account of the initial development of a powerful vertical order. This section provides necessary background information on the vertical, international legal system and EU law under the ECJ interpretation. The rise of the ECJ shows the efforts undertaken by the ECJ to create a powerful vertical legal order. Even a brief accounting of the history of the ECJ shows a strong position of vertical supremacy of the ECJ over member state courts. The ECJ has

secured for itself a strong position of vertical authority within in Europe in comparison to the contentious position occupied by the ECtHR as we saw in chapter IV. The ECJ has utilized its case law, particularly the principles of direct effect and supremacy, along with the transformation of treaties among sovereign states into a vertically integrated legal order throughout EU member states (Stone Sweet 2004). This section will cover the establishment of the ECJ vertical authority, the use of the preliminary ruling procedure to encourage cooperative relationships between the supranational and national levels of courts, and the establishment of the principles of direct effect and supremacy as tools to ensure the maintenance of a strong vertical order led by the ECJ.

ii. ECJ AS A VERTICAL AUTHORITY

The Court of Justice of the European Community was created in 1952 by the Treaty establishing the European Coal and Steel Community (Treaty of Paris 1951). With the treaty of Lisbon in 2009, the Court's name was officially changed to the Court of Justice; however, in the English language the Court has been historically referred to as the European Court of Justice.³ The ECJ is the highest court within the EU and the presiding, vertical, authority on the interpretation of EU law. Courts often serve as arbitrators between competing powers within a political system; within the EU, the ECJ serves as the arbitrator between competing EU political institutions and between member state governments (Shapiro 2005). It is the responsibility of the ECJ to interpret EU law and to ensure that EU law is applied consistently across all twenty-eight current member states (Anderson 2004, pg 199-200).

³ This dissertation will refer to the Court as the ECJ.

The ECJ cannot apply national law to the cases before it, only EU law. National member state courts, by contrast are obligated to apply both national and EU law in the appropriate contexts. This places a burden of juggling national and European interests on national courts, while the ECJ only applies European interests. The ECJ may through their judgments declare national member state law incompatible with EU law and therefore void, giving the ECJ the power of judicial review of national laws. The ECJ cannot apply national law to its cases, but must have an awareness of the context and application of national laws to engage in judicial review of national laws.

*iii. PRELIMINARY RULING PROCEDURE AS A GENTLE MEANS OF
SECURING VERTICAL AUTHORITY*

There is no system of appeals directly from a member state court to the ECJ; meaning that a Supreme Court of the UK case cannot be directly appealed to the ECJ. In order to bring a case before the ECJ, lawyers must file an application to have a case heard before the ECJ which is an independent application from hearings on the case domestically. However, the ECJ may review the application of EU law by a member state court through the preliminary ruling procedure, which can only be requested by a member state court. Law Lords or UK Supreme Court Judges as the highest courts are likely to be resistant to a new court, such as the ECJ, asserting authority over them. Member state high courts are not “accustomed to playing a subordinate role” and would resent the ECJ’s attempts to overrule them and potentially subvert the role of national courts by utilizing judicial review to strike down national laws (Anderson 2004, pg 201). The creation of the preliminary ruling procedure, rather than creating a system of direct

appeals from member state high courts to the ECJ, was a wise strategic move on the part of the European Community architects. It created a mechanism for national court judges to solicit opinions from the ECJ, without the ECJ overriding the national court or usurping the powers normally held by national courts. By designing the preliminary ruling procedure in this way it can even provide national courts with additional powers such as the privilege of judicial review in the case of the Netherlands (Kate and Van Koppen 1994) and declares member state judges as recognized interpreters of EU law (Burley and Mattli 1993; Alter and Meunier-Aitsahalia 1994; Garrett et al. 1998; Slaughter 1999; Alter 2000). Article 234 of the European Community (also Article 177 of the Maastricht Treaty) created the preliminary ruling procedure, allowing a means of ECJ pre-judgment. The preliminary ruling procedure judgment allows the ECJ to answer questions about EU law which national courts may then apply to the cases before them. This encourages the use of EU law “without diminishing the jurisdiction of the national court or requiring it to give a judgment which might subsequently be overruled” if direct appeals from national courts were allowed (Anderson 2004, pg 201). The preliminary ruling procedure allows for a cooperative relationship between the ECJ and member state courts rather than a purely competitive relationship between supranational and national courts. In *Foglia v. Novello (2)* (European Court of Justice 1981), the ECJ claimed that the preliminary ruling procedure was meant to foster dialogue and cooperation between itself and member state courts in a spirit of mutual regard. Lord Bingham of Cornhill, Law Lord from 2000 to 2008, argued that the use of the preliminary ruling procedure is made “rather as an architect is willing to seek advice of a consulting engineer or a quantity surveyor as a source of specialised expertise, needed by the architect to enable

him to perform his task” (Anderson 2004, pg 202). Considering the strong is the vertical legal order established by the ECJ, it is surprising how the design of the court and the efforts to be inclusive of member state judges make the court seem friendlier.

iv. WELL ESTABLISHED POWERS OF DIRECT EFFECT AND SUPREMACY

The ECJ has expanded its’ authority through two legal concepts: direct effect and supremacy. Direct effect is a legal principle of EU law that requires member state courts to recognize and enforce any rights of the individual provided for in EU law. The ECJ established direct effect in *Van Gend en Loos v. Nederlandse Administratie der Belastingen* in 1963 (European Court of Justice 1963, Referred to as *Van Gend en Loos*). This meant that the EU was capable of creating individual legal rights and that member state courts must recognize and enforce them within the state legal structure. *Van Gend en Loos* established that a citizen was able to enforce a right granted by EU law against infringement by a state. *Van Gend en Loos* states “the general scheme and the wording of the Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect” (European Court of Justice 1963, pg 13). *Defrenne v. SABENA* in 1974 (European Court of Justice 1974a) further expanded direct effect by creating vertical direct effect when a state impinges upon an EU right and horizontal direct effect when a non-state actor impinges upon an EU right granted to citizens. A critical part of direct effect is that while EU law only becomes fully established once it is translated into national law, the ECJ ruled in *Van Gend en Loos* that the EU law is legally actionable once it has been passed at the European level, even if national governments lag in passing it through into national law. Monist states have no

problem meeting this demand given that international law is automatically seen as valid and applicable within a state so long as that state remains a signatory to the relevant treaties. Dualist states struggle with the notion of direct effect since in order for international law to be applicable in national courts it must first be translated into domestic law through an act of parliament, which is the context Britain usually finds itself in. This does not affect British cases before the ECJ, since Britain must not incorporate EU law into domestic law for this process. This does affect cases involving EU law that appear before British judges within national courts. Britain must reconcile the national tradition of Parliamentary Supremacy with the need to incorporate international law into the domestic context through an act of parliament and the well-established and prior to accession principle of direct effect claimed by the ECJ. The British parliament has allowed an exception for dualism for the ECJ.

The principle of supremacy, otherwise known as primacy in every other context than the EU, asserts the EU legal principle that if EU law is in conflict with member state laws, then national laws must be overruled to allow EU law to take effect. Supremacy was first established in *Flaminio Costa v. ENEL* in 1964 (European Court of Justice 1964). *Costa v. ENEL* states

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves (European Court of Justice 1964, section 3).

The Treaty of Lisbon (2007) included Declaration 17 which formally incorporated primacy into the EU treaties, forty-three years after the ECJ had established it.

Declaration 17 states that the “primacy of EU law is a cornerstone principle of Union law” (Opinion of the Council Legal Service of 22 June 2007). Two cases further clarified supremacy. First, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* otherwise referred to as *Simmenthal II* (European Court of Justice 1978) declared that member state courts had a duty to set aside (strike) national law inconsistent with EU law. *Simmenthal II* states that

The direct applicability of Community law means that its rules must be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force. Directly applicable provisions are a direct source of rights and duties for all those affected thereby, whether Member States or individuals; this consequence also concerns any national court whose task it is as an organ of a Member to protect the rights conferred upon individuals by Community law (European Court of Justice 1978, section 2).

Second, *Marleasing SA v. La Comercial Internacional de Alimentacion SA* in 1990 (European Court of Justice 1990b, Referred to as *Marleasing*) asserted that national law should be interpreted and applied as much as possible to avoid a conflict with EU law. *Marleasing* stated “It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty” (European Court of Justice 1990b, paragraph 8). While Britain has developed its own practices of judicial review (See Sterett 1994), it is a practice infrequently used by the Law Lords and the Supreme

Court of the UK except in the most egregious government violations of “constitutional” principles. The use of supremacy to effectively neutralize domestic laws that conflict with EU law is most assuredly used by the ECJ with greater frequency and lesser provocation than most British judges would find reasonable.

v. CONCLUSION

This section has shown the steady progression taken by the ECJ to assert its authority and create a stratified vertical legal order within the EU. Once established the ECJ worked quickly to assert its authority within the European Union legal order and to ensure that national courts were made a part of the international legal order through the preliminary ruling procedure, direct effect, and supremacy. This account of vertical legal integration under the ECJ has closely followed the arguments of neofunctionalist scholars, who provide persuasive arguments about the nature of power relations and institutional constraints of vertical legal integration. What this chapter will add to this is an understanding of the horizontal legal integration and how this knowledge impacts our understanding of the international legal order.

