CHAPTER VI - JUDICIAL LAW REFORM

A. JUDGES AS LAW REFORMERS

Most members of the judiciary hastily deny any implication that they reform the law. According to Lord Simonds, "heterodoxy, or as some might say, heresy is not the more attractive because it is dignified by the name of reform" and law reform "is the task not of the courts of law but of Parliament". 1 Similarly, O'Higgins, C.J. says in the Norris case that Judges may, and do, share with other citizens a concern and interest in desirable changes and reform in our laws; but, under the Constitution, they have no function in achieving such by judicial decision....[T]he sole and exclusive power of altering the law of Ireland is, by the Constitution [Article 15.2.1], vested in the Oireachtas. The courts declare what the law is -- it is for the Oireachtas to make changes if it so thinks proper. 2

Similar views are expressed by Viscount Dilhorne in Cassell & Co. Ltd. v Broome, 3 by Lord

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1 Scrutons Ltd. v. Midland Silicones Ltd. [1962] AC 446 at 467/8


3 [1972] AC 1027 at 1107: "As I understand the judicial functions of this House, although they involve applying well established principles to new situations, they do not involve adjusting the common law to what are thought to be the social norms of the time. They do not include bowing to the wind of change. We have to declare what the law is, not what it ought to be."

4 [1976] 1 QB 345 at 371: "The task of law reform, which calls for wide-ranging techniques of consultation and discussion that cannot be compressed into the forensic medium, is for others."

5 In Michael Zander (ed.), What's Wrong with the Law? (BBC, London, 1970) at pp.92-3: "I do not believe that the judge is equipped, or ought to be equipped, to make law.... The court is not the proper place to manufacture new law." Similarly, "Great as has been the contribution of judicial decision to the development of our law it can no longer carry the load.... It is really a perversion of the judge's function in society that he should be requested to do so; his task is to decide particular cases, not to make but to apply the law" - Scarman, 'Codification and Judge-Made Law: A Problem of Co-existence' (Univ. of Birmingham, 1966), p.18; reprinted (1967) 42 Indiana L.J. 355 at 366.
Scarman in *Farrell v Alexander* and elsewhere, by Lord Reid in *Myers v D.P.P.* and *Shaw v D.P.P.* and by Stephen J. in the Australian case of *White v Barron*. And those views have been supported by Blackstone and Bacon:

The judges in the several courts of justice ... are the depositaries of the laws; the living oracles .... [The judge is] not delegated to pronounce a new law but to maintain and expound the old one .... Precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted wholly without consideration.

Judges ought to remember that their office is *jus dicere*, and not *jus dare*; to interpret law, and not to make law, or give law.

Montesquieu believed that

les juges de la nation ne sont ... que la bouche qui prononce les paroles de la loi; des êtres inanimés qui n'en peuvent modérer ni la force ni la rigueur.

6 [1965] AC 1001 at 1021-2: "If we are to extend the law it must be by the development and application of fundamental principles. We cannot introduce arbitrary conditions or limitations: that must be left to legislation.... A policy of make do and mend is no longer adequate. The most powerful argument of those who support the doctrine of strict precedent is that if it is relaxed judges will be tempted to encroach on the field of the legislature, and this case to my mind offers a strong temptation to do that which ought to be resisted."

7 [1962] AC 220 at 275: "Where Parliament fears to tread it is not for the Courts to rush in." (Dissenting opinion).

8 (1980) 54 Austl. L.J.Rep. 333 at 336: "In this area ... there is, perhaps, less scope than usual for judicial innovation by appellate courts. There is also little room for the formulation of general rules to guide the future exercise of curial discretion. If judicial discretion is to be subjected to such rules, this should be rather as a result of legislative intervention after full consideration by law reform agencies."


10 Sir Francis Bacon, *Of Judicature*. Cappelletti has added that from *jus dicere* came the word *jurisdicio* to indicate the judicial function, whereas *legislatio* came from *jus dare* (or *legem ferre*) - 'The Law Making Power of the Judge and its Limits: A Comparative Analysis' (1981) 8 Monash U.L.R. 15 at p.66, fn.214.

11 *De L'Esprit des Lois*, Livre I, chap.6. Translation: "The national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour."
It is often stated that French judges do not reform the law. Juillot de la Morandière states that "without doubt ... the judges do not make law, but only apply it."\textsuperscript{12} Article 12 of the Decree on the Organisation of the Judiciary (16th and 24th August 1790) provided that the judges "shall not make regulations, but they shall have recourse to the legislative body, whenever they think necessary, either to interpret a law or to make a new one."\textsuperscript{13}

While one frequently finds statements to the effect that judges do \textit{not} reform the law, the contrary view is often to be found as well. Lord Radcliffe is adamant that judges do reform the law:

\begin{quote}
There was never a more sterile controversy than that upon the question whether a judge makes law. Of course he does. How can he help it? The legislature and the judicial process respectively are two complementary sources of law-making, and in a well ordered state each has to understand its respective functions and limitations.\textsuperscript{14}
\end{quote}

It is interesting to note that Lord Radcliffe made these observations within a few months of his retirement from the House of Lords. It is as if he became able to voice his true opinion only after he ceased to be a judge. Three years later, he repeated his views in the following terms:

\begin{quote}
Would anyone now deny that judicial decisions are a creative, not merely an expository, contribution to the law? There are no means by which they can be otherwise, so rare is the occasion upon which a decision does not involve choice between two admissible alternatives .... I do not believe that it was ever an important discovery that judges are in some sense lawmakers. It is much more important to analyse the relative truth of an idea so far reaching.\textsuperscript{15}
\end{quote}

An Australian example of this view comes from Mr. Justice Mason:

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\textsuperscript{12} Morandi\`ere, \textit{Droit Civil} (3rd ed., 1963), p.86


\textsuperscript{15} 'The Lawyer and his Times' (Opening Address at 150th Anniversary of Harvard Law School, 1967), reprinted in \textit{Not in Feather Beds} 265 at 271
The myth that judges do not make law has been dispelled. The entire body of our non-statutory law has been created by the courts, as indeed has so much of our statutory law as flows from judicial interpretation.16

Similarly, but more narrowly, Mr. Justice McCarthy of our Supreme Court has attacked the Blackstonian idea:

At times, judges proclaim that they are not making law but declaring what the law is. Rubbish! Every invocation of the Constitution means judge-made law.17

Judges seem to feel freer to admit to their lawmaking function outside the courtroom, in public addresses as quoted above. However, there are times when they admit to this function in the course of their judgements. For instance, in Southern Pacific Co. v Jensen (1917), Holmes J., dissenting, admitted that courts can legislate:

I recognise without hesitation that judges must and do legislate, but they do so only interstitially; they are confined from molar to molecular motions.18

Lord Denning put it in typical Denning fashion in the Siskina case:

To the timorous souls I would say in the words of William Cowper:
Ye fearful saints, fresh courage take,
The clouds ye so much dread
Are big with mercy and shall break
In blessings on your head.
Instead of “saints” read “judges”. Instead of “mercy” read “justice”. And you will find a good way to law reform.19

One more frequently comes across a narrower acknowledgement of a law reform function in statements to the effect that "the law on this topic is judge made and can therefore be altered by the judges." Thus in Miliangos v George Frank Textiles, Lord Wilberforce says


17 Niall McCarthy, 'To Do a Great Right, Do a Little Wrong' (1987) J.Ir.Soc.Lab.L. 1 at 1

18 244 U.S. 205 (1916) at 221; 61 Law Ed. 1086 at 1100.

19 Siskina v Distos Compania Naviera S.A. [1977] 3 WLR 532 (C.A.) at 554. Bridge, LJ said in his dissent that "The clouds in Lord Denning MR's adaptation of William Cowper may be big with justice but we are neither midwives nor rainmakers" (p.561). The House of Lords was similarly dismissive - [1977] 3 WLR 818 at 831 (Lord Hailsham).
The law on this topic is judge-made -- it is entirely within the House’s duty in the course of administering the law to give the law a new direction in a particular case where on principle and on reasoning it is right to do so. I cannot accept the suggestion that because a rule is long established only legislation can change it.\(^\text{20}\)

In *R. v I.R.C., ex parte Federation of Self-Employed*, Lord Diplock stated that

> The rules as to “standing” for the purpose of applying for prerogative orders, like most of English public law, are not to be found in any statute. They were made by judges, by judges they can be changed; and so they have been over the years.\(^\text{21}\)

In *Haley v London Electricity Board*, Lord Evershed took a similar approach:

> The ancient rules of the English common law have - and have as one of their notable virtues - the characteristic that in general they can never be said to be finally limited by definition but rather have the capacity of adaptation in accordance with the changing circumstances of succeeding ages.\(^\text{22}\)

Finally, mention should be made of the wording of the famous 1966 Practice Statement of the House of Lords on judicial precedent:

> Their lordships ... propose ... to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.\(^\text{23}\)

This is yet another statement acknowledging that if judges have made laws then they can alter them.

As regards the civil law countries, the duty on judges to reform the law in certain instances has actually been inserted into the Codes. (Ironically, most common lawyers believe that the Codes do not allow judicial law reform but the provisions of the Codes themselves contradict this surface view).\(^\text{24}\) Article 4 of the French Code Civil (1804) is the most famous example:

\(^{20}\) [1976] AC 443 at 469.

\(^{21}\) [1982] AC 617 at 639. See also *State (Lynch) v Cooney* [1982] IR 337 at 369: Walsh J says that the rules regarding "sufficient interest" for certiorari etc. are "judge-made rules and, as such, can be changed and altered by judges."

\(^{22}\) [1965] AC 778 at 800-801

\(^{23}\) Practice Statement (Judicial Precedent) [1966] 3 All E.R. 77

\(^{24}\) "In the common law, perhaps for too long, we were of the opinion that the real difference between our system and that of the civil law was its emphasis upon the judge as a maker of
Le juge qui refusera de juger sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice.25

There is a similar provision in Article 11 of the Quebec Civil Code (1866):

A judge cannot refuse to adjudicate under pretext of the silence, obscurity or insufficiency of the law.26

Article 1, paragraphs 2 and 3, of the Swiss Civil Code (ZGB, 1907) is even more explicit than the French model:

À défaut d'une disposition légale applicable, le juge prononce selon le droit coutumier et, à défaut d'une coutume, selon les règles qu'il établirait s'il avait à faire acte de législateur.
Il s'inspire des solutions consacrées par la doctrine et la jurisprudence.27

Gény has praised this remarkable provision as "probably the first time that a modern legislator has given official recognition in a general formula to the fact that the judge is his indispensable auxiliary."28 There are similar provisions in Article 1 of the Turkish Civil Code,29 in the Italian Civil Code of 194230 and in the Brazilian Code of Civil Procedure.31

law. It isn't One of the things that a comparative lawyer very quickly learns ... is that the judge, whatever the system, is the repository - is the secret - of the life of the law" - Scarman, 'Law Reform by Legislative Techniques' (1967) 32 Sask.L.R. 217 at 217-8

25 Translation: "The judge who shall refuse to judge under the pretence of the silence, obscurity or insufficiency of the statute shall be liable to prosecution for denial of justice." See J. Vanderlinden, 'Some Reflections on the Law-Making Powers of the French Judiciary' (1968) 13 Juridical Review 1


27 Translation: "Where no relevant legal provision can be found, the judge shall decide according to the existing customary law, and, in its absence, according to the rules which he would lay down if he had himself to act as legislator. In so doing he must be guided by accepted legal doctrine and case-law." See Ivy Williams, Swiss Civil Code: Sources of Law (1923), pp.54-60 and Konrad Zweigert and Hein Kotz, An Introduction to Comparative Law, vol.1 (trans. Tony Weir, 2nd ed., Oxford U.Press, 1987), pp.182-3.

