Zeitschrift des Max-Planck-Instituts für Rechtsgeschichte und Rechtstheorie
Journal of the Max Planck Institute for Legal History and Legal Theory

Rechts Rg geschichte

Rechtsgeschichte
Legal History

www.lhlt.mpg.de

http://www.rg-rechtsgeschichte.de/rg32
Zitiervorschlag: Rechtsgeschichte – Legal History Rg 32 (2024)
http://dx.doi.org/10.12946/rg32/249-252

Rg 32 2024 249 – 252

Mathias Reimann *

America's Engagement with Foreign Law. A (Nearly) Comprehensive Account

* University of Michigan Law School, Ann Arbor (MI), purzel@umich.edu

Mathias Reimann

America's Engagement with Foreign Law. A (Nearly) Comprehensive Account*

The title of David Clark's *American Comparative Law. A History*, suggests an inquiry into how American scholars have studied foreign laws and compared them with their own. The title is deceptively narrow, however, because the book's scope is *a lot* broader than that. It looks not only at *American* scholars in a narrower sense but also at actors who were still British colonial subjects or who were non-citizen refugees from other lands. It focuses not only on *scholars* but includes statesmen, politicians, military leaders as well as governmental and non-governmental institutions. It is not only about *foreign laws* but also about forms of jurisprudence, legal methods and political ideals. And it covers not only the *study and comparison* of legal materials but also their import and export, collection and organization, as well as their use as economic instruments and political agendas. In short, the book is not about »comparative law« in the traditional sense but about how a variety of actors in America have engaged with a variety of non-indigenous legal material in a variety of forms and for a variety of purposes – from the 18th to the early 21st centuries. In other words, the book is a wide-ranging historical account of America's engagement with legal material beyond the United States. If this account is just *nearly* comprehensive, it is because it largely omits the role of foreign legal sources in actual practice, i. e., its treatment by the American bench and bar which is, of course, a huge subject that deserves an analysis in its own right.

The first of the book's eight chapters is sui generis – it is not part of the main narrative but rather something like an introduction which consists of a variety of elements. Among them is a 22-page overview of American »historiography« which chronicles how American legal history was written between the 1770s and the early 2000s, introducing the most prominent protagonists, some of the important works, and the leading paradigms as they changed over time. This discourse connects at best loosely with the rest of the book. It is, however, valuable in its own right for those interested in the development of American historiography – as may be true for many readers of this Journal.

The core of the book consists of the seven remaining chapters. In chronological order, they each focus on a distinct era, from colonial times to the present. It is a truism in (legal and other) historiography that periodization is a dubious business. Yet, Clark's divisions make sense because each era was characterized by distinct themes and styles of dealing with non-indigenous legal materials. As a result, Clark's march through history is also a review of the many ways in which American jurists and institutions have dealt with a panoply of foreign legal systems and ideas.

It is often assumed that colonial America was governed by the common law because that was what the early settlers brought with them from England. Clark's chapter on »British Colonization in North America« (45–83) shows that matters were not nearly so simple. In fact, colonial Americans came from a variety of European countries and lived in a world of not only religious (and sometimes linguistic) but also legal pluralism (60–65) in which not only continental but also Scottish law played a significant role. According to many scholars, English common law became more dominant, however, as the 18th century wore on (»Anglicization thesis«, 65–66).

When Clark turns to the »Legal Foundations for the New Republic: 1776–1791« (85–144), the predominant theme is the foreign influence on the creation of a political and constitutional structure after independence. In this wide-ranging chapter, Clark shows that the »founding fathers« like John Adams, Benjamin Franklin, Alexander Hamilton, John Jay, James Madison, and James Wilson (most of whom were lawyers) looked far beyond English

* David Scott Clark, American Comparative Law. A History, New York (NY): Oxford University Press 2022, 560 p., ISBN 978-0-19-536992-2

law and history. Foreign models guided them with regard to the Constitution's republican and democratic nature (Greek city states and the Roman Republic); the separation of powers (Montesquieu, contemporary Britain), the federal structure of the country (the Holy Roman Empire, the United Netherlands, Switzerland), and ideas of »liberty« (in the continental and British Enlightenment literature). As a result, the making of the US Constitution was a process of extensive discussion of, and substantial borrowing (»transplantation«) from, foreign material.

In the so-called »Formative Era« of American law between the foundation of the Republic and the Civil War, i. e., the 1790s through the 1860s (154–221), attention shifted from the grand constitutional questions (considered largely settled, with the notable exception of the issue of slavery) mainly to the building of an American private law in its own right. In this endeavor, continental European civil law again came to the fore, especially when it provided solutions for newly arising problems of a nation fast expanding westward. In addition, the elite of the legal profession often looked to Roman law as a model of a rational and sophisticated system from which the common law had much to learn.

