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978-0-521-13802-4 - Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law

Thomas H. Bingham

Excerpt

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## 1

## ‘Foreign moods, fads, or fashions’

When Miss Hamlyn signed her will on 12 June 1939, less than three months before the Second World War began, the world was on the brink of radical change. But she was secure in her Britishness, confident in the superior virtue of the law developed in these islands. So, when bequeathing the residue of her will, she wished what she called ‘the Common People of this country’ to be instructed by lectures or otherwise in ‘the Comparative Jurisprudence and the Ethnology of the chief European Countries including our own and the circumstances of the growth of such Jurisprudence’, but she did so for a very specific purpose: ‘to the intent that the Common People of our Country may realise the privileges which in law and custom they enjoy in comparison with other European Peoples and realising and appreciating such privileges may recognise the responsibilities and obligations attaching to them.’ Thus Miss Hamlyn sought to promote responsible, law-abiding citizenship, and to do so by impressing on her British fellow-citizens the advantages their national law conferred on them as compared with their less fortunate European counterparts. So the jurisprudence of the chief European countries was firmly marked ‘Not for import’. As Lord Hailsham once observed, ‘Abroad is for hols.’

As the daughter of a solicitor practising in the West Country, who also sat as a Justice of the Peace for some years, Miss Hamlyn no doubt grew up with some knowledge of

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legal matters, and she is said to have studied the law herself, although little or nothing is known of her progress as a student. She was, however, described as ‘very intellectual’ and may therefore have warmed – unlike many practitioners – to the more philosophical aspects of the subject. Be that as it may, she clearly regarded our law in this country as something quite separate and distinct from the law of other countries. Her mental picture was of British (more probably, in truth, English) judges administering a body of indigenous, home-made law, some of it statutory, some of it made by the judges in case after case decided over the centuries, some of it customary, but all of it ‘Made in Britain.’

This is a picture which very many people, including most judges and legal practitioners at the time, would have shared. And of course it was, and remains, in part an accurate picture. There are some areas of the law – one might instance taxation and social security – in which the task of the courts is essentially to interpret and apply the extremely detailed and complex statutory schemes which Parliament has laid down. The judge is unlikely to gain much help in resolving the problem before the court from consideration of analogous schemes in Germany or Australia or the United States. The greater the statutory content of the law in a particular field, the more likely, generally speaking, is this to be so. But in other areas of the law, and sometimes even in these, to an extent which Miss Hamlyn could not have dreamed of, the modern British judge sitting in a British court is not confined to administering a body of indigenous, home-made law. Frequently, and increasingly, the judge is administering a body of law which derives, directly or indirectly, from the European Union. Sometimes, and again (it

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would seem) increasingly, the judge is interpreting and giving domestic effect to a rule of international law. Often, nowadays, the judge is ruling on claims pertaining to human rights, and is doing so by reference to rules which are international, not national, in origin. Sometimes, in seeking to resolve a problem in domestic law, the judge gains assistance or inspiration from considering the law of another country in which an apparently satisfactory solution to the same or a similar problem has been found. The task of the British judge is, as it has long been, to 'do right to all manner of people, after the laws and usages of this realm, without fear or favour, affection or ill-will', but 'the laws and usages of this realm' have a broader connotation today than they were thought to bear seventy years ago in 1939 when Miss Hamlyn laid down her pen. Judicial horizons have widened and are widening.

It is these widening horizons which I wish to discuss in these three chapters. In this first chapter I shall consider the use of comparative law in British courts. In the second chapter I shall address the modern role of the British courts in applying international law. In the third and final chapter I will touch on the role of the British courts in relation to the international law of human rights. I shall not address the first of the non-indigenous sources just mentioned, the law of the European Union. This is not because it is unimportant. Far from it. My reason for the omission is that this topic was addressed in the much-acclaimed Hamlyn Lectures (*The Sovereignty of Law*) given by Professor Sir Francis Jacobs in 2006 and any contribution by me would be a work of inexperienced supererogation.

I turn, therefore, to the use of comparative law, by which I mean the law of other jurisdictions, in the British

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courts. In doing so, I should acknowledge at the outset the existence of a body of opinion which regards such law as at best irrelevant and at worst dangerous. Such was the view vividly expressed by Justice Scalia in the United States Supreme Court in a human rights context when he dismissed the majority's discussion of foreign authorities as 'meaningless dicta' and ruled that the court 'should not impose foreign moods, fads, or fashions on Americans'.<sup>1</sup> Others, more temperately, have drawn attention to the inevitable differences of legal culture, tradition, education and statutory background between one country and another, to the difficulty facing any practitioner or judge seeking to assimilate a foreign law in anything approaching an accurate or comprehensive way and to the even greater difficulties which arise where the foreign law is accessible to the judge or practitioner only through the medium of translation. These are real problems. Even where a decision is made in the English language and by a court (such as a state or federal court in the United States) exercising a recognisably similar jurisdiction, it is not always easy for the foreign lawyer to be sure whether the decision is representative of mainstream jurisprudence or the ill-considered work of some maverick judge; where a decision is based on the application of a foreign code, available only in translation, the pitfalls are even greater. Accusations of superficiality and cherry-picking may be made, perhaps with justification.

