

## LEGAL CULTURE

**Review of Annelise Riles (ed.), *Rethinking the Masters of Comparative Law*, Oxford & Portland/Oregon, Hart Publishing 2001. xii, 262 p. ISBN 1-84113-289-6, £ 40 (hard-bound), ISBN 1-84113-290-X, £ 25 (paper), <http://www.hart.oxi.net/bookdetails.asp?id=386&bnd=1>**

*By Ralf Michaels*

### I.

General cliché has it that US American law is forward-looking (and, dependent on one's point of view, ignorant of history – and therefore doomed to repeat it?), while European law relies on firm traditional values (or is inflexible?). In comparative law, the situation seems different, at least at first sight. Europeans have bold proposals and feel that comparative law can serve as the forefront, the avant-garde of the law. Americans, on the other hand, seem to be engaged in a business of “rethinking” what is already there. Yet on closer view, the cliché can be upheld. Americans think that what Europeans consider avant-garde as methodologically naïve and passé. On the other hand, their own “rethinking” does not happen for its own sake, or for mere archeological reasons, but in order to understand the present, and to shape the future.

In this vein comes this new volume, grown out of a conference at Northwestern University in 2000. Entitled “Rethinking the Masters of Comparative Law”, it was edited by one of America's foremost younger comparatists, Annelise Riles (then of Northwestern, now of Cornell University). Indeed, in her foreword she explicitly calls the book “a volume about our present” (4). Each of the authors was asked to critically evaluate one “master” of comparative law, under the hypothesis that comparative law – that still esoteric “discipline apart from jurisprudence or international law on the one hand, and from the social sciences and the humanities on the other” (2) – is shaped, to no small degree, by those who pioneered it. Such interest in the comparatist himself<sup>1</sup> rather than in the object of his studies, has recently become popular<sup>2</sup> and provides an interesting lens for the discipline's self-understanding.

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<sup>1</sup> The masters presented in this volume are all men.

<sup>2</sup> See Pierre Legrand, *Questions à Rodolfo Sacco*, 47 *Rev. int. dr. comp.* 943 (1995); Legrand, John Henry Merryman and *Comparative Legal Studies*, 47 *Am. J. Comp. L.* 3-66 (1999); see also Ralf Michaels, *Im Westen nichts*

## II.

The authors look at their masters in four groups. Part I deals with the “pre-history” of comparative law. Under the heading of “Founding Moments”, two scholars are presented. Robert Launay gives a fairly generous reading of Montesquieu: his typologies of government (republics animated by virtues, monarchies by honor, and despotism by fear) predated modern comparative ordering principles, and he could, as a child of his time, be excused for his ethnocentrism. Ahmed A. White does not allow for this kind of excuse in his far more critical picture of Max Weber, whom he blames of conservatism (politically as well as philosophically, the verdict is “Neo-Kantian”) and of imperialism.

In the second part, “The Critique of Classicism”, we find a somewhat surprising couple of “masters”. Vivian Curran’s object of analysis, Hermann Kantorowicz, is more famous for his role in legal history and theory than in comparative law. Indeed, Curran focuses on two rather unarticulated comparative aspects of his work. First, she argues that his quarrels with American realism<sup>3</sup> stem from his civil law background, which underlies his conception of free law (*Freirecht*)<sup>4</sup> and distinguishes it from American legal realism. Somewhat on the same grounds, she defends Kantorowicz against the criticism that his thought led to the Nazis’ perversion of law – the limited use he propagated for free law was largely different from the Nazis’ totalitarian legitimation of their law with regard to a Volk as a “sham construct” (81). The other “master”, Henry Wigmore (analyzed by Annelise Riles)<sup>5</sup>, is an equally surprising choice, because, as was apparently also argued at the conference (125), he should not be considered a master at all. Indeed, while Riles shows some empathy for her object, she ultimately criticizes Wigmore for his amateurism and his faith in legal formalism apparent from his writings. His preference for storytelling over rigorous analysis of his material, of performance over textual debate, strike her as pre-modernist (94) traits that still haunt comparative law as a discipline.

Part III is devoted to “The Science of Modernization” and contains two rather different aspects: comparative law in the process of modernizing non-European countries and laws (Japan, Egypt), and the modernization of comparative law in the

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Neues?, 66 *RabelsZ* 97, 98 (2002). For a comparatist’s self-inspection see John Henry Merryman, *The Loneliness of the Comparative Lawyer*, in Merryman, *The Loneliness of the Comparative Lawyer*, 1-12 (1999).

