1. Introduction

This paper undertakes a mapping exercise as a leeway to finding answers to two questions in the Sri Lankan discourse of human rights. One question (the broader one) is, why do judges cite foreign cases and documents in the judgements they write in determining fundamental rights applications? How useful are those citations – either to the immediate victim or to the legal system in general? The second question (the more specific one) is to understand (or unpack) the citation of the judgements of the European Court of Human Rights in the fundamental rights jurisprudence of Sri Lanka. Why do judges cite those cases and treaty provisions? How often do they cite them? Is there a pattern to it or is it random? How useful has the Strasbourg jurisprudence been in developing the Sri Lankan rights jurisprudence?

This paper explores some of those questions with the objective of trying to understand the decision making process of the judges in determining fundamental rights applications. That would be useful both as a descriptive and a normative study. The description will be helpful in that it might (hopefully) offer an alternative analysis of fundamental rights decisions in Sri Lanka that approaches judgements as “a text.” That text would be taken as an indicator of how judges come to the conclusions that they do and how they present their reasoning to the world. The study would be normative in that, through the descriptive analysis, it would make suggestions for a re-conceptualization of the role of foreign jurisprudence in general in the Sri Lankan fundamental rights jurisprudence and in particular the Strasbourg jurisprudence.

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1 Hereinafter “ECHR.”
The methodology used in this paper will be a combination of the quantitative with the qualitative. The quantitative method will be used to map out the use of foreign jurisprudence (both European and Non-European) in Sri Lankan fundamental rights judgements in the last twenty years. The qualitative analysis will be restricted to the reference to Strasbourg jurisprudence. The reasons for citing the judgements of the European Court of Human Rights (hereinafter the “ECHR”) and impact of those judgements on the judgement will be analysed.

Based on the quantitative analysis of the judgements, the main argument presented in this paper is that the use of Strasbourg jurisprudence, in the main, has not particularly changed (improved or taken away from) the decision making process of the judiciary in the fundamental rights jurisdiction. However, it seems that the judges perceive reference to Strasbourg jurisprudence as adding quality to the decisions by providing those decisions with authority and persuasiveness.

This paper has the potential to make a contribution to the existing scholarship on fundamental rights jurisprudence of Sri Lanka particularly in the area of using the combined approach of quantitative analysis with the qualitative, in the consideration of an issue such as the use of foreign jurisprudence in decision making. Moreover, it seems that so far, no attempt has been made to give particular focus to the use of Strasbourg jurisprudence in this area of case law.

2. Sri Lankan Constitutional Framework

Sri Lanka has had a tradition of written constitutions since the late 1900s, with the latest being the Second Republican Constitution of 1978 which has been amended seventeen times so far.\(^2\)

The country has the dubious privilege of having had over four Constitutions since that time and over the last decade there have been several attempts to either reform the current constitution or to adopt a new one.\(^3\)

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\(^3\) The recent most official draft was in 2000. There are current attempts at constitutional reform but those discussions have not been presented officially by the government to the public or to parliament.
The characteristics of the Second Republican Constitution reflects the influence of the British colonial experience of the country, the nationalist reactions to colonialism and also attempts to use the constitution has a mechanism for concentrating power as opposed to devolving it. On the other hand, it also reflects attempts to address the ethnic conflict (of which the armed conflict ended last year) through devolution and also an attempt to dilute the concentration of power, with the executive president. The 1978 Constitution, in that sense, can be presented as a contradiction of sorts and as a framework which has been tampered with at different times according to prevailing political wills.

