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PLAN

TEXTE

1 Comparative public law is likely to be of increasing importance in the United Kingdom. Globalisation has increased the need to provide solutions that are not purely nation-specific. Bodies such as the OECD (Organisation for Economic Co-operation and Development) are a major vehicle for sharing the experiences of different countries on a wide range of topics in public governance.[1] It produced important studies on topics such as privatisation.[2] At the same time, in very recent years, the United Kingdom has become deliberately more legally insular. Withdrawal from the European Union in 2020 and proposals on *Human Rights Act Reform* in December 2021 to ensure British courts adopt a British interpretation of the European Convention,[3] rather than that of the Court of Strasbourg will enhance British distinctiveness. As a result, the UK will have different rules in public law areas from its former EU partners. The UK will also have a 'British Bill of Rights' which will differ in some respects from rights in other countries of the Council of Europe. But, interestingly, there will be a distinctive British interpretation of common norms. After the exit from the European Union, very many rules of EU law remain in force as 'retained EU law'. But without the jurisdiction of the European Court of Justice, it is left to the UK courts to interpret these provisions. So there is the real possibility of

a distinctive British interpretation of aspects of EU law. The idea of distinctive British interpretations of common European norms is even more explicit in the proposals of December 2021. The Human Rights Act 1998 incorporated the European Convention on Human Rights into UK domestic law and in section 2 it instructed courts to have regard to the case law of the European Court of Human Rights in interpretating Convention rights. Proposals in 2021 and in 2022 deliberately planned to remove this instruction. At one stage, the proposal suggested the repeal of the incorporation of the Convention and only gives effect to it in domestic law to the extent that these rights are included in the new 'British Bill of Rights'. Furthermore, the proposal required the UK courts to interpret the Convention rights that are part of the British Bill of Rights as laid down by the UK courts, in particular the UK Supreme Court. The case law of the Strasbourg court would no longer to be considered part of UK law. These proposals are on hold for the moment. But specific legislation is already derogating from Convention provisions in relation to immigration. Such trends suggest that a new discipline of comparative public law is emerging – a comparison between the UK's interpretation of common European norms and the interpretation given to them by other European countries, especially by their specific common courts in Luxembourg and Strasbourg. This will mirror to some extent what has already been happening in the common law. Whereas until about 1945 the common law applied within the British Empire (now Commonwealth) could have been considered fairly uniform, this has become increasingly less the case since then. The UK's move into the orbit of the European Union and the Council of Europe made its public law different from other Commonwealth countries. Independence obtained by Commonwealth members ensured that they had distinct institutions, constitutional principles and public law jurisprudence. This is very noticeable in countries like India, Pakistan, Malaysia, Singapore and Hong Kong, as well as later in South Africa. Especially since the 1980s, Canada has moved in a very different direction on fundamental rights from Australia. The fragmentation of the Commonwealth countries and their interpretation of common law rules and principles has accelerated the diversity within the common law that began with the independence of the United States. Arguably, the centre of influence for common law legal

developments, even within the Commonwealth, is no longer the United Kingdom, but the United States and Canada.

2 The result of these developments is that comparative public law has expanded beyond comparison between two or more countries. It now encompasses comparison with common systems of legal rules and principles of which the UK is part, both within Europe and within the common law. This article will focus on these latter dynamics.

3 Before looking at specific areas, it is necessary to clarify how UK lawyers use the term 'public law'. Conventionally, public law is divided into two general subjects: constitutional law and administrative law. Within constitutional law, a certain number of matters which might be included in continental European definitions of the subject are not usually included in UK definitions of constitutional law. These would include parliamentary procedure, electoral law and the institutions of government. Such matters are more likely to be included in non-legal discussions in political science or in studies of 'British Government'. In addition, many matters are governed by constitutional *conventions*, rather than constitutional *law*, such as the powers of the sovereign to appoint ministers or to summon, prorogue and to dissolve Parliament. Constitutional *law* only tends to consider such questions when they might involve the courts, as in the Brexit cases, *Miller* 1 and *Miller* 2.[4] Many of the following topics will not feature in discussions of 'public law' and thus in comparisons of public law in different legal systems: public finances, the maintenance of public order, the conduct of public meetings, planning procedures and non-judicial compensation for wrongs by public officials. The result is that comparison in public law is predominantly about aspects of the general principles of public law with a very strong focus on what the courts do in different countries. This concentration on courts is a particular feature of common law scholarship, both in the United Kingdom and the United States.