<sup>3</sup> Hermann Kantorowicz, *Some Rationalism about Realism*, 43 *Yale L. J.* 1240 (1934).

<sup>4</sup> See his influential article: *Der Kampf um die Rechtswissenschaft* (published in 1906 under the pseudonym of Gnaeus Flavius and reprinted in: *Rechtswissenschaft und Soziologie. Ausgewählte Schriften zur Wissenschaftslehre* 13-39 (Thomas Würtenberger ed. 1962).

<sup>5</sup> See also Annelise Riles, *Wigmore’s Treasure Box: Comparative Law in the Era of Information*, 40 *Harv. Int’l. L. J.* 221 (1999).

West. First, Hitoshi Aoki scrutinizes the work of Nobushige Hozumi, a Japanese scholar whom the Meiji regime sent to England and Germany to study law and help modernize Japanese law. In his study, Aoki focuses especially on how Hozumi closely followed an article by anthropologist James Frazer, except in one point irreconcilable with Japanese traditions: Frazer's theory that people feared, instead of loved, the spirits of their ancestors. He thereby provides a good example of a confrontation between imported Western thought and cultural resistance. This confrontation also shapes the article by Amr Shalakany, for me the most fascinating in the collection. Shalakany focuses mainly on Abdel-Razzak Al-Sanhuri, co-author of Egypt's civil code. Yet in the analysis Shalakany devotes extended thoughts also to two other figures: Edouard Lambert, Sanhuri's teacher in France and his co-author for the Egyptian civil code, and Tariq Al-Bishri who criticized Sanhuri in Egypt of giving up Arab traditions. The French-Arab connection was fruitful, Shalakany argues, because it brought together, in both countries, modernization and socialization (as anti-elitist and antiformalist approaches). Yet ultimately he finds that all three – Lambert, Sanhuri, and Bishri – suffer from the same deficit, a nostalgia for an imagined pure Islamic past. The nostalgia appears as orientalist interest in an exotic, substantively other in Lambert (167), in an attempt to recreate "pure" Islamic law by modernizing it in Sanhuri (182), and a desire to save Islamic law and keep it pure from European influence in Bishri (182). All three attempts must fail. In the third essay in this part, David Gerber devotes a short and dense study to Ernst Rabel as the founder of modern comparative law. Gerber argues convincingly that what Rabel considered important and what he left outside his "lens", still defines the "orthodoxy" of comparative law<sup>6</sup>. The essay leads nicely to part IV on "Mid-century pragmatism". Jorge L. Esquirol, in a highly informed essay, discusses René David, and focuses not so much on legal families (his claim to fame)<sup>7</sup>, but rather his conception of comparative law as an attempt to overcome both natural law and legal positivism<sup>8</sup>. Finally, Ugo Mattei uses the comparative method on the objects of his studies and presents a highly original comparative biography of Rudolf Schlesinger, forehead of comparative law in the United States and head of the Cornell common core project<sup>9</sup>, and of Rodolfo Sacco, the grand old man of Italian comparative law, famous for the concept of "legal formants"<sup>10</sup>.

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<sup>6</sup> Gerber's own ideas about the directions comparative law should take can be found in David J. Gerber, *System Dynamics: Toward a Language of Comparative Law*, 46 *Am.J.Comp.L.* 719 (1998); Gerber, *Globalization and Legal Knowledge: Implications for Comparative Law*, 75 *Tul. L. Rev.* 949 (2001).

<sup>7</sup> René David, *Traité élémentaire de droit civil compare*, 222-226 (1950); David, *Les grands systèmes de droit contemporains*.

<sup>8</sup> On this, see also Michaels (*supra* n. 2) 100.

<sup>9</sup> Rudolf Schlesinger (Gen. Ed.), *Formation of Contracts – A Study of the Common Core of Legal Systems*, 2 Vols., Dobbs Ferry, N.Y. & London (1968). The program and method have been explained in some more depth in Rudolf B. Schlesinger, *The Common Core of Legal Systems – An Emerging Subject of Comparative Study*, in: K.