C. INTERACTIONS BETWEEN THE BRITISH AND THE ECJ

i. INTRODUCTION

The relationship between the ECJ and Britain shows efforts by the British government and judges to comply with EU law. Beyond signing treaties of accession and further consenting to integration by signing all EU treaties since 1973, British politicians showed their support for European legal integration through the Communities Act of

1972 and the European Union Act of 2011. British judges propelled integration through the Practice Statement of 1966 and their case law. The discussion of the history of the ECJ and British relationship will focus on a few key events that hint at the importance of British judges in European legal integration. The following sections of this chapter will tackle the role of British judges in horizontal integration directly.

ii. THE PRACTICE STATEMENT EMPOWERS BRITISH JUDGES

The 1966 House of Lords Practice Statement asserted that the practice of *stare decisis* would no longer be followed when it created “injustice” and “unduly restrict(s) the proper development of the law” thus overturning *London Tramways Co. v. London County Council* of 1898 (England and Wales Court of Appeal Court 1898, referred to as *London Tramways*). The Practice Statement was given on July 26, 1966 by Lord Gardiner on behalf of himself and all Law Lords in the House of Lords. This statement was meant to bind lower courts under *stare decisis* to the highest courts (Law Lords and then the UK Supreme Court), while allowing the Law Lords to contradict precedent when necessary by the use of new legal ideas and foreign law. The Practice Statement was the initial step in an effort to institute a set of reforms of the judiciary through Parliament by the Conservative Party in Britain. The motivation for this decision was to overturn a few well known cases of injustice that had unfortunately been repeated due to the practices of precedent, but also to permanently free the judiciary from legislative acts that had banned the use of foreign law. Acts banning the use of foreign law date back to the early seventeenth century before Britain’s Imperial Commonwealth had been established and though these acts were regularly defied with no consequences as examples from all three

empirical chapters provided, they remained a nuisance in the eyes of British judges (Anderson 2004). The Practice Statement was widely supported by the House of Lords who have remained influential in politics due to their continuing authority in judicial and legal matters (Paterson 1982; Anderson 2004).

Outside of the Practice Statement, the judicial reforms were put on hold indefinitely while negotiations to join the EU took precedence. The Practice Statement altered the judiciary far beyond allowing Law Lords and UK Supreme Court Judges to contradict precedent, by lifting the ban on the use of foreign law in British courts, it unintentionally paved the way for entrance to the European legal order. The Practice Statement allows EU law to be a source of new ideas and inspiration to British judges. Prior to the Practice Statement, dialogue with living academics was not allowed for judges (Lambert and Husain 2010, pg 125). By asserting that precedent could be overturned by new laws and the use of foreign law, rather than by only the introduction of new legislation in Parliament, Lord Gardiner and his fellow Law Lords asserted their authority to look beyond politicians in Parliament and to new ideas beyond Britain including EU law, international law, scholars, and foreign courts. It is not clear how aware of the consequences of the act politicians, were particularly because the act mentions new laws and ideas explicitly, but has been implicitly interpreted by British judges to allow for foreign and international laws and ideas to be introduced.

iii. BRITAIN PREPARING FOR EU ACCESSION AND THE EARLY YEARS

In preparation for accession and compliance with the *acquis communautaire*, the UK Parliament passed the European Communities Act of 1972. This act allowed for the

formal incorporation of European Community Law into the domestic law of the UK. A crucial part of this act is Section 2(4) which asserts that:

The provision that may be made under subsection (2) above includes, subject to Schedule 2 to this Act, any such provision (of any such extent) as might be made by Act of Parliament, and any enactment passed or to be passed, other than one contained in this part of this Act, shall be construed and have effect subject to the foregoing provisions of this section; but, except as may be provided by any Act passed after this Act, Schedule 2 shall have effect in connection with the powers conferred by this and the following sections of this Act to make Orders in Council (United Kingdom Parliament 1972, section 2(4)).

This section means that all UK legislation including Acts of Parliament shall be subject to comply with all directly applicable EU law. With this legislation, the UK broke with its traditional dualist interpretation of international law and embraced a monist approach allowing all EU law to be directly incorporated into British national law without an act of Parliament translating it into national law. Thus the acceptance of EU law has direct effect in the British legal system, as the only legal exception to Britain's dualist approach to international law.

Judicial citation of the ECJ by the Law Lords began in the early 1970's when the UK acceded to the European Economic Community (EEC) in 1973. Interactions between British judges and EU law started slowly. EU law was very different from the common law that they had been exposed to in terms of concepts, style, and jargon of which the civil law of the EU was based. The early years of EU law were quite shocking in comparison to the ECtHR; the ECJ was active and producing jurisprudence in many fields of law, while the ECtHR was struggling during its decades of no cases. Since the mid 1980's there has been a rapid increase in judicial citations of EU law particularly in

the fields of administrative law (formerly the Crown Office) and commercial law (Anderson 2004, pg 200 and supra note 6). Over time, the use of EU law by British judges has expanded to include patent law and even criminal law (Anderson 2004, pg 200 and supra note 6). Bodies of law become known for their advancements in certain areas of law. Europe became known for public law, laws which govern the relationship between people and their government such as constitutional law, administrative law, procedural law, and tax law (Lambert and Husain 2010, pg 126). European Union law sought to expand upon the European public law strength. Judges have not just responded when the EU and ECJ have created new EU laws that forced them to consider the interaction between the supranational and national, but instead judges began to look to EU law proactively and cite it to make arguments about the national laws before them.

An area of contention during this time frame is when EU law and British law were in conflict. Under supremacy, EU law is to be applied by national judges' above all domestic law and even domestic constitutions. During the early years, British judges struggled to do this and attempted to interpret EU and British law in accordance with each other, never really voiding British law. The act of trying to reconcile the two competing laws was a nod to the traditions of Parliamentary Supremacy coupled with the unfamiliar territory of EU law being exempt from dualism. This created a new legal atmosphere for international law and British judges moved cautiously through these uncharted waters in the beginning.

iv. FACTORTAME: BRITISH JUDGES PROCLAIM EU LEGAL SUPREMACY

In *R (Factortame Ltd) v. Secretary of State for Transportation* in 1990 (United Kingdom House of Lords 1990) better known just as *Factortame*, Lord Bridge (Law Lord) interpreted Section 2(4) of the European Communities Act as inserting an implied clause into all UK statutes, a clause that renders the UK statutes inapplicable (void) when they directly conflict with EU law. This is a radical departure from the UK's unwritten constitution's prime doctrine of Parliamentary Supremacy. This has sparked much debate within the UK Parliament; however, to repeal the European Communities Act would make all EU law void in the UK. Under British Parliamentary procedures there is no way to remove or void the section without repealing the entire act. According to ECJ case law on supremacy combined with *Factortame* British case law, the Law Lords and now the UK Supreme Court is "obliged to apply the law of the EU alongside domestic law and, where there is conflict, in precedence to it" (Anderson 2004, pg 201). Member state courts are meant to absorb, nurture, and enforce EU law in a similar way to how international treaties are designed to interact with national courts.

With the European Union Act of 2011, the British introduced two limits on the process of integration within the European Union. The first relates to EU law and claims that EU law is only supreme (principle of supremacy) to domestic law (parliamentary statutes) as long as Parliament declares it so (Martinico and Pollicino 2012, pg 53-54). The ECJ does not have the authority to dictate its supremacy over the member states; rather the member states have the authority to declare EU law supreme and only the member states have this power. Section 18 of the act declares that Parliament reaffirms the supremacy of EU law over national statutes but not over the unwritten constitutional

ideas enshrined within the British legal system. From time to time, the British Parliament will need to reevaluate the supremacy of EU law and either deny or reaffirm British involvement. The second relates to efforts to further integrate Britain within the EU. The act created a referendum lock on any further transfers of power from British institutions to EU institutions, requiring that a nationwide referendum would have to pass before any further pro-integration changes could be applied in Britain (Martinico and Pollicino 2012, pg 54). The potential number of changes that could trigger a referendum is “remarkably broad” (Martinico and Pollicino 2012, pg 54). This broad nature makes further integration of the British within the EU difficult to achieve, except from within the current institution’s powers such as single-market provisions.

v. CONCLUSION

This section has shown the steady progression taken by the ECJ to assert its authority and create a stratified vertical legal order within the EU. The Practice Statement and *Factortame* show that British judges have engaged the treaty obligations of the United Kingdom to join the European legal arena. While the European Communities Act shows that British politicians, at least in the beginning, accepted the adoption of EU law into the domestic law of Britain despite any regrets they may harbor now about joining the EU. This is a crucial background condition to the arguments of this chapter, including the argument of the next section that British judges have actively helped to establish the authority of the ECJ and the following section where British judges are described as horizontal borrowers of EU and member state law. This

background knowledge of the ECJ and Britain has demonstrated the strong vertical nature of the European legal order under the ECJ.

