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## How the United States Failed to Establish a »Government of Laws«

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»tirania dos juizes« e como uma esfera de aprendizagem da cidadania. A sua implementação nas colônias foi discutida em 1853, em razão de uma proposta a favor de sua restauração no Estado da Índia. Nesse momento, os argumentos contrários à proposta se baseavam na »distância civilizacional« entre a metrópole e as colônias. Para a autora, esse debate foi bastante representativo da hierarquia que existia entre as populações europeias e as não-europeias, no Império português.

Ao final do capítulo, analisando os debates sobre a legislação eleitoral, Silva conclui que, a partir da década de 1880, consolidou-se a ideia de que as populações não-europeias do Império português não integravam o corpo de cidadãos; portanto, o governo das colônias deveria ser diferente do da metrópole. Essa modificação no paradigma jurídico coincidiu com a Conferência de Berlim (1884–1885) e com o Ultimato inglês (1890), que determinaram novas formas de apropriação militar e de governo dos territórios coloniais.

Os três livros, produzidos em contextos acadêmicos distintos e a partir de diferentes perspectivas historiográficas, apontam, em seu conjunto, direções possíveis para uma História Atlântica do Direito. O livro de Carvalho descreve diversos mecanismos pelos quais agentes coloniais portugueses foram adentrando o território angolano e

como se organizaram diferentes esferas de normatividades. Aprofundar a análise de Carvalho, detalhando esse processo de sobreposição de ordens normativas pode abrir novos horizontes para entendermos o papel do direito na estruturação de sociedades coloniais. Já o livro de Candido apresenta diversas relações e categorias sociais que se expressavam, também, em termos de categorias e institutos jurídicos. As diversas relações de dependência descritas pela autora possuíam correlatos no Brasil e apontam para a existência de categorias jurídicas similares em ambos os lados do Atlântico. Por fim, o trabalho de Silva é fundamental, pois ainda há muitas lacunas nas pesquisas sobre a organização e a administração da justiça no Império português, principalmente na África. Ele é baseado, sobretudo, na análise de legislação e doutrina, abrindo campo para o diálogo com as pesquisas que encontram, nos processos judiciais, suas principais fontes.

Esses são apenas alguns exemplos das inúmeras possibilidades de diálogo que esses livros permitem e sugerem aos historiadores do direito dedicados a entender as práticas e institutos jurídicos de qualquer parte dos territórios que compunham o ambiente cultural compartilhado do Atlântico. ■

**Mathias Reimann**

## How the United States Failed to Establish a »Government of Laws«\*

In 1780, John Adams (later to become the second president of the United States, 1797–1801) included in the Massachusetts Constitution a principle that became one of the enduring ideals of the United States (and beyond): »a government of laws, and not of men« (Constitution of Massa-

chusetts, Part the First, Art. XXX, 1780). This ideal has since been trumpeted in myriad speeches, articles, and statements. The central claim of James Maxeiner's new book is that the United States has failed to live up to that ideal, at least as the founding fathers understood it. For them, and

\* JAMES R. MAXEINER, *Failures of American Methods of Lawmaking in Historical and Comparative Perspectives*, Cambridge: Cambridge University Press 2018, 336 p., ISBN 978-1-107-19815-9

for much of the 19<sup>th</sup> century, »a government of laws« meant a legal system based primarily on legislation, rather than judicial decisions, and that legislation had to be consistent, clear, and accessible so that ordinary people could actually understand the laws that govern their lives. As Maxeiner states, measured by these standards, the current American legal system is a failure. Much law is judicially created or shaped, and to the vast majority of Americans, the vast majority of legal rules are inaccessible, obscure, and unintelligible without expert (and thus expensive) legal advice. The book is a scathing indictment of that status quo – as well as a call for change. Written in a popular (and strangely disjointed) fashion and containing numerous reproductions of historical pamphlets, illustrations, and cartoons, it addresses itself primarily to a non-specialist audience.

Leaving aside the short *Preface* (xix–xxiii) and *Summary* (xxvii–xxix), and mercifully ignoring the embarrassingly overblown *Foreword* by (attorney and popular writer) Philip K. Howard, the book has four, rather diverse parts. First, an *Introduction: Of Government and Laws* lays out the basic argument (3–30); second, the *Historical Part* chronicles *America's Longing for Laws for the People* from the founding era to the late 19<sup>th</sup> century (31–162); third, a *Comparative Part* seeks to show *Ways to a Government of Laws* by featuring Germany as a model (163–299); and fourth, an *Appendix* ruminates on *The Foreign Law Controversy and the Fate of Civil Law Scholarship in American Law Schools* (305–324), including a personal reckoning of the author with the legal academy (»The Fate of an American Comparativist«, 318–324) that would have been wise to omit. This review focuses only on the second, historical, part, simply because it is the only element of real interest to readers of a legal history journal.

