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The Challenge of Comparative Law

Lord Steyn*

A. Introduction

It is a great privilege to address this distinguished gathering. It is less certain that my selection as a speaker was wise. One antecedent will illustrate my point. A few years ago in *MacFarlane v. Tayside Health Board*[1] a case came before the House of Lords about a failed sterilisation operation which resulted in the birth of a perfectly healthy child. The parents claimed the financial cost of bringing up the child. In a case in which there was a substantial review of comparative law materials the members of the House of Lords, for bewilderingly different reasons, dismissed the action. The decision attracted strong academic criticism in the United Kingdom. Professor Thompson of Glasgow University was very severe on my colleagues. He said they had forgotten the basic principles of law of tort or delict. I thought he was going to say that my judgment was a notable exception. Not a bit. He said I had abandoned the law altogether.

B. The Link Between Common Law and Civil Law

The story of comparative law studies is a long and diverse one. I come from a mixed or hybrid legal system – South Africa – which represents a blending of the common law and civil law legal cultures. In the United Kingdom where I settled 33 years ago, there are four law districts: England, Wales, Northern Ireland and Scotland. Voltaire said that England is the land of liberty. The spirit of liberty is the dominant theme of the common law. Whatever is not specifically forbidden, individuals and their enterprises are free to do. By contrast the government and its agencies may only do what the law permits; what is done in the name of the people requires constant examination and justification. England is pre-eminently the land of the pragmatic common law tradition of judge made law. It represents a legal tradition nowadays associated with nearly half the industrialised legal world. On the other hand, the roots of the law of Scotland lie in the very different civil law tradition, closely identified with nearly another half of the industrialised world. In England this legal culture is often linked with codes and statute based law. Scotland has a mixed legal culture. In the period 1675-1725 in particular

* A Lord of Appeal in Ordinary from 1995 – 2005; now a member of Essex Court Chambers, 24 Lincoln's Inn Fields, London WC2.

1 [2002] 2 AC 59.

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Scottish lawyers were frequently educated at Dutch universities such as Leyden and Utrecht. In this way the civil law left an indelible imprint on legal education and practice in Scotland. And private law is, of course, at the heart of a legal culture. James Boswell, the biographer of Samuel Johnson, came to Utrecht to pursue his civilian legal studies. It is interesting to observe that Johnson also appreciated the value of comparative law. He said that a generous and elevated mind is distinguished by nothing more certainly than an eminent degree of curiosity; nor is that curiosity ever more agreeably or usefully employed than in examining the laws and customs of foreign nations. The link between Utrecht and Scottish law is substantial. And in this way English lawyers received, somewhat indirectly, a measure of education in civil law traditions. After all, there are always two Scots Law Lords out of 12 in the House of Lords. It sometimes seems that their influence has been disproportionate to their numbers.

C. The Application of Comparative Law Methods

In an era of economic globalisation the conditions for applying comparative law methods in academic analysis and in legal practice have become more and more propitious. The rapid expanse of information technology has, subject to some language barriers, made access to comparative law sources far easier. Comparative law studies now proliferate at European universities and elsewhere. There has been an explosion of academic literature on comparative law in Europe and worldwide. This has been accelerated by the continuing process of the integration of European legal culture. At an earlier stage the United Kingdom stood somewhat aloof from this process but in recent years the integration of the United Kingdom into the legal culture of Europe has – whatever eurosceptic politicians may say – become greater year by year. In these circumstances it is not surprising that English judges, like their continental colleagues, regard comparative law as an essential tool in adjudication. Courts now are not only willing to consider comparative materials but expect practitioners to research and produce such materials. Usually, lawyers in our highest court are equal to this task but not always. Among lawyers the outlook in Europe is generally internationalist.

I do not, of course, suggest that there are not also isolationist forces at work. In the United States Supreme Court a narrower philosophy has sometimes attracted powerful support. The high watermark of this isolationism must be the observation of Justice Scalia in *Lawrence v Texas*[2] that the Supreme Court "should not impose foreign moods, fads or fashions on America." There are, however, contrary views in the US. There is, in particular, another view encapsulated by Judge Guido Calabresi: "Wise parents do not hesitate to learn from their children", in *United States v. Then*.[3] I would like to believe that the trend is in favour of the utility of comparative law method.

