

# THE RELEVANCE OF FOREIGN EXAMPLES TO LEGAL DEVELOPMENT

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## INTRODUCTION

The use of foreign legal sources in legal argument is commonplace. It is an integral part of the way lawyers work. The use of such arguments in American constitutional law may be controversial, but it is widely practiced in other branches of the law, even by those who complain about the use made of foreign sources in constitutional law.<sup>1</sup> But it is possible to overstate the importance of the argument from “elsewhere,” as Martin Loughlin described it.<sup>2</sup> This Article seeks to make sense of the argument from foreign sources drawing principally on work undertaken for the European Legal Development project which I headed with David Ibbetson. In the light of that project, it is possible to engage with the justifications offered by leading authors Markesinis and Waldron for the use of foreign law. This Article argues that a justification based on foreign sources is not essentially a free-standing justification, but rather gives additional luster 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.

By contrast, Markesinis presents the major pragmatic argument that foreign law offers a distinct justification for a legal result in that foreign law contains useful lessons for domestic law.<sup>3</sup> He argues that this can be achieved if academic lawyers package the foreign law in ways that make it accessible to the practitioners (judges and counsel in cases). Waldron<sup>4</sup>

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1. Justice Scalia is perhaps the most prominent example. See e.g., *Lawrence v. Texas*, 539 U.S. 558, 598 (2002) (Scalia, J., dissenting) and *Roper v. Simmons*, 543 U.S. 551, 622-28 (2005) (Scalia, J., dissenting); see also BASIL MARKESINIS WITH JÖRG FEDTKE, *ENGAGING WITH FOREIGN LAW* 195-203 (2d ed. 2009).

2. Martin Loughlin, *The Importance of Elsewhere*, 4 *PUB. L. REV.* 44, 56-7 (1993).

3. See generally Basil Markesinis & Jörg Fedtke, *The Judge as Comparatist*, 80 *TUL. L. REV.* 11 (2005).

4. Jeremy Waldron, *Treating Like Cases Alike in the World: The Theoretical Basis of the Demand for Legal Unity*, in *HIGHEST COURTS AND GLOBALISATION* 99, 109 (Sam Muller & Sidney Richards eds., 2010) [hereinafter *HIGHEST COURTS*].

offers a more principled justification. He suggests that we need to examine foreign law essentially out of concerns for equality before the law.

In discussing this topic, 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).<sup>5</sup> 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. Markesinis's utility argument predominantly addresses the process of discovery, whereas Waldron's argument is more closely directed at the process of justification. This Article focuses its attention on the place of foreign law as a justification for a domestic decision.

My argument will be developed in two phases. First, I will present examples of the place of foreign law in the development of private law in Europe. In the second Part, I will relate the conclusions to the arguments of Waldron on why one should take account of foreign law in domestic legal decisions.

## I. DEFINING THE PROBLEM

In what situations does the problem arise of citing foreign legal arguments as a justification for a legal decision? There are three situations in which a foreign legal principle may feature in the justifications that a national lawyer gives for a decision. They can be illustrated as follows:

- (a) A national court applying an international treaty may justify its decision by citing the decision of another national court of a state party to that treaty. For instance, 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 argumentative weight comes essentially from the Convention, but it is a concretization of it. A domestic lawyer really has no problem with this situation. The national legal order either incorporates the Convention or has an interpretative obligation to make the national law compatible as far as possible with treaty law. So it is appropriate to examine foreign decisions on a provision that is shared by both systems.
- (b) Within the common law, courts of one jurisdiction are used to citing decisions of other common law courts that apply the same principles. For instance, an Australian decision on tort law offers both an example of how to interpret the common law and in particular a

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5. See NEIL MACCORMICK, *RHETORIC AND THE RULE OF LAW* 208 (2005).

principle within the common law. An example is 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 (shared) common law within a particular area from which an English rule could also be drawn. This is why common lawyers are some of the most regular users of comparative law, even if that comparison is within the common law family. European Union (“EU”) law does use the concept of “principles common to the constitutional traditions of Member States” and this, under article 308 of the European Community Treaty, serves as a basis for the creation of European Community law. But this concept suggests that there might be some principles of law that are shared between states. In my Australian example, the common law<sup>6</sup> is a binding source of law, and so the appeal to a principle within that common law that is shared by a number of legal systems is an appeal in some sense to a binding source of law. In the EU example, the source is binding on the EU, but only on Member States when they are acting as EU courts.

(c) The more interesting and difficult question is whether a legal rule of another jurisdiction can provide a justification where there is no express common rule that is shared with the receiving jurisdiction. An argument from France might be a curiosity in England—for example, on wrongful birth—but it does not formally 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 does this help with the justification? It may clearly serve as a source of inspiration, but in what way does it provide a distinctive argument?

It is the third category of case that contains the interest for this Article. In the difficult cases, where a judge draws on the practice of another legal system to support a decision in his own, he is immediately met with the argument that the foreign law is not one of the sources of his own domestic legal system. It is, therefore, formally irrelevant. This Article discusses how he might make the foreign system relevant.

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6. We can argue whether the common law binds through a notion of established caselaw or of general principles of law. See generally Robert Alexy et al., *Precedent in the Federal Republic of Germany*, in INTERPRETING PRECEDENTS 17, 30 (D. Neil MacCormick & Robert S. Summers eds., 1997) (describing observance of German precedent as obligatory); see generally Michel Troper & Christophe Grzegorzczuk, *Precedent in France*, in INTERPRETING PRECEDENTS 103, 130 (D. Neil MacCormick & Robert S. Summers eds., 1997) (describing French precedents as not being binding themselves but rather as being illustrative of formally binding legal principles). Civilian courts often cite decisions of other jurisdictions for their persuasive power, which is close to the idea of a “common law” extending beyond specific national boundaries.

## II. PRIVATE LAW AS A CONVERSATION BEYOND BOUNDARIES

Private law offers a rich history of examples of one jurisdiction drawing on the law of another jurisdiction in developing its law. The European Legal Development project has examined the development of the law of tort in Europe from 1850 to 2000, in particular, liability for fault.<sup>7</sup> The argument in this Part is that, at least in private law, there is a regular conversation across national boundaries. Often, we examine the meaning of texts that may cross nations. But even where we are not examining a common text, the existence of common problems or tasks makes it not merely prudent or useful to find out what other countries do. Their experience is often a trigger for legal change. It is rare that we import the foreign solution, but we often revise our law in light of the results that foreign systems have been able to achieve. In another place, I have called this “cross-fertilization.”<sup>8</sup> Essentially this means the change that occurs in a legal system integrates with the patterns of that system, so it looks like it belongs. In more formal terms, we maintain the importance of coherence as well as consistency within the legal system.<sup>9</sup>

There is a danger that we think of legal systems as closed, limited by obedience to one political sovereign with a single set of legal professions and courts, with a united education and training system. This picture does not capture the interplay between legal systems. The institutional structure and influences between systems are much more complex and varied, leading to regular links. In the first section, I show that, at least within Europe, there are background conditions that make legal systems necessarily open to influences from other national legal systems. In the

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7. The series includes seven volumes: COMPARATIVE STUDIES IN THE DEVELOPMENT OF THE LAW OF TORTS (David Ibbetson & John Bell eds. 2010); THE DEVELOPMENT OF PRODUCT LIABILITY (Simon Whittaker ed., 2010) [hereinafter PRODUCT LIABILITY]; THE DEVELOPMENT OF TRAFFIC LIABILITY (Wolfgang Ernst ed., 2010) [hereinafter TRAFFIC LIABILITY]; THE DEVELOPMENT OF MEDICAL LIABILITY (Ewoud Hondius ed., 2010); THE DEVELOPMENT OF LIABILITY BETWEEN NEIGHBORS (James Gordley ed., 2010); THE DEVELOPMENT OF LIABILITY IN RELATION TO TECHNOLOGICAL CHANGE (Miquel Martín-Casals ed., 2010) hereinafter TECHNOLOGICAL CHANGE]; THE DEVELOPMENT AND MAKING OF LEGAL DOCTRINE (Nils Jansen ed., 2010) [hereinafter LEGAL DOCTRINE].

