

# *How Global is the Common Law? A Comparative Study of Asian Common Law Systems – Hong Kong, Malaysia, and Singapore*

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## **Abstract**

This article compares three common law jurisdictions in Asia – Hong Kong, Malaysia, and Singapore. By studying the use of foreign citations in the reported opinions of these jurisdictions, we show that they have acquired a judicial character that is distinctively outward-looking and global. The variety and range of foreign citations suggest that the phenomenon cannot be fully explained as a matter of colonial legacy. The article further discusses the ways in which the use of foreign case citations serve as a means for legal and professional enrichment.

The common law is one of the most widespread and influential legal traditions of the world. As much as a third of the world's legal systems are common law systems, or mixed systems with a common law element.<sup>1</sup> Yet, the common law is often treated as a rather homogeneous family. In fact, when the common law is discussed in comparative terms, scholars often refer exclusively to the common law of England and the United States, with the occasional reference to Australia, New Zealand, and Canada. At times, comparative common law comes close to being treated as synonymous with comparative studies of Anglo-American law.<sup>2</sup>

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1. See JuriGlobe Research Group, 'Common Law Systems and Mixed Systems with a Common Law Tradition' (*University of Ottawa*) <[www.juriglobe.ca/eng/sys-juri/class-poli/common-law.php](http://www.juriglobe.ca/eng/sys-juri/class-poli/common-law.php)> accessed 13 May 2017.

2. See e.g. Patrick Selim Atiyah and Robert S Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press 1987); Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd edn, Clarendon Press 1998).

Scholars sometimes speak at cross-purposes when it comes to studying the common law. They acknowledge and indeed revel in the nature of the common law as a global legal tradition. Yet, they seldom look beyond the handful of common law jurisdictions mentioned above. Other internal differentiations within the common law family are understudied and have remained largely unknown. No doubt the English and American common law are well developed – their historical and contemporary influences are broad and penetrating. Yet, as this article will show, these jurisdictions display a strong self-referencing and sovereigntist tendency – most manifest in their aversion to citing to foreign cases – that is not the practice in newer common law jurisdictions.

Take the case of the United States as an example. In general, citing to foreign decisions is uncommon at all levels of the federal courts.<sup>3</sup> On the rare occasions where foreign citations are used, for example in some high profile cases of the Supreme Court, citing to foreign cases is considered a controversial act.<sup>4</sup> The influential legal scholar and judge, Richard Posner, describes citing to foreign citations as an act of legal opportunism.<sup>5</sup> The late Supreme Court Justice Antonin Scalia vociferously criticized the use of foreign citation, expressing his view that ‘it lends itself to manipulation’.<sup>6</sup> Similarly, in the case of Britain, the highest English courts are far more used to being *cited from* than *citing to*. Indeed, for a long time, it was considered a great virtue for the courts in all its colonies to cite to decisions by the Privy Council and the House of Lords, in order to see to the uniform development of the common law.<sup>7</sup> It is fair to say that Anglo-American common law tends to be self-referencing and sovereigntist in its legal temperament.<sup>8</sup> England and the United States illustrate the inward-looking component of the common law, often articulated as the ‘common sense of the community, crystallized and formulated by our ancestors’.<sup>9</sup>

One exception to the trend of overlooking internal differentiations within the common law comes from the work of the late Canadian legal scholar H Patrick Glenn. Glenn proposed that there is, alongside the Anglo-American model, a Commonwealth model of the common law that is cosmopolitan and outward-looking. While the former

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3. See David Zaring, ‘The Use of Foreign Decisions by Federal Courts: An Empirical Analysis’ (2006) 3(2) *Journal of Empirical Legal Studies* 297.
  4. See, e.g. the debates surrounding *Atkins v Virginia* [2002] 536 US 304; *Lawrence v Texas* [2003] 539 US 558; *Roper v Simmons* [2005] 543 US 551. For a discussion of the controversy surrounding foreign citations and an empirical analysis of the role and form of foreign citations in US Supreme Court constitutional rights cases, including these three high-profile cases, see Stephen A Simon, ‘The Supreme Court’s Use of Foreign Law in Constitutional Rights Cases: An Empirical Study’ (2013) 1(2) *Journal of Law and Courts* 279.
  5. Richard A Posner, *How Judges Think* (Harvard University Press 2010) 350.
  6. Federal News Service, ‘Transcript of Discussion between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer – AU Washington College of Law’ (*American University*, 13 January 2005) <[www.freerepublic.com/focus/news/1352357/posts](http://www.freerepublic.com/focus/news/1352357/posts)> accessed 28 April 2017.
  7. *Waghorn v Waghorn* [1942] 65 CLR 289, 297-98. In the decision, Dixon J stated: ‘The common law is administered in many jurisdictions, and unless each of them guards against needless divergences of decision its uniform development is imperilled’ (at 297).
  8. See Judith Resnik, ‘Law as Affiliation: “Foreign” Law, Democratic Federalism, and the Sovereignism of the Nation-State’ (2008) 6(1) *International Journal of Constitutional Law* 33.
  9. See *Barker v Herbert* [1911] 2 KB 633, 644-45, per Farwell LJ. See also John H Baker, *An Introduction to English Legal History* (4th edn, Butterworths LexisNexis 2002) 196.

represents the high watermark of the common law as national law, the latter takes the common law more as a mode of ‘enquiry’. In his 1987 article ‘Persuasive Authority’, Glenn developed his Commonwealth model mainly through examining Canada as a case study. In Canada, binding state law (both statutory and case laws) never achieved complete dominance, and ‘[p]ersuasive authority from abroad is always to be welcomed, and alliances are as essential for the continuation of law as for its reception’.<sup>10</sup> The common law is declared and discovered through a continuing reception of Anglo-American law and Commonwealth case law. The refusal to accept local decisions as definitive has prevented any real notion of distinctive binding case law from developing, while ensuring circulation of decisional law both from within and without.<sup>11</sup>

What about the common law systems in Asia? Do they subscribe to a sovereigntist or a global approach in developing their laws? This article contributes to the project of comparative common law by turning our attention to several jurisdictions in Asia – still a much understudied geographical region, and one that has been undergoing vibrant changes and reforms.<sup>12</sup> An examination of the common law in Asia is particularly salient at a time when plurality and globalization have become key themes in comparative law and legal theory. We examine three small to mid-sized jurisdictions – Hong Kong, Malaysia, and Singapore. As with most of the common law countries today, the three Asian jurisdictions were once British colonies. They are arguably three of the most active and vibrant common law systems in Asia. Have these jurisdictions developed a judicial character that is substantially different from the Anglo-American common law? Do they resemble the Commonwealth model of the common law that is more encompassing? Given that the common law of the three jurisdictions was developed in more pluralistic legal environments, competing with strong and deep-rooted traditions of local customary and religious laws, would their search for a distinct identity and the pursuit of dominance propel their practices of the common law in line with upholding a strong notion of binding sovereign law?

## I. CITING TO FOREIGN CASES IN ASIAN COMMON LAW JURISDICTIONS

Despite the growing significance of enacted statutes and administrative rules and regulations, case law remains a bedrock of fundamental legal principles within common law systems. Common law courts cite to *stare decisis* – the principle that a court must follow precedents on legal principles previously established by that court or a superior court in its jurisdiction. Such previously established principles are said to be binding. This is the dominant view shared within the Anglo-American circle. In England, judges seldom refer to cases in other common law jurisdictions. In the United States, citing to ‘non-binding’ precedents most of the time means citing to precedents of another state, while citing internationally is more rare and controversial,

10. H Patrick Glenn, ‘Persuasive Authority’ (1987) 32(2) McGill Law Journal 297.

11. *ibid* 295–98.

12. Yves Dezalay and Bryant G Garth, *Asian Legal Revivals: Lawyers in the Shadow of Empire* (University of Chicago Press 2010).

as discussed previously. In other words, within the Anglo-American tradition, the rule of precedent means following the precedents of one's own jurisdiction. Citing to foreign cases, no matter how appealing, is perceived to be a rarity. As Atiyah and Summers put it, 'at the end of the day, wherever the common law operates, there must, we think, be many cases where a court feels obliged to follow a precedent of a higher court, solely and simply because that precedent is regarded as a formal reason for making a decision, excluding from consideration all contrary reasons of substance'.<sup>13</sup>

We examine whether the three Asian jurisdictions adhere to the same common practice of citation prevailing in the Anglo-American common law. We do so by presenting empirical data on foreign citations from the reported cases of Hong Kong, Malaysia, and Singapore. We explore the role of foreign citations and their degree of prevalence. Furthermore, we attempt to account for how foreign citations are used differently in these three jurisdictions, as well as the circumstances of their use.

