BUCHBESPRECHUNGEN / BOOK REVIEWS

Günter Frankenberg, **Comparative Law as Critique,** Edward Elgar 2016, 296 p., £95.00, ISBN: 9781 785363931*; Günter Frankenberg, Comparative Constitutional Studies: Between Magic and Deceit, Edward Elgar 2018, 360 p., £105.00, ISBN: 9781782548973

Critical approaches to comparative law emerged rather recently. For a long period, Günter Frankenberg's essay 'Critical Comparisons: Re-Thinking Comparative Law' from 1986 was a solitary marker in the field of comparative constitutional law. Only in the late 1990s, his work got some company by contributions in a special issue in Utah Law Review, which brought further reflections on the relationship between critical theory and comparative law, but also through a few other voices outside the inner circle of the US-American critical legal studies movement (e.g. Pierre Legrand or Upendra Baxi). Building on his pioneering early work, Frankenberg has been developing many well-received concepts of comparison over the last years. Many of these are now assembled in two volumes, which are landmarks for both comparative law in general and comparative constitutional law in particular. ‚Comparative Law as Critique' (2016) provides a theory of comparative law from the perspective of the critical legal studies, whereas 'Comparative Constitutional Studies' (2018) further deploys this critical approach in the context of comparative constitutional law. Both pieces offer a refreshingly partisan, happily polemic approach to comparative legal studies, and illuminate their weaknesses and potentials in a highly eloquent and elegant way.

The basic assumption underlying both volumes is that comparative legal studies foundationally depend on critical reasoning that reflects on its own process of knowledge generation and rejects premature calls for uniformity and convergence. As Frankenberg explains in detail in ‚Comparative Law as Critique', this assumption follows from a twofold observation. Along the lines of critical legal theory, he points out the special degree to which comparison does not simply 'discover' its insights but rather constructs knowledge. Legal reasoning in general includes constructions of social reality, selects relevant sources and creates asymmetries of knowledge. This is even more true for comparative endeavors since the object here is a depiction of foreign law, i.e. an object which is naturally alien to its observer, prone to be misconceived by stereotypes, and therefore requires particular caution with regard to knowledge asymmetries (Critique, p. ix preface, chapter 2).

The specific necessity of critical reflection arises also from the particular character and history of comparative law as an academic discipline as Frankenberg describes it (Critique, chapter 1). He understands modern comparative law as a discipline, which was dominated by a functionalistic approach during the 20th century, mainly focusing on positive law and

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seeking to systematically identify legal families, taxonomies and similarities. In this sense, comparative law is a discipline that "disciplines its followers" (as Frankenberg puts it) and suppresses diverging approaches. Frankenberg considers this approach as fundamentally wrong in respect of both its methods and its political and ethical stance, having a standardizing, possessive and status quo stabilizing impact.

This basic assumption, explored in Part I of 'Critique', is further unfolded in Part II, at first in historical, hereafter in systematic ways. In chapter 3, Frankenberg portrays the development of comparative law as a modern discipline, which emerged in 1900 and initially pursued a philosophical-universal approach, but which was increasingly set aside by a practical, functionalistic approach in the second half of the century. Systematically, he distinguishes four ideal-type approaches to comparison and hereby illustrates their relationship (Critique, chapter 4). They are scaled in respect of their attitude towards the two central challenges comparison poses: firstly, their degree of distance to the object examined (detachment vs. commitment); and secondly, their focus on similarity or difference. The four approaches' relationship is visualised in a four-part grid.

Frankenberg identifies the differentiated and distanced approach, which rather employs narratives than systemization, as the most preferable one. He is not intending a blueprint but nonetheless aims at giving impulses and providing support for reflecting and unsettling. In the following chapters, the potential of such a critical approach is demonstrated by three studies in which the method is utilized. The first one (chapter 5) deals with the European debate on Muslim face veiling through the lens of the four approaches defined before; the second one (chapter 6) compares several narratives about human rights; and the third one (chapter 7) is dedicated to access to justice in literary and legal forms.