8. John Bell, *Mechanisms for Cross-fertilisation of Administrative Law in Europe*, in NEW DIRECTIONS IN EUROPEAN PUBLIC LAW 147 (Jack Beatson & Takis Tridimas eds., 1998) (defining “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.”).

9. MACCORMICK, *supra* note 5, at 190, 193 (arguing that consistency is simply a matter of the lack of contradiction between legal provisions, but coherence “is a matter of their ‘making sense’ by being rationally related as a set, instrumentally or intrinsically, to the realization of some common value or values”).

second section and drawing on the European Legal Development project, I show an example of how legal ideas from the United States in relation to product liability shaped the development of civilian legal systems in Europe.

#### A. Background Conditions

There are three background features of legal systems which may explain why they are porous to ideas from other legal systems. First, there is no necessary reason to conceive of legal systems existing in isolation from each other. This is connected to the nature of the law. Private law is essentially about *texts*, rather than about the intention of the legislature. The reasons for this are obvious. In Europe, the boundaries of nation states have been fluid. Take the town of Tournai in Belgium. In 1787, it was part of the Austrian Empire and an Austrian version of Roman Law prevailed in private law. In 1795, it was part of the French Republic, and so it adopted the French Civil Code when it was enacted in 1804. In 1814, it was part of the Kingdom of the Netherlands, which also had the French Civil Code. In 1830, it was part of the new Kingdom of Belgium. In 1914 and again in 1940, it was occupied by Germany without the abolition of its Civil Code. Belgium has the French Civil Code of 1804 because of the occupation by the French, but since 1949 the Code has existed in two languages, French and the Flemish (Dutch) language. Since 1951, it has operated within the various forms of what is now the European Union. Belgian lawyers recognise the difficulty of looking just at the rules enacted by the Belgian legislator and the decisions of the Belgian courts.<sup>10</sup> *Countries* like Germany and Italy did not exist as nation states before 1870. Their law schools have existed for many centuries and have interpreted private law, but the attachment to a nation state has not been crucial.

Second and consequently, attachment to a document is more important, and that document is interpreted. So the French civil code of 1804 applied in France, Spain, Belgium, the Netherlands, parts of Italy and part of Germany at various times in the nineteenth century.<sup>11</sup> Commentaries on that Code circulated widely. So the German-language commentary by Zacharias was used in southern Germany and its structure (and some of its

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10. See BOUDEWIJN BOUCKAERT & MARK VAN HOECKE, *INLEIDING TOT HET RECHT* 19 (10th ed. 1994).

11. See *RICHTERLICHE ANWENDUNG DES CODE CIVIL IN SEINEN EUROPÄISCHEN GELTUNGSBEREICH AUSSERHALB FRANKREICHES* (Barbara Dölemeyer, Heinz Mohnhaupt & Alessandro Somma eds., 2006).

ideas) were used by French writers when they wrote their own textbooks.<sup>12</sup> Belgian and Luxembourgish interpretations of the same civil code were then cited in French courts. Common texts create the community and the tradition of interpretation.<sup>13</sup> The result is that commentaries produced in one country are being read in others.<sup>14</sup> A particular feature of this conversation between legal systems over the same texts is the importance of translations and thus the accessibility of these ideas.<sup>15</sup> The existence of translations shows a ready market for foreign ideas, which is not confined to countries sharing the same legal tradition.

This history of European territories and the conversation about the interpretation of texts have an important impact on how the law is conceived. It is first and foremost a tradition within which particular texts have pride of place. They are then interpreted and re-interpreted over time. Only secondarily is the law the will of the enacting legislator.<sup>16</sup> After all, the law of any state is made up of provisions enacted by a wide variety of legislators—monarchs, dictators, democracies and lots of others in between. If you look at the references in private law textbooks, you get no hint that a law enacted by the Nazis or a decision of the courts under Nazi rule might not be still good private law. That is why I have argued like so many Europeans that we take a contemporaneous view of the interpretation of the law, rather than a historical one.<sup>17</sup>

Take for example a current commentary on the German Civil Code (legislation of 1896, coming into force in 1900, which was during the Empire):

[Der Gläubiger] haftet also für den vom Eigentümer erlittenen Rechtsverlust, sofern ihn an der Pfändung und Verwertung einer schuldnerfremden Sachen ein Verschulden trifft.

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12. See CHARLES AUBRY & CHARLES RAU, *COURS DE DROIT CIVIL FRANÇAIS D'APRÈS LA MÉTHODE DE ZACHARIAE* (4th ed. 1869).

13. On the notion of tradition, see generally Mark Krygier, *Law as Tradition*, 5 *LAW & PHIL.* 237, 237-62 (1986).

14. See GUIDO ALPA, *TRADITION AND EUROPEANIZATION IN ITALIAN LAW* 34-51 (2005). See also David Ibbetson, *English Law and the European Ius Commune 1450-1650*, 1 *CAMBRIDGE Y.B. EUR. LEGAL STUD.* 115 (2006) (relating to the earlier period).

15. See GUIDO ALPA, *THE AGE OF REBUILDING* 375-76 (2007) (noting that over 1000 legal works were translated from French into Italian in the nineteenth century, with about half that number translated from German and about 160 English works).

16. Cf. JOHN BELL & GEORGE ENGLE, *CROSS STATUTORY INTERPRETATION* 23-30 (3d ed. 1995).

17. John Bell, *Interpreting Statutes over Time*, in *TEMPS ET DROIT, LE DROIT A-T-IL POUR VOCATION DE DURER?* 31-53 (François Ost & Mark Van Hoecke eds., 1998).

[The debtor is therefore liable for the deterioration in rights suffered by the owner of property, insofar as that wrongfully affects the pledging and the value of things external to the creditor].

Set side by side in the footnotes, we have cases from all kinds of regimes being cited as evidence of what the current law is.<sup>18</sup> These references are to German Supreme Court (*Reichsgericht/Bundesgerichtshof* (“BGB”)) decisions from all the regimes since 1900, including Nazi Germany. The law is a set of texts that have to be interpreted. (In that respect, it is rather like Scripture, as Gadamer points out.<sup>19</sup>) German lawyers interpret those texts in the light of the current constitution, membership of the European Union and the values expressed in contemporary principles of private law.<sup>20</sup>

The common law is a similar system. English lawyers cheerfully cite Australian, Canadian, Irish and New York cases to support an argument about the law of tort. It does not bother us whether there have been constitutional differences or whether the rules were created at different periods. Our concern is to find the principles that now represent the common law.

Third, the movement of ideas is not limited to national boundaries because academics (and judges) are intellectual scavengers. Individuals are mobile and visit or communicate with colleagues abroad. National law is a latecomer to the Academy. In France, it dates from 1689 (and not really until 1807). In England, the first course was in 1753 and the real start of teaching English law in the Universities of Oxford and Cambridge is after 1871.<sup>21</sup> In Germany, Thomasius was giving lectures on German law in the University of Halle in 1705 and Beyer in Wittenberg in 1707,<sup>22</sup> but it was much more legal history than the science of contemporary law. Creating local German civil laws was a work started in the mid-eighteenth century,<sup>23</sup> but it took a while. Legal education revolved in Germany and England for

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18. Entscheidungen des Reichsgerichtshofs in Zivilsachen [RGZ] 61, 430, 432 (1905, during the German Empire); RGZ 108 (260, 263) (1924, during the Weimar Republic); RGZ 156 (395,400) (1938, during Hitler’s Third Reich); Entscheidungen des Bundesgerichtshofs in Zivilsachen [BGHZ] 58 (207, 210) (1972, German Federal Republic (West Germany)); [BGHZ] 118 (201, 205ff) (1992, German Federal Republic (Unified Germany): Taken from Gerhard Wagner, *in* 5 MÜNCHNER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH §823at 1788, para. 108 n.430 (5th ed., Mathias Habersack ed. 2009).