To preview our argument, we suggest that the three jurisdictions as a group resemble an extraordinary case of the Commonwealth model. The common laws in these Asian jurisdictions identify themselves not as a set of home-grown laws rooted in customs and traditions, but as part of a global system with its rules having been tried and tested in other more influential jurisdictions. These jurisdictions include England, especially, but also elsewhere such as Australia, Canada, the United States, New Zealand, and neighbouring India (in the cases of Malaysia and Singapore). We challenge the belief that the common law tends to indigenize and become increasingly local over time. It is more accurate to describe the common law here as an imported global system of law, with a Western core that continues to draw from the international common law tradition while simultaneously building upon it with new domestic case law and precedents. This identity of the common law as a global system is shared and also promoted by the judges and lawyers who help to add a local flavour to the law. In a paradoxical way, as a result of the extensive borrowing done by the judges and lawyers of these jurisdictions, the common law as practiced in Hong Kong, Malaysia, and Singapore is much more global and transnational than the common law as practiced in England and the United States. This global character, we argue, is by design. Drawing from the ideas and resources of some of the more established jurisdictions legitimizes the decisions made by the courts from these smaller jurisdictions and, as we shall discuss, helps the judiciaries of these countries maintain their professional character. As we will demonstrate, through the act of referring to cases from other jurisdictions, judges and lawyers in these countries develop a global notion of the common law that undermines the salience of national boundaries on which distinctions between binding and non-binding, mandatory and persuasive, turn.

### *A. Three Common Law Systems in Asia*

As with most common law countries today, the three Asian jurisdictions we examine were once British colonies. Malaysia became an independent nation in 1957. Singapore was a

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13. See Atiyah and Summers (n 2) 9.

British colony until 1963 and for a short while, a part of the Malaysian federation until it became an independent nation in 1965. Hong Kong's colonial period stretched longer, ending in 1997 when Hong Kong became a Special Administrative Region of the People's Republic of China (see Table 1 for basic facts on jurisdictions).

These relatively young jurisdictions developed their common law in social and historical conditions noticeably different from the core common law systems with which comparative legal scholars are often most familiar. The most obvious factor is that these societies, though once colonized by the British, are not part of the Anglosphere.<sup>14</sup> There has been a general lack of a visible English-speaking majority in these societies, with the exception of Singapore, which transformed itself into an English-speaking society within a couple of generations as a result of its government's official language policy. In Malaysia, English is an elite language that has to compete with the growing popularity of the national language of Bahasa Malaysia. Hong Kong is a Cantonese city and has been so for the entirety of its colonial period. Since its return to China in 1997, English ceased to act as the political language of governance.<sup>15</sup> Instead, Cantonese has assumed an expanded role in political debates, alongside the more visible presence of Mandarin in oral discourse. Yet, the common law, based on judicial decisions rather than codes, has a vast and open-ended 'body' of law written in English. Even today, with very few exceptions, the majority of common law judgments in Asian jurisdictions are written in English, which remains the official language of Hong Kong's highest court. This is also true for India and Singapore, and English is the *de facto* dominant language of Malaysia's Federal Court.<sup>16</sup> There is a seemingly inexorable link between the English language and the common law. It might be expected then that applying the common law in non-English speaking societies is a very different project from the practice of the common law in an English-speaking environment.

The common law may have come to these societies as a transplanted system during the height of British colonialism; nonetheless, it has taken root and flourished. Despite obvious challenges, including the highly pluralistic legal environment to which it entered as well as structural and political complications, the common law systems of these countries maintain rule over large areas of legal concern. In legal parlance, the common law is the law of general application. It serves the general population;

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14. The term commonly refers to the United Kingdom, Ireland, the United States, Canada, Australia, and New Zealand. Among English-speaking societies and post-British colonies, it specifically points to nations in which there was a sizeable British settlement resulting in ongoing cultural, political, and demographic trends.
  15. The role of the English language seems to be in decline. The use of English in politics and government has quickly retreated since 1997, creating a linguistic environment that makes the use of the common law more difficult. See Stephen Evans and Christopher Green, 'Language in Post-Colonial Hong Kong: The Roles of English and Chinese in the Public and Private Sectors' (2001) 22(2) *English World-Wide* 247; Kwai Hang Ng, *The Common Law in Two Voices: Language, Law, and the Postcolonial Dilemma in Hong Kong* (Stanford University Press 2009).
  16. The National Language Act was introduced in 1963 to make the Malay language the official language of Malaysia; the courts were exempted from making the transition from English to Malay. In 1990, the National Language (Amendment) Act 1990 came into force which removed the exemption enjoyed by the courts. So, the official language of the law is Malay, though English remains the dominant language in the High Court and the Court of Appeal. See Richard Powell, 'The Role of English in Malaysian Law' in K Bolton and A Hashim (eds), *Malaysian English* (Hong Kong University Press 2010).

it does not turn into a system for the elite sector or a system that deals with criminal matters only. In the context of constant dialogue and interaction, the common law exerts its significant influence over other legal systems. It has, for example, re-fashioned Islamic and Hindu law in its own image by transposing its institutional procedures onto these systems.<sup>17</sup> Formal institutional practices of the common law, such as the case law tradition, *stare decisis*, and the adversarial set-up of the litigation process, have all shaped the judicial interpretations of rights within other co-existing legal systems in Asia, and in the process, have shaped the substance of these laws. The process continues today long after these systems have achieved legal independence.

It is important to note that the three judicial systems in this study are generally regarded as effective, vibrant, and professionalized legal institutions. Singapore's legal system is among the most effective and professional in the world. It is also considered one of the cleanest systems in the world, featuring a judiciary with a very low level of corruption. Hong Kong's legal system is similar in its effectiveness and professional outlook. Malaysia's legal system is considered to be relatively stable and accountable, even if it is not a fully accessible system.<sup>18</sup> Among countries with a similar level of economic development, it possesses a good degree of the rule of law. As far as everyday cases are concerned, they enjoy a relatively high degree of professional autonomy despite the unique contexts in which they operate.

### B. *Research Questions*

There are three questions about foreign citations in these jurisdictions that we set out to answer. First, how prevalent are foreign cases in the three jurisdictions? Second, to what extent is citing to foreign cases a *contemporary* practice as opposed to a legacy practice? Third, what are the roles and purposes of foreign citations?

First, we examine the prevalence of foreign cases in the three jurisdictions. As discussed, in England and the United States, judges seldom refer to cases in other common law jurisdictions. Partly due to their rarity in the United States and England, in the few occasions where foreign citations are used, they are generally viewed with scepticism. Citing to foreign cases is considered 'opportunistic'<sup>19</sup> in England and the United States because it goes against the grain for judges and lawyers to do so. By comparison, the Commonwealth model is more tolerant towards foreign citations. In fact, the imputation that the practice is motivated by an opportunistic mentality would be hard to sustain if it is found to be a routine feature of a jurisdiction. Hence, examining the degree of prevalence allows us to understand the *character* of foreign citations in the three jurisdictions. Is using foreign cases an opportunistic and maverick act? Or is it a routine, recurrent feature of these younger Asian common law jurisdictions?

17. See M B Hooker, *A Concise Legal History of South-East Asia* (Clarendon Press 1978).

18. See Gary K Y Chan, 'The Right of Access to Justice: Judicial Discourse in Singapore and Malaysia' (2007) 2 *Asian Journal of Comparative Law* 1.

19. See e.g. Posner (n 5) 350.

Second, to what extent is citing to foreign cases a contemporary practice as opposed to a legacy practice? This is an important distinction in the context of the three jurisdictions we study. As former British colonies, it is possible that the presence of ‘foreign cases’ is simply due to the historical legacy of British colonialism, especially since the three jurisdictions previously had the Privy Council as their court of final appeal. Older English cases are still precedential in Hong Kong, Malaysia, and Singapore because of the historical role of the Privy Council. Hence, citing to English cases might simply be an instance of citing to one’s own precedents, a practice of *stare decisis*. It is important, then, to distinguish the extent to which the presence of English citations is a historical legacy. In our analysis, we distinguish between English cases that were decided before and after the citing jurisdiction ceased to refer to the Privy Council as its court of final appeal. If these courts cite to English cases that were handed down *after* their respective breaks from the Privy Council as the final appellate court, it lends weight to the claim that citing to foreign cases is a voluntary act of referencing, not an act of citing one’s own precedents.

