Reviews

Law as a Product

Some thoughts on *Engaging with Foreign Law* by Sir Basil Markesinis and Jörg Fedtke, Hart Publishing 2009, xix + 452 pp, Pbk £35, ISBN 978-1841139470.

In his famous dissent from the majority opinion in *Abrams v United States*, Justice Oliver Wendell Holmes Jr stated:

> But when men have realized that time has upset many fighting faiths, they may come to believe … that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[1]

This quote, referred to by Markesinis and Fedtke in the last chapter of their newest work on comparative law (p 352), is commonly considered to have introduced the concept of 'the marketplace of ideas' into legal discourse. While Holmes' comment was originally concerned with an interpretation of the First Amendment to the US Constitution and thus the judicial protection of freedom of speech, it has subsequently been applied in a wider context—stressing the importance of a competition of ideas for the advancement of legal systems and of society at large. The rationale of the marketplace of ideas is at the heart of *Engaging with Foreign Law*, and the truly innovative characteristic of the book is that it endeavours to build a theory and methodology of comparative law around the perceived necessity to contribute to the trade in ideas (or, more precisely, the trade in legal concepts).

The major theme is introduced in the second chapter of the book, after a brief survey of the state of comparative law at the beginning of the new millennium that takes issue with Peter Birks's observation that comparative law remained 'in the ghetto' (p 1) or compartmentalised at the margins of legal analysis. Markesinis and Fedtke stress that comparative law, in order to escape this 'ghetto' and a decline in importance that may have been triggered by the gradual exit from the academic stage of the most charismatic

1 *Abrams v US*, 250 US 616, 630 (1919).

and influential comparatists (René David, René Rodière, Konrad Zweigert, Gino Gorla, Sir Otto Kahn-Freund) in the 1970s and 1980s, deficiencies of the university system at that time,[2] and the failure of contemporary scholars to adapt Rabel's methodology to the workings of the modern world or devise a new approach, should focus on specific issues instead of broad concepts. It also stands to gain, they argue, by highlighting the presentation of material in a form that facilitates its usage by the practitioner instead of elaborate but abstract and theoretical considerations. The authors use the terms 'functional approach' (or 'functional specificity') and 'packaging' to describe their method. As far as the first aspect is concerned, they advocate an analysis that is factual and contextual, ie that starts 'from a specific litigated situation and then slowly [fans] out towards a bolder attempt to better understand a foreign system' (p 43). They claim that this 'pragmatic and particularist method',[3] which avoids generalities and sweeping statements, is better suited to produce insights with relevance to the 'real world' and to the needs of judges and lawyers.

This last point is related to the second element of the method advanced by Markesinis and Fedtke ('packaging'). The role of the academic as the authors understand it consists not only in the expansion of knowledge for the sake of science, but also (and possibly predominantly, at least in the case of the comparatist) in the dissemination of this knowledge to circles outside academia. This presupposes an appreciation of the particularities of the world outside academia. In the words of Markesinis and Fedtke: the comparatist is expected to make 'foreign material first and foremost attractive to national judges', to assemble it in a way that is 'user-friendly and clear for the ultimate consumer: the judge' (p 35). The authors intentionally use commercial terminology; indeed, they stress: '[I]deas must be sold to others just as much as any other commodity. Being highbrow does not help in the task that we are trying to achieve' (p 35).

They implement their approach in a number of chapters of the book, in particular in chapters eight and nine where, acting in the spirit of their methodology, they analyse two specific issues of practical relevance in great detail, namely the liability of statutory bodies for negligent acts or omissions of public servants, for example the inadequate monitoring of foster children or maintenance of public highways, and the question of how the contributory negligence of one tortfeasor affects the injured party's claim against the other tortfeasor.[4] In both cases Markesinis and Fedtke examine English and German law and conclude that a comparison of the two legal systems is not only of theoretical interest but also feasible in the practical setting, provided that the foreign law is 'served to [the

2 It is amusing to read the account of Markesinis, partly relying on third sources, partly on his own experience as a Cambridge and Oxford don, of the atmosphere that must have been prevalent in the two institutions in the 1970s and 1980s; see pp 20–22.

