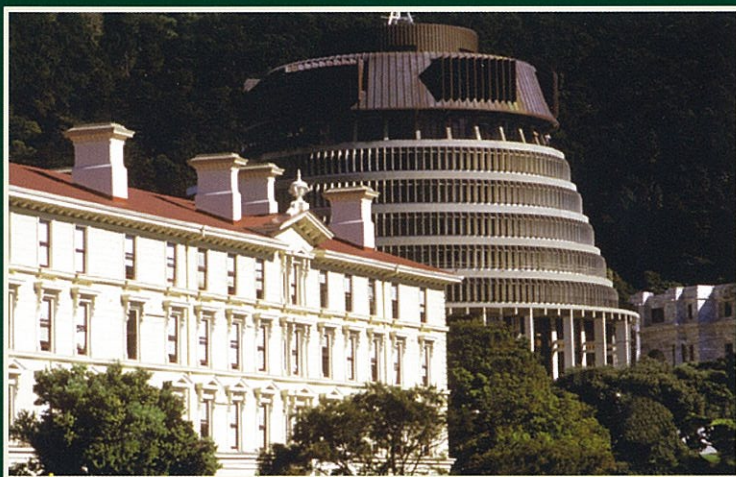


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SPECIAL CONFERENCE ISSUE
FROM PROFESSING TO ADVISING TO JUDGING:
CONFERENCE IN HONOUR OF SIR KENNETH KEITH

THIS ISSUE INCLUDES CONTRIBUTIONS BY:

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*Te Whare Wānanga
o te Upoko o te Ika a Māui*



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SEEING THE WORLD WHOLE: UNDERSTANDING THE CITATION OF EXTERNAL SOURCES IN JUDICIAL REASONING

Ben Keith*

The citation by courts of material other than case law and legislation of their respective jurisdictions can be seen as a matter of common sense or a cause of controversy. Both perceptions are problematic. The first, which can be seen to be grounded in pragmatism, risks disregarding underlying questions of principle and, particularly, may often not adequately respond to the controversy that can ensue. However, the second is grounded in an empirically untenable and simplistic account of legal analysis that fails to account for the issues of principle at all.

This article proceeds from a broad survey of external citations that encompasses not only the current controversy over international and comparative law, but also the parallel practices of reference to social science and literary materials. From that survey, the article proposes three successive accounts of citation practice that acknowledge and accommodate both the pragmatic and the controversial perceptions of such citation.

I INTRODUCTION

The practice of citation in judicial decisions of material beyond the case law and legislation of the relevant jurisdiction — here termed "external sources" — has a curiously dual character. On the one hand, instances of such citation are empirically uncommon¹ and even then, on one account, demonstrate no more than the pragmatic resolution of novel issues.² On the other, of course, such citation gives rise to controversy and criticism, both as a general proposition and in particular

* Crown Counsel, Crown Law Office, Wellington. I am grateful for comments provided by Claudia Geiringer and Dean R Knight, and by an anonymous reviewer. Any remaining errors and omissions are my own. The views expressed in this paper are personal and are not necessarily those of the New Zealand government.

1 See Part IV Empirical Study.

2 See Part V B Problem-Solving in Legally Indeterminate Cases.

instances.³ As to the latter, one need only think of the reactions to Lord Atkin's citation of Lewis Carroll in *Liversidge v Anderson*,⁴ the reference by the United States Supreme Court to Gunnar Myrdal's *An American Dilemma* in *Brown v Board of Education (Brown)*,⁵ its more recent engagement with factually unsupported legislative "findings" in *Gonzales v Carhart*⁶ or, albeit in more moderate tones, the citation of social science information and international instruments respectively in decisions of the New Zealand courts such as *Z v Z (No 2)*⁷ and *Sellers v Maritime Safety Inspector (Sellers)*.⁸

This dual character is, moreover, reflected at the level of theoretical accounts of external citation. For example, and as a number of commentators have observed, much of the debate in respect of the citation of international and comparative law has proceeded from contrasting, and perhaps exclusive, accounts of the role of such citation in judicial reasoning.⁹ Notably, Jeremy Waldron has observed that these contrasting views can, broadly, be aligned with the philosophical distinction between "law as will" and "law as reason".¹⁰

The first of these parallel accounts, which has largely been reflected in critical responses to such citation, treats reference to external material as attributing inherent legal authority to that material, with the effect that intrajurisdictional legislation, case law and constitutions are effectively subverted:¹¹ to use Roger Alford's colourful description, it "outsources authority".¹² In the second, largely adopted by proponents of use of external material, such reference is a pragmatic exercise in

3 It attracts, for example, claims of judicial inferiority complexes and treason in the current United States debate over comparative and international law. See Part IV A International and Comparative Law.

4 *Liversidge v Anderson* [1942] AC 206, 245 (HL) Lord Atkin. See Part IV C Literary Sources.

5 Gunnar Myrdal *An American Dilemma: the Negro Problem and Modern Democracy* (Harper and Bros, New York, 1944), cited in *Brown v Board of Education* (1954) 347 US 483, fn 11 Warren CJ for the Court [*Brown*]. See Part IV B 1 *Brown* and New Zealand examples.

6 *Gonzales v Carhart* (2007) 127 S Ct 1610. See Part IV B 2 (b) Legislative findings.

7 *Z v Z (No 2)* [1997] 2 NZLR 258 (CA).

8 *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA) [*Sellers*].

9 Jeremy Waldron "Foreign Law and the Modern *Ius Gentium*" (2005) 119 Harv L Rev 129. See also, among others, Ruti Teitel "Comparative Constitutional Law in a Global Age" (2004) 117 Harv L Rev 2570, 2586, contrasting "transfer" of comparative law and "engagement" with it; Roger Alford "Four Mistakes in the Debate on 'Outsourcing Authority'" (2006) 69 Albany LR 653, 658, setting out proponents' and opponents' views as two broad groupings; and Christopher McCrudden "Judicial Comparativism and Human Rights" in Esin Öricü and David Nelkin (eds) *Comparative Law: A Handbook* (Hart Publishing, Oxford, 2007) 371, 378–379, differentiating rhetorical, empirical and two categories of authoritative use of comparative law.

10 Waldron, above n 9, 145–146.

11 See for example the commentaries cited by Alford, above n 9, fns 38–63.

12 *Ibid*, 658.

problem-solving, as in the pithy, and regularly cited¹³ observation of the German legal theorist and comparativist Rudolf von Ihering:¹⁴

The reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn't grow in his back garden.