On one hand the Constitution recognizes that “the People” are sovereign and that their sovereignty is inalienable. However, the executive president is immune from legal suit while in office and review of legislation is restricted to pre-enactment review. In that sense, the Constitution places executive and legislative action beyond the accountability framework of the Constitution. Similarly, even though the Constitution recognizes fundamental rights and

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4 The British model of constitutional government has been followed in the formulation of the post-independence Constitutions. The 1978 Constitution provides inter alia, for parliamentary sovereignty and does not recognize judicial review of legislation except for a limited period at the pre-enactment bill stage.
5 For instance, art. 9 provides that “The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha Sasana while assuring to all religions the rights granted by Articles 10 and 14(1) (e)” i.e. the right to freedom of religion. The original Constitution also provided that Sinhala (the language of the majority) should be the official language of the country. That was amended in 1987 to provide that Tamil (the language of the minority) shall also be an official language.
6 The Executive President under the Constitution is all powerful. He enjoys immunity from legal action while in office. The original Constitution vested the power of appointment to the highest offices in the judiciary, police and other administrative functions. In 2001, through an amendment, the power was vested with a Constitutional Council. However since 2006, the Constitutional Council has not been appointed and the President continues to make those appointments.
7 The thirteenth amendment to the Constitution in 1987 established nine provincial councils and devolved several power to those councils include powers related to education, health and land.
8 Through the 17th Amendment to the Constitution. Supra note 5.
9 Art. 3 of the Constitution “In the Republic of Sri Lanka sovereignty is in the people and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise.” Art. 4 of the Constitution. “The Sovereignty of the People shall be exercised and enjoyed in the following manner :- (a) the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum; (b) the executive power of the People including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People: (c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law: (d) the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided: and (e) the franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament, and at every Referendum by every citizen who has attained the age of eighteen years, and who being qualified to be an elector as hereinafter provided, has his name entered in the register of electors.”
10 Art. 35 of the Constitution.
11 Art. 120, 121, 123 of the Constitution.
language rights, at the same time, it also provides that all written and unwritten law will continue to apply even in such laws are inconsistent with the recognized rights.

Interpretation of the Sri Lankan Constitution is within the “common law” context. As the British colony, Sri Lanka inherited particularly public and commercial law from the British and many of those laws continue in force today. The English common law, as interpreted in contemporary British courts and in other parts of the Commonwealth, therefore, continues to have persuasive force in Sri Lankan public law. As far as interpretation of common law principles are concerned, it could be argued that the interpretations afforded by contemporary British courts are binding on Sri Lankan courts.

3. Overview of Fundamental Rights Jurisdiction of the Sri Lankan Supreme Court

Fundamental rights were recognized for the first time in the First Republican Constitution of the country in 1972. However, that constitution did not provide a mechanism whereby individual’s could seek remedies for the violations of those rights. The Second Republican Constitution of 1978 (i.e. the present constitution), not only recognized fundamental rights and language rights but in art. 126 provides a mechanism for seeking remedies for violation and/or imminent violation of those rights. The Supreme Court of Sri Lanka, is vested with exclusive jurisdiction in entertaining and determining applications on fundamental rights. The writ jurisdiction of the appellate courts too, can be a means of seeking a remedy for violation of rights in Sri Lanka but the discussion in this paper will be confined to the fundamental rights jurisdiction.

12 Chapter IV of the Constitution
13 Art. 16 of the Constitution “(1) All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter. (2) The subjection of any person on the order of a competent court to any form of punishment recognized by any existing written law shall not be a contravention of the provisions of this Chapter.”
14 See, Cooray, J.A.L, ibid.
15 Chapter VI of the First Republican Constitution recognized several civil and political rights as “Fundamental Rights and Freedoms” including the right to equality (Art. 18(1) (a)) and the freedom of thought, conscience and religion (Art. 18 (1)(d)). However, that Constitution did not provide a remedy that individuals could avail themselves of, if those rights were violated.
16 Chapter III and IV of the Constitution
17 The Constitution provides that if a matter related to fundamental rights arises in the Court of Appeal, such application should be sent to the Supreme Court for determination in relation to the fundamental rights issue and sent back to the Court of Appeal for the final determination. See, art. 126 (3) of the Constitution, infra note 18.
18 Art. 140 provides for the writ jurisdiction of the Court of Appeal and the Supreme Court. “Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect and examine the records of any Court of First Instance or tribunal or other institution, and grant and issue, according to law, orders in the nature of writs of certiorari, prohibition, procedendo, mandamus and quo warranto against the judge of any Court of First Instance or tribunal or other institution or any other person :
Under art. 126, any person suffering from a violation/imminent violation of fundamental rights can, by her lawyer or in person, make an application to Court within thirty days of such violation.\textsuperscript{19} Over time, the Supreme Court has given a liberal interpretation to the rules of standing encapsulated in this article. For instance, it is now recognized that the thirty days will be counted only from the time the victim was able to consider the filing of a fundamental rights application.\textsuperscript{20}

