Foreign jurisprudence as a persuasive authority
Judicial Comparativism at the UK Supreme Court

Dr Hélène Tyrrell
The judicial use of foreign precedents has received relatively little attention in the UK context, yet foreign jurisprudence is cited in around one third of the UK Supreme Court’s decided cases.

**The status of foreign jurisprudence**

UK Courts are under no duty or obligation to follow the decisions of a foreign domestic court, but neither are these sources prohibited. In the absence of any guiding principles, the authority of foreign jurisprudence is merely persuasive. In human rights cases, the Human Rights Act 1998 provides that courts must ‘take into account’ the jurisprudence of the European Court of Human Rights (ECtHR) in Strasbourg. The Act is silent on the use of jurisprudence from the domestic courts of other jurisdictions.

**Foreign jurisprudence at the UK Supreme Court**

Foreign jurisprudence is used extensively by the UK Supreme Court in a range of areas and is deeply integrated into judicial reasoning. The judgments of foreign domestic courts can be valuable empirical tools, or heuristic devices. Of the 533 cases handed down by the Supreme Court in the first eight years, explicit citations of foreign jurisprudence were found in 157, just under 30 per cent of the total.

![Figure 1: Cases citing foreign jurisprudence as a proportion of all cases decided each legal year.](image-url)
Foreign jurisprudence remains a non-binding source of law, but it represents an aid to judicial reasoning that would be unfairly characterised as merely ‘persuasive’. These sources can be viewed as logical, empirical, tools, which serve a wide range of functions.

Thus the Supreme Court seems to be neither reluctant nor overly keen to have recourse to comparative law. There is also no consistent pattern of individual foreign jurisprudence citations. The Supreme Court cited 671 decisions from foreign domestic courts between 2009 and 2017, peaking at 129 in 2010-11 and dropping to 48 in 2011-12 (figure 2).

Figure 2: Total number of foreign cases cited by the UK Supreme Court, 2009-17.

Citations of foreign jurisprudence are mostly drawn from a small family of courts (figure 3). Australia, the United States and Canada were the most commonly cited jurisdictions between 2009 and 2017, referenced in 54 per cent, 47 per cent and 45 per cent of all cases making reference to foreign jurisprudence. Other common law jurisdictions followed, with fewer cases referring to courts working in civil law or mixed legal traditions.

Figure 3: Number of UK Supreme Court cases citing at least one decision from given jurisdiction, as a percentage of all cases making reference to foreign jurisprudence, 2009-17.
Foreign jurisprudence as a persuasive authority

Those who are sceptical about the legitimacy of citing foreign jurisprudence worry that courts are likely to use it in an unprincipled and unsystematic way. The risk is that foreign jurisprudence could mask judicial creativity or obscure political judgments. But that overlooks the fact that foreign jurisprudence is not generally used as a ‘magical ace of trumps’.

The purpose and legitimacy of foreign jurisprudence in judicial reasoning

The lack of clear guiding principles has given rise to some debate about the legitimacy of using foreign jurisprudence. Judges are occasionally suspected of using foreign jurisprudence which is likely to support their own predetermined conclusions, or as a means of ‘judicial fig-leafing’, designed to obscure the reality of judicial choice.

Concerns about legitimacy usually stem from a fear that courts could use foreign jurisprudence in an unprincipled and unsystematic way. If that is the case, the risk is that foreign jurisprudence may mask judicial creativity or obscure political judgments. In other words, it is uncertainty about the reasons for using foreign jurisprudence that creates the conditions for criticism.

Reasons for citing foreign jurisprudence

The Justices rarely articulate the reasons for citing foreign jurisprudence in their judgments but analysis of the Supreme Courts’ case-law pointed to three main purposes for using foreign jurisprudence:

1. Foreign Jurisprudence as a Heuristic Device:
In the main, foreign jurisprudence provides the Justices of the Supreme Court with a fresh perspective—an analytical lens—through which to reflect on their own reasoning about a problem. The heuristic uses are distinct from the ‘gap-filling’ thesis offered by much of the literature (that foreign jurisprudence may offer a useful perspective where the indigenous jurisprudence is lacking or unsettled). While it is fairly clear that counsel tend to approach foreign jurisprudence in this way, it was not possible to find clear evidence that judges do so.

2. Foreign Jurisprudence Used for Consistency:
Where there is no supranational court jurisprudence (for example, in relation to the interpretation of the 1951 Convention Relating to the Status of Refugees), it is up to the contracting states to work in harmony, balancing the interpretation of the instrument according to common developments with a measure of self-regulation, so that the courts do not attach a meaning to the instrument that was not envisaged by all contracting parties. In these cases foreign jurisprudence may appropriately be of equal or greater importance than the domestic case law, irrespective of the nature or absence of domestic jurisprudence.

3. Instrumental Uses of foreign jurisprudence:
The Supreme Court has used foreign jurisprudence to support conclusions that are at odds with the relevant supranational jurisprudence. In other words, the Justices appear to use foreign jurisprudence instrumentally, to legitimate a particular result. It is these types of uses that have attracted the most criticism but this instrumentalism does not appear to be driven by political concerns. Rather, foreign jurisprudence can assist the Supreme Court to enter into dialogue with supranational courts, such as the European Court of Human Rights (and may provide a useful perspective to the Strasbourg Court in its own review).
The human rights framework might yet change. For example, a replacement British Bill of Rights might be explicit about directing UK judges away from the jurisprudence of the Strasbourg Court. If the link to the supranational jurisprudence is removed or diluted, a broader comparative outlook could become more important.

Judicial Individuality

Since there are no rules governing the use of foreign jurisprudence in the UK, the Supreme Court has been willing to use comparative sources where it is thought to shed light on an issue or provide a useful benchmark against which to measure domestic law.

The discretionary nature of these sources means that individual judicial attitudes and approaches play a large part in their use. Some Justices were known to have a greater interest in comparative law than others. More specifically, some Justices were known to have an interest in certain jurisdictions. Aside from Lord Mance’s reputation for interest in German law, reference was frequently made to Lord Collins, who was well known for using American authority. Other Justices expressed confidence in other languages or frequently engaged with the judges from top courts in other countries. The prevalence of citations of foreign jurisprudence from other common law countries was often explained on this basis. One of the clearest conclusions from this research is that the Justices continue to take individualised approaches to judicial reasoning.

Figure 4: Judgments referring to foreign jurisprudence as a proportion of total cases heard, where at least one foreign judgment was cited by the court.
The prevailing fear about judicial comparativism in other jurisdictions has been that comparativism might import foreign standards that were not intended or anticipated by the domestic legislature. But in the UK the situation is reversed. The prevailing fear is that the provisions of a domestic statute—the HRA—are responsible for an overly deferential attitude to the European standards.

In Convention cases, the Supreme Court has the peculiar task of achieving compatibility with an international instrument, without compromising the domestic character of human rights. In this context, the jurisprudence of foreign domestic courts provides the Supreme Court with the opportunity to measure the Strasbourg case law and support departures from it where necessary.

Paradoxically, it is the jurisprudence of foreign domestic courts that may enable the Supreme Court to realise its full potential: to develop the domestic law of human rights that many hoped the Human Rights Act would foster.

**Key Points**

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The data and graphs in this briefing can be found in: Hélène Tyrrell, *UK Human Rights Law and the Influence of Foreign Jurisprudence* (Hart 2018).

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