The difference between the European and US perspective is important. In the jurisprudence of the European Court of Justice and the European Court of

[2] 123 S.Ct 2472 (2003).
[3] 56F. 3rd 464 at 469 (2nd Cir 1995).

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Human Rights comparative law has been given formal recognition. The approach generally prevails that autonomous concepts are developed using the building blocks of national law. The Court of Justice refers to the "legal traditions", the "constitutional traditions", "the legal orders", the "legal concepts" or "common legal principles" of member states. In practice the European Court of Human Rights goes even further. It relies on national case law on the European Human Rights Convention. On those grounds alone one can confidently assert that comparative law has come of age.

It is perhaps useful to consider the purpose of comparative law studies. It is an intellectually demanding academic discipline. It deserves study in its own right. It also affords valuable insights to a lawyer into the fundamental principles of his own national legal system or international instruments. It is always valuable for lawmakers and judges to make informed choices. Much is to be learnt from experience in other countries, particularly when they share similar cultural values. While total convergence of private law is unattainable the tendency towards convergence is likely to continue. In those circumstances the practical value of comparative law methodology is likely to become ever greater.

D. The Real Function of Comparative Law

A more sophisticated understanding of the function of comparative law has emerged. The aim is decidedly not to arrive at some sort of poll of the solutions adopted in a majority of jurisdictions. The real function of comparative law in practical jurisprudence is to throw light on the competing advantages and disadvantages of feasible solutions thereby showing what in the generality of cases is the most sensible and just solution in a difficult case. It enables courts to re-examine the merits and demerits of legal institutions in a rigorous manner. It arises when in accordance with principles of institutional integrity a judge has the option of choosing between two possible solutions. Such an enquiry must be approached from the vantage point of principled decision making. Where possible it must also be tested against empirical evidence. A good illustration of this is provided by *Arthur J. S. Hall & Co. v. Simmons*[4] in which the House of Lords, relying on empirical evidence of legal practice in other jurisdictions, decided to end the longstanding immunity of advocates from claims of negligence. This decision sent shock waves through the English legal system. It was said that the sky would fall in. Five years later my understanding is that there have been no significant adverse results. Used in this way comparative law educates lawyers beyond the parochial understanding of their own system. It enables judges better to select a solution which fits into today's world.

The context in which the use of comparative law is considered is always important. By and large, it is only possible to learn from countries which have a broadly similar ideological or philosophical basis. That should be obvious: a liberal European democracy should not follow the lead of fascist or Stalinist

[4] [2002] 1 AC 615.

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states. Thus in the field of constitutional law and public law – a particularly fruitful area for the use of comparative law – it is generally only useful to make comparisons between legal systems in which the observance of the rule of law and the pursuit of justice are respected. One would therefore hope that countries which respect the international rule of law, would not take their cue from the lawlessness of the so-called war on terrorism waged by the government of the United States of America with the unquestioning energetic support of the United Kingdom government. One would have to be a supreme optimist to think that the fracturing of the international legal order and international institutions, which has taken place, can quickly be restored. It is easier to destroy than build. The names Guantánamo Bay, Abu Ghraib, Fallujah, Hadith, and many others, will dominate thinking in the moderate Muslim world for a long time. One would have to say, in the roll call of infamy, it is right that those names should never be forgotten. Similarly, the ongoing investigation regarding extraordinary rendition, a fancy word for kidnapping, ought to remind us of what was decided about kidnapping at Nuremberg. Complacency is out of place. President Barak, the Chief Justice of Israel, said if democracy could be perverted in the Germany of Kant, Beethoven and Goethe, it can happen anywhere. Our allegiance as lawyers is to democracy through law. A legal system which accepts torture is contaminated. That allegiance can tolerate no compromises. I mention these matters to you because comparative law is not a dry as dust subject. We must engage with the issues facing a modern world, and notably the effect of the lawlessness committed in the name of the war on terrorism. If we, as lawyers, decline to be involved we must not complain if our activities are seen as lying at the margin of the true issues of the day.