28 François Gény, Méthode d'Interpretation et Sources en Droit Privé Positif II (2nd ed., 1954), p.328


From the evidence quoted so far, it is seen that there is a conflict of authority as to whether judges reform the law. Even before attempting to resolve the problem, it is submitted that the very existence of this conflict of authority is an argument against any categoric statement that judges do not reform the law. In other words, a categoric statement by a judge or commentator that judges do not reform the law, without any discussion of the opposite view, is to be treated with great suspicion since it is incomplete.

It is submitted that judges do indeed reform the law, despite their many statements to the contrary. In fact, those statements are frequently used to "camouflage"32 actual reform. A judge often says one thing ("we cannot reform the law") and proceeds to do exactly the opposite in the same case. The truth of the matter is that the Blackstonian idea is a fiction33 behind the cloak of which judges have been reforming the law for centuries. Weber has remarked as follows:

Gerade auch den, objektiv betrachtet, am meisten 'schöpferischen' Richtern eigen gewesen, daß sie subjektiv sich nur als Mundstück schonsei es eventuell latent - geltender Norman, als deren Interpreten und Anwender, nicht aber als deren Schöpfer fühlen.34

It is submitted that this fiction should no longer be relied upon by judges, for the sake of clarity and honesty. We have had enough of these fictitious sweeping statements that judges merely declare the law, that they are its mouthpieces only. There is nothing inherently wrong with a


33 Austin refers to the "childish fiction employed by our judges that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity and merely declared from time to time by the judges" - *Jurisprudence*, II, p.634. Diplock refers to the "legal fiction that the courts merely expound the law as it has always been" - 'The Courts as Legislators' (U. Of Birmingham, 26th Mar. 1965), reprinted in Brian W. Harvey (ed.), *The Lawyer and Justice* (Sweet & Maxwell, London, 1978), 265 at 281

34 Translation: "The very judges who, objectively speaking, are the most 'creative' have felt themselves to be just the mouthpiece of legal rules, as merely interpreting and applying them, rather than as creating them" - *Wirtschaft und Gesellschaft* II (4th ed., 1956), p.512; cited in Zwi­egert and Kotz, supra n.27, p.130.
judge holding that he/she cannot reform the law in a particular case (e.g. because he/she feels that it would be better for the legislature to undertake a comprehensive reform project)\(^{35}\) provided he/she admits that in general judges can reform the law in the right circumstances.

The vast majority of commentators who have seriously considered the question nowadays conclude that judges reform the law in some form or another. Thus, Mauro Cappelletti has said that the idea of judges deciding the law, "writing the script" in addition to being the mouths of the law, is "news to no-one" today.\(^{36}\) Friedmann lists the jurists who have reached this conclusion:

> The Blackstonian doctrine ... has long been little more than a ghost. From Holmes and Gény to Pound and Cardozo, contemporary jurists have increasingly recognised and articulated the lawmaking functions of the Courts.\(^{37}\)

Dias also concludes that judges make law.\(^{38}\) So much for the common law theorists. What of the civil law? Reference is sometimes made to Article 5 of the Code Civil as proof that French judges do not make law. That Article provides:

> Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises.\(^{39}\)

But, for various reasons, the commentators have concluded that civil law judges do in fact reform the law:

> In substance ... it is really undeniable that in Civil Law countries judges are playing a large and constantly growing part in the development of the law.\(^{40}\)

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\(^{35}\) Lord Reid in *Myers v D.P.P.* [1965] AC 1001 at 1022: "The only satisfactory solution is by legislation following on a wide survey of the whole field, and I think that such a survey is overdue. A policy of make do and mend is no longer adequate."

\(^{36}\) Mauro Cappelletti, *Giudici Legislatori?* (Giuffré, Milan, 1984), p.130


\(^{39}\) Translation: "The judges are forbidden to pronounce, by way of general and legislative determination, on the causes submitted to them."

\(^{40}\) Zweigert and Kotz, supra n.27, p.278.
Similarly, Friedmann has noted that there is "in all Continental countries, an amazing amount of judge-made law".\textsuperscript{41} René David's view is that

French law is not a creation of law professors. Like the common law, it is a judge-made law in its origins. The only difference is that judicial decisions have not been viewed as authoritative in themselves. Their authority arises only after they have received scholarly study, evaluation, and systemization. Legal science has viewed them as an essential, but not the exclusive, source of insights in to the kind of rules required to achieve justice. The difference between French law and the common law in their treatment of the sources of law is much more a matter of technique than of substance.\textsuperscript{42}

Finally, Von Mehren concludes that any court aware of the true, nonmechanical nature of the judicial process recognises that at times it must make new law.\textsuperscript{43}

Apart from this consensus amongst many commentators, it is submitted that more concrete proof of the fact that judges reform the law can be summarised under the following five headings:

\begin{itemize}
\item[a)] The broad definition formulated above in the Introduction includes judicial law reform.
\item[b)] Judicial decisions are widely recognised as a "source" of law.
\item[c)] The very act of interpretation is a form of law-making.
\item[d)] Judges must "fill in gaps".
\item[e)] Strict adherence to precedent is now a thing of the past.
\end{itemize}

\textbf{a) The definition includes judicial law reform}

In the Introduction, it was suggested that law reform could be defined as follows:

Law reform is the solution of a problem which arises because law, legal institutions or legal methods are outdated and obsolete.

If such a broad definition of law reform is adopted, then there is no reason why judicial law-making should not be included in it. If a judge makes new law, or interprets a statute/code creatively, then he/she is solving a problem which arises because the law is outdated and obsolete.

Hurlburt addresses the question as follows:

\textsuperscript{41} Friedmann, supra n.30, p.534
\textsuperscript{43} Von Mehren and Gordley, supra n.13, p.1143.
What is law? Certainly, for the purposes of "law reform" it includes statute law and judge-made law, including equity. There is no reason to exclude from the term "law" anything which professional or common usage would include in it.  

Some believe that while judges make law, they do not reform the law. Lord Scarman, while he recognises that "the judge, whatever the system, is the repository - is the secret - of the life of the law" and refers to the judge's vital role as a law maker and modifier, submits that "this function ... is not to be confused with law reform". However, he offers no coherent explanation as to what is the difference between law making and law reform. In fact, on another occasion, he criticises Bentham for not paying sufficient regard to "the function of the judge as a maker of law", refers to "the courts ... as legislators" and by stating that the courts are no longer sufficient instruments for "the reform or modernisation of the law", implies that judges are instruments for reform.

Whatever about the inconsistencies of Scarman's statements, his views show that if one adopts a narrow definition of law reform then it is likely that one will not permit judicial law making to be considered as law reform. However, since it has been submitted that law reform should be broadly defined, there is no necessity to try and unravel such pedantic distinctions as made by Scarman. Furthermore, it is unnecessary to investigate in any detail the pedantic argument that while judges make law, they cannot be considered as legislating.

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45 Scarman, supra n.24, p.218.


47 Ibid., p.10

48 "There are clear indications that under the strain of our times the Courts, notwithstanding the quality of their work, can no longer be accepted as sufficient instruments for the reform or modernisation of the law" - Ibid., p.10.

49 Lord Diplock said that "Courts by the very nature of their functions are compelled to act as legislators" and referred to the courts' exercise of a "legislative power" (Supra n.33, p.266 and
b) Judicial decisions are a source of law

There are some areas of the law which can be described solely by reference to statutes/codes and regulations. But most areas are governed by a mixture of statutory law and case-law, and indeed some areas are entirely the creation of the judges. The very fact that a description of the law is usually incomplete without a description of case-law is evidence that judicial decisions make/reform law. Who would think of describing constitutional law in the United States without referring to Brown v. Board of Education? Is it not true to say that the "neighbour principle" in Donoghue v. Stevenson has been a source of development of countless principles of tort law? Areas such as the law of evidence, the law of procedure, and the rules of equity are almost entirely created by judicial decisions.

In civil law countries, judicial decisions are now widely recognised as a source of law (or, by some writers, as authorities but not sources.) Hence, Mazeaud has said that "la jurisprudence est pour la loi la fontaine de la jouvence" and that "la jurisprudence est devenue en France une source de droit d'une importance considérable". Juillot de la Morandière refers to "son rôle cap-

p.267). But Cappelletti strongly disagrees: "If a court acts as a legislator it simply ceases to be a court": Supra n.10, p.42.


51 [1932] AC 562 at 580 (Lord Atkin). "No lawyer really supposes that such decisions as Rylands v. Fletcher [(1868) LR 3 HL 330] in the last century or Donoghue v. Stevenson in this did not change the law just as much as the Law Reform (Contributory Negligence) Act, 1945" - Diplock, supra n.33, p.266

52 Many jurists still believe that only legislation and custom can be considered as sources of law e.g. Carbonnier, Droit Civil (Paris, 1957), vol. I, p.105 at seq. David insists that while judges make law their decisions are not a source of law, strictly speaking (Supra n.42, p.181). See generally Vanderlinden, supra n.25, p.17.


54 Ibid., p.129. Translation: "In France, case law has become a source of law of considerable importance."
ital” in speaking of “la jurisprudence”. Judicial decisions created the vast majority of what is known as “droit administratif”, and also created the “general principles of law”, which Brown and Garner have summarised as follows:

a) Prerogatives of the administration e.g. the necessity to preserve public order, the doctrine of separation of powers
b) Liberties of the individual e.g. right to strike, freedom of thought and opinion, freedom of movement, right to a normal family life
c) Economic and social rights e.g. local authorities’ right to establish services where local need is proved, right to strike, right to join or not to join a union, right to a minimum wage for public sector employees
d) Protection of the environment
e) Equality before the law
f) Impartiality
g) Audi Alteram Partem
h) Non-Retroactivity
i) The right to judicial review

c) The very act of interpretation is a form of lawmaking

In the past, orthodox statements of the theory of judicial decision contained elements of a mechanical theory of the judicial process. As regards interpretation of statutes/codes, this would mean that a judge looks at the provision in question and decides what its ordinary or plain meaning is. It was said that resort could be had to other canons of construction only if there was ambiguity in the wording of the provision. This view can still be found in judicial decisions. However, there is now a growing tendency to recognise that interpretation is not a mechanical process. It is an art, rather than a science. Questions of interpretation arise every day of the week in the courts. For example, in the U.K., the Law Commissions found that more than half of

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55 Morandière, supra n.12, loc.cit.
57 Von Mehren and Gordley, supra n.13, p.1133.
58 For example, see Inspector of Taxes v. Kiernan [1981] IR 117 at 122.
the cases in the courts of first instance and in the Court of Appeal involved a point of statutory interpretation and three quarters of the reported cases before the House of Lords raised an issue of this kind.\textsuperscript{60} If statutory interpretation were as mechanical as it is sometimes made out to be, then there would be no need for this amount of litigation on such points.\textsuperscript{61}

Marsh has pointed out that

\begin{quote}
The inherent ambiguity of words is a fundamental truth to be grasped in any approach to the problems of interpretation .... The meaning to be given to any particular words depends on factors extraneous to those words themselves and the meaning of the words will always be to a greater or lesser extent ambiguous because it is impossible to provide the interpreter with a cut-and-dried and consistent list of all the factors which he is to take into account in giving a meaning to the word.\textsuperscript{62}
\end{quote}

Hence, he believes that it is inaccurate for so many of the "canons" of construction to begin with "if the words of a provision are clear and unambiguous". There is no such thing as unambiguous wording. It is submitted that Marsh's argument is a fundamental support for the proposition that the very act of interpretation is a form of lawmaking. When a statute is promulgated, many questions immediately arise in the minds of the reader as to what are the limits of its application. Those questions are only satisfactorily answered once there has been litigation to clarify the meaning of the statute's provisions.