19. HANS-GEORG GADAMER, TRUTH AND METHOD 294-95 (1975).

20. See, e.g., BASIL S. MARKESINIS & HANNES UNBERATH, THE GERMAN LAW OF TORTS, 415–420 (4th ed. 2002) (discussing the *Herrenreiter* decision).

21. See R.C. VAN CAENEGEM, JUDGES, LEGISLATORS AND PROFESSORS 61–63 (1987).

22. See RICHARD SCHRÖDER, LEHRBUCH DER DEUTSCHEN RECHTSGESCHICHTE 904 (4th ed. 1902).

23. *Id.* at 910–12.

many years around Roman law. So there was no need to restrict interest to what emanated from national courts or legislatures. Equally, there was no necessary restriction on individuals and where they worked. John Austin, the first professor of jurisprudence in the University of London found that few people were coming to his lectures, so he went off to Heidelberg for much of the rest of his life.<sup>24</sup> Leading works of the period display an erudite knowledge of the laws of other European systems. Dicey was proud to write about the strengths of the British constitution. But that did not prevent him from citing Gneist, Duguit, de Toqueville and Montesquieu, as well as discussing the Swiss and US constitutions.<sup>25</sup> Simpson points out that the French civil code was cited more than 40 times in English cases up to 1850. In tort, we have a great awareness of solutions in different countries. The most obvious examples are Pollock and Winfield; Pollock's view of the law of torts was shaped greatly by his stay in Harvard.<sup>26</sup> Winfield looked to U.S. caselaw in the 1920s, confirmed by visits he made. These visits led to articles in English and American journals that paved the way for the leading decision of *Donoghue v. Stevenson* in 1932.<sup>27</sup>

#### B. Illustration of Legal Developments: Products

I want to take two stories from the book on product liability in the European Legal Development series.<sup>28</sup> Our two correspondents, Coggiola and Wagner, give us accounts of the place of two individuals in the development of product liability in Italy and Germany. The problem is how the end-user of a product could claim compensation for personal injuries suffered as a result of defects in the product.

The research for our project relating to products shows how legal ideas travel. With the move from an agricultural economy to an industrial economy, two changes occur. The first is that products become more complex, so *caveat emptor* is less appropriate: the buyer is really not in a position to assess a product by visual inspection. The second is that the distribution chain changes. Instead of the buyer relying on a local seller and his expertise, the manufacturer produces standardised products and markets

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24. See WILLIAM L. MORISON, JOHN AUSTIN (1982).

25. See ALBERT V. DICEY, AN INTRODUCTION TO THE LAW OF CONSTITUTION 183–205 (10th ed. 1959) (1915).

26. See e.g., NEIL DUXBURY, FREDERICK POLLOCK AND THE ENGLISH JURISTIC TRADITION 224–48 (2004); LEGAL DOCTRINE, *supra* note 7, at 49 n. 21; Percy H. Winfield, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41 (1934).

27. See Alan Rodger, *Lord Macmillan's Speech in Donoghue v. Stevenson*, 108 L. Q. REV. 236 (1993).

28. See generally PRODUCT LIABILITY, *supra* note 7.



them directly to the public. There is little distinctive contribution from the retailer-distributor. The legal options are either that the victim sues for a breach of warranty in the sales contract or brings a tort/delict action.

The sorts of complex products being bought in the second half of the nineteenth century were generally industrial machinery, the victims of which were typically employees. Workmens' Compensation, introduced in Germany in 1884 and spreading across Europe by 1910, provided a non-tortious solution for injuries caused by machines.<sup>29</sup> The next complex product was the motor car. This product was bought initially by rich consumers and later by the wider public. Accidents were frequent. In Germany in 1909, there was one accident causing death or personal injury for every seven vehicles on the road.<sup>30</sup> In France in 1925, the Cour de cassation reacted by creating strict liability in contract on the part of a professional seller who was liable for all losses if the product had a hidden defect.<sup>31</sup> Coupled with lax rules of privity, this provided a basis of liability for consumers, even if they were not the purchaser of products. Particularly because of the influence of an article written by a Parisian professor, Mazeaud, in 1955,<sup>32</sup> the fiction developed that the professional seller was deemed to be in bad faith. There was a short time limit within which a claim for breach of warranty could be brought under article 1641 of the French Civil Code. A more contested solution was to use strict liability for things. Having found its own solution, France became rather immune from later developments. There were problems with Ford cars manufactured in Germany in the 1930s owing to defects in the brakes which Ford knew about. In 1940, the German Supreme Court held Ford liable for intentional delict under §826 BGB.<sup>33</sup> In the 1920s, English lawyers retained fault liability for defective brakes, rather than the tort of breach of a statutory duty.<sup>34</sup> After World War II and the subsequent austerity period ended, the consumer society was reborn with a much greater variety of manufactured products.<sup>35</sup>

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29. French law had adapted its private law and administrative law liability rules to create a form of strict liability in 1895-96, shortly before workmen's compensation was introduced. In English law, the tort of breach of a statutory duty performed a similar role. See *Groves v. Lord Wimborne* [1898] 2 Q.B. 402 (Eng.).

30. See TRAFFIC LIABILITY, *supra* note 7, at 93 n.66.

31. Cour de cassation [Cass.] req. 21, Oct. 20, 1925, D.P. 1925, 1.9, obs. Célice, (France).

32. See PRODUCT LIABILITY, *supra* note 7, at 91.

33. *Id.* at 120: RGZ 163 (21, 25) (Ger.); RG Deutsches Recht 1940, 1293 (Ger.).

34. TRAFFIC LIABILITY, *supra* note 7, at 40-41; *Phillips v. British Hygienic Laundry* [1923] 2 K.B. at 832 (Eng.).

35. See PRODUCT LIABILITY, *supra* note 7, at 46.

In the early part of the twentieth century, Italian courts were very protective of newly emerging industries. Italian scholars were naturally outward-looking. There had been an official attempt to have a new joint Civil Code with the French in 1928. Subsequently, an official Italian commission produced a modern civil code, which was later enacted in 1942 and is still in force.<sup>36</sup> That was heavily influenced by German developments including their civil code of 1900. In such a context, it was not surprising that leading Italian scholars, such as Gorla in 1937, studying at product liability should look at French solutions as a model. In France, the modern solution was to use strict contractual liability on the part of the professional seller under the warranty against hidden defects. Such a liability could apply not only to the purchaser, but also to the ultimate user, mainly by some ingenious re-interpretation of the rules on privity of contract. Gorla represented this tendency in 1937 and showed how it could apply in Italian law.<sup>37</sup> The problem remained firmly labelled as a problem of “sales,” not a problem of product liability. He developed his argument after World War II, as French doctrinal writing and caselaw expanded.<sup>38</sup> But, while French law was a natural reference point, it had to be acknowledged that French law was out of line with the tradition of Roman law in which Italian law stood and was stretching the Code by ingenious fictions—treating all professional sellers in bad faith and interpreting “costs incurred in the sale” as including any kind of loss. There was also the problem of stretching privity of contract. It is here that Gorla’s newly discovered reference point, the United States, came in. He was in the United States in 1949-50, just as Justice Traynor’s early decisions on products were being discussed.<sup>39</sup> To begin with, he started to borrow the American conceptualization of the problem, using a social category, “product liability,” rather than a 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

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36. GUIDO ALPA, *LA CULTURA DELLE*, 260 and 304ff (2000).