E. Historical, Cultural and Structural Differences

On a different level a familiarity with historical and cultural differences between legal systems is essential for the discriminating comparative lawyer. For example, the tort system of the United States is more expansive than the tort system of Europe, whether civilian or common law based. The great comparative lawyer, the late Professor John Fleming, showed how the difference is at least in part influenced by the general rule in the United States against the recovery of costs by a successful defendant and the availability in civil cases of awards of punitive damages and treble damages by juries. Hence the difficulty of enforcing United States tort judgments in Europe. Not surprisingly, in this area the citation of US tort judgments must be approached with circumspection.

A comparative lawyer must also be alive to the structure of the domestic legal framework into which a solution suggested by foreign law must fit. Thus, in *Gregory v. Portsmouth City Council*[5] a consideration of comparative law material did not persuade the House of Lords to extend the tort of malicious prosecution to civil proceedings. Coherence militated against it: the field was by and large already covered by other torts, and, if adjustment was necessary, it could more

[5] [2000] 1 AC 419.

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appropriately take place by the development of other torts. While as a matter of judgment this factor is relevant it will not always be decisive. Sometimes the pursuit of simplicity will carry the day.

On a broader basis in seeking guidance from comparative law materials the court must always be alive to structural differences between legal systems. A good illustration is provided by *White v Jones*[6] where the House of Lords had to consider whether a lawyer responsible for the careless drafting of a will may in principle be liable in tort to a disappointed heir or legatee. The context is that in England the somewhat technical doctrines of consideration and privity of contract, which only the most die-hard common lawyers would now defend in all their rigour, appeared to rule out a solution in contract. On the other hand, in Germany a more expansive role is accorded to the domain of contract. In Germany a contractual solution is preferred. The House of Lords by a narrow majority upheld the claim in tort. In an overall assessment of the law on this point it may not be of decisive importance whether the German or English theory is to be preferred. What is, however, of great importance is that the German jurisprudence convincingly showed is that it would be contrary to the reasonable expectations of the parties and unjust to deny a remedy. To that reasoning conceptual analysis had to take second place.

F. International Commercial Law

Having mentioned some of the complexities of the subject I would emphasise that, depending on the context, the potential scope for the use of comparative law is wide. Not surprisingly, it is in the field of international trade law that comparative law in action has flowered in the form of multilateral treaties, which usually represent a blend of legal cultures. Time allows me only to mention two of the outstanding successes of UNCITRAL. The Convention on Contracts for the International Sale of Goods, which entered into force in 1988, represents a compromise between civilian and common law principles. It is now in force in 68 states. It has been applied in hundreds of court decisions. The promotion of international trade is a desirable goal. One of the impediments to transnational trade is the differences between the commercial laws of different countries. And perhaps more important than objective divergences in national laws is uncertainty as to what the laws of different countries are. Uncertainty as to the nature and scope of legal risks complicates business transactions. No convention can eliminate such differences: After all, national courts may apply the convention differently. No convention can eliminate uncertainties in its application. But the Vienna Sales Convention will tend to reduce differences. But unfortunately the convention is not yet in force in England. There is merit in the point that the United Kingdom often encourages other countries to harmonise trade law and then stands aside when it comes to adopting it as part of our law.

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[6] [1995] 2 AC 207.

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Another example is the UNCITRAL Model Law on Commercial Arbitration (1985). It is designed to assist states in reforming and modernising their laws on arbitration procedure so as to take account of the particular features and needs of international commercial arbitration, viz that arbitration is not a poor relation to court proceedings. On the contrary, it is a freestanding system, which should be allowed to settle its own procedure and to develop its own substantive law. The role of the courts is an auxiliary one, viz. to support the arbitration process whenever possible. Legislation based on the Model Law has been enacted in some 49 countries. Here the record of England is better: while it has not adopted the Model Law its Arbitration Act 1996 has been strongly influenced by the Model Law. But England was not as brave as Scotland which adopted the Model Law. Here again one witnesses the influence of the civilian tradition in Scotland.

