

Influential Authority and the Estoppel-Like Effect of International Law

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I Introduction

Contemporary adjudication in national courts presents legal practitioners and theorists alike with some persistent puzzles about the kinds of legal resources that domestic judges can legitimately invoke. These seemingly arcane questions generate considerable interest, in no small part because of how they implicate the venerable but increasingly outmoded conception that has long held the legal imagination in its grip. Inspired by positivism, this picture of legal authority distinguishes sharply between binding and non-binding sources of law and consequently imagines the judge as either entirely free or completely constrained. Perhaps the strongest argument in favour of this traditional picture is found in the reception of international law in dualist domestic legal systems such as we find in many common

* This chapter is part of a larger project with Karen Knop on the changing nature of legal judgment, sources of law and the role of justification that attends the declining significance of the traditional binding law model. My argument here has benefited in innumerable ways from her input. I am also especially grateful to David Dyzenhaus for conversations and inspiration and to the organisers and participants in the stimulating workshop 'International Challenges to National Legal Systems' that led to this volume. On the larger project see, eg, Karen Knop, 'Here and There: International Law in Domestic Courts' (2000) 32 *New York University Journal of International Law and Politics* 507; Mayo Moran, 'An Uncivil Action: The Tort of Torture and Cosmopolitan Private Law', in Craig Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001); Mayo Moran, 'Authority, Influence and Persuasion: Baker, Charter Values and the Puzzle of Method', in David Dyzenhaus (ed), *The Unity of Public Law* (2004) 389; Mayo Moran, 'Time, Place and Value', in David Dyzenhaus and Mayo Moran (eds), *Calling Power to Account: Law, Reparations and the Chinese Canadian Head Tax Case* (2005); Mayo Moran, 'Shifting Boundaries: Binding Law and Influential Authority', in *New Perspectives on the Divide between National and International Law* (forthcoming).

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