4 Finally, it is worth clarifying the subject matter of comparative public law in the United Kingdom. Classically, attention is paid to the work of academic institutions, mainly universities but also independent research institutions such as the British Institute of International and Comparative Law in London, which has been a major contributor and catalyst to comparative legal research for over 60 years. These have

teaching and research activities and produce publications. Today in the United Kingdom publishing houses provide a major platform for comparative law scholarship. Scholars from around the world convene seminars and workshops and then they have their fruits disseminated by these publishers. The research may not take place in the UK, but the UK is the base for its editing and dissemination. In addition, publishers with their own series, such the Hart series on constitutional systems of the world [5] and on comparative public law [6] or the *Oxford Handbook* series [7], actively commission comparative work from scholars from around the world. The work of publishers enhances the vitality of the research which goes on in the UK. More recently, with the substantial increase in online workshops and seminars, such as those organised by the British Association of Comparative Law, [8] scholars from around the world are convened to undertake research together without a physical association with the United Kingdom. Furthermore, it needs to be remembered that the hiring patterns for academics within UK universities are different from many other European countries. University academics are not civil servants and there is no national set of standards for recruitment. There is no *Habilitation* or *agrégation* process. Universities hire whomsoever they want. Those who are hired need not have a degree in any of the legal systems of the UK. This flexibility has enabled UK universities to recruit highly talented colleagues from around the world who are not UK nationals and who bring a diversity of wider legal experience to enrich the UK research environment. This has been particularly helpful in comparative law because such individuals will often bring knowledge of their own legal system (and a wider fluency in languages other than English) as a starting point for comparison with the laws of the UK. The traditional model of UK-educated common lawyers studying 'foreign' legal systems and drawing comparisons is no longer typical. Scholars based in the UK may actually be natives of a wide variety of non-UK legal systems. All these developments show that the dynamics of comparative law research are changing, and that ideas of a nation-specific tradition or pattern of comparative law research are actually fluid and need re-thinking. The presentation of a nation-specific UK pattern of comparative law research which follows needs to be understand within this broader perspective.

1. European comparisons

5 Comparisons of the United Kingdom with other parts of Europe take two forms. On the one hand, there are comparisons between the UK (often just England) and one or two other specific European countries (1.1). On the other hand, there are comparisons between the UK and supranational European legal systems – the European Union and the European Convention (1.2). The former is concerned with understanding similarities and differences between national legal traditions in addressing common problems of government and public policy. The latter is concerned with how the United Kingdom matches up to uniform legal rules and principles established at a transnational level. As has already been said, this is likely to be an issue of increasing importance. But it is not only the increasing legal importance of the second approach which determines its attractiveness to scholars. A major reason of growing importance of a focus on comparison with transnational law is the weakness of knowledge of European languages within the United Kingdom. The British Academy has been reporting on this issue for nearly twenty years without making any impression on the school curriculum.[9] The result is that, although the internet now makes a huge improvement in the accessibility of legislation and judicial decisions from different European countries, British-educated (and particularly English-educated) legal scholars are less likely to have the linguistic ability to study these foreign sources in their original language. By contrast, EU law and ECHR law are readily available in English, as is a large body of scholarship, even by scholars who are not themselves based in the UK. It is therefore very likely that the second form of scholarship will predominate increasingly in coming years.