It is, however, the mission of the comparative legal scholar to acquire expert knowledge of the law of one or more

<sup>1</sup> *Lawrence et al. v. Texas* 539 US 558 (2003), 598, citing *Foster v. Florida* 537 US 990 (2002), note.

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foreign countries as well as of his or her own country; to provide reliable translations and explanations of foreign materials; to place them in their historical and social context; to highlight differences and draw attention to similarities; to enable intelligent lawyers grappling with a problem in one country to see it through the eyes of a lawyer grappling with the same problem in another. Even expert scholarly guidance of this kind will not of course immunise practitioners or judges against the risk of error. But few human activities are free from the risk of error and judicial decision-making is no exception.

Those who see, and would wish to see, the law of England and Wales as 'an island, entire of it self' face two problems. The first is that, much as we (like Miss Hamlyn) may care to think of our law as a pure-bred, home-grown product of our national genius, the truth is otherwise. It is a mongrel, gaining in vigour and intelligence what it has lost in purity of pedigree. As a trading nation, we have not over the years been immune to foreign influences, but have responded to them when it appeared that a little discreet borrowing would improve our law.<sup>2</sup> There is perhaps no better example than the rule governing the measure of damages in contract, known to lawyers as 'the rule in *Hadley v. Baxendale*'<sup>3</sup> sometimes seen as a fine flowering of common law jurisprudence, the immediate sources of the rule were the French Code Civil, Pothier's *Treatise on the Law of Civil Obligations*, Kent's *Commentaries*<sup>4</sup>

<sup>2</sup> See the author's general discussion in "'There is a World Elsewhere': The Changing Perspectives of English Law" in T. Bingham, *The Business of Judging* (Oxford University Press, 2000), 87–102.

<sup>3</sup> (1854) 9 Ex 341.

<sup>4</sup> (New York: D. Halsted, 1826–30), vol. II, 480.

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and Sedgwick's *Treatise on Damages*,<sup>5</sup> none of them works of indigenous origin.<sup>6</sup>

The second problem faced by those who regard any resort to foreign sources as at best irrelevant and at worst dangerous is of a more general nature. In no other field of intellectual endeavour – be it science, medicine, philosophy, literature, architecture, art, music, engineering or sociology – would ideas or insights be rejected simply because they were of foreign origin. If, as most of us would probably like to think, the law is a humane science reflecting the product of intellectual endeavour century after century, it would be strange if in this field alone practitioners and academics were obliged to ignore developments elsewhere, or at least to regard them as of no practical consequence. Such an approach can only impoverish our law; it cannot enrich it.

Distinguished voices have been raised in support of this more open-minded approach. Thus Lord Goff of Chievely has written:

I welcome unreservedly the study of comparative law. In my own work, I have done and continue to do my limited best to promote it, in every possible way ... We encourage the study of other systems of law in our universities and in independent institutes; we promote exchanges of professors and students between universities in different European countries; we hold meetings between senior judges from our own and other European countries; we

<sup>5</sup> Theodore Sedgwick, *A Treatise on the Measure of Damages* (1st edn, New York, 1847; 2nd edn, 1852).

<sup>6</sup> A. W. B. Simpson, 'Innovation in Nineteenth Century Contract Law', *Law Quarterly Review* 91 (1975) 247–78, at 273–7.

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even attempt to take advantage of principles from other systems of law in our judgments, though I have learned from experience that nobody should underestimate the difficulties facing such an enterprise.<sup>7</sup>

In similar vein, Conseiller Guy Canivet, formerly President of the French Cour de Cassation, now a member of the Conseil Constitutionnel, said:

Citizens and judges of States which share more or less similar cultures and enjoy an identical level of economic development are less and less prone to accept that situations which raise the same issues of fact will yield different results because of the difference in the rules of law to be applied. This is true in the field of bioethics, in economic law and tort liability. In all these cases, there is a trend, one might even say a strong demand, that compatible solutions are reached, regardless of the difference in the underlying applicable rules of law.<sup>8</sup>

If, however, it is true, as I think it is, that modern British judges are on the whole more inclined than their forebears to consider the effect of foreign authority in appropriate cases, the case should not be put too high. It is not easy, if indeed it is possible, to identify cases in which resort to foreign authority (I am excluding cases relating to the law of the EU, international law and human rights law) can be confidently said

<sup>7</sup> ‘Coming Together – the Future’ in *The Coming Together of the Common Law and the Civil Law*, The Clifford Chance Millennium Lectures, ed. B. S. Markesinis (Oxford: Hart Publishing, 2000), 239–49, at 240–1.