The historical part of the book essentially tracks the fate of two early American ideals: that legal rules should be laid down in legislation, and that this legislation should be systematically organized. While these ideals were closely intertwined, they are better discussed separately because they suf-

fered a distinctly different fate in modern American law.

According to Maxeiner, the ideal of legislative lawmaking was prominent from the colonial era to the late 19<sup>th</sup> century. The colonies (and later the young states) did not receive English common law *in toto* but rather selectively, and statutory law played an important role even during the colonial period (44–53). As is well-known, during the American revolution, many patriots regarded the common law, like its mother country, with hostility. Thus, at the dawn of the Republic, »[t]he founding fathers of the United States believed that they were creating ... an order built on statutes, not on common-law precedents« (33) – Adams, Jefferson, and Madison were all heavily engaged in legislative projects. Subsequent generations continued to strive for legislative rules which were widely considered superior to common law cases. One manifestation was the creation of constitutional texts, not only by the United States as a whole but by every single state joining the Union (57–65). Another was the significant legislative activity especially on the state level; states adopted a multitude of statutes to overcome outdated (English) common law and to adjust the legal order to the rapidly changing social and economic circumstances in the New World (65–71). Maxeiner also points to broad popular support for statutory law, reflected in a mass of literature addressed to lay people, rather than lawyers (85–91).

Maxeiner's claim that during the first hundred years of the Republic, making law usually meant legislation is well-supported by historical fact – when American jurists at the time spoke of »laws«, they normally *did* mean statutes.<sup>1</sup> Maxeiner is also correct that during this period, there was a strong belief in, and drive for, legislative rulemaking. Yet Maxeiner overplays his hand when he thus calls it a »myth« that the early United States were a common law country (22, and *passim*). In reality, the common law heritage with its reliance on judicial precedent played a very prominent role right from the beginning. Witness that the Massa-

1 This is perhaps most clearly illustrated by a landmark decision that Maxeiner (somewhat oddly) does not cite in this context, i. e., Justice Story's opinion in *Swift v. Tyson* (41 U.S. 1, 1842).

chusetts Constitution mentioned above was construed by that state's courts to authorize the reception of the English common law then in effect.<sup>2</sup> Note that the most popular law book in the early American Republic was a summary of English common law, i. e., William Blackstone's *Commentaries on the Laws of England* (4 vols., 1765–69, first American edition 1771–1772). Consider that the foundational works on early 19<sup>th</sup>-century American law were overwhelmingly based on judicial decisions, i. e., James Kent's *Commentaries on American Law* (4 vols., 1826, 14<sup>th</sup> ed. 1896), and Joseph Story's *Commentaries* on about a dozen (mainly private law) subjects (1831–1845). In addition, there was a growing tradition of more specialized treatises summarizing and digesting the common law, and mid-19<sup>th</sup> century books written for legal study were largely case law-based as well, such as Timothy Walker's popular *American Law* (11 editions between 1837 and 1905). In other words, Maxeiner's tale of legislation is only one side of the story to which a – strong and pervasive – common law side must be added for a complete understanding of the period. Yet, despite its on one-sided nature, Maxeiner's revisionist account is a valuable contribution to the literature because existing scholarship has often overemphasized the common law element in American legal history. Many classics of American jurisprudence, ranging from Holmes' *The Common Law* (1881) to Cardozo's *Nature of the Judicial Process* (1920) and Llewellyn's *The Common Law Tradition* (1960) focused almost exclusively on (and often exalted) judicial lawmaking. And reading seminal works on American legal history such as William Nelson's *Americanization of the Common Law* (1975) and Morton Horwitz' *The Transformation of American Law 1780–1860* (1977) can easily leave one with the impression that »the nature of American institutions, whether economic, social or political, was largely to be determined by judges« (Horwitz at 2, quoted by Maxeiner 71). To be sure, the standard works on American legal history are not blind to early American legislation, and more recent scholarship has duly emphasized the statutory and regulatory element in 19<sup>th</sup>-century America.<sup>3</sup> Still, Maxeiner's history is a welcome antidote to the

widespread assumption that in the American legal tradition, a commitment to statutory lawmaking played but a marginal role before the 20<sup>th</sup> century.