Perhaps unsurprisingly, given the perception that the New Zealand legal and constitutional system is strongly pragmatic in character,¹⁵ the second account is seen strongly in New Zealand judicial practice. While there has been adverse and sometimes forceful academic comment in respect of such citation,¹⁶ there has not been significant public or political reaction or, for that matter, a parallel to the polarised exchanges that have occurred between members of the United States Supreme Court and of the High Court of Australia.¹⁷ If anything, the respective comments of Keith J in *Sellers* and Gault P in *Hosking v Runting* indicate a determinedly pragmatic approach.¹⁸ As to the former, his Honour said as follows:¹⁹

New Zealand Courts have for over a century made it plain that legislation regulating maritime matters should be read in the context of the international law of the sea and, if possible, consistently with that law, *R v Dodd* (1874) 2 NZCA 598, and *Re The Award of the Wellington Cooks and Stewards' Union* (1906) 26 NZLR 394 (Full Court).

-
- 13 See among others Teitel, above n 9, 2575; Gregor Thüsing "A Welcome to Friends and Colleagues of Hein Kötz" in Florian Faust and Gregor Thüsing (eds) *Beyond Borders: Perspectives on International and Comparative Law: Symposium in Honour of Hein Kötz* (Heymanns, Köln, 2006) 1, 7; and Jack Tsen-Ta Lee "Interpreting Bills of Rights: The Value of a Comparative Approach" (2007) 5 Int J Const L 122, 122.
- 14 Rudolf von Ihering *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* (9 ed, Schwabe, Basel, 1954) 8, cited in Konrad Zweigert and Heinz Kötz *Introduction to Comparative Law* (Tony Weir trans, 3 ed, Clarendon, Oxford, 1998) 17 [trans of: *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*].
- 15 See for example Michael Taggart "The New Zealandness of New Zealand Public Law" (2004) 15 PLR 81, 85; and Sian Elias "Interweavers: Contribution of the Judiciary to New Zealand Law" in Geoffrey Palmer (ed) *Reflections on the New Zealand Law Commission: Papers from the Twentieth Anniversary Seminar* (LexisNexis, Wellington, 2007) 55, 63.
- 16 See for example James Allan "Statutory Interpretation and the Courts" (1999) 18 NZULR 439, 443; Jim Evans "Questioning the Dogmas of Realism" [2001] NZ Law Rev 145, 156–159; Nessa Lynch, James Allan and Grant Huscroft "The Citation of Overseas Authority in Rights Litigation in New Zealand" (2007) 11 Otago LR 433; and Mark Henaghan "Are Future Earnings Matrimonial Property?" [1996] NZLJ 323, 325.
- 17 See for the former Alford, above n 9, fns 49 and 50; and for an example of the latter, *Al-Kateb v Godwin* (2004) 219 CLR 562, paras 62–73 McHugh J; paras 152–192 Kirby J.
- 18 *Sellers*, above n 8; *Hosking v Runting* [2005] 1 NZLR 1 (CA).
- 19 *Sellers*, above n 8, 57 Keith J for the Court.

In a similar vein, Gault P said in *Hosking v Runting*:²⁰

To ignore international obligations would be to exclude a vital source of relevant guidance. It is unreal to draw upon the decisions of Courts in other jurisdictions (as we commonly do) yet not draw upon the teachings of international law.

The difficulty in the pragmatic account, however, and also in the perception of that account as the polar opposite of that of "outsourced authority", is that neither account is complete. The pragmatic account does not, of itself, address the questions of methodology and of constitutional principle, let alone the controversy, that can arise from the use of comparative, international or other external material.²¹ Asserting an exclusive reliance on intrajurisdictional material simply does not reflect the actual, and longstanding, practice of courts and judges.²² The "outsourced" account, however, is still more problematic.²³

In attempting to resolve that difficulty here, this paper proposes that both the pragmatic resolution of problems and the attendant controversy form elements of the particular function served by external citation in judicial reasoning in difficult or contentious cases.

The paper begins by placing the issue in the context of the New Zealand decisions and extrajudicial writings of Judge Sir Kenneth Keith, who has been associated to a substantial, and arguably unique, degree with the citation of international and comparative law and, more broadly, with the invocation of external material in legal reasoning.²⁴ The paper then reviews practice in wider terms, both in the form of empirical studies that have been undertaken of external citation in judicial decisions and through a series of instances of controversial citation of external material. The remainder of the paper seeks to develop a theoretical account by reference to the practice of external citation in contentious cases and to the attendant controversy.

II SEEING THE WORLD WHOLE: THE APPROACH OF JUDGE KEITH

The subject matter and timing of this article is, of course, apposite in light of the recent retirement of Judge Sir Kenneth Keith from the New Zealand Supreme Court and his subsequent election to the International Court of Justice. In addition to his very substantial association with the

²⁰ *Hosking v Runting*, above n 18, 6 Gault P for Gault P and Blanchard J.

²¹ See for example Teitel, above n 9, 2581 suggesting that a "functionalist" account of comparative citation does not acknowledge particular legal and social context.

²² See *Sellers* above n 8, 57 Keith J for the Court; *Hosking v Runting*, above n 18, 6 Gault P for Gault P and Blanchard J; Teitel, above n 9, 2588. But compare Alford, above n 9, 664–670, disputing the comparability of historical incidents of citation of comparative law by United States courts.

²³ See for example Waldron, above n 9, 146.

²⁴ See for example Claudia Geiringer "International Law through the Lens of *Zaoui*: Where is New Zealand At?" (2006) 17 PLR 300, 310.

increased engagement by the New Zealand courts with international law,²⁵ Judge Keith has consistently advocated a wide and flexible approach to legal method. Citing both Richard Maclaurin (another, and perhaps even more broad-minded, former Professor of Law — as well as of both Mathematics and Astronomy — of the then Victoria University College) and the poet Matthew Arnold, Judge Keith has repeatedly exhorted lawyers to see the world "steadily and see it whole".²⁶

For example, in *Sellers*,²⁷ a judgment authored by Keith J, the Court of Appeal reached the controversial conclusion that the power to impose safety requirements on foreign-flagged vessels must be read subject to the limits of New Zealand's jurisdiction at international law. The judgment supported that conclusion by reference not only to the United Nations Convention on the Law of the Sea, but also to a series of other international agreements that confer specific and very limited maritime jurisdiction, to the example of Canadian legislation that had unsuccessfully asserted jurisdiction unilaterally, and to decisions of a number of courts including, as noted above, New Zealand cases concerning maritime jurisdiction from 1874 and 1906, the decision of the United States Supreme Court in *Murray v Schooner Charming Betsy* and the decision of the Permanent Court of International Justice in *The Case of the SS "Lotus" (France v Turkey)*.²⁸ More broadly still, Keith J's decision for the Court of Appeal in *Attorney-General v Daniels*, concerning the statutory scheme for special needs education, encompassed — in the view of one commentator, crucially²⁹ — the history of special education and its statutory basis in New Zealand from 1880 onwards, and the wider context of public education, including Dr CE Beeby's *Biography of an Idea*.³⁰

25 See *ibid*.

26 See among others Kenneth Keith "The Law, the Constitution and Legal Education in the Twenty-First Century" (2000) 31 VUWLR 83, 85 fn 7, citing Richard Maclaurin, in turn citing Matthew Arnold's poem "To a Friend" (1849). See also Kenneth Keith "Public Law in New Zealand" (2003) 1 NZJPL 3, 3.