4. Challenges/ Limitations in Carrying out Research on Fundamental Rights Jurisprudence in Sri Lanka

Due to particular limitations on the regular and consistent reporting of judgements in Sri Lanka, there are certain challenges to legal research in the country. There is no right of access to judgments by the public or for the legal community, even in relation to the judgments of the superior courts. The official annual law reports i.e. Sri Lanka Law Reports (Sri L.R.) are general and would include only a few of the fundamental rights judgments of a given year. Moreover, there are certain judgements which significantly impacted on the fundamental rights jurisprudence of the country, which were not reported officially.

\textsuperscript{19} Art. 126. “(1) The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV.

(2) Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, within one month thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two Judges.

(3) Where in the course of hearing in the Court of Appeal into an application for orders in the nature of a writ of habeas corpus, certiorari, prohibition, procedendo, mandamus or quo warranto, it appears to such Court that there is prima facie evidence of an infringement or imminent infringement of the provisions of Chapter III or Chapter IV by a party to such application, such Court shall forthwith refer such matter for determination by the Supreme Court.

(4) The Supreme Court shall have power to grant such relief or make such directions as it may deem just and equitable in the circumstance in respect of any petition or reference referred to in paragraphs (2) and (3) of this Article or refer the matter back to the Court of Appeal if in its opinion there is no infringement of a fundamental right or language right.

(5) The Supreme Court shall hear and finally dispose of any petition or reference under this Article within two months of the filing of such petition or the making of such reference”

Consequently, legal researchers depend on the personal contacts with practitioners, to a large extent, to obtain copies of judgments given by the superior courts. Alternatively there are about two libraries that maintain files of unreported judgments as far as it possible to obtain them. Any attempt to make general overarching conclusions about the direction in which the fundamental rights jurisprudence is moving there are limited by these practical problems. That limitation becomes crippling, particularly when attempting to reach quantitative conclusions, as attempted in this paper. These limitations apply in particular to the quantitative analysis of case law in this paper.


Below is presented the total number of judgements issued each year from 1991 onwards, in the determination of fundamental rights applications, as gathered in ongoing research. The figures cannot be used as an indication of the number of applications filed, but rather provides a sense for how often each year the Supreme Court has engaged in writing judgements pertaining to the remedy.

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Judgements</th>
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<tbody>
<tr>
<td>2008</td>
<td>15</td>
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<td>2007</td>
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<td>27</td>
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<tr>
<td>1999</td>
<td>41</td>
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</tbody>
</table>

21 The library maintained by the Nadesan Centre, No. 4, Charles Circus, Colombo 03 and the library maintained by Law & Society Trust, Colombo 08 have over the last twenty years maintained a fairly comprehensive collection of unreported judgments among other legal material.
Accordingly at the least a total of 697 judgements have been given by the Supreme Court over the last 17 years in the exercise of its fundamental rights jurisdiction. The records accessed to gather this data does not include the decisions that would have been issued by the Court in the exercise of its “leave to proceed” jurisdiction.\(^22\)

Between the years 1991 – 2008 there have been about 26 instances where the Supreme Court has made reference to foreign case law. Out of those identified 26 instances, there are 7 references to judgements of the European Court of Human Rights and 11 cases where judgements other than the ECHR judgements have been referred to. There are 8 cases where the Court has made reference to both ECHR judgements and judgements other than ECHR.