1.1. Cross-national comparison

6 The comparison between different European legal systems is very old. Among the earliest public law comparisons were those of Dicey. Dicey's *An Introduction to the Law of the Constitution* in 1885[10] had long discussions about French and Belgian public law, especially the French *droit administratif* and the Belgian constitution. But there are also references to German scholarship in comparative law. In

lectures which have only been published in recent years, Dicey showed that he undertook research of considerable depth into French and German public law, especially administrative law.[11] The focus on French administrative law continued to dominate until the 1980s. It reached its zenith perhaps when the Vice-President of the Conseil d'Etat was invited to give evidence to the public inquiry into the control of governmental power and the role of the courts in 1956.[12] Comparison between English administrative law and French administrative law gave rise to a number of books in that period, notably by Hamson from Cambridge University and Brown and Garner from Birmingham and Nottingham universities respectively.[13] These were general works which had the objective of providing a broad introduction to the French administrative law system with the purpose of encouraging reflection on English (and more generally UK) administrative law which was really in its infancy. The French legal system offered an example of a developed and coherent system of rules and principles which contrasted with the fragmentary and unsystematic pattern of English law before the reforms of 1977. Works of this substantial kind continue, primarily connected with the present author. But the purpose is now less to offer lessons for the development of English administrative law. Its purpose is much more to discover general principles relating to the control of the administration which are shared between the two countries and to understand the factors which lead to divergences between them.

7 Although comparison with French administrative law is the older topic, comparison with French constitutional law has developed since the 1980s, particularly because of the role of the Conseil constitutionnel as a constitutional supreme court. In particular, there have been books by an English-educated scholar (the present author) and a French-educated scholar based in the UK, Sophie Boyron.[14] Much of the work here is predominantly explanation of how the French constitutional system works and why it is distinctive. There is more limited space given to comparison with the UK because of the distinctive institutional structures in the UK. All the same, explanation of French law to a UK-based readership involves a significant element of comparison, since it draws out the features which are most different between the two.

8 Whilst scholarship on French law is the most substantial, in recent years there has been a significant effort to broaden the range of countries about which scholars write. As exemplified by Boyron, the UK has been able to recruit talented foreign scholars to work in its universities. She is among a number of scholars who have contributed volumes to the Hart Publishing series on *Constitutional Systems of the World*, edited by Peter Leyland, Andrew Harding, Benjamin Berger, Rosalind Dixon and Heinz Klug.[15] The series includes presentations of the constitutional laws of Austria, Belgium, Finland, France, Germany, Ireland Italy, Poland, Romania, Russia, Spain and the United Kingdom. Most of these short works make this information available to an English-speaking audience. For the most part, they are not very comparative and are written by scholars based in the country in question.[16] Henderson (UCL) on Russia and Boyron (Birmingham) on France are exceptions as authors based in the UK, but writing on other countries. This very valuable series demonstrates the importance of the English language as a medium for the broad dissemination of studies.

9 The linguistic importance of English may help to explain why comparative topics undertaken by scholars who are not based in the UK are published by UK publishers. To take a recent example, Kettemann and Lachmayer's collection, *Pandemocracy in Europe*[17] examines the powers of parliament and executive in dealing with the Covid crisis across Europe. It has seven case studies: UK, Germany, Italy, Sweden, Hungary, Switzerland, and France. These are written by scholars in those countries and then there are comparative conclusions and analysis. This work is one many which illustrate that comparative public law is often written in English and published by UK publishing houses in order for it to be accessible for a world-wide audience. So the linguistic limitations of British-educated scholars is compensated by the importance of the English language as the major medium for the publication of comparative law.

10 This choice of English as the medium for disseminating comparison is seen in major works on comparative constitutional law. Rosenfeld and Sajó's *Oxford Handbook* on the topic[18] is a major achievement covering a wide range of topics from rights to constitutional institutions. Very few of the excellent scholars who contributed to this volume work in the UK, yet this must be one of the major reference

points in the field today available in English from an English publisher. The convening power of international scholars working with UK publishers to bring some of the world's leading scholars to work together provides perhaps the major contemporary platform for comparative public law in the United Kingdom.