27 *Sellers*, above n 8.

28 *Sellers*, above n 8, 47–59 Keith J for the Court, citing the United Nations Convention on the Law of the Sea (10 December 1982) 1833 UNTS 3; *The Case of the SS "Lotus" (France v Turkey)* (Judgment) [1927] PCIJ (Series A, No 10) 1; and *Murray v Schooner Charming Betsy* (1804) 6 US 64. For critical comment see Paul Myburgh "Shipping Law" (1999) NZ Law Rev 387, 397–398, suggesting that the effect of the decision is to "erase [the relevant empowering] provision from the statute book"; and Bruce Harris "Judicial Activism and New Zealand's Appellate Courts" in Brice Dickson (ed) *Judicial Activism in Common Law Supreme Courts* (Oxford University Press, Oxford, 2007) 273, 313, commenting that "[t]he country's dualist approach to international law was rocked a little". See in contrast Scott Davidson "Freedom of Navigation on the High Seas: *Sellers v Maritime Safety Inspector*" (1999) 14 Int J Marine and Coastal L 435, 438, describing the ratio of the decision as "probably correct".

29 See Claudia Geiringer "Parsing Sir Kenneth Keith's Taxonomy of Human Rights: A Commentary on Illingworth and Evans Case" in Rick Bigwood (ed) *Public Interest Litigation* (LexisNexis NZ, Wellington, 2006) 179, 179–180, saying that: "In Keith J's view, the court below had failed to appreciate the manifold and multilayered way in which the scheme of the Education Acts 1964 and 1989, and the legal and policy environment more generally, specify the contours of the right to receive a free education."

30 *Attorney-General v Daniels* [2003] 2 NZLR 742, 751–755 (CA) Keith J for the Court.

The same outlook can be seen still more prolifically in Judge Keith's non-judicial writings. By way of perhaps extreme example, a 1993 essay on the role of the courts cites not only legal treatises ranging from Cicero's *De Legibus* to the International Law Commission's draft *Articles on State Responsibility* but also, among many others, the Gospel according to St Luke, a paper written by Jocelyn Keith and Lorna Dyal for the Royal Commission on Social Policy, CP Snow's text on public understanding of science and Tolstoy's *War and Peace*.³¹

III THE EXAMPLE OF *A v SECRETARY OF STATE FOR THE HOME DEPARTMENT (No 2)*

Such breadth of approach is, of course, not unique. To take one recent example, similar breadth can be seen in several of the judgments of the House of Lords in *A v Secretary of State for the Home Department (No 2) (A (No 2))*.³² That decision concerned the lawfulness of the use, in the designation of persons suspected of terrorism, of information that could have been obtained by torture.

The unanimous conclusion (on this point) that such material must not be used might have been thought unremarkable, but for the fact that a majority of the Court of Appeal had held to the contrary. In reaching or, at least, in expressing that conclusion, each member of the House of Lords noted the views of commentators and legal historians that such evidence had been inadmissible under United Kingdom law since the 17th century³³ and further the prohibition of such use under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention Against Torture).³⁴

Several of their Lordships went considerably further. Their judgments cite:

- (a) decisions from the International Court of Justice, the International Criminal Tribunal for the Former Yugoslavia and courts in Australia, Canada, France, Germany, Ireland, Israel, the Netherlands, the United States and Zimbabwe;³⁵

31 Kenneth Keith "Policy and Law: Politicians and Judges (and Poets)" in Bruce Gray and Robert McClintock (eds) *Courts and Policy: Checking the Balance* (Brookers, Wellington, 1995) 117.

32 *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221 (HL) [*A (No 2)*].

33 *Ibid*, paras 11–13 Lord Bingham; paras 64–65 Lord Nicholls; para 81 Lord Hoffmann; paras 103–110 Lord Hope; para 129 Lord Rodger; para 152 Lord Carswell.

34 *Ibid*, paras 23–26, 29, 32, 36, 39, 43, 53 and 61 Lord Bingham; para 97 Lord Hoffmann; paras 111, 119–121 and 125–126 Lord Hope; paras 139 and 145 Lord Rodger; para 151 Lord Carswell; paras 160, 162 and 173–174 Lord Brown. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85.

35 *Ibid*, paras 17, 19, 33, 34, 37–39, 60 Lord Bingham; paras 121–122 Lord Hope; paras 140–142 Lord Rodger; and paras 150 and 155 Lord Carswell.

- (b) general factual material, including a United States government memorandum setting out "counter-resistance strategies" approved as lawful by United States military lawyers (but some of which were considered by the Law Lords likely to amount to torture or cruel treatment)³⁶ and a reported comment by United States Senator John McCain that, when tortured while a prisoner of war in the then North Vietnam, he had "confessed" to his interrogators the names of his high school football team;³⁷ and
- (c) last and more broadly still, the familiar description of the United Kingdom by Lord Tennyson as "a land of settled government, a land of just and old renown, where Freedom slowly broadens down, from precedent to precedent".³⁸

The short question that follows from these examples is that if — as it would appear — the point could be decided by reference to common law or by common law read together with the Convention against Torture, what further objective is sought or served by such reference?³⁹

IV EMPIRICAL STUDY

To begin to answer that question, it is helpful first to turn to the substantial body of empirical analysis of judicial citation practices. Commencing with the 1954 analysis by John Merryman of the decisions of the California Supreme Court and including, notably, the extensive studies of Australasian practices by Russell Smyth, it is possible to attempt to identify overall trends, at least, in the use of such material.⁴⁰

For present purposes, there appear to be at least two clear inferences, both generally and in New Zealand decisions in particular.⁴¹ The first is that while, as is apparent from Jeremy Finn's recent

36 Ibid, para 53 Lord Bingham; para 126 Lord Hope.

37 *A (No 2)*, above n 32, para 147 Lord Carswell.

38 Ibid, para 152 Lord Carswell.

39 For a somewhat critical review of the reliance on common law see Sangeeta Shah "The UK's Anti-Terror Legislation and the House of Lords: The Battle Continues" (2006) 6 HRLR 416, 432–434.