37. See Nadia Coggiola, *The Development of Product Liability in Italy*, in *THE DEVELOPMENT OF PRODUCT LIABILITY*, *supra* note 28, 197–98 (citing GINO GORLA, *LA COMPRAVENDITA*, n<sup>os</sup> 121, 170 (1937) (suggesting that the discussion on the issue is actually extremely brief, as it was of marginal interest in the overall scheme of his work).

38. *Id.* at 213–14 (citing articles by Gino Gorla from 1957 and 1959).

39. In particular, *Escola v. Coca-Cola Bottling Co.*, 24 Cal 2d 453 (1944); *Greenman v. Yuba Power Products Inc.*, 59 Cal. 2d 57 (1963); William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1132 (1960) (collecting cases); *RESTATEMENT (SECOND) OF TORTS §402A* (1965); G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 197–207* (Expanded ed. 2003).

restatement text of §402A published in 1965.<sup>40</sup> The idea of strict liability through reversing the burden of proof in fault liability actions under art. 2043 of the Italian Civil Code of 1942 offered an alternative.<sup>41</sup> That came through in a decision in 1964, *Saiwa*.<sup>42</sup> The 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. It is clear from Martorano's commentary on the case<sup>43</sup> that discussions in Germany and the United States were well known, especially through the work of Gino Gorla in 1959<sup>44</sup> and Werner Lorenz's seminal article in 1961.<sup>45</sup> There is also discussion of insurance being taken out by manufacturers to deal with this liability.<sup>46</sup> So the foreign material provides a context, especially for academic writers, but would clearly have been known to the Court.<sup>47</sup> The importance of American law was to take 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.<sup>48</sup> Instead the Court in *Saiwa*<sup>49</sup> adopted a presumption of liability, which the manufacturer found it hard to discharge.

In our collection, Wagner makes similar points about Germany. There is one pivotal author for the development of product liability, Werner

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40. See WHITE, *supra* note 39, at 169–72. WILLIAM PROSSER, LAW OF TORTS (1955).

41. See Coggiola, *supra* note 37, at 209.

42. Cass., sez III, 25 May 1964, n.1270, reprinted in 88 FORO ITALIANO: RACCOLTA GENERALE DI GIURISPRUDENZA, at 2098 (1965), commented on by Frederico Martorano, *Sulla responsabilità del fabbricante per la messa in commercio di prodotti dannosi (a proposito di una sentenza della Cassazione)* in 89 FORO ITALIANO: RACCOLTA GENERALE DI GIURISPRUDENZA 13 (1966).

43. Martorano, *supra* note 42, at 15-17.

44. Gino Gorla, *Considerazioni sulla giurisprudenza francese in tema di garanzia per i vizi redibitori*, in STUDI IN ONORE DI FRANCESCO MESSINEO 231 (A. Scialoja ed., 1959).

45. Werner Lorenz, *Produkthaftung*, in FESTSCHRIFT DER RECHTS- UND STAATSWISSENSCHAFTLICHEN FAKULTÄT DER JULIUS-MAXIMILIANS-UNIVERSITÄT WÜRZBURG ZUM 75. GEBURTSTAG VON HERMANN NOTTARP, 591 (P. Mikat ed., 1961).

46. Martorano, *supra* note 42, at 16 n.16 (citing M. De Martino, *Prospettive nuove di una formula di copertura in evoluzione: l'assicurazione della responsabilità civile prodotti*, in 61 DIRITTO E PRATICA DI ASSICURAZIONE (1964)).

47. See *id.* at 16.

48. See Coggiola, *supra* note 37, at 213-15.

49. Cass., sez III, 25 May 1964, n. 1270, reprinted in 88 FORO ITALIANO: RACCOLTA GENERALE DI GIURISPRUDENZA, at 2098 (1965).

Lorenz. He won a scholarship to spend time in England and was familiar with the works of Prosser and Gorla. Wagner writes<sup>50</sup>

With a little exaggeration, one might say that product liability was imported from the US, both with regard to the legal problem and its solution. The question as to why American law figured so prominently here is difficult to answer. One factor might have been the emigration of eminent German lawyers—mostly of Jewish faith—to the US, which made it easier for German [language scholars] to access the learning of American law. Throughout the 1960s, a relatively high number of German-born professors continued to teach at leading American law schools, and they were happy to introduce scholars from post-war Germany to American legal thought. In addition, the German and the US governments facilitated scholarly exchange across the Atlantic, both financially and politically, in order to help re-educate German lawyers.

Like Herbert Bernstein at Duke, Rudolf Schlesinger of Cornell was such a German-born professor teaching at an American law school.<sup>51</sup> He invited Gorla and Lorenz to work on projects with him. Lorenz's ideas formed part of an active debate on whether contract or delict (torts) should be the basis of liability. This was resolved by the BGH in its "Fowlpest" or "Newcastle Disease" decision of 1968.<sup>52</sup> Lorenz's views that one should create a direct liability based on reliance were not accepted. They were too far from existing legal techniques.<sup>53</sup> But 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.<sup>54</sup> The manufacturer found it in practice difficult to discharge the burden of proof imposed. Lorenz then went to be an expert for the Council of Europe project on product liability, which gave rise to the Directive.<sup>55</sup>

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50. Gerhard Wagner, *The Development of Product Liability in Germany*, in *PRODUCT LIABILITY*, *supra* note 7, at 121.

51. For information on the importance of émigré scholars for comparative law generally, see Jack Beatson, *Aliens, Enemy Aliens, and Friendly Enemy Aliens: Britain as a Home for Émigré Lawyers*, in *JURISTS UPROOTED*, 73, 87 (Jack Beatson & Reinhard Zimmermann eds., 2004) (stating that 132 of the 1200 university teachers dismissed by the Nazi Government in 1933 were law teachers, and that there were 113 refugee lawyers and 102 law students registered in Britain in 1933).

52. Bundesgerichtshof [BGH][Federal Court of Justice] Nov. 26, 1968, 51 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* [BGHZ] 91 (93ff) (Ger.), *translated in* *CASES, MATERIALS AND TEXT ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL TORT LAW* 601 (Walter van Gerven et al. eds., 2000) [hereinafter *SUPRANATIONAL AND INTERNATIONAL TORT LAW*].

53. *See* *SUPRANATIONAL AND INTERNATIONAL TORT LAW*, *supra* note 52, at 99.

54. *Id.* at 93-101.

55. Council Directive 1985/374/EEC of 25 July 1985 on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products. OJ L 210, 7 August 1985. Council of Europe, Council Directive, *On the Approximation of the Laws*,

These two stories illustrate three points: (1) legal development depends on people, as much as on ideas; (2) legal development frequently does not involve borrowing something from another legal system, but being inspired to create an indigenous rule or principle (i.e. development results from cross-fertilisation); and (3) the extent of foreign influence depends on how it is presented and the climate of the receiving legal community.

(1) These two stories merely illustrate that the circulation of ideas depends on people. Legal development is not often the result of systematic activity. People with their own personal histories and reasons for travel or communication become vectors for the transmission of legal ideas. This is particularly the case where you need to translate the ideas into another language or into another legal culture. But the two stories show that individual histories relate to a broader climate in their legal community and in their society. The choice of potential comparisons (France or the United States) fit what others in their community saw as relevant and exciting. Their compatriots were ready to listen to what they brought back from those countries. In the case of liability for products, there was also a sense that the United States (and to some extent France) represented societies that were more advanced economically and from which lessons could be learned.

(2) But, of course, the mere publication or transmission of information about other legal systems does not lead inevitably to any legal change. In order to achieve change, there need to be decisions, often strategic decisions, by those in power (courts or legislators). The circulation of ideas by academics merely provides the basic material from which decisions can be selected. Neither Gorla's views, influenced by French law and by American law, nor Lorenz's theory of strict liability, influenced by American law, were accepted by their national courts. But this did not mean that they were unsuccessful. The extent of the discussion in the BGH shows that these were views that had to be taken seriously and could not be dismissed as some exotic foreign invention of no relevance to Germany. Just before the BGH decision in the *Fowlpest* case, the German annual conference of law scholars (the *Juristentag*) had been given over to the question of product liability.<sup>56</sup> So Lorenz's contribution was shaping a much larger debate. The same is true of Gorla's contribution, which sparked a range of contributions noted in the commentary on the *Saiwa* case.<sup>57</sup> Perhaps the most important part of the contribution is not the

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*Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products*, 1985/374/EEC (Jul. 25, 1985).