3 Here the authors draw on Rabel; see p 41.

4 The discussion of this second issue is based on the decision of the High Court in *Greatorex v Greatorex* [2000] 1 WLR 1976.

national] "consumers" [judges and other practitioners] in an easily digestible way' (p 317).[5]

Most important is the removal of the linguistic barrier. The authors argue that the transplantation or adaptation of legal concepts from another jurisdiction will be unlikely to occur unless the material is available in the native language of the potential 'consumer' or at least in English as the emerging *lingua franca* of business and science.[6] In addition, they contend that the processing of foreign legal material should take account of the 'understanding abilities of a foreign audience' (p 319). This requires, on the one hand, a critical assessment of the theoretical and conceptual level of the material. Markesinis and Fedtke are careful not to suggest manipulation;[7] however, they seem to imply that simplification can be expedient in order to render the source 'user-friendly'.[8] In any case, intelligibility should take precedence over literary accuracy. On the other hand, transplantation necessitates a reflection on the similarities and differences of the legal systems; a legal institute might have different consequences depending on its position within a society's regulatory regime and its interaction with other rules. Consequently, the authors warn that 'the fact that foreign legal material is accessible to us in linguistic terms does not mean that it can be transplanted into our system without thought, caution, and preparation' (p 319). It is the task of the comparatist to undertake this preparatory work.

The last two chapters of the book contain passages that elaborate on the central thesis of Markesinis and Fedtke. Economic analysis has emphasised the importance of free movement in legal rules. The permeability of national borders for legal principles from other origins can lead to the application of the more adequate and thus often more cost-efficient rule in any given locale. This free movement of concepts has obvious implications for comparative law since it presumes the willingness and ability of practitioners to utilise foreign rules. Markesinis and Fedtke refer to the work of one of the proponents of economic analysis, Anthony Ogius,[9] in illustrating the interrelations of economics and comparative law. They acknowledge that Ogius' economic reasoning 'comes very close to [their own] ideas of the need to be practical and useful' and that 'the ideas of competition and survival of the best are implicit in [their] approach and form a kind of Wagnerian leitmotiv' of the book (p 363). Alternatively, if the legislator or the judge is not willing or not in a position to compare and, if appropriate, embrace foreign law, cost-reducing effects can be achieved by allowing the addressees of the rule to make arrangements in

5 In *Greatorex v Greatorex* Mr Justice Cazalet had made use of principles of German tort law to solve the respective issue under English law.

6 Markesinis and Fedtke discuss the importance of language at pp 78–79.

7 Markesinis refers to an earlier publication where he suggested precisely this course of action. Has he now qualified his position, if not in substance then in form; see p 319.

8 See in particular p 318.

9 They quote from his article 'Competition Between National and Legal Systems: A Contribution of Economic Analysis to Comparative Law' (1999) 48 *International and Comparative Law Quarterly* 405; see p 363.

order to fall within its territorial scope of application. In other words, if not free movement in legal rules, then at least free movement in goods or services or freedom of establishment should be encouraged.

The demand for comparative research and the 'packaging' and dissemination of the findings of the research as advocated by Markesinis and Fedtke is comparable. In such cases, often more than one legal system interact, and counsel for the potential addressee of the foreign rule needs to understand its import in order to be able to advise on the move. In chapter ten, which investigates comparative law in commercial practice, Markesinis and Fedtke discuss a number of instances in which such situations led to forum shopping. A well-known case in point is the right of establishment for companies under the EC Treaty (pp 340–2). After convoluted litigation that has produced a number of high-profile decisions by the ECJ,[10] it is accepted that companies which have been lawfully established in a Member State of the European Union have to be recognised in all other Member States, even if they do not conduct any business in the state of incorporation and the latter's law has been chosen merely for the purpose of circumventing the more stringent requirements of the state where the company's centre of administration is actually located. The authors point out that this liberality in interpretation on the part of the ECJ has led to a surge in the popularity of the English private limited company (Ltd) among incorporators from the Continent. Today, one in four private limited companies operating in Germany is established under English law, which is more flexible than its German counterpart, the law on the *Gesellschaft mit beschränkter Haftung* (GmbH), in particular with respect to capital requirements (p 341). This, in turn, has prompted the German legislature to ease the rules on capital adequacy and to allow for a special form of GmbH that dispenses with minimum capital altogether, albeit at the price of restrictions on the right to make distributions.[11]

