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The Argumentative Status of Foreign Legal Arguments

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1. Introduction

Comparisons with other jurisdictions are a commonplace in legal argumentation. It is an integral aspect of how lawyers work. However, the significant issues are the force which such comparison carries and the legitimacy with which it is used. This paper seeks to make sense of the argument from foreign sources drawing on the work of Markesinis and Waldron. It argues that a justification based on foreign sources is not essentially a free-standing justification, but rather it gives additional support to arguments that can be based on existing domestic law sources by showing that they illustrate a principle or value shared by a number of other legal systems. A key aspect is that legal development does not work simply by reformulating the rules by borrowing words or rules from other jurisdictions. Law essentially involves the meaning that is given to words, and that involves an act of interpretation in the context of the legal system as a whole. So to ascertain the meaning, we need to appreciate how rules are interpreted and integrated into the legal system.

The argument proceeds in three steps. First, there is a discussion of the nature of legal arguments, which seeks to show that the formulation of legal rules in a domestic context is contested and that citations typically serve to add weight to an argument in favour of a particular formulation of a legal rule. Within that structure of legal argument, it is straightforward to see the potential weight of a citation from a foreign legal system. Secondly, a discussion of the argumentative status of foreign citations takes this further by examining whether the foreign citation adds an additional reason for a decision or merely embellishes the argument. This is illustrated by judicial decisions in the field of product liability in Italy and Germany. Thirdly, the suggestion is made that the foreign citation argument operates in this way because of the reputation of the foreign legal system and the fact that it concerns a common enterprise between the jurisdictions, in the sense of an attempt to solve what is, at a general level, a common social problem.

It could be suggested that the two authors, Waldron and Markesinis, are incomparable in that Waldron is writing about international comparisons in the context of human rights law (in a national court) and Markesinis is writing about comparative contract or, more broadly, private law. I think this view, though understandable, mistakes their approach to comparative law. It may be that, in continental

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Europe, many lawyers habitually confine their attentions to either public law or private law, and there are often separate courts hearing such cases, which may develop different practices in relation to the admission of foreign legal material. But there is nothing sacrosanct about the distinction between public and private law,¹ especially in terms of legal methodology. Indeed, neither the arguments of Waldron or of Markesinis are logically confined to one branch of law, even if their specific discussion and illustrations are more limited. Some legal systems use principles of private law to govern the liability of public authorities, some have special rules. Human rights arguments may be raised in public law against the state, but they may often have horizontal effect against private individuals before private law courts. However distinct some rules happen to be in some legal systems, and however distinct the jurisdiction of courts may be in some legal systems over some legal problems, it is not possible to provide a bright-line distinction between public and private law as the basis for a distinctive general theory of legal methodology. However surprising to some continental European lawyers, this article proceeds on the basis that a general analysis and theory of legal methodology has to offer an account of the use of comparative law which is coherent across a legal system as whole.

2. The structure of legal arguments

There are two features to bear in mind when considering legal arguments in this context. The first is the nature of the sources on which lawyers draw, the second is the force attached to individual parts of those arguments.

2.1. Legal sources

Rodolfo Sacco usefully developed the concept of ‘legal formants’ to describe the conception of a legal system with which lawyers work:

‘even the jurist who seeks a single legal rule, indeed who proceeds from the axiom that there is only one rule in force, recognizes implicitly that living law contains many different elements such as statutory rules, the formulations of scholars, and the decisions of judges – elements that he keeps separate in his own thinking. In this essay, we will call them, borrowing from phonetics, the “legal formants”. The jurist concerned with the law within a single country examines all of these elements and then eliminates the complications that arise from their multiplicity to arrive at one rule. He does so by a process of interpretation. Yet this process does not guarantee that there is, in his system, only a single rule.’²

It would be clearer to say that national doctrinal lawyers and judges making decisions have the ideas of coherence and consistency as regulative ideals.³ This produces the notion that there is a single formulation of the law valid at a particular moment of decision. As Sacco says, this regulative ideal is implemented by an act of interpretation which has authority because of the position occupied by the decision-maker. It would not be right, however, to characterise the legal community as actually operating with a single view of what the law is.

The idea of ‘formants’ suggests that there are competing, always incomplete, versions of what the law is on a particular matter. These are contributed by different participants in the legal discussion, even if they agree on the basic sources and principles of the system. Some discussants have particular authority, such as higher courts. Others will contribute their ideas without particular authority, e.g. lower courts and many doctrinal writers. So, in coming to a decision in a difficult case, lawyers are arguing for a

1 See J. Allison, *A Continental Distinction in the Common Law*, 1996, and G. Jurgens & F. van Ommeren, ‘The Public-Private Divide in English and Dutch Law: a Multifunctional and Context-Dependant Divide’, 2012 *Cambridge Law Journal* 71, no. 1, pp. 172-199.

2 R. Sacco, ‘Legal Formants: A Dynamic Approach to Comparative Law’ 1991 *American Journal of Comparative Law* 39, no. 1, p. 22. See also S. Mancuso, ‘Legal Transplants and Economic Development: Civil Law Vs. Common Law?’, in J.C. Oliveira & P. Cardinal, *One Country, Two Systems, Three Legal Orders – Perspectives of Evolution*, 2009, p. 75.