56. Wagner, *supra* note 50, at 122 n.20.

57. See Martorano, *supra* note 42.

particular opinion that each academic author proposed, but the way in which each contributed significantly to changing the frame of reference for academic and judicial debate. In particular, they managed to make American common law a legitimate point of reference for legal interpretation within civil law systems.

(3) The effectiveness of this approach depended on how the American system was presented. Guido Alpa makes the point that, in the nineteenth century, there were many translations of works on English law by leading writers.<sup>58</sup> But this did not lead to any influence from the common law on Italian private law. The reason he suggests is that those English authors who were translated generally criticized English law as archaic and unsystematic. If national lawyers were not enthusiastic about the merits of their own system, why should foreign lawyers take it seriously?<sup>59</sup> This was in contrast to the enthusiasm expressed by many of the same authors for the British constitution, and that enthusiasm was influential. American authors such as Prosser were enthusiastic about the development of product liability and this was infectious. The second aspect is the way the ideas are received. Here the arguments of the American lawyers engaged with the period mood in European countries. Economic progress after the dark days of war was highlighted in the consumer revolution. America had been further ahead in the 1930s and was very much ahead in the 1950s. Product liability fit into emerging social and economic changes arising from changes in the modes of production and distribution of goods. Alpa notes that it is not surprising that “consumerism” as a legal idea starts in America and then spread to Italy, among other European countries.<sup>60</sup> Although there was some recognition of the category of “consumer” in the preparatory documents for the Italian Civil Code in 1941, significant legal discussion of consumer rights took place in the 1970s, following on from the consumer boom in the Italian economy of the 1960s.<sup>61</sup> The law on product liability was characterised as modernizing German or Italian or European law to deal with a new problem. The paradigm of modernization fit the *Zeitgeist*. The alternative paradigm was the paradigm of fidelity to tradition, to doctrinal consistency. Although the courts actually negotiated changes between these two paradigms, the significance of what Gorla and Lorenz achieved was really to push the legal debate into a new dominant paradigm in this area.

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58. See Alpa, *supra* note 15, at 376.

59. *Id.* at 380-81. *But cf. id.* at 392-93 (describing Gorla’s willingness to embrace Pollock’s justification for the bindingness of contract in consideration).

60. *Id.* at 201-02.

61. *Id.* at 200, 202-3, 203 n.9.

So, in terms of content, the influence of the United States encouraged the creation of the liability of manufacturers for products. But the Italians did not parallel the American method of strict liability in tort but they reconsidered their own law to find analogous routes by a presumption of liability under article 2043 of the Italian Civil Code.

### C. Comparative Law and the Legislator

Legislation is often adopted not necessarily in order to deal with a pressing domestic social problem, but as much for symbolic reasons. The national legislation can appear modern. In Spain, industrialization had come late, and only a very small proportion of the workforce was engaged in industry. Workmen's compensation was not the pressing social problem that it was elsewhere. But the Spanish legislature regarded workmen's compensation legislation as a badge of modernity and forward thinking; it did not matter that only a very small number of people could benefit from it.<sup>62</sup>

Legal change is the product of many factors. But an important part of the process of reviewing the law usually involves an examination of what other countries are doing. A first reason may be the comparison of different experiences and outcomes: a way of checking whether systems that have broadly similar problems are achieving similar kinds of outcome. The second use might be to look for advanced systems and put the law in an advanced position. The third reason might be to anticipate the future.

In the United Kingdom, the national law commissions will typically undertake research on how the law is being developed in other countries (for example, privity of contract). In relation to product liability, the subject formed part of a wide-ranging Royal Commission on Civil Liability,<sup>63</sup> which did look at foreign jurisdictions. The principle of selection is obviously relevance: so common law countries tend to be preferred, though civil law systems are also the object of study. The legislator will choose not only on the basis of systemic compatibility, but also on the reputation of another system for being progressive. European-wide legislation is preferred because it ensures that there are no competitive disadvantages. This was certainly the case in Italy.

The legislature will undertake a certain amount of horizon scanning. Within Europe, no country was big enough to have a complete picture of

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62. See Miquel Martin-Casals & Jordi Ribot, *Technological Change and the Development of Liability for Fault in Spain*, in TECHNOLOGICAL CHANGE, *supra* note 7, at 227, 238-244.

63. See generally Royal Commission on Civil Liability and Compensation for Personal Injury, 1977-78, Cmnd. 7054; see Peter Bartrip, *No-Fault Compensation on the Roads in Twentieth Century Britain*, 69 CAMBRIDGE L.J. 263, 274-81 (2010).

the problems and solutions. It is here that the more advanced countries play a significant role. In order to predict problems, it is easier to examine the experience of other systems. A classic example was Prussia in 1838. It introduced legislation on compensation for railway accidents merely four days after the first passenger line was opened. The Prussian King had seen the accidents in England<sup>64</sup> and wanted to ensure that provision was made. In relation to products, Spain developed rules in the light of German and American experiences.

But we noted in the project that comparative law examples provide the raw material for legislative reform. The actual trigger for legislative action is likely to be a crisis. This is most clearly seen in relation to Spain, where specific legislation was enacted immediately following the Colza oil scandal.<sup>65</sup> In May 1981 a mass poisoning resulted from the consumption of denaturalized colza oil. This process was required by Spanish law in order to prevent certain imported oils from reaching the consumer market. When the product reached the consumers, thousands of people were affected. The scandal led to legislation protecting consumers in 1984 and to judicial decisions in 1990.<sup>66</sup> Whittaker comments: "one is left with the impression of a set of legislative provisions put together under political pressure in too much haste, and without full thought being given to their technical or practical implications."<sup>67</sup> The *Thalidomide* case was another example where legislative investigation was triggered by an accident.<sup>68</sup> In such situations, the legislator draws on what is already available by way of preparation, because the imperative to legislate in response to public opinion often outstrips the capacity for rational deliberation.

Of course, in addition, national governments form part of a wider community of ideas. The development of product liability in Europe shows this. In his introduction to *The Development of Product Liability*, Whittaker explains that the basic ideas of current product liability were developed by the Council of Europe over a number of years.<sup>69</sup> That, in turn, was inspired by the U.S. experience of product liability. There was a deliberate attempt not to go down the U.S. route. So there was a sense of differentiation. The Council of Europe drafted a Convention on product liability whose

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64. Sebastian Lohsse, *The Development of Traffic Liability in Germany*, in, *supra* note 30, at 81.

65. Miquel Martin-Casals & Josep Solé Feliu, *The Development of Product Liability in Spain*, in *PRODUCT LIABILITY*, *supra* note 7, at 251-256.

66. *Id.* at 246-47.

67. Simon Whittaker, *Introduction to Fault in Product Liability*, in *PRODUCT LIABILITY*, *supra* note 7, at 22.

68. *Id.* at 6.