G. Other Areas of Law

Outside the field of international trade law, there is perhaps no area in which comparative law has proved more useful than in regard to constitutional adjudication under Bills of Rights. It is necessary to make allowance for their different histories and for structural differences in the texts. But decisions of the House of Lords in the last five years since the Human Rights Act came into force are cogent testimony to the critical role that comparative law methods can and must play in this area. In a recent review I have shown how the House of Lords has been influenced by the jurisprudence of the courts of Germany, New Zealand, Canada and South Africa on their bills of rights.[7]

More broadly, the European dimension has influenced the development of English public law. It was the spur to the introduction of the principle of proportionality – at first hesitantly and then in comprehensive fashion.[8] The ancestry of the principle of legal certainty is European. It has raised our public law standards.

Comparative law methods are also useful in the interpretation of statute law even where the statutes do not have a common origin. In a House of Lords case the question arose about the cross-examination of a rape victim about her previous sexual experience with the accused or others. Parliament passed so-called "rape shield" legislation to protect the victim from unfair questioning. But a fair trial had to be ensured. In resolving this difficult issue the House of Lords was to a considerable extent influenced by the interpretation given by the Canadian Supreme Court to corresponding legislation.[9] Comparative law brought a deeper understanding of the English statute. It reflects the reality that a text has no "true meaning". All understanding of a text is the result of interpretation. This is a point of great importance since statute law is the prime source of law of our time.

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[7] Lord Steyn, *Laying the Foundations of Human Rights Law in the United Kingdom*, 10 European Human Rights Law Review 349, at 361 (2005).

[8] *R (on the application of Daly) v. Secretary of State for the Home Department* [2001] 2 AC 523.

[9] *R v. A (No. 2)* [2002] 1 AC 45.

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The capacity of legal principles to travel is enormous. A recent illustration is provided by a decision of 6 July 2005 by the French Cour de Cassation.[10] Until this decision was delivered the position was that the quintessentially English doctrine of estoppel formed no part of French law. The point arose in the context whether a claimant in an international arbitration is permitted to adopt inconsistent positions regarding an Arbitral Tribunal's jurisdiction. Unambigously, the Cour de Cassation held that the principle of estoppel is an autonomous principle of law which debars a party from adopting such inconsistent positions. It was unnecessary in such circumstances to examine whether the Tribunal had jurisdiction or not. You may ask: why should waiver not deal effectively with such cases? The answer is that waiver concentrates on the *unilateral* inconsistent behaviour of a party. On the other hand, estoppel focuses on the *reasonable reliance* of the other party. On this occasion it seems there was something of value to be learnt from the common law. The solution adopted by the Cour de Cassation ensures more comprehensive procedural fairness in international commercial arbitration.

Contract, tort, and unjust enrichment are particularly fruitful areas for the application of the comparative method. For my part, in contract England still has much to learn from the civil law. The English doctrines of privity of contract and consideration have no place in the modern law of commerce. Similarly, the large scale adoption of principles of good faith will in my view eventually have to become part of the law of England. The *Principles of International Commerce and Contracts*, UNIDROIT, Rome, 1994, Art 1-7; and the *Principles of European Contract Law*, Part 1, Art 1.06, (ed by Lando and Beale) point the way forward. While traditionally English lawyers are hostile to such ideas they more readily accept that the reasonable expectations of the parties are of critical importance. What is the difference?