D. EVOLUTION OF ECJ AND BRITISH INTERACTIONS

This section will proceed with a discussion of the changing nature of the relationship between British judges and EU law. An important aspect of this relationship is coming to terms with the conflicting nature of the ECJ doctrine of supremacy and the British conception of Parliamentary Supremacy which are in direct conflict and must be resolved from a legality standpoint. To understand the forty-plus year relationship between British judges and the ECJ it is necessary to note the evolution of this relationship over time. This judicial relationship has experienced three phases: hesitation, consent, and engagement. In the earliest interaction with the ECJ, British judges tried to restrict the application of all EU law that conflicted with domestic law avoiding dealing with *Rechtsstellung* (legal positions of conflict) displaying the hesitation phase. This phase is marked by an interest in EU law by British judges but a complete unwillingness to enter into any legal discussion grappling with Parliamentary Supremacy and EU law in competition (Martinico and Pollicino 2012, pg 118). During this phase, when EU law was perceived as being in conflict with national law, judges tried to find the common ground between the two to base their judgment on and relied on the idea of *lex posterior derogate priori*. The *lex posterior derogate priori* created a chronological criterion according to which the European Community Act of 1972 was considered to be an ordinary statute which did not have the capacity to limit Parliamentary Supremacy as a constitutional document would have. Thus the constitutional idea of Parliamentary

Supremacy must be maintained by judges as the UK case of *Felixstowe Dock Railway Co v. British Transport Docks Board* (1976) articulated (England and Wales Court of Appeal Civil Division 1976). In *Felixstowe*, the judges stated “if there were to be any conflict between UK law and Community law then it would have to be the latter which would fail” (England and Wales Court of Appeal Civil Division 1976). In this classic reading of Parliamentary Supremacy there is an impossibility that any act of Parliament can detract from the position of sovereignty that it enjoys (Dicey 1959, pg 10).

The second phase of consent has largely been attributed to the legal writings of Lord Denning while Master of the Rolls, from 1962-1982, and whose famous quote begins this chapter. Lord Denning described the influx of EU law into Britain as an “incoming tide” which could not be stopped (England and Wales Court of Appeal Civil Division 1974). Lord Denning popularized the idea that Britain had given consent to be a part of the European legal order, and British consent of EU law becomes the focus of this second phase. Lord Denning argued that the case law of the ECJ establishing primacy and direct effect were prior to the British joining the EU and the European Communities Act of 1972 was written with an acknowledgment of this and that British judges should give assent to all relevant EU law (Martinico and Pollicino 2012, pg 119). In a sense Lord Denning is suggesting that the British Parliament gave consent to make an exception to Parliamentary Supremacy, the recognition of EU law as supreme.

The third and current phase is engagement and is characterized by the *Factortame* (1990) case and subsequent jurisprudence. *Factortame* gave British judges the power of judicial review to strike down national laws that conflicted with EU law and represents a full engagement of EU law. The House of Lords was quick to embrace this decision as a

“constitutional catch-up” that would reflect the reality of membership within the EU and the nature of the EU legal order to which the British politicians consented to join voluntarily (Martinico and Pollicino 2012, pg 120). To be clear, while judges do exert a great deal of influence, they also have a vested interest in maintaining the governance system that they are a part of. In *Thoburn v. Sunderland City Council* (England and Wales Divisional Court 2002), the Law Lords attempted to apply *Factortame* while being sensitive to the guaranteeing of the EU principle of supremacy and the need to uphold the English notion of the Supremacy of Parliament. In *Thornburn*, Lord Justice of Appeals, Lord Laws argued that *Factortame* allowed for British judges to declare acts of Parliament incompatible with EU law and to thus override national law in favor of following EU law, but it does not allow British judges to declare “constitutional” documents of Britain incompatible or to override them on any occasion, this power remains the purview of Parliament to revoke or amend said documents only (Martinico and Pollicino 2012, pg 117-118). *Factortame* allowed British judges to override individual acts of parliament, while not fundamentally altering the character of British “constitutional” ideas of law, tradition, and culture.

E. THE ECJ AND THE HORIZONTAL DODGE AND MESSAGE

The ECJ is the only international legal order in history that has succeeded in constructing a robust legal system of international vertical authority. British judges, unlike British political actors and the media, have generally appeared supportive of the ECJ as neofunctionalist arguments have asserted, but that does not mean that British judges have simply become thoroughfares for EU law. British judges are engaging

regularly with EU law, but not always directly with ECJ case law. In engaging with international legal orders, British judges take part in what I call the supranational dodge and massage. British judges “dodge” the use of EU law due to a lack of understanding of its civil law meaning and then participate in a process of legal “massage” where knowledge gleaned from horizontal legal integration including Advocates General opinions and other member state courts jurisprudence is used to understand and apply the EU law. Sometimes national judges use borrowing in ways that strengthen the influence of international legal orders in the domestic realm. We see this most obviously with the EU; where borrowing can play a role in helping national judges bring EU law into the vastly different British legal arena. National judges can “massage” EU law through the horizontal context of the common law in order to make EU law more comprehensible and palatable to the British.

Despite respect for ECJ case law and intentional design features of the ECJ to induce national government participation such as the preliminary ruling procedure, British judges freely admit to the struggle to understand EU law, particularly the ECJ case law and preliminary ruling procedure decisions (Interviews). ECJ jurisprudence is difficult for British judges to make use of due to its codified civil law basis, its brevity and neglect of context and future applicability, and its lack of legal prescription in order to make legal decisions more palatable for public consumption. British judges overcome this difficulty by using member state cases involving the relevant EU law and Advocates General opinions to decipher the meaning of EU law and standards. In engaging the ECJ, British judges execute the dodge and massage. British judges dodge the difficulties in understanding the decisions rendered by the ECJ in their case law and responses to the

preliminary ruling procedure, limiting the implications and uses of EU law that is lacking extensive jurisprudence available. Then British judges massage the relationship by looking to General Advocate opinions and member state case law to understand and comply with the EU law, expanding the implications of EU law through an exploration of all relevant jurisprudence, even beyond the EU. Without horizontal sources for understanding EU law and ECJ case law, British judges would not be such willing participants in the European legal arena. Horizontal explorations and justifications help British judges both understand and alter (massage) the implications of ECJ law for Britain; without the horizontal options British judges would be forced into more incomprehensibility and more of a direct clash with the ECJ.

To illustrate the supranational dodge and massage an example will prove helpful. This case provides an interesting example of British judges dodging ECJ jurisprudence to utilize the common law in massaging the international legal order. One of the cases I was present for during the Michaelmas 2012 term at the Supreme Court of the UK was *Imperial Tobacco Ltd v. Lord Advocate of Scotland* (United Kingdom Supreme Court 2012a). This case has already been discussed in previous section, but will be used here to illustrate a distinct point. This was a politically contentious case involving EU law concerning consumer protection. The case concerned the Lord Advocate of Scotland requiring an end to displaying cigarettes in public spaces where children could see them. The thought was simply if children could not see them behind register counters and in stores that they would be less tempted to try them and their might be a reduction in underage smoking in Scotland. This logic embraces the old adage of out of sight, out of mind. The Lord Advocate of Scotland did not want them displayed or advertised in

stores, advertisements on billboards and television have been illegal for many years; however listing the names and price in plain letters was allowed as was continuing to sell cigarettes to adults with proper identification. The largest tobacco company in the UK, Imperial Tobacco Ltd, brought a lawsuit claiming that this violated EU laws of consumer protection. EU laws specifically the EU Directive on Consumer Rights allows a customer to view the product in person prior to purchase to ensure the quality of what they are purchasing as well as its contents. From the literature on EU consumer protection we can posit that there are numerous cases available from ECJ case law to draw upon including *Procureur du Roi v. Dassonville* and *Deutscher Apothekerverband eV v. 0800 DocMorris NV and Jacques Waterval* (2004) (Unberath and Johnston 2007; European Court of Justice 1974c; European Court of Justice 2004). However neither of these cases have a corresponding Advocates General opinion nor are they readily used in the case law of the Western European member states, which typically have stronger national consumer protection laws than the EU, that British judges regularly turn to for guidance in applying EU law (Unberath and Johnston 2007). By not using the two aforementioned cases, the Supreme Court of the UK dodges the ECJ jurisprudence, meaning avoiding relying upon the ECJ jurisprudence to determine EU law. However in 2011 Australia implemented a new set of consumer protection laws including adopting EU standards of consumer protection to facilitate trade with their largest trading partner the EU under the Australian Consumer Law (ACL) (Corones 2013). To understand EU law and why they had not violated it, the Lord Advocates case drew strongly on the ACL legislation and the *Google Inc v. Australian Competition and Consumer Commission* (High Court of Australia 2012) the first High Court of Australia case involving the ACL

(Corones 2013). The Supreme Court of the UK sided with the Lord Advocate citing both the ACL and the Australian *Google* case in their logic which was adopting the solution that once a customer has expressed interest in a type of cigarette and provided identification they may be shown the product to view it without being obligated to purchase and thus the consumer and children are both protected (United Kingdom Supreme Court 2012a). The international legal order is massaged by using the interpretation of EU law by the common law courts of Australia which voluntarily follows some EU regulations to facilitate trade with the EU. The British judges massage the relationship through the use of EU law by a trusted source, Australia, and have well-articulated and palatable case law to draw upon as precedent.

The final sections of this chapter will discuss the process of dodge and massage that British judges take towards the ECJ. Here we are trying to understand why British judges look to other sources of EU law rather than just directly at the ECJ in understanding how British judges dodge ECJ jurisprudence. Advocates General opinions and member state court's judgments will be examined as sources of massaging the relationship to the international legal order. These sections will draw heavily on cases heard in the UK Supreme Court Michaelmas term of 2012 and Hillary term of 2013 and interviews with retired Law Lords, current UK Supreme Court Judges, law clerks, and Barristers.