40 John H Merryman "The Authority of Authority: What the California Supreme Court Cited in 1950" (1954) 6 Stan L Rev 613; Russell Smyth "Academic Writing and the Courts: A Quantitative Study of the Influence of Legal and Non-Legal Periodicals in the High Court" (1998) 17 U Tas LR 164; Russell Smyth "Judicial Robes or Academic Gowns? Citation of Secondary Authority and Legal Method in the New Zealand Court of Appeal" ["Judicial Robes or Academic Gowns"] in Rick Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, 2001) 101 [*Legal Method*]. See also among many others, Wes Daniels "Far Beyond the Law Reports': Secondary Source Citations in United States Supreme Court Opinions October Terms 1900, 1940, and 1978" (1983) 76 Law Libr J 1; Ivor Richardson "Trends in Judgment Writing in the New Zealand Court of Appeal" in Bigwood (ed) *Legal Method*, above n 40, 261; and Lynch, Allan and Huscroft, above n 16.

41 See for example, Daniels, above n 40, 4, noting substantial and continuing increase in United States Supreme Court citation of non-legal material from 1900 to 1978.

essay on the Otago District Law Society Library, citation of comparative case law is far from new in New Zealand,⁴² there is some greater tendency since 1960 to cite not only comparative, but international legal material and also non-legal material.⁴³

The second point is that, in seeking to proceed from empirical study to principled analysis, it is apparent that attempts to derive general principles are often fraught. Not only is it difficult to ensure that those decisions that are subject to analysis are representative, but it is also necessary to account for such extrinsic factors as the particular cases that come before the courts, the material put before the court by counsel⁴⁴ and the practical availability of such material.⁴⁵ Further, such studies present the methodological difficulties of identifying those instances in which material is considered but not expressly cited⁴⁶ and of differentiating material from incidental references.⁴⁷ Last, and most narrowly, the empirical position is further complicated by developments such as the enactment of the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act), which not only refers expressly to the International Covenant on Civil and Political Rights⁴⁸ but also, at a practical level, has entailed recourse both to comparative and international law and to social science information.⁴⁹

42 Jeremy Finn "New Zealand Lawyers and 'Overseas' Precedent 1874–1973 — Lessons from the Otago District Law Society Library" (2007) 11 Otago LR 469.

43 See notably Richardson, above n 40, 271 and 274. This record increases in respect of material other than legal periodicals, texts, and parliamentary and law reform documents from an average of 0.01 citations per decision in 1960 to 0.05 in 1990, 0.17 in 1997 and 0.09 in 2000.

44 See for example William Manz "Citations in Supreme Court Opinions and Briefs: A Comparative Study" (2002) 94 Law Libr J 267.

45 See for example Robert Fisher "New Zealand Legal Method: Influences and Consequences" in Bigwood (ed) *Legal Method*, above n 40, 25, 43–44; and on a historical note, Finn, above n 42, 487–488, noting the possible connection between citation of United States authority in the early 20th century and the availability to practitioners of convenient digests of United States decisions.

46 See Smyth "Judicial Robes and Academic Gowns", above n 40, 105; Richardson above n 40, 265; Richard Sutton "Lord Cooke and the Academy: A View from the Law Schools" in Paul Rishworth (ed) *The Struggle for Simplicity in the Law — Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) 13, 34. The writers note a recent trend toward acknowledgement of academic writing in judgments.

47 See for example the attempted differentiation in Melissa Waters "Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties" (2007) 107 Colum L Rev 628, 653 fn 95. She, for example, describes the reference to the International Covenant on Civil and Political Rights in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) as a "false positive" that simply refers to but does not rely on the Covenant, notwithstanding the innovative reliance in that decision (para 17) on the Covenant as a possible basis for the making of judicial indications of inconsistency.

48 International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171.

49 See Richardson above n 40, 261–262 and 265; and Kenneth Keith "Sources of Law, Especially in Statutory Interpretation, with Suggestions about Distinctiveness" in Bigwood (ed) *Legal Method*, above n 40, 77, 89–90.

A *International and Comparative Law*

Much of the current discussion relates to the use of comparative and international law. As was noted earlier, views are frequently polarised.⁵⁰

In the United States, particular controversy has arisen in respect of the use of such citations in the decision to hold the execution of minors to be unconstitutional in *Roper v Simmons*⁵¹ and in respect of the invocation of the rights of certain combatants under common article 3 of the Geneva Conventions in *Hamdan v Rumsfeld*.⁵² These instances have led to furious, if often profoundly ill-informed, debate in the United States, to charges of intellectual inferiority complexes on the part of the judges concerned and of judicial treason,⁵³ and even to legislative proposals that judges who cite such material should be impeached.⁵⁴ Similar debates arose in the aftermath of *Minister of State for Immigration and Ethnic Affairs v Teoh*⁵⁵ in Australia, where there was extensive criticism both outside and within the High Court,⁵⁶ in more moderate terms, after *Baker v Canada*⁵⁷ and *Suresh v Canada (Minister of Citizenship and Immigration)*⁵⁸ in Canada,⁵⁹ and after a number of New Zealand decisions,⁶⁰ including *Sellers*.⁶¹

50 See for example Alford, above n 9, fns 38–63.

51 *Roper v Simmons* (2005) 543 US 551.

52 *Hamdan v Rumsfeld* (2006) 126 S Ct 2749.

53 See for example Kenneth Anderson "Foreign Law and the US Constitution" [2005] Policy Review 33, 37.

54 See Alford, above n 9, 663; and Austen Parrish "Storm in a Teacup: The US Supreme Court's Use of Foreign Law" [2007] U Illinois L Rev 637, 646 fn 50.

55 *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

56 See discussion in Hilary Charlesworth and others "Deep Anxieties: Australia and the International Legal Order" (2003) 25 Sydney LR 423, 423–426; and *Al-Kateb v Godwin*, above n 17.

57 *Baker v Canada* [1999] 2 SCR 817.

58 *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 [*Suresh*].

59 See for example Law Commission of Canada *Crossing Borders: Law in a Globalised World* (2006) 29, suggesting that the partial effect given to the Convention against Torture by *Suresh* may be the "worst of both worlds": a treaty is given effect without express legislative implementation, but that effect falls short of meeting Canada's international obligations. See more generally Jutta Brunnée and Stephen Toope "A Hesitant Embrace: The Application of International Law by Canadian Courts" [2002] 40 Can YBIL 3.

60 See for example Allan, above n 16, 443; Evans, above n 16, 156–159; and Lynch, Allan and Huscroft, above n 16.

61 *Sellers*, above n 8.

B Social Science

The citation of social science information has been regularly described as seeking to ensure that the court is able to address the social, economic and other implications of the issues before it.⁶² In *Williams v Attorney-General*, a 1989 decision involving a claimed duty of care on the part of customs officials, Sir Ivor Richardson observed that:⁶³

... it ought always to be important in policy analysis to assess all direct and indirect effects where and to the extent that that is possible. In a case of this kind I consider that the Court should be furnished with arguments and available analytical material so that proposed policy alternatives are considered in an informed way rather than resting on instinctive responses supported by generalised reasons.

