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Not on the Other Side of the Channel!

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Not on the Other Side of the Channel!*

»Rechtsdogmatik in England« is perhaps not the most obvious title for an enquiry concerning juristic methodology and its evolution on the other side of the Channel. Even when translated into English, as the blurb does (»Doctrinal Legal Scholarship in England«), many readers will still be baffled, and left wondering about the subject of this book, because there really is no *Rechtsdogmatik* in England! Nonetheless, this is an honest title for a study dedicated to an intriguing question: whether that mode of thought – so familiar to German jurists, judges, and practicing lawyers – has any parallel in England at all. One may be curious to know why this is an interesting question? Why is it relevant, perhaps also important in general terms?

First, lawyers trained in jurisdictions where that mode of thought is well accepted all too often pose a similar question. Why do English legal materials apparently concede so little to elaborate theories, neat categories, broad overarching principles? This essential question has kept many scholars of comparative law and legal historians busy. Secondly, the book explores a crucial epistemological problem. To what extent do the laws of different countries diverge not just because they differ in substance, but rather because they are set out in different ways? This is the subject of much recent controversy (9 ff.), and Flohr's book provides some insights on the point. Finally, this book makes clear that nothing ever remains the same in the law. In recent years we witness a sustained scholarly effort in England (and in some other parts of the common law world) to provide a more doctrinally structured treatment of certain areas of private law (and of private law in general). This has resulted in a form of scholarship that is perhaps more easily recognised as »legal dogmatics« by continental lawyers than anything produced so far in the field of legal studies in England. Are English academics actually turning to a form of »legal dogmatics«? How did this happen? What are the consequence of this? Is the English judiciary paying attention? Is it influenced by this change? Those who are interested in these topics can turn to this volume and will find much of interest in it.

The book is a slightly modified version of a PhD dissertation defended at Bucerius Law School in 2016. The author benefitted from the advice and supervision of Prof. Reinhard Zimmermann and Prof. Stefan Vogenauer, as well as of periods of study at Oxford and Cambridge, and at the Max Planck Institute of Comparative and International Private Law in Hamburg, where these themes are also cultivated.

The text is divided into seven chapters, preceded by a substantial introduction and followed by a brief conclusion. In the introduction (1–26), the author shows that the epistemological problem he is concerned with has a distinguished pedigree. Max Weber's well known (and by now controversial) remarks on English law's peculiar lack of formal rationality and the ensuing debate provide the starting point for the enquiry. Much has changed in England since Weber's time, and Flohr shows how his rather one-sided assessment has been critically received in the subsequent literature. Yet the question remains (9): in which way does the formal rationality of English law differ from that practiced in Germany? To address the issue in a meaningful way one must avoid falling into a particular trap. The reference to the notion of *Rechtsdogmatik* cannot work as a reference to a universal mode of thought that would as such provide the key to penetrate any form of juristic thinking. This would be to adopt an ethnocentric approach to the subject, which the author squarely rejects. Rather, the question of how to compare (24) is framed by using local knowledge – in this case the notion of *Rechtsdogmatik* – as a way to illuminate what would otherwise not be highlighted or would rather be left in the dark in the comparative enquiry.

The first chapter of the book covers the object of comparison, *Rechtsdogmatik* in Germany (27–69).

* Martin Flohr, Rechtsdogmatik in England (Studien zum ausländischen und internationalen Privatrecht 393), Tübingen: Mohr Siebeck 2017, XIII + 342 p., ISBN 978-3-16-155280-9

The author traces the origins of the concept and of the corresponding practice back to the 19th century, to the works of Jhering and Puchta, who built upon the seminal achievements of their predecessors. Flohr proceeds to map the transformations that this method underwent in the last one and a half centuries under the pressure of a variety of factors, including the enactment of the civil code and of the Federal Constitution of Germany. In the remaining part of the chapter, he offers a concise but penetrating discussion of the different tasks and functions normally performed by such an approach to law. The old dogmatics, practiced by the masters of *Pandektistik*, has now nearly vanished, but in a way is still there, like the Cheshire cat's iconic grin. The author rightly notes that for many German jurists the word *Rechtsdogmatik* is intimately bound with the very idea of scientific legal research. Thus in daily exchanges among German jurists, any scholarly enquiry of a speculative character is often simply labelled as »dogmatics« (34). This explains why sometimes the German expression *Rechtsdogmatik* is translated in other languages by the more general notion of »legal doctrine«. In a way, Flohr's work also oscillates between these two meanings of the word – the more specific and the more general. Much attention in this book thus goes to the general conditions of academic legal research in England, that is, to the overall framework to which the specific theme belongs. Several earlier important studies on the general topic are used to provide this background to the research.