Markesinis and Fedtke substantiate their call for more practically oriented comparative research with data on the impact that prominent comparatists had on fellow academics and the courts (chapter three). They use legal research engines and manual counts to conduct an empirical analysis of the citation rates of 49 comparative law scholars from five countries (England, France, Germany, Italy and the United States). The survey is, of course, fraught with methodological problems; and Markesinis and Fedtke acknowledge them.[12] The sample is too small to be statistically significant, older scholars are disadvantaged due to the fact that many of their publications are not electronically accessible, cultural differences might distort the real influence that a certain comparatist

10 The latest being Case C-210/06 (CARTESIO).

11 So-called *Unternehmergesellschaft*; see section 5a of the *Gesetz betreffend die Gesellschaften mit beschränkter Haftung* (GmbHG) and the *Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen* (MoMiG) of 23 October 2008, Bundesgesetzblatt I 2008, p 2026.

12 See the chapter 'Warnings and Caveats', pp 81–85.

has exerted,[13] the selection of a work as 'comparative' inevitably involves a value judgement, and the existence of a reference does not allow for any conclusions as to the quality of the argument that has been quoted. For example, court decisions can be based on the academic work referred to, mention the work *obiter*, or reject it; scholarly publications may cite it approvingly or disapprovingly.

In spite of these problems, Markesinis and Fedtke advance several—tentative—conclusions, the most important of which are the following three. First, reputation is enhanced if the scholar publishes in English (p 78). Second, the publications have a very modest impact on practitioners. This is only different if the work is innovative and of practical relevance (pp 98–99). Third, publications in comparative law do not fare worse than those in other areas (at least in England), calling into question the 'ghetto theory' of Peter Birks (pp 102–3, 109, 111–14).

Two additional points that Markesinis and Fedtke make are worth mentioning. The alleged necessity to employ functionality and specificity implies, in the opinion of the authors, that comparative law should dissociate itself from two disciplines that have a bearing on it: Roman law and Critical Legal Studies (CLS). Neither of those fields is concerned with providing aid to the practitioner; and the empirical survey mentioned above confirms that citation rates drop where texts are of a historical or theorising nature. The authors argue that 'the dying scholarship of Roman law' (p 11) adds nothing to the understanding of the common law and consumes creativity and scholarly effort while appealing to an ever decreasing number of people. As a consequence, they believe that, where it is associated with comparative law, its predicament afflicts the latter as well (pp 15–18). Therefore, Markesinis and Fedtke favour a comparative approach that restricts itself to living legal systems and, among them, to those that are well developed and possess a rich culture of legal institutions (p 349). In fact, in an academic world of limited resources and new legal trends and developments that requires an expansion of university curricula, Roman law should, they argue, be the first subject to make way for more relevant topics (p 356).

These are sweeping (and provocative) statements, and while it is correct that a number of comparatists, particularly of the older generation in England, have worked in both Roman law and comparative law, this is not a prominent feature of many present-day scholars of comparative law. It seems therefore somewhat exaggerated to claim that anything short of an unequivocal denunciation of Roman law would exert negative effects on comparative law or legal education in general.

The same is true for the second recurring *tête de Turc* of the book: CLS. In several chapters, the authors turn their dissecting eyes on the contributions of the proponents of

13 For example, Markesinis and Fedtke point out that Continental academics tend to over-cite their PhD supervisors, which the author of this review is not in a position to refute, and to inflate the number of citations by excessively referring to their own work; see p 84–85.