What is more, the use of evidential material permits, as Justice Kirby of the High Court of Australia has suggested, that where policy choices fall to be made, these can be made on an objective and transparent basis.⁶⁴

This is not to suggest that the use of such material is either uncontroversial or straightforward. As numerous commentators have observed, judges are not economists, sociologists or otherwise expert in the analysis of social science literature.⁶⁵ Perhaps most memorably, the prominent United States Judge Jerome Frank once expressed his concern in relation to the use of psychiatric data that it involved "[embarking] without a pilot, rudder, compass or radar — on an amateur's voyage on the fog-enshrouded sea".⁶⁶ As with international and comparative material, the use of economic, sociological and other data necessarily raises problems of sufficiently robust judicial methodology and procedure.⁶⁷

1 Brown and New Zealand examples

Further, it is regularly suggested that not only are judges not necessarily capable of engaging with such questions, but it is illegitimate that they do so. Take the best known example cited at the

62 See for example John Burrows "Interpretation of Legislation: The Changing Approach to the Interpretation of Statutes" (2002) 33 VUWLR 561, 565–566.

63 *Williams v Attorney-General* [1990] 1 NZLR 646, 681 (CA) Richardson J.

64 Michael Kirby "On the Writing of Judgments" (1990) 64 ALJ 691, 708. See also Fisher, above n 45, 60.

65 See Fisher, above n 45, 64–66; Alan Galbraith "Sources of Problems of Interpretation: A Commentary" in Rick Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis, Wellington, 2004) 179, 181–182; and Jeremy Blumenthal "Law and Social Science in the Twenty-First Century" (2002) 12 S Cal Interdisc LJ 1, 47.

66 *United States v Flores-Rodriguez* (1956) 237 F 2d 405, 412, cited in Arthur Miller and Jerome Barron "The Supreme Court, the Adversary System and the Flow of Information to the Justices: A Preliminary Inquiry" (1975) 61 Va L Rev 1187, 1211.

67 See John Burrows *Statute Law in New Zealand* (3 ed, LexisNexis, Wellington, 2003) 177 and 194.

start of this paper: the decision of the United States Supreme Court in *Brown*, which invoked, among other sources, Gunnar Myrdal's study *An American Dilemma*⁶⁸ for the proposition that separate treatment is inherently unequal.⁶⁹ This famous example led to widespread attacks, including the description of the Supreme Court by a Southern judge as "a board of sociology garbed in judicial robes".⁷⁰ It was also open to the criticism that the point was self-evident.⁷¹

The New Zealand examples are, as might be expected,⁷² more moderate: for instance, in *Z v Z (No 2)*, a precedent case concerning the treatment of future earnings in matrimonial property, the Court of Appeal sought guidance as to the wider consequences of the issue through the appointment of amici curiae and invitation of interest groups as intervenors.⁷³ At least one commentator suggested that the Court had exceeded its judicial role.⁷⁴

2 "Legislative fact" and legislative findings

The issue of social science evidence arises most concretely in the context of judicial analysis of the factual basis or context for particular regulatory matters, especially but not exclusively in the context of constitutional review. In court proceedings, this has led to the emergence in other jurisdictions of the concept of "legislative fact" and, in corresponding legislative decisions, the making of "legislative findings" as to relevant factual matters.

(a) Legislative fact

Taking the first of these, the label "legislative fact" (as distinct from the specific "adjudicative facts" of a particular case) was first adopted by Kenneth Culp Davis in the context of United States administrative law but has, as is seen below, acquired more significance in constitutional contexts

68 Gunnar Myrdal, above n 5.

69 *Brown*, above n 5.

70 Circuit Judge Sebe Dale, quoted in "On Behalf of Lynch Law" (16 November 1959) *Time*. See also, addressing similar criticisms, Louis Pollak "The Supreme Court under Fire" (1957) 6 J Pub L 428, 436–437; and Michael Klarman "*Brown* and *Lawrence* (and *Goodridge*)" (2005) 104 Mich L Rev 431, 438–439, noting the use of social science data in *Brown* as "virtually unprecedented" and comparing it to the use of comparative human rights law in later decisions.

71 See among others Ronald Dworkin "Social Sciences and Constitutional Rights: the Consequences of Uncertainty" (1977) 6 JL Ed 3, 5.

72 See for example Taggart, above n 15, 85; and Elias, above n 15, 63.

73 *Z v Z (No 2)*, above n 7, 273.

74 Henaghan, above n 16, 325.

there and in Canada.⁷⁵ Although the term itself has been used relatively rarely in New Zealand, such evidence has been part of legal method in New Zealand and elsewhere for some time.⁷⁶

The question of legislative fact evidence was expressly canvassed in the recent decision of the Supreme Court in *R v Hansen*, which held that the presumption of intention to supply in relation to the possession of illegal drugs is inconsistent with the right to be presumed innocent under the Bill of Rights Act.⁷⁷ The Crown had sought to show the justifiability of the presumption of supply through evidence as to the nature of drug offending. Although rejecting the application as made too late, the Court noted that admission of such material could be warranted. Members of the Court differed significantly, however, in their approaches,⁷⁸ which suggests that the issue is some way from clear resolution. Even in Canada, where legislative fact evidence is routinely relied upon, the approach to be taken to legislative fact remains somewhat unsettled.⁷⁹

(b) Legislative findings

The making of legislative findings as to the underlying factual basis of a particular measure is largely unexplored in New Zealand.

By way of a recent and illustrative example, the Supreme Court of Canada held in *R v Daviault* that the denial of self-induced intoxication as a criminal defence was an unjustified infringement of the right to fundamental justice under sections 7 and 1 of the Canadian Charter of Rights and Freedoms, noting the absence of scientific evidence and also, in the Court's view, of sufficient justification in principle.⁸⁰ The legislative response was to enact legislation that not only reinstated the rule but set out the Canadian Federal Parliament's rationale for regarding it as Charter-consistent. The particular terms of the preamble and operative provision of the amendment are instructive:⁸¹

75 Kenneth C Davis "An Approach to Problems of Evidence in the Administrative Process" (1942) 55 Harv L Rev 364.

76 See for example New Zealand Law Commission *Evidence Law: Documentary Evidence and Judicial Notice: A Discussion Paper* (NZLC PP22, Wellington, 1994) paras 277–283.

77 *R v Hansen* [2007] 3 NZLR 1 (NZSC).

78 Ibid, para 9 Elias CJ ("reception of such material may be important"); ibid, para 50 Blanchard J (rejection in this instance "should not be taken as any general indication that in future cases the receipt of evidence of legislative fact would be precluded"); ibid, para 133 Tipping J (such evidence should not be considered by the Supreme Court at first instance); and ibid, paras 230–231 McGrath J (the Court "should be ready to receive material of this kind, without subjecting it to the requirements of the rules of evidence or of admitting new evidence" although it should be appropriately tested; it is preferable to have the assessment of the Court of Appeal of such material but "it will not always be practical to put the material before that Court").