<sup>8</sup> Lecture at the British Institute of International and Comparative Law, November 2002.

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to have had a decisive effect on the outcome in the sense that the judge would have decided differently but for the foreign authority. We should not, I think, regard foreign authority as a match-winner, a magical ace of trumps. But there are perhaps two situations in which foreign authority may exert a significant if not a decisive influence. One is where domestic authority points towards an answer that seems inappropriate or unjust. The other is where domestic authority appears to yield no clear answer. In such situations, as I shall seek to show, the courts have proved willing to take notice of, and give weight to, solutions developed elsewhere.

The first category, then, includes cases in which domestic authority points towards an answer that seems inappropriate or unjust. I will give three examples. The first is *Kleinwort Benson Limited v. Lincoln City Council and others*.<sup>9</sup> The facts, briefly summarised, were these. In the early 1980s Kleinwort Benson (which I shall call 'the bank') entered into rate swap agreements with the Lincoln City Council and three other local authorities. The agreements were duly performed and the bank paid the authorities a sum exceeding £800,000. Time passed until, in 1991, the House of Lords delivered an unexpected judgment holding rate swap agreements to be unlawful as outside the powers of the local authorities.<sup>10</sup> The bank sued the local authorities to recover the sums overpaid, and succeeded in recovering sums paid within the six-year limitation period.

<sup>9</sup> [1999] 2 AC 349.

<sup>10</sup> *Hazell v. Hammersmith and Fulham London Borough Council* [1992] 2 AC 1.

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But recovery of the sums paid longer ago was problematic because of a well-established rule of English law which provided that, although money paid under a mistake of fact could be recovered, money paid under a mistake of law could not. That rule was very pertinent here, since the bank had paid out under the agreements in the belief that it was legally obliged to do so. Until the House of Lords judgment in 1991, that was a very reasonable belief.

Now I venture to think that the Common People of this country, Miss Hamlyn's chosen audience, would be puzzled by this rule. The local authorities had received money to which they were not entitled. The limitation period could be extended if the bank had paid under a mistake which it could not with reasonable diligence have discovered earlier.<sup>11</sup> If the bank had sent its payment to the wrong authority under a mistake of fact, it could have recovered it. Why should the local authorities hang on to money to which they were not entitled simply because the bank had, entirely reasonably, shared what was at the time a settled understanding of the law?

At first instance the judge decided this issue against the bank, as he was bound to do, and when its appeal reached the House of Lords a minority of two out of five law lords agreed with him. But a majority, led by Lord Goff in an opinion of outstanding quality, held that the existing rule should be abrogated. What matters for present purposes is that Lord Goff, in reaching his conclusion, supplemented his discussion of English authority by referring to the American Law Institute's *Restatement of the Law, Restitution* (1937), and to

<sup>11</sup> Section 32(1)(c) of the Limitation Act 1980.

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authority deriving from Canada, Australia, South Africa, the United States, Germany, Italy and France.<sup>12</sup> This enabled Lord Goff to say:

For present purposes, however, the importance of this comparative material is to reveal that, in civil law systems, a blanket exclusion of recovery of money paid under a mistake of law is not regarded as necessary. In particular, the experience of these systems assists to dispel the fears expressed in the early English cases that a right of recovery on the ground of mistake of law may lead to a flood of litigation, while at the same time it shows that in some cases a right of recovery, which has in the past been denied by the mistake of law rule, may likewise be denied in civil law countries on the basis of a narrower ground of principle or policy.<sup>13</sup>

In deciding what rule should be laid down here, Lord Goff referred to legislation in New Zealand and Western Australia<sup>14</sup> and to reports of the Law Commissions not only of England and Wales<sup>15</sup> but also of British Columbia, New Zealand, South Australia, New South Wales and Scotland.<sup>16</sup> Lord Hoffmann described this as one of ‘the most distinguished’ of Lord Goff’s ‘luminous contributions to this branch of the law’,<sup>17</sup> and it gained immeasurable strength from the world-wide perspective which he adopted.

<sup>12</sup> [1992] 2 AC 349, at 373–5.

<sup>13</sup> *Ibid.* at 375 C.

<sup>14</sup> *Ibid.* at 374, 384.

<sup>15</sup> *Ibid.* at 372, 376–7.

<sup>16</sup> *Ibid.* at 384.

<sup>17</sup> *Ibid.* at 398.