F. DODGING THE ECJ'S JURISPRUDENCE

The judicial dodge entails avoiding using ECJ decisions as the sole authority on the meaning and uses of EU law when forming a decision involving EU law in a national

member state court. We can conceive of many reasons why British judges would engage in a judicial dodge of the ECJ. An initial claim may be that British judges are just anti-EU or Euroskeptics. While British judges are not without their criticisms of the ECJ, none of the Law Lords and UK Supreme Court Justices I spoke to found the ECJ to be an unacceptable source of jurisprudence. Lord Millett expressed admiration for the efforts of the ECJ to remain depoliticized through secret votes on case decisions and not attributing written decisions to any member of the ECJ (Lord Millett 2012). At a bare minimum Parliamentary Supremacy dictates that when Parliament signs a treaty, the judiciary is bound by the obligation to uphold that treaty in the case law despite any feelings they may have on the subject. Judges do not get to choose which laws to uphold and which laws to ignore; their personal feelings do not get to influence this, at least not outright. However, the water becomes murkier when assessing how their personal views influence their interpretation of the relevant legal material. Here the idiosyncrasies of judges have been well documented in a number of jurisdictions (See Meernik 2003; Cardozo 2005; Baum 2006; Feldman 2008; Tamanaha 2010; Lee 2011).

The preliminary ruling procedure allows for direct communication, albeit hierarchical direct communication, between ECJ Justices and member state judges. For high courts, whose decisions allow for no judicial remedy such as the UK Supreme Court and British Law Lords, the use of the preliminary ruling procedure is required when deciding an issue relevant to EU law (Article 234 EC Section 3). This form of vertical communication is built into the European Union legal system. This obligation is limited by two legal principles established by the ECJ. First, *acte éclairé* allows a high court to be released from its duty to submit a preliminary ruling procedure when the question at

stake has been covered in another preliminary ruling in a similar case and the court in question may use the previous ruling to inform their judgments (*Da Costa en Schaake NV and Others/Nederlandse Belastingadministratie* 1963 Joined Cases 28-30/62). Second, *acte clair* excuses a high court from requesting a preliminary ruling when the answer to the question is “sufficiently obvious” (European Court of Justice 1982). These two exceptions to the obligation to utilize the preliminary ruling procedure, promote the formation of horizontal communication networks. By examining the preliminary ruling procedure database maintained by the ECJ, member state judges can find cases where the issue of EU law in question has been explored by other judges throughout Europe and read the case law and jurisprudence of member state judiciaries on the subject matter. By looking to member state cases for the answer to a question of EU law, dialogue between national judiciaries can emerge.

A third consideration is that there is logic beyond a distrust of the EU and the ECJ to not rely only on ECJ judgments. Many British judges admit to being befuddled by ECJ law. The EU sponsors academic conferences and workshops to socialize member state judges with ECJ Justices on an annual basis, though an individual judge rarely attends more than two to three times during their career. After interviewing several judges it became clear that direct communication between an ECJ judge and British judges is quite rare and when it does occur is often between British judges and the ECJ judge from the United Kingdom. Lord Millett, a retired Law Lord, asserted that the only time he directly contacted an ECJ judge about a legal case was when he and his fellow judges could not decipher the meaning of a preliminary ruling. After this event, Lord Millett regarded preliminary rulings as “a required duty rather than an attempt to achieve

any meaningful understanding of EU law” (Interviewed December 10, 2012). In fact all of the judges interviewed expressed an understanding that use of the preliminary ruling procedure was a “duty” to be discharge and that the resulting preliminary ruling had not caused them to change their mind about a case before them. This commentary shows that to understand EU law and its impact on national law, the ECJ’s preliminary ruling procedure decisions may not be the best source of enlightenment of EU law according to British judges.

During the 1990’s, Lord Goff of Chieveley, a Law Lord, introduced many new ideas from continental European law and held regular meetings with judges from different European countries in order to expand the British judge’s knowledge of European civil law (Lambert and Husain 2010, pg 126). Other Law Lords known for their engagement with foreign law include Lord Cooke of Thorndon, Lord Woolf, and Lord Bingham and current UK Supreme Court Judges including Lord Mance and Lady Hale. Lord Carnwath stated “that we [UK Supreme Court judges] have argued for hours over the meaning of preliminary rulings” without finding agreement between the judges (Lord Carnwath of Notting Hill 2012). Lord Carnwath went on to say that they eventually gave up and asked the Advocates General to the ECJ from Britain, Eleanor V. E. Sharpston if she could decipher it. Lord Millett has asserted that he “never quite knows what to ask” in order to get the details of EU law relevant to the case and went further to state that he “avoid[s] writing the question” for the preliminary ruling choosing instead to rely on the Scottish Judges, who have a hybrid common/civil law system, setting on the court or other judges versed in continental European law (Lord Millett 2012). Two of the twelve Supreme Court judges are always Scottish judges. Scottish

judges are trained in both common law and civil law since Scotland's legal code is a hybrid of common and civil law. This makes the civil law knowledge of the Scottish judges valuable in helping to decipher the civil law meaning of the ECJ. Lord Millett asserted that Lord Goff was particularly skilled at writing questions for preliminary ruling procedures given his substantial knowledge of German law that he often incorporated into his decisions (Lord Millett 2012). Lord MacKay asserted that ECJ decisions "are not written for us" claiming decisions are not written for judges and in particular common law judges (Lord Mackay of Clashfern 2012). Lord MacKay stressed the use of non-legal language and the brief decisions in ECJ judgment that did not speak to context or why other options are not discussed as "limiting" his ability to apply them in the domestic context without taking liberties with the law (Lord Mackay of Clashfern 2012). Lord Scott spoke of his South African civil law education before joining the English bench as essential to his ability to delve into European law (Lord Scott of Foscote 2012).

British judges wish to fulfill Britain's legal obligations to the EU and have an interest in gleaning what they can from EU law to improve the quality of legal reasoning and jurisprudential evidence in their domestic legal cases. For the reasons discussed above, British judges find it difficult to grasp the breadth of knowledge they find necessary to apply the EU jurisprudence to UK cases. In order to remain in integrated part of the European legal order, British judges must find additional jurisprudence that provides the clarity needed to utilize EU law. Here British judges attempt to massage the relationship with the ECJ. They do this by citing ECJ decisions, but use Advocates General opinions or other member state court's case law to apply the ECJ decision and to support the legal logic of the decision. This act is in a sense sidestepping the case law

established by the ECJ “dodging”, but also shows the extensive research and effort being made to incorporate an understanding of EU law into British law through a reliance on alternative sources of clarity in the meaning of EU law “massaging” such as Advocates General opinions and other member state case law, which will be the topic of the next two sections.

G. MASSAGING THROUGH ADVOCATES GENERAL OPINIONS AND MEMBER STATE COURTS

The Advocates General produce detailed opinions for the ECJ and member states on issues of EU law that can be used by member state courts as a means to horizontally massage the relationship between the ECJ and a member state. This section will discuss what the Advocates General do, how British judges have employed their opinions as vehicles of clarity on the nature and meaning of EU law, and discuss some cases where British judges employ the Advocates General opinion as a means of massaging their relationship to the ECJ.

The ECJ is currently comprised of twenty-eight judges, one from each member state. The judges are assisted by nine Advocates Generals who deliver impartial opinions to the ECJ based upon oral and written submissions to the Court on cases that raise a new point of law (Burrows and Greaves 2007). The Advocates Generals do not take part in the ECJ’s formal deliberations and their decisions are not binding. Most all Advocates Generals have served as judges within their national court system (Burrows and Greaves 2007). Since 1973, one of the nine Advocates Generals has been a British judge sent to assist the court, leaving Britain with a strong presence within the Advocates General in

particular. Germany, France, Italy, and Spain also always have one Advocates General from their state since the start of their membership in the EU. The position of Advocates General is a familiar concept to the British, having been invented by them as a means of incorporating regional notions of law throughout the British Commonwealth countries (Collins 1984). Britain still uses Advocates General to incorporate Scottish and Northern Ireland law into the UK and many of Britain's former colonies have an active role for Advocates General within their legal system particularly Australia, India, and Pakistan (Burrows and Greaves 2007). The French are the only continental European power with a history of Advocates General, an idea they borrowed from the English during the French Revolution, and were responsible for its incorporation into the ECJ in 1952 (Ritter 2006). So the idea of an Advocates General is British and they are comfortable with their role while other member states such as the Germans are unsure of what role they should and do play (Burrows and Greaves 2007, pg 269-271).

Even when the conclusion of the ECJ judges and Advocates General are the same, it is difficult to conclude that they were reached by the same legal logic due to the sparse nature, lacking judicial logic and context, of ECJ decisions and their secrecy. Most British Law Lords asserted that contact with ECJ was more fruitful when accompanied by Advocates General and there has recently been scholarship to support this (Burrows and Greaves 2007; Ritter 2006). The writings of Advocates General on a case is written in a legal style that British judges are more accustomed to and is not constrained by brevity and desire to be more publically accessible as ECJ decisions are prone to be (Alter 1998; Garrett et al. 1998). If there is an Advocates General opinion in line with the final ECJ decision, British judges are far more likely to utilize ECJ judgments, which

is a central cog in the argument of this chapter that the horizontal dynamic within the European legal order is having an influential effect on the relationship between British judges and EU law.

The Advocates General can be seen as an ally to the British. In *Kaba v. Secretary of State for the Home Department* (European Court of Justice 2000, referred to as *Kaba*) a third party national immigration case, the decision of the ECJ closely aligned with the Advocates General opinion. Upon the outcome of the case being sent to England, British judges and the British Immigration Adjudicator in the case refused the deportation order for *Kaba* and instead compiled a new set of documents and included what they thought was the proper judicial logic to determine the case to be given to the Advocates General and made a new reference to ECJ (Burrows and Greaves 2007, pg 49-50). Upon receiving the documents from British judges, the Advocates General reversed his position and argued the opposite in *Kaba v. Secretary of State for the Home Department 2* (European Court of Justice 2003, referred to as *Kaba 2*; Burrows and Greaves 2007, pg 50-51). Here the Advocates General was seen by British judges as an ally who could take their concerns into account and who could be swayed by a convincing legal logic. The ECJ accepted the Advocates General change in logic and *Kaba 2* reversed the deportation order. *Kaba* and *Kaba 2* helped to establish the right to reply by all parties as part of an adversarial legal order (Kelemen 2011).