11 The format of the Kettemann and Lachmayer volume is typical of many works of comparative law. It involves bringing together scholars from different legal systems to discuss a common topic with the aim of producing not only summaries of those different laws, but drawing conclusions on whether there are general principles and identifying what may be salient reasons why some or all of the systems are similar or different. This format is not peculiar to public law, but is particularly effective when the institutions of different legal systems differ so much.

12 The importance of the English language is shown by some of the journals which regularly publish comparative public law material. The most notable is *European Public Law* which has been edited from the University of Hull since its foundation by Professor Patrick Birkinshaw in 1995. This has regularly published short articles on recent developments and longer articles on issues related to national public law in Europe, both constitutional and administrative law.

13 Other monographs and articles on comparative law reflect the linguistic abilities and interests of particular individuals. Among works which could be cited include the work of Dupré (Aberystwyth and Exeter) on the importation of constitutional ideas of human dignity mainly from Germany into Hungary.[19] She has also edited a collection on Icelandic constitutional reform.[20] Fairgrieve (originally Oxford and now BIICL) and Harlow (LSE) have published substantial works on state liability concentrating on comparisons between English and French law.[21] Turenne (Cambridge) has published on judicial appointments and independence in a variety of countries.[22] Each shows the significance of individual interests in countries and topics within public law.

14 Place of Public and Private law.
In the United Kingdom, there are very few specific centres of comparative public law, and scholars are spread over a range of institutions. By contrast, in private law, there are some centres which are

with a substantial number of scholars, such as the Oxford Institute of European and Comparative Law. The British Institute of International and Comparative Law (BIICL)[23] in London has been a major centre of comparative law scholarship since 1960. Its work covers both comparative public law and comparative private law. It would be fair to say that much of its work over the years has been in private law, e.g. consumer law and commercial law. But it has also had public law projects, especially on human rights. More recently, with the creation of the Bingham Centre for the Rule of Law within the British Institute, there is significant attention to rule of law and governance issues.[24] Its interests extend beyond Europe, but pay significant attention to Europe.

1.2. Comparison with transnational European laws

15 Much contemporary comparative research is conducted in relation to transnational European laws. One major question is how far the UK has been able to receive and be transformed by the laws of the European Union or the European Convention.[25] The discussion of the approach of national courts to the application of such European laws may be general, as in the work of Bjorge (Bristol),[26] or on a specific topic such as human dignity.[27] The detailed study of Bjorge shows the way in which the study of national legal systems can illuminate the emergence and extent of a really transnational legal order in Europe. The existence of the right of individual petition has enabled citizens to challenge the application of the Convention in the domestic legal order and to mark out the conflict which may exist between European and domestic norms and practices. The incorporation of the European Convention into domestic law has occurred differently in different countries. The advantage of national case studies is that they can test out whether this really makes much difference. Each country has its own constitutional traditions and traditions of legal interpretation. The case studies also test how far these might act as barriers to effective implementation of treaty obligations. Bjorge examines French, German and English domestic laws as they apply principles like proportionality and autonomous ECHR concepts. His conclusion that these national courts go far in

avoiding friction with the Strasbourg Court. In this they are acting as 'faithful trustees' of Convention rights, interpreting it honestly and in good faith, and usually in line with the jurisprudence of that transnational Court.[28] All the same, studies of specific topics, such as human dignity may show the influence not so much of European Convention law on domestic law, but the influence of particular national legal systems which have a high reputation and which may also go out of their way to purvey their influence to others. This is particularly shown by the work of Dupré on the influence in Hungary of German ideas on human dignity, which was stronger in a direct way than the European Convention case law.[29]

