

Buchbesprechungen

Kischel, Uwe: Rechtsvergleichung. München: C. H. Beck Verlag, 2015. ISBN 978-3-406-67585-0. XXXII, 1010 p. € 99,-

“Rechtsvergleichung” – A New Gold Standard?¹

I.

Looking at the world (of laws) from *Archimedes*' imaginary outpost, unmarked and never called into question, exercises a temptation not every scholar finds easy to overcome. Who would not fancy a complete grasp of a field of research? Besides, comparative law invites comparatists, almost by definition, to study, understand, classify and compare *any* familiar and unfamiliar legal phenomenon that may cross the researcher's mind.²

Observing and comparing do not come with unsurmountable obstacles, as long as the comparatist considers at the very least: She will never see the whole picture,³ is part of the picture⁴ and, more significantly, does not compare the laws “out there” from “nowhere in particular”.⁵ By consequence, these are the basic challenges comparatists have to cope with – selectivity, positionality and perspectivity. And there are more. It seems fair or at least plausible to infer from this unholy trinity the main criteria for reviewing and appraising an author's coping performance.

Uwe Kischel's “Rechtsvergleichung” commands serious review. It neither comes with the false modesty of a mere introduction to the discipline nor limits its scope of attention to a region or legal style. Instead, the author places his voluminous study “in the tradition of the grand textbooks” (p. VII), marked by their comprehensive reach and scientific depth. And what is more, he goes global. It is hard not to read *Rechtsvergleichung* as an ambitious attempt (once translated) to replace, bypass or update the standard

¹ The author of this review assumes responsibility for all deficiencies of the translation.

² Paralleled only by a few other disciplines with a transnational drive, like international law or legal philosophy. This implies that comparative law is a discipline with boundaries, however porous and shifting they may be, within which knowledge is produced and processed by professionals in a systematic fashion, organized and applied with recourse to methods and theories, to reach certain ends (understanding foreign laws, better understanding or reforming one's “own” law, cross-fertilization of legal cultures, having something interesting to do, and so on). See *M. Foucault*, *The Order of Things*, 1980; *E. Messer-Davidow/D. R. Shumway/D. J. Sylvan* (eds.), *Knowledges: Historical and Critical Studies in Disciplinarity*, 1993; *G. Frankenberg*, *Comparative Law as Critique*, 2016, Ch. 1.

³ *U. Kischel*, *Rechtsvergleichung*, 2015, 32 et seq.

⁴ For references see *G. Frankenberg* (note 2), 70 et seq.

⁵ *T. Nagel*, *The View from Nowhere*, 1989.

textbooks, notably *Zweigert & Kötz*, An Introduction to Comparative Law.⁶ The latter, even though in dire need of revision, still sets the standard.

Where *Zweigert & Kötz* render a condensed discussion of theory and method, *Kischel* offers, in the first part, an elaborate treatment of *the* foundations of comparative law, which culminates in the unveiling of the contextual method and the shift from “Rechtskreise”⁷ (the familiar functional equivalents are *grands systèmes*, legal traditions or cultures) to contexts of legal orders. After having repeatedly distanced his approach from “Rechtskreise”, the author brings forward or rather represents, in the second part, six of the contextual global varieties – common law, Continental-European law, African law, Asian laws, Islamic law and transnational law.

Rechtsvergleichung challenges the disciplinary hegemony of private law by drawing its examples and insights also from public (administrative and constitutional) sources as well as criminal law. It challenges, albeit with temperance, the wearisome dominance of (comparative) functionalism by delivering a moderate but persuasive critique (§ 3) and a transition to what the author deems to be the peculiar properties of the contextual method. At times, one is led to feel the relief and thrill that the era of late functionalism may be near. Accordingly, one looks out for an in-depth management of the world of laws that would help delegitimize ethno-Anglo/Eurocentrism⁸ and enhance the appreciation of diversity, once the contextual method is put to work in the second part of the book.

II.

Selectivity. 1010 pages invoke monumental associations.⁹ The author aligns them with his claim to global scope and a design that suggests it comprises *the* foundations of the discipline (not some) and *all* continents, i.e. significant contexts of law, appended by the transnational plane. As an upshot, one reviewer, apparently trembling with “admiration and awe, indeed, envy”,¹⁰ celebrated *Kischel’s* opus magnum already as the legitimate successor of *Zweigert & Kötz* and proclaimed it installed a new “gold standard” of comparative law.

⁶ K. *Zweigert/H. Kötz*, Einführung in die Rechtsvergleichung, 3rd ed. 1996, engl. transl.: An Introduction to Comparative Law, 3rd ed. 1998.

⁷ The literal but inadequate translation would be “circles” of law. See also U. *Kischel* (note 3), 221.