79 See Mahmud Jamal "Legislative Facts in Charter Litigation: Where are We Now?" (2005) 17 NJCL 1.

80 *R v Daviault* [1994] 3 SCR 63.

81 An Act to amend the Criminal Code C 1995 c C-32.

Whereas the Parliament of Canada recognizes that the potential effects of alcohol and certain drugs on human behaviour are well known to Canadians and is aware of scientific evidence that most intoxicants, including alcohol, by themselves, will not cause a person to act involuntarily;

Whereas the Parliament of Canada shares with Canadians the moral view that people who, while in a state of self-induced intoxication, violate the physical integrity of others are blameworthy in relation to their harmful conduct and should be held criminally accountable for it;

Whereas the Parliament of Canada desires to promote and help to ensure the full protection of the rights guaranteed under sections 7, 11, 15 and 28 of the Canadian Charter of Rights and Freedoms for all Canadians, including those who are or may be victims of violence; ...

For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.

This response can be seen to function at several levels, setting out not only a contrary expression of opinion to the finding of the Supreme Court but also a rationale for that view that incorporates an evidential basis. That basis was, moreover, reinforced in the course of the legislative process, notably through the receipt of expert evidence by a parliamentary committee.⁸² The legislation has yet to be reconsidered by the Canadian courts.

A second and still more recent example of both legislative findings and judicial response is the 2007 decision of the United States Supreme Court in *Gonzales v Carhart*, concerning the constitutionality of a ban on partial birth abortion.⁸³ The relevant legislation included 14 paragraphs of congressional findings, including the statement that "a moral, medical, and ethical consensus exists that the practice is a gruesome and inhumane procedure that is never medically necessary and should be prohibited", extensive rejections of evidential findings made in earlier court proceedings and a statement of "the very informed judgment of the Congress" that partial-birth abortion is never necessary to preserve the health of a woman, that it poses serious risks to a woman's health, that it lies outside the standard of medical care, and should, therefore, be banned.⁸⁴

The Supreme Court upheld the prohibition by a 5:4 majority, dividing in part on the approach to be taken to these findings, and in part on the approach to the evidence given in the proceeding. For the majority, Kennedy J indicated that he did not consider the legislative findings dispositive and

82 K Roach "Dialogue or Defiance: Legislative Reversals of Supreme Court Decisions in Canada and the United States" (2006) 4 Int J Constitutional Law 347, 359–360.

83 *Gonzales v Carhart*, above n 6.

84 Partial Birth Abortion Ban Act 18 USC § 1531.

accepted that some of the findings were simply wrong, but was nonetheless content to characterise the evidential dispute as "uncertainty", in the face of which Congress was entitled to impose "reasonable regulations".⁸⁵ For the minority, Ginsburg J recorded that the lower courts had determined, on the evidence, that the congressional findings "do not withstand inspection". For example, Congress had "found" that no United States medical school taught the procedure in question but the evidence was that many, in fact, do, including Columbia, Cornell and Yale. Moreover, the claim of "consensus" was made when numerous medical groups had given evidence to Congress contrary to its findings and no comparable medical groups had supported the ban. Further, noted Justice Ginsburg, the lower courts had, "in contrast to Congress ... made findings after full hearings at which all parties had the opportunity to present their best evidence" and the evidence to support the ban and the findings was slight.⁸⁶

C *Literary Sources*

The third category of literary references may appear incongruous in the context of this paper. In many instances, literary citations are really not much more than substitutes for or supplements to dictionary definitions.⁸⁷ In others, citations simply appear to provide a pithy or elegant turn of phrase.⁸⁸ Even the most creative allusions — such as the citation by Justice Doogue of Bertolt Brecht, Gertrude Stein and William Shakespeare in the course of determining the tariff classification of an artificial flower that could be transformed into underwear⁸⁹ — undoubtedly add to the aesthetic appeal of a judgment, but perhaps add comparatively little to the reasoning.

This impression is supported by the results of citation studies, which tend to suggest that literary references in judicial decisions are generally slight and inconsequential.⁹⁰ There is also a question of propriety: Sir Owen Dixon, among others, reportedly regarded literary allusions as too frivolous to be appropriate to the serious task of legal judgment,⁹¹ while others have suggested that such allusions detract from the clarity or rigour of legal reasoning or of the resulting judgment. For example, it has been suggested that Lord Atkin's famous allusion to the parable of the Good

85 *Gonzales v Carhart*, above n 6, 35 and 33 Kennedy AJ (slip opinion).

86 *Ibid*, 7–11 Ginsburg AJ (slip opinion).

87 Michael Meehan "The Good, the Bad and the Ugly: Judicial Literacy and Australian Cultural Cringe" (1990) 12 *Adel LR* 431, 435. See for example *R v Sturm* [2005] 3 *NZLR* 252, para 99 (CA) Anderson P, referencing Shakespeare and Spenser as demonstrating long established ordinary meaning of the word "stupefy".

88 Meehan, above n 87, 436.

89 *Customs Agents Wellington v Comptroller of Customs* [1994] 2 *NZLR* 759, 760 and 768 (HC) Doogue J.

90 Jules Gleicher "The Bard at the Bar: Some Citations of Shakespeare by the United States Supreme Court" (2001) 26 *Okla City UL Rev* 327, 353.

91 See Harry Gibbs "Judgment Writing" (1993) 67 *ALJ* 494, 499. See also Kirby, above n 64, 697–699.

Samaritan in *Donoghue v Stevenson* has become an overly persuasive "rhetorical flourish" and, as a result, has extended the reasoning of that decision to an untenable degree.⁹²

Against this, however, it is necessary to account for striking, if rare, instances where such citation is strongly material. The best known example, it is suggested, is the dissent of Lord Atkin in the wartime detention case of *Liversidge v Anderson*.⁹³ As is well known, the case turned on whether the power of the United Kingdom Home Secretary to detain persons believed to have "hostile associations" required some objective basis for that belief. Four of the Law Lords, noting the confidential and political nature of the Home Secretary's role, held that a subjective belief would suffice.⁹⁴ In dissent, Lord Atkin commented that he "[viewed] with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive".⁹⁵ Following a careful analysis of the relevant provision, he described the majority view as follows:⁹⁶

I know of only one authority which might justify the suggested method of construction: "When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean, neither more nor less". "The question is," said Alice, "whether you can make words mean so many different things". "The question is," said Humpty Dumpty, "which is to be master — that's all".