A recent decision of the House of Lords on causation is a striking instance of the qualification of traditional principles in the light of wider jurisprudence. In *Fairchild v. Glenhaven Funeral Services Ltd*[11] it was impossible on the state of scientific evidence to determine which one or more of several employers, all admittedly in breach of duty, had caused the claimant to contract mesothelioma by exposure to asbestos dust. The House of Lords carved out an exception to traditional principles of causation. The House considered that any other outcome would be deeply offensive to notions of what justice requires and fairness demands. In a lengthy discussion the House found support in the writings of distinguished continental scholars, decisions of the German BGB, the French Cour de Cassation, the Dutch Hooge Raad, and other comparative materials. In the leading judgment, given by the Senior Law Lord, Lord Bingham of Cornhill, explained (at 66E-F):

> Development of the law in this country cannot of course depend on a head-count of decisions and codes adopted in other countries around the world, often against a background of different rules and traditions. The law must be developed coherently, in accordance with principle, so as to serve, even-handedly, the ends of justice. If,

[10] *Cour de Cassation*, 1st Civil Chamber, 6 July 2005, "Golshani c/ Government de la République Islamique d'Iran" (pourvoi nº 01-15912), JCP nº 42, 19 October 2005, p. 1948.
[11] [2003] 1 AC 32.

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> however, a decision is given in this country which offends one's basic sense of justice, and if consideration of international sources suggests that a different and more acceptable decision would be given in most other jurisdictions, whatever their legal tradition, this must prompt anxious review of the decision in question. In a shrinking world … there must be some virtue in uniformity of outcome whatever the diversity of approach in reaching that outcome.

About the reach of the principle decided in *Fairchild* Lord Bingham said in conclusion that "it would be unrealistic to suppose that the principle here affirmed will not over time be the subject of incremental and analogical development". Where justice demands a modification of causation principle it is not beyond the wit of modern legal analysis.

In England there was undoubtedly in the past an insular legal tradition. It is wonderfully captured in Orley Farm in which Trollope dwells on the prejudice of English lawyers against learning from international experience. Trollope describes the reflection of an English lawyer as follows:

> It would be useless at present, seeing that we cannot bring ourselves to believe it possible that a foreigner should in any respect be wiser than ourselves. If any such point out to us our follies, we at once claim those follies as the special evidence of our wisdom. We are so self-satisfied with our own customs, that we hold up our hands with surprise at the fatuity of men who presume to point out to us their defects.

In England we are nowadays somewhat more open-minded. Provincialism is in recession.

H. The Panoply of Comparative Law Solutions

In the years ahead convergence between the laws of European states can only increase. In that process lawmakers would do well to heed the wise words of Professor Dr Günter Hirsch:[12]

> "It is the idea behind the law, the aspiration of justice connected with the law, which has to be understood if one wishes to master it."

This idea proved fruitful in *Rees v. Darlington Memorial Hospital NHS Trust*[13] in which the House of Lords re-examined the case of *MacFarlane* when a claim for a healthy child born as a result of a failed sterilization operation was dismissed. A *via media* prevailed. In *Rees* the mother suffered from a disability. She had undergone a sterilization operation because she suffered from a visual handicap. She feared it would prevent her from properly looking after the child. She conceived and gave birth to a healthy child. She was a single parent. She sought damages. The House affirmed the general rule in *MacFarlane*. But the majority – and I was in the minority – creatively introduced a qualification. The majority held that it is unfair to deny the victim (the mother) any recompense at all beyond

[12] President of the Bundersgerichtshof, *Foreword*, *in* B. Markesinis *et al*., The German Law of Contract, A Comparative Treatise (2006).
[13] [2004] 1 AC 309.

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the immediate expenses of pregnancy and birth. The majority held that the mother had been denied by negligence the opportunity to live her life in the way she wished and planned. She was not entitled to compensatory damages based on a product of calculation. But she was entitled to a conventional sum, fixed at £15,000. The merit of this compromise was that it provided some recognition of the wrong done. Having disagreed with the majority in Rees. I now accept that the solution was consistent with one of the highest aspirations of the law, viz to redress a just grievance. This was a contribution to the panoply of comparative law solutions in this area which may be of interest elsewhere.

If I have appeared to make the problems thrown up by comparative law unduly difficult, I would add that a judge usually starts, unlike other professions, with the comfort that he has a 50% chance of getting the answer to the question right. Moreover, he has the reassurance of Lord Reid's advice to judges that if your average drops significantly below 50% you have a moral duty to spin a coin.