### III.

One interesting aspect of the book at large concerns the authors' own approaches to their subject. After all, this is meant to be "a volume about our present", so we should learn a lot about the state of comparative law by looking at what comparatists have to say about other comparatists. All authors in the book share, with different degrees, modern/postmodern political positions. This can be seen in the frequent focus on the treatment of non-Western societies and the degree of ethnocentrism, although with different effects. Thus, some authors excuse the naïve parochialism they find in the masters they write as caused by the times (Launay on Montesquieu, Aoki on Hozumi). Others show their own spite of such arrogance in their harsh critique (White on Weber, Riles on Wigmore). Only Shalakany sees the self-other relation in a more complex light. The importance of treating foreign societies – "the other" – with neither parochial arrogance nor naïve fascination for the "pure savage", with neither universalism nor relativism, is, of course, a sign more of our time<sup>11</sup> than of the time in which the scholars discussed in the book developed their ideas. In this sense, the book does achieve its aim to "rethink" the masters. The implicit controversy between the authors, while not openly addressed, is still ubiquitous.

It is therefore not surprising that, in writing about past "masters", the book's authors, bring in their own ideas about comparative law. For example, Vivian Curran's particular take on Hermann Kantorowicz reflects her own (re-)conception of the difference between civil law and common law as one between Enlightenment and romanticism<sup>12</sup>. I remain skeptical about this dichotomy. While the French civil

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Nadelmann & al. (eds.), *XXth Century Comparative and Conflicts Law – Legal Essays in Honor of Hessel E. Yntema*, 65-79 (1961); Schlesinger & Bonassies, *Le fonds commun des systèmes juridiques*, 15 *Rev. int. dr. comp.* 501 (1963). On Schlesinger's life see also Ugo Mattei & Andrea Pradi (eds.), *Rudolf B. Schlesinger, Memories* (2000); Robert S. Summers, *Professor Schlesinger's Memories, and a Bit More*, 28/2 *Cornell Law Forum* 10-17 (2001).

<sup>10</sup> Rodolfo Sacco, *Legal Formants. A Dynamic Approach to Comparative Law*, 39 *Am. J. Comp. L.* 1 (1991). The article is an edited translation of the introduction of Rodolfo Sacco, *Introduzione al diritto comparato*, 1980 (The German translation was published in 2001 by Nomos, Baden-Baden, see especially pp. 13-151). See also P.G. Monateri & Rodolfo Sacco, *Legal Formants*, in 2 Peter Newman (ed.), *The New Palgrave Dictionary of Economics and the Law*, 531 (1998). On Sacco's life, see also Legrand, *Questions* (supra n. 2); Rodolfo Sacco, *Souvenirs d'un vieux comparatiste*, 10 *ZEuP* 727 (2002).

<sup>11</sup> See Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 *Harv. Int'l L.J.* 411-455 (1985); Nathaniel Berman, *Aftershocks: Exoticization, Normalization, and the Hermeneutic Compulsion*, 1997 *Utah L. Rev.* 281-286.

<sup>12</sup> Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 *Col. J. Eur. L.* 63 (2001); see also Curran, *Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law*, 35 *Cornell Int'l L. J.* .101, esp. 158 ff. (2002).

code was certainly a fruit of the enlightenment (albeit a less dramatic departure from pre-revolutionary law than is often claimed<sup>13</sup>), much German legal thought of the 19<sup>th</sup> century, certainly an important part of the civil law tradition, was influenced strongly by Romantic thought. For example, Savigny was part of the circle of friends that ridiculed Schiller's naïve faith in the enlightenment, and even married Kunigunde Brentano, Bettina von Arnim's and Clemens Brentano's sister. His theory of the law's foundation within the people ("Volksggeist") is an ultimately romantic legal concept, and one that found a lot of sympathy in England (and the United States) at the time<sup>14</sup>. For these reasons, I am not fully convinced by her reading of Kantorowicz, on both her accounts. First, it is certainly true – and relevant – that Kantorowicz saw a more limited use for free law, only supposed to fill gaps left by the codifications, as opposed to being a concept of law-making in general<sup>15</sup>. But it is doubtful that the radical variant of legal realism really characterizes the common law today. Even if we limit our analysis to the United States, we see an abundance of positivism and formalism, at least in the courts<sup>16</sup>. Secondly, while Kantorowicz, who fled the Nazis, can certainly not be blamed in person for the perversities of Nazi legal thought, he was obviously well aware that the Nazis could abuse his (and others') conceptions of free law. In fact, it is with reference to German developments in 1933 when he writes that "sound methods without a sound methodology are dangerous, not so much in the hands of the master as in the hands of his pupils."<sup>17</sup> All in all, Curran's take on Kantorowicz is fascinating, but her tendency to essentialize a particular conception of "the civil law" (and, on that account, of "the common law") leaves some open questions<sup>18</sup>. Likewise, Annelise Riles' analysis of Wigmore reflects a lot of her own thought, and a different reading of Wigmore might lead to the exact opposite of what she finds. Thus, for example, the use of stories and images she criticizes in Wigmore is exactly what, some argue, a modern/postmodern academic field requires<sup>19</sup>. Amateurism,