CLS. This is amusing to read, in particular when Markesinis and Fedtke reproduce highlights of neologism-fraught excerpts from writings that are close to unintelligible (pp 53–57). Indeed, one feels inclined to side with Karl Popper, who put it succinctly: 'If you can't say something clearly and simply, it is better to keep quiet and keep working until you can say it clearly';[14] and to agree with the two authors that the victims of their occasionally acerbic criticism (as Markesinis and Fedtke themselves admit at p 352) might 'object to what [they] say and how [they] say it', but that 'those who have no immediate stake in this debate will … enjoy the frankness of a robust text' (p 352). However, both CLS and comparative law are broad movements that certainly overlap in parts, but that are at the same time strong and multi-faceted enough that one will not be taken over by the other.[15] Thus, the comprehensive attack levelled at CLS might be less a matter of necessity than one of personal concern on the part of one or both of the authors.

This is not a problem as such. Markesinis' and Fedtke's excellence of scholarship and breadth of erudition is beyond doubt, and so is the richness of the topics dealt with in *Engaging with Foreign Law*. The authors raise many interesting questions and their claim that legal research should be more practically relevant is well argued. However, the focus on CLS should not be allowed to distract from a discussion of other, more deserving topics. Several of them are only touched upon, and at times the interested reader wishes for a more detailed discussion. For example, chapter four examines the adoption of seven institutions of German public law by South Africa during the constitutional reforms following the demise of apartheid—the constitutional state principle (Rechtsstaatsprinzip), the essential content clause for human rights protection (article 19(2) of the German Basic Law), horizontal effect of human rights (Drittwirkung), freedom of occupation, protection of legal persons, the general right to freedom (Allgemeine Handlungsfreiheit) and, finally, federalism. The authors observe that two of these institutions have been transposed successfully, the transposition of another two has met with difficulties, and the adaptation of the remaining institutions has not (yet) been successful (p 159). They conclude that substantive rules, eg freedom of occupation or the application of human rights to legal persons, are the most difficult to transplant. Broad principles (such as the constitutional state principle) are more adaptable to their new environment since they offer a greater degree of flexibility, and institutional structures are the most resistant.

Unfortunately, this is all they have to say on the question of *how* legal rules and concepts travel (it is also somewhat contradictory to later examples, eg the successful application of very specific substantive rules of foreign tort law by the court in *Greatorex*). We have learnt in this book a great deal about the positive effects of the marketplace for ideas for the advancement of society and we have come to understand the role of the

14 Quote from Hubert Beyerle, 'In Praise of Simplicity' *Max Planck Research* 3/2008, 18.

15 The concern that comparative law might be absorbed by CLS is voiced by Markesinis and Fedtke at p 4.

comparatist in the marketplace. The comparatist, we see, facilitates the trade in ideas by appropriate 'packaging' and education of potential addressees or beneficiaries of the rule. We do not know, however, what happens to the rules and concepts when they transgress borders, and we do not learn which *inherent* characteristics render them more or less susceptible to being successfully transplanted. Here, arguably, lies the next great challenge for comparative law: in the analysis of the determinants of the dissemination and adaptation of rules and principles in the world. Furthermore, as Markesinis and Fedtke show with the example of South Africa and in other parts of the book as well, legal rules change in the process of transplantation. What characterises this change or evolution? Just as biological evolution does not lead to one specific outcome,[16] does the transformation of legal rules as they are adapted proceed in multi-directional ways, sometimes progressive and sometimes regressive? Does it lead to an increase in complexity?[17] An increase in efficiency?

In a similar vein, Markesinis and Fedtke mention another highly important issue with a bearing on interdisciplinary research: the influence of the socio-political background of a society on legal rules (p 187). They discuss this wide topic first by means of a comparison of the attitudes of the highest courts in the United States and France to the role of foreign law in statutory interpretation (chapter six), then the aforementioned liability of the state for negligent breach of its statutory obligations under English, French and German law (chapters seven and eight), and finally the convergence of legal approaches through the unco-ordinated adoption of similar concepts by national legal systems or private commercial actors—the latter leading to the formation of new, transnational concepts (eg *lex mercatoria*; see chapter ten).