In the realm of constitutional law, lawyers have always recognised that interpretation is a form of law-making. Because the wording of Constitutions is so broad, their meaning only becomes clear when the judges say what they mean. "The Constitution is what the judges say it is".\textsuperscript{63} Just as interpretation of Constitutions is a form of judicial lawmaking, so too interpretation

\textsuperscript{60} Joint Report on the Interpretation of Statutes, 1969. (Law Com. No.21, Scot. Law Com. no.11, H.C. 256).

\textsuperscript{61} "The fact of litigation... is surely compelling evidence that absolute certainty and omniscience in the law are unachieved, and arguably unachievable, ideals" -- James C. Brady, 'Legal Certainty: The Durable Myth' (1973) 8 Ir.Jur. (ns) 18 at 20, fn.10.

\textsuperscript{62} Marsh, supra n.59, p.22. He states that he has relied heavily on Chapter 4 of Alf Ross, \textit{On Law and Justice} (Stevens & Sons, London, 1958).
of statutes/codes is judicial law-making.

In civil law countries, the situation is much the same as with the common law jurisdictions. The orthodox theory is that the interpretation of the codes is a mechanical process, but the practice is very different -- the codes are creatively interpreted to meet new situations. The difference from the common law method is that in civil law jurisdictions, the code must always be the starting-point for the judicial decision.64

It is submitted that judges should be more explicit in describing how they have come to interpret a provision one way rather than another. They should explicitly recognise their lawmaking function in interpreting words which are, after all, inherently ambiguous. Their reluctance to do this is understandable:

To begin with, judges find such activity difficult and psychologically disturbing. In addition, the thinking of the Western World generally favours the logical development of accepted premises. This attitude is due both to the importance of rationalized procedures in regulating and facilitating human life and to an instinctive human urge to find security through simplifying and categorizing reality .... Finally, in societies where the exercise of political power is legitimated through the democratic process, a court is understandably reluctant to formulate the policies regulating social behavior.65

But, while the reluctance is understandable, it is not excusable. What is more, the fear that public faith in the courts would decrease if the judges were explicit about their lawmaking function is unfounded. In fact, it is likely that public faith in justice would actually increase if they were explicit about it. Witness the words of Justice Hall of the Supreme Court of Canada:

I find it hard to believe that the public will cease to believe in the fairness and probity of the courts if the courts lay down new laws from time to time. Indeed, if anything, faith in the courts will increase.66


64 See Zweigert and Kotz, supra n. 27, pp.260-274 (Law-Finding in Common Law and Civil Law).

65 Von Mehren and Gordley, supra n.13, pp.1142-3.

66 Hall, 'Law Reform and the Judiciary's Role' (1972) 20 Chitty's L.J. 77 at 82; reprinted (1972)
**d) Judges must fill in gaps**

Aristotle once remarked that "no piece of legislation can deal with every possible problem".67 Similarly, Portalis et al explained that they approached the drafting of the French Civil Code bearing in mind that "to foresee everything is a goal impossible of attainment":

> We have ... avoided the dangerous ambition to desire to regulate and foresee everything .... The needs of society are so varied, the intercourse among humans so active, their interests so multiple, and their relationships so extensive that it is impossible for the legislator to foresee everything .... One cannot do without either case law or laws. We leave to the case law the rare and extraordinary cases that do not enter into the plan of a rational legislation, the very variable and very disputed details that should not occupy the legislator at all, and all the things that it would be futile to try and foresee or that a premature foresight could not provide for without danger. It is for experience to fill in gradually the gaps we leave.68

The French judge is specifically forced to fill in gaps in the law by the provisions of Article 4 of the Code Civil (see page 185 above). We have also seen how Article 1 of the Swiss Civil Code forces the judge to act as a legislator if there is no applicable legal provision. German jurists have invented the term "Rechtsfinden" to signify filling in gaps in the law by analogy69 and the German Supreme Court once expressed the view that "when the written law fails, the judge takes the place of the legislator for the individual case".70 Zweigert and Kotz maintain that ever since the decline of conceptualist positivism everyone has recognised that a legal order will still have gaps, even after all the possibilities of reasonable interpretation and analogy have been exhausted, and that they have to be filled by creative judicial activity.71

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67 Scarman, supra n.46, p.14. No source is given for the remark.


69 Marsh, supra n.59, p.68.


71 Zweigert and Kotz, supra n.27, p.182.
Gaps arise which judges must fill in a variety of situations. One American judge has pointed to legislative errors, ambiguous statutes and clearly wrong statutes as occasions on which judges must fill in the gaps.  

In *McGonagle v. McGonagle*, the Supreme Court rectified an error which the legislature had made by referring, in the Criminal Justice (Evidence) Act 1924, to 'The Prevention of Cruelty to Children Act 1904 - the whole Act':

> The words ... would seem to indicate that, per incuriam, the Legislature overlooked the fact that a great deal of the Act of 1904 had been repealed and re-enacted in the [Children] Act of 1908.  

Exactly the opposite approach was taken in *Commissioners of Inland Revenue v. Ayrshire Mutual Insurance* - Lord Macmillan recognised that "the legislature has plainly missed fire" (speaking of s.31(1) of the Finance Act 1933), but the mistake was not to be rectified by the courts.  

It is submitted that the *McGonagle* approach is preferable. As Lord Diplock says of the *Ayrshire Insurance* case,

> If, as in this case, the Courts can identify the target of Parliamentary legislation, their proper function is to see that it is hit: not merely to record that it has been missed. Here is judicial legislation at its worst.  

In *Bailly v. Ministère Public*, an enactment which forbade passengers to get on or off the trains "when the train has completely stopped" was held to forbid such *before* the train stopped. In other words, the court corrected the error. The statute was clear, but it was clearly wrong.

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73 [1951] IR 123 at 128 (O'Byrne J.)

74 [1946] 1 All ER 637 at 641.

75 See also Lord Esher MR in *R. v. Judge of the City of London Court* [1892] 1 QB 273 at 290 - "If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity."

76 Diplock, supra n.33, p.274.

e) Strict adherence to precedent is now a thing of the past

In civil law countries, there has never been any doctrine of binding precedent, strictly speaking. However, the reality has always been that previous decisions will be highly persuasive:

The existence of official and private case reports where decisions are reported makes it easy to cite them. Advocates have never failed to do so .... Although such arguments may not be legally binding, they cannot help but affect a court. There is a natural tendency for courts to follow precedents.78

In common law countries, precedents are theoretically binding if a higher court has rendered a decision on the question, or if there is a previous decision of the same court. However, recently many common law courts have recognised that precedent should not be strictly adhered to if it will cause injustice. The most famous example is the 1966 Practice Statement of the House of Lords.79

Even without decisions such as that Practice Statement, the common law doctrine of precedent is to a certain extent only a myth. Justice Hall believes that precedent "has been a protective screen behind which judges legislated in silence and in secrecy".80 If a judge did not want to follow a particular precedent, he could always distinguish it on technical ground from his present decision. However, now with the new openness in common law countries as regards precedent, cases can be expressly overruled and the matter is much more clearly resolved. In R. v. Shivpuri,81 the House of Lords expressly overruled Anderton v. Ryan,82 which had been decided only a year or so earlier. Lord Bridge remarked that

78 David, supra n.42, p.182.

79 [1966] 3 All ER 77. For reference to similar developments in other common law countries see J.H. Hiller, The Law-Creative Role of Appellate Courts in the Commonwealth" (1978) 27 ICLQ 85 at 96.

80 Hall, supra n.66, p.78, quoting from Dr. Mark MacGuigan, a Canadian M.P.


The 1966 Practice Statement is an effective abandonment of our pretention to infallibility.\textsuperscript{83}

Even before 1966, courts were often willing to correct precedents which they found to have been erroneously decided. In Australia, Sir Isaac Isaacs reasoned as follows:

Our sworn loyalty is to the law itself, and to the organic law of the Constitution first of all. If, then, we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation. It is not, in my opinion, better that the Court should be persistently wrong than that it should be ultimately right.\textsuperscript{84}

In \textit{R. v. Button},\textsuperscript{85} it was held that the common law offence of affray could occur in a private place. There was no reason to perpetuate erroneous precedents which held that it could only occur in a public place. In \textit{Bourne v. Keane},\textsuperscript{86} the House of Lords overruled \textit{West v. Shuttleworth}\textsuperscript{87} and Lord Birkenhead said

\textit{I cannot conceive that it is my function as a judge of the Supreme Appellate Court of this country to make error perpetual in a matter of this kind.}\textsuperscript{88}

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Having concluded that judges do reform the law, two questions often arise:

i) Is judicial law reform an undemocratic usurpation of the legislative power?

ii) Which is the more useful – reform by legislative or judicial means?

As regards the first question, it has been emphasised by Cappelletti that we should ask whether judicial law reform is undemocratic \textit{in comparison} to that of other governmental decision-makers.\textsuperscript{89} He points out that the judiciary is not without democratic features. For example, judg-

\textsuperscript{83} [1986] 2 All ER 334 at 345.

\textsuperscript{84} (1913) 17 CLR 261 at 278.


\textsuperscript{86} [1919] AC 815.

\textsuperscript{87} (1835) 2 My. and K. 684.

\textsuperscript{88} [1919] AC 815 at 860.
es are appointed by the elected government, they give written decisions justifying their opinions and they are perhaps more easily accessible (the key to the courtroom is only a complaint). On the other hand, the legislatures are not as democratic as they seem. They do not perfectly reflect majority sentiments. Also, the majority will can be unjust, so the courts rightly "check" it.

The second question is largely a matter of opinion, and depends to a large extent on the area of law in question. Judicial law reform has its advantages and disadvantages, and so does legislative law reform. The main disadvantages of judicial law reform are:

1) The judiciary cannot conduct research or investigations into the needs and opinions of society.90
2) Judicial law reform depends on the "adventitious concatenation of the determined party, the right set of facts, the persuasive lawyer and the perceptive court".91
3) The law develops slowly and unsystematically if it is reformed by the judges. Judicial law reform can take centuries.92

On the other hand, the courts have the advantage of dealing with a "flesh and blood" problem which arises. They can often deal with problems much more quickly than the legislature. Nowadays, with the increasing demands on legislatures’ time, it can often be quicker to reform the law through a court action. Piecemeal improvements are better than none at all.93

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89 Cappelletti, supra n.36, p.132.
90 Scarman, supra n.24, p.219.
91 Friendly, supra n.72, p.791.
B. THE COMPARATIVE METHOD AND JUDICIAL LAW REFORM

If a judge is solving a problem which arises because the law is outdated, external comparison can serve as a useful tool in this problem-solving function.\(^{94}\) Let us now turn to the combination of the comparative method and judicial law reform and ascertain its use and its usefulness.