In looking at the use of international treaties and/or soft law instruments, out of the cases examined, there have been 2 cases where the Court has referred to the European Convention on Human Rights and 7 cases where the Court has made reference to other international treaties and/or soft law documents.

It seems then, from a quantitative perspective, the place of foreign jurisprudence in the Sri Lankan fundamental rights jurisprudence is marginal. The total number of cases which make reference to authorities outside Sri Lanka in terms of judgements and other international

\(^{22}\) “When an application by way of a petition in writing is made in terms of Article 126(2) of the Constitution to the Court, such application shall be referred to a Bench of not less than two Judges of the Court nominated by the Chief Justice, for a decision whether leave should be granted or refused. After such consideration, and after such hearing of the petitioner as to the said Court may seem necessary or expedient, the said Court shall make an order granting or refusing the application for leave.” Supreme Court Rules, 1978, Rule No. 65(3)
documents is 5.02% and the use of either ECHR judgments or the convention in judgements seem to stand at 1.3%.

6. Place of Foreign Jurisprudence in Fundamental Rights Jurisprudence

Theoretically, the Sri Lankan legal system is considered as dualist. The Constitution does not make an express statement on this matter. Enabling legislation is required for treaties to have effect within the domestic legal system. That view has been affirmed by a divisional bench of the Supreme Court in the case of *Nallaratnam Singarasa v. Attorney-General*. In that case however, the Supreme Court went even further and opined that accession to the First Optional Protocol to the International Covenant on Civil and Political Rights by the Sri Lankan President was unconstitutional on the basis that it was an unauthorized alienation of the sovereignty of the People.

The Directive Principles of State Policy of the Constitution provides *inter alia* that the state must “endeavour to foster respect for international law and treaty obligations in dealing among nations.” That obligation is not justiceable. However, there have been instances where the Supreme Court has relied on Directive Principles of State Policy in interpreting the obligations of the State.

However, the point remains that as far as the Sri Lankan legal system is concerned, reference to foreign judgments and/or international treaties/soft law instruments remains largely an unregulated and open ended process. Unlike the South African constitution which expressly provides for the use of foreign authorities in the interpretation of its bill of rights, the Sri

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24 “Therefore the accession to the Optional Protocol in 1997 by the then President and Declaration made wider Article 1 is inconsistent with the provisions of the Constitution specified above and is in excess of the power of the President as contained in Article 33(f) of the Constitution. The accession and declaration does not bind the Republic qua state and has no legal effect within the Republic.” Per Sarath N. Silva, Chief Justice in *Nallaratnam Singarasa v. Attorney-General*, ibid.
25 Art. 27(15) of the Constitution.
26 Art. 29 of the Constitution “The provisions of this Chapter do not confer or impose legal rights or obligations, and are not enforceable in any court or tribunal. No question of inconsistency with such provisions shall be raised in any court or tribunal.”
28 Art. 39 of the South African Constitution of 1996 “When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law; and may consider foreign law.”
Lankan constitutional framework has no express authorization or a prohibition. Neither is there is a prohibition by convention. As a result, it could be argued that reference to authorities outside the Sri Lankan legal system continues as a random, arbitrary and unregulated judicial practice that is outside (or above) accountability – either within the judiciary or against the other branches of government.

However, there have been several instances where the Supreme Court has held the view that it could rely on treaties that have been ratified by Sri Lanka, even in situations where the legislature has not adopted enabling legislation for the same. For instance in the case of *Weerawansa v. Attorney General* Justice MDH Fernando, writing for the Court held that even in situations where there was no express enabling legislation, the Supreme Court could enforce the obligations undertaken by Sri Lanka, under the ICCPR.

“*Sri Lanka is a party to the International Covenant on Civil and Political Rights (as well as the Optional Protocol)....Should this Court have regard to the provisions of the Covenant? I think it must. Article 27(15) requires the State to “endeavour to foster respect for international law and treaty obligations in dealing among nations.” That implies that the State must likewise respect international law and treaty obligations in its dealings with its own citizens, particularly when their liberty is involved. The State must afford to them the benefit of the safeguards which international law recognizes. In that background, it would be wrong to attribute to the Parliament an intention to disregard those safeguards.*”

Similarly in the case of *Bulankulama v. Secretary, Minister of Interior Development* the Supreme Court relied on international soft law instruments such as the UN Stockholm Declaration of 1972 and the UN Rio De Janeiro Declaration of 1992 to introduce and develop the principle of sustainable development in the domestic law.

