

Lord Reed at the Centre for Private Law, University of Edinburgh

Comparative Law in the Supreme Court of the United Kingdom

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John Keats described autumn as a season when gathering swallows twitter in the skies.¹ It is also a season when gathering judges twitter in the skies, as they travel to conferences, meetings and exchanges all over the world. The purpose of this migration is to learn about, and possibly to learn from, the laws of other jurisdictions. The judges are following in a long tradition, which can be traced back to the ancient world. The Roman historian Livy describes how an embassy was sent from Rome to Athens in the fifth century BC to learn about the laws of Solon, for the purpose of preparing the Twelve Tables.² Writing a century later, the Greek historian Plutarch describes how Lycurgus, the Spartan lawgiver of around the eighth century BC, travelled to Crete and to Asia Minor, comparing the societies he found and the laws by which they were regulated, in order to draw up a constitution which would be suitable for the sort of society he wished to create.³ Many scholars view these accounts with a sceptical eye, but even if no such embassy was actually sent to Athens, and even if Lycurgus is a semi-legendary figure, it is nonetheless significant that the study of foreign law, for the purpose of making domestic law, was thought in ancient times, as it would be today, to be just the sort of thing that would happen.

Nowadays, it is normal for judges to travel around the world to attend conferences, to give lectures, and to hold discussions with foreign colleagues. On the Supreme Court of the United Kingdom, we have contact with a large number of jurisdictions in all parts of the world. In recent years, our most frequent and regular contacts have been with the German Federal Constitutional Court (the

* The Rt Hon Lord Reed, Justice of the Supreme Court of the United Kingdom. This lecture was given on 13 October 2017 at the University of Edinburgh, and is a revised version of a lecture originally given on 10 July 2017 at the Max-Planck-Institut für Ausländisches und Internationales Privatrecht, Hamburg, on the occasion of its annual *Sommerkonzil*. I am grateful to my former judicial assistant, Eleni Dinenis, and to Christoph Schoppe, for their comments on an earlier draft.

¹ *To Autumn* (1819).

² Livy, *Ab urbe condita*, III, 31-32.

³ Plutarch, *Life of Lycurgus*, Ch 4.

Bundesverfassungsgericht), the French Conseil d'Etat, the Canadian Supreme Court and the United States Supreme Court.

It is perhaps worth emphasising that our contacts with the German constitutional court have become as frequent and important as our contacts with the common law courts that I have mentioned. But that is a recent development. Our links with the US and Canadian courts are of long standing: there are close links between our legal systems, especially in the case of Canada, and we speak the same language, at least up to a point. We also have longstanding links with the Conseil d'Etat: it has been keen to maintain contact with *les Rosbifs*, and there are sufficient members of our respective courts who can speak each other's language, again up to a point. Since M. Laurent Fabius became President of the Conseil constitutionnel, that institution also has strengthened its relationship with our court, and meetings have been taking place. The excellent relationship which we now enjoy with the German constitutional court similarly owes much to the initiative of its President, Prof Dr Andreas Voßkuhle. We have now had several exchanges at which we have discussed areas of common interest, such as the constitutional implications of judgments of the European Court of Justice, and other developments in our constitutional jurisprudence. There are also more frequent informal discussions with the President and his colleagues. Each court has begun to cite the other's judgments.

Another important development has been the establishment of annual seminars involving a group of judges and academic lawyers from a variety of European countries, with an interest in comparative public and constitutional law. They include judges from the French Conseil d'Etat and Cour de Cassation, the German constitutional court, the Italian Corte de Cassazione, the Norwegian and Swedish Supreme Courts, the European Court of Human Rights and the UK Supreme Court. Another important forum is the annual seminar on Global Constitutional Law at Yale, which involves members of constitutional courts from around the world, including the UK Supreme Court.

Comparative lawyers tend to focus primarily on private law. In that field, the use of comparative material is taken for granted in the Supreme Court. The legal systems on which we draw are almost always within the common law family. When we are dealing with problems in areas of the common law, we expect to be referred to the

judgments of the highest courts of other common law jurisdictions, especially Australia, Canada, New Zealand, Hong Kong, Singapore and the United States, and we also consult their academic scholarship. In an English or Northern Irish appeal, we will also look at relevant Scottish cases, and vice versa. I always take a particular interest in Australian case law and academic writing, because of their high quality, and I am also a great admirer of the Canadian Supreme Court, which tends to produce particularly stimulating judgments. I sit on the Hong Kong Court of Final Appeal, as do several retired Law Lords and Justices of our court, and its judgments are naturally of great interest.