3 N. MacCormick, *Rhetoric and the Rule of Law. A Theory of Legal Reasoning*, 2005, pp. 189-93. This is contested by C. Sampford, *The Disorder of Law: A Critique of Legal Theory*, 1989; F. Ost & M. van de Kerchove, *Legal system between order and disorder* (translated by I. Stewart), 1994.

particular formulation and interpretation of the national law drawn from the stock of currently arguable versions of the law within a particular legal community. The support for such an argument comes from its coherence and consistency with the rest of national law, but also with the ambitions of national law to represent the abstract ideal of justice instantiated in a particular time and place.

Legal argumentation might usefully be described as a conversation between members of the legal community (as well as with outsiders) about how the law is best formulated and applied in an individual situation. Courtroom debate highlights this feature most dramatically – there is an interchange between advocates and judges in order to test out arguments and reformulate them. This is clearly seen before the European Court of Justice. In other systems, such debates may happen through written submissions or in the privacy of the chambers in which judges meet together to deliberate on their conclusions. From observing these different processes at work,⁴ there are great similarities in the character of legal argumentation, whether the process is written or oral, whether it focuses on debates between judges and advocates or whether the judges debate among themselves. Legal argumentation most typically takes the form of a conversation between lawyers, testing and refining argument.

The combination of the ideas of formants and the legal conversation produces a sense of indefiniteness in statements of the law. Although the regulative ideal may lead to claims that a particular view is the ‘right’ statement of the law, the picture which an observer of the legal system acquires is of a diversity of opinions. It is in this indefiniteness of national law that statements of foreign law can contribute weight to some of the competing internal statements of the law.

2.2. The force of citations

I do not believe that the justification of judicial decisions typically depends on a single argument, but that it depends on an accumulation of arguments. The model of legal reasoning I have in mind is one that depends on a combination of reasons, each of which may be insufficient to justify the decision in its own right, but, taken together, they provide support for the decision.⁵ The analogy is with individual threads of fibre. On its own, a single thread cannot hold up a weight, but twisted in combination with other threads, it forms a cord which can carry a substantial weight. Common lawyers are bewitched by the force of a single binding precedent and often forget that precedents come in groups which provide a context for each other.⁶ The meaning of a precedent is not just given by the facts of the case, but also by the legal context out of which the ruling comes. After all, the concept of distinguishing (which limits the effect of a precedent) relies on the idea that any statement of the law also contains a number of unexpressed ideas, which are then articulated in a later case. In distinguishing, the judge modifies the precedent rule by adding a condition or a restriction. For example, in *Mutual Life v Evatt*, the Privy Council restricted the liability for negligent misstatements laid down in *Hedley Byrne v Heller* to statements made in the professional area in which the person making the statement worked.⁷ The reason was to make the law more consistent – the *Hedley Byrne* rule was itself an exception to the general idea that recovery for economic loss was not possible. The German expression *ständige Rechtsprechung* and the French idea of *la jurisprudence constante* both contain the idea that, whilst a single decision may not have a lot of force, a group of decisions in the same direction have a gravitational effect.

In Raz’s terms, there is a distinction between an argument having weight (because of the authority of its source or the persuasiveness of its content) and being an exclusionary reason for action, i.e. a reason which allows you to ignore otherwise valid arguments.⁸ An exclusionary reason arises from some extrinsic quality of an argument, e.g. the authority of a decision-maker. So a rule laid down by the Dutch legislator provides a reason for the Dutch citizen to decide to act contrary to what she would otherwise treat as a valid moral reason for acting. For example, all things considered, she may think that it is right to cross the road which is currently empty of traffic, as far as she can see. But if there is a red light against the pedestrian, she has a legal reason for excluding her normal reasoning processes and following the legal

4 J. Bell, ‘Reflections on the Procedure of the Conseil d’Etat’, in G. Hand & J. McBride (eds.), *Droit sans frontières*, 1991, p. 211.

5 J. Wisdom, ‘Gods’, 1944 *Proceedings of the Aristotelian Society* 45, pp. 185-206.

6 N. Duxbury, *The Nature and Authority of Precedent*, 2008, pp. 60-66.

7 *Mutual Life v Evatt* [1971] AC 793; *Hedley Byrne v Heller* [1964] AC 465.

8 J. Raz, *Practical Reason and Norms*, 2002, pp. 37-43, 190-194; see also Duxbury, *supra* note 6, pp. 102-108.

requirement to cross only when the pedestrian light is green. Such an exclusionary reason provides a reason for discounting most other reasons, but is not absolute. (For example there may be an emergency which makes it morally right to ignore the legal requirement.) Compliance is secured because the individual merely has to reflect on the generic reason ('I must comply with the decisions of the Dutch legislator'), rather than on each particular rule ('Must I comply with the rule on traffic lights?')⁹ In the same way, the decision of a highest court may be an exclusionary reason for action in a system that operates a system of precedent. Thus a ruling on the law by the *Assemblée plénière* of the *Cour de cassation* on a case will bind the *Cour d'appel de renvoi* which has to decide the case on its facts.¹⁰ Even if it thinks the *Assemblée plénière* is wrong, it must follow it for this case.