A similar situation to this occurred over pension schemes in *Newstead v. Department of Transport and HM Treasury* (European Court of Justice 1987, referred to as *Newstead*) when its judicial logic was revised following discussions between British judges and the Advocates General in *Douglas Harvey Barber v. Guardian Royal*

Exchange Assurance Group (European Court of Justice 1990a, referred to as *Barber*).

Both cases involved issues of gender equality in pension schemes. While *Barber* did not overturn *Newstead*, it did allow for exceptions to gender equality in pension schemes, which allowed the British judges to institute administrative processes that would bring UK law in line with EU law (Burrows and Greaves 2007, pg 108-110). Here British judges were able to ally themselves with a sympathetic Advocates General who could influence the case.

In *ICI SpA and Commercial Solvents Corp v. Commission* (European Court of Justice 1974b) an Italian case before the ECJ, the Advocates General opinion drew heavily on the British Law Lords case *Morris v. Redland Bricks Ltd* (United Kingdom House of Lords 1969) citing British law as being in conformity with EU law and proscribing that Italian companies conform to be in line with EU standards for competitiveness within the marketplace (Burrows and Greaves 2007, pg 171). Ultimately the ECJ diverged sharply from the Advocates General opinion, but showed a willingness on the part of Advocates General to draw legal ideas from the member state as an interactive process of legal exchange within the EU.

These cases illustrate the dialogue between British judges and Advocates Generals and the willingness of both parties to discuss judicial logic. What is needed to complete this discussion is how Advocates General opinions are utilized by British judges in deciding EU matters in their national courts as an example of horizontal borrowing. A good area to illustrate this point is in patent law. The UK has more than a century of patent case law to draw upon and ample legislation in the form of the UK Patent Act of 1977 and 1997 which has been amended by the British Parliament over the

years to adjust for changes introduced by the internet and globalized concern over the enforcement of patents (Leblond 2008; Jettinghoff 2011). In *Virgin Atlantic Airways v. Jet Airlines (India) & Zodiac Seats UK* (England and Wales Court of Appeal Civil Division 2013, referred to as *Virgin Atlantic*), the Supreme Court of the UK overturned British patent precedent and brought UK patent law into accordance with EU patent law. In 1908 Britain established the right to receive damages from a competitor company which violated a patent held by another company. Even recently this decision has been upheld by the Law Lords in *Unilin Beheer v. Berry Floor* (United Kingdom House of Lords 2007b, referred to as *Unilin Beheer*). In *Unilin Beheer*, the respondent received compensation for having their patent violated by Berry Floor, even though the patent of *Unilin Beheer* had been revoked given that the violation occurred prior to the patent being revoked (United Kingdom House of Lords 2007b). In *Virgin Atlantic* a similar situation has occurred, given the patent was revoked after the patent violation occurred (England and Wales Court of Appeal Civil Division 2013). The ECJ's *Opinion 1/09* on 8 March 2011 determined the scope of powers and authority of the European Patent Office (EPO) as well as stating that only valid patents that follow precise standards of European patent law qualify for compensation if violated (European Court of Justice 2011). The British judge's logic in *Virgin Atlantic* relied heavily on the accompanying Advocates General opinion including citing large blocks of its text while only briefly citing the ECJ's *Opinion 1/09* (England and Wales Court of Appeal Civil Division 2013). The EU argued that compensation is not available for infringements if the patent is later revoked. In *Virgin Atlantic*, British judges overturned their previous decisions and applied EU law

after being convinced of the logic provided by a corresponding Advocates General opinion.

In *Zakrzewski v. The Regional Court in Lodz, Poland* (United Kingdom Supreme Court 2013b, referred to as *Zakrzewski*) a European Arrest Warrant (EAW) was issued for Zakrzewski in Poland. Zakrzewski was arrested in England for an unrelated offense and was discovered to have an outstanding EAW. Under EU law Zakrzewski should be extradited to Poland to face charges there. Zakrzewski argued that he should not be extradited given the EAW was invalid because the Regional Court in Lodz, Poland that issued it specified the details of one crime against him and failed to list the details but reported that there were an additional five crimes for which he was sought. The EAW was invalid because it was incomplete and did not specify what crimes he would be charged with in Poland. In the case of *Zakrzewski*, Supreme Court Judge Lord Sumption notes that not only has the ECJ addressed the case in *Advocaten de Wererd VZW v. Ledem Van de Ministerraad* (European Court of Justice 2007, referred to as *Wererd VZW*), but the high courts of Germany, France, and Italy have all faced the issue. While discussing the logic of all relevant case material, including the case law of the member states, Lord Sumption relies on the accompanying Advocates General opinion to the ECJ case law of *Wererd VZW* to formulate his argument as to how to validate an EAW (United Kingdom Supreme Court 2013b). Without horizontal borrowing and massaging through Advocates General opinions British judges would have ignored the hard to understand case law of the ECJ.

In *X v. Mid Sussex Citizens Advice Bureau* (United Kingdom Supreme Court 2012f, referred to as *Mid Sussex Citizens*) is a Supreme Court case to determine if

volunteers are protected from discrimination under the Treaty of Rome to the same extent as employees are. Under British common law volunteers are protected, but not to the same extent as employees and cannot claim financial restitution for dismissal. In *Mid Sussex Citizens*, X was a woman who volunteered at the advice bureau until her supervisor learned she was HIV positive and informed her she was no longer needed despite a well-known shortage of qualified help at the bureau. Lord Mance in unanimous decision modeled his logic after the Advocate General opinion in *Küçükdeveci v. Swedex GmbH & Co KG* (European Court of Justice 2010, referred to as *Küçükdeveci*) which dealt with discrimination on the basis of age (being too young), and finds no basis within EU law to award damages to a volunteer. In the decision, Lord Mance cites dozens of ECJ cases, all of which appear in the Advocate General opinion of *Küçükdeveci*, and regularly returns to the logic provided in *Küçükdeveci* to explain the decision made to distinguish between protections for employed and volunteer workers (*Mid Sussex Citizens* 2012).

In *O'Brien v. Ministry of Justice* (United Kingdom Supreme Court 2012c, referred to as *O'Brien*) the decision on the status of part-time workers and their right to a pension, Lord Walker directly cites the numerous Advocate General opinions in his judgment including Advocate General Colomer, a prestigious Spanish jurist who served the ECJ from 1995 to 2009:

The Advocate General (Colomer) stated in para 36 of his opinion: “despite the fact that article 2(1) of Directive 93/104 provides that the three criteria used to define working time are to be specifically delimited in accordance with national laws and/or practice, that stipulation does not mean that member states may refrain from applying those criteria and rely on rules of national law . . . However a member state may not rely on its own legislation to support

the view that a doctor who carries out periods of duty on call in a hospital is not at the employer's disposal at times when he is inactive but is waiting for his services to be called on again” (United Kingdom Supreme Court 2012c, paragraph 31).

Lord Walker goes on to cite the UK Advocate General at the ECJ since 2006, Eleanor V.E. Sharpston:

As the Advocate General (Sharpston) stated in *Istituto Nazionale della Previdenza Sociale v. Bruno & Pettini* C-395/08, para 119: “The prohibition on discrimination in Clause 4 of the Framework Agreement is a particular expression of the general principle of equality. It must therefore be interpreted in accordance with that principle. Any national implementing measures must likewise respect the general principles of Community law, including the principle of equal treatment” (United Kingdom Supreme Court 2012c, paragraph 33).

Lord Walker continues on to cite an additional three Advocates Generals in his opinion which makes this decision rather a tribute to the five Advocates Generals opinions he weaves together to form a single legal logic.

This section has explored several British legal cases to show how British have utilized the supranational dodge and massage to apply EU law by utilizing the legal logic they have found to be convincing in Advocates General opinions. In each case the British judge relies upon the Advocates Generals opinion to point to the relevant case law, the primary concerns of the EU jurisprudence in question, and to most importantly what legal logic to apply to case at hand in order to reach a decision that can be seen as consistent with EU law.

H. MASSAGING THROUGH MEMBER STATE COURTS

The relationship between British high court judges and the ECJ does not occur within a vacuum; rather it is punctuated by the ECJ's relationship with other member state courts and Britain's relationship with other member state courts. This section will discuss the ways in which British judges massage their relationship horizontally by citing EU law in member state court jurisprudence. According to my interviews with retired Law Lords, British judges often communicate with German judges over the breath and meaning of EU law and the scope of powers the ECJ possesses. British and German judge make likely allies given their dualist approach to treaty law (a rarity in Europe, particularly for Germany, with a civil law code, as dualism is most common amongst common law systems). If we look at the relationship between British and ECJ Judges, while taking into consideration other member state judges' role in the dialogue, we see a more holistic, although complex, view of the relationship. It also broadens our understanding of the strategic nature of the relationship between the ECJ and member state judges, by incorporating the idea that multiple member states' judges may work in concert to alter the dynamics of the relationship between member state judges and ECJ judges and to persuade ECJ judges to adopt jurisprudence held in common by a certain set of member states. Even if British judges rarely directly communicate with ECJ judges, they may still have an impact on the ECJ through their interaction with German judges whose direct communication with the ECJ has been widely documented (Van Calster 2005; Stöbener et al. 2006; Panke 2010; Popelier et al. 2011; Davies 2012).