Furthermore, if the three jurisdictions cite to foreign cases outside of the English legal system, then clearly this is not a legacy practice. Citing to Australian, Indian, or American cases has nothing to do with *stare decisis*. We argue that the presence of non-English foreign citations is an important trait of *judicial cosmopolitanism*,<sup>20</sup> as demonstrated primarily through an outward-looking mentality among judges and lawyers.<sup>21</sup> We pay close attention to the role of non-English foreign cases in these jurisdictions.

Third, what are the roles and purposes of foreign citations? Specifically, what types of issues and questions are foreign cases used to address? Here, we divide the issues into two main types – procedural and substantive matters. Foreign cases can be cited to resolve matters relating to due process and for identifying accepted standards. They can be used to identify the best practices to promote procedural rigor. The common law is a procedurally complex system, with complex formality in the rules of evidence and pre-trial procedures. A precise formulation of the relevant issues is seen as a necessary preparation to a pleading; discovery (advance information about the opponent’s witnesses and evidence) and other pre-trial procedures are given the closest attention.<sup>22</sup>

Besides procedural matters, foreign citations can also be used to substantively provide new contents to the law. Specifically, they can provide new ways to fill gaps in the domestic law or address contemporary developments within a more technical area of law. Certainly, the common law defers to statutory law, since the latter reflects the explicit will of the executive and the legislature. However, the common law constitutes a key form of ‘judge-made’ law. Judges can choose to add to the law by referring to the substantive content of foreign case law.

20. Ulrich Beck and Natan Sznaider, ‘Unpacking Cosmopolitanism for the Social Sciences: A Research Agenda’ (2006) 57(1) *The British Journal of Sociology* 1.

21. Beyond case citation, the international-looking legal culture is further underlined by frequent reference to foreign texts and specific references to influential foreign jurists, particularly English judges.

22. See e.g. John Henry Merryman, *The Civil Law Tradition* (2nd edn, Stanford University Press 1985); Mirjan R Damaska, *Evidence Law Adrift* (Yale University Press 1997); Zweigert and Kötz (n 2).

Between procedural and substantive matters, we expect most of the references to be of the former. After all, procedural formality was a trademark of colonial common law systems, from which all three of the legal systems evolved. It was through the procedural workings of the law that colonial law created its own authority.<sup>23</sup>

Finally, in assessing the role of foreign citation in the three jurisdictions studied, it is useful to consider whether judges generally affirm the principles of the cited cases. Do judges use foreign citations to justify and support their reasoning? Or do they cite to some foreign cases only to express disagreements? To assess this, our analysis examines the extent to which foreign citations are employed in an affirmative, neutral, or negative manner.

### C. Method

Most studies of foreign citations delimit the scope of analysis to the decisions of the highest national courts. The belief is that only the highest courts are free to deviate from following domestic precedents or legal sources, and cite to foreign cases. In fact, most of these studies focus only on constitutional cases, and this is understandably so as constitutional debates are occasions where politics and law interact. Our analysis is different in that our scope encapsulates the entire body of *reported cases* of the three jurisdictions. In order to understand the institutional practices of the common law in these jurisdictions, we see it important to examine not just the benchmark constitutional decisions made by the highest courts of these places, but to expand our purview to the wider body of law.

Our research consists of two stages. First, we identified the prevalence of foreign citations among the reported cases in these jurisdictions. We did so by surveying three years (2006-08) of published cases for each country in the most established and widely used law reports of that country – the Hong Kong Law Reports and Digest (HKLRD), the Malayan Law Journal (MLJ), and the Singapore Law Reports (SLR), respectively (see Table 1).<sup>24</sup> To identify the proportion of reported cases with foreign citations, we derived a list of search terms, designed to capture cases that used foreign citations or foreign references in their text. The search terms included the abbreviations for major law journals, country names, and other key words that would indicate external reference. The terms were carefully selected in an effort to capture the cases employing foreign citations.<sup>25</sup> The search list generated a sub-population of opinions with foreign

23. Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (University of Michigan Press 2003); Ng (n 15).

24. At the time of commencing this project, the three years of 2006, 2007, and 2008 represented the latest years in which complete reported cases were available in the selected databases. We understand that the three jurisdictions are at different stages of development. As one reviewer pointed out, the historical significance of the research period (2006-2008) to Hong Kong, Malaysia, and Singapore might differ, as marked by their different years of separation from the Privy Council. We agree. That said, the three-year period identified allows us to compare the current states of the three jurisdictions over a multi-year period, thus minimizing the risk of potential anomalous results that may arise in response to particular historical circumstances, within the limitations of available data.

25. The list of search terms was customized for each country and for the search parameters of each database. For instance, the Singapore database restricted the number of characters in a search, which necessitated



Table 1. Basic Facts on Jurisdictions and Data Collection Process

Jurisdiction	Hong Kong	Malaysia	Singapore
Population in millions (2010)	7	28	5
Year of colonial independence	1997	1957	1963
End date – Privy Council appeal	1997	1978/1985	1989/1994
Law report surveyed	Hong Kong Law Reports and Digest (HKLRD)	The Malayan Law Journal (MLJ)	Singapore Law Reports (SLR)
Search database	WestlawHK	Lexis-Nexis	Law Net of Singapore
Total # reported decisions 2006-08	922	1308	561
Decisions per million inhabitants	132	47	112

citations, allowing us to derive an accurate measure of reported cases that cite to foreign cases in Hong Kong, Malaysia, and Singapore. We are confident that we succeeded in producing a comprehensive and representative, albeit not necessarily exhaustive, search list.

The next stage of our research was to conduct an in-depth analysis of a sample of opinions that use foreign citations. We surveyed a random sample for each jurisdiction of 10 to 15 per cent of cases selected in the first stage.<sup>26</sup> For each of the three jurisdictions, we used a random number (e.g. nine in the case of Malaysia) to identify the case we selected (i.e. the ninth case). We then continued to survey every tenth case (e.g. ninth, nineteenth, twenty-ninth, etc)<sup>27</sup> of the search list as ordered chronologically.<sup>28</sup> Each case was read, coded, and analyzed.<sup>29</sup> In total, we sampled

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cutting a number of search terms; each term that was cut was tested to make sure its absence did not affect the results (i.e., a search term was cut only if its individual results were redundant with another term in the list). The longest list of search terms, from which the other lists were customized as appropriate, was for Malaysia. It was as follows: KB or QB or All ER or WLR or AC or Ch. or Cr App or Halsbury's or CLR or Commonwealth Law Reports or NZLR or SCR or FCR or DLR or Dominion Law Reports or SLR or HKC or HKLR or HKLRD or (AIR w/3 19! or 20!) or ALR or House of Lords or Privy Council or Human Rights Act 1998 or United States or The Constitution Act 1982 or Australia! or Aust. or SALR or Canad! or England or UK or U.K. or Bom. or ILR or Mad. LJ or India! or New Zealand! or NZ or N.Z. or Singapore or USA or U.S.A. or U.S. or Hong Kong or HK or H.K.

26. 10 per cent of cases were surveyed for Malaysia by including every tenth case in the sample. Since Hong Kong and Singapore each had a significantly lower universe of cases, we sampled approximately 15% of cases for these jurisdictions. Tables 2–5 include the 15% sampling for Hong Kong and Singapore, whereas Tables 6–7 include data based on a 10% sampling for all three jurisdictions.
27. Random sampling for the 15% sampling was maintained by including every tenth case and alternating every other fifth case (e.g. for Singapore with the random number of 5, would include cases 5, 10, 15, 25, etc).
28. The order was chronologically ascending for Malaysia and Singapore and chronologically descending for Hong Kong due to differences in database structuring and functionality. If a case within the sampling sequence was deemed ineligible, due to (i) being a false positive for foreign citation or (ii) being written in a language other than English, the following case would be coded in its place (for e.g. if 19 was written in the Malay language, we would instead survey 20; if 20 was also ineligible it would also be skipped and so on). Cases had to be skipped for reason of language or false positive results in thirteen instances for Hong Kong, sixteen instances for Malaysia and four instances for Singapore.
29. For the purpose of this analysis, each case is considered as the entirety of the published judgment. There were a few instances of dissenting or concurring opinions. While we coded any substantial individual

ninety-eight cases from Hong Kong, ninety-two cases from Malaysia, and seventy-seven cases from Singapore. Coding captured quantitative data, such as the number of foreign citations (further distinguished between citations from England and those from other foreign jurisdictions), as well as qualitative data. These include, for example, countries from which the citations were drawn, for what purposes they were employed, and whether the authoring judge evaluated the precedent in an affirmative, neutral, or negative manner. Coding categories also captured the extent of integration of foreign cases, such as whether foreign citations co-existed with domestic citations, whether they were indicated as foreign, or unmarked in terms of origins.