Most legal arguments are merely persuasive, but not exclusionary. Binding reasons are not the only reasons. Other arguments, such as statements by a regulatory authority or a previous lower court, have weight in deliberation, but they do not offer a shortcut in the way an exclusionary reason does. Faced simply with a persuasive legal argument, I would not look for a single reason to justify my decision. It will be a matter of weighing the combinations of reasons pulling in each direction. I am faced with a normal balance of reasons. Within this model, there is scope for a variety of reasons of different strength to contribute to a justification. As a result, it is of limited value to look at individual reasons on their own. A lawyer has to look for the combination of reasons. Hence the idea of threads in a rope. One individual thread does not hold up a heavy load, but a number twisted together can achieve that. It is that idea that underpins concepts like *ständige Rechtsprechung*. One decision may not have a lot of force: it could just be a mistake. But a pattern of decisions over time has a lot more force. If many judges over many years have thought in a particular way, then it is strongly persuasive that this is the correct answer. I would need to be very convinced by my own arguments to decide against this regular pattern.

Now, if we take this analysis of ordinary arguments in national law, it is far easier to see how a foreign legal citation can fit in. The rope is not necessarily made up of threads of the same kind. In a national legal argument, there may be previous judicial decisions, analogy with legislation, arguments of fairness or justice, arguments of legal policy and the like. All these are recognised in works on legal reasoning.¹¹ To my mind, the argument from a foreign legal system typically adds lustre to an argument already available in the host legal system, it is a further thread to support an argument which has support already within the national sources of law. This is essentially because I believe the mechanism by which a foreign legal idea takes root in the host legal system is essentially by means of 'cross-fertilisation'.¹² Through this form of influence, we obtain an indigenous reason for a decision that integrates well within the host legal order. The foreign legal arguments may shape the debate and cast some possible solutions in a better light. Typically, however, there is no wholesale direct transplanting of the solution from another system, unless it also integrates with a local solution. In the many cases on the development of law and the citation of foreign judgments, it would be exceedingly rare to find such a foreign judgment standing alone as the reason for a decision.

So, in brief, if we are to understand correctly where foreign citations fit into legal reasoning, we need to get away from the common lawyer's obsession with the rare cases in which a single decision provides a binding or an exclusionary reason for a decision. Rather, we are looking at such a decision operating within a combination of reasons to add force to reasons that exist within the system. Indeed, as the cross-fertilisation idea suggests, it is often the domestic reason stimulated by the foreign legal idea, rather than the foreign decision itself, which actually provides the strongest justification for a particular legal solution.

9 Ibid., p. 193.

10 Art. L 431-4, para. 2 of the French *Code de l'organisation judiciaire*.

11 E.g. N. MacCormick, *Rhetoric and the Rule of Law*, 2005, ch. 10; W. Fikentscher, *Methoden des Rechts*, 1977, IV, pp. 202-267, 283-287.

12 J. Bell, 'Mechanisms for Cross-fertilisation of Administrative Law in Europe', in J. Beatson & T. Tridimas, *New Directions in European Public Law*, 1998, pp. 147-167. I defined 'cross-fertilisation' as 'an external stimulus promotes an evolution within the receiving legal system. The evolution involves an internal adaptation by the receiving legal system in its own way. The new development is a distinctive but organic product of that system rather than a bolt-on.' (p. 147).

3. Argumentative status

If we accept that a foreign citation is likely to serve as a supporting reason, then the question can be asked: within the justification for a judicial decision, what is the force of the citation of a foreign judgment? I suggest that there are three options (a) it adds force to an opinion by providing an additional reason for action, (b) it adds force by identifying an underlying legal principle of which the proposed decision, supported by national law, is but an illustration and of which the foreign citation is also an illustration, or (c) it apparently adds no weight at all, but is a rhetorical flourish.

These three options can be illustrated as follows:

1. A Danish decision interpreting the Geneva Convention on refugees would provide a reason in its own right that the Convention has a particular meaning for a country like the UK which is also a signatory. The Danish decision's weight comes essentially from the Convention, but it is a concretisation of it. There is no reason why the Danish courts should rule differently from the UK courts. (But there may still be a genuine disagreement on what the Convention requires.)
2. Within the common law, an Australian decision on tort law offers both an example of how to interpret the common law and in particular a principle within the common law, e.g. causation, on which an English common law decision could be based. So it is not that the Australian decision as such has any weight, but it illustrates a principle of the common law within a particular area from which an English rule could also be drawn.
3. An argument from France might be a curiosity in England, e.g. on wrongful birth, but it does not add any weight to a solution reached by the application of English law. It may comfort the English judge that judges from other countries have reached the same solution, but this has no added value in the reasoning. It may serve as a source of inspiration, but there needs to be something more which makes the citation of a foreign decision a distinctive argument.

It is this third category that is of interest, because it concerns citations of foreign case law that are not required. A good lawyer ought to find out about interpretations given of common legal documents or common principles. In the third case, however, we are dealing with an apparently optional citation. The decision could have been taken without the citation. My argument would be that the foreign citation does carry some weight in such circumstances, but it is as a supportive and not as an independent argument.

I want to take two examples from the literature of arguments why such optional citation of non-binding legal principles should carry weight in legal argument. In very broad terms, I would characterise Markesinis's approach to the subject as 'utilitarian' and that of Waldron as principled. We need to distinguish the process of discovery (how we should go about making a decision) and the process of justification (why anyone should accept our decision as correct in law).¹³ The mere fact that we examine foreign legal arguments as part of the process of discovering what the law is, does not mean that these arguments provide a justification for a decision by a judge. Citation is only relevant here where it plays a part in a justification.