16 Similar approaches to European Union law can be equally insightful. For example, Zahn[30] (Strathclyde) wrote a study on the way trades unions in a number of specific 'old' EU countries (Austria, Germany, Ireland, Sweden and the UK) reacted to the enlargement of the EU in 2004 and 2007. Their influence on domestic laws shows how far EU free movement of workers could be applied not just as a result of political decisions, but also because of the influence of policy actors. Authors not based in the UK have published major works on comparative public law in the UK. Tuori[31] examines the way in which national constitutional debates interacted with developments in EU constitutionalism. It shows the importance of an alignment between national and transnational opinion for the advancement of the EU constitution. Van Gestel and de Poorter have studied the problems of national supreme administrative courts in their dialogue with the Court of Justice of the European Union.[32] Such work included interviews with national judges. Their conclusion is that the preliminary reference procedure as conducted by the Luxembourg court is not really a 'dialogue', which challenges the perception which that court like to portray of the process. Even in general EU law, discussion of national situations illuminates the EU law and identifies areas where national resistance is likely to be found.[33]

17 Often comparison may include both EU and ECHR law, for example in the study of proportionality or legitimate expectations.[34] The same has been true of the comparison of state liability.[35]

2. Common law comparisons

18 The common law tradition involving in particular England, Ireland, Canada, Australia, New Zealand, and, for these purposes, Scotland, Malaysia, and South Africa has been an increasingly active forum of debate. Because they were administered as parts of the British Empire, there was a close connection between the administrations of the different countries and this persisted, even after independence. Particularly where countries are federal, they may have significant differences from Britain in their modern constitutional and governmental organization. But there is still a significant commonality in traditions and approaches that they can be seen as having a sufficient family resemblance to enable fruitful debate and mutual understanding in difference. Other common law countries have developed differently, especially in constitutional structure and in the activeness of the judiciary in relation to Government. In particular, one would single out the United States, India and Pakistan.

19 The increasing importance of comparison within the common law is demonstrated by the work of Taggart.[36] He convened discussions among scholars from different common law systems to examine the state of administrative law and the values which underpinned it. This has now been carried on by the 'Public Law Conference'. The volumes of essays from the first three conferences[37] demonstrate the ease of debate between lawyers from different common law jurisdictions, but also the differences which constitutional and institutional traditions bring to the way issues are handled. The differences extend also to doctrines, such as 'jurisdictional error', 'legitimate expectation' and 'proportionality'. Reasons can be offered for these specific differences. But Saunders suggests that there is a fundamental unity in this diversity and offers three reasons: 'the trajectories of legal and political developments in relation to public law; the cross-fertilisation of legal experience between common law jurisdictions; and…the equilibrium of common law doctrine, in which, despite often apparently dramatic developments, a broadly similar state is often maintained.'[38] Within this common law tradition, the American material is not only accessible in terms of language, but also in terms of its broad conceptual structure, even if there are also radical differences.[39] The same would be true of India and Pakistan. Within such a nexus, the

character of the discussion goes well beyond documenting similarities and differences between rules (2.1). Rather, the debate seeks to identify solutions to what are perceived as common problems arising not only from a common inherited legal and administrative tradition, but also in the application of common values (2.2).

2.1. Cross-national comparisons

20 Comparisons between specific countries has been frequent throughout the history of the common law. But one has to distinguish between citations of decisions or legal provisions from other common law jurisdictions and fully developed comparison. The former really belongs in the second section of this Part as an example of the search for common principles.