The second volume, 'Comparative Constitutional Studies: Between Magic and Deceit', applies the notions evolved in 'Critique' to comparative constitutional law. Once more, the main concern is to reject tendencies of uniformizing and disciplining comparison by an 'unitary project' of the mainstream and to repel concepts, which were developed in the West and dominate the discourse. Instead, the global diversity of constitutional orders is emphasized, and marginalized, yet unnoticed constitutions and constitutional traditions are shed light on. To pursue that purpose, one central instrument beside differentiating and differencing is the analyzation of constitutions as 'layered narratives' (p. 85). That is, the inclusion of manifold contexts of constitutions and the consideration of specific constitutional reasoning.

As he already did in 'Critique', Frankenberg is not merely stating a theory but again demonstrates his method by using it with regard to two controversial topics frequently debated by comparative constitutional law scholars. In part II, he deals with the transfer of constitutional ideas, presenting his well-known IKEA phase theory (chapter 4) and portraying the emergence of constitutional monarchies in Europe in the 19th century as a process of interchanging and experimenting (chapter 5). In part III, he eventually notes any constitution's aspiration towards building a pacifying order and exemplifies this aspiration by describing three fields: the challenge of political authority and social integration facing vio-

lent conflicts (chapter 6), federal and secessionist dynamics of fragmentation (chapter 7), and the state of exception (chapter 8).

In sum, both volumes present an impressive panorama of thoughts on comparative law in a theoretically well-grounded way. Rarely any other piece of work mastered theoretical inquiries into comparative law and comparative constitutional law in such a consequent, eloquent and provocative way. Even though comparative law has recently attracted more attention, such a pointed illustration was absent among the wide range of systematic works. Besides that, one very central and convincing aspect demonstrates the volume's fundamental character, regardless of whether the reader considers him- or herself as a critical comparatist or not: Due to the increased fragile and preliminary character of our knowledge about other legal orders, profound comparison depends on constantly questioning its processes knowledge generation, even more than other fields do. Elaborating that aspect on a thorough theoretical and historical basis is tremendously valuable.

Notwithstanding, a few aspects can be called into question. For example, Frankenberg's depiction of the 'mainstream' and its alignment is not always convincing as it does not take into account the considerable progress of the last 20 years. Also, the highly ambitious methodological and theoretical approach poses challenges that even Frankenberg seems to be incapable of complying with at times. Employing a grid of archetypes of constitutions (Studies, chapter 2) or phases of transfer curiously resemble the taxonomies he at first has explicitly rejected and rather ironically contradicts his own standards. Moreover, it is surprising that he often – especially when it comes to the Global South – solely relies on the constitution's text to build an argument although he has firmly foregrounded the importance of contexts. Likewise, it is puzzling how rarely authors based in the Global South are cited. Frankenberg's demanding standards require such a deep and wide (referring to the number of compared orders) understanding of other constitutional orders that apparently it is very difficult to meet those standards in practice (even for the author himself).

However, as it is always the case with great books, they provide impulses but also raise new and ultimately unanswered questions. In my view, it can be particularly questioned whether Frankenberg's approach actually goes far enough in terms of its critical potential and its methodological and theoretical arsenal. This refers, first, to the very organization and methods of comparative research projects that according to Frankenberg should seek more breadth and more depth at the same time. For such demands, a solitary comparatist reaches his and her limits (and instead, cooperation and collaborations beyond sterile country reports would be needed); but Frankenberg doesn't engage such vital questions of research design. With regard to the interplay of various disciplines and their knowledges, Frankenberg's approach also requires further thinking. Frankenberg mainly draws lessons from theoretical discussions in anthropology (see especially Critique, chapter 8). The relationship to other disciplines and their knowledge reservoirs is not part of Frankenberg's reflections, although political theory, political economy and several other disciplines and perspectives promise valuable insights. In effect, to realize the ambitions of critical compara-

tive law in Frankenberg's sense requires further theorization of research designs, collaboration and interdisciplinarity.

Ultimately, however, all those doubts and questions play a secondary role considering Frankenberg's achievements in the two volumes. His critique points out many of comparative law's central problems and frames important guidelines for future comparative endeavors. His intervention is both demanding and compelling, and thus ensures that the two volumes will have a lasting impact on the discipline of comparative (constitutional) law for years to come.

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