Kamba has confined the usefulness of the comparative method to three areas:

i) Cases of first impression

ii) Elucidation in national law of concepts and principles which have a foreign origin

iii) In the application of foreign law in national courts under the Conflict of Laws\(^{95}\)

But it is submitted that this is too restrictive an explanation. In particular, Kamba's first heading (cases of first impression) means that he cannot see any role for the comparative method if there is national law on the topic, but in fact the method \textit{can} perform a useful function in such cases.

Marsh says that the knowledge of a foreign system of law brings about a "widening of the intellectual horizons", thus enabling a judge to realise that a step in judicial development of the law which may seem very bold is after all not so revolutionary, and its adoption in a similar country has taken place without apparent ill-effects.\(^{96}\) This "widening of the intellectual horizons" need not be confined to cases where there is no preexistent national law. Marc Ancel has urged the judge to make a habit of casting an eye on the world,\(^{97}\) since the comparative method furnishes

\[\text{une règle d'interprétation singulièrement efficace pour démêler les difficultés d'un texte nouveau ou les complexités d'une espèce judiciaire.}^{98}\]


\(^{96}\) Marsh, supra n.29, p.80 (Proceedings), p.660 (RabelsZ.)

\(^{97}\) Marc Ancel, 'La Fonction Judiciaire et le Droit Comparé' (1949) Rev.Int.Dr.Comp. 57 at 60.

\(^{98}\) Translation: "a rule of interpretation singularly effective for unravelling the difficulties of a new text or complexities of a judicial kind" - Ibid., p.61.
The comparative method helps the judge in three ways:

i) trouver plus facilement une solution exacte
ii) mieux se renseigner sur la portée d'une loi nouvelle
iii) suggérer plus aisément, pour un cas imprévu, une interprétation renouvelée
d'une règle ancienne.99

Again, Ancel does not confine these areas to cases of first impression. Finally, it may be noted that courts refer to persuasive authorities100 even when there is national law on the topic.

Before trying to come to conclusions as to the use and the usefulness of the combination of the comparative method and judicial law reform, a brief country-by-country survey would be helpful.100a Material on this subject is difficult to trace, and Dutoit's comment should be borne in mind:

Cet aspect de l'impact du droit comparé dans la vie juridique reste parfois dans l'ombre, malgré son intérêt.101 "

ENGLAND

The various historical influences on English law are often overlooked. Edward Stanley Roscoe started his book on 'The Growth of English Law' with the following words:

Before the time of Edward I, English law did not exist: Anglo-Saxon, Danish, Norman and Roman influences were each at work.102

99 Translation: "(i) to more easily find an exact solution (ii) to better inquire about the scope of a new law (iii) to more easily suggest, for an unforeseen case, a renewed interpretation of an old rule" - Ibid., p.62.

100 See Glenn, 'Persuasive Authority' (1987) 32 McGill L.J. 261; Cohn, supra n.31, pp.100-118.

100a No account is given of the comparative method in decisions of the European Court of Justice. This topic has been dealt with recently in G.Benos, 'The Practical Debt of Community Law to Comparative Law' (1984) 37 Rev. Hellenique Dr.Int. 241-254 and M.Hilf, 'The Role of Comparative Law in the Jurisprudence of the Court of Justice of the European Communities' in A. de Mestral et al (eds.), The Limitation of Human Rights in Comparative Constitutional Law (Ed. Y.Blais, Cowansville, 1986), 549-574.

101 Bernard Dutoit, 'Quelques Considérations sur les Objectifs d'une Revue de Droit Comparé' (1975) 27 Rev. Int. Dr. Comp. 113 at 117. Translation: "This aspect of the impact of comparative law in legal life at times stays in the shade, in spite of its interest."

The French influence was particularly strong:

The Common Law itself is derived from the Norman laws and customs which were carried from France to England at the time of the conquest by William the Conqueror. We should remember that until the sixteenth century French was the judicial language of England. 103

It has been argued that French thought and culture have not disappeared from English law, but have rather been absorbed into it. 104 References to French law are in fact quite rare in British decisions. In the nineteenth century, it was common to refer to the writings of Pothier, especially on the Sale of Goods. In *Cox v. Troy* (1822), Best J. stated

> The authority of Pothier is expressly in point. That is as high as can be had next to the decision of a court of justice in this country. It is extremely well known that he is a writer of acknowledged character; his writings have been constantly referred to by the court and he is spoken of with great praise by Sir William Jones in his *Law of Bailments*, and his writings are considered by that author equal in point of luminous method, apposite examples, and a clear manly style, to the works of Littleton on the laws of this country. We cannot, therefore, have a better guide than Pothier on this subject. 105

Lord Blackburn said in *McLean v. Clydesdale* (1883) that

> we constantly in the English courts, upon the question what is the general law, cite Pothier. 106

Pothier was also relied upon in *Hodgson v. Beauchesne* (1858), 107 in *Young v. Grote* 108 and in *Taylor v. Caldwell* (1863). 109 Cohn has remarked that

> Only tradition can justify the preference granted to Pothier as against the large treatises of Planiol, Aubry at Rau and Baudry-Lacantinerie. 110

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105 (1822) 5 B. & Ald. 474 at 480.

106 (1883) 9 AC 95 at 105.

107 (1858) 12 Moore P.C. 285.


109 (1863) 3 B.S. 826.
Sources other than Pothier were also relied upon. In *Wing v. Angrave*,†† Lord Campbell refers to the Code Napoleon. In *Hadley v. Baxendale* (1854),‡‡ the rule of the Code Napoleon on the question in issue was considered. *Hickman v. Peacey & Others* (1945)§§ involved extensive references to the Code Civil (articles 720-722).

In *Bulmer v. Bollinger*, Lord Denning, M.R., referred to Conseil d'Etat and Cour de Cassation cases‖ and said that European law "is like an incoming tide ... [which] cannot be held back".‖ Lord Denning has justified the granting of a mareva injunction on the basis of "the practice in the Continent of Europe" (*Nippon Yusen Kaisha v. Kasageorgis* (1975))‖ and more particularly, the French concept of "saise conservatoire" which "is applied universally on the continent" (*Rasu v. Perushaan* (1978)).‖ He also came very close to relying on a French interpretation on Company Law in *Phonogram Ltd. v. Lane* (1982),‖ even quoting from a French textbook on the subject, but he eventually rejected the idea that the French text was decisive. Lord Wilberforce, in *Hoffman-La Roche* (1978),‖ referred to "more developed legal systems" (meaning France) to point out the inadequacy of English law on claims for loss arising from illegal acts or omissions of the administration.

110 Cohn, supra n.31, pp.116-117.
111 8 H.L.C. 183 at 197-8.
112 (1854) 9 Ex. 341; 156 E.R. 145.
113 [1945] AC 304 at 332-3 (Lord Porter), at 342-3 (Lord Simonds).
114 [1974] 2 All ER 1226 at 1235.
115 Ibid., p.1231.
Roman law was consulted more often than French law. Gutteridge comments that "there can be little doubt that much Roman law has found its way into our common law system either directly or through the canon law". In *Acton v. Blundell* (1843), Tindall C.J. said:

> The Roman law forms no rule, binding in itself, upon the subjects of these realms; but, in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law the fruit of the researches of the most learned men, the collective wisdom of ages, and the ground work of the municipal law of most of the countries of Europe.

In 1863, Blackburn J., in the course of his judgment in *Taylor v. Caldwell*, held that although the Civil Law is not of itself authority in an English Court, it affords great assistance in investigating the principles on which the law is grounded.

Willes J. justified his conclusion in *Becharwaise v. Lewis* (1872) on the authority of the civil law, and quoted from the Digest. References to Roman law continued into the twentieth century. Roman law was invoked in 1901 in *Keighley Maxted & Co. v. Durant*, in 1924 in *Cantiare San Rocco*, and in 1939 in *Kearry v. Pattinson*. The 1942 case of *Hope Brown Deceased*...
constitutes a legal curiosity since the quote from Ulpian relied upon in it was buried under three cross-referring authorities. Cohn argues that the quote should have been relied upon as it stood, without the complications which Langton J. unnecessarily brought about by referring to the other three authorities.\textsuperscript{129}

American cases have often been cited in English courts. In \textit{Hadley v. Baxendale} (1854),\textsuperscript{130} counsel urged that the court "ought to pay all due homage in this country to the decisions of the American courts upon this very important subject, to which they appear to have given much careful consideration", and both counsel and the judges referred to an American treatise, Sedwick on Damages. But in 1889, Fry LJ interrupted counsel's comparative arguments to say:

I have been struck by the waste of time occasioned by the growing practice of citing American authorities.\textsuperscript{131}

In 1921, in \textit{Re Macartney}, Astbury J. quoted extensively from an American case and adopted and followed it.\textsuperscript{132} Lord Atkin's judgment in \textit{Donoghue v. Stevenson} (1932)\textsuperscript{133} relied extensively on "the illuminating judgment" of Cardozo J. in \textit{McPherson v. Buick},\textsuperscript{134} adding that

It is always a satisfaction to an English lawyer to be able to test his application of fundamental principles of the common law by the development of the same doctrine by the Courts of the United States.\textsuperscript{135}

\textsuperscript{129} Cohn, supra n.31, fn.189.

\textsuperscript{130} (1854) 9 Ex. 341; 156 E.R. 145 at 149.

\textsuperscript{131} \textit{In Re Missouri Steamship Co.} (1889) 42 LR Ch.D. 321 at 330. Cotton LJ said "I have often protested against the citation of American authorities" (p.331).

\textsuperscript{132} [1921] 1 Ch. 522 at 528-530. Cohn describes this as one of the few unfortunate cases where a foreign precedent has been adopted just as it stands without further investigation - supra n.31, p.103.

\textsuperscript{133} [1932] AC 562 at 598.

\textsuperscript{134} 217 N.Y. 382 (1916).

\textsuperscript{135} [1932] AC 562 at 598.
However, in the same case, Lord Buckmaster, referring to the citation of an American case, was of an entirely different view:

It is clear that such cases have no close application and no authority for though the source of the law in the two countries may be the same, its current may well flow in different channels.  

In 1934, Greer LJ alluded to the scarcity of authority in England on the effect of assumption of risk in relation to the principle of violenti non fit injuria, and went on to study the American approach:

There is, however, a wealth of authority in the United States .... The effect of the American cases is, I think, accurately stated in Professor Goodhart's article to which we have been referred .... In my judgment that passage represents not only the law of the United States, but I think it also accurately represents the law of this country. 

Lord Wright had this to say of American authorities in Beresford v. Royal Insurance Co. (1937):

Authorities were cited from the Supreme Court of the United States. Decisions of that court are always considered with great respect in the courts of this country, and it has often been said that it is desirable to have uniformity in the law of contracts as far as possible in our two countries. 