21 Particularly since 1945, US law has been a point of reference in the UK common law world not only for constitutional law (especially the judicial protection of fundamental rights), but also in administrative law, both as a source of inspiration for different ways of governing and also of well-developed public law scholarship, especially at a time when universities in other common law countries were not fully developed in this area.[40] A common pattern of comparative works, similar to cross-European studies, involves the use of specific national case studies. So, for example, in a study on religious freedom in the liberal state, Ahdar and Leigh examined Australia, Canada, New Zealand, the USA, the UK and the Council of Europe.[41] Conclusions in this area of fundamental rights may be more amenable to drawing out common principles or ideas. But, as here, the conclusion is more often that there are similar questions achieving different answers in terms of rules and institutional practices. All the same, issues of fundamental rights frequently compare the UK and the US with other comparisons from within the common law family or from the European Convention.[42] A good example of divergence within the common law lies in the role of supreme courts in relation to the legislature. Chandrachund's study of India and the UK was originally a doctoral work in the UK, but it reveals a radically different and activist role for the supreme court in India, with its *suo moto* actions, compared with the deference shown in the UK but its supreme court.[43]

22 Once institutions are the main focus, then the focus is more on similarity of questions, rather than of similarity of solutions. Craig and Tomkins studied the extent to which the executive is controlled by and is accountable to the legislature in Australia, New Zealand, Scotland, the USA and the UK, as well as in a few European Union countries.[44] The purpose was to draw out whether there are common themes and mechanisms of control, rather than to develop specific common rules, which would not be possible because of the constitutional and institutional differences between countries. The delegation of powers to private actors would be another institutional practice which gives rise to differences even within the common law.[45] This applies not only to governmental and regulatory institutions, but also those bodies involved in adjudication of disputes brought by citizens against the administration. Such disputes are handled in the common law not only by courts, but also by tribunals and the comparison of these shows significant differences within the common law world.[46]

23 It is in these areas of institutional and policy divergence that empirical research is sometimes undertaken. Because of the difficulties of collecting and understanding data (especially the necessary contextual information needed for understanding), language is a significant issue. Much of the comparative empirical research is conducted within the common law family of legal systems.[47] But interview research has been conducted by Mak and Marique and they have been able to span both common law and continental European systems.[48]

2.2. Seeking general principles

24 In his recent book *Understanding Administrative Law*,[49] Daly seeks to organise the principles of judicial review of administrative action around four values: individual self- realisation, good administration, electoral legitimacy and decisional autonomy. In his view, these represent 'the core features of judicial review of administrative action, those which are common to multiple jurisdictions'.[50] In particular, he studies in depth Australia, Canada, England and Wales, Ireland and New Zealand as leading common law jurisdictions. The author is well aware of the constitutional and institutional differences

between these different countries. But he considers that they share sufficient in terms of common values, common legal concepts and procedures to provide a solid foundation for general common law principles of judicial review to be discerned. Such an approach follows the path trodden by a number of common law scholars in recent years. [51] There is a significant body of comparative research on general principles and specific elements of the judicial review of administrative action. In this field, the basic principles and case law are sufficiently common that lawyers from one system read the materials from another with ease and even cite them without much need to refer to differences in the legal context in which judicial review operates in different systems.

25 When it comes to constitutional law, matters are different. Dixon and Landau have warned of the danger of abusive constitutional borrowing. Norms and institutions from one legal system can be taken into another in ways that are superficial, selective, acontextual and distorting the purpose which the original item borrowed serves in its original jurisdiction. [52] At the same time, the common heritage may make borrowing and common development legitimate and plausible. In particular, this may apply to fundamental rights. The first reason is that common institutions and people have shaped more than one of the jurisdictions. Although now very limited in its jurisdiction, the Privy Council provided for much of the twentieth century a common supreme court for many countries in the Commonwealth. Although it did not cover the United Kingdom, its members were largely the same as those of the House of Lords, so the two courts tended to operate in step with each other. In addition, until the strong growth of Canadian, Australian and New Zealand universities in the last third of the twentieth century, it was common for able scholars from these countries to undertake masters or doctorate programmes in English universities, notably the University of Oxford with its Rhodes Scholarships. These built a degree of commonality in thinking which is now translated into dialogue between scholars and courts. All the same, it is notable that there has been an increasing growth of distinctive thinking in the different leading common law countries, not least in constitutional law where choices about federalism and the entrenchment of Bills of Rights have been taken in different ways. [53] As Daly makes clear, similarities exist around a

number of values, including the rule of law which provide the basis for a fruitful comparison between common law legal systems.