The second chapter of the book is dedicated to »Elements of dogmatic thinking in England – a fragile tradition« (71–100; *all English translations are my own*). As the ancestors of present-day English *Rechtslehrern* Flohr identifies the earliest English authors who showed an inclination for the search for order and precise distinctions, the tendency to proceed from general principles to more detailed solutions, and so on. All these aspects, which are foundational features of the dogmatic tradition, are rightly presented as part of the larger rationalist programme launched by René Descartes. Cartesianism showed with greater clarity how mathematics, and more particularly geometry, could provide a template to renew legal science as well. The usual suspects are thus presented in a gallery that is opened by Francis Bacon and closed by Frederick Pollock, the eminent Victorian jurist whose works set the standard for university research on law. Here the coverage is focused only on the most essential points, but this is not a legal history book.

The following chapter (Ch. 3, »The Search for the English Legal Mentality«, 101–118) investigates whether the national character of the English people led to a specific legal mentality – a point that some comparative works have pressed. The author does not share this assumption. With some bold strokes, he instead reveals the institutional and professional settings that contributed to the formation of a certain *mentalité*. These factors explain several features of common law. In turn, the German jurists' mentality, too, can be considered as the expression of a particular *déformation professionelle* (112). Adding historical perspective to his subject, Flohr reconstructs the transition from an older English legal mentality, which goes back to the 16th century, to a newer one inaugurated in the 19th century. The older mentality considered common law as a continuous legal tradition of unwritten, customary law. Perfected generation after generation through its adaptation to new circumstances, the common law in this period was considered as unchanging in its fundamental features, as the ship of the Argonauts. The more recent mentality, inaugurated in the 19th century, was dominated instead by legal positivism. This positivism confirmed that it was not the business of university jurists to improve upon the current conditions of the law. In this new environment, overarching and systematic projects that would have provided a new understanding of several judicial developments were out of the question.

Chapter 4 covers the »Institutional obstacles to the diffusion of dogmatic thought« (119–156). The initial part of this chapter critically examines the old thesis advanced by Pringsheim of an inner relationship between English law and Roman law. This thesis fails to persuade, as it is based on too many doubtful assumptions. Flohr offers a more precise picture based on the analysis of all those lasting institutional factors that worked against the establishment of a strong doctrinal tradition in England. These include the initial poverty of written norms that prevented elaborate doctrinal commentary; the large use of fictions to foster legal development; the reluctance to recognise rights emerging from the procedural devices available to litigants; the late establishment of an academic tradition in law and of a modern system of legal education at the universities. The academic

contribution to the development of law has been increasing in importance over time, however. In the last part of the 20th century, Lord Goff's British Academy Lecture on »The Search for Principle« announced that the times were indeed changing. A partnership between scholars and judges in the common search for principle was now a welcomed, much needed move, not just a remote possibility as in the past (154–155).

The fifth and the sixth chapters, the central parts of the book, explore this theme in depth. They examine the work of Peter Birks, the late Regius Professor of Civil Law at the University of Oxford. Birks was a towering, charismatic figure, whose intense scholarly activity left an important, indelible mark on several branches of English law and influenced a large number of pupils, who are now among the most brilliant academic jurists active in England and in other jurisdictions. The obvious names are Jack Beatson, Andrew Burrows, James Edelman, Ewan McKendrick, Thomas Krebs, Ben McFarlane, James Goudkamp, Lionel Smith, Bill Swadling, Robert Stevens – basically two entire generations of English private lawyers. Flohr examines Birks' contribution as a prime example of the renewal of English private law through rigorous logical scrutiny of the conventional wisdom and the unflinching search for doctrinal coherence and better systematisation of the law.

Chapter 5, titled »Bringing order to case law« (157–201), covers Birks' magisterial treatment of what was in the mid-1980s still mostly labelled the law of restitution. This field of the law was radically transformed by Birks' approach and by the contributions of those who engaged with his thought. The chapter introduces the reader to the state of the law of restitution before the appearance of Birks' path-breaking »Introduction to the Law of Restitution« (1985), the book that launched a sort of academic gold rush in the field. The chapter then goes on to discuss the core of the arguments made in that work, as well as Birks' later shift towards a different take on the subject, which is the gist of his last, poignant book dedicated to the topic (»Unjust enrichment«), delivered to the press just before his premature death in 2004.