When the Law Lords or United Kingdom Supreme Court Justices hear a case involving EU law, among the principle concerns was how other courts had interpreted

EU law. Lady Hale and Lord Mance of the newly created Supreme Court of the UK, both with extensive knowledge of foreign law, are quick to ask about the particularities of foreign law cases during judicial hearings (Mak 2011; Le Sueur 2004; Lee 2011). While with the Supreme Court in 2012 and 2013, on multiple occasions I heard Lord Mance asked about the case law of other member state courts of the EU and how they grappled with EU law. Lord Mance did so in *New Cap Reinsurance Corporation v. A E Grant, Members of Lloyd's Syndicate* (United Kingdom Supreme Court 2012b), *Rubin v. Eurofinance SA* (United Kingdom Supreme Court 2012d), *X v. Mid Sussex Citizens Advice Bureau* (United Kingdom Supreme Court 2012f), and *Zakrzewski v. The Regional Court in Lodz, Poland* (United Kingdom Supreme Court 2013b). What is surprising in the British context is the scope and extent to which the search for uses of EU law expands the search for relevant case law beyond the member states of the EU to include close trading partners of the EU including Norway, Switzerland, commonwealth countries, and Israel.

The following cases while discussed above in the section on the Advocates General also illuminate how borrowing horizontally from other national courts can result in a massaging of the EU legal order. These cases contributions to massaging from another national court will be briefly pointed to. In *Imperial Tobacco Limited v. the Lord Advocate of Scotland* (United Kingdom Supreme Court 2012a), the secondary argument of the appellants (Imperial Tobacco Limited) was that Scotland's government unreasonably expanded the EU conception of consumer protection in preventing cigarettes from being available to view by customers prior to purchase. The barrister representing Imperial Tobacco asserted evidence for this argument through a discussion

of several Australian Supreme Court cases seeking to challenge the limits of consumer protection under EU law, of which the EU is Australia's largest trading partner. In *Zakrzewski v. the Regional Court in Lodz, Poland* (United Kingdom Supreme Court 2013b), a case involving the interpretation of the European Arrest Warrant, Italian and Israeli court cases were used by both the barristers of the appellant and the respondent in their legal arguments before the Supreme Court. These recent cases along with others like them imply that British judges prefer to understand EU law through the lens of court decisions outside the ECJ. In an interview with Lord Carnwath of Notting Hill, a current UK Supreme Court Judge, he stated that ECJ decisions "were not accessible" and "lacked legal explanation" making them difficult to apply to cases that were not legally identical (Interviewed November 13, 2012).

These sections have argued that within the vertical relationship with the ECJ, there exists horizontal dialogue between British judges and other member state court's judges and Advocates General. This horizontal dialogue helps to further integrate British judges into a European legal order. British judges engage in a process of dodge and massage with the ECJ. British judges "dodge," meaning avoiding relying upon, ECJ judgments and preliminary rulings to inform the logic of their national court decisions on matters of EU law. British judges engage in this dodge, because of their struggle to grapple with the content and meaning of the foreign law contained within the decisions of the ECJ. The civil code basis of EU law, the brevity and need for public consumption of ECJ case law by the media, and the disjointed nature of opinions which are often written by several judges with differing views as the logic by which the decision was made all inhibit British judges from using ECJ case law, particularly given the British legal

sensibility that it is best to use whatever is available to the judge in terms of precedent than to risk misapplying law that is not understood. British judges then massage, meaning finding a way to utilize and incorporate EU law through another source, the relationship with the ECJ by utilizing other sources of EU law from horizontal communication including Advocates General opinions and member state court jurisprudence on EU law.

I. CIVIL LAW: A NEW SOURCE TO BORROW FROM OR THE DEATH OF THE BRITISH COMMON LAW?

i. INTRODUCTION

In understanding the common law it is important to discuss the changing nature of the common law. The common law evolves as judge-made law encounters new ideas and new cases particular to modern society. The common law also evolves as it is exposed to civil law from continental Europe from the EU and the ECHR. This section discusses the changing nature of the common law and how the Europeanization of the common law in the UK might lead to a future decline in the exchange of common law jurisprudence with the Commonwealth. This section begins with a discussion of how receptive to change the common law is. As the UK absorbs continental European law as a part of the EU and the ECHR, the survival of the common law comes into peril. The incoming tide of civil law in ever expanding areas of interest may overshadow the British common law as the applicable law becomes more codified. The increasing quantities of EU law, mainly German in origin, create a codified systematic approach to the application of the law in contrast to the nuanced judge-made law of the common law. As more civil law is

absorbed by the British, the danger of the common law enduring becomes greater as does the ability of the English common law to remain an influential legal force in the Commonwealth. The ECHR further encourages the introduction of European ideas into the British legal system through the jurisprudence of the Strasbourg Court and other member state courts of the Council of Europe. In contrast to this literature, is the idea that the common law and civil law are converging. Creating a new hybrid legal system, that may possess the benefits of both, the capacity for judicial nuance in the common law and the precision of the civil law's statute law.

ii. CHANGE IN THE COMMON LAW

“The common law, though identifiable, is a weak identifier” (Glenn 2010, pg 262). This is because the common law contains few specific rules and can be easily nationalized as the “reasonable man” acquires social and cultural characteristics of the state in which he resides. Since judges are given such independence in the common law system, the act of nationalizing the common law involves nationalizing the common law judges (Glenn 2010, pg 263). The United State belongs to this Commonwealth tradition of the common law but has engaged in a practice of nationalization of the common law to look very different from the English common law today (Merryman 1981; Atiyah and Summers 1987; Coquillette 1999; De Cruz 2007; Mattei and Pes 2008; Glenn 2010). “A common law tradition must today be highly flexible and accommodating if it is to continue to provide some measure of commonality to the diverse legal orders which have been associated with it, at one time or another” (Glenn 2010, pg 261). Lord Goff, a Law Lord from 1986 to 1998, in his speech “the Search for Principle” in 1983, he claimed the

common law was “a mosaic that is kaleidoscopic in the sense that it is in a constant state of change in minute particulars” (Beatson 1997, pg 295).

The idea of the common law as perpetually in motion and changing is a relatively new development in thinking about the common law. In their canonical work, Atiyah and Summers describe the English legal system as formalistic and rigid (Atiyah and Summers 1987). “In the English system, rules tend to have, in our terminology, higher content formality, higher interpretive formality, and higher mandatory formality than the American system” (Atiyah and Summers 1987, pg 32). According to Atiyah and Summers formal legal systems such as the English system rigidly confine themselves to the boundaries of the written law as produced by the British Parliament (Atiyah and Summers 1987). As such formal legal systems are difficult to change, meaning to absorb new jurisprudence or substantive reasoning, and instead are faithful translators of the law into practice based upon the legal language of parliamentary laws and statutes. In practice this notion has been challenged by the development of British judicial review (Sterett 1994) and the emergence of foreign legal jurisprudence in the British case law (Markesinis 2001; Waters 2004a; Waldron 2006; Markesinis and Fedtke 2009; Goodwin-Gill and Lambert 2010; Lambert and Husain 2010; Mak 2011). Mechanism of change in the common law center on the ability of common law judges to engage new material including the common law of other states and foreign sources of law such as integrating into the European legal orders of the EU and ECHR.

iii. SURVIVAL OF THE COMMON LAW

With increasing forays into the civil law communities of continental Europe, including the ECJ and the ECtHR, scholars and judges began to ask the question, “Can the Common Law of the United Kingdom Survive European Unification?” (Harris 1993, pg 171). Many scholars find the answer to this question quite simply, no (Harris 1993, pg 179; Beatson 1997; McCrudden 2000). Those who argue that the common law is fading under the pressures to conform to European ideas, see and onslaught of civil law ideas overshadowing the traditions of the common law. EU law brought into the English common law results in an increasing Germanization of the law (Harris 1993; Beatson 1997; Jupille and Caporaso 2009). Many of the proposals within the European Community have originated with the German legal system, after all the “Germans are systematic, conceptual and careful and have an admirable approach to many areas of jurisprudence” (Harris 1993, pg 179). While the common law by its very nature as judge-made law, produced as the need arises, creates a system with “the slightly haphazard developments which are inherent in the system of common law” and unpalatable to the civil law traditions of continental Europe (Harris 1993, pg 179). Scholars have pointed to the EC Directive on Unfair Terms in Consumer Contracts which is almost identical to the German Standard Contract Terms Act of 1976 and the addition of German legal concepts such as good faith and proportionality which are common in ECJ jurisprudence though foreign to the common law as evidence of the tide of German law contained within EU law (Beatson 1997, pg 292; Jupille and Caporaso 2009, pg 206). “[I]f the process continues by which much of the harmonization of social and commercial

law is based on German legal practice, then inevitably we shall see a steady decline in the common law during the period of European unification” (Harris 1993, pg 179).

The common law will begin to disappear as more areas of law are touched upon by the ECJ, as areas of common law give way to civil laws of Europe. The increase of civil law or even German law with the UK may not be cause for alarm, but it may fundamentally alter the position of English common law globally. If the Germanization of English common law continues, then Canada, Australia, New Zealand and the Commonwealth will no longer follow English common law as they have historically done because English common law will lose its persuasive capacity (Harris 1993, pg 184). “It is a pity,” but as English common law wanes under the influx of European civil law, a new state will emerge as the head of the common law (Harris 1993, pg 184). So the English common law is torn between the civil law forces of Europe on one hand and the familiar common law members of the Commonwealth on the other. Here the “forces in Europe, moreover, appear to be matched by centrifugal forces in Commonwealth common law systems, most noticeably and self-consciously seen in Australia and Canada but also evident in New Zealand, and this country’s [Britain] links with the common law world seem looser and increasingly fragile” (Beatson 1997, pgs 292-293).