26 Apart from judicial review, topics which have proved particularly amenable to finding common principles and approaches across the common law jurisdictions of Australia, Canada, Ireland, New Zealand and the United Kingdom include the interpretation of constitutions [54] and statutes [55] as well as judicial activism. [56] More modern issues such as environmental rights have equally been explored with a view to developing general principles. [57]

Conclusion: the place of comparative law in judicial decisions

27 Although much comparative law activity is undertaken by scholars, in the common law world impact depends in no small part on the reception and use of comparative materials by judges. The comparative law literature is sceptical that foreign decisions from outside a cognate legal family have much influence on judicial decisions. Gelter and Siems [58] and Groppi and Pontoreau [59] have developed data on the use of citations by supreme courts in Europe, the former being more sophisticated than the latter. Both point in the direction that judges will be comfortable making use of arguments from cognate systems (Ireland-UK, or UK with common law), rather than with other legal systems. This very much reflects what is found in public law cases. There is frequent reference to common law courts in other countries, occasional reference to the European Court of Human Rights (and in the past to the European Court of Justice), but very rarely to the national courts of other European states.

28 Groppi and Ponthereau [60] conclude that judges are more likely to cite foreign precedents in cases about human rights than about the institutions of government. Human rights norms have more obvious claims to be universal, not only because there are international law reference points. The human condition and values such as human dignity are not specific to particular countries. By contrast, the roles of presidents and legislators can be very specific. This would be borne out in the UK setting where decisions on fundamental rights from Canada, the US and the European Court of Human Rights are

often cited, but not in relation to topics like the separation of powers or the institutions of government. This is borne out by Mak in her interviews with UK and other judges. They are likely to be influenced through what they perceive as their engagement as 'partners in a common judicial enterprise'. [61]

29 Andenas and Fairgrieve have suggested that comparison may go further to cover common problems more generally. [62] But this is difficult to establish and the examples they quote mainly return to the use of common law and European Court of Human Rights decisions. Bobek rightly notes that comparative law may be cited in novel or complex cases where national rules may be unclear, unsatisfactory or be lacking. [63] Foreign law serves as inspiration in this context. But, if materials are merely inspiration, then they are not essential to be included as references. Reading such materials does constitute intellectual engagement, but citing them has another purpose – it serves to add authority to the decision reached or to the decision-maker. Mak quotes a French judge who drew the analogy with scaffolding. Foreign law provides inspiration whose presence may be obvious during the construction work, but once the building is complete, the scaffolding is taken down and it leaves no trace of its presence in the structure of the completed building. [64] Bobek rightly points out that judges will not always cite everything they have read. The material may be left out because, if it is only a supporting argument, it adds little and may make the argument more vulnerable to attack. [65] Bobek notes that continental European courts tend to prefer foreign law that has been subject to scrutiny by academic authors, [66] and the same is true of the UK. UK courts will receive submission from counsel for each side and will not undertake much independent research themselves. It will be rarely that they are presented with foreign judicial decisions. The studies undertaken do not suggest that the parties' lawyers are able or willing to provide presentations of foreign law which are sufficiently comprehensive and objective. Judges have good reason to be sceptical about the quality of what they are being presented. Reliance on decisions of Strasbourg or Luxembourg, rather than national courts reflects the ability of these courts to sift through national decisions and find what is reliable and representative. [67]

30 I have suggested elsewhere that it is best not to seek uses of foreign law as independently weighty justifications for a judicial decision. [68] The accumulation of reasons may provide a reinforcement of a particular result, adding weight or lustre to available domestic legal arguments. So it is not so much that a foreign judgment supplants a domestic judgment, but that it enhances the standing of existing domestic options. Mak's analysis based on interviews confirms this picture. She suggests that

> Judges with an interest to learn about non-binding foreign legal sources can be found in all of the examined highest courts. However, the judges generally consider the usefulness of comparative law for judicial decision-making should not be over-rated. [69]

31 But she also comments that they are discussed internally in the court more than is apparent from the citations available in the judgment. [70] In brief, comparative law is an influence but not a determining one in UK judicial decisions, unless it comes from a familiar source, mainly in the common law. Scholarly comparative law, which is substantial and thriving, contributes in a more indirect fashion to create an environment in which some decisions become thinkable.