By the end of the Civil War (1865), the work of building an American legal system was largely done. In the closing decades of the 19th century, American jurisprudence fell under the spell of the Historical School and the concomitant idea of »Learned Law« (223–272). The dominant model now became German legal science (227–228). The conception of law as a »science« also entailed the institutionalization of its study in university-affiliated law schools which were substantially modeled after the ideals of the German university, and which rose to dominance under Harvard's leadership between the 1870s and World War I (228–245). Historical Jurisprudence also was an important factor in the renewed debate about (private law) codification in the 1880s, when quasi-Savignian arguments helped to defeat the project of a civil code in New York – which was, however, adopted in several other (mainly western) states, including California (245–251).

The first half of the new, 20th, century then brought the »Modern Development« of what came to be known as »comparative law« (273–347). In Clark's once again sweeping account one can identify four developments that characterized this period. One was the institutionalization of comparative law as a distinct enterprise and academic discipline. A second major development was the growing involvement of American comparative law scholars on the international level. In particular Roscoe Pound and John Wigmore (320–332) played leading roles in the activities of the International Academy of Comparative Law (founded in 1924); and American jurists more generally participated in the Academy's World Congresses (1932, 1937) in key functions and large numbers. A third important factor was the arrival of the emigrant jurists who came as Jewish refugees from Nazi Germany in the 1930s. While many did not find a firm foothold in the United States, several rose to academic prominence and catalyzed comparative legal studies in crucial ways (331–333, 343–354). It is important to remember, however, that, at the time, they were far from universally welcome. As Clark properly reminds us, antisemitism was quite rampant in some American quarters, including at some law faculties (326–331). Finally, the first half of the 20th century saw a shift from importing legal ideas (mainly from Europe) to exporting them (inter alia to the newly acquired Philippines and to post-1911 republican China) – a process that would accelerate in the wake of the United States' ascent to the leading world power after 1945.

The decades between World War II and the end of the Cold War (1945–1990) were characterized by »Postwar Legal Transplants and Growth of the Academic Discipline« (349–449). Of the many themes pursued by Clark, three are what one might call success stories. One was the post-World War II export of American constitutional credos and concepts to the defeated nations, especially Germany and Japan (and, in addition, Korea) which marked the beginning of the global influence of US constitutionalism that has persisted well into our century (349–379). The second is the further institutionalization of comparative law through modern academic organizations, especially the American Association for the Comparative Study of Law (founded in 1951) which, eventually renamed the American Society of Comparative Law, remains the foremost American platform for the discipline on the academic level (384–392). The third successful enterprise was the establishment of comparative law as an academic subject in American law schools – with its own courses, casebooks, specialized journals, and conferences; at the same time, many law schools developed

special degree (LLM) programs for foreign students (402–418). There was also, however, a significant failure: American attempts to export free market ideas and human rights values to developing countries, known as »Law and Development«, were undertaken without a sufficient understanding of indigenous conditions and were soon recognized as largely unsuccessful (421–428, 441–446).

The final chapter chronicles the developments since the end of the Cold War, aptly characterized by Clark as »Between Globalization and Nationalism«. The period started with virtually unbridled belief in rapid globalization which was almost ubiquitously conceived as a blessing. In this environment, comparative law seemed more relevant than ever; notably, however, the erstwhile focus on legal unification gave way to a growing emphasis on cultural differences and legal pluralism (456–467). American law schools and law firms now operated increasingly in a global context while American constitutionalism and especially judicial review vied for adoption in many parts of the world. Yet, as Clark's critical analysis illustrates, this, second, »Law and Development« agenda – now attempting to bring the blessings of American-style rule of law and free market principles to other countries (especially in Eastern Europe) – was again marred by insufficient understanding of the cultural, political and economic differences; as a result, its success was limited – and at times lacking (487–489, 496–504). As Clark properly notes, since the second decade of the 21st century, enthusiasm for internationalization and globalization has significantly declined. Nationalism has been on the rise once again and authoritarianism has staged a disconcerting comeback in many countries (including some in the West). The new assertiveness of Islamic culture, China's rise to power and Russia's aggressive neo-imperialism have entailed a re-fragmentation of the global order which creates new challenges for comparative law.

A summary cannot even begin to capture the scope and detail of Clark's account. The work sweeps so broadly, pursues so many sub-themes, and explores so many contexts that its richness is almost overwhelming.

As indicated by the English saying that one can »lose sight of the forest for the trees«, it is one thing to look at details but quite another to look at the whole picture. Clark's *American Comparative Law* focuses largely on the trees, but pays little attention to the forest.

To be clear, there is nothing wrong with looking at lots of individual trees; attention to detail is necessary to keep the account well-grounded and informative. The book's persistent focus on factual, biographical, literary and institutional facts, makes it an impressive storehouse of information. As such, it has its strengths and weaknesses. Its main strengths are the diligent collection and helpful organization of material: Clark proffers an almost exhaustive assemblage of everything one might want to know about the topic, and he organizes the vast and diverse material in ways that makes it digestible and intelligible; this is no small accomplishment. The book's main weaknesses as an account of information are occasional indulgence in too much detail and redundancy: some of the particulars provided seem too minute to be of general interest (e. g., the list of all the activities and names of officeholders of the American Society of Comparative Law, 467–479), and on some occasions, the same or similar information is provided more than once, albeit in slightly different contexts (e. g., on John Adams, 72–83, 187–188). More streamlining would have rendered the text more concise as well as more readable.