In Lorentzen v. Lydden & Co. (1942), American cases assisted Atkinson J. to solve a novel question as to a Norwegian order in Council. American Restatements of Law may also be relied on in English cases: They are spoken of "with the highest respect as a statement of the trend of decisions in American law". Finally, in Corocraft v. Pan American Airways (1969), Lord Denning referred to American cases so that the Warsaw Convention on air transport could be "given the same meaning throughout all the countries who were parties to it".


138 [1937] 2 KB 197 at 216. 


140 Read v. J.Lyons & Co. Ltd. [1945] KB 216 at 225 (Scott LJ). 

Scottish and Irish cases are cited quite frequently in English courts. In 1974, Lord Scarman commended the attention of English lawyers to *McGee v. A.G.*,\textsuperscript{142} saying that the Irish Supreme Court was showing a profundity of thought and independence of approach seldom seen in English judgments, and that it was developing a very exciting jurisprudence.\textsuperscript{143} In *Re Brightlife* (1986),\textsuperscript{144} Hoffman J. consulted the Irish decision of *Re Keenan Bros.* (1985)\textsuperscript{145} in relation to fixed charges on the book debts of a company.

Commonwealth jurisdictions are another source of persuasive authorities in English cases. These references are so frequent that examples are unnecessary. Sir C.K.A. Allen, speaking of decisions of English-speaking courts, has noted a growing disposition on the part of English courts
to recognize [them] as somewhat more than merely persuasive, and to regard the line between 'persuasive' and 'binding' as thin and shadowy, or at least as technical and artificial.\textsuperscript{146}

It has been urged that more use should be made of Commonwealth cases:

Legal issues should be decided in the light of, rather than in ignorance of, decisions already taken in other common law jurisdictions.\textsuperscript{147}

Lord Denning has at least twice referred to German cases in support of his judgments. In *Trendtex Trading Corporation v. Central Bank of Nigeria* (1977),\textsuperscript{148} many civil law authorities

\begin{footnotes}
\footnote{142} [1974] IR 284
\footnote{143} Scarman, foreword to Marsh, supra n.59.
\footnote{144} [1986] 3 All ER 673.
\footnote{145} [1985] IR 401.
\footnote{146} Allen, *Law in the Making* (7th ed., 1964), p.284. He speaks of "foreign judgments", but makes it clear that these are only cases from "English-speaking courts in countries beyond this realm" (p.281).
\end{footnotes}
were cited in the arguments of counsel\textsuperscript{149} and Denning relied particularly on a decision of the Commercial Court of Frankfurt - \textit{Youssef M. Nada v. Central Bank of Nigeria} (1976)\textsuperscript{150} - saying that the decision

affords strong support for the view I have expressed, seeing that the German court decided in just the same way for just the same reasons.\textsuperscript{151}

In \textit{Siskina v. Distos Compania Naviera} (1977),\textsuperscript{152} Denning relied on the decision of a Hamburg court concerning "saise conservatoire".\textsuperscript{153}

In the area of Private International Law, seventeenth century English judges frequently resorted to foreign sources when laying down the rules.\textsuperscript{154} For example, in \textit{Potinger v. Wightman} (1817), Grant MR observed:

\begin{quote}
On the subject of domicil, there is so little to be found in our own law that we are obliged to resort to the writings of foreign jurists for the decision of most of the questions that arise.\textsuperscript{155}
\end{quote}

However, foreign jurists are no longer referred to as frequently as before, a state of affairs which Gutteridge regrets since it involves a failure to recognise the importance of ensuring that similar problems in the conflict of laws should not receive different solutions in different jurisdictions and that problems of conflict often assume the same form in all systems of law.\textsuperscript{156}

\begin{itemize}
\item \textsuperscript{149} Counsel's arguments are only summarised in the Queen's Bench report. The cases cited were from the Courts of Appeal of Brussels, Amsterdam, Paris and the Hague, from the French Cour de Cassation and from the Commercial Court of Frankfurt.
\item \textsuperscript{150} L.G. Frankfurt a.M., August 25, 1976, No. 3/8 014/76.
\item \textsuperscript{151} [1977] QB at 558-9.
\item \textsuperscript{152} [1977] 3 WLR 532 (C.A.)
\item \textsuperscript{153} \textit{Firma N.R.G. & Co. v. Firma G.S.K. B.V.}, Hamburg, July 9, 1975 (612 C 257/75). Denning was overruled in the House of Lords: [1977] 3 WLR 818.
\item \textsuperscript{154} Gutteridge, supra n.121, p.44.
\item \textsuperscript{155} (1817) 3 Mer. 67 at 79; 36 ER 26 at 30.
\item \textsuperscript{156} Gutteridge, supra n.121, p.45.
\end{itemize}
Also as regards Conflict of Laws, the comparative method is utilised by English judges when they determine questions of foreign law. Foreign law is a question of fact, but a question of fact of a peculiar kind.\textsuperscript{157} Section 102 of the Supreme Court of Judicature (Consolidation) Act 1925 provides that the issue is decided by the judge and cannot be left to the jury. The judge must be furnished with evidence as to the foreign law, and in assessing that evidence, he/she employs the comparative method.\textsuperscript{158}

Statistical surveys of cases cited are of some assistance, but their usefulness must not be overestimated. Professor Diamond\textsuperscript{159} conducted a survey of the 434 cases reported in the three volumes of the \textit{All England Reports} for 1965. The 3,685 cases cited included 65 Scottish, 37 Australian, 12 Irish, 12 Canadian, 10 American, 4 New Zealand, 3 Northern Irish, 2 South African decisions and 1 Indian decision. Two points may be made about this survey. Firstly, there may well have been references to foreign law which was not case-law. Roman law is never cited by cases, but instead by references to the Digests. Continental law may be referred to simply by quoting provisions of Codes or opinions of jurists. Secondly, the survey does not show how much weight was placed on the foreign decisions by the English judges. Jane Giddings\textsuperscript{160} has conducted a survey which deals with citations of cases in argument and judgment of cases reported in the \textit{Appeal Cases} from 1973 to October 1975. The information is broken down year by year, but it is perhaps more helpful for present purposes to obtain totals and represent them in a Table as below:

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|c|c|c|c|}
\hline
Year & Scottish & Australian & Irish & Canadian & American & New Zealand & Indian \\
\hline
1973 & 65 & 37 & 12 & 12 & 10 & 4 & 1 \\
1974 & 64 & 36 & 13 & 11 & 9 & 3 & 1 \\
1975 & 63 & 35 & 14 & 10 & 8 & 2 & 1 \\
\hline
\end{tabular}
\end{table}


\textsuperscript{158} See generally Gutteridge, supra n.121, chap.IV (Comparative Law & The Conflict of Laws) and Kamba, supra n.95, pp.500-501.

\textsuperscript{159} Diamond, 'Codification of the Law of Contract' (1968) 31 MLR 361 at 366.

There are several limits on the usefulness of this survey. It does not show how much weight is placed on the foreign cases. There may have been references to foreign law which was not case-law. (Giddings states that the information is obtained from the lists of cases cited given in the headnote to each reported case.) With respect, on this basis, Giddings is mistaken to conclude from this survey that

Perhaps quite naturally, there seems to be no place in decisions of cases for comparison with e.g. Civil Law solutions .... Judicial cognisance is taken of legal decisions in other jurisdictions, but this is limited exclusively to cases from other common law jurisdictions.161

Examples have already been given above of modern references to Roman and civil law authorities in English cases. Unfortunately, these can only be discovered from reading of cases, since the fact of reference to those authorities is often not included in the headnote. Another limit to the usefulness of Giddings's survey is the fact that she has not broken the foreign cases down country by country.

One interesting point in her survey is that foreign cases are cited more frequently in the Privy Council (167) than in the House of Lords (80), since the former Board sits as the Supreme Court of appeal from British Colonies and Protectorates and from the higher courts of some independent Commonwealth countries. Giddings found that the Privy Council used for the main part cases local to the dispute (e.g. from Australia, Bahamas, Jamaica, Trinidad and Tobago, Hong Kong, Malta, Malaysia, Fifi). She refers to \textit{Vaudin v. Hamson} (1974)\(^{163}\) as an exception to the general predilection for the exclusive use of comparative cases from common law jurisdictions. 

The case involved the law of prescription of land on the channel island of Sark, and Lord Wilberforce, delivering the judgment of the Privy Council, made short references to French and Roman law.\(^{164}\)

**UNITED STATES**

Cases in the United States can involve two forms of comparative law - international (consideration of solutions adopted in jurisdictions outside the U.S.A.) and interstate (consideration of solutions adopted in other U.S. states). It has rightly been said that "interstate law comparison and international law comparison are methodologically very similar".\(^{165}\)

When the settlers arrived, they did not adopt English law exactly as it was in England. In the post-revolutionary period (1776-1861), civilian sources were frequently referred to by Chancellor

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\(^{162}\) Ibid., p.13.

\(^{163}\) [1974] AC 569.

\(^{164}\) Ibid., p.582. Also p.584 (Terrien) and p.586 (Terrien and Pothier). He cites another Privy Council case, \textit{La Cloche v. La Cloche} (1870) LR 3 PC 125 as authority for the proposition that it is proper to look at related systems of law, and commentators on them, in order to elucidate the meaning of terms. But he limits this proposition to cases where it can be shown "that the system of law to which appeal is made in general, and moreover the particular relevant portion of it, is similar to that which is being interpreted in a manner which should call for a similar interpretation in the latter" (pp.581-2).

\(^{165}\) George A. Zaphirou, 'Use of Comparative Law by the Legislator' (1982) 30 AJCL (Supp.) 71 at 95.
Kent of New York and Justice Story of Massachusetts and the U.S. Supreme Court. As Whitmore Gray has said,

In the early years of every state, looking at decisions beyond its borders was an obvious necessity.

Some state legislatures attempted to prevent post-1776 English cases being cited in the state courts, but these statutes were short-lived and often ignored by the courts.

However, international comparison declined after the Civil War (1861-1865). But civil law elements have remained, particularly in Louisiana, Texas, California and Puerto Rico. For example, in *Li v. Yellow Cab Co. of California* (1975), a landmark California case on comparative negligence, there were references to the Code Napoleon and French laws in general. In 1953, the Supreme Court of New Jersey, in the case of *Greenspan v. Slate*, cited at length Article 203 of the French Civil Code, Articles 147 and 148 of the Italian Civil Code and Articles 271 and 272 of the Swiss Civil Code. Maritime law cases are more likely than most to contain references to civil law authorities.

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166 Ibid., p.81.
168 See further John Chipman Gray, *The Nature and Sources of the Law* (Macmillan, N.Y., 2nd ed., 1931), p.245, fn.1. Such statutes were passed in Kentucky, Pennsylvania and New Jersey. The Kentucky statute was passed in 1808 and was actually applied twice. It was revised in 1852.
169 13 Cal. 3d. 804, 532 P. 2d. 1226, 119 Cal. Rptr. 858 (1975); discussed in Zaphirou, supra n.165, pp.89-90. See also 'Li v. Yellow Cab Company -- Judicial Activism Illustrated' (1977) 30 Arkansas LR 557-70.
170 12 N.J. 426, 97 A. 2d. 390 (1953); cited in Zaphirou, supra n. 165, p.88.
Interstate comparison is now so complicated a matter that American courts are less likely than before to resort to international comparison. Furthermore, international comparison is also rendered less likely since American judges resort more freely than English judges to textbooks, academic articles and the Restatements of Law. Professor Wise has summarised the situation today as follows:

Foreign law is consulted, at best, only sporadically. To survey (as is often done) the law within the United States, with its multitudinous specific variations in over fifty independent jurisdictions, is already a laborious undertaking. Such glances as are cast abroad are likely to be towards other English-speaking countries, towards England usually more so than the rest of the Commonwealth for reasons of habit, familiarity, and perhaps accessibility. English cases continue to be read, although more in academic circles than elsewhere and largely, I fear, because to American sensibilities they seem to have many of the delightful qualities of a quaint fairy tale.