In the case of the Strasbourg Court’s jurisprudence the effects are visible as well, though the jurisprudence is not necessarily comparable to any state (McCrudden 2000). The Strasbourg Court is “already exercising a profound, if indirect and sometimes subliminal influence” on the common law (Beatson 1997, pg 293). The Human Rights Act of 1998 allows British judges the freedom to determine what cases are relevant and to have regard for these cases while making their decisions. In the debates on the

creation of the act in the UK Parliament, “those most in favor of the Bill resisted amendments which would have *required* the UK to apply the decisions of the European Court of Human Rights, rather than merely have *regard* to them” (McCrudden 2000, pg 503 emphasis added). The expansion of the ECHR beyond judges of Western Europe to include Central and Eastern European judges may have been an influential factor urging as cautious tone the legislative debate. During the debate Lord Browne-Wilkinson argued that “we are now seeing a wider range of judges adjudicating such matters, a number of them drawn from jurisdictions 10 years ago not famous for their observance of human rights. It might be dangerous to tie ourselves to that” (HL Debs. November 18, 1997b). The result of the debate was to leave the British judiciary to decide how much weight it gave to decisions of the ECHR and other courts in its own judgments. Speaking for the Conservative Opposition, Lord Kingsland stated that “in short, as the jurisprudence of the convention is not binding, judges can really range over the substance of the Bill in any way they want” (HL Debs. November 18, 1997a). Lord Markesinis notes that “in recent times some [judges in England] have broken from the ranks and manifested an open interest in...foreign law attempting, whenever possible, to make use of [it] in their judgments” (HL Debs. November 3, 1997a). A recent example of this is the British case *Barry v. Midland Bank* (United Kingdom House of Lords 1999) a case concerning equal pay for foreigners, where Judge Peter Gibson, Lord Justice (LJ), cited the German case *Bundes-arbeitsgericht* in his logic (McCrudden 2000, pg 505).

iv. COMMON LAW AND CIVIL LAW CONVERGE

There are scholars who do not despair at the influx of the civil law into the common law, but see it not as an end to the common law in Britain, but as an opportunity for convergence within Europe. The common law will mix with the civil law and create a hybrid taking things of value from both systems to create something new and hopefully better. The creation of a unified European legal system would not only encompass a convergence of the common and civil law, but a restructuring of legal education (De Witte and Forder 1992; Mincke 1992) and nationalistic legal positivism (law by general consent, rationality) (Legrand 1996). The civil law lawyers “regard our case law [common law] with admiration and our statute book with despair” (Zimmermann 1997, pg 316). The common law can share the nuance of its judge-made law with the precision of the civil law’s statute law.

The efforts to incorporate civil and common law within European law has been shaped by a variety of actors from judges, legislators, and academics and “any institutionalised antagonism between these three agents of legal development is bound to lead to bias and distortion, waste of scarce resources, and lack of either rationality, cohesion, or simply practical common sense” compounds the situation (Zimmermann 1997, pg 326). A system that combines both civil and common law ideas while also producing harmony between the three agents of legal development is Germany. The “...great success of the German Civil Code. For from the very outset this Code (the 100th anniversary of which we celebrated last year) has set the scene not for confrontation but for an alliance between legislation, legal science and the courts” (Zimmermann 1997, pg 326). Since the previous section has indicated that many German ideas have found their

way into the English common law, the English common law should “imaginatively develop and elaborate the statutory law so as to co-ordinate it with the common law” the way that the “German courts have to *develop* the [European] law in conformity with the Basic Law” (Zimmermann 1997, pg 328).

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

Whether convergence is taking place remains a deeply polarized debate amongst scholars. Basil Markesinis entitled his book devoted to the meeting between English law and Continental law consequent to the common European institutional setting as *The*

Gradual Convergence (Markesinis 1994) while Pierre Legrand has published an article, devoted to the same topic, with the title *European Legal Systems Are Not Converging* (Legrand 1996). The convergence of the common and civil law is a deeply cultural experience that is best understood when the environment to which it is embedded is examined (Schlesinger 1995). During different historical phases the two legal systems converge and diverge given the political and cultural contexts of engagement creating “integrative” and “contrastive” approaches to their interaction (Schlesinger 1995, pg 477). The 1990’s produced a wave of “integrative” interactions between the common and civil law, but how far convergence will persist is difficult to gauge and whether efforts to converge today will be undone tomorrow is unknowable (Schlesinger 1995, pg 478). Markesinis view of convergence suggests the creation of a unified Western rule of law, capable of both ideological and hegemonic construction of the “end of history” (Markesinis 1994; Fukuyama 1992; Mattei and Pes 2008). While Legrand points to the postmodern ideas of incompatibility and continuing lines of difference (Legrand 1996, pg 55). Others who operate between these two poles cite the fact that “legal traditions are not monolithic entities, so that convergence might be observed and experienced at certain levels of the legal systems and not at others” (Mattei and Pes 2008, pg 272). Convergence may also be viewed as moving to a European common law system imported by the overwhelming influence of American common law on the international stage (Wiegand 1991; Shapiro 1993; Mattei 2003; Kelemen and Sibbitt 2004; Mattei and Pes 2008).

v. *CONCLUSION*

As the common law continues to be open to influence from other members of the common law Commonwealth to civil law from processes of European integration with the continent, it begs the question as to whether the British legal system can continue integrating down these two distinct paths much longer. Will Britain have to give up one of these endeavors or risk not being a part of either? How much longer can Britain embrace both? This section contributes to these ideas by discusses the forces of change within the English common law today. With the absorption of the civil law of the EU and the ECHR, the survival of the English common law and continuation as part of the Commonwealth is called into doubt. To this discussion is added whether the common and civil law are converging, not only is the English common law changing, but the civil law traditions of Europe may be becoming more like the common law as well.

J. CHAPTER CONCLUSION

This chapter has argued that British judges engage in a dodge and massage relationship with the ECJ. The ECJ has established its vertical authority over member states through landmark case decisions allowing for EU legal supremacy and direct effect. British judges have utilized their case law to further integrate Britain into the European legal order than perhaps British politicians are comfortable with through landmark cases such as *Factortame*. British judges have a hard time understanding and applying the ECJ case law and thus “dodge” relying on ECJ jurisprudence as the source of their judicial logic when applying EU law in British national courts. British judges “massage” their ECJ relationship, by heavily utilizing Advocates General opinions and

other member state's high court decisions to provide the required EU legal logic in deciding their cases and in doing so bring a vast array of EU law into the British domestic law system. Despite concern over the maintenance of Parliamentary Supremacy, British judges have embraced EU law and have formed horizontal ties with EU legal actors, particularly the Advocates General's attached to the ECJ, and other member state's courts to facilitate their absorption of EU law, horizontally. British judges can thus be understood to selectively apply EU law, when there is sufficient material available outside the ECJ case law to make EU law sufficiently clear, such as Advocates General opinions or member state case law on the EU law in question.

CHAPTER VI

RECOGNIZING THE ROLE OF HORIZONTAL LEGAL INTEGRATION IN INTERNATIONAL LEGAL ORDERS

A. INTRODUCTION

This dissertation project has sought to understand when and how do national judges play an active and significant role in how international legal orders do or do not affect their polities. Specifically, this dissertation has looked at when and how do British judges play a role in how European Union law through the European Court of Justice and European human rights law through the European Court of Human Rights affect the British polity. A goal of this project has been to draw attention to the role national judges play in international legal orders, overcoming the diminished attention national judges receive in the European legal integration scholarship by neorationalists and neofunctionalists. The second goal has been to see what a focus on horizontal legal integration can contribute to the existing vertical, international legal order scholarship. Horizontal legal integration involves courts making more similar decisions over time because the courts interact, borrow, and imitate each other informally. Horizontal legal integration occurs when judges intentionally and selectively borrow legal concepts and precedents from other national or international jurisdictions. An example of horizontal legal integration can be seen in the ECtHR, which was created by the European Convention on Human Rights (ECHR or the Convention) which specifically compelled member state courts to take into consideration the jurisprudence of other member state

courts when deciding human rights issues, meaning member state courts should be aware of each other's jurisprudence. The causes and role of horizontal legal integration are often ignored in the literature or seen as a side effect of vertical integration particularly in the ECJ literature (See for example Garrett 1995; Mattli and Slaughter 1995; White 1996; Alter 1998; Carrabba and Murrah 2005; Josselin and Marciano 2007; Panke 2010; Carruba et al. 2012), which is why this dissertation has striven to show how horizontal legal integration affects these international legal systems and to discuss the implications of this argument.

Britain was chosen because we have a low expectation of finding autonomous judges who would engage in international judicial activism and find it difficult to think that Britain willingly engages in vertical legal integration much less horizontal legal integration making it a hard case. International judicial activism is when judges actively incorporate international treaty law and the jurisprudence of international legal institutions into the domestic arena autonomous of domestic governance institutions. Britain has a strong resistance to international authority, a deeply entrenched idea of Parliamentary Supremacy, and a dualist legal tradition where Parliament translates international law into domestic law prior to its use by the courts, all of which contribute to a lack of expectation of British judges engaging in international judicial activism. The United Kingdom has often vehemently rejected actions by international institutions that it interprets as diminishing its sovereignty including the Euro, a federalized Europe, new constitutional rules, and the loss of authority and stature within the international community as powers are transferred to a supranational or international authority.