Quantitative analysis provides us with a broad picture about the prevalence of foreign citations in the cases analyzed. It also helps us to identify and compare the distribution between 'old' and 'new' foreign cases cited. Our data is fine-grained enough to distinguish the extent to which these jurisdictions tend to cite to old foreign cases as a matter of colonial legacy, or contemporary foreign cases, which would indicate a trend toward legal globalization. Where appropriate, we provide qualitative analysis to facilitate more in-depth comparisons among the three jurisdictions.

## II. FINDINGS

### A. *Prevalence of Foreign Citations*

A clear majority of the reported cases of Hong Kong, Malaysia, and Singapore made international reference for the time period surveyed. This markedly distinguishes how foreign cases are used in these three places, as compared to England and the United States. Cases that matched our search list constituted 62.6 per cent of Hong Kong reported cases, 67.1 per cent of Malaysian reported cases, and 85.8 per cent of Singapore reported cases for the time period surveyed (see Table 2).<sup>30</sup> The results provide overwhelming evidence that citing to foreign cases is a common, everyday practice for these jurisdictions.

While the percentage of cases featuring any foreign citation is impressive in itself, it is also worth noting the extent of citation within individual judgments. Judges in these jurisdictions do not just cite to a foreign case incidentally. When they cite, they tend to cite to multiple foreign decisions. For the sampled cases in each of the three jurisdictions, Table 3 shows the average number of direct citations by their origins: domestic, English, non-English foreign, and total foreign cases cited per judgment, as well as the highest count of citations in each category within any single judgment by country.<sup>31</sup> As can be seen here, the sampled judgments in each of the three

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opinion within our coding records, in this article, 'opinion', 'judgment', and 'sampled case' will refer to the entirety of the majority opinion plus any concurring or dissenting opinions encapsulated within the particular published case.

30. These figures have been corrected to account for false positive results from the search lists. We estimate the false positives for foreign citation at a rate of 6.3% for Hong Kong, 6.5% for Malaysia and 4.9% for Singapore. The figures in Table 2 are also adjusted to correct for the rate of false positives for each jurisdiction.

31. Foreign judgments are cited in two ways, directly and indirectly (or 'embedded'). Direct citations are those referenced in the words of the authoring judge, while indirect citations are those embedded within other

Table 2. Percentage of Total Published Cases Citing Foreign Cases by Category

	Hong Kong	Malaysia	Singapore
Total per cent citing foreign decisions	62.6%	67.1%	85.8%
Per cent total published cases citing English court decisions	61.3%	64.2%	82.4%
Per cent total published cases citing foreign jurisdictions other than England	21.7%	43.0%	56.8%

Note: 'Total per cent citing foreign decisions' is based on the ratio of cases matching search terms divided by the total published cases in the respective law reports for the three-year period, then corrected by subtracting the rate of false positives from our sample. Values in subsequent rows are based on multiplying the 'Total per cent' value by the percentage of our sampled cases that referenced one or more foreign cases from the relevant categories.

Table 3. Average and Maximum Number of Direct Citations per Case within Sample for Each Category

		Hong Kong	Malaysia	Singapore
Domestic cases cited	Average # cited	2.7	8.9	5.5
	Max # cited	21	88	24
English cases cited	Average # cited	4.1	4.8	6.2
	Max # cited	54	36	43
Other (i.e., non-English) Foreign cases cited	Average # cited	0.7	1.9	2.7
	Max # cited	11	44	15
Total Foreign (English & non-English) cases cited	Average # cited	4.8	6.7	8.9
	Max # cited	65	65	45

Note: Based on direct citations within sample. Hong Kong N = 98; Malaysia N = 92; Singapore N = 77.

jurisdictions cite on average between four to six different English cases and an individual judgment may contain as many as 54 (in the case of Hong Kong). Among the groups of cases that cite to foreign opinions, both Hong Kong and Singapore judges on average cite to more foreign opinions than to domestic cases. England is the most frequently cited jurisdiction for all three, and it is common for multiple English cases to be cited. However, there are often multiple citations of other jurisdictions within judgments as well, with a maximum of 44 non-English foreign citations being made within a single judgment (in the case of Malaysia). It is clear from these data that the use of foreign citations in these jurisdictions is not only common, but also pervasive.

quotations in the judgment. Both were considered and recorded as part of our data. Here, we refer only to direct citations; elsewhere as indicated we also refer to total citations, including both direct and embedded. Embedded citations are an important way through which particular foreign cases become institutionalized and perpetuated within judicial practices.

## B. *How Foreign Citations are Used*

### 1. *Foreign citation as contemporary practice*

Are these foreign cases mostly old English cases that are part of the domestic precedents of the three jurisdictions? Without a doubt, English decisions constitute the single largest group of foreign cases that are referred to in decisions in Hong Kong, Malaysia, and Singapore.<sup>32</sup> A total of 61.3 per cent of Hong Kong cases, 64.2 per cent of Malaysian cases, and 82.4 per cent of Singaporean cases cite to English cases (see Table 2). The extent to which the strong presence of English citations is a historical legacy of colonialism and particularly, the role of the Privy Council as the former court of final appeal of these jurisdictions, deserves further probing. To assess this, we divided the English cases that appear in the sampled judgments into those that were decided *before* and *after* the citing jurisdiction ceased to refer to the Privy Council as its court of final appeal. In the case of Malaysia, appeals to the Privy Council were suspended in 1978 for criminal and constitutional matters, and in 1985 for civil matters. Singapore abolished Privy Council appeals in all cases, except those involving the death penalty or in civil cases where the parties had agreed to such a right of appeal in 1989, with the remaining rights of appeal abolished in 1994. Hong Kong ceased appeals to the Privy Council in 1997, at the same time as its political transition.

The results in Table 4 suggest that all three jurisdictions cite frequently and prolifically to English decisions, both from the periods before but, more importantly for our purposes, *after* their respective breaks with the Privy Council as the final appellate court. For Hong Kong and Singapore, over half of the opinions surveyed cite to post-break English decisions, with Malaysia just below, at 46 per cent. The practice of citing to more recent English cases (decisions delivered after the Privy Council ceased to be the court of final appeal) means that citing to English cases cannot be fully explained away as an act of citing to one's own precedents.

It is also important to point out that, if anything, our analysis overestimates the effect of *stare decisis*. Strictly speaking, only a small portion of the early pre-break English decisions cited are legally binding. Historically, the Privy Council asked the three jurisdictions to treat House of Lords decisions as having great persuasive authority.<sup>33</sup> However, as a matter of law, only Privy Council decisions on appeal from the appellate court of a particular jurisdiction are binding in that jurisdiction. Hence, cited English decisions from the period prior to these countries' respective breaks with the Privy Council are non-binding in the strict legal sense and in fact, the majority of 'English' citations in our sampled cases are indeed English court decisions. Even among the Privy Council cases that are cited, the clear majority were appeals from other

32. The result about the persistent presence of English decisions in the case of Singapore is consistent with the findings in Yihan Goh and Paul Tan, 'An Empirical Study on the Development of Singapore Law' (2011) 23 Singapore Academy of Law Journal 176. See also Yihan Goh, 'A Conscious Effort to Develop a Different Common Law of Obligations: A Possible Endeavour?' in Andrew Robertson and Michael Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart Publishing 2016).

33. Historically though, the Privy Council seemed to maintain tighter reins on Hong Kong. See William Stewart Clarke, 'The Privy Council, Politics and Precedent in the Asia-Pacific Region' (1990) 39(4) ICLQ 741, 747-749.