Prior to delivery of judgment, the reference to Lewis Carroll had also led the then Lord Chancellor, Viscount Simon, to make a possibly unprecedented approach to Lord Atkin to ask whether the "very amusing citation" and the possible injury to the colleagues whose view was satirised was "on final reflection ... necessary" and giving his view that "neither the dignity of the House, nor the collaboration of colleagues, nor the force of [Atkin's] reasoning would suffer from the omission". Lord Atkin, of course, declined.⁹⁷

As is well known, Lord Atkin's dissent met with widespread reaction, both within the legal profession and the public as a whole, in part as a result of the Carroll reference.⁹⁸ The judgment was

92 *Donoghue v Stevenson* [1932] AC 562, 580 (HL) Lord Atkin, citing (implicitly) the Gospel according to St Luke. See JC Smith and Peter Burns "*Donoghue v Stevenson*: The Not So Golden Anniversary" (1983) 46 MLR 147, 147–148.

93 *Liversidge v Anderson*, above n 4.

94 See for example *ibid*, 220–223 Viscount Maugham.

95 *Ibid*, 244 Lord Atkin dissenting.

96 *Ibid*, 245 Lord Atkin dissenting, citing Lewis Carroll *Through the Looking-Glass and What Alice Found There*.

97 Tom Bingham "Mr Perlzweig, Sir John Anderson, and Lord Atkin" in *The Business of Judging: Selected Essays and Speeches* (Oxford University Press, Oxford, 2000) 211, 216.

98 *Ibid*, 217; RFV Heuston "*Liversidge v Anderson* in Retrospect" (1970) 86 LQR 33, 40.

met with such hostility from his fellow judges that Lord Atkin is described as having never recovered.⁹⁹ The dissent, on the other hand, has outlived the majority decision¹⁰⁰ and the reference to Lewis Carroll has also been cited subsequently (and, it must be the case, in conscious invocation of Lord Atkin's dissent) on a number of occasions, including in decisions of the United States Supreme Court and the High Court of Australia.¹⁰¹

V CONCLUSION: THREE ACCOUNTS OF EXTERNAL CITATION

From this overview of practice, which is, of course, limited, it is nonetheless possible to derive at least two inferences. The first and simplest is that, between the examples given and the empirical studies, express reference to external material is an established element of judicial reasoning, at least in novel cases. It seems unlikely that the views of the former Chief Justice of the High Court of Australia, Sir Garfield Barwick, retain much currency: "[C]itations of the views of others, however eminent and authoritative, may reduce the authority of the judge and present him as no more than a research student".¹⁰²

Further, and while again noting concerns of method or principle, it does not seem tenable to maintain that: "The Judge ... is probably better off thinking about the problem at hand in a darkened room than rummaging about in non-legal literature looking, like a bird, for the latest thing that glistens".¹⁰³

The better view, as has been suggested by Justice Kirby among others, is that express reference simply acknowledges and, it may be suggested, affords some rigour to consideration of external material that would occur in any case.¹⁰⁴ In this latter respect, the use of objective material at least

99 Kirby, above n 64, 699.

100 *IRC v Rossminster* [1980] AC 952, 1011 (HL) Lord Diplock: "The time has come to acknowledge that the majority of this House in *Liversidge v Anderson* were expediently, and, at that time, perhaps, excusably, wrong and the dissenting speech of Lord Atkin was right". Controversy continues as to the merits of the dissent: see for example Heuston, above n 98, 63–68; Alec Samuels "The Quietness of *Liversidge v Anderson*?" (1993) 14 Statute LR 140; and David Dyzenhaus *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, Cambridge, 2006) 152–153.

101 *Shapiro v United States* (1948) 335 US 1, fn 5 Frankfurter J dissenting, indicating that the legislative scheme did not support the interpretation adopted by the majority but that Humpty-Dumpty did; *TVA v Hill* (1978) 437 US 153, n 18 Burger CJ for the Court, comparing the dissenting interpretation of Powell J to Humpty-Dumpty's; and *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 180 ALR 1, 30 fn 88 (HCA) Kirby J dissenting in part.

102 Garfield Barwick *A Radical Tory* (Federation Press, Sydney, 1995) 224.

103 Peter Watts "The Judge as Casual Lawmaker" in Bigwood (ed) *Legal Method*, above n 40, 175, 207.

104 Kirby, above n 64.

begins to answer the concern that judges or, more widely, legal principle, reflects a necessarily limited outlook on the world.¹⁰⁵

The second and less straightforward inference is that it is not coincidental that such citation often occurs in highly contentious decisions. In some instances, the contention precedes the decision and any element of the reasoning in that decision: for example, *Brown* and *Gonzales v Carhart* would, as decisions dealing with racial desegregation and abortion respectively, have attracted controversy in any case. But even there — as seen in the reaction to *Brown* — the express reference to external material itself attracts a response.¹⁰⁶ In other instances, the controversy follows primarily and perhaps even solely from the citation: it seems very likely, for example, that, while raising an administrative law question of some importance, the circumstances of Mr Liversidge would have attracted far less attention, particularly with the passage of time, had Lord Atkin not expressed himself in the terms that he did. Less dramatically, the invocation of social science literature in decisions such as *R v Daviault*, *Gonzales v Carhart* and *Attorney-General v Daniels* can be seen to afford a direct connection between the decision and the wider process of public debate and/or decision-making in the area concerned.

Drawing on that inference, the practice of connection between judicial decision and external references can, it is suggested, be understood in terms of three distinct objectives.

A *Correctness*

The first and simplest is to understand such citation as an efficient or robust means of ensuring a correct decision. In the empirical studies noted above, John Merryman identified a large number of possible rationales for reliance upon other material, including such pragmatic considerations as efficiency, predictability and ease.¹⁰⁷ More recently, but in much the same spirit, Eric Posner and Cass Sunstein have proposed that the Condorcet jury theorem — by which aggregation of successive decisions can, under certain conditions, increase the likelihood that subsequent decisions are correct — may underpin appropriate, if also limited, use of comparative and international law.¹⁰⁸

This simple account may, it is suggested, address instances in which the point under decision is open to a determinate answer by reference to the external material. For example, in interpreting

105 See for example John Braithwaite "Community Values and Australian Jurisprudence" (1995) 17 Sydney LR 351, 401, expressing distrust in the capacity of "legal traditions" to select "public-regarding", rather than "lawyer-regarding", values; Richard Sutton and Rick Bigwood "Taking Stock: Legal Method in New Zealand Today (and for the Future?)" in Bigwood (ed) *Legal Method*, above n 40, 305, 326–327, referring to the "necessarily bounded nature of [the judge's] education and subsequent legal experience."