Given what we think we know about Britain, we should expect that international law only matters to the extent that domestic actors are forced to incorporate it by a strong international legal order with vertical supremacy and unambiguous authority. To the contrary, this dissertation shows that British judges are active in many international legal orders in ways that do not merely reflect the degree of established vertical legal authority. Through dynamics that are quite autonomous from British politicians' difficult interactions with international authority, British judges play a very active role in managing and integrating international law into British politics. To see these dynamics and understand how international law has affected British politics, we must pay special attention to facets of horizontal legal integration.

To understand how British judges act within the European legal orders of the ECtHR and ECJ and with what domestic effects, we need to start elsewhere. At the origins of these distinct legal dynamics are the common law and the British Commonwealth, within which a British tradition of judicial borrowing of foreign law first emerged. These dynamics continued with the European Convention of Human Rights and its court in Strasbourg and with the European Court of Justice and EU law, where British judges continued a pattern of practices of international judicial activism and horizontal engagement.

B. SUMMING UP THE ARGUMENT

The dissertation aims to display that the horizontal interaction of member states is an important component of the international legal order and that in conjunction with the plentiful scholarship on the vertical legal integration of these legal orders provides a more

realistic, albeit complex, picture of the functioning of the international legal orders. I do not wish to imply in any way that the vertical legal order does not matter or that it is somehow diminished by the existence of the horizontal legal order. In fact my research suggests that they are mutually reinforcing and that having both leads to a greater sharing of legal ideas and jurisprudence by creating more opportunities for it. Horizontal legal integration is a missing piece of the puzzle in understanding what is occurring when member states of an international legal order attempt to share knowledge of the law.

When we take this unique horizontal dynamic into account, we see that horizontal integration can be used a tool by national judges to reaffirm their participation and comment to the international vertical legal order as is the case with the ECJ or to absolve national judges from being obligated to follow the jurisprudence of an international vertical legal order as is the case with the ECtHR. When we study both the vertical and horizontal dynamics of European legal integration we can see national judges engage in the dodge and massage. National judges dodge by avoiding the use of the jurisprudence from the international court. Within the EU, the dodge is done to avoid using civil law jurisprudence that is difficult for British judges to comprehend; within the Council of Europe, the dodge is done because there is contention over the meaning of the Convention ascribed by ECtHR judges and British judges. National judges massage by turning to horizontal jurisprudence to provide logics, legal reasoning, to use in their jurisprudence to fulfill their binding obligations to international legal orders whose international courts are being dodged. Within the EU, British judges massage their relationship to the ECJ by using the logics of horizontal actors employing EU law; within the Council of Europe, British judges massage their relationship to the Convention

obligations, circumventing the ECtHR, by using horizontal actors logics employing the Convention that are in alignment with British judges' perceptions of the meaning of the Convention.

This dissertation argues that while the ECJ has created a strong vertical legal order over member state courts, the British have a hard time understanding and applying the ECJ case law and thus “dodge” relying on ECJ jurisprudence as the source of their judicial logic when applying EU law in British national courts. However, British judges do not want to be seen to be derelict in applying EU law which they feel represents a binding legal obligation since their accession to the EU in 1973. British judges “massage” their ECJ relationship, by heavily utilizing Advocates General opinions and other member state’s high court decisions to provide the required EU legal logic in deciding their cases and in doing so bring a vast array of EU law into the British domestic law system. Despite concern over the maintenance of Parliamentary Supremacy, British judges have embraced EU law and have formed horizontal ties with EU legal actors, particularly the Advocates General’s attached to the ECJ, and other member state’s courts to facilitate their absorption of EU law, horizontally. British judges dodge the direct vertical logic of applying EU law through the ECJ jurisprudence and horizontally massage the relationship by citing Advocates’ General opinions and member state court’s jurisprudence that explain the meaning of EU law.

As the British antagonism to the ECtHR grows, we begin to see a pattern of horizontal behavior being used to dodge and massage the ECtHR. The British still have affection for the Convention and wish to promote the values enshrined within the Convention, but many British judges drastically disagree with the interpretation, meaning

of the document, of the Convention held by the ECtHR and the logic by which the ECtHR makes its decisions. In exploring the aspects of horizontal legal integration involved with the Strasbourg Court, the case is best understood as an instance where horizontal legal integration allows British judges to avoid obedience to an international legal order they find themselves in conflict with. British judges dodge the contentious jurisprudence produced by the ECtHR, while massaging their relationship to the international legal order by drawing on the Convention directly and by using the jurisprudence of other member state courts.

C. IMPLICATIONS AND FUTURE RESEARCH

A potential set of implications results from an understanding of what does the spread of judicial ideas lead to. Judicial borrowing cannot take “place without the provision of forums in which dialogue is promoted” (Opeskin 2001, pg 1271). International legal orders are forums where dialogue between judges and courts can be promoted. They provide the necessary space for a discussion of what states share in common and the exchange of hopes and goals. While the treaties that bind these member states together start small such as the European Coal and Steel Community, upon success they inevitably expand like the European Union’s free movement of goods, services, labor, and capital which touches upon numerous areas of law. Examples in this dissertation have extended from patent law to criminal law; the use of foreign law can be found in almost every conceivable area of law. The spread of foreign law is far more extensive than it is often credited with being, yet this project has hinted that it might expand beyond these limits. A potential implication of this research is that international

legal orders might produce forums where the spread of foreign law, makes knowledge of purely domestic law irrelevant, in other words a mass convergence. As Lord McCluskey feared

In future no lawyer will be able to advise a client on any matter which might involve a public authority without studying not just the European jurisprudence of Germany, France, Spain...but also American case law, Canadian case law, and even Indian case law and Australian and New Zealand case law (HL Debs. November 3, 1997b).

According to “the end of history” view, social systems are naturally “converging toward market-based, liberal, capitalist democracies after having abandoned aberrations such as communism” (Fukuyama 2005, pg 167). Here, the idea of convergence is used to present how pervasive power dynamics become the outcome of ‘natural’ evolutions, suggesting that such transformations are ultimately legitimate and enviable on a legal plane (Mattei and Pes 2008, pg 270). A potential “new world order” of law may literally be, at least for the West, largely a single international legal order while still containing a little nuance created by judicial idiosyncrasies and national legal culture (Slaughter 1997). While it does not seem likely that a mass convergence of law is a danger waiting behind the next corner it would mark the end of the British notion of “reasonable man” and views of the law as part of a nation’s cultural makeup. After all a mass convergence of law would be made up of pieces contributed by the nations who are now a part of the new world order, but taken as a whole it would not resemble any single national legal order we could imagine. Perhaps this would be the most natural of legal orders as a legal order devoid of a single cultural footprint and instead be a unique amalgamation of many cultural identities.

Remembering the discussion of convergence and divergence in chapter II, international legal orders may not lead to a mass convergence of the law. International legal orders provide forums for the borrowing of law, but that act of judicial borrowing is not simplistic. Once foreign law has penetrated the domestic legal realm it is influenced by domestic notions of jurisprudence and can interact within the domestic realm in unintended ways (Jupille and Caporaso 2009). In precise terms judicial idea F, a foreign idea, interacts with judicial idea D, a domestic idea, to spawn judicial ideas X, Y, and Z, new ideas. These new ideas then become judicial idea F's for other jurisdictions. The more ideas that are exchanged the more new ideas are created. Instead of creating a mass convergence, a legal Renaissance might form. A cornucopia of new legal might be created leading to the further nationalization of the law as foreign legal ideas are translated and adapted to the national legal culture.

A second set of research implications might prove more valuable to those who do not find legal studies their particular cup of tea is based upon what does this research tell us about international organizations. The dissertation has discussed three legal orders all attached to international organizations (IO), the EU, the Council of Europe, and the Commonwealth of Nations. While there is a great debate as to whether the EU is some kind of super state or an international organization, let just pretend for a minute that the IO camp won the debate. It is clear from the historical background knowledge provided in each of the empirical chapters that international legal orders do not require horizontal legal orders to start; in fact a vertical legal order seems sufficient to start the creation of an international legal order. If the British is any indicator a vertical legal order may be necessary but not sufficient for the continued endurance of an international legal order.

To survive long term, an international legal order may need a horizontal legal order.

Does this logic apply to other international organizations outside of the law? Does the EU continue to expand because vertical supranational institutions press forward with new areas touched upon by the EU or does the EU expand because member states continue to engage each other to solve common problems and share information? In truth both are probably happening. Further research on how horizontal relationships between political actors operating within vertical structures might offer interesting results.

D. CONCLUSION

As a final thought, this dissertation project has sought to create a space in the literature for the examination of horizontal elements that add to the structure and interactions within international legal orders. First and foremost, the empirical chapters have provided evidence of its occurrences by drawing attention to some of the case law in Britain where judicial borrowing is being undertaken. Second, the empirical chapters tried to show how the examples of judicial borrowing can be seen as an important part of the international legal order, serving a particular function in maintaining the legal order. In the case of the ECJ, the horizontal is a means of complying with the vertical legal order, of understanding it and applying it. In the ECtHR, the horizontal legal order allows British judges to utilize the Convention and apply it in a similar pattern to other member states while avoiding the expansions and disagreements of interpretation with the ECtHR. In sum, a horizontal legal order can serve as glue to maintain international legal orders.

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