IRELAND

Since Ireland only became independent of English law in 1922, there has always been a marked English influence on Irish law. Article 73 of the Constitution of the Irish Free State (1922) provided that subject to that Constitution and to the extent to which they were not inconsistent therewith the laws in force in Saorstat Éireann at the date of the coming into operation of that Constitution should continue to be of full force and effect until either repealed or amended by the Oireachtas. This meant that pre-1922 common law and statutes would still apply. Article 50 of the 1937 Constitution carried forward the laws of Saorstat Éireann courts under similar conditions. The courts were quite free to develop new common law rules if they wished. In 1945, in

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172 Zaphirou, supra n.165, pp.87-88.


174 Ibid., p.11.

175 For a historical survey, see James C. Brady, 'English Law in the Republic of Ireland' (1978) 6 U. Tas. L.R. 60. A pamphlet governing the Republican courts established from 1919-1922 stated that "citations may be made ... from the Code Napoleon and other Codes, the Corpus Juris Civilis and works embodying or commenting upon Roman law, but such citations shall not be of binding authority". However, "there was a very limited acceptance of the invitation" - J. P. Casey, 'Republican Courts in Ireland, 1919-1922' (1970) 5 Ir.Jur. (n.s.) 321 at 329.
Cook v. Carroll, Gavan Duffy J. said:

When, as a measure of necessary convenience, we allowed the common law generally to continue in force, we meant to include all the common law in harmony with the national spirit, we never contemplated the maintenance of any construction of the common law affected by the sectarian background. 176

He believed that English law "surviving to us from an alien polity" need not be applied, and instead cited the laws of sacerdotal privilege from U.S. states, Newfoundland and Quebec as representing the correct rule.

In 1964, in State (Quinn) v Ryan, Walsh J. stated his preference for U.S. decisions:

In this State one would have expected that if the approach of any Court of final appeal of another State was to have been held up as an example for this Court to follow it would more appropriately have been the Supreme Court of the United States rather than the House of Lords. 177

1964 was also the year when the Supreme Court departed from the strict doctrine of stare decisis, and in so doing preferred the American, European, Canadian, South African and Australian rules to that of the House of Lords. 178 This writer has conducted a survey of the cases cited in the 1965 volume of the Irish Reports, and found that of the 439 cases cited in the 39 cases reported, 229 are English (including at least 7 from the Privy Council), 152 are Irish, 29 are American, 21 are Scottish, 4 are from Northern Ireland, 2 from Canada, and 2 from Australia. While this survey is subject to the same limitations as those of Diamond and Giddings discussed above, it does show that at that time references to English cases were extremely frequent.

It is no longer as necessary as before to rely on English authorities. While there is still wholesale copying of English statutes (Black J. has called this the "scissors and paste penchant" of the Oireachtas), 179 our law has diverged from English law on a wide variety of issues. Further--

176 [1945] IR 515 at 519.
177 [1965] IR 70 at 126.
179 Cited by McWilliam J. in Breathnach v. McCann [1984] IR 344 at 346. No source is given for
more, within the last ten or fifteen years, many fine textbooks on areas of Irish law have been produced which reflect this divergence from English law and assist students, lawyers and judges in finding relevant Irish authorities.

The judiciary have continued to criticise excessive reliance on English cases. Mr. Justice McCarthy of the Supreme Court has condemned such reliance, saying that English cases

must be examined and questioned in the light of a jurisprudence whose fundamental law is radically different in its denial of a supremacy of parliament and its upholding of three co-equal organs of government.\textsuperscript{180}

He stresses that we have a written Constitution, in contrast with the situation in England, and that our courts

would, in my view, find more appropriate guidance in the decisions of courts in other countries based upon a similar constitutional framework than in what at times appears to be an uncritical adherence to English precedent, which itself, appears difficult to reconcile from time to time.\textsuperscript{181}

Similarly, D'Arcy J. has criticised reliance on English authorities, particularly in the area of Landlord and Tenant.\textsuperscript{182}

United States law has had quite an impact on the interpretation of the 1937 Constitution, as P.D. Sutherland has found.\textsuperscript{183}

\textsuperscript{180} [1984] IR 200 at 227; [1984] ILRM 595 at 603.

\textsuperscript{181} Ibid., loc.cit. McCarthy J. has recently re-iterated this view but added "a plea against the unthinking citation of precedent as being a substitute for argument on principle, a practice all the more offensive when it involves a form of forensic forelock touching to judgments in foreign courts" - Supra n.17, p.2

\textsuperscript{182} \textit{C.I.F. First Holdings Ltd. v. Barclays Bank (Irl) Ltd.} (H.C., 25 July 1986). No written judgment was delivered, but D'Arcy J's comments are cited in De Blacam, 'Disregarding Rent Reviews when Fixing a New Rent' (1988) 6 ILT (n.s.) 7 at 7.

\textsuperscript{183} P.D. Sutherland, 'The Influence of U.S. Constitutional Law on the Interpretation of the Irish
Civil law is at times referred to in Irish cases. A striking example is *Byrne v. Ireland* (1972),\(^{184}\) in which Walsh J. describes the French and German law on state liability, referring to the *Blanco* case,\(^{185}\) Article 839 of the German Civil Code and Article 34 of the German Basic Law. In *Bourke v. Attorney General* (1972),\(^{186}\) concerning the principle of non-extradition for political offences, there were references to French, Belgian and German law.\(^{187}\) In *Wavin Pipes v. Hepworth Iron* (1982),\(^{188}\) Costello J. decided that in certain circumstances the Irish courts might look at legislative history in interpreting statutes, and in so holding commented that the English rule did not apply in civil law jurisdictions, in the U.S.A. or in the European Court of Human Rights. In *Murphy v. Attorney General* (1982),\(^{189}\) German and Italian law on tax assessment of married couples was quoted in some detail by the High Court and the Supreme Court.\(^{190}\)

As regards the law on *locus standi*, there have been references to "the law in other countries" (without the particular countries being named, but presumably including civil law countries) in *East Donegal Co-Operative v. A.G.* (1970)\(^{191}\) and *Cahill v. Sutton* (1980),\(^{192}\) while a more particular reference to the law of the member states of the European Communities was made by Walsh "Constitution' (1984) 28 St. Louis U.L.J. 41.

\(^{184}\) [1972] IR 241 at 267-8. Walsh J. also refers to the situation in the U.S.A., Australia, Canada, New Zealand, South Africa and India.

\(^{185}\) Tribunal des Conflits, 8 Feb. 1873, *Recueil Dalloz* 1873.III.17.

\(^{186}\) [1972] IR 36.

\(^{187}\) Art. 227 of the Belgian Code d'Instruction Criminelle was quoted in French and references were made to the French law of 10 March 1927, the Belgian law of 1833, Beltzen's Encyclopédie and the German Supreme Court case of *Re Fabijan* 1933 [1933-34] Ann. Dig. 360 (No.156); 6 Digest of Int. Law 834-6.


\(^{189}\) [1982] IR 241.

\(^{190}\) Ibid., pp.272-3 (Hamilton J., H.C.) and pp.284-5 (Kenny J., S.C.)


In the field of Private International Law, the same rules apply as in England, 194 which means that Irish judges and counsel use the comparative method in assessing expert evidence on foreign law. Thus, Barrington J. assessed evidence on French divorce law in *L.B. v. H.B.* (1980), 195 and German law was assessed in *Re Interview Ltd.* (1975) 196 and *Krupstahl Equipment v. Quitmann Products* (1982). 197

**FRANCE**

In 1876, the *Service de Législation Étrangère*, attached to the Ministry of Justice, was established 198 and part of its function was to inform French judges about foreign law. In 1951, this *Service* became part of the *Centre Français de Droit Comparé*. 199

It is extremely difficult to evaluate how much use is made by French judges of comparative law in deciding cases. In 1948, Marc Ancel spoke of the comparative method's usefulness to the French judge at considerable length, but unfortunately did not cite any cases to back up his description. 200 Tallon's report to the 1976 Council of Europe conference is of no assistance

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193 [1982] IR 337 at 368.


199 Established by decree of 2 April 1951, reproduced in Anon., 'Centre Français de Droit Comparé' (1951) 3 Rev. Int.Dr. Comp. 301.

200 Ancel, supra n.97.
either. The problem is aggravated by the length of French judicial decisions. The French believe that "a judicial decision must assert itself in rigorous brevity".201 As René David has said, "the higher the court the shorter the decision in France, where a brief decision is regarded as a sign of experience and wisdom."202 This concise style has been criticised by Touffait and Tunc in a 1974 article.203 Since the French decisions are so short, we have no means of ascertaining just how much foreign law is consulted by the French judges. Zweigert and Kotz have recently stated that the Cour de Cassation seems utterly unreceptive to comparative law arguments, due to the peculiar style of its judgments, which pay no heed to the factual background of the law.203a

GERMANY

Ulrich Drobnig has surveyed the use of comparative law by the German courts from 1950 to 1980,204 and concluded that the likelihood of resort to foreign cases depends on the type of case involved. There are three classes of cases. In the first class, comparison is unavoidable. Comparison is necessary in order to determine general principles of international law, or for the classification of foreign institutions so that the appropriate German conflicts rule may be correctly applied. In the second and third classes, comparison is on a voluntary basis. The second class consists of cases where comparison is encouraged by a more or less pronounced international


202 David, supra n.42, p.187.


203a Zweigert and Kotz, supra n.27, p.19.

204 Ulrich Drobnig, 'The Use of Comparative Law by German Courts' (English summary) (1986) 50 RabelsZ. 629-630. See also A. Weber, 'The Role of Comparative Law in the Civil Liberties Jurisprudence of the German Courts' in A. de Mestral et al (eds.), supra n.100a, 525-548. Dr. Hahn's national report to the 4th European Conference of Law Faculties is of no assistance in this respect.
connection of a relevant rule of German law -- the rule may be based on a convention for uniform law, it may have been derived from a foreign legal system, or the relevant branch of the law may address trans-border situations. In the third class, recourse to foreign law is completely voluntary and therefore quite rare, especially in criminal and public law. Comparative law is sometimes used in order to fill a gap in domestic law.

One example of such rare voluntary references to foreign law is a Constitutional Court (Bundesverfassungsgericht) decision of 1953\textsuperscript{205} in which the court referred to Article 1 of the Swiss Civil Code in justifying its opinion that the courts had a duty to adapt the law to new governing principles where the legislator was under a temporary disability to effect the change.