106 See Part IV B 1 *Brown* and New Zealand examples.

107 Merryman, above n 40, 621–622.

108 Eric Posner and Cass Sunstein "The Law of Other States" (2006) 59 Stan L Rev 131, 135.

provisions in the Bill of Rights Act which, as noted, is expressed to affirm the International Covenant on Civil and Political Rights,¹⁰⁹ the Covenant is a direct interpretative source. Even here, however, the simple account is not necessarily comprehensive: while, for example, *Sellers* can be seen to reflect a straightforward question of New Zealand's international jurisdiction, it does not preclude controversy as to the relevance of that point.¹¹⁰

B Problem-Solving in Legally Indeterminate Cases

The limits of the correctness account can be understood and, it is suggested, addressed in terms of Neil MacCormick's model of judicial reasoning in which deductive analysis of the legal text, if unable to resolve the point in issue, gives way to an analysis based on the material consequences of the possible legal outcomes: the outcome in such cases must, on MacCormick's analysis "make sense in the world".¹¹¹

The insight advanced by MacCormick can be seen running through many of the accounts of external citation. To return, for example, to the observation of Gault J in *Hosking v Runting*, the excerpt given above was preceded by the comment that:¹¹²

From time to time ... there arise in the Courts particular fact situations calling for determination in circumstances in which the current law does not point clearly to an answer. Then the Courts attempt to do justice between the parties in the particular case. In doing so the law may be developed to a degree. ... That is the traditional process of the common law.

The Courts are at pains to ensure that any decision extending the law to address a particular case is consistent with general legal principle and with public policy and represents a step that it is appropriate for the Courts to take.

A similar emphasis on the robust determination of novel questions can be found in the observations of Sir Ivor Richardson and Kirby J noted earlier.¹¹³ That emphasis can also be seen to underpin the point advanced by Breyer J of the United States Supreme Court, among others, that comparative and international law provides common principles in response to common questions

¹⁰⁹ International Covenant on Civil and Political Rights, above n 48.

¹¹⁰ See above n 28.

¹¹¹ Neil MacCormick *Legal Reasoning and Legal Theory* (2 ed, Clarendon Press, Oxford, 1994) 103–108. See also Neil MacCormick *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press, Oxford, 2005) 140.

¹¹² *Hosking v Runting*, above n 18, 6 Gault P for Gault P and Blanchard J.

¹¹³ See above nn 63 and 64 and associated text.

that arise across jurisdictions and, further, provides a form of evidence of the practical effect of a given legal outcome.¹¹⁴

C Problem-Solving in Legally and Societally Indeterminate Cases

It will be seen, however, that even the "problem-solving" account is predicated on the ultimate availability of a determinate and demonstrably correct answer. It follows that, again, this account may suffice in many instances.

Where the point in issue is not determinable in this sense but is instead subject to ongoing societal disagreement, it is suggested that external citation fulfils a further and different role. As both Ruti Teitel and David Dyzenhaus, Murray Hunt and Michael Taggart have suggested, reference to international and comparative law provides a basis for robust discourse about the point in issue.¹¹⁵

More broadly, the same premise can be seen in accounts both of the role of legislative fact evidence and even literary allusions.

In the first it can, for example, be seen in the decision and subsequent legislative response in *R v Daviault*¹¹⁶ that the decision of the Supreme Court of Canada and the response of the Canadian Parliament are, through their respective engagements with relevant social science evidence, effectively engaging from a common starting point. As has been developed at length in the now well-known model of judicial-parliamentary dialogue advanced by Peter Hogg and Alison Bushell Thornton over the past decade,¹¹⁷ the process of successive consideration by the courts and the legislature can become a means of discourse from common premises, rather than blunt disagreement that does not articulate underlying evidential assessment. Judicial decisions of this kind can, as Paul Horwitz comments, "self-consciously and actively participate in a conversation about Charter values

114 See for example Stephen Breyer "Keynote Address" (2003) 97 PASIL 265, 267. See also Christopher McCrudden "A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights" (2000) 20 OJLS 499, 525–526.

115 Teitel, above n 9; David Dyzenhaus, Murray Hunt and Michael Taggart "The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation" (2001) 1 OUCLJ 5, 29–30, suggesting that reference to international human rights standards provides a procedural assurance of democratic justification of public policy decisions.

116 *R v Daviault*, above n 80.

117 See particularly Peter Hogg and Alison Bushell "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997) 35 Osgoode Hall LJ 75; and Peter Hogg, Alison Bushell Thornton and Wade Wright "Charter Dialogue Revisited — Or 'Much Ado About Metaphors'" (2007) 45 Osgoode Hall LJ 1. See also Peter Hogg "Judges and Legislatures: Constitutional Dialogue under a Bill of Rights" in Claudia Geiringer and Dean R Knight (eds) *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008, forthcoming).

... among both the public and future courts".¹¹⁸ Even in *Gonzales v Carhart*, where, as seen, the dissenting members of the Court and the legislature disagreed at a very basic level over the relevant evidence,¹¹⁹ there is nonetheless an articulated discourse between the two institutions.

The same, it is suggested, can be seen in literary references and, more generally, in the broad invocation of external material of the kind undertaken in *A (No 2)*. Michael Meehan has pointed to the potential for literary references to "... [run] beyond innocent decoration towards expressing significant cultural and even legal attitudes: it runs beyond mere springings of mind towards shaping judicial perception of the facts and law at issue".¹²⁰

To return to the example of *Liversidge v Anderson*, David Dyzenhaus has described Lord Atkin's dissent as a demonstration of the moral resources of the common law, that in turn draw upon community adherence to the values of the rule of law.¹²¹ Drawing on that proposition, it is suggested that the literary allusion affords a mechanism by which an otherwise potentially exclusively legal determination (or, in *Liversidge v Anderson*, a dissenting opinion) can engage directly with public discourse.

The same analysis, it is suggested, provides the answer to the question posed earlier as to the purpose of the broad, and on one view, superfluous citations in *A (No 2)*.¹²² As was noted, the legal basis for the conclusion reached is straightforward and it could be suggested that, for example, to cite John McCain's experience introduces a utilitarian analysis that runs counter to that legal basis. Equally, Sangeeta Shah has criticised the emphasis on common law in the decision as too reluctant in its engagement with the prohibition at international law of the use of evidence obtained by torture.¹²³

The better view is that the very breadth of approach taken in *A (No 2)* is to be understood in terms of the account of the engagement between judicial method and public discourse advanced above. As Shah notes, there is — notwithstanding the prohibition — a public debate over the propriety of use of such evidence and the possibility of derogation from (and also denunciation of) international standards.¹²⁴ In that context, the practice of external citation affords a process that,

118 Paul Horwitz "Law's Expression: The Promise and Perils of Judicial Opinion Writing in Canadian Constitutional Law" (2000) 38 Osgoode Hall LJ 101, 126.

119 *Gonzales v Carhart*, above n 6, discussed at Part IV B 2 (b) Legislative findings.

120 Meehan, above n 87, 448.

121 Dyzenhaus, above n 100, 63–64.

122 *A (No 2)*, above n 32.

123 Shah, above n 39, 434.

124 *Ibid*, 433–434; and see for example Darius Rejali "Review Essay: American Torture Debates" (2008) 9 Hum Rights Rev 393.

while remaining within the established scope of judicial method, allows for a robust and broad-based engagement with that wider issue.