Putting a complex matter very briefly, we are interested in the doctrine of other common law jurisdictions as a possible guide to the development of our own. A recent example was the decision of the Supreme Court in *Montgomery v Lanarkshire Health Board*,⁴ a Scottish appeal in 2015 concerned with medical negligence, in which we considered authorities from the US, Canada and Australia to identify respects in which the then leading authority on informed consent to medical treatment was unconvincingly reasoned and had become out of date, and used those overseas authorities (particularly the Australian cases) to assist us in identifying a principled and practical approach for the United Kingdom to adopt. And our judgments on common law subjects can in turn influence the thinking of judges in those other countries.

By comparison with the use made of comparative material from common law jurisdictions, and also by comparison with the civilian influence on our law through the medium of EU law, the use made in our judgments in private law of legal reasoning in civilian jurisdictions is very limited. We sometimes refer to civilian codes and to the judgments of civilian courts, but we do not do so frequently, and the material tends to be used in a different way. In general, this is partly because the law tends to be substantially different from our own, partly because of language issues, and partly because some civilian courts do not produce fully reasoned judgments.

German law has tended to feature more prominently than most other European systems, partly because we have had a number of judges, such as Lord Goff, Lord Hoffmann, Lord Rodger, and Lord Mance, who have been fluent in German and

⁴ *Montgomery v Lanarkshire Health Board* [2015] UKSC 11.

knowledgeable about German law. We have also been assisted in recent years by young German academic lawyers from the Max Planck Institut who have spent a year working on our court in a research capacity. Several of our judicial assistants have also spent part of their legal studies in other European countries, usually France or Germany.

A recent example of the citation of French and German private law was the case of *Cavendish Square Holding BV v Makdessi* in 2015, in which our court reviewed the English law governing the enforcement of contractual penalty clauses.⁵ The majority of the court adopted an approach under which clauses providing for financial penalties on breach of contract were generally likely to be upheld under English law unless they were not merely deterrent but had consequences which were exorbitant or unconscionable. The court also considered that the fact that parties were negotiating at arm's length and had access to legal advice was a highly material factor: an approach which means that clauses are more likely to be upheld when they appear in commercial contracts.

The principal question the court had to address was whether it should abolish the general rule of English law which made penalty clauses unenforceable, on the ground that it was anomalous and unnecessary, in view of EU and domestic legislation protecting the interests of consumers. In deciding that the rule should not be abolished, the court noted that there had been a general convergence of approaches in European civil codes, and in law proposals at an international level, towards a recognition that judicial control of disproportionate or unreasonable penalties was desirable. In that regard, the court referred particularly to the French and German Civil Codes. The court did not base its analysis of the rule in English law on French or German law, but it used the comparative material to reach the conclusion that the English rule was in line with a broad international consensus. That conclusion enabled the court to decide that English law ought not to separate itself from that consensus by abolishing the rule.

An area of English private law where it is possible that civilian or mixed legal systems might have a greater influence in future is the law of unjust enrichment. Until recently, English law dealt with the problems which are now classified as raising issues of unjust enrichment in a variety of ways under common law and equity. In recent times,

⁵ *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67; [2016] AC 1172.

however, under the influence of the late Peter Birks, the House of Lords adopted a unified theory of unjust enrichment based on the application of a simple structure described in very broad language. This has in practice permitted judges to apply rather subjective approaches and has resulted in a degree of uncertainty. In reaction to that, in two recent judgments⁶ the Supreme Court has begun to develop more strictly defined principles. It may be possible to steer the development of English law further in that direction. In that event, as Lord Goff observed many years ago,⁷ it may be helpful to have regard to the position under other systems of law, notably Scottish, South African and German law. They have systems of classification which recognise material differences between different kinds of claim: for example, between claims based upon enrichment by performance, claims based upon the discharge of another person's obligation, and claims to recover expenses incurred on behalf of another person under the *actio negotiorum gestio*. An alternative approach may be to place greater emphasis on equitable doctrines, under the influence of Australian law. One way or another, comparative law may be influential.