29 SC (FR) 730/96, S.C. Minutes 3rd August 2000
30 SC (FR) 730/96, S.C. Minutes 3rd August 2000
31 [2000] 3 Sri L. R. 243
7. Use and/or influence of European Court Judgements in the Fundamental Rights Jurisprudence

A reading of the Sri Lankan judgements which refer to judgements of the ECHR suggests that the ECHR cases are not used to extend judicial reasoning beyond the existing interpretation of the legal principles involved. Rather, the Court seems to rely on ECHR cases as a means for supporting the argument made; as a way on enriching the argument. A careful analysis of the arguments posed in those cases show that the Court could have reached its conclusions even without citing the ECHR cases – for instance through a purposive interpretation of the relevant constitutional provisions. However, the Court seems to prefer to use ECHR judgments as authority and/or as persuasive, in addition to its interpretation of the constitutional provisions.

For instance, in the case of Wimala Senanayake v. University of Peradeniya\textsuperscript{32} the reference to the case of James v. United Kingdom\textsuperscript{33} was in making the argument that the procedure that had been adopted in the appointment of a public official was a violation of the petitioner’s right to equality. The reference therefore was not to introduce a new concept of law or to give a liberal/progressive interpretation to an existing right but rather to reinforce an interpretation that has been made even in previous occasions by the court.

In the case of Sujeewa Nilruk Ihlakathrige, Attorney-at-Law for and on behalf of Lance Corporal WAD Nilusha Hemali v. Upali Jayanetti, Officer Commanding Sri Lanka Corps of Military and Others,\textsuperscript{34} the Court referred to the Greek Case of the ECHR\textsuperscript{35} in interpreting “inhumane treatment” under Art. 11 of the Constitution.\textsuperscript{36} The court sought to interpret the term to include gross forms of humiliation.\textsuperscript{37} The Greek Case\textsuperscript{38} is also cited in the case of Shaul Hammed Mohomed Nilam and Others v. K Udugampola, Superintendent of Police, Kandy.\textsuperscript{39} Here the Court relies on the case to explain what it understands as coming within the constitutional term

\textsuperscript{32} S.C. Application 269/2004
\textsuperscript{33} (1986) 8 EHRR 123
\textsuperscript{34} SC Application 691/2000, SCM 04th June 2002
\textsuperscript{35} (1969) 12 YB 1
\textsuperscript{36} Art. 11 of the Constitution “No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.
\textsuperscript{37} Inhumane treatment “as an aggravated form of inhumane treatment which treatment or punishment may be said to be degrading if it grossly humiliates the individual before others or drives him to act against his will or conscience.” SC (Application) 691/2000, SCM 04th June 2002
\textsuperscript{38} Ibid.
\textsuperscript{39} SC (FR) Application 68/2002, SCM 29th January 2004
“degrading treatment” under Art. 11 of the Constitution and makes the observation that, “...a situation where there is humiliation, the conduct could become derogatory, although a person would have suffered less than torture.”

The one case where reference to ECHR judgements has been both extensive and elaborate is the case of Sunila Abeysekera v. Rubesinghe. Reference is made to judgements of the European Court and to decisions of the Supreme Court of the United States. This issue in this case was on the extent to which the right to freedom of expression could be limited under emergency regulations. The Court held that in that particular case the limits imposed on freedom of expression were both reasonable and legitimate. In coming to this conclusion however, the Court engaged in a rich discussion on several important principles, including the importance of freedom of speech for democracy, the link between freedom of expression and citizen’s right to franchise, and the freedom of expression and an individual and collective right. Over one hundred authorities are cited in this judgement and those included judgements from Sri Lanka, the United States and the ECHR.
However, even in this judgement the challenge is to measure (if possible) the kind of impact the foreign decisions have had on the final outcome of the case. The general expectation of this type of a judgement (where over 100 authorities – mostly foreign) are cited, is that it would uphold rights rather than not and that the foreign judgements would contribute to a progress interpretation of the right(s) at issue. However, in this case, the Court was of the view that the restrictions imposed on the freedom of expression were valid.