Maxeiner then describes how the ideal of legislative rulemaking was largely abandoned, beginning in the 1870s. This was the result of several interrelated developments of which Maxeiner foregrounds three. First, the »newly solidifying legal professions« (146) preferred judicial decisions and resisted legislation (and especially codification) because the common law process raised the status of the bench and bar, and because it served the lawyers' and their clients' interests (156–157, etc.). Second, in the wake of (Harvard dean) Christopher Columbus Langdell's reform of legal education in the 1870s, law teaching gradually shifted from an expository approach to an analysis of appellate cases according to the so-called »Socratic method« (157–160). Third, beginning in 1879, the West Publishing Company developed the *National Reporter System*, a comprehensive regime of case reporting organized by *Key Numbers* which made it much easier to find cases than to locate statutes (147–149). (The system is still in use today.) Three other factors, some hinted at by Maxeiner, deserve mention. A historical turn in legal scholarship (and thought) entailed a turn to the (medieval) English past (see David Rabban, *Law's History*, 2013, 153–380), probably best exemplified by Oliver Wendell Holmes' *magnum opus*, *The Common Law* (1881). A broader cultural *rapprochement* between the United States and England fostered something like an American love affair with the common law tradition (see Richard Cosgrove, *Our Lady the Common Law: An Anglo-American Legal Community, 1870–1930*, 1987). And the propertied and conservative classes often resisted legislation because it threatened social reform.

Maxeiner is right to note a decline of the older agenda of legislative ordering in the closing decades of the 19<sup>th</sup> century. Yet, he is wrong that there was a general shift from legislation to common law which thus betrayed the founding fathers' goal of a »government of laws«. Even in the midst of the late 19<sup>th</sup> century's idealization of precedent, legislative activity never slackened, and in the 20<sup>th</sup> century, the number of statutes simply exploded. In fact, the

2 WILLIAM NELSON, *Americanization of the Common Law*, Cambridge 1975, 8.

3 E. g. WILLIAM NOVAK, *The People's Welfare*, Chapel Hill 1996.

book's cover itself alludes to that: it shows a deluge of »laws« pouring out of the US Capitol, drowning »Justice«. Today, most aspects of American society and economy are governed by (federal, state and local) statutes and regulatory regimes. To be sure, the courts continue to »make law«, but the majority of contemporary decisions deal either with interpreting statutes or filling the interstices between them. Free-standing common law is an exception. One could thus be tempted to argue that the triumph of statutory over common law has fulfilled the founding fathers' dream of a »government of laws« after all.

Yet, here is where the second ideal inherent in their agenda comes into play: the requirement that the laws (i. e., the statutory rules) be systematically organized. Only such an organization would make the laws findable, consistent, and clear so that they can be known and obeyed by the people subject to them. Maxeiner shows the significance of this ideal in the 1<sup>st</sup> century of the Republic. He chronicles how leading 19<sup>th</sup> century American jurists undertook comprehensive compilations of statutory law, especially on the state level (92–102). Perhaps more importantly, they also pursued a variety of codification projects (in part drawing on European models) of which those led by David Dudley Field (»Field codes«) are the most widely known (120–127, 135–145). They even scored some successes: the rules of civil procedure were eventually codified virtually everywhere, and about half a dozen states actually adopted full-fledged civil codes. In the 1870s and 1880s, one might have predicted that the United States will be headed in the direction of civil law-style legislation and codification.

Towards the end of the 19<sup>th</sup> century, however, this ideal was abandoned as well – »[s]ystematizing in the first century of the Republic was a story of high hopes and disappointing delivery« (133). As

Maxeiner shows, the 19<sup>th</sup> century efforts to organize the law in a systematic fashion were largely abandoned by later generations. It is true that there are some exceptions: the *American Law Institute's Restatements* (since 1923) have put the case law in some areas into a fairly systematic order; many statutes (such as the *Uniform Commercial Code*) have a roughly logical structure; and standard treatises often present the law on a particular topic in a more or less ordered fashion. In general, however, efforts to maintain a systematic order in American law have been few and far between.

Even in the age of statutes, American law largely continues to operate in a common law *style*. Many statutes are piecemeal, ad hoc, and ex post, reactions to particular problems. Legislation is not fit into an overall system and thus poorly coordinated or outright incoherent. The multitude of individual states legislate as they please and with little or no regard to their neighbors. State and federal laws do not necessarily go in sync and sometimes simply contradict each other. And since legislation does not employ a consistent and uniform terminology, the same words may have vastly different meanings. Thus, much like late 19<sup>th</sup> century English common law, American legislation today remains a »chaos with a full index«. <sup>4</sup>

At the end of the day, the United States fails to provide a »government of laws« in the founding fathers' sense not because of too little legislation and too much common law. It fails because even the law that governs people's daily lives – their home ownership or lease, their marriage and employment, their consumer transactions and travel, their insurance and taxes, not to mention their procedural rights and remedies – is often so complex, uncoordinated, and chaotic that it remains inaccessible and incomprehensible without consulting a specialized lawyer. ■

4 THOMAS ERSKINE HOLLAND, *Essays upon the Form of Law*, London 1870, 171. The index consists largely of electronic search engines.