Public law is a field in which one might generally expect less reference to be made to comparative law. It is particularly embedded in a specific historical and political context, and in a particular constitutional framework and culture. For example, French law relating to religious symbols and ceremonies reflects a long-standing secular ideology, which treats secularity as an instrument of social solidarity and public displays of religious alliance as socially divisive. That ideology has no parallel in the United Kingdom, and so we have no comparable body of law. Similarly, German law relating to privacy and state surveillance, like that of much of continental Europe, but unlike that of the United Kingdom, is highly protective of privacy, and wary of the assertion of public interests in security. Differences of these kinds between one country and another reflect differences in their historical experience. More generally, decisions of courts in states with a written constitution can be as likely to mislead as to help when it comes to analysing the boundaries of common law rules developed on a case by case basis over the course of British history. So there are reasons inherent in the nature of

⁶ *HMRC v Investment Trust Companies* [2017] UKSC 29; *Lowick Rose LLP v Swynson Ltd* [2017] UKSC 32.

⁷ *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 389.

public law why cross-jurisdictional dialogue may be limited to a shared high-level framework of ideas within which jurisdictions develop independently.

Indeed, until recent times English and Scots law showed relatively little interest in the public law of countries such as France and Germany. In his *Introduction to the Law of the Constitution*, first published in 1885, the English constitutional scholar A V Dicey described French *droit administratif* as utterly unlike any branch of modern English law: even the term, he wrote, had no proper equivalent in English legal phraseology. That view was exaggerated: at that stage in his career, Dicey appears to have misunderstood aspects of the French system of administrative law, and to have overlooked the existence of a body of English law on the same subject. In fairness, he later came to adopt a more nuanced view. His earlier writings were, however, highly influential in forming British attitudes towards continental systems of public law. And some significant differences did exist. Whereas administrative law became increasingly important in France and Germany as the activities of the state developed during the first half of the twentieth century, and a stream of judgments was analysed and systematised by legal scholars, there was, for quite a prolonged period, comparatively little activity in that area of the law in the United Kingdom. Furthermore, the establishment of judicial institutions to apply administrative law which were wholly separate from the ordinary courts, such as the French Conseil d'État and the German Federal Administrative Court (the *Bundesverwaltungsgericht*), had no parallel in the United Kingdom. Even the concept of the state had no equivalent in our law, and no clear distinction was drawn between private and public law. Although a body of case law concerned with the exercise of public functions had been developing since the eighteenth century, it was not a prominent part of the law and it did not attract much attention from scholars.

A renaissance of administrative law began in England only in the 1960s, and in Scotland in the 1980s, building on the older body of case law and adapting it to modern methods of government. Remedies in public law became more readily available in England and Wales and in Northern Ireland with the introduction in the 1970s of the application for judicial review, and the establishment of generous rules of standing. Scotland followed suit some years later. New institutional arrangements were

established, with the creation of administrative tribunals and, eventually, their closer integration into the framework and culture of the courts and the judiciary.

But the most significant changes in this area of the law occurred as a result of the United Kingdom's membership of the EU and its implementation of the European Convention on Human Rights and Fundamental Freedoms by means of the Human Rights Act 1998. The EU and the ECHR have, of course also affected the legal systems of the other European countries which belong to the EU and adhere to the ECHR, and so have resulted in a growing convergence of some aspects of the different European legal traditions in public law.

Both the establishment of the EU, and the task of interpreting and applying the ECHR, have depended on recognising and building on the fundamental values which the different national legal cultures have in common: values with their roots in a shared European cultural tradition. They include the values which find expression in the concepts of the rule of law, the *Rechtsstaat*, and the *État de droit*, such as the independence of the judiciary, the right of access to a court, and the right to a fair trial, and the other values which are reflected in the guarantees contained in the EU Charter of Fundamental Rights and the ECHR. These shared values also include basic constitutional principles, such as the separation of powers between the courts and the other institutions of government.

At the same time, the application of both EU law and the ECHR has also given rise to constitutional questions which are common to many of the member states. In the case of the EU, constitutional issues have arisen as to the relationship between the legal order established by the EU treaties and national constitutional principles, in relation to which the German and Italian courts began to develop a jurisprudence long before us, notably in the *Solange* cases.⁸ The case law of the German constitutional court provides