The examples discussed suggest that Strasbourg jurisprudence has not directly influenced the progressive development of Sri Lanka’s fundamental rights jurisprudence but rather has been used as a persuasive authority.

8. Reference to Strasbourg Jurisprudence as a Persuasive Exercise

If reference to ECHR judgements is not necessarily to expand the existing legal standards or to develop new precedent, why does the Sri Lankan Supreme Court refer to judgements of the ECHR? What objective does it serve? The argument that is made in this paper is that, in looking at the judgements as text, what seems to be happening is that the judges make reference to foreign cases and in particular to ECHR cases as a matter of persuasion. By referring to decisions made by a foreign and internationally respected Court, the Sri Lankan Court is seeking to validate its own viewpoint and its own legal arguments. This section seeks to critically analyse this process of referencing foreign cases.

In commenting on the use of foreign case law by the South African courts, Lollini, in her article, *Legal argumentation based on foreign law, An example from case law of the South African Constitutional Court* makes reference to several models for analysing the reference to foreign jurisprudence in a domestic court: cross-judicial influence, cross-constitutional influence/ cross-constitutional fertilization, judicial transplant, trans-judicial communication/ judicial dialogue, trans-judicial borrowing/precedent borrowing are the different approaches that are so identified.

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44 Lollini, *ibid*, p. 61.
While each of these terms is a reference to a particular aspect of the notion of “borrowing” from foreign jurisdictions, it must be pointed out that in relation to “borrowing” by judges of the developing countries, those terms could be misleading. Lollini is of the view that “...interpretive solutions are now being actively sought and borrowed by courts from different legal traditions, a practice that no longer arises out of subordination.”\textsuperscript{45} The terms used by Lollini such as “cross-constitutional fertilization” too connotes the same idea – that there is a form of “exchange” and that the different jurisdictions involved in the process are placed horizontally against each other.

This paper seeks to challenge two aspects of this assumption. One – the assumption of an “exchange” element, the notion that it is a two way process among legal systems and courts that are placed equally. Second – the idea that there is in the actual sense a process of “borrowing.”

The first assumption is easy to correct. Even though the terms used to characterize the use of foreign jurisprudence such as cross fertilization suggests mutual influence, it is evident that the use of foreign jurisprudence is by and large uni-directional. There are very rare, if any, instances where jurisprudence of developing countries or the global south are cited or relied on by courts in the developed world or the global north. Therefore, one is to claim that there is no “subordination” in the process, she needs to establish both quantitatively and qualitatively that there are examples from the global north to consider, cite and rely on jurisprudence of the global south.

Of course it must be noted that there are reasons for the uni-directional flow of judicial borrowing. At the physical level accessibility of foreign judgements is a critical factor. For instance, as discussed elsewhere in this paper, the judgements on fundamental rights of Sri Lanka are not easily accessible even to lawyers within the country, let alone the general public or the international community. As a result, those judgments will not be read by other judges, lawyers, scholars and law students who can eventually use those judgments in their work (whether local or foreign).

\footnote{45 Lollini, \textit{ibid}, p. 61.}
Lack of an up to date law library, lack of human resources in the chambers of judges, heavy case loads are additional resource related issues, that affects the quality of judgements written in the global south. Additionally academic discussion and analysis of case law is not as rigorous as in other legal systems with more resources. In terms of academic writing, the jurisdictions from the global south rank relatively low.