Table 4. Percentage of Sampled Cases Containing English Citations Distinguished Between Pre- and Post-Break with the Privy Council

	Pre-Break with Privy Council	Post-Break with Privy Council
Hong Kong	89.8%	53.1%
Malaysia	90.2%	45.7%
Singapore	88.3%	68.8%

Note: Hong Kong N = 98; Malaysia N = 92; Singapore N = 77

foreign courts.<sup>34</sup> These Privy Council decisions on appeal from other jurisdictions are technically non-binding. For example, Hong Kong courts today are bound only by Privy Council decisions on Hong Kong appeals.<sup>35</sup> Local appeals only constituted 34.6 per cent of Hong Kong, 27.7 per cent of Malaysia, and 11.8 per cent of Singapore citations to Privy Council cases so reference to Privy Council cases was only legally binding in a minority of instances. Overall, of the total number of 489 ‘English’ citations made in the sampled Hong Kong cases, only nine of these citations were of Hong Kong cases on appeal to the Privy Council. Of the 624 ‘English’ citations in the sampled Malaysian cases, 13 of these were in reference to Malaysian cases on appeal to the Privy Council. Of the 564 ‘English’ citations in the sampled Singaporean cases, only four were in reference to Singapore cases on appeal to the Privy Council.<sup>36</sup> Thus, of the cited English cases from the pre-break period, legally binding precedents constitute a very small minority.

More salient evidence of citing to foreign cases as an evolving contemporary act is the substantial proportion of judgments citing to non-English foreign cases (see Table 2). Within our sample, 64.1 per cent of the Malaysian judgments and 66.2 per cent of the Singaporean judgments cite to non-English foreign cases. While Hong Kong judgments cite to fewer non-English foreign cases, the percentage remains substantial at 34.7 per cent. Outside of England, the most cited foreign authorities include Australia, Canada, New Zealand, and India (see Table 5). The United States is also cited occasionally in each of the jurisdictions. The evidence, as a whole, points to a shared, widespread practice of citing to foreign cases among judges and counsel in these jurisdictions.

Judges in the studied jurisdictions also cite to one another’s decisions, although unevenly. Certainly, judges, in looking for legal solutions to resolve the problems they encounter, can empathize and learn from other judges who share similar common law values and practices. Particularly, we find that Singapore and Malaysia cite frequently to

34. Privy Council cases were coded as ‘English jurisdiction with foreign subject matter’, and the country whose appeal was being considered were noted and recorded. For our purposes of studying foreign citation as an institutional practice, we consistently coded Privy Council case citations in this manner even in instances of local appeal. Privy Council cases on appeal from various countries were cited in each of our samples studied.

35. See *Solicitor (24/07) v Law Society of Hong Kong* [2008] 2 HKLRD 576.

36. These figures are based upon total citations of the category, including direct and embedded.

Table 5. Percentage of Sampled Decisions Citing Cases from Indicated Jurisdiction

Country Cited	Hong Kong	Malaysia	Singapore
England	98.0%	95.7%	96.1%
Australia	15.3%	26.1%	39.0%
Canada	11.2%	4.3%	23.4%
New Zealand	3.1%	6.5%	10.4%
India	2.0%	28.3%	10.4%
United States	4.1%	2.2%	6.5%
ECtHR	3.1%	0%	1.3%
Scotland	1.0%	4.3%	3.9%
Ireland	0%	2.2%	2.6%
Sri Lanka	0%	2.2%	2.6%
Hong Kong	X	0%	16.9%
Malaysia	0%	X	20.8%
Singapore	1.0%	21.7%	X

Note: Based on sample. Hong Kong N = 98; Malaysia N = 92; Singapore N = 77. ECtHR is abbreviation for European Court of Human Rights.

each other, which would be expected given their shared history and proximity, and Singapore also tends to cite cases from Hong Kong. However, Malaysia and Hong Kong do not cite to each other, and Hong Kong's citation to Singapore is minimal (see Table 5).

Overall, the legal opinions in the countries surveyed extensively and consistently cite to other common law jurisdictions. Table 5 presents the major jurisdictions referenced by the sampled judgments. These numbers reflect whether each jurisdiction listed was cited one or more times per judgment surveyed. This is not, however, an indication of the extent or depth of the citations: in many cases, there will be multiple citations, sometimes in great depth, to a particular jurisdiction within the surveyed judgment. In addition to the commonly cited jurisdictions listed in Table 5, individual judgments of the Singapore sample further cited to Norway, South Africa, Barbados, Germany, Brunei, and the European Court of Justice, while individual judgments within the Hong Kong sample additionally cited to Anguilla and the Straits Settlements. Among the three places, Singapore judgments draw upon the broadest range of citations from various jurisdictions.

Judging from the findings, the three studied jurisdictions resemble more strongly the Commonwealth model that Canada exemplifies, rather than the sovereigntist model exhibited by Anglo-American common law. If anything, the tendency to seek out persuasive authority from foreign cases is even more pronounced for the three Asian jurisdictions. For the sake of comparison, we conducted a brief survey of Canadian reported cases using the popular Lexis-Nexis database. Of the total 47,336 English-language cases reported during the same three-year period of 2006-2008, about 15.6 per cent cited to foreign cases.<sup>37</sup> In terms of percentage, Canadian cases with foreign

37. Since Canada publishes cases in English and French, we broke out just the English language cases for the following reasons: (1) to be consistent with our focus on English language cases elsewhere, (2) on the assumption that the search terms may not work as well for French language cases, and (3) to minimize

citations are much less prevalent compared to the rates in Hong Kong, Malaysia, or Singapore (see Table 2). The foreign cases cited by Canadian judges are also less diversified in sources. Among the 15.6 per cent of Canadian cases that include any foreign citation, approximately 86 per cent cite to English cases, 19 per cent to American cases, and 6 per cent to Australian cases. Those jurisdictions made up the top three categories of foreign cases referenced. While Canadian cases are referred to quite frequently by judges in Hong Kong, Malaysia, and Singapore (see Table 5), the borrowing of case law can hardly be described as a two-way street. Only 0.12 per cent, 0.09 per cent, and 0.01 per cent of Canadian cases refer to Singaporean, Hong Kong, and Malaysian cases respectively.

## 2. *Types of issues foreign citations address*

Procedural uses were a significant function of foreign citations for all three countries, with a clear majority of Hong Kong and Malaysia sampled cases employing them and Singapore at just below half (see Table 6). Examples of procedural matters invoking foreign citation in the sampled judgments include: the role of an appellate court in addressing matters outside an appeal; the appropriate use of the doctrine of estoppel; the test to determine if an order is final or interlocutory; whether a plaintiff may continue an existing action after seemingly resolving the issue; when to reject a witness's testimony as evidence in instances of omissions, contradictions, or minor discrepancies; and the extent of discretion of a trial judge to disallow evidence.

Substantive uses were less common but still significant in Hong Kong and Malaysia, while they were much more pronounced in Singapore (see Table 6). An important area of substantive use is about guidance in judicial interpretation and the common rules of statutory interpretation.<sup>38</sup> This is a matter of particular importance in the case of Hong Kong, since the common law rules of statutory interpretation are very different from those applied in China.<sup>39</sup> Other examples of substantive issues that we came across in our survey include: whether a particular religious practice is integral to freedom of religion; the requirements for a bank rejecting documents; liability in the case of inadvertent patent violation; the validity of a collective sale agreement in a property sale; and evaluating an offender's psychiatric condition in a criminal case. The findings suggest that foreign cases do more than confer legitimacy to the judicial decisions in these three jurisdictions. Collectively, they play the role of a significant legal resource for filling in legal gaps stemming from a dearth of local precedents.

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redundancy within search results, since a number of individual cases are published both in French and English. When we look at the universe of English-language reported Canadian cases, 15.6% of these match our search terms for foreign citation. If we include all Canadian reported cases (both in English and French), 7.3% of Canada's reported cases match our search list for foreign citations (in which search terms are based on English words and acronyms).

38. Our findings support the view of Brian Flanagan and Sinéad Ahern, 'Judicial Decision-Making and Transnational Law: A Survey of Common Law Supreme Court Judges' (2011) 60(1) ICLQ 1, 18-21. Their study suggested that guidance in judicial interpretation was seen by common law judges as the most plausible reason to refer to foreign court decisions.
39. Anthony Mason, 'The Common Law' in Simon NM Young and Yash Ghai (eds), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (CUP 2014) 329.