3.1. The 'usefulness argument': Markesinis

Markesinis essentially argues that the use of comparative law is justified by its utility: the examination of foreign law helps the judge to make a better decision.¹⁴ He provides a number of examples of situations in which this is valuable.¹⁵ First, the court may need to discover 'common principles of law' and clearly this is a situation where comparison of different systems is necessary. Secondly, he suggests that the law may be in need of modernisation or have a gap and some guidance about the right answer for contemporary needs may be welcome. He illustrates this with the English law on defamation where the issue of whether public bodies should be allowed to use the law of defamation against critics was resolved by

13 N. MacCormick, *Rhetoric and the Rule of Law. A Theory of Legal Reasoning*, 2005, p. 208. Duxbury talks about case law as a *heuristic* to discover what is right: *supra* note 6, p. 94.

14 See B. Markesinis & J. Fedtke, *Engaging with Foreign Law*, 2009, e.g. p. 372.

15 See B. Markesinis & J. Fedtke, 'The Judge as Comparatist', 2005 *Tulane Law Review* 80, no. 1, pp. 76-109.

looking at the law of the United States. Thirdly, a social problem may be so widespread that it is desirable to have a harmonised response. For example, asbestos has caused injuries to workers in many countries, and it would seem sensible that similar approaches to causation in relation to the harm caused would be adopted. Fourthly, the experience of other countries may disprove local fears about the consequences of a change in the law. For example, the English always fear that making public bodies liable for regulatory activities will cause officials to be excessively cautious in the performance of their regulatory duties and that they will therefore perform their role less efficiently. But he suggests that an examination of German experience would have shown that such fears were exaggerated.¹⁶ Fifthly, the foreign experience may show that a particular solution has already worked elsewhere. Sixthly, as I have already mentioned, comparison with other countries is particularly necessary where the national law has its origins in an international instrument. Finally, where the law is confronted by technical matters, rather than value-laden ones, then comparison is less difficult – there is no cultural or political reason for differences between countries. This valuable list of situations for comparison shows why national courts would find the citation of foreign decisions useful information in coming to decisions. Basil Markesinis argued that ‘Necessity, *practical commercial necessity*, is what will make the study of foreign law grow further and deeper, not dreamers of the past nor trendy preachers of the present (...).’¹⁷ But the status of the comparative argument depends on a judgement about utility in each situation.

The argument provides excellent reasons why, in the process of coming to a decision (of discovering the law), a judge should be referred to a wide variety of sources including those from foreign law. The difficulty with this argument is that it provides no explanation of why the foreign citation carries justificatory weight.

3.2. *The ‘equal treatment principle’: Waldron*

By contrast, Waldron focuses on reasons of principle why a decision of a foreign court *ought to be* persuasive, and why judges ought to be required to consider them.

Waldron argues that the justification for references to decisions from other jurisdictions lies in two types of reason. The first and most distinctive of the Waldron approach is to examine what he calls ‘bottom-up demand for consistency.’¹⁸ This is an argument based on the requirement of justice that like cases be treated alike. In brief, this means focusing on those in differing jurisdictions who are subject to divergent treatment. He gives the analogy of humanitarian agencies operating in a refugee camp. If a British charity, Oxfam, operating in the north of the camp gives the refugees two meals a day, and other agencies operating in the south only give them one meal a day, different refugees in different parts of the camp get different treatment. They will complain, but do they have any grounds of complaint? They are aware of the different treatment of others and are (at least humanly speaking) understandably distressed by the disparity of treatment. He argues:

‘People in one country are aware of the way individual rights are accorded to others, similarly situated in another country. They know that their government is supposed to be responding to the same principles, the same concerns, and the same circumstances as the other governments, and so they wonder about fairness and why different governments have not got their act together to ensure that, in this world, like cases are treated alike.’¹⁹

Now this complaint says that the same broad principles should lead to the same results despite institutional or geographical difference. The core of the argument is that the law is a search for a right answer to the application of certain principles which has to be ‘figured out’ in each jurisdiction.²⁰ In this he is argu-

¹⁶ Ibid., pp. 99-100.

¹⁷ B. Markesinis & J. Fedkte, *Comparative Law in the Courtroom and in the Classroom*, 2003, p. 66.

¹⁸ J. Waldron, ‘Treating like cases alike in the world: the theoretical basis of the demand for legal unity’, in S. Muller & S. Richards (eds.), *Highest Courts and Globalisation*, 2010, p. 109 (hereafter ‘*Highest Courts*’).

¹⁹ Ibid., p. 110.