Chapter 6 (»A Taxonomy of Private Law«, 203–238) is dedicated to Birks' efforts to generalise his approach and to establish English private law as a whole on a new basis. The need to set English law on the foundation of a proper taxonomy, to provide a systematisation in which causative events are clearly identified, and legal consequences precisely tailored to fit them, is at the origin of the two volumes on »English Private law« published in 2000. This work, first edited by Birks, is now in its third edition, under the editorship of Andrew Burrows. Flohr notes that Birks himself conceived his programme as linked to a long-term rationalisation project of the law of England by university scholarship (200). Nonetheless, his theoretical insights neither amounted to a complete theory of law and legal scholarship, nor were they inspired by the desire to effectively align legal methods with the methods of the natural sciences. Birks' teachings have had wide resonance across the judiciary and the law reports tell this part of the story. Unjust enrichment is now accepted as a fundamental category, next to contract and tort, as a part of the law of obligations, operating as an independent source of rights and obligations (*Banque Financière de la Cité SA v Parc (Battersea) Plc* [1999] 1 AC 221, 227, per Lord Steyn). Still, not everyone has been persuaded by Birks' vigorous insistence on the need to fundamentally rethink the arrangement of English law. The arguments made against his approach are presented in the book in detail, in an interesting and fair way (221–238). The reader will be surprised to learn that some of the reactions have been very strong indeed, for a variety of reasons, including the fear of the loss of flexibility or discretion in the application of both common law and equitable doctrines (236).

The last chapter (Ch. 7, »The Attack on Orthodoxy«, 238–293) offers a critical discussion of the current approaches and controversies generated by the impact of Birks' intellectual legacy. The divisions of this chapter pick up the many threads of the taxonomy debate and the arguments concerning the need to justify doctrinal arrangements of the law. It relates how an interpretative approach to law and an increased prominence of rights in private law discourses have made progress in England. These trends are broadly related to a recent wave of strong scholarly interest in »private law«. The analytical and conceptual lenses shared by those working in the field vindicate much of what Birks stood for.

The conclusion advanced by the author is that there is no case for a significant convergence between the ways in which juristic thinking proceeds in England and in Germany. But it is also impossible to make the point for the complete alterity of common law vis à vis its civil counter-

part (295). This Solomonic judgment affirms that in England there is no place for *Rechtsdogmatik* as a productive system of law and that is nowhere to be seen in the distance either (298). Hence, difference – rather than similarity – remains the prevalent comparative outlook in this respect. On the other hand, in recent years something comparable to it has taken shape in some university and college halls. The work of Birks and his pupils has thus been a transformative force, shining a strong light on the new tasks of academic jurists. They are now free to investigate the fundamental structures of the law, and to question their legitimacy when they fail to meet the fundamental demands of rationality and justice (297). On a personal note, I had the privilege to know Peter Birks; his ability to spot certain fault lines of English law was not just the sign of what an exceptionally gifted mind could find out, but also the revelation of his subtle mastery of some continental legal methods. This, of course, was exceptional too. Legal methodology as the subject is understood in Germany still has no parallel in England.[1]

Martin Flohr has written an enlightening, discriminating contribution on the comparative study of different modes of thoughts and of the variety of approaches to the law across national boundaries, and for this he is to be complimented.

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Rafael Diego-Fernández Sotelo

El concepto de *formación protoestatal* en Hispanoamérica*

El motivo de esta reflexión no es en realidad el de hacer la reseña al contenido de este reciente trabajo de Horst Pietschmann, pues eso es algo que ya ha hecho con buen conocimiento de causa, en la introducción misma de la obra, José Enrique Covarrubias. Por el contrario, el propósito central de este comentario consiste en considerar cuál habrá sido la razón que llevó a Josefina Vázquez y a José Enrique Covarrubias a plantear dicha iniciativa, y cómo interpretar el hecho de que dos prestigiados historiadores, provenientes de dos de las instituciones académicas más reconocidas en el área de las ciencias sociales y de las humanidades en México se hallan tomado la molestia de hacerlo.

Una primera respuesta a la interrogante salta a la vista de inmediato, y no es otra que la de rendir un merecido homenaje a un gran historiador, amigo y maestro de tantos académicos mexicanos de diversas generaciones. No resultaría exagerado decir que el profesor emérito Horst Pietschmann de la Universidad de Hamburgo se encuentra en un selecto grupo de historiadores extranjeros, que no rebasa en todo caso la media docena de integrantes, que han alcanzado tan altas cuotas de reconocimiento y respeto en México.

Otra más es la de hacer accesibles textos de gran relevancia dentro de la producción del autor (desde los años setenta hasta la primera década de siglo XXI), que o no habían sido aún traducidos del alemán (como en el caso de seis artículos) o habían sido publicados en el extranjero, o bien en México pero hacía ya muchos años o en publicaciones de difícil acceso.

En el fondo de las cosas, la razón principal que llevó al autor a ganarse el respeto de los historiadores mexicanos y latinoamericanistas en general se debe precisamente a lo que se considera una contribución medular a la historia no sólo de México sino incluso a la de toda Iberoamérica: la etapa correspondiente a las reformas borbónicas.

1 See on this Gerhard Dannemann, Juristische Methodenlehre in England, in: Rabels Zeitschrift 83,2 (2019) 330–345.

* Horst Pietschmann, Acomodos políticos, mentalidades y vías de cambio. México en el marco de la monarquía hispana (compiladores: José Enrique Covarrubias, Josefina Zoraida Vázquez), México: El Colegio de México 2016, 598 p., ISBN 978-607-462-918-7