69. *Id.* at 22-23.



contents were discussed between 1971 and 1977.<sup>70</sup> The process was essentially technical, being discussed and agreed by a committee of experts, and its adoption by Member States was entirely voluntary. Its explicit concern was with the protection of consumers, understood to mean any person physically injured or killed by a product. Its principal provisions were clearly directly inspired by American law, most notably its definition of “defect” in terms of “the safety which a person is entitled to expect, having regard to all the circumstances.”<sup>71</sup> This standard of liability was seen as a “mixed system,” imposing neither an “absolute liability” nor merely a presumption of fault.<sup>72</sup> While the Convention never came into force, its provisions were important as they formed the blueprint for the European Economic Community (“EEC”) Commission in its proposals for a directive governing liability for defective products to be enacted by the Council. Both Italian and German chapters in the *The Development of Product Liability* note how their national laws were changed by the 1985 Directive.<sup>73</sup> The change in Italy was more marked than in Germany, since the Germans had developed their own sophisticated case-law interpreting §823 BGB in favour of consumers following the *Fowlpest* decision.<sup>74</sup>

#### D. Non-legislators

In relation to product liability, there was cross-national discussion by the potential litigants and their insurers. This reflects the importance from the nineteenth century of the growth in transnational interest groups.<sup>75</sup> Perhaps the clearest examples come in relation to industrialization. Trade associations existed in France, Italy and England. Their function was to support their members by spreading good practice and conducting inspections. Such industrial self-help was also supported by insurance companies. They either conducted their own inspections or insisted on the inspection. So the British Manchester Steam Users’ Association was founded in 1854. French and Italian associations followed.<sup>76</sup> There was exchange between these associations. Regarding motor cars, there was an early meeting in Paris of the International Association of Motoring in 1909

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70. European Convention on Products Liability in Regard to Personal Injury and Death, Jan. 27, 1977, E.T.S. No. 91.

71. *Id.* at art. 2(c).

72. Whittaker, *supra* note 67, at 23 (citing Explanatory Report to the European Convention on Product Liability in Regard to Personal Injury and Death, E.T.S. No. 91, ¶ 17 (Jan. 27, 1977)).

73. See Wagner, *supra* note 50, at 133-38, 218-22; see also Nadia Coggiola, *supra* note 37, at 218-22.

74. See *supra* note 52.

75. MATTHEW HILTON, CONSUMERISM IN TWENTIETH-CENTURY BRITAIN 301 (2003).

76. Martin-Casals & Ribot, *supra* note 62, at 60-61, 116, 207-08.

which showed the extent of interchange at this early stage. In relation to products, the Spanish chapter gives a graphic example:

[I]t was in the decade of the 1970s when public authorities and private companies started to worry about the possibility of taking out liability insurance for defective products (*seguro de la responsabilidad civil por productos*). As a result of this concern, in October 1970, a seminar dealing with tortious liability of companies, professional liability and product liability was organised in Madrid under the auspices of Swiss Re. According to Professor Rojo Fernández-Rio, the Spanish experience in this area is parallel to the experience in other countries, something that is shown by the fact that, in 1970, the European Insurance Committee (CEA) also expressed, in its plenary assembly, the concern of European insurance companies regarding coverage, as a new risk, of product liability of producers. In Spain one of the first scholarly studies on product liability insurance policies was published in 1972, at a time when these policies were not yet sold in Spain.<sup>77</sup>

Insurance companies, too, engaged in sharing across jurisdictions. For example, there was a lot of insurance undertaken in the United States by European insurers as the U.S. economy developed.<sup>78</sup>

From these examples, we have seen that academics, legislators and users of the law do not confine their attention to national boundaries. Problems are not confined to those boundaries and are often neither texts nor principles.

Academic study abroad is not a new phenomenon. The twentieth century has made it more possible. In a number of areas, there is clear evidence of the movement of ideas. It is clear that there has been extensive reading of the legal materials of other countries. The area of product liability, for example, demonstrates wide reading, particularly by academics, of the developments in other countries.<sup>79</sup> The development of legal rules often reflects ideas that were prominent among jurists. Gorla's critique of Italian law on liability for products was then taken up by the

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77. Martín-Casals & Feliu, *supra* note 65, at 264 (citations omitted).

78. Mathias Leimgruber, *Accidental Crossings: Commercial Insurers and the Spread of Workmen's Compensation in Western Europe and the United States, 1880-1930* 15-17 (Mar. 22, 2006) (unpublished manuscript) (on file with author).

79. Coggiola, *supra* note 37, at 213-14 remarks on the way Gino Gorla in the 1950s examined French solutions, as well as English and American solutions, even if he did not recommend their wholesale adoption in Italy. The reversal of the burden of proof in Spanish car accident cases came in 1943, after there had been much pressure in the literature to create no-fault liability, influenced by discussion of French, German and Italian laws. Miquel Martín-Casals & Albert Ruda, *The Development of Legal Doctrine on Fault in Spanish Tort Law*, in *LEGAL DOCTRINE*, *supra* note 7, at 201.

courts. More specifically, one can see reference to ideas of jurists being used by judges to justify their decisions.<sup>80</sup>

Academics often play more than one role. Academics across all of the jurisdictions often became law reformers, judges, and politicians. By way of illustration, José Castán went from a professorship at Murcia to the Supreme Court; Robert Badinter was a professor at Paris and, at the same time, Minister of Justice, in which latter capacity he implemented proposals for an automobile accident scheme. Percy Winfield and W.T. Stallybrass were, respectively, professors in Cambridge and Oxford, who were specially appointed to the Law Reform Committee. Such scholars, and others like them, are not unusual. They do not just publish and hope that they will be noticed, but have the means of making their voices heard. Their later appointments put them in an excellent position to implement the ideas they had developed in their academic careers.

### III. STATUS OF FOREIGN LEGAL ARGUMENTS

#### A. Argumentative Status

Legal decisions do not typically depend on a single argument, but on an accumulation of arguments.<sup>81</sup> Even when faced with a binding statute or precedent, the existence of other principles or rules may shape how that single rule is interpreted. The model of legal reasoning I have in mind is one that depends thus 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.<sup>82</sup> In other words, I would not look for a single binding and thus exclusionary reason to justify a decision. Binding reasons are not the only reasons. But it will be a matter of weighing the combinations of reasons pulling in each direction. 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 such as foreign legal arguments on their own. The best analogy is with threads making a rope. One thread is unlikely to hold up the 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. The meaning of a precedent is not just

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80. *See Mercier*, Cass. Civ., 20 May 1936, D.P. 1936.1.88 at 94 (conclusions of *Avocat Général* Matter quoting the academic writings of the reporter judge *Josserand*).

81. *Cf. MACCORMICK*, *supra* note 5, at 192-93.

82. J. Wisdom, *Gods*, 45 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 185 (1944); *MACCORMICK*, *supra* note 5, at 213.

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. The German expression *ständige Rechtsprechung* and the French idea of *la jurisprudence constante* both contain the idea that, while a single decision may not have a lot of force, a group of decisions in the same direction have a gravitational effect.

To my mind, the most important combination is the way in which the argument from a foreign legal system adds luster to an argument already available in the host legal system. This is because I believe the mechanism by which a foreign legal idea takes root in the host legal system is essentially by means of the mechanism of “cross-fertilization.”<sup>83</sup> 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. But typically there is no wholesale direct transplanting of the solution from another system, unless it also integrates with a local solution.

This is seen by the Italian and German cases, where the national arguments remained preponderant. The illustrations in the second section show that legal development is going to occur through a process of cross-fertilization. That involves looking at what others do and coming to a way of developing your own law which is both consistent internally and coherent with the objectives that have been identified externally. The foreign material adds luster to the national solution. But we start with the national or code-based set of principles and then seek to apply them to the problems we have before us. Foreign materials help us to explore solutions that are out of the box. The problem that Gorla and Lorenz faced was that their use of American or French material did meet the “threshold of fit” (to use Dworkin’s term<sup>84</sup>) to satisfy the argument of internal consistency. Rather than adopt a direct strict liability between manufacturer and consumer, the courts adopted presumptions of fault. In broad terms it achieved the same result, but was more consistent with the existing law. Seen in this way, the foreign law reference adds strength to an existing domestic law argument. The foreign law adds attractiveness because it meets certain ideals of the domestic law. The Italian and German cases both highlighted the importance of legal solutions integrating with

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83. See generally Bell, *supra* note 17.