Chapters seven and eight, spanning more than 70 pages, may be singled out as both comparative law and an example of the Markesinis/Fedtke-method 'in action' at its best: specific, detailed, and supported by extensive empirical material on the cost of government liability (pp 287–93). Nevertheless, one additional comment may be permitted: at the outset, Markesinis and Fedtke state that 'legal rules or judicial decisions can only be understood within the broader context of their society; … these broader "cultural" factors may change within one and the same system and, as they change, so will its law' (p 230). Furthermore, they point out that legal inquiry will eventually lead 'to the final and deeper level where one has to confront the core issues. At this level, legal arguments become subservient to political, economic, or moral ones, which now come to the fore' (p 244).[18]

16 J Maynard Smith and E Szathmáry, *The Major Transitions in Evolution* (Oxford University Press, 1995) 4–5.

17 *Ibid*, pp 5–6.

18 At a different point, Markesinis and Fedtke speak of 'three circles', the third one referring to the cultural, political or economic phenomena at the core of legal disputes; see p 249.

They go on to explain the differences that they identify between French and English rules on government liability in terms of those societies' different philosophical stances towards the role of the state—as a guarantor of equality and social solidarity (France) on the one hand, a philosophy that is conducive to damages claims against the state, and as an entity whose discretion in how to allocate resources should be shielded (England) on the other hand.[19] While this interpretation is convincing, it does not explain how the law changes as cultural, political and economic conditions change. Through which channels is change effected? What will be the outcome of the competition of ideas? Can we identify diverse trajectories that countries follow or will we eventually experience convergence?[20] Do economic conditions influence the legal environment or does the regulatory regime determine the development of the economy? Much has been written on these questions, and catchphrases such as 'race to the bottom/to the top',[21] the 'law matters hypothesis',[22] or 'path dependency'[23] come to mind, but conclusive answers are lacking. For example, the controversy about the importance of a common law/civil law origin for investor protection and shareholder rights rules and the impact of these rules on stock market development follows largely geographical lines, with US economists propagating the supremacy of their national regulatory regime and European scholars arguing the converse.[24] Both sides use statistical analyses to substantiate their claims, which has led to a rather unsatisfactory stalemate.

It is the role of the comparatist of the 21st century to assess these issues by following the path of legal concepts as they transgress national borders and evolve or fail in new environments. In other words, the comparatist will need to go beyond packaging and investigate the workings of the marketplace for ideas itself.

Carsten Gerner-Beuerle

London School of Economics

19 The situation is more nuanced and the dichotomy less clear than this summary may convey. Markesinis and Fedtke, of course, appreciate and assess the nuances; see p 247.

20 Markesinis and Fedtke argue that convergence will occur 'not because Community legislation, model laws, or international treaties are regulating more and more aspects of our life but because growing urbanisation, industrialisation, inter-state commerce and travel are attenuating local differences of behaviour and thought, and are assimilating human tastes, attitudes and values' (p 252). This assessment is by no means commonly accepted.

21 Confer R Romano, 'The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters' (2006) 23 *Yale Journal on Regulation* 209.

22 See eg R LaPorta *et al*, 'The Economic Consequences of Legal Origins' (2008) 46 *Journal of Economic Literature* 285.

23 MJ Roe and LA Bebchuk, 'A Theory of Path Dependence in Corporate Ownership and Governance' (1999) 52 *Stanford Law Review* 127.

24 See n 22 for the US view and BR Cheffins, 'Does Law Matter? The Separation of Ownership and Control in the United Kingdom' (2001) 30 *Journal of Legal Studies* 459; A Singh *et al*, 'Shareholder Protection and Stock Market Development: An Empirical Test of the Legal Origins Hypothesis', Centre for Business Research, University of Cambridge Working Paper No 358 (2007), www.cbr.cam.ac.uk/pdf/WP358.pdf, for the European view and additional references.