⁸ For definitions see W. *Fikentscher*, Modes of Thought: A Study in the Anthropology of Law, 1995, 117; V. *Palmer*, From Leretholi to Lando. Some Examples of Comparative Law Methodology, Am. J. Comp. L. 53 (2005), 261/264.

⁹ T. *Groß*, Rechtsvergleichung, Verwalt. 48 (2015), 581 et seq.

¹⁰ P. *Mankowski*, Rechtsvergleichung, NJW 69 (2016), 1644.

At this day and age no textbook, gold standard or not, can seriously be expected to “encompass the law of the whole world, past and present, and everything that affects the law” from geography and climate to the needs of production.¹¹ Therefore, it comes as no little surprise that an author places his work “in the tradition of comparative law textbooks” (p. VII) and exposes a global display. No wonder then that *Uwe Kischel* appropriates roughly 150 pages to the Common Law context, 230 pages to the context of continental European law but only a meager 100 (comparatively counting) to Latin America and Africa, only a bit more than the space reserved for “courts and jurists” in France and Germany plus “typical legal institutes” (Rechtsinstitute). While the student of comparative law has certainly been exposed to more substantial misallocations of attention, notably in *Zweigert & Kötz*, Introduction, and *Rene David*, Grands systèmes, Rechtsvergleichung, demonstrates not equal but undoubtedly more consideration of the non-civil/common law world.

Surprise regarding selectivity springs up elsewhere, though – in the peculiar treatment of the “Grundlagen” and the applied contextual method. Whereas a textbook need not address “modesty in comparative law” (pp. 32 et seq.) or its justifiability (pp. 47 et seq.), one would assume that a gold standard or top quality treatise contained a differentiated and not overly selective and narrow discussion of legal transplant/transfer; did not take “universality” and “universalism” as quasi-natural givens; gave due process also to non-functionalist approaches, which achieved some prominence in the history of the discipline, like structuralism and taxonomy; and did not reiterate, out of hand, the dismissive treatment of a somewhat rigorous debate on method (e.g., pp. 92 et seq., 97, 103 et seq.). Whatever *Gustav Radbruch* and others may have said about a preoccupation with method, for a discipline with a methodological focus and practice it looks contradictory – if not outright foolish – to cut off an intense and controversial exploration of how to “do” legal comparison and why to be concerned about the pitfalls this practice might have in store. It is symptomatic for the “innocence of method”¹² or rather professional naiveté, so widespread in comparative law, to merely mention the unavailability of a “cooking recipe” (p. 165), refer to doubts *Zweigert & Kötz* have uttered about the possibility of a coherent theory of method (“geschlossene Methodenlehre”, p. 94) – whatever that may be, or to contradict “by no means” the pleasantly empty *Markesinisian*

¹¹ This standard was set by *A. von Feuerbach*, Blick auf die deutsche Rechtswissenschaft, 1810 and confirmed by *E. Rabel*, Aufgabe und Notwendigkeit der Rechtsvergleichung, 1925, 3.

¹² Discussed at length in *G. Frankenberg* (note 2), Ch. 3.

dictum that “[i]n law, ideas and notions that cannot be put to practical use, are likely to satisfy only those who spend their time devising them and quoting each other with self-satisfaction” (p. 47). Oh well, there it is again – the fusty theory-praxis divide that seems to have found its last refuge in comparative law, where it glorifies a narrowly utilitarian, positivist version of application.¹³

A contextual approach might have been enriched and the comfort zone – constituted by authors in agreement or voicing only mild dissent – extended by context-sensitive (?) articles the author feels (and is) at liberty to disregard or to dismiss as “too radically”, “specifically” or “typically”¹⁴ post-modern.¹⁵ It is true, no author can be held responsible for not covering the whole range of discursive diversity, even less if she reaches out to the global plane. Yet, for the sake of her students she should feel invited to look over the fence to see whether there are conceptual or other cherries in the friendly neighbors’ (postmodern) garden.¹⁶

III.

Positionality is the topos that is meant to turn the comparatist’s attention to her position in the comparative space and both her role as observer of the foreign and participant in her own legal culture/setting. To discuss positionality implies that, first and foremost, comparative law is a practice geared toward studying foreign laws (p. 2) and relating them to more familiar legal concepts, norms, experiences, cultures or, for that matter, contexts. So it may be crucial to know whether the comparatist sees herself as detached from or committed to one or the other context and bent on coping with settled knowledges and experiences. It is further assumed that it makes a difference whether the comparatist is a male WASP, a feminist from Utah or a

¹³ The theory-praxis distinction is down the road used as a crucial device for saving the *praesumptio similitudinis* entertained by functionalists as not dictated by theory/method but flowing naturally from practical experience (*U. Kischel* [note 3], 181).

¹⁴ *U. Kischel* (note 3), 238 et seq. For a nuanced treatment of post-modern approaches see *A. Peters/H. Schwenke*, Comparative Law beyond Post-Modernism, in: ICLQ 49 (2000), 800.