<sup>13</sup> See James Gordley, *Myths of the Code Civil*, 42 *Am. J. Comp. L.* 459 (1994).

<sup>14</sup> See Mathias Reimann, *Historische Schule und Common Law – Die deutsche Rechtswissenschaft des 19. Jahrhunderts im amerikanischen Rechtsdenken* (1993).

<sup>15</sup> Whether this is really true for his earlier work is a different matter. Cf. K. Muscheler, *Relativismus und Freirecht: Ein Versuch über Hermann Kantorowicz* (184).

<sup>16</sup> Formalism may be part of every (Western) law; see only Stanley Fish, *The Law Wishes to Have a Formal Existence*, in Fish, *There's no such Thing as Free Speech ... and it's a Good Thing too*, 141-179 (1994).

<sup>17</sup> Kantorowicz (*supra* n. 3) 1252-3.

<sup>18</sup> See, for a parallel argument in a different context, Mitchel de S.-O.-l'E. Lasser, *Do Judges Deploy Policy?*, 22 *Cardozo Law Review* 863 (2001), criticizing Duncan Kennedy, *A Critique of Adjudication (fin de siècle)* (1997).

<sup>19</sup> See for example, Kathryn Abrams, "Hearing the Call of Stories," 79 *Cal. L. Rev.* 971 (1991); Daniel A. Farber and Suzanna Sherry, "Telling Stories Out of School: An Essay on Legal Narratives," 45 *Stan. L. Rev.* 807 (1993). Peter Brooks / Paul Gewirtz (eds.), *Law's Stories: Narrative and Rhetoric in the Law* (1996); for criticism, Reinhard Zimmermann, *Law Reviews - Ein Streifzug durch eine fremde Welt*, in: R. Zimmermann (Hg.), *Amerikanische*

originally, did not have the pejorative meaning we now ascribe to it, and her statement that "one difference between the professional and the amateur is that the latter by definition does not live by his or her ideas" is ambiguous – in a real sense, the self defines itself not by the work it does for a living, but by what it does for pleasure. Mattei's favorable review of Schlesinger and Sacco is not surprising, given that one of his own projects, the "Common core of European private law" is based on their methodological insights and inspirations<sup>20</sup>. Shalakany openly admits that he, as a Harvard S.J.D. who returned to his home Palestine after his studies for some time, cannot help but project himself on Sanhuri (which would probably turn his Harvard supervisors David and/or Duncan Kennedy into reborn Lamberts). Such projection of the authors' own thoughts on the comparatists they scrutinize is not a deficit but an asset of the book. The extent to which the present is mirrored in our representation of the past, to which the authors of the book see themselves in relation to the masters they describe, says more about comparative law as a discipline than a mere recounting of facts and lives ever could. The reader is invited to rethink the authors of the essays, in an act of "re-rethinking of the masters" (or of "rethinking the new masters").