84. RONALD DWORIN, LAW’S EMPIRE 255 (1986).

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. Catherine Dupré has picked this up in relation to the use of German constitutional court decisions in the development of Hungarian constitutional law.<sup>85</sup> For various reasons, which she explains, the German court enjoyed a particularly high prestige in the eyes of Hungarian lawyers, and therefore provided an important reference point when they were developing their law.<sup>86</sup> The importance of reputation for modernity and for experience with the problems was important for the American case.

The reputation of a legal system depends on three factors. Prestige is only one of them. There also needs to be a sense that the foreign system is relevant. To go back to Dupré, Germany had managed to overcome the problems of dictatorship and had developed a strong protection for human rights. These were obviously relevant features for Hungary as it emerged from communism. Similarly, the fact that the United States was in the vanguard of the consumer economy and consumer society made it a relevant reference point for Germany and Italy, as well as the European Communities.

The third factor that determines reputation is the proximity of the foreign legal system to the receiving system. Some legal systems are naturally more proximate than others. Usually this is because they belong to the same so-called legal family. Thus, Gorla turned first from Italian law to French law, because it was part of the same legal family. Common lawyers naturally look first to common law systems.

Basil Markesinis has argued that “[n]ecessity, *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.”<sup>87</sup> I think Waldron shows that there is a deeper underlying reason. But whereas Waldron thinks of the principles as a common enterprise, I think that may go too far. There is a perceived common set of problems and the foreign system shows how they may be resolved. But the result is the need for thinking within a domestic system. We need the catalyst.

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85. CATHERINE DUPRÉ, IMPORTING THE LAW IN POST-COMMUNIST TRANSITIONS 167-71, 183-84 (2003).

86. *Id.* at 174-75.

87. BASIL MARKESINIS, COMPARATIVE LAW IN THE COURTROOM AND IN THE CLASSROOM 66 (2003) (emphasis added).

## B. How does the Foreign Law Argument Work?

In *Fairchild v Glenhaven Funeral Services Ltd.*,<sup>88</sup> 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 some virtue in uniformity of outcome whatever the diversity of approach in reaching that outcome.

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 that is both consistent internally and coherent with the objectives that have been identified externally. The foreign material adds luster to the national solution. But the judge starts with the national or code-based set of principles and then seeks 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 solution adopted gains luster 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 of the German Civil Code, there is only a presumption of fault that can be rebutted by showing that the employer chose a competent employee or supervised him appropriately.<sup>89</sup> This leads German lawyers to adopt solutions in contract to get around this problem.<sup>90</sup> 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.

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88. *Fairchild v. Glenhaven Funeral Services Ltd.*, [2002] UKHL 22, 32 (U.K.).

89. See MARKESINIS & UNBERATH, *supra* note 20, at 700.

90. *Id.* at 693-709.

Second, 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.

The third feature in creating luster to an argument is the reputation of the system in question. As noted above, this breaks down into three aspects: prestige, relevance, and proximity.<sup>91</sup> Markesinis makes a convincing argument that receptivity to foreign influences is a matter of mentality among the judges.<sup>92</sup> In particular, he suggests this may be partly due to the education and experiences of individual judges,<sup>93</sup> but also to a general mood within the legal system.<sup>94</sup> Catherine Dupré 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 or protecting rights after the experience of dictatorship, an outcome to which the Hungarians aspired.<sup>95</sup> 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 addition, the reputation of a foreign system may depend on the way it is presented in translation. Guido Alpa makes the point that, in the nineteenth century, there were many translations of works on English law by leading writers.<sup>96</sup> But they did not lead to any influence from the common law on Italian private law. The reason he suggests is that those 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 should foreign lawyers take it seriously?<sup>97</sup> (This was in contrast to the enthusiasm expressed by many of

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91. See discussion *supra* Part III.A.

92. See Basil Markesinis, *Judicial Mentality: Mental Disposition or Outlook as a Factor Impeding Recourse to Foreign Law*, 80 TUL. L. REV. 1325 (2006).

93. *Id.* at 1356-59 (examining the German courts).

94. See generally MARKESINIS & FEDTKE, *supra* note 1 (considering not only U.S. Courts, but also French ordinary courts).

95. DUPRÉ, *supra* note 85, at 99-101.

96. ALPA, *supra* note 15, at 376-77.

97. *Id.* at 380-81, 387.

the same authors for the British constitution, and that enthusiasm was influential.) This has an intimate connection with how the country is perceived. Markesinis rightly stresses 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 in the *Fowlpest* decision relies on the work of Lorenz,<sup>98</sup> the discussion of it by the Italian Corte di cassazione almost certainly relies on Gorla,<sup>99</sup> and that by the Advocate General Tesouro in the European Court of Justice relies on an Italian author, Ponzarelli.<sup>100</sup> “Packaging” is a way in which Markesinis suggests material needs to be given, and he is fundamentally right. Third, reputation depends also on the receptivity of the receiving system. 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.

This discussion of the reputation and presentation of foreign sources helps us to understand their place in the process of discovery. It helps us see why national lawyers might think it useful to look at foreign sources and how they might be able to access them. But it does not explain why these foreign sources carry argumentative force. For this, we need to turn to the more jurisprudential work of Waldron.

#### IV. THE JUSTIFICATORY FORCE OF FOREIGN CITATIONS

This article has suggested that foreign citations typically have argumentative force because they encourage revised interpretations of national sources. So the new argument is based directly on national sources and only indirectly on foreign sources. But there are those who would wish to give foreign citations a more direct authority. One such author is Jeremy Waldron.

##### A. Common Enterprise: The Rule of Law

Waldron offers two arguments for treating foreign sources as justifications for decisions in domestic courts.<sup>101</sup> The first is that the

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98. See BGHZ, *supra* note 52, at 91, 93-96; MARKESINIS & UNBERATH, *supra* note 20, at 560.

99. See Martorano, *supra* note 42.

100. Case C-300/95, *Comm'n v. U.K.* 1997 E.C.R. I-2649 ¶ 16,n.4 (citing GIULIO PONZARELLI, LA RESPONSABILITA CIVILE. PROFILI DI DIRITTO COMPARATO (1992)).

101. HIGHEST COURTS, *supra* note 4, at 103-07.



foreign system provides an example of the methodology for resolving legal problems. The second is that the argument of equal treatment applies, even though the states involved in the comparison are not the same. I will add an additional argument from human flourishing. But I will also argue that such justifications for the force of foreign law citations as a distinct legal reason are limited. They are limited because of the level of generality involved in identifying common legal tasks across legal systems. In addition, any comparative lawyer knows that you simply cannot compare legal rules or legal outcomes without situating them in context. You need to see a particular task that law performs in the light of other tasks that law performs in a country and in relation to the tasks that other social institutions perform. Put into that broader context, the comparability of a foreign jurisdiction with the domestic jurisdiction may be more limited than at first appears.

In the first argument, Waldron suggests that, even where domestic courts are not applying a common set of binding rules with the foreign system, that nation still has access to 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 to the best application of principles of justice in their own setting. Because the domestic court is also looking to apply the same principles, the solutions the foreign court adopted have a value as methodological illustrations of how to conduct the exercise of finding the right solution to a problem, as well as of how to justify a possible outcome. Waldron lauds 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.<sup>102</sup> But the issue of showing that the outcome is right requires a stronger argument: that the national rules are based on the same fundamental principles.<sup>103</sup>

Waldron's second argument on equal treatment has two distinct alternatives. The first and most distinctive of the Waldron approach is to examine what he calls "bottom-up demand for consistency."<sup>104</sup> In brief, this means focusing on those in differing jurisdictions who are subject to divergent treatment, but are otherwise in similar situations. 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 give them only one

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102. *See id.* at 102-04, 108 (citing example of *Hopkinson v. Police*).

103. *Id.* at 106.

104. *Id.* at 114.