Table 6. Percentage of Sampled Cases Using Foreign Citation for Procedural and Substantive Purposes

	Procedural	Substantive
Hong Kong	62%	43%
Malaysia	73%	38%
Singapore	49%	78%

Note: Based on sample. One case may be counted for both procedural and substantive uses of foreign cases. A case was counted for a particular category if it used foreign citation(s) with a clear and significant procedural or substantive purpose. Hong Kong N = 65; Malaysia N = 92; Singapore N = 51.

We acknowledge that the distinction between substance and procedure is not absolute. In reality, the two realms sometimes flow into each other. As Fletcher and Sheppard suggest, ‘procedure dominates the common law, and in the cracks and joints of the procedural machine we can find rules of substantive law’.<sup>40</sup> However, the distinction remains a useful diagnostic device to make sense of the functions of foreign citations in the three studied jurisdictions. As our examples suggest, procedural uses address various rule-governed aspects of the judicial process. By contrast, substantive uses are those that invoke specific legal-normative standards drawn from foreign cases to apply to the facts of the local case. We will further address the nature of substantive issues within foreign citation and their implications in the discussion below.

### 3. *Extent to which judges affirm the decisions made by foreign cases*

The treatment of a foreign citation can be categorized into one of the following three categories – affirmative, neutral, or challenging. An *affirmative* citation means that a cited case is used in a positive way, either to state the established position of the common law or to support the reasoning process of the citing decision. We look for variants of words that indicate positive treatment, such as ‘follow’, ‘applicable’, ‘authoritative’, ‘persuasive’, etc. However, we do not adopt a strict literalist approach in our coding process. A citation is considered affirmative if it is used to state what the law is, or to support an argument made by the citing case. A *neutral* citation means that the citing case does not challenge or explicitly disagree with the legal analysis carried out by the cited case; rather, it indicates that the cited case is inapplicable for some legal reason. The legal reason can either be that the scope of the principle of the cited case is considered too narrow or different to be of relevance, and/or the material facts between the two cases are too different to be considered *prima facie* similar. A cited case is treated *negatively* if the logic of its legal reasoning or the principle it establishes is challenged or is considered out-of-date. We look for variants of words and phrases such as ‘reject’, ‘wrong’, ‘ought not be followed’, ‘abrogate’, ‘archaic’, ‘question’,

40. George P Fletcher and Steve Sheppard, *American Law in a Global Context: The Basics* (OUP 2005) 20.



Table 7. Nature of Citation

	Affirmative	Neutral/ Interpretive Difference	Negative
Hong Kong	97%	34%	14%
Malaysia	93%	24%	8%
Singapore	96%	39%	25%

Note: Indicates what percentage of sampled judgments use the treatment categories (affirmative, neutral, negative) for some or all of the foreign cases discussed. A single judgment may employ more than one category of treatment for various citations within it. Hong Kong N = 65; Malaysia N = 92; Singapore N = 51.

‘overrule’, or ‘criticize’. Again, we do not follow a strict literalist approach; rather the context and tone of the reference is accounted for in this coding.

Of the cases surveyed, 93 per cent of Malaysian, 96 per cent of Singaporean, and 97 per cent of Hong Kong cases use some or all of the foreign cases cited affirmatively as legal authority in their reasoning. By comparison, opinions that treat foreign cases neutrally and negatively are substantially fewer (see Table 7). Furthermore, even within the subset of cases that employed neutral or negative interpretations of foreign citations, this was often the exception rather than the norm (e.g. there may be a case with ten positive citations and one negative citation).

The results are consistent with what we expected. As the primary purpose of citing to foreign cases is to make reference to the ideas and practices of the common law, we should expect a scenario where foreign cases are by and large positively interpreted. But since judges do not *have to* cite to foreign cases, what gives rise to the presence of neutral and negative citations? It seems to us that the authoring judges in some cases felt obligated to explain *why* they deviated from foreign decisions. In cases where deviations from known common law practices and ideas were involved, judges felt the need to justify their decisions. In other cases, neutral or negative citations appeared because judges were responding to foreign cases first cited by counsel with which they disagreed. Such instances of judges responding to cases raised by counsel highlight the fact that for the legal communities in these jurisdictions, which include advocates as well as judges, the use of foreign cases is entrenched in the practice of law. The affirmative use of foreign cases is often integrated into judgments without much fanfare. Indeed, with the frequency of citing foreign case law in these jurisdictions, one would not expect justification or explanation for each foreign reference, as for instance is typical in the United States. However, at times, judges in these jurisdictions offer telling reflections on their use of foreign citations. For instance, a Hong Kong judge states in a sampled decision that the ‘English common law has always been widely followed in Hong Kong as providing a developed corpus of landlord and tenant and real property law’.<sup>41</sup> He furthermore implied that he was not ‘free to depart from the path-lighting of the settled English law’.<sup>42</sup> Such a statement is notable since,

41. *Lau Wing Hong & Others v Wong Wor Hung & Another* [2006] 4 HKLRD 671, 709.

42. *ibid* 708.

technically, the Hong Kong judiciary is free to depart from English case law other than that which is binding. Yet, such treatment of British and other Commonwealth case law as being significant to judicial decision-making is reflective of the trends we see vis-à-vis common law practices in these jurisdictions.

### C. *Differences Between Hong Kong, Malaysia, and Singapore*

Clearly, the employment of foreign citations is deliberate and permeates these three jurisdictions. However, are there differences in how they engage with foreign content?

Malaysian judges on average cite the most number of cases, domestic and foreign combined.<sup>43</sup> Foreign citations are so common that we would describe their prevalence as part of the judicial style of Malaysian judges. Citations in Malaysian judgments are often extensive and in-depth, including, notably, long quotations from foreign cases. Judges display a strong sense of professional esteem for foreign cases, as reflected in the lowest percentage of negative citation (8 per cent) among the three jurisdictions. When reading through the judgments from Malaysia, it is common to see judges cite to a string of related cases, domestic and foreign, when they invoke or explain a certain relevant principle or rule. The concomitant citation of domestic *and* foreign cases seems to signal an absence of boundaries in the manner in which Malaysian judges treat domestic and foreign cases. Below is an excerpt taken from one of the Malaysian opinions we sampled:

Since MCAT is the plaintiff in the S6 suit and the plaintiffs in the S4 suit are the directors of MCAT, it is my judgment that it would be appropriate that the S4 suit be transferred to this court and this court will hear and determine the S6 suit first and then followed by the S4 suit. This would certainly prevent and ‘avoid the potential disaster of inconsistent verdicts’ as envisaged in *Baring Futures (Singapore) Pte Ltd (in liquidation) v Deloitte & Touche (a firm) & Anor*. This approach also finds support in the following cases:

- (a) *Leong Chee Kong & Anor v Tan Leng Kee* [1999] 4 AMR 4422, where the court granted consolidation of two separate suits involving the same issues, facts and parties;
- (b) *Lesco Development Corp Sdn Bhd v Malaysia Building Society Bhd* [1988] 2 MLJ 184, (SC), where Wan Hamzah SCJ delivering the judgment of the Supreme Court aptly said at page 185 of the report:

It is undesirable to allow a situation where two different courts would try and determine the same issues arising between the same parties relating to the same subject matter. As MBS had chosen to sue *Lesco* in the Commercial Division before filing the originating summons and there was already default judgment in the suit and the application to set aside the default judgment is still pending, in our opinion the hearing of the originating summons should have been postponed until final disposal of the suit in the Commercial Division. Therefore, we order that the order of sale be set aside. We further order that the originating summons be dealt with after the final disposal of the suit, and that appropriate orders should be made on the originating summons taking into consideration the result of the suit.

43. The average numbers of total direct case citations in our sample, irrespective of source, are 7.59 for Hong Kong, 15.58 for Malaysia and 14.39 for Singapore. See Table 3 for averages by category (domestic, English, non-English foreign).