On at least two occasions, the Bundesgerichtshof (Federal Supreme Court) has used comparative law to support the principle that the victim of an invasion of the "general right of personality" may claim damages at large. In one case, it said:

In almost all legal systems which, like ours, put a prime value on the individual, damages for pain and suffering are regarded as the proper private law sanction for invasions of the personality. The availability of such damages does not adversely affect the freedom of the press, which those systems also treat as of fundamental importance, so the objection that the award of such damages in cases of invasions of personality improperly invades or unduly imperils the constitutionally guaranteed freedom of the press is clearly without substance.\textsuperscript{205a}

In another case, the Bundesgerichtshof held that the claim for such damages was limited to cases where the invasion of the right of personality had been particularly serious, observing that such a limitation "is also to be found in Swiss law, which is more concerned with legal protection of the personality than the BGB (see art.49 I OR)."\textsuperscript{205b}

\textsuperscript{205} Civil Decisions (BGZ) Vol.II.Appendix P.35 (1953), cited in W. Friedmann, supra n.30, p.535.

\textsuperscript{205a} BGHZ 39, 124, 132 (BGHZ = Decisions of the Bundesgerichtshof in civil matters); cited in Zweigert and Kotz, supra n.27, p.19.

\textsuperscript{205b} BGHZ 35, 363, 369; cited in Zweigert and Kotz, loc. cit. (BGB = West German Civil Code; OR = Swiss Code of Obligations). Zweigert and Kotz state that many further examples from German courts are analysed by Aubin, 'Die Rechtsvergleichende Interpretation autonom-intern Rechts in der deutschen Rechtsprechung' (1970) 34 RabelsZ. 458.
In Conflicts of Law cases, the German courts are in a different position to the English and Irish courts. Under S.293 of the Code of Civil Procedure (ZivilProzessOrdnung), foreign law is not a question of fact, and the court may use any source of information in order to ascertain it.\textsuperscript{206} The result is that "the German judge cannot fold his hands and leave the question to be dealt with by the parties; he must take it up himself and pursue the matter on his own account."\textsuperscript{206a} In 1967, Cohn found that the German judges hardly ever relied on English case reports, since they only rarely had access to them. Instead recourse was had to textbooks, sometimes in out-of-date editions.\textsuperscript{207}

**SWITZERLAND**

The unification of the cantonal laws of Switzerland was a long process which did not end until 1907 when the Code Civil was adopted. That Code was influenced by German and French law, and comparative law continues to be referred to in the majority of Swiss doctrinal writings.\textsuperscript{208}

In 1959, Professor Klein surveyed 20 years of cases of the Tribunal Fédéral and cited approximately 50 cases in which that court had referred to German, French, Austrian, Italian, Belgian, Chilean, Argentinian and English law. He found that comparative law was extremely useful to a judge in interpreting Swiss law or when he/she was forced to act as a legislator by the provisions of Article 1 of the Swiss Civil Code (cited at page 185 above). On the other hand, sometimes comparative law could permit the judge to establish if there was, in fact, a gap in Swiss law.\textsuperscript{209} He notes that often the court is not contented to compare the Swiss rule with a "parent"


\textsuperscript{206a} Gutteridge, supra n.121, p.48.

\textsuperscript{207} Cohn, supra n.206.

foreign rule, but spreads the comparison to other systems proceeding on different principles.\textsuperscript{210}

As regards the court's method of comparison,

Un simple renvoi à tel auteur allemand, français ou italien suffit parfois pour corroborer un raisonnement. De nombreux arrêts, toutefois, consacrent de long développements à l'analyse comparative. Et s'il est vrai que cette méthode est essentiellement appliquée en matière de droit privé, il n'en reste pas moins que certains arrêts de droit public ont su la mettre pareillement à profit.\textsuperscript{211}

Klein refers to only one public law decision in which the comparative method was applied - \textit{Lüt-}

\textit{hold c. Küng} (1956).\textsuperscript{212}

Some 16 years later, M. Gabriel Frossard of the University of Geneva\textsuperscript{213} came to a very different conclusion:

Forcé est de constater que, pour l'application du droit national, le recours au droit comparé est trés peu pratiqué dans la jurisprudence rendue en matière de droit privé. En revanche, l'étude de droits étrangers est fréquente lors de la préparation des décisions prononcées en matière de droit public (droit constitutionnel et droit administratif), ainsi que, tout particulièrement depuis 1973, en matière de droit pénal également.\textsuperscript{214}

Perhaps the reason M. Frossard reaches such a different conclusion to Professor Klein is that the former is referring to the preparatory stage of the judicial process, whilst the latter relied entirely on the published reports of the court's decisions. M. Frossard explains that the Tribunal Fédéral

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\textsuperscript{209} Ibid., p.332.
\textsuperscript{210} \textit{Loc.cit.}
\textsuperscript{211} Translation: "A simple reference to some German, French or Italian author sometimes suffices to corroborate a point. However, many decisions contain long expansions of comparative analysis. And if it is true that this method is essentially applied in private law matters, it is no less true that certain public law decisions have equally applied it profitably" - Ibid., p.323.
\textsuperscript{212} 5 December 1956, Arrets du Tribunal Federal Suisse 82 - I - 234.
\textsuperscript{214} Ibid., p.34. Translation: "It must be noted that, for the application of national law, comparative law is resorted to very little in private law cases. On the other hand, study of foreign laws is frequent at the time of preparation of decisions pronounced in matters of public law (constitutional and administrative law) and also, particularly since 1973, in criminal law."
uses comparative law mainly in the phase which precedes the judgment: such studies are contained in the report of the juge rapporteur and form the subject of the court's deliberations. The published decisions only rarely mention comparative analysis or references to foreign law.\textsuperscript{215} 

M. Fossard adds that French law is never referred to, for two reasons. Firstly, Swiss public law, procedural law and criminal law are much more similar to the corresponding legislation in force in Germany, Austria and Italy than that adopted by France. Secondly, German, Austrian and Italian decisions are elaborated and presented according to rules and conceptions which correspond to those practised by the Tribunal Fédéral: the difference from the French Cour de Cassation, for example, is considerable.\textsuperscript{216} What he is saying, in effect, is that the brevity of French decisions reduces the likelihood of their being used as a source of comparative material by the Swiss Courts.\textsuperscript{217} 

M. Fossard also makes a point which is probably true not just of Switzerland, but of most countries:

Le recours au droit comparé, dans l'application du droit national, est unanimement souhaité et reconnu comme de la plus haute utilité. Cependant, compte tenu de la surcharge des tribunaux, l'analyse comparative apparaît un peu comme un luxe, étant donné le temps considérable qu'elle nécessite.\textsuperscript{218} 

In 1984, Zweigert and Kotz stated that the Swiss Federal Court readily accept arguments from comparative law. They referred to BGE 98 II 73 and 273 as leading examples.\textsuperscript{218a}

\textsuperscript{215} Ibid., p.35.
\textsuperscript{216} Ibid., p.34.
\textsuperscript{217} See also Marsh, supra n.29, p.79 (Proceedings), p.658 (RabelsZ.)
\textsuperscript{218} Fossard, supra n.213, p.35. Translation: "Resort to comparative law in the application of national law is unanimously wished for and recognised as of the greatest usefulness. However, having regard to the overburdening of the courts, comparative analysis appears somewhat as a luxury, given the considerable time which it requires."
\textsuperscript{218a} Zweigert and Kotz, supra n.27, p.19. Although the English translation of Zweigert and Kotz was published in 1987, the German version of the second edition was published three years earlier in 1984 (p.vi). BGE = Decisions of the Swiss Federal Court (Bundesgericht). As a
Finally, it should be noted that the Swiss Institute of Comparative Law, created by a federal statute of 6 October 1978, provides information to courts as part of its functions.219

**OTHER EUROPEAN COUNTRIES**

In Greece, judicial decisions are "not indifferent to"220 foreign law, as M. Mettalinos has illustrated by referring to a decision of the Court of Appeal of Athens. In that unnamed case, a question of arbitration law was decided by reference to Austrian and, in particular, German law, since the Greek Code of Civil Procedure was modelled on their systems of law.

In Turkey, judicial decisions benefit from comparative researches and this is especially true when the judge must act as a legislator under Article 1 of the Turkish Civil Code (modelled on Article 1 of the Swiss Civil Code).221

In the Netherlands, Dutch court practice has been said to be coloured by a *horror alieni juris*.222 Mr. E.H. Hondius says that it is very rare to find references to foreign law strictly for comparative reasons in Dutch court decisions. A 1943 *Hoge Raad* decision, *Van Kreuningen v. Bessem*,223 which was based on case-law and legislation of neighbouring countries concerning

source of further details and references, they cite Uyterhoven, *Richterliche Rechtsfindung und Rechtsvergleichung* (1959).


tortious compensation for nonfinancial loss, has proven to be a *rara avis*. Ever since, references to foreign law usually are not made, even if it is quite clear that inspiration was drawn from foreign law. Thus, a 1973 decision of the Hoge Raad concerning the demand of a transsexual for change of the mention of his sex in his birth certificate\(^\text{224}\) may well have been inspired by a similar decision of the German Bundesgerichtshof\(^\text{225}\) (which Hondius says seems to have the highest impact on Dutch legal science). Hondius adds that the motivation of Hoge Raad decisions is far less elaborate than that of German and English decisions, but not as staccato as that of Belgian, French and Russian decisions in cassation.\(^\text{226}\)

Comparative law seems to play a considerable role in Luxembourg, probably because it is such a small jurisdiction. M. Arendt describes the situation as follows:

Il ne se conçoit pas une bibliothèque de praticien (juge ou avocat) où ne figurent les grands traités et un grand nombre de périodiques édités en France, en Belgique ou en Allemagne. Les arrêts de la Cour de Cassation reflètent très souvent ceux de la Cour de Cassation de France, plus rarement ceux de la Cour de Cassation de Belgique (notamment en matière de responsabilité délictuelle ou quasi-délictuelle). Un revirement de jurisprudence en France ou en Belgique sera tôt ou tard suivi au Luxembourg.\(^\text{227}\)

M. Arendt therefore describes the Luxembourg situation as eclectic in character.\(^\text{228}\)

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\(^\text{226}\) Hondius, supra n.222, p.14.

\(^\text{227}\) Translation: "A library of a practitioner (judge or advocate), without the main treatises and a large number of periodicals published in France, Belgium or Germany, is inconceivable. The decisions of the Luxembourg Cour de Cassation very often reflect those of the French Cour de Cassation, more rarely those of the Belgian Cour de Cassation (notably in delictual or quasi-delictual matters). A change of case-law in France or Belgium will sooner or later be followed in Luxembourg" - E. Arendt, National Report to the Fourth European Conference of Law Faculties (unpublished, 20 February 1976), pp.17-18.

\(^\text{228}\) Ibid., p.18.
CONCLUSIONS

Consultation of foreign solutions is probably more frequent in judicial law reform than has hitherto been realised. Judges often seem slow to admit to such consultation - "judges are seldom explicit about their reliance on comparative law".229 Again, it is submitted that a policy of openness in judicial decision-making should be pursued, which would mean that judges should refer to foreign law researches in their judgments if they have conducted such researches.

The country-by-country account above demonstrates that comparative law is not only useful for cases of first impression, for conflict of law cases and for cases involving international conventions. Judges have consulted foreign solutions on a much wider basis.

The judiciary normally consult jurisdictions within the same legal family as their own jurisdiction. Thus, common law judges normally consult civil law jurisdictions and vice versa. However, statistical surveys of cases cited in published reports have been shown to be defective and to present an incomplete picture of crossreferences from common law to civil law. Consultation of foreign solutions would appear to be more frequent in small jurisdictions or jurisdictions whose legal history involves a mixture of influences.