Consequently, there is minimal “borrowing” of judgments or legal developments, by the global north from the global south. This is also a reflection of the nature of power relations at a global level. While it may not strictly be a manifestation of “subordination” – it does reflect the fact that courts of the global south look to and use legal authorities mainly from the global north in their legal writing and this is quite clearly evident in judgments. However, it must be noted that reference is generally to a jurisdiction that is considered to be “worth” citing, or has the power of persuasion. Lollini makes the following comment in that regard:

“National constitutional judges could simply confirm their auctoritas by aligning themselves with the interpretation of judges from powerful democracies in accordance with a somewhat surreptitious rationale of subjection.”46

In Sri Lanka Supreme Court judges quite often cite Indian judgments in their fundamental rights cases and other judgements as well. The judicial affinity towards their Indian counterparts is a reflection of the close legal, political, historical, cultural and economic ties Sri Lanka shares with that country. In comparison to reference to Indian judgements, reference to judgements from other South Asian jurisdictions is minimal.

The quantitative analysis carried out for this paper, in the Sri Lankan context, strongly suggests that even when the Court makes reference to foreign judgments and/or foreign authorities, the impact of those authorities on the substance of the judgement is marginal. This is evidenced in the manner in which foreign judgments are cited domestically. Lollini makes the following observation in this regard:

46 Lollini, ibid, p. 73
“The foreign cases cited tended to reinforce the pre-orientation that the freedom of expression can place a limitation on intellectual property and supplied extra-systemic parameters according to which the aforementioned fundamental freedom played a central role in other ‘open and democratic societies.’ The doubt raised here is that in reality no clear comparison was made; the foreign rulings were simply imported into the South African pool of interpretation. The decisions were not analysed, but simply used as reinforcement of a decision regarding the principles at stake. The ‘audience’ that the Court wished to ‘persuade’, if it should desire to refute the pre-orientation, should being with criticising the pertinence of the cases presented so assertively by the Court.”

The Sri Lankan experience is a good example of the phenomenon that Lollini describes. Foreign judgments are used by the Court to support an interpretation that it has already determined should be applied to the issue at hand. As a result, the Court does not really delve into the foreign decisions cited, but rather makes brief references to them as secondary material; presumably to persuade its audience that there is adequate reason and evidence to rely on the interpretation that it chooses to rely on. Furthermore this phenomenon also suggests that judges feel obliged to have a multiplicity of reasons, wherever possible, for the conclusions that they draw in judgements.

9. Conclusion
This paper has sought to establish that reference to ECHR judgments in Sri Lankan judgements within the fundamental rights jurisdiction of the Supreme Court is not particularly to draw from the particular judicial reasoning of such judgements but perhaps to use the widespread recognition of the Court as an additional support for its own legal reasoning. Other apparent reasons include the need to use a multiplicity of sources to substantiate the particular arguments made by the Court and also perhaps the desire of the Court to persuade its audience of its decision.

Such citations have its limitations as observed by Lollini;

“...there is some perplexity as to the limits to using foreign law since it can create inconsistency and confusion within a system. In fact, the study of this practice must consider the underlying risks regarding the arbitrary way in which judges are free to choose a system or judgment by
investigating the problem of compatibility between the systems whose legal orientation is being adopted and those that import interpretive solutions.”

Moreover, in a context where the citation of foreign judgements also suggest a uni-directional influence of judgements from the global north in the courts of the global south, the perception that outward looking courts (i.e. courts that are open to citing foreign judgments) are also more progressive, can be challenged.

Furthermore this short paper suggests that the use and relevance of foreign jurisprudence in the development of human rights law is to be found not so much in actual domestic jurisprudence. Foreign (regional and international) developments in human rights law therefore is probably a more useful tool in legal education and training. Foreign judgements should be used in a more systematic way to inform the legal argumentation of law students both at undergraduate and graduate level. Given the lack of access to foreign databases even for the judiciary, attention should also be given to ensuring that judges have direct access to foreign jurisprudence. Such training would enable them, should they wish to, use relevant foreign judgments meaningfully, rather than nominally, in their judicial reasoning.

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47 Lollini, *ibid*, p. 72