- (c) *Naylor v Preston Area Health Authority, Foster v Merton and Sutton Health Authority, Thomas v North West Surrey Health Authority, Ikumelo v Newham Health Authority* [1987] 1 WLR 958, where four separate actions alleging medical professional negligence were tried at the same time particularly where the principal issue to be decided in each case was the same;
- (d) *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] 1 AC 965, a decision of the House of Lords with a coram of Lord Bridge of Harwich, Lord Brightman, Lord Mackay of Clashfern, Lord Ackner and Lord Goff of Chieveley where the motions to remit the arbitration awards that arose out of the same incident were heard together; and
- (e) *Daws v Daily Sketch & Sunday Graphic Ltd and Darke v Same* [1960] 1 ALL ER 397, where two actions were ordered to be tried consecutively by the same judge and by the same jury.<sup>44</sup>

The extended list put together by the judge in the above example exemplifies the practice of concurrently providing both foreign and domestic cases as foundational citations.

Citations to India is one factor that contributes to the higher number of non-English foreign citations in Malaysia. Among Malaysian judgments with foreign citations, more than a quarter of them (about 28 per cent) cite to Indian precedents. Indian precedents are often referenced because Malaysia, like Singapore, has adopted some of its key statutory laws modelled after Indian statutes, most significantly the Indian Penal Code, which is the basis of their criminal law.<sup>45</sup> Malaysian judges use Indian decisions as a source of authority regarding questions about construing sections of the code.

Like Malaysia, Singapore employs a significant number of Indian cases, albeit at a lower percentage (10 per cent), on issues related to the interpretation of the Code as well as other matters. Within our sample, Singaporean judgments contained citations from the broadest array of jurisdictions. Compared to their Malaysian counterparts, however, Singaporean judges make a markedly stronger distinction between domestic cases and foreign cases overall. Singaporean judges sometimes seem to refer to foreign cases only to demonstrate their knowledge of a newer development of the common law in other jurisdictions, even though they do not always follow the rulings of the foreign cases cited (especially in the area of criminal law).<sup>46</sup>

Hong Kong is the last among the three jurisdictions to create its own court of final appeal. Compared to Singapore and Malaysia, English decisions play an even stronger role in the foreign judgments cited. Among Hong Kong cases that cite to foreign decisions, 66 per cent of them directly cited to English cases exclusively with no other foreign citations. By comparison, the figures are 40 per cent for Malaysia and 34 per cent for Singapore. Citation to English law is a powerful way to signal the continuity of

44. *MCAT Gen Sdn Bhd v Celcom (Malaysia) Berhad* [2007] 8 MLJ 277, 290.

45. In addition to the Penal Code, Malaysia's Contracts Act and Singapore's Evidence Act are both modeled after Indian statutes.

46. See e.g. *Ho Wing On Christopher and others v ECRC Land Pte Ltd (in liquidation)* [2006] 2 SLR(R) 103. In the case, a High Court judge in Singapore referred to an Australian case that recognized that a liquidator could be made personally liable for costs but only to point out that the case was not good law in Singapore. Goh and Tan (n 32), based on their survey of reported cases of Singapore, arrived at similar conclusions.

its English common law heritage. Hong Kong remains the jurisdiction that stays closest to the decisions of English courts.

### III. DISCUSSION

Let us further examine how foreign cases are ‘substantively’ used by the three jurisdictions. A frequent type of substantive use is for judges to invoke foreign cases to articulate the shared common law standards, tests, and approaches to address a host of garden-variety disputes. Especially in the case of Malaysia, but also for Hong Kong and Singapore, citing to foreign cases is a convenient way for judges to invoke authoritative definitions of important common law concepts and ideas. Foreign cases offer a shared model or framework for principled decision-making. Judges lean on foreign citations from England and other prominent jurisdictions to justify that their method of deciding is based on ‘the common law way’. The common law as interpreted in foreign cases is treated as a reservoir of legal knowledge.

Here, we use the Malaysian cases we surveyed as examples to illustrate this use of foreign citations. The following is a selected, non-exhaustive list of topics to which Malaysian judges apply foreign citations: whether a claimant can proceed with a statement of claim after the execution of a deed of settlement;<sup>47</sup> proper test of judicial bias;<sup>48</sup> grounds in which a winding up petition would be dismissed or stood over;<sup>49</sup> categories of cases relevant to death caused by dangerous driving;<sup>50</sup> when to reject a witness’s evidence in cases of omissions, contradictions, or minor discrepancies;<sup>51</sup> what constitutes an aider/abettor;<sup>52</sup> the meaning of the term ‘possession’;<sup>53</sup> extent of discretion of the trial judge to disallow evidence;<sup>54</sup> when the appellate court should act in reviewing findings of facts;<sup>55</sup> and the definition of a ‘hostile witness’.<sup>56</sup>

As can be seen from the list above, foreign cases are used to explain standards, rules, and operating concepts in common law reasoning. Foreign cases inform what tried standards and tests should be carried out for a certain type of problem. In other instances, foreign cases are invoked to provide new, novel ideas. An important but underexplored aspect of foreign citation is the soft law-making power that judges in these jurisdictions garner when they cite to foreign cases. Some foreign cases are referred to in order to fill a lacuna of domestic law, or to update the law on contemporary judicial developments in areas which are stagnant domestically. Judges who bring about foreign cases for substantive use proactively adopt global legal

47. *Samanda Holdings Bhd v Sakullah Holdings Sdn Bhd & Ors* [2006] 4 MLJ 381.

48. *Cherie Booth QC v Attorney General, Malaysia & Ors* [2006] 6 MLJ 501.

49. *Pontian United Theatre Sdn Bhd v Southern Finance Bhd (formerly known as United Merchant Finance Bhd)* [2006] 2 MLJ 602.

50. *Public Prosecutor v Wan Khairil bin Wan Isa* [2007] 6 MLJ 601.

51. *Public Prosecutor v Nagathevan all Manoharan & Ors* [2009] 7 MLJ 464.

52. *ibid.*

53. *Public Prosecutor v Azwan Irewan bin Rosni* [2009] 8 MLJ 201.

54. *Public Prosecutor v Peter Kong* [2007] 5 MLJ 567.

55. *Dato’ Haji Azman bin Mahalan v Public Prosecutor* [2007] 4 MLJ 142.

56. *ibid.*

concepts, frameworks, and standards to fill in an undefined space left out by statutory law. Case law reasoning is agile.<sup>57</sup> It has an ability to move quickly into undefined space and leave its mark. For these systems, it is a quiet but effective way to gradually expand the reach of the law.

As an institution, the law develops a technical expertise, which is perpetuated and consolidated through its practices.<sup>58</sup> The law develops its own set of rules, procedures, conventions, strategies, and technologies around which the specialist character of law is constructed and through which it operates. Legal actors, including judges and lawyers, share a set of institutionalized routines to sustain an emergent judicial space that minimizes political interference in everyday operations. Many of the practices and routines are tacitly agreed upon and seldom questioned.<sup>59</sup>

Case citing is arguably the most recognizable and distinctive legal practice through which exchanges of legal knowledge are facilitated among common law jurisdictions. It facilitates continuity and coherence within the law itself. An emphasis on case law, particularly the use of foreign citations, reinforces a sense of continuity among common law practitioners that transcends national boundaries. Constant and recurrent reliance on foreign citation makes it possible for judges at times to yield some soft law-making power. The accepted practice of frequent foreign citation enables the courts, at times, to develop the law at the margins.

The effectiveness of foreign citation as a means of law-making lies in the asymmetry of legal transaction costs required between soft law-making through case law and hard vetting of statutory law. It is an asymmetry that judges of the three jurisdictions have readily exploited. It does not cost much for judges to shape the development of law by means of citing to foreign cases. By contrast, legislating is more time-consuming and costly. For example, in a Singapore case we analyzed, the respondent was convicted of shoplifting multiple times. However, she was also clinically diagnosed as a kleptomaniac. Previously, the High Court had already warned the respondent to avoid re-offending, failing which the courts would have little alternative but to visit upon her a period of incarceration. Subsequently charged of committing theft again, the respondent pleaded guilty in the District Court to two charges of theft. The District Court eventually imposed a total sentence comprising of one day's imprisonment and a fine of \$8,000 (Singapore Dollars). Dissatisfied with the District Court's decision, the prosecution appealed. The High Court judge who heard the appeal stated clearly that his intention was to go beyond the circumstantiality of the case to develop a broader approach to handling kleptomaniacs:

In my view, there is a need for the courts to adopt a broadly consistent and coherent approach in dealing with offenders who suffer from kleptomania. In this judgment, I shall

57. Edward H Levi, *An Introduction to Legal Reasoning* (University of Chicago Press 1962).

58. Mark C Suchman and Lauren B Edelman, 'Legal Rational Myths: The New Institutionalism and the Law and Society Tradition' (1996) 21 *Law and Social Inquiry* 903; Mark C Suchman, 'On Beyond Interest: Rational, Normative and Cognitive Perspectives in the Social Scientific Study of Law' (1997) *Wisconsin Law Review* 475; Catherine R Albiston, *Institutional Inequality and the Mobilization of the Family and Medical Leave Act* (CUP 2010).