⁸ Italy: see for example Case 6/64 *Costa v ENEL* [1964] ECR 585. Germany: see for example, Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, in which the ECJ held that directly applicable EU law could not be challenged even by a fundamental principle of a nation's constitution. Subsequently in *Re Wünsche Handelsgesellschaft* [1987] 3 CMLR 225 the *Bundesverfassungsgericht* held that so long as EU law provided protection for fundamental rights substantially in line with the German Constitution, it would not scrutinise EU law by the standard of the German Constitution. The primacy of EU law in the legal order of the United Kingdom was grappled with in the following cases: *R v Secretary of State for Transport ex p Factortame Ltd (No 2)* [1991] 1 AC 603 in which the House of Lords held

much the most penetrating analysis of these issues. Constitutional issues can also arise in relation to the ECHR, as to how the duty of the courts to give effect to the Convention affects rights guaranteed under the national constitution, and the separation of powers between the courts and the elected branches of government, for example in relation to controversial issues such as assisted suicide and abortion. Another issue of concern in some countries is the extent to which the ECHR requires judges to make policy judgments.

In addition to fundamental values held in common, and a shared understanding of the broad elements of constitutionalism, the successful implementation of EU law and the ECHR also requires the application by the national courts of some shared general principles of administrative law. Fortunately, the Court of Justice and the European Court of Human Rights have established some common principles, derived mainly from French and German administrative law, such as legal certainty, the protection of legitimate expectations, equality, non-discrimination, proportionality, and subsidiarity.

The application of those principles has become a familiar aspect of the work of national courts, including those of the United Kingdom. Cultural adaptation to these principles, and understanding their relationship to the apparently different principles established in domestic administrative law, has in some ways been a challenge. Some principles, such as the protection of legitimate expectations, have been fully absorbed into the domestic administrative law of the United Kingdom. The absorption of others, such as proportionality, remains controversial. Some judges and academic commentators have come to feel that the differences between proportionality and our traditional concept of reasonableness are more apparent than real: a matter of articulating explicitly an analysis which is in any event implicit. Others think that there are real differences affecting the separation of powers. In analysing and applying these principles, our court bears in mind that they not only have their origins in Germany and

that courts could ‘disapply’ Acts of Parliament in conflict with EU law; *Thoburn v Sunderland City Council* [2003] QB 151, in which it was held that the constitutional relationship between EU law and our domestic law was determined by the common law, and that the European Communities Act 1972 fell within a category of constitutional statutes recognised by the common law as protected from implied repeal; and *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 WLR 324, in which the Supreme Court held that the status of EU law in our legal system is derived from the European Communities Act 1972.

France, but continue to be applied and developed by courts there in relation to similar problems to those which face us.

As the ambit of EU law has widened over time, and as the influence of the ECHR on national law has developed, these general principles have become increasingly central to the application of public law in all the member states. That is one factor which has drawn their courts closer together. But more generally, because EU law and the ECHR give rise to legal issues which affect the courts of the member states in common, the process of European integration has been accompanied by a marked increase in the frequency and intensity of discussions between the leading courts in those countries. As I have explained, dialogues involving the Supreme Court of the United Kingdom, the French Conseil d'État and Conseil constitutionnel, the German constitutional court and the Italian Consiglio di Stato have become well established. Through these dialogues and others, United Kingdom courts, and their counterparts in other jurisdictions, have learned from each other's experience and jurisprudence. These dialogues between national courts have been accompanied by the establishment of parallel dialogues between those courts and the European Court of Human Rights, conducted partly through meetings but mainly, in the case of the United Kingdom, through our judgments. We consciously draft judgments so as to explain any difficulties we may have in applying the Strasbourg case law, knowing that our judgments will be read and considered there; and the dialogue often produces valuable results. Although less fully developed, a third dialogue also exists between the Court of Justice and national courts, partly through the reference procedure under 267 of the Treaty on the Functioning of the European Union, and partly through meetings.

These developments form the background to the use of comparative law from continental Europe – especially German law - in public law cases in the Supreme Court. For example, the *Bank Mellat* case in 2013 raised the question whether sanctions imposed by the British Government on an Iranian bank suspected of involvement in the Iranian nuclear missile programme were a proportionate interference with the right under the ECHR to peaceful enjoyment of possessions. My discussion of the concept

of proportionality in that case,⁹ which has been cited in many subsequent cases, was influenced by discussions with Prof Dr Gertrude Lübke-Wolff, then a judge at the German constitutional court, at the meetings I mentioned earlier.