²⁰ J. Waldron, ‘“Partly Laws Common to All Mankind”: Foreign Law in American Courts, Part 3’, Storrs Lecture 2007, <<http://cs.law.yale.edu/blogs/podcasts/archive/2007/10/11/partly-laws-common-to-all-mankind-foreign-law-in-american-courts-part-3.asp>> (last visited 1 March 2012); J. Waldron, *Partly Laws Common to All Mankind: Foreign Law in American Courts*, Yale University Press 2012, forthcoming.

ing that there is something like a common enterprise between legal systems. Since it is not a common enterprise of applying the same text, it must be a common enterprise of achieving a form of government under law and, in particular, the promotion of human flourishing. To achieve law and order, or a narrow view of the rule of law as government under law, it is sufficient that each system applies its rules correctly, whatever they are.²¹ Waldron's argument from equal treatment only has purchase if we consider that the law has a more substantial function, such as to protect rights or to promote human well-being. However, if that is what law is for, then the existence of different treatment elsewhere is an argument with weight, since there is no reason why people within the common enterprise should be treated differently. The problem with the argument is the level of generality in which it is couched. I can state the object of the law as human flourishing. I can then point to the fact that car crash victims get no-fault compensation in French tort law, but not in England. But is that unequal treatment? If I then broaden the story and examine the free medical care under the NHS and social security payments in England, and compare those with France, then is the whole package really unequal? Like most of comparative law, we are forced to examine legal solutions in their broader setting. Only when we have examined the legal rule in its legal and non-legal context will we be able to form an intelligent judgement about whether there is in fact unequal treatment. So I think Waldron makes a valuable point that unequal treatment across jurisdictions may well be unfair, but we need to approach this with caution.

Waldron's second argument is that the *ius gentium* acts as an intellectual clearing house of ideas. He argues

‘it was a settled and embedded consensus derived from these principles having become established in practice as actual legal arrangements all over the known and civilized world. It was not natural law, though it was informed by natural law. Though it was a cosmopolitan idea, it was down-to-earth cosmopolitanism, “a brooding omnipresence on the ground,” if you like.’²²

Of course, one nation must have regard to the solutions of other systems when they are both applying a common and reciprocal system (an argument of integrity). Still, even where they are not, one nation has access to the doctrinal and other solutions for handling common problems. He rejects the idea that legal systems are just trying to find the solution that fits the genius or culture of their own society. They are looking for the best application of common principles in their own setting. In brief, if we voluntarily concur on the same broad principles, then we ought to achieve broadly similar results. This is why he argues that, for the purposes of the protection of human rights, we are all part of a single community.²³ It is that basic assumption that grounds the argument of global fairness. It is why there is a link between the nature of law and the use of foreign law. Some might wish to argue that this argument works in relation to human rights, but not in relation to many other branches of the law. Here, Markesinis is helpful. As has been noted, his list of reasons for using comparative law identifies a number of situations where there is no reason for difference in handling common problems. He accepts that there may be moral areas where there is no common enterprise. There will be lots of areas, however, where there can be seen to be a common enterprise, e.g. (as we will see below) product liability.

Waldron offers a more sophisticated approach to the character of the example offered by other legal systems. He distinguishes between the method of decision making (how we make decisions) and the content (what decisions we make). Because others are also looking to apply the same principles, then the approach they adopt has value as a methodological illustration (of how to conduct the exercise). He justifies this in terms of learning: he praises judges who check that their approach is the sensible way of tackling a problem by learning from the method adopted by judges in other jurisdictions.²⁴ But the issue of outcome is different and requires a stronger argument: that the national rules are based on the same fundamental principles.²⁵ In other words, there may be two kinds of common enterprise. The first is the

21 J. Raz, *The Authority of Law*, 1979, ch.11, esp. pp. 219-223.

22 *Highest Courts*, supra note 18, p. 114.

23 *Ibid.*, p. 109. His argument is that this is a demand of peoples, and not just rulers.

24 The example *Hopkinson v Police*: *Highest Courts*, supra note 18, pp. 102-104, 108.

25 *Ibid.*, p. 106.

enterprise of solving particular kinds of problem, e.g. the duties of parties negotiating the formation of a contract, but the second requires common principles that are being applied in the context of different legal systems. It may be here that there are moral differences between legal systems, e.g. between those that believe that relations between contracting parties should be governed by principles of good faith and those that are based on a more competitive relationship between them.²⁶

Unlike Markesinis, Waldron argues that the decision making is principled, if only because we have to give reasons for actions (legislation or judicial decisions) and reason giving is a principled activity. Now Waldron's specific argument was confined to human rights, but, as I have formulated the argument above, it seems applicable to a wide range of branches of law. It seems to me that the nub of Waldron's argument is that there should be either common principles or a common enterprise across the foreign and host jurisdictions, such that the equal treatment argument can apply legitimately.

3.3. Two illustrations of using foreign citations

Let us take two cases on product liability that are clearly influenced by debates in the United States. Faced with changes in the way in which products were made and distributed for a consumer market, the Americans in the 1940s had developed a category of 'product liability' within tort law, which was capable of regulating the direct relationship between the manufacturer (who now prepared and marketed the product) and the ultimate consumer. This problem was not unique to the US, and indeed US companies were significant in exporting the production and distribution methods to Europe, particularly during reconstruction after the Second World War. Traditionally, European national laws retained the two categories derived from Roman law and enshrined in codes: the sale relationship between the retailer and the purchaser, and the delictual relationship based on fault between a wrongdoer and the victim. Influenced by the information about the US approach provided through particular academics, Italian and German courts in the 1960s reacted in similar ways, not by adopting American rules, but by rethinking their own rules to produce solutions which were similar to those in the US, but not identical.