Hondius points out that comparative research is something of a luxury when courts are overburdened, given the considerable amount of time it requires. However, it is submitted that while this may excuse judges for their lack of such research, the situation for practitioners is very different. Hence, Gutteridge has stated:

It would be too much to expect of our judges that they should all be comparative lawyers. The burdens imposed on them are already sufficiently heavy without the addition of a further requirement that they should engage in a profound study of foreign law. This is a plea, however, which should not be available to those who practise in the courts. If they themselves have not the qualifications to enable them to place before the court an accurate synopsis of solutions which have been arrived at or proposed in other jurisdictions it is their duty to consult others who are in a position to supply the information which is needed.230

229 Marsh, supra n.29, p. 77, fn.17 (Proceedings), p.654, fn.18 (RabelsZ.)
Finally, it must not be forgotten that there are dangers in the misuse of the comparative method in judicial law reform, as in all areas of law reform. These dangers have been summarised in Chapter I. For example, Cohn has noted that there are a few unfortunate cases where a foreign precedent has been adopted just as it stands without any further investigation. However, as he says, such cases are rare.

C. THE SUGGESTIVE ROLE OF JUDGES IN LAW REFORM

Often when a judge is deciding a case, he/she will point out a defect in the law which he/she feels should be remedied by the legislature. He/she may even summarise the solution which should be adopted. This is known as the "suggestive" role of judges in law reform -- judges suggest to the legislature the remedial action which should be taken. Strictly speaking, this is not judicial law reform at all. In fact, it is an aspect of the mechanism for reform by legislation. However, to the extent that in performing this suggestive function judges are catalysts or initiators of law reform, this topic may be dealt with here.

An early example of judges' suggestive role in law reform is Hall's Case (1845). The heavy ironic humour which Mr. Justice Maule employed in sentencing a bigamist at Warwick Assizes in this case is said to be the 'fons et origo' of the move to transfer matrimonial jurisdiction from the ecclesiastical to the secular courts. The Matrimonial Courts Act, 1857, was enacted partly as a result of this judgment. There are many other English cases containing such suggestions. One notable example is Cartledge v. Jopling (1963) which caused an amendment of the law.

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230 Gutteridge, supra n.121, p.45.

231 Cohn, supra n.31, p.103.


233 [1963] AC 758
within 6 months. In *Mangin v. I.R.C.* (1971), Lord Donovan suggested amendments to s.108 of the Land and Income Tax Act 1954. In *Dennis v. Charnwood Borough Council* (1981), Lawton LJ suggested a compulsory insurance scheme for builders of houses. In the 1960's, the Council of Law Reporting added a new category to its indexing and digesting of cases reported, viz., "Law Reform - Whether Necessary", and there have been more than 50 cases classified under that heading to date.

In New York, judges have sometimes sent copies of their judgments to the Law Revision Commission to ensure that a suggestion will not be ignored. In *Germain v. Germain* (1959), Judge Moule stated:

> The court believes that consideration should be given to amending the New York State law to provide for the appointment by the court of a conservator of the property of one who disappears voluntarily or involuntarily and cannot be proved dead, seen or heard of.... This court, by sending copies of this opinion to the New York State Law Revision Commission, New York State Bar Association and Erie County Bar Association, is suggesting that remedial legislation be enacted.

Sometimes, the New York courts will send a letter to the LRC to call its attention to a suggested reform, as happened in *Karminski v. Karminski* (1947).

The Irish courts have often suggested reforms to the Oireachtas. As Tony Kerr says,

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235 [1971] 1 All ER 179.


The Supreme Court has never been shy of indicating to the legislature any deficiencies there might be in legislation they are called on to interpret.\textsuperscript{238}

In 1945, Gavan Duffy J. suggested that the Oireachtas adopt the Quebec statute on sacerdotal privilege.\textsuperscript{239} In 1977, Kenny J. and O'Higgins CJ urged immediate reform of the Trade Disputes Act 1906.\textsuperscript{240} In 1980, in \textit{Cahill v. Sutton},\textsuperscript{241} the Supreme Court urged changes in s.11 of the Statute of Limitations 1957.\textsuperscript{242} In \textit{Siney v. Dublin Corporation} (1980),\textsuperscript{243} Henchy J. suggested that statutory effect in relation to tenancies be given to the legislative proposals set out in the Law Reform Commission's Working Paper No.1. The same judge pointed out a problem with the ground rents legislation on 14 November 1980\textsuperscript{244} but it was not solved until 1984, with the enactment of the Landlord and Tenant (Amendment) Act 1984. Reforms in the planning laws were enacted a mere five months after the decision in \textit{State (Pine Valley Developments) v. Dublin County Council}.\textsuperscript{245} Finlay P. (as he then was) urged removal of an anomaly in s.22 of the Courts Act 1981 in his decision in \textit{Mellowhide Products v. Barry Agencies} (1983),\textsuperscript{246} pointing out that the equivalent U.K. statute did not have such an anomaly. Murphy J. suggested an amendment to s.180 of the Building Societies Act 1976 in \textit{Rafferty v. Crowley} (1983)\textsuperscript{247} and took the highly

\textsuperscript{238} Tony Kerr, 'Is There Anybody Out There Listening' (1983) 1 ILT (n.s.) 100-102 at 100.

\textsuperscript{239} \textit{Cook v. Carroll} [1945] IR 515 at 518-9.

\textsuperscript{240} \textit{Goulding Chemicals Ltd. v. Bolger} [1977] IR 211 at 241 (Kenny J) and at 233 (O'Higgins CJ).

\textsuperscript{241} [1980] IR 269 at 288.

\textsuperscript{242} In \textit{O'Domhnaill v. Merrick} [1984] IR 151, McCarthy J. noted that the Oireachtas was stalling incredibly on reforming the problem. The problem was the subject of a Dáil question on 13 May 1987 (372 Dáil Debs. 1788). The Law Reform Commission has now proposed reforms --- Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries (LRC 21, Oct. 1987).

\textsuperscript{243} [1980] IR 400 at 420-421.

\textsuperscript{244} \textit{Gilisenan v. Foundary House Investments} [1980] ILRM 273.

\textsuperscript{245} [1982] ILRM 169.

\textsuperscript{246} [1983] ILRM 152.

\textsuperscript{247} [1984] ILRM 350.
unusual step (as in the New York cases) of directing the Registrar of the Courts to forward a copy of his judgment to the Minister for the Environment and to the Registrar of Building Societies to ensure they were aware of his suggestion. As a result, the second reading of the Building Societies Bill 1983 was moved nine working days after his judgment. In *State (Clarke) v. Roche*, decided on 12 December 1986, Finlay CJ suggested that the Oireachtas replace the Petty Sessions Act 1851 with statutory provisions more suitable to the modern District Court. Within 17 days, the Oireachtas passed the Courts (No.3) Act 1986, which legalised computer summoning (but did not repeal the 1851 Act). In the Derrynaflan Hoard case, the Supreme Court suggested reform of the law of treasure trove by provision of a system of rewards as existed in other countries.

Judges and observers have often expressed dissatisfaction at the slow response (or often, absence of response) of legislatures to such suggestions. In France, a limited mechanism already exists which strengthens the communication between the judges and the legislators. Since reforms in 1963 (i.e. the creation of the Commission du Rapport et des Etudes), the Conseil D'État submits an annual report to the President of the Republic which deals, inter alia, with what legal or administrative reforms it considers desirable. Some have called for a system whereby there would be no danger that the legislature would not be aware of a judgment and the suggestions for reform contained in it.

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In 1934, Prof. Yntema proposed links of "mediation" between the courts and the legislature as one means of achieving a scientific process of law reform.251 In 1948, the editor of the Law Quarterly Review complained that

There have been a considerable number of cases in recent years in which the judges have called attention to desirable changes in the law, but as things are at present there can be little hope that their authoritative recommendations will be put into effect.252

In 1974, Mr. Justice Fox, senior Justice of the Supreme Court of the Australian Capital Territory, proposed that there should be machinery at an appropriate official level to process the suggestions for law reform made by judges from time to time, and to ensure due consideration being given to any legislative changes recommended by them.253 In 1976, the Second Annual Report of the Australian Law Reform Commission regretted the wastefulness caused because law reform suggestions "remained hidden in the lawbooks".254 In 1979, a Committee of the Australian Senate recommended that the Australian L.R.C. act as a clearing house for law reform suggestions, and that its annual reports should list suggestions by judges or received from other sources.255 In 1980, Sir Garfield Barwick, Chief Justice of Australia called for a "formalised apparatus" for suggested reforms to be communicated from judges to the legislature and the executive.256 The Australian government agreed to the Chief Justice's suggestion and Annual Reports of the Australian

251 Yntema, 'Legal Science and Law Reform' (1934) 34 Col.LR 207 at 224-5.
252 Note (1948) 64 LQR 171.
L.R.C. now contain a schedule of law reform suggestions, including those emanating from the judiciary. In 1983, Tony Kerr said that the Irish judiciary was justified in wondering whether the "hot-line" between the Courts and the legislature was "out of order" and concluded as follows:

Law reform should not depend on the chance of whether sufficient pressure can be brought to bear on Ministers nor on whether sufficient political advantage can be derived from it. A constructive move would be an amendment to the Law Reform Commission Act 1975 empowering the Commission to respond immediately to decisions such as *Mellowhide Products* and to produce draft Law Reform (Miscellaneous Provisions) Bills without having to be specifically directed to do so by the Attorney General.

It is submitted that some formalised apparatus is indeed needed to ensure that useful suggestions for reform are not forgotten or ignored. Some judges may be opposed to such an arrangement on the grounds that it would be an inappropriate reduction of judicial independence, but the system would only ever be a facility of which judges could choose to avail or not to avail as they pleased. Murphy J's move in *Rafferty v. Crowley*, when he forwarded a copy of his judgment to the Minister and to the Registrar, would appear to indicate that at least some Irish judges would welcome a formalised apparatus. There would be no obligation on judges to use the apparatus. This would eliminate the main defect of three other procedures which involved compulsory reference to the legislature by a judge for an interpretation if he/she found a gap in the law, namely the French *référé législatif* (1790-1837), Article 50 of the *Preuissiches Allgemeines Landrecht*

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257 See, for example, Annual Report 1986 (ALRC 34), Appendix C, pp.73-78. In March 1988, Mr. Justice Kirby complained that no parliamentary mechanism had been established to consider the suggestions -- 'Revitalising Parliament' [1988] Reform 101 at 102.

258 Kerr, supra n.238, p.100.

259 Ibid., p.102.


261 Otherwise known as the "rèféré obligatoire". This only applied if there was a "résistance des juridictions du fond" -- see Art.21, decree of 27 Nov.-1st Dec. 1790. Further details in Gérard Comu and Jean Foyer, *Procédure Civile* (Presses Universitaires de France, Paris, 1958), p.195 and p.199.
(Prussian General Land Law) (1794)\textsuperscript{262} and Bentham's 'View of a Complete Code of Law'.\textsuperscript{263}

\textsuperscript{262} This required a judge, if he did perforce fill a gap in the Code, immediately to report it to the Ministry of Justice. See Marsh, supra n.59, p.11.