The *HS2* case in 2014 concerned an argument that judgments of the European Court of Justice in the field of environmental law required national courts in some circumstances to exercise supervision over the quality of Parliament's consideration of Bills, and to ensure that Parliamentary decisions on environmental matters were not determined by the whipping of votes.¹⁰ The argument was incompatible with a well-established principle of our constitution, which prevents the courts from interfering in the proceedings of Parliament. We avoided a conflict by borrowing an idea from German law, which had been discussed during one of our meetings with the German constitutional court. That court had said that in the context of a co-operative relationship between the European Court of Justice and the national constitutional court ("*Im Sinne eines kooperativen Miteinanders zwischen dem Bundesverfassungsgericht und dem Europäischen Gerichtshof*"), a decision of the Court of Justice should not be read by the national court in a way that places in question the identity of the national constitutional order ("*dass dies die Identität der durch das Grundgesetz errichteten Verfassungsordnung in Frage stellte*").¹¹ In support of the idea that parliamentary parties, with their internal discipline, are recognised as playing a legitimate role in democratic decision-making in other member states besides the United Kingdom, we also referred to the German Basic Law¹² and to a judgment of the German constitutional court.¹³

In the *Pham* case, decided in 2015, we again referred to German law in seeking to avoid a conflict with the European Court of Justice. That court had asserted that decisions to deprive a person of the nationality of a member state fell within the ambit of EU law, because of the consequential loss of EU citizenship. We were not readily inclined to accept that proposition, but we avoided a conflict by holding that the

⁹ *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700, paras 68-76.

¹⁰ *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 WLR 324. See paras 106, 111 and 202.

¹¹ Judgment of 24 April 2013 on the Counter-Terrorism Database Act, 1 BvR 1215/07, para 91.

¹² Article 53a.

¹³ The judgment of 10 May 1977 on the Weapons Act 1972, BVerfGE 44, 308, paras 35 - 37.

intensity of review required in this context by the principle of rationality under our domestic administrative law was equivalent to that required by the proportionality review said to be necessary under EU law.¹⁴ In reaching that conclusion, we relied on a discussion of the principle of proportionality in the case law of the German constitutional court in an article written by Prof Dr Lübke-Wolff.¹⁵

The same article was referred to again in the *Keyu* case later in 2015, concerned with a decision not to hold an investigation into deaths which had occurred at the hands of British forces in Malaya in the 1950s.¹⁶ The issue was again whether review of the rationality of the decision in accordance with our domestic administrative law was significantly different from review of the proportionality of the decision, as was argued to be required under the ECHR.

A final example is the *Belhaj* case decided earlier this year, concerned with the doctrine of foreign act of state.¹⁷ The court had to decide the scope of the doctrine in our own constitutional law, but undertook a detailed survey of its scope in a number of other jurisdictions, including France, Germany and the Netherlands, in view of its relevance to international relations.

What conclusions can one reach about the use being made of comparative law in the Supreme Court of the United Kingdom? The impact of dialogue between legal systems is of course a complex matter, varying from one area of the law to another. That said, I think that one can distinguish a number of different, but sometimes overlapping, ways in which comparative law is used.

There is, first of all, the use of judgments of foreign courts in order to analyse their reasoning and consider whether to apply it directly in our own doctrine. One frequently sees this in the way in which we consider the judgments of other common law courts concerning common law issues. An example was the medical negligence case I mentioned earlier. In principle, the same might be done in relation to judgments of civilian jurisdictions on questions which are closely analogous to those arising under

¹⁴ *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591, para 96.

¹⁵ The Principle of Proportionality in the Case Law of the German Federal Constitutional Court (2014) 34 HRLJ 12.

¹⁶ *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69; [2016] AC 1355, para 134.

¹⁷ *Belhaj v Straw* [2017] UKSC3; [2017] 2 WLR 456, paras 67-72, and 201; cf para 133.

our own law. For example, as I have explained, we borrowed from the German constitutional court a principle of interpretation of EU judgments. The cases I have mentioned concerning proportionality in EU law and under the ECHR also illustrate how German case law on a principle which is, at least, closely analogous to the one that we have to apply may be influential. On the other hand, outside the area of EU law and the ECHR, we do not often apply the same principles as civilian courts, and direct borrowings are therefore uncommon.

Secondly, there are situations in which there is a practical value in knowing how a foreign court has dealt with an issue, because the nature of the issue is such that it is important that courts should arrive at solutions which can work in harmony with those arrived at by the courts of other countries. We cannot, for example, sensibly decide whether to make orders against Internet corporations based in California without having some idea whether those orders are likely to be enforced by the American courts, which in turn requires us to know something about the relevant American law, for example on the First Amendment. Equally, if we have to deal with questions concerning the sharing of intelligence material relating to UK citizens between our intelligence agencies and the US National Security Agency, we need to understand the protections to which that material will be subject under US law, if it is shared. And, of course, when interpreting legislation intended to give effect to international treaties, the need for a consistent approach provides a strong justification for judges considering the decisions of foreign courts.