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.<sup>105</sup>

In other words, citizens complain 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.”<sup>106</sup> In this he is arguing that, despite the institutional distinctiveness of the nation states, they need to be seen together. There is something like a common enterprise between legal systems. So, going back to the illustrations in Part II, courts of all western countries could be seen to be faced by similar problems in a consumer society, and so the results for consumers in one country, such as Germany, should be similar to other countries where the context is similar, such as the United States.

Waldron’s second argument is that the *ius gentium* (law of all nations) 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.<sup>107</sup>

Again he appeals to a kind of common enterprise. The decisions of foreign courts are part of a common stock of potential solutions for handling common problems and, domestic courts, in fairness to domestic litigants, should refer to these. There is a common enterprise, such that we

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105. *Id.* at 110.

106. See Jeremy Waldron, *Partly Laws Common to All Mankind: Foreign Law in American Courts, Part 3*, Yale Law School Community Server (Sept. 12, 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.aspx>.

107. HIGHEST COURTS, *supra* note 4, at 114.

should learn from those who are engaged in the same enterprise. This is why he argues that, for the purposes of the protection of human rights, we are all part of a single community.<sup>108</sup> 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. Unlike Markesinis, I do not think the argument is entirely utilitarian. Like Waldron, I think it has to be principled because giving reasons for actions (legislation or judicial decisions) is a principled activity.

In this article, I focus primarily on the argument that equal treatment requires the consultation of foreign legal arguments and their use as part of a legal justification. In order to develop the idea that foreign legal arguments provide a justification within our own domestic law, one needs to expand on Waldron's argument, making it relevant to private law. I do this in two stages. The first stage examines the nature of the "common legal enterprise;" the second examines the actual practice of legal influence in private law, recalling the earlier example from product liability.

In what way is law a "common legal enterprise" across a multiplicity of countries? At a high level of abstraction, Hans Kelsen was right that governance through law is a mark of social progress.<sup>109</sup> That progress is about the control of social power, power of individuals and power of the State. Such an exercise of controlling power provides the elements of a common agenda. That common agenda provides a basis for a dialogue between legal systems, each seeking to learn from the other. This is true in three ways. First, governance through law provides social order. Second, the rule of law provides a control on the arbitrariness of the executive. Third, the protection of fundamental rights provides a control over the exercise of social power in the interests of the promotion of social well-being. These are three generic values that governance through law achieves, but at this generic level, they provide common points of reference for different legal systems. Such ideas reflect a broad conception of the rule of law. It includes fundamental rights, encourages the independence of the judiciary, and provides conditions for the exercise of rights. Lord Bingham has suggested that this "thick theory" of the rule of law is to be preferred these days.<sup>110</sup> My colleague Trevor Allan argues that the rule of law has an

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108. *See id.* at 109 (arguing that this is a demand of peoples, and not just rulers).

109. *See generally* HANS KELSEN, *PURE THEORY OF LAW* (Max Knight trans., Univ. of Cal. Press 1967) (1934).

110. TOM BINGHAM, *THE RULE OF LAW* 67 (Allen Lane eds., 2010). *See generally* the Dehli Statement of the International Commission of Jurists *in* NORMAN S. MARSH, *THE RULE OF LAW IN A FREE SOCIETY: A REPORT ON THE INTERNATIONAL CONGRESS OF JURISTS, NEW DEHLI, INDIA, JANUARY 5-10, 1959* (Int'l Comm'n of Jurists, 1959).

ethical imperative based on values common to all modern liberal democracies.<sup>111</sup> Applied to private law, such a thick conception of the rule of law entails respect for rights. But, in the end, these are abstract and general features of the ambitions of a legal system. It does not necessarily mean that the specific areas that the law regulates, such as products, are indeed necessarily common enterprises across legal systems. This has to be shown in each case.

Going beyond Waldron, the other argument for seeing law as a common enterprise focuses on the role of law in making possible the social conditions for human flourishing. The conditions of welfare, as well as economic and social rights that attach to this idea are contested. It is here that the notion of the “social welfare state” (*sozialer Rechtsstaat*) has been used.<sup>112</sup> Although there may be disagreement about how this works out in particular branches of the law, it is certainly a common ambition which goes beyond classical areas of fundamental rights.

## B. Common Principles

If law performs certain tasks that are common across the world, or at least in developed countries, then it becomes natural that these countries should look at how these tasks are performed elsewhere. This can be the basis of the common principles to which Waldron alluded. Of course, there is a significant level of generality involved in the description of the common principles or tasks. Indeed, they might well be described as categories of tasks, rather than specific tasks. There are lots of ways in which to establish order in society, lots of ways in which to embody the rule of law; lots of disagreement about what constitute fundamental rights or human flourishing. But the international character of debates on these matters can be seen in any work.<sup>113</sup>

Where there is a common function, the strength of an argument drawn from a foreign law about the performance of that function is that it offers a different perspective on that shared task. Waldron’s argument that people can legitimately claim against their government that they are not being treated equally to people in other countries in the performance of common tasks has some force. But context imposes a significant limitation on its force. It may be true that the victim of a traffic accident does not obtain

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111. See generally TREVOR R.S. ALLAN, *CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW* (2001).

112. Erich Fechner, *Future Prospects of the Sozialer Rechtsstaat*, in *LAW AND THE FUTURE OF SOCIETY* 146 (Francis Charles Hutley, Eugene Kamenka & Alice Erh-Soon Tay eds., 1979).

113. See e.g., Jean Rivero, *Etat de droit, Etat du droit*, in *L’ETAT DE DROIT. MELANGES EN L’HONNEUR DE GUY BRAIBANT* 609-614 (Marceau Long & G. Vedel eds., 1996).

compensation without proof of fault before the courts of one country, but does in another. But is it unfair? If in the second system there is a strong national health service provided by the state and a strong social welfare system of benefits for those unable to work, then it is not clear that a pedestrian who is unable to sue the car driver in tort without proving fault has been badly treated, even if a pedestrian in another system is able to do so. We can only form a serious judgment about inequality of treatment if we take a holistic view of the victim's situation. That requires us to look not only at the law, but at other social mechanisms. The danger of Waldron's example of the refugee camp is that he concentrates on one feature (meals per day) and does not draw our attention to the other features of the situation. As I said at the beginning of this Part, it is a commonplace of comparative law that you simply cannot compare legal rules or legal outcomes without situating them in context. When we look at private law, for example in relation to products, the law has compensation mechanisms in contract and tort and also regulation through the criminal law.<sup>114</sup> The relationship between the three differs from system to system.<sup>115</sup> In addition, some systems have developed compensation mechanisms outside tort law for particular causes of damage. If one is going to cite foreign law, then one needs to be aware of the context in which the rules you are citing operate in their foreign system, so that a genuine comparability can be established.

### 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. But these will be the minority of situations when foreign case law is cited. In most cases, the foreign judicial decision is being offered as a way of gaining a perspective on arguments already available within domestic law—the divergent ways in which the rules can be legitimately formulated and interpreted. To the extent that the social and political situation of the foreign jurisdiction are similar to that of the domestic law, I would follow Waldron in thinking that it does add some force to domestic arguments. The sense of fairness that similar situations should receive similar solutions across legal systems has some weight, even if the full force depends on a closer and holistic analysis of the way a problem is treated by a legal system. Additionally, the foreign decision provides a reflecting mirror to observe our own system and the options it

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114. See Whittaker, *supra* note 67, at 3-11.

115. *Id.*

has for development. It provides a counterfactual world in which consequences can be tested, not merely hypothetically, but in some form of grounded reality. But the argument of the paper has been that the force of the eventual argument that is presented to justify a new judicial decision remains 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 individuals with authority available in the host legal system can the luster 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. To that extent, there is no difference between private law and constitutional law. In constitutional law, one also has to find sources in the domestic law which can then be enhanced or made more appealing by reference to foreign law.

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