For Italy,²⁷ contract expert Gino Gorla was in the US in 1949-1950, just as Traynor J.'s early decisions on products were being discussed.²⁸ To begin with, he started to borrow the American conceptualisation of the problem, using a social category, 'product liability', rather than the traditional Italian (and Roman law) legal category, 'sales'. In addition, from the American experience, he saw an alternative legal route to compensation for the victim of defective products to the law on sales. It was also clear that Gorla had read the work of Prosser which was to lead to the second restatement text of §402A published in 1965.²⁹ Gorla sought to promote the idea of a strict liability of the manufacturer to the consumer. Instead, a decision in 1964 provided a solution within fault liability under Article 2043 of the Civil Code by reversing the burden of proof.³⁰ The *Saiwa*³¹ case concerned personal injury caused to consumers through defective biscuits. The Italian Supreme Court (*Corte di cassazione*) rejected the argument of the manufacturer that the consumer had to prove it had been at fault, and required that the manufacturer disprove fault. It is clear from Martorano's commentary on the case,³² that discussions in Germany and the United States were well known to the Court, especially through the work of Gino Gorla in 1961 and Werner Lorenz's seminal article in 1961. There is also discussion of insurance being taken out by manufacturers to deal with this liability.³³ So the foreign material provided a context, especially through academic writers, which would clearly have been made known to the Court.³⁴ The importance of American law was to take

26 See, e.g. R. Zimmermann & S. Whittaker (eds.), *Good Faith in European Contract Law*, 2000, ch. 1.

27 See N. Coggiola, 'The development of product liability in Italy', in S. Whittaker (ed.), *The Development of Product Liability (Comparative Studies in the Development of the Law of Torts in Europe, vol. 1)*, 2010, ch. 6, esp. pp. 195-198, 203-204, and 206-209.

28 In particular, *Escola v Coca-Cola Bottling Co. of Fresno*, 24 Cal 2d 453, 150 P2d 436 (1944); *Greenman v Yuba Power Products Inc* 59 Cal. 2d 57; 377 P2d. 897; W. Prosser, 'The Assault upon the Citadel', 1960 *Yale LJ* 69, no. 7, p. 1099, 1132 (collecting the cases); Restatement Torts 2d (American Law Institute 1965) §402A; G. White, *Tort Law in America: An Intellectual History*, 2003, pp. 197-207.

29 See White, *ibid.*, pp. 169-172; W. Prosser, *Law of Torts*, 1955.

30 See P. Trimarchi, *Rischio e responsabilità oggettiva*, 1961; U. Carnevali, *Responsabilità del produttore*, 1974.

31 Cass., 25 May 1964, n° 1270, in *Foro it.*, 1965, I, 2098, commented on by F. Martorano, 'Sulla responsabilità del fabbricante per la messa in commercio di prodotti dannosi (a proposito di una sentenza della Cassazione)' in *Foro it.*, 1966, V, pp. 13 et seq.

32 *Ibid.*, pp. 15-17.

33 *Ibid.*, p. 16, n. 16 citing M. De Martino in 1964 *Diritto e pratica di assicurazione* 61.

34 Case law does not provide an absolute indication of the frequency of problems (the 'legal' interest of topics) but there is some correlation

on board both problem-based classification and a greater emphasis on the role of law in social engineering. The specific solution to which a transplant of Prosser's ideas would have led was strict liability. That was not doctrinally possible in Italy, despite the urgings of many authors, like Gorla. Instead the Court adopted a presumption of liability, which the manufacturer found hard to discharge. Such a solution preserved the conceptual structure of the Code and the formulation of the text, but gave it a radically different interpretation.

The German development was similar.³⁵ Rudolf Schlesinger of Cornell, a German-born academic, invited Gorla and Lorenz to work on projects with him. This led Lorenz to formulate an idea connecting American solutions to and active German debate on whether contract or delict (torts) should be the basis of liability.³⁶ This was resolved by the *Bundesgerichtshof* in its *Newcastle Disease* decision of 1968.³⁷ Lorenz's views that one should create a direct liability based on reliance were not accepted. Such a strict liability would be incompatible with existing concepts within the Code. They were too far from existing legal techniques.³⁸ So, starting with §823 of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB), the court did come to a similar result by creating a presumption of fault based on the damage occurring within the sphere of control of the manufacturer. Once a defect in the product was demonstrated, then the manufacturer had to demonstrate that he was not at fault. The manufacturer in practice found it difficult to discharge the burden of proof imposed.

The problem that the American example (transmitted to the courts through the works of Gorla and Lorenz, as well as of others) faced was that it lacked enough institutional fit (to use Dworkin's term) to satisfy the argument of internal consistency. Rather than adopt a direct strict liability between manufacturer and consumer, the courts adopted presumptions of fault, which could always be rebutted, but which had been adopted in a number of other areas of delict law. In broad terms it achieved similar results to American strict liability, but was more consistent with the existing law. Seen in this way, the foreign law reference adds strength to an existing domestic law argument to develop presumptions of liability. The foreign law adds attractiveness because it meets certain ideals of the domestic law to deal with contemporary problems through existing legal structures. The Italian and German cases both highlighted the importance of legal solutions integrating with domestic legal concepts but also with the ambitions of society to be modern. The attractiveness of the American solution was that it had the authority of experience and modernity. It relies heavily on the idea of reputation. But reputation alone cannot carry the day. The integrity of the system also matters.