But the practical value of international legal discussions does not relate only to common problems, or problems which require international solutions. In the field of commercial law, for example, where cross-border transactions are very common and are assisted by standard forms of documents, the convergence of law and practice across jurisdictions is economically efficient, since it reduces transaction costs. This tends to make jurisdictions sharing a common approach more attractive to each other as destinations for investment or as sources of collaboration. That is something of obvious importance to the United Kingdom, as a predominantly common law country sharing a legal heritage with a third of the world's population. As we have recently said in two of our judgments, although it is "inevitable that inconsistencies in the common law will

develop between different jurisdictions ... it seems to us highly desirable for all those jurisdictions to learn from each other, and at least to lean in favour of harmonising the development of the common law round the world".¹⁸ And, sometimes, not only the common law. The example I gave earlier, of the law on penalty clauses in contracts, illustrates how there can also be advantages in not being out of step with the general trend of legal developments elsewhere in Europe.

So, in a globalised world, there can be practical advantages in jurisdictions achieving a degree of coherence and consistency in their case-law. Even when there are no apparent practical advantages of that kind, we may still sometimes derive benefit from considering the reasoning of others confronted by similar issues. But it very much depends on the circumstances. In the case concerned with the doctrine of act of state, for example, the then President of the Supreme Court, Lord Neuberger, noted in his judgment that two of the other members of the court had referred to decisions of courts in France, the Netherlands and Germany. In each of those three countries, the courts had developed comprehensible and principled legal rules, which however differed from each other. He commented that deciding which of those rules would be most appropriate for the courts of the United Kingdom seemed an unnecessarily cumbersome way, and indeed an unnecessarily constraining way, of resolving the question which the Supreme Court had to decide.¹⁹

I would agree with that. Where we are not applying the same legal principles as a civilian jurisdiction, we do not normally look at its law in order to find a rule which we can adopt in our own system. But the judgments of other courts in other jurisdictions, including systems of civil law, can nevertheless be useful. They can give us a clearer insight into the state of our own law, and see our own thinking and its possible deficiencies more clearly. They can make us question received wisdom, and can give us ideas about how our law might be developed. As Thomas Mann wrote in *Joseph and His Brothers*,²⁰ it is by comparison with others that we discover who we are, and learn what we could be.

¹⁸ *FHR European Ventures LLP v Cedar Capital Partners LLP* [2015] AC 250, para 45; *AIB Group (UK) Ltd v Mark Redler & Co* [2015] AC 1503, para 121.

¹⁹ *Belhaj v Straw* [2017] UKSC3; [2017] 2 WLR 456, para 133.

²⁰ T Mann, *Joseph und seine Brüder* (Stockholm, Bermann-Fischer, 1948).

Looking to the future, until it becomes clear what our future relationship with the EU and the rest of the world is to be, it is impossible to predict how the relationship between our law and other legal systems may develop. The changes which emerge will inevitably influence our law's future relationship with the law of other common law and civilian jurisdictions.

But I am not pessimistic. Nor are the continental judges whom we meet. At a meeting with the German constitutional court earlier this year, we continued to find much value in our discussions, and resolved that they should continue. To give just one example, I was interested in a judgment which that court issued last year, in which the court held that intellectual property rights might in some circumstances be overridden by the fundamental right of freedom of artistic expression.²¹ That is an idea which might possibly influence our own approach to the law of copyright, for example, in a similar situation.

Whatever the future may hold, comparative law will remain an important tool in the judge's toolbox. The UK Supreme Court will remain one of the leading courts in the common law world. The influence of other common law systems on our law, and vice versa, is of long standing and shows no sign of diminishing. The Supreme Court will also continue to share with other leading European courts a cultural heritage, and some important legal concepts and principles. European influence on the legal systems of the United Kingdom, and vice versa, did not begin with our entry into the EU, and it will not end with our withdrawal. I began by quoting one English poet. I shall end by quoting another. The opening lines of T S Eliot's *Burnt Norton* may be apposite:

“Time present and time past
Are both perhaps present in time future,
And time future contained in time past.”

²¹ *Kraftwerk*, Judgment of 31 May 2016, 1 BvR 1585/13.