#### IV.

This is an excellent book. Wherein lies its value? The back cover informs us that the book was "designed with courses in comparative law as well as scholarly projects in mind". The latter purpose is admirably met. Granted, the book is not a complete history of comparative law, not even a collection of essays on canonical figures in the field (3)<sup>21</sup>. Yet, as a whole, consisting of excellent essays on various key figures,

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Rechtskultur und europäisches Privatrecht, 87 ff (1995); English translation as *Law Reviews: A Foray through a Strange World*, 47 *Emory L.J.* 659 (1998) with further references. At the same time, there is a tendency in legal history towards the use of stories instead of legal texts, including the equal treatment of myths and factual report. See Marie-Theres Fögen, *Römische Rechtsgeschichten* (2001) (violently criticized, from a conservative standpoint, by Hans-Heinrich Jakobs: <http://www.jura.uni-bonn.de/institute/roemr/Jakobs/Foegen.pdf>); see also her foreword to the first issue of the new journal *Rechtsgeschichte* (Rg): Marie-Theres Fögen, *Rechtsgeschichte – Geschichte der Evolution eines sozialen Systems*, 1 *Rg* 14 (2002), <http://www.martinicolor.de/shop/artikel.php3?AUGN=2&AGN=2&PHPSESSID=a200d061a86d4da92a212ca3c88a0a08>.

<sup>20</sup> On the methods of the Trento project see, as "quasi-official" presentations, Mauro Bussani & Ugo Mattei, *The Common Core Approach to European Private Law*, 3 *Colum. J. Eur. L.* 339 (1997/98); Bussani & Mattei, *Le fonds commun du droit privé européen*, 52 *Rev. int. dr. comp.* 29 (2000) (largely a translation of the 1997/98 article); Mauro Bussani, *Current Trends in European Comparative Law: The Common Core Approach*, 21 *Hastings Int'l & Comp. L. Rev.* 785 (1998); Ugo Mattei & Mauro Bussani (eds.), *The Common Core of European Private Law – Essays on the Project* (2002); see also <http://www.jus.unitn.it/dsg/common-core/home.html>.

<sup>21</sup> Not all presentations at the conference made their way to the book. Thus, according to the program, Mitchel de S.-O.-L.E. Lasser spoke about Roscoe Pound (see Lasser, *Synthetic Readings of Roscoe Pound's Jurisprudence*, *Global Jurist Frontiers*: Vol. 1: No. 1, Article 3. <http://www.bepress.com/gj/frontiers/vol1/iss1/art3>; Lasser, *Comparative Readings of Roscoe Pound's Jurisprudence*, 50 *American Journal of Comparative Law* (Issue 4, forthcoming 2002)), Bianca Tedeschi dealt with Lambert, and Marie-Claire Belleau compared Pound and Lambert. In addition, Bryant Garth presented his long-time collaborator, Mauro Cappelletti.

it represents an excellent study on the historiography of comparative law as an academic discipline (3) – defined and determined at each point in time by a small number of players, and always mirroring broader ideas and political situations in society. The book will thus serve as prime reading for anyone who wants to understand comparative law as a discipline.

But courses in comparative law? Riles, in her article on Wigmore, openly articulates her critique of the case method and of teaching the law through primary materials; in her view, law, like humanities and social sciences, should be taught through finished papers and essays (120 f.). This is certainly open for debate. The naïveté with which some professors try to adapt the case method, perhaps questionable in itself, to comparative law, is certainly not the optimum for the field. Thinking like a French lawyer cannot be taught through the lecture of three decisions rendered by the Cour de Cassation. Yet if one thinks that the important thing in comparative law is to expose students to the different modes of thinking about issues, different “mentalités”, it will be unavoidable to expose them to primary materials – only secondary texts about the field will not do that job. Certainly, comparative law should become more aware of, and improve, its methodologies. The functional method is still the seldom questioned mantra of comparative law, although the social sciences, from which it was adopted, has since given it up. Thus, more methodological awareness also for students is certainly desirable. However, in the recent debate in the United States we often see the opposite: an obsession with methodology, with very little actual application of any findings – rethinking of comparative law instead of doing comparative law. The book at hand cannot be criticized for not putting its findings into practice, but it does not, at least for me, really seem apt for a beginners’ course in comparative law.

All in all this is more a critique of an assumed purpose of the book than of the book itself. One may criticize the selection of the masters. One may also regret that some of the secondary masters receive rather ungenerous spellings (“Eurlich”, “Le-Grand”) and that the cross-references in the footnotes were not always updated. Unfortunately, the connections between the scholars described which Riles mentions in her foreword (4 f.), are not explored in the essays, with the exception of the articles by Shalakany and Mattei. But such minor formal quibbles should not cloud the impression that this is a very valuable book for a discipline still in search of itself. All studies in the book are of truly superior quality, and reading them together gives a good picture of events in the history of comparative law, and of its present.