The main limitation of the book is that it pays little attention to the forest as a whole. After the exhaustive, and at times exhausting, rendition of particular information about a myriad facts and developments, the reader must wish for a conclusion that sums up what it all means at the end of the day. Yet, there is no such conclusion – the book ends more or less abruptly when it reaches the present. Clark does not look back to provide some broader perspectives. This is regrettable, because such perspectives are not hard to come by. For example, Clark's narrative teaches us that for three centuries, American jurists and institutions have engaged with foreign legal material in a myriad different ways that go far beyond »comparative law« as commonly understood; that the mode and intensity of this engagement has largely depended on the changing intellectual environments, social needs and political situations; that in the first half of this period, the emphasis was on importing legal matter from other countries while since the early 20th century, the emphasis has been on exporting American ideas to foreign lands; that some of the imports and exports were successes, others failures; and, perhaps most importantly, that

in light of all this engagement with foreign law, the popular view of the American legal landscape as parochial is, at least in historical perspective, plainly wrong. Even if Clark trusted the reader to draw such conclusions for him- or herself, it would have been useful to provide them in a final chapter – at least for the benefit of those who are not interested in all the minutiae but in its essence.

The principal value of Clark's book is not that it presents large amounts of new information (though it does its fair share of that) but that it pulls together the extensive knowledge produced by previous scholarship (including Clark's own), puts it in chronological order, and summarizes it in readable form. This makes *American Comparative Law* the definitive historical account of the American engagement with foreign legal matter. From now on, those interested in the topic no longer have to resort to hundreds of scattered sources but can, at least for starters, rely on one handy volume.

Nor is the book's principal value that it proffers an entirely new perspective on, or interpretation of, the subject; such is not its objective. In American legal academia, where novelty and originality are prized above almost all else, this may impair the book's recognition as a significant work. In most of the rest of the world, where painstaking collection, reliable rendition, and careful organization of important information is recognized as an accomplishment in its own right and appreciated for its utility, the book will be greatly valued. Few will read it from beginning to end, but many will use it as an essential reference tool. As such, the book is a must in every even moderately comprehensive comparative law library. ■

Thomas Simon

Eine Verfassungsgeschichte literarisch illustriert*

Vorzustellen ist eine Neuerscheinung auf dem nicht gerade dünn besetzten Themenfeld der »Deutschen Verfassungsgeschichte«. So lautet auch der schlichte Titel dieses Buches; der eindeutige Schwerpunkt, aber auch die großen Stärken des Werks liegen in der Darstellung des 19. und 20. Jahrhunderts.

Es ist in den Worten des Verfassers eine geradezu »Kopernikanische Wende« (§ 12), die sich in der zweiten Hälfte des 18. Jahrhunderts in der Verfassungsentwicklung vollzogen habe und die es rechtfertige, an der Schwelle zur Moderne in der Darstellung der neuzeitlichen Verfassungsgeschichte einen Schnitt zu setzen. Denn damals tauchen zwei grundstürzend neue Ideen auf: »die Idee der geschriebenen Verfassung« und ein vollkommen neues »Konzept der Herrschaftsbegründung«. Sie tragen bis heute »unser staats- und verfassungsrechtliches Weltbild«. Weit über drei Viertel des Buches sind daher der modernen Verfassungsgeschichte des 19. und 20. Jahrhunderts gewidmet. In der Tat erscheint es angesichts einer solch tiefen Zäsur im politischen Denken und in der Entwicklung des Verfassungsbegriffs plausibel, den Schwerpunkt der Darstellung auf die Epoche der »geschriebenen Verfassungen« zu setzen, wie sie in der zweiten Hälfte des 18. Jahrhunderts auftauchen.

Dennoch möchte Stefan Korioth die früheren Epochen »zumindest knapp behandeln«. Ihnen ist Teil 2 und 3 gewidmet. Diese sind nicht chronologisch gereiht, vielmehr wird in Teil 2 zunächst die Geschichte des Alten Reiches von der fränkischen Zeit an bis zu seinem Ende 1806 erzählt, im 3. Teil hingegen die Entstehung und Entwicklung des deutschen Territorialstaats vom Spätmittelalter bis zum Ende des 18. Jahrhunderts. Für einen bloßen Überblick ist das Werk auch in diesen Teilen durchaus gelungen: Der Autor skizziert die Verwurzelung des Alten Reichs in der spätantiken Welt, und zumindest im Groben seine Struktur im Mittelalter und der Frühen Neuzeit; auch die Wendepunkte in der Entwicklung seiner »Verfassung« (im materiellen, faktischen Sinne)

* Stefan Korioth, Deutsche Verfassungsgeschichte, Tübingen: Mohr Siebeck 2023, XXVIII + 490 S., ISBN 978-3-16-162069-0