If we relate this example back to Markesinis and Waldron, it shows the way the question of product liability was approached in a principled way. It was not simply a matter of deciding first on a result (compensation for consumers), and then seeking arguments to support it, with suitable foreign citations added if they are useful. In both systems, consistency with principle within the existing national legal order operated as a limitation on importing a foreign standard. The foreign illustration demonstrated ways in which a fairer result could be achieved than was being currently achieved in Italy or Germany. It provoked reflection on what would be a fairer local result consistent with principle. To take Waldron's argument, in a consumer society in which the same products were being traded in different countries, then the question arose why Italian or German consumers should be worse off than American consumers. All the same, coherence within existing national legal principle creates a reason for a dissimilarity in legal rules, but not in the broad direction of the law. Strict liability for products might be consistent with American legal principles, but would not fit within the Italian and German civil codes. It is at that level of generality that Waldron's argument works to support the use of a foreign illustration as a contributing reason to a national legal solution.

between economic wealth and the type of problem being presented (*ibid.*, p. 16).

35 See G. Wagner, 'The development of product liability in Germany', in S. Whittaker (ed.), *The Development of Product Liability (Comparative Studies in the Development of the Law of Torts in Europe, vol. 1)*, 2010, ch. 4, esp. pp. 120-128.

36 W. Lorenz, 'Produkthaftung', in P. Mikat (ed.), *Festschrift der Rechts- und Staatswissenschaftlichen Fakultät der Julius-Maximilians-Universität Würzburg zum 75. Geburtstag von Hermann Nottarp*, 1961, pp. 59 et seq.; see also P. von Caemmerer, 'Product liability', in E. von Caemmerer et al. (eds.), *Jus Privatum Gentium, Festschrift für Max Rheinstein*, vol. II, 1969, pp. 659 et seq.; K. Simitis, *Grundfragen der Produzentenhaftung*, 1965.

37 *Entscheidungen des Bundesgerichtshofs in Zivilsachen* (BGHZ) 51, pp. 91, 93 et seq.; W. Van Gerven et al. (eds.), *Tort Law*, 2000, case 6 G 24; B. Markesinis & H. Unberath, *The German Law of Torts*, 2002, p. 560.

38 See BGHZ 51, *supra* note 37, p. 99.

4. how does the foreign law argument work?

In *Fairchild v Glenhaven Funeral Services Ltd.*,³⁹ Lord Bingham argued:

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

On this view, the function of the foreign legal example is to trigger internal enquiry to find out why the host system appears to achieve a different result. In that sense, its first function is methodological: to encourage more serious thinking about one's own system. Care needs to be given to the idea of uniformity of outcome, particularly when it comes to deciding cases. Judicial decisions rarely see the totality of a problem and it is often not submitted to the judges in that form. As a result, it will be quite frequent that a difference in outcome appears *on that very specific point*. But, as I have said, the benchmark for evaluation is the outcome taken in the round.

The judge's objective is to look at what others do and come to a way of developing her own law which is both consistent internally and coherent with the objectives that have been identified externally. The foreign material adds lustre to the national solution. However, the judge starts with the national or code-based set of principles and then seek to apply them to the problems before her. Foreign materials help us to explore solutions that are out of the box from a domestic law point of view.

Any domestic solution adopted gains lustre from three features. First, the foreign solution must fit with the problem as it presents itself in the host system. To take an example, German law has specific problems with liability for others, because under §831 BGB, there is only a presumption of fault that can be rebutted by showing that the employer chose a competent employee or supervised him appropriately. This leads German lawyers to adopt solutions in contracts to get round this problem. The rules on vicarious liability are differently constructed in French and English laws, so the legal problem does not present itself in the same way. Secondly, to have weight, the foreign approach must be consistent with internal legal principle in the host system. For example in the area of product liability in the 1960s, American direct, strict liability of the manufacturer was rejected in Italy and Germany, because it did not fit with existing legal principles. A presumption of fault was adopted, because this was more consistent with legal principle.⁴⁰

The third feature in adding lustre to an argument is the reputation of the system in question. This breaks down into two aspects. First there is the standing of the foreign system in question and secondly the receptivity of the host system to such influences. Markesinis makes a convincing argument that receptivity to foreign influences is a matter of mentality among the judges.⁴¹ In particular, he suggests this may be partly due to the education and experiences of individual judges,⁴² but also to a general mood within the legal system.⁴³

Not all citations of foreign legal arguments will carry much weight. I think that there are three features that contribute significantly to the lustre of the foreign system which is being used to support a national legal argument. The most important is the way in which it is presented. Guido Alpa⁴⁴ makes the point that, in the nineteenth century, there were many translations of works on English law by leading writers, but this did not lead to any influence from the common law on Italian private law. The reason he suggests is that the English authors who were translated generally criticised English law as archaic and unsystematic. If national lawyers were not enthusiastic about the merits of their own system, why

39 [2003] 1 AC 32 at 66.

40 Whittaker, *supra* note 27, pp. 127-128, 208-209.

41 See B. Markesinis, 'Judicial Mentality: Mental Disposition or Outlook as a Factor Impeding Recourse to Foreign Law', 2006 *Tulane Law Review* 80, no. 4, p. 1325.