59. Walter W Powell and Paul J Dimaggio (eds), *The New Institutionalism in Organizational Analysis* (University of Chicago Press 1991).

attempt to provide some general guidance outlining the sentencing considerations which should be taken into account in cases of this nature.<sup>60</sup>

The lack of local precedents provided justifications for the judge to look elsewhere.<sup>61</sup> He then moved on to survey cases involving kleptomaniacs in Australia, Canada, and Hong Kong. He concluded:

It would be fair to say that the examination undertaken above has shown that other jurisdictions take a decidedly enlightened approach towards kleptomaniacs, even when they have had a long record of reoffending. These jurisdictions appear to have given primacy to the absence of a causal link between the act of theft and the criminal intent of the offender due to the onset of kleptomania. They also do not appear to attribute much weight to the possibility of the offender seeking treatment for his ailment, and are seemingly prepared to give the offender chance upon chance to improve notwithstanding the lack of effort on the offender's part. Perhaps part of the reason why these foreign courts are so reluctant to order the incarceration of the offender, despite repeated reoffending, is due to the realization that long-term imprisonment serves little purpose in the rehabilitation of the offender, which itself represents the greater public interest, that is to say, to prevent or ameliorate recidivism.

The judge's survey of foreign cases played an instrumental role in his decision to dismiss the prosecution's appeal (seeking a harsher sentencing of the respondent). Engagement with foreign cases provides useful information about the effects of particular legal or policy decisions. He wrote:

Acknowledging that kleptomania is an enigmatic psychiatric disorder will assist in the future treatment of such cases by both the Prosecution and the courts. There will usually be little public interest in vigorously pursuing such cases in the courts as there is no compelling need for the law to adopt a heavy-handed approach in sentencing such offenders. So long as they have demonstrated a commitment to adhere to their treatment plan and are showing real improvement, the courts should be slow to commit them to prison for every relapse of the disorder.<sup>62</sup>

Similarly, in the few Hong Kong cases containing lengthy quotations of foreign cases, they were primarily used on topics where local precedents were lacking. In a case about whether the Warsaw Convention applied when an unaccompanied thirteen-year-old boy suffered an injury, the Court had to decide on the scope of the meaning of the term 'disembarking.' The District Court judge who presided over the case wrote:

Counsel for the plaintiff argued that at the material time, the plaintiff had completed the process of disembarkation and hence the accident so occurred was outside the scope as stipulated in art.17 as it had happened not in the course of any of the operation of disembarking. Counsel for the plaintiff relied on a number of overseas authorities. In *Dick v American Airlines Inc & Another* 476 F Supp 2d 61 (2007), the plaintiff sustained injury while

60. *PP v Goh Lee Yin* [2008] 1 SLR(R) 824, 830.

61. According to the judge, there have only been three known kleptomaniacs apprehended and charged in Singapore recently; *ibid* 871.

62. *ibid* 880.

travelling from Trinidad to Canada on 25 February 2002. The plaintiff was travelling with her elderly mother who required wheelchair assistance within the airline terminal from American Airlines. The plaintiff and her elderly mother had to stop at Miami International Airport. In Miami, the plaintiff and her mother were proceeding from one gate to another and were directed by their escort to use an escalator. While riding the escalator, the plaintiff's mother fell backward on the plaintiff, injuring her. In that case, the US District Court took the view that the applicability of the Warsaw Convention depends on whether the injury occurred 'on board the aircraft or in the course of any of the operation of embarking or disembarking'. The phrase could be paraphrased as: 'on board the aircraft or in the course of any of the operation of getting on or getting off the aircraft.' As such, there must be a 'tight tie' between the accident and the physical act of entering an aircraft.' It was said, 'a court must consider (1) the passenger's activity at the time of injury, (2) his or her whereabouts when injured, and (3) the extent to which the carrier was exercising control. These factors — activity, location and control — as separate legs of a stool, but, rather as forming a single, unitary base.'<sup>63</sup>

The judge then continued to review other English and American cases to identify the meaning of 'disembarking'.

The examples from Singapore and Hong Kong show how foreign citations are sometimes used by judges to inform or update a niche area of law that suffers from a dearth of local precedents. It also exemplifies the tendency of judicial soft law-making to pull towards global contemporary standards.

#### IV. CONCLUSIONS

This article argues that the common law in Asia is not positioned as a set of local laws rooted in common customs or practices, but as a globalized system of law that operates as a well-tested set of legal know-hows. We have analysed the use of foreign citations in Hong Kong, Malaysia, and Singapore to empirically show that foreign cases are prominently used in the three jurisdictions. Arguably, the most striking finding is that foreign citations are almost as common as domestic citations in the case law of the three jurisdictions. As such, not only do the three deviate greatly from the practices of the Anglo-American common law; together, they represent an extraordinary case of the Commonwealth model. In all three jurisdictions studied, over 60 per cent of the reported cases cite to foreign cases. By comparison, Canada, a jurisdiction often considered to embody the Commonwealth model, appears relatively spare in citing to foreign cases.

The practice of foreign citation in the three jurisdictions is contemporary and cosmopolitan. Cited foreign cases are in no way limited to old English cases that are deemed foreign as a result of formal separation, but rather, include citations to recent English cases as well as non-English foreign cases from a broad range of countries. The recentness of the cases cited and the scope of foreign jurisdictions to which judges refer, the vast majority of which were never binding on these jurisdictions, suggest that citing to foreign cases cannot be written off simply as a legacy phenomenon. Foreign citations contribute significantly to the legal development of the three jurisdictions. The common law was brought to Hong Kong, Malaysia, and Singapore by colonialism.

63. *ONG v Malaysian Airline System Bhd* [2007] 3 HKLRD 255, 259-60.

Today, English court decisions remain the biggest category of foreign citations. However, even putting aside the English cases, there remains a substantial level of foreign cases from other established common law countries, including Australia, Canada, New Zealand, India, and the United States that cannot be overlooked. There are also cross-citations among the three jurisdictions, albeit unevenly distributed.

Our study further shows the depth of the practice of citing to foreign cases. Foreign citations permeate the corpus of the law in the three examined jurisdictions. They do not just appear in the decisions of the highest courts, but are in fact well represented in the entire body of reported cases. We found that citing to foreign cases is such a common practice that it often requires no justification. They are cited to bolster the legitimacy of a judge's reasoning as well as to provide new ideas or experiences of other more established jurisdictions. It becomes an institutionalized mechanism for judges to import new ideas and contents into the domestic law.

This study furthermore contributes to an understanding of the enriching function of foreign citation in the three selected common law systems. The outward-looking, cosmopolitan character of the common law of Hong Kong, Malaysia, and Singapore is certainly due in part to relatively fewer local cases, but it is also due to a different perspective that sees the common law as a method of enquiry. Citing to foreign cases allows the jurisdictions to draw from a shared repertoire of legal know-how to uphold procedural rigor, adhere to shared legal concepts, ideas and approaches to statutory interpretation, and occasionally, to fill a gap in the domestic law.

Citing to foreign cases, when practiced on a broad and regular basis, dramatically expands the pool of available cases to which a judge may refer. It also reorients the practice of case law citation from a strictly jurisdictionally binding basis, to one in which influential or compelling precedents potentially affect judicial reasoning, irrespective of whether they are technically binding. For newer and aspiring common law jurisdictions such as the three studied here, referring to foreign cases is an important means of enriching and globalizing the contents of the law. Hong Kong, Malaysia, and Singapore epitomize this 'enquiry' character of the common law. By reaching beyond domestic legal knowledge and running between the cracks of statutory law, the common law in Asia has acquired a global character that is unique by virtue of its extent and depth – foreign citations are almost as common as domestic citations in the case law of the three jurisdictions.

There have not been many socio-legal studies of the development of the common law in Asia from a comparative perspective. We hope that this study will generate further interest in learning about the vibrant development of the common law in Asia.