NOTES

1 See https://www.oecd.org/governance/

2 See W. L. Megginson and J. M. Netter, 'From State to Market: A Survey of Empirical Studies on Privatization' (2000), https://www.oecd.org/daf/ca/corporategovernanceofstate-ownedenterprises/1929649.pdf.

3 *Human Rights Act Reform. A Modern Bill of Rights*, CP 588, December 2021.

4 *R (on the Application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; *R (on the Application of Miller) v Prime Minister* [2019] UKSC 41 J. Bell, 'La Cour suprême au Royaume-Uni et le *Brexit*', *Revue française de droit administratif* 2017, 1.

5 https://www.bloomsbury.com/uk/series/constitutional-systems-of-the-world/

6 https:// www.bloomsbury.com/uk/series/hart-studies-in-comparative-public-law/

7 M. Reimann and R. Zimmermann (eds.), *Oxford Handbook of Comparative Law*, 2nd ed., Oxford, Oxford University Press, 2019; M. Rosenfeld and A. Sajó (eds.), *Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2012; P. Cane, H. Hofmann, E. C. Ip and P. L. Lindseth (eds.), *Oxford Handbook of Comparative Administrative Law*, Oxford, Oxford University Press, 2020.

8 https://british-association-comparative-law.org/

9 See British Academy, *Languages in the UK. A Call for Action*: https://www.thebritishacademy.ac.uk/documents/61/Languages-UK-2019-academies-statement.pdf.

10 A. V. Dicey, *An Introduction to the Law of the Constitution*, edited by J. W. F. Allison, Oxford, Oxford University Press, 2013.

11 A. V. Dicey, J. W F. Allison, *Comparative Constitutionalism*, Oxford , Oxford University Press, 2013.

12 See J. Bell and F. Lichère, *Contemporary French Administrative Law*, Cambridge, Cambridge University Press, 2022, p. 2. See generally, J. Bell, 'The Role of Doctrinal Writing in Creating Administrative Law: France and England Compared' (2018) 15 *Glossae* 140-154.

13 J. Hamson, *Executive Discretion and Judicial Control: An Aspect of the French Conseil d'Etat*, London, Stevens, 1954; L. N. Brown and J. F. Garner (with the help of N. Questiaux), *French Administrative Law*, 1st ed., London, Butterworths, 1967.

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RÉSUMÉS

English

In the UK, comparative law is an influence but not a determining one in judicial decisions, unless it comes from a familiar source, mainly from the common law. Scholarly comparative law, which is substantial and thriving, contributes in a more indirect fashion to create an environment in which some decisions become thinkable to judges and legislators. In the current atmosphere of a retreat from European-wide legal rules, comparing different national legal systems will be more influential than the appeal to pan-European standards in both judicial decisions and in inspiring legislation.

Français

Au Royaume-Uni, le droit comparé n'a qu'une influence négligeable sur les décisions de justice, sauf lorsque les références sont puisées dans des systèmes juridiques voisins, relevant de la tradition de common law. Par contraste, les travaux doctrinaux en droit comparé sont importants et florissants, et contribuent, bien que de façon indirecte, à créer un environnement susceptible d'influencer la pensée des juges et du législateur. Dans le contexte actuel de recul de l'influence européenne, la comparaison des différents systèmes juridiques nationaux aura davantage d'influence que la référence à des standards juridiques européens sur les décisions juridictionnelles et sur la législation.

INDEX

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