42 *Ibid.*, pp. 1356-1359, where he examines German courts.

43 Markesinis & Fedtke, *supra* note 14, ch. 6, where he considers not only the US, but French ordinary courts.

44 G. Alpa, *The Age of Rebuilding*, 2007, pp. 376 et seq.

should foreign lawyers take it seriously?⁴⁵ (This was in contrast to the enthusiasm expressed by many of the same authors for the British constitution, and that enthusiasm was influential.) This has an intimate connection with how the country is perceived. In the area of products, the United States both represented more experience (as the home of the consumer revolution) and social ideas of modernity (especially in the emergence of Europe from the effects of war).⁴⁶ The second feature that Markesinis rightly stresses is the accessibility of legal systems. It is most noticeable that translations feature heavily in chains of connection. To take a simple point, in product liability, the discussion of American law by the German *Bundesgerichtshof* relies on the work of Lorenz,⁴⁷ the discussion of it by the Italian *Corte di cassazione* almost certainly relies on Gorla,⁴⁸ and that by the Advocate General Tesaurò in the European Court of Justice relies on an Italian author, Ponzarelli.⁴⁹ ‘Packaging’ is a way in which Markesinis suggests material needs to be given, and he is fundamentally right. Thirdly, reputation also depends on the receptivity of the receiving system. Catherine Dupré⁵⁰ has picked this up in relation to the use of German constitutional court decisions in the development of Hungarian constitutional law. German constitutional law had a reputation for having developed a robust system of protecting rights after the experience of dictatorship, an outcome to which the Hungarians aspired. The importance of reputation for modernity and for experience with the problems was important for the influence of America on Italy and Germany in relation to product liability. America was seen as the place with experience of the modern problem of defective products and of having identified it as a distinct social problem, rather than losing it within the more general categories of sale or delict. In both the Hungarian and the product liability situations, a key vector in achieving this receptivity in the receiving system was the presence of individuals who had studied or visited the foreign country for an extended period of time. Prior familiarity creates this form of willingness to consider a foreign system as having something desirable to offer. But there is also the sense that the foreign system and the national system are, as Waldron and Markesinis suggest, concerned with some form of common enterprise, which makes them comparable. Not all branches of law are common enterprises, but this idea is not confined to human rights, but underpins many researches of foreign law in legal decisions.⁵¹

5. Conclusion

When a judge in one system cites a case from another system, he can be claiming that this is evidence of a common principle of law or of the right way to interpret an international instrument which is part of his domestic law. These, however, represent the minority of situations where foreign case law is cited. In most cases, the foreign judicial decision is being offered as a way of gaining a perspective on the formants of domestic law, the divergent ways in which the rules have been formulated and interpreted in the past or can be in the future. To the extent that the social and political situation of the foreign jurisdiction are similar to that of the domestic law, i.e. are in some sense engaged in a common enterprise at some level of generality, then I would follow Waldron in thinking that it does add some force to domestic arguments. There is a sense of fairness that similar situations should receive similar solutions across legal systems. This adds some weight to the domestic legal rules, even if the full force depends on a closer and holistic analysis of the way a problem is treated by a legal system. In this, the foreign decision provides a reflecting mirror to observe our own system and the options it has for development. It provides a counterfactual world in which consequences can be tested, not merely hypothetically, but in some form of grounded reality. The argument of the paper, however, has been that the force of the eventual argument that is

45 Ibid., pp. 380-381; cf. Gorla's willingness to embrace Pollock's justification for the bindingness of contract in consideration: *ibid.*, p. 387.

46 V. de Grazia, 'Changing consumption regimes in Europe 1930-1970', in S. Strasser et al., *Getting and Spending*, 1998, p. 59.

47 *Entscheidungen des Bundesgerichtshofs in Zivilsachen* (BGHZ) 51, pp. 91, 93 et seq.; W. Van Gerven et al. (eds.), *Tort Law*, 2000, case 6 G 24; B. Markesinis & H. Unberath, *The German Law of Torts*, 2002, p. 560.

48 Cass., 25 May 1964, n° 1270, *Saiwa*, in *Foro it.*, 1965, I, 2098, commented on by F. Martorano, 'Sulla responsabilità del fabbricante per la messa in commercio di prodotti dannosi (a proposito di una sentenza della Cassazione)', in *Foro it.*, 1966, V, p. 13.

49 G. Ponzarelli, *La responsabilità civile. Profili di diritto comparato*, 1992, cited in Case C-300/95, *Commission v UK*, [1997] ECR I-2649 in para. 16 and in note 4.

50 C. Dupré, *Importing the law in Post-Communist Transitions*, 2003, esp. pp. 167-71, 183-184.

51 See the report of Mme Pascale to Cass. Ass.plén. 29 June 2007 (Case 06-18.141), <www.courdecassation.fr>, where she discusses foreign laws in relation to the liability of sporting bodies.

presented to justify a new judicial decision should remain firmly grounded in domestic law. If the reasons are not convincing in domestic law, then no amount of foreign law is going to make them good enough. Only where there is a sufficient body of formants with authority available in the host legal system can the lustre added by foreign law do any good. Foreign law is not a completely new argument, but provides additional support to the arguments already available in the host domestic legal system.