¹⁵ To name only a few: *P. G. Monateri*, Black Gaius: A Quest for the Multicultural Origins of the “Western Legal Tradition”, *Hastings L. J.* 51 (2000), 479; *V. Grosswald Curran*, Cultural Immersion, Difference and Categories in U.S. Comparative Law, *Am. J. Comp. L.* 46 (1998), 43; *S. Baer*, Verfassungsvergleich und reflexive Methode: Intersubjektive und interkulturelle Kompetenz, *ZaöRV* 64 (2004), 735; *H. Muir Watt*, La fonction subversive du droit comparé, *R.I.D.C.* 52 (2000), 503; *M. de S.-O.-l’E. Lasser*, Judicial Self-Portraits: Judicial Discourse in the French Legal System, *Yale L. J.* 104 (1995), 1325.

¹⁶ E.g. “juxtaposition” and “juxtaposition plus” paraphrasing “schlichte Gegenüberstellung”, cf. *G. Frankenberg*, Critical Comparisons: Re-Thinking Comparative Law, *Harv. Int’l L. J.* 26 (1985), 441 and *U. Kischel* (note 3), 204. Or the pragmatic turn: cf. *U. Kischel* (note 3), 238 et seq. and *M. de S.-O.-l’E. Lasser*, The Question of Understanding, in: *P. Legrand/R. Munday* (eds.), *Comparative Legal Studies: Traditions and Transitions*, 2003, 197.

postcolonial theoretician from India. This information might be helpful to comprehend and cope with pre-understandings and biases, commitments and research interests that may privilege areas of study and account for disparities in the representation of the “relevant” materials.

Placing oneself and one’s work “in the tradition of the grand textbooks” is telling but not good enough. 1010 pages should allow at least for a passing mention that the author holds a chair for public law and comparative law with a special focus on northeastern European law in Greifswald (Germany).¹⁷ This information might elucidate the sufficiently extensive discussion of “Nordic legal thought” and the non-reception of both postcolonial legal thought¹⁸ and feminist theory. If one reads through *Rechtsvergleichung*, one is inclined to compare *Uwe Kischel’s* picture of the comparatist with *Robert Musil’s* “Man without Qualities”¹⁹: neither only observer nor completely participant, basically gender-neutral, culturally cautious, well-meaning and modest, an avid learner but oblivious to the ethical challenge of any good comparative practice – a challenge posed by the co-presence of the other – foreign legal cultures and laws – in the comparative space. The presumption of neutrality is not a very promising way to meet the foreign at eye-level, study it as a phenomenon in its own right, and give it what *Ronald Dworkin* would have called equal concern and respect.

IV.

Perspectivity shifts the attention to the cognitive orientation a comparatist brings into the field where she sets out to study, evaluate and relate foreign legal phenomena to each other and to the familiar. *Perspectivity* also to pin down her interpretative dilemma. If all goes well in comparative practice, that is if the comparatist manages to reflect upon not only who she is (see above) but also what kind of work she does, which methods she uses to what end, and how she can disengage herself from settled knowledges, she may succeed in elucidating the hermeneutic and political pitfalls that threaten to entrap her.

By contrast, the scholarly discourse has ingeminated with never tiring energy the similarity versus difference and universalism versus contextualism (or cultural relativism) debates.²⁰ Until recently, comparatists have abstained from submitting to self-critical scrutiny their obsession with or hushed

¹⁷ In a similar vein *T. Groß* (note 9), 4.

¹⁸ Reception might have prevented the author from titling a subchapter “Common law im *Rest der Welt*”, 378 – emphasis added.

¹⁹ *R. Musil*, *Der Mann ohne Eigenschaften*, 1940.

²⁰ See *P. Legrand*, *The Same and the Different*, in: *P. Legrand/R. Munday* (note 16), 240 with further references. See also *J. Tomberlin* (ed.), *Philosophical Perspectives, Epistemology* 13 (1999).

preference for similarity. Thus, they managed to present themselves and their work as politically agnostic. *Uwe Kischel*, however, sees the dangers of chauvinism, legal-cultural imperialism and hegemony that come under the guise of convergence theories and unitary projects (pp. 47 et seq.). However, arguing for a “relaxed handling of the aims of comparative law” (p. 49) prevents him from submitting the mainstream practice of cognitive control – in short: the collection and ordering of knowledge – to a more rigorous audit. He trusts that the problems of (distorted) communication and misunderstanding can be solved, if at all, only by acquiring as much knowledge about foreign cultures as is possible, which may explain the enormous amount of information brought together in this book. While he opts for a more pragmatic hermeneutic approach, rather than bringing foreign laws and legal cultures very close while at the same time keeping them far away,²¹ he still claims to focus on the “specific otherness” of legal institutions and legal thought in the various, in particular historical contexts (p. 172).

V.

With circumspection and prudence *Uwe Kischel* advances toward his “contextual approach”. In extended preparation, he takes three crucial theoretical-methodological steps: First, in a fairly redundant and swaying motion, he pasteurizes the *functional method* by criticizing it with restraint and then salvaging it from more radical objections. Having omitted the more questionable aspects of the protagonists’ similarity obsession and the functional method’s delicate problems,²² *Uwe Kischel* finally embraces the basic insights of functionalism “without reservation” (p. 187). If this is not only an attempt to accommodate or pacify the discipline’s mainstream, he could have drastically shortened the various takes on functionalism (pp. 6 et seq., 93 et seq., 108 et seq., 179 et seq.).

Second, on a similarly meandering pathway the author leads his readers from perilous insights into “Rechtskreislehren” to their acceptance in the end. It is no little astonishment to see, after the methodological bankruptcy²³ and the blatant ethnocentric connotations and usage²⁴ of concepts like “Rechtskreis”, “grands systèmes”, legal families, etc., that *Uwe Kischel* still finds kind words for their (chiefly didactic) use value in a comparative law textbook.

²¹ The more complex hermeneutic operations required by comparative law are analysed, e.g., by C. Geertz, *The Interpretation of Cultures*, 2nd ed. 2000; T. Scheffer/J. Niewöhner (eds.), *Thick Comparison. Reviving the Ethnographic Aspiration*, 2010.

²² For a thorough discussion see R. Michaels, *The Functional Method of Comparative Law*, in: *The Oxford Handbook of Comparative Law*, 2006, 339.

²³ Already: L.-J. Constantinesco, *Rechtsvergleichung III*, 1983, 73 et seq.

²⁴ See M. Siems, *Comparative Law*, 2014.

Thus, in the spirit of mainstream tradition, he “groups” together, in the second part of the book, the world’s numerous and diverse legal regimes as “Rechtskreise” a.k.a contexts, because he is convinced they may provide basic knowledge regarding the respective context or legal culture, domesticate the (unruly?) diversity of legal orders and help avoid “numerous possible mistakes” (p. 225). While the latter is too vague to be refuted, some questions come to mind: Who needs or can rely on a collective singular denoting commonness – “context” (Rechtskreis) – that is introduced with a warning: watch out for “plurality”; “there is diversity”; be aware of “openness”; be mindful of “grave differences” and “peculiarities”²⁵? Who would seriously advise a doctoral candidate to write a thesis on “Consideration in Sub-Saharan Africa”, “Administrative Procedure in Southeast Asia”, “Constitutional Development in Latin America” or “The Jury in the Common Law Context”? A more narrowly framed project, such as a comparison of the main tenets of US-style and Scandinavian legal realism or the structure of indigenous rights in two or three selected legal regimes, would appear clearly more promising.

Third, both functionalism and “Rechtskreise” are used as supporting pillars in the edifice of the *contextual* method (pp. 164 et seq.). It is not easy to peg down more definite, detailed and *distinguishing* elements of this approach. The author stresses legal science as his methodological point of orientation – not sociology, history or anthropology, – characterizes his approach quite broadly as the “result” of all other traditional approaches (mainstream one would assume), and praises its pragmatic, common sense nature. A cooking recipe one should not expect (who would?) nor positive instructions how to do comparative law. High expectations regarding the “contextual”, nourished by the monumentality of the volume, are disappointed: At the end of the day, the contextual approach amounts to little more than a “Fehlerlehre” (pp. 188 et seq.), a theory about how to avoid mistakes that might occur when reading texts, looking for sources, dealing with pre-understandings, distinguishing styles or not seeing functional equivalents, and so on. To be fair, contextual also means interlocking rather than juxtaposing the texts/insights gleaned from diverse legal systems – cases, doctrinal solutions, norms, institutions – and thereby also considering extra-legal aspects.

After reading through the different “contexts” presented with commendable care and astounding detail in *Rechtsvergleichung*, one wonders about

²⁵ See *U. Kischel* (note 3), 225 et seq., 244 et seq., 524 et seq., 554, 729 et seq.

the use value of the groupings and classifications²⁶ here in place. Certainly, “Japan, Taiwan, South Korea: The Southeast Asian Path on Continental-European Basis” has a slightly better ring, though not bereft of a gently Eurocentric tinge, than the “Law of the Far East”.²⁷ But why not explore some of the more narrowly framed, interesting differences between the legal regimes here united under one roof, such as a comparative constitutional study of how South Korea and Taiwan handled their post-war division? Or: The role of comparative law in Japanese and German legal education and science?

No doubt, the “context of African law” (pp. 679 et seq.) is by far richer in information and more sensitive toward plurality than the comparable chapter in any other textbook. Still, the justification of this (and other) context’s defining commonality is occasionally scary: “In Africa the most diverse legal orders and concepts of law clash with one another and have to try to cooperate or at least tolerate each other.” (p. 679).

Why introduce the “continental European context” in the first place, if it boils down *au fond* to France and Germany with short excursions to other countries, defined as its “basic context” (§ 6). As a matter of fact, the author argues that most other legal orders in Europe and beyond are related to France and Germany (pp. 554 et seq., 561, 565 et seq., 628). *Rechtsvergleichung* could have renovated the textbook-tradition in comparative law, for instance, by an equal and differentiated discussion of post-socialist countries (if need be: as a three groups, p. 585). The defining commonality and focus would have been the characteristic predicament of their transition and restructuring. Why integrate the variety of post-socialism without much ado in the continental European context (pp. 571 et seq.), when *Rechtsvergleichung* contains an in-depth analysis of their transformation anyway? – By the same token, the legal regimes of Latin America deserve to be dignified, at least, as a “context” rather than be treated as an annex to Europe, as Europe’s beyond, regardless of intense influences and correspondences. The shock of situating Latin America “Beyond Europe” but still in the European context is not exactly tempered by the apodictic introductory statement: “Latin America belongs to the continental European context” (p. 629).

The context-option has another side-effect: It invites generalizations one would prefer not to come across in a gold or mint standard textbook. For example: “The multitude of potential conflicts [in Africa] are not drawn to the light and solved” but handled “pragmatically if and as far as they consti-

²⁶ For a thorough critique of taxonomies see R. Miller, “Taxonomy ...”, 2016, unpublished manuscript on file with the author.

²⁷ K. Zweigert/H. Kötz (note 6), *An Introduction ...*, 286.

tute a problem” (pp. 564 et seq., 628, 633). Likewise, one wonders what exactly means that “single as well as groups of legal orders, which in common, though highly differing in their context, tap the legal cosmos of Asia and can serve as a blueprint for the understanding of all Asian legal orders” (p. 731).

Summing up: The more one reads on, the more one is left with the impression that artificially constructed commonality raises more questions than are (and can be) answered. What is more, the conundrum of bogus contexts distracts from both the author’s explicit diversity orientation and the cornucopia of his analyses and insights.

Günter Frankenberg, Frankfurt

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Critical Legal Studies, Postmodernism and the Contextual Method in Comparative Law – A Reply to *Günter Frankenberg*

I.

When I first received the request by the editor of this journal to write a reply to *Günter Frankenberg’s* review¹ of my book on comparative law,² I felt a bit uneasy. After all, it is – for good reasons – unusual to let an author reply to a review, and to even publish the two together. The request seemed to put me in an impossible situation in which I could only loose: Either reply and run the risk of sounding touchy, petulant and petty-minded. Or not reply and let the first English-language review stand, although it forms a stark contrast to the other reviews (so far mostly in German, but also in Spanish, Italian and Swedish), and although some readers will, at least at present,³ be prevented by language barriers from forming their own opinion. But then I started reading *Günter Frankenberg’s* review, and my doubts evaporated. Yes, his review is highly critical. But then, he is absolutely right – *if* you accept his premises and share his personal stance on legal theory, which might best be described by three keywords: critical legal studies, postmodernism, Frankfurt School. Most readers – forming part of this terrible if ill-defined “mainstream” – are not likely to do so. I actually like

¹ *G. Frankenberg*, “Rechtsvergleichung” – A New Gold Standard?, printed above p. 1001.

² *U. Kischel*, *Rechtsvergleichung*, 2015.

³ An English translation of the book is under preparation and will be published with Oxford University Press.

Günter Frankenberg's review, because it is such a perfect example of a well-known, if somewhat peripheral theoretical attitude, not only on comparative law but on law in general, which I have always tried to understand, but never shared.

II.

Günter Frankenberg's stance on comparative law is determined by the U.S. critical legal studies movement, whose jurisprudential as well as leftist political agenda found its heyday in the late 1970s/early 1980s, as well as by the multi-faceted⁴ movement of postmodernism. His position found its best-known expression as early as 1985, in an article for the *Harvard Law Review*.⁵ Ever since, he has fought against mainstream views of comparative law, which nevertheless continue to dominate the vast majority of all work done in the field. It is this theoretical outlook which determines the concrete criteria he applies in his review, whether explicitly (selectivity, positionality, perspectivity) or implicitly (sufficient departure from the mainstream, insistence on difference, refutation of similarity, political correctness). The explicit criteria, which are used to structure the entire review, are somewhat revealing in all the aspects they do *not* cover: readability, comprehensiveness, systematic structure, internal consistency, comprehensible explanations and argumentation, selection and representation of topics according to their importance to comparative lawyers in general, inclusion of contextual aspects (legal culture), sources not only in English, selection of sources where original language material was not used, or concise and correct description of the different possible attitudes on debated points, to mention a few. Many of these criteria, however, are probably in no way consistent with a postmodern, or critical, attitude.

And, of course, the book simply had to disappoint a reader who, like *Günter Frankenberg*, is led by my rather detailed discussion of methods in comparative law “to feel the relief and thrill that the era of late functionalism may be near”, and probably to hope that I would put a definite end to “the wearisome dominance of (comparative) functionalism”. To put matters in a nutshell:⁶ The contextual approach, which I propose, is based on the

⁴ On the possible topics and meanings of postmodernism see e.g. *D. Hebdige*, *Hiding in the Light – On Images and Things*, 1988, 181 et seq.; for a short introduction to postmodernism and its role in comparative law see *U. Kischel* (note 2), § 3 marg. note 23 et seq., 144 et seq.; for a much wider notion of postmodernism which would comprise many other trends in comparative law see *M. Siems*, *Comparative Law*, 2014, 97 et seq.

⁵ See *G. Frankenberg*, *Critical Comparisons – Re-Thinking Comparative Law*, *Harv. Int'l L. J.* 26 (1985), 411.

⁶ For more details see *U. Kischel* (note 2), § 3; for a short version in French see *U. Kischel*, *La méthode en droit comparé – L'approche contextuelle*, *R.I.D.C.* 4/2016 (forthcoming).

basic insights of traditional comparative law, i.e. of the functional method, but tries to evade some of its misunderstandings and pitfalls. Maybe even more importantly, I try to actively defend this contextual method – which proudly considers itself part of the mainstream – against its critics who implicitly or explicitly try to delegitimize mainstream comparative law by deploring its lack of “theory”, by insisting on the need to overcome the common sense approach, and by proposing as a cure to fully adopt the methodological insights of social sciences. I try to show that this critique is itself an exercise in ideology, accepts as “scientific” only analytical approaches modeled on natural science, disregards the diversity of methodological approaches that exist even in social science, and tries to import a somewhat tired methodological debate from social science into comparative law. The positive methodological answer which I offer is hermeneutics, which asks us to try and work our way into a foreign legal system, to get a feel for its style, its atmosphere, and by doing so try to understand it in and of itself.⁷ This, I propose, is not only what comparative lawyers should aspire to do (in spite of all the inherent difficulties), but also what, in the end, many of them have aspired to do for many years. The reproach that mainstream comparative law lacks “theory” or suffers, to use *Günter Frankenberg’s* expression, from some “innocence of method” can thus be met with complete tranquility. The contextual approach’s active attack on much of the literature that would probably like to be called “progressive”, combined with an equally active defense of traditional, mainstream comparative law and of the independence of legal (as opposed to social science) approaches, was, of course, from the outset likely to engender not only applause but also adverse feelings and reactions in certain circles.

III.

From a postmodern point of view, writing a treatise on comparative law is a futile effort. After all, such a treatise would involve the collection and ordering of knowledge, something that *Günter Frankenberg* deprecatingly calls “the mainstream practice of cognitive control” and which he wants to submit to a rigorous audit. Also, a treatise would involve the attempt to depict many topics – like the debates on method or the characteristics of certain legal orders – as correctly as possible. This could be called an attempt at neutrality, which postmodernists believe is so impossible that it should never be made. It is, indeed, difficult to understand and describe for instance

⁷ On the importance of a hermeneutical approach in comparative law, *inter alia* as a counterpoint to approaches guided by social science, see e.g. *A. von Bogdandy*, Zur sozialwissenschaftlichen Runderneuerung der Verfassungsvergleichung – Eine hegelianische Reaktion auf Ran Hirschs Comparative Matters, *Der Staat* 55 (2016), 103 (110 et seq.).

the way in which African traditional law works and relates to state law, the sources and thought processes of classical Islamic law, or the position of Scottish law by reference to English common law. It is difficult to grasp the degree to which post-socialist countries in Eastern Europe are still characterized by the transformation process, how the seemingly familiar surface structures of today's Chinese law relate to very unfamiliar deep structures, not least under the influence of the Chinese Communist Party, or in what way the old principle of "obey, but do not follow" influences law in Latin America. And it may be as confounding for a civil lawyer to truly understand the common law reasoning from case to case as it is for the common lawyer to understand the techniques and implications of "subsumption" and expert opinion which are so dear to German jurists. But should these difficulties keep us from trying? By no means! They are a challenge to be taken. Indeed, these problems should be solved, as *Günter Frankenberg* notes with some apparent astonishment and disbelief, by "acquiring as much knowledge about foreign cultures as possible". In other words, the motto for writing a treatise on comparative law should be: If you don't know, or if you don't understand, work harder, until you know and understand!

The same is true for the question of personal bias ("positionality", "perspectivity"): It is, indeed, not easy to rid oneself from one's own preconceptions on, for instance, how legal decisions should be generated (e.g. legal realism vs. formalism), what a judge does (e.g. apply "the law" vs. generate law), or even what law is (e.g. traditional law vs. modern state law). But we should try to at least make ourselves aware of our preconceptions, be ready to question them, and – where needs be – point them out. Postmodernists and others, however, not only regularly believe that you can never rid yourself sufficiently of your preconceptions, they sometimes even seem to expect the author to provide some sort of explicit self-analysis. It should be enough, however, that the author's personal point of view is sufficiently clear, as *Günter Frankenberg* apparently assumes for himself in his review. All in all, his somewhat ironic description of my position as "basically gender-neutral, culturally cautious, well-meaning and modest, an avid learner" to me does not only appear quite correct, but also has a decidedly positive ring which, of course, it was not intended to have.

IV.

Legal academic writing, and especially treatises, must in most cases attempt to give due regard to all possible positions, and to all aspects of the problem ("selectivity"). When talking about methods in comparative law, for instance, it is important to describe not only one's own position and the

arguments in favor of it, but to analyze the pros and cons of the entire debate, plus at least a representative selection of the existing alternative methods, such as economic analysis, statistical comparison, legal formants, or legal traditions. All of this should be accompanied by a critical evaluation. Such an evaluation may, by the way, point out that especially ardent critics of traditional methods often do not tell us in detail how they would do the job, i.e. they often do not develop a workable alternative. The same is true for comparatists with special research interests based on personal values like feminism or postcolonialism, which are not in or of themselves methods in comparative law, but only influence the choice of topics and the evaluation of results. Be that as it may, the entire analysis of the methodological debate should hopefully lead the reader, in a systematic way, towards the author's own position, clarifying his stance towards other propositions and their arguments. To do all that is, of course, a "meandering pathway" as *Günter Frankenberg* calls it, but one that I consider not only the best and intellectually most honest way, but also very helpful to the reader. After all, this is a treatise, intended to help aspiring young comparatists and to provide interesting insights or open new perspectives to the more experienced.

V.

Giving due regard to all aspects is equally important when it comes to the legal contexts of the world, i.e. what is conventionally called legal families. I fully agree that it is by no means sufficient, today, to restrict oneself to the usual suspects, esp. England, the United States, Germany, and France. I tried to evade that trap by devoting more pages to the rest of the world than to these four jurisdictions combined. On the other hand, it would be illusionary to pretend that to the average comparative lawyer, there was no clear difference in interest between, for instance, U.S. and English law on the one hand, and the law in Israel, Indonesia, Sweden, Nigeria, or Taiwan, on the other hand. The law in these later countries is certainly fascinating in its own right and should be talked about, but even lawyers from these countries would not normally expect or even want a treatise on comparative law to turn its focus completely away from the usual centers of interest.

But why talk about legal contexts, at all? Are they simply "bogus" constructions that distract from the diversity of legal orders, as *Günter Frankenberg* assumes? On the contrary: The different legal contexts are a direct result of the contextual approach in comparative law. This contextual approach is, as I have mentioned, hermeneutical in that it requires the comparative lawyer to immerse himself in the legal orders under study, to gain more and more knowledge in order to get a feel for their specific atmosphere and style. This, and only this, will allow him to put his knowledge on

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specific topics into perspective, to understand his sources and to avoid the numerous mistakes that are so easily made in comparative law. The contextual approach does not offer a fail-proof cooking recipe,⁸ but it is meant to lead any comparative lawyer to good results (and therefore goes way beyond a mere systematic analysis of possible mistakes). Analyzing and sorting the different legal contexts of the world is nothing more than the direct consequence of this method: It tries to provide the comparative lawyer with the information he so direly needs to understand the specific atmosphere and style of many legal orders. *William Ewald*, in a well-known article, has once deplored how little his law school course on comparative law had prepared him for his studies in Göttingen, Germany, in 1985. He lively described how nobody had ever told him that in German law formally binding precedent does not exist, cases play a much reduced role, while codes and commentaries are very important; he did not know that even the question what law is would find different answers in German and U.S. law, that judges in France are met with a certain distrust, or that academic lawyers enjoy a higher authority and argue in a more formal way than in the United States.⁹ In other words, *Ewald* lacked large parts of the all-important information about the civil law *context*, something a treatise on comparative law (and any good course on comparative law) should amply supply. It is to this end that my analysis of the different legal contexts of the world provides what *Günter Frankenberg* has so nicely called “the author’s explicit diversity orientation and the cornucopia of his analyses and insights”. Of course, these contexts and their analysis are not, as *Günter Frankenberg* seems to rhetorically ask, something you would normally write a doctoral thesis about (but then, why not?); they are, however, something that any doctoral student and any other comparative lawyer will need to know about the countries of his choice, no matter what the specific topic he writes about.

This is also the background against which the systematization of national (and non-national) legal orders into groups and sub-groups should be judged: Which legal orders are sufficiently similar so that knowledge of one will help you to get a feel for the other? Or, from another perspective: How pronounced is the feeling of alienness when lawyers from different countries meet? To put it *very* broadly and definitely oversimplify for clearness’

⁸ Since the book is meant to be a practical aid, as well, it nevertheless offers not only a long discussion on methods, but also a short, purely practical introduction to comparative law research and writing, aimed for instance at students writing their master thesis or their doctoral thesis, see *U. Kischel* (note 2), § 3 marg. note 235 et seq.

⁹ See *W. Ewald*, *Comparative Jurisprudence (I) – What Was It Like to Try a Rat?*, *U. Pa. L. Rev.* 143 (1995), 1889 (1966, 1969 et seq.).

sake: Polish, Austrian and German lawyers will understand each other passably well; from their position, the French will be a little different, the English very different, and Americans even more so. Such relations are by no means always simple or evident: Although the Spanish are frequently grouped with other Romanic countries, a Spanish penal or constitutional lawyer would have decidedly less problems talking shop with his German colleagues than with his French ones. Chinese law is definitely a world of its own, but on some of the finer point of private law, a Chinese lawyer will have no problems talking with his Japanese or German colleagues, while his American counterparts would be at a complete loss. If you want to understand Australian law, it really helps to know English law; the same is true for the law in India, but you have to be much more careful because of the profound influence of the very different social structure and history. So why does, for instance, Latin America form part of the civil law context (as *Günter Frankenberg* asks)? – Well, in a nutshell because they have much in common with other civil law countries, because you need to understand civil law (and sometimes U.S. law) to understand Latin America,¹⁰ and because most Latin American lawyers would most certainly agree with this evaluation. And why is Latin America – just like Scandinavia, or Eastern Europe with the exception of Russia – treated as a different and unique subgroup within civil law (as *Günter Frankenberg* tends to disregard)? – Well, in a nutshell because there are a number of traits specific to Latin America which make them quite different from, say, Germany and France (and, of course, the existence of such traits cannot only be mentioned in passing, as a caveat, but they must be spelled out in detail). This mixture of similarities and differences leads to a complicated, often layered landscape in which each legal order is unique, but will share more or less traits with other legal orders, which helps the comparative lawyer to understand what is yet unknown to him. Such a highly differentiated approach, however, is not likely to be appreciated or accepted by those comparative lawyers who take an analytical social science perspective and demand “theories”.¹¹

¹⁰ See for instance the telling advice, given to U.S. lawyers, on some surprising peculiarities of Latin American law by *A. M. Garro*, On Some Practical Implications of the Diversity of Legal Cultures for Lawyering in the Americas, *Revista Jurídica Universidad de Puerto Rico* 64 (1995), 461 (467 et seq.), which could be directly applied to France, Germany, or Spain, as well.

¹¹ On this typically analytical stance in social science see clearly *R. Dahrendorf*, *Pfade aus Utopia – Zur Theorie und Methode in der Soziologie*, 4th ed. 1986, 200: “The more assumptions underlying scientific theories become ‘realistic’, the more they become differentiated, restricted, ambiguous; to the same degree, however, they do not allow for deduction of certain explanations or predictions. In this sense, theories are better the more their assumptions are unrealistic, i.e. stylized, specified, unequivocal.” (my translation).

Finally, *Günter Frankenberg* repeats the well-known argument that any such groupings reveal the comparative mainstream's obsession with similarity. But there is no such obsession. Quite on the contrary, comparisons are mostly undertaken precisely because there *is* a legal difference. Even beginners in comparative law will often have much more fun finding and explaining differences than coming to the somewhat boring result that things are basically the same in different countries. Nevertheless, the average comparative lawyer simply is unwilling to disregard existing similarities, as much as he is unwilling to disregard differences. It sometimes seems as if it is not the mainstream that is obsessed with similarity, but some of their critics that are obsessed with difference. The legal world, however, is characterized by an unending combination and interplay of differences and similarities – and that is what makes comparative law so interesting.

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Frankenberg, Günter: Comparative Law as Critique. Cheltenham, UK/Northampton, MA, USA: Edward Elgar Publishing, 2016. ISBN 978-1-78536-393-1. xii, 281 p. £ 85,-; eISBN 978-0-78536-394-8. £ 42,52

When an established and respected German constitutional scholar, steeped in “Critical Legal Studies (in the old times)”, “develops” a book on comparative law “in the environment of New Approaches to Comparative and International Law”, using inputs received during conferences and workshops of the Harvard Institute for Global Law and Policy (p. xi), the reader can expect something extraordinary. Such a conceptual background may enthuse some, and discourage others, especially when one notices, on paging through the book, the post-modernist vernacular and style. The vogue terms (ironically having acquired a certain orthodoxy) are all there: discourses, narratives, deconstruction, the project, the female personal pronoun, dis-connecting hyphens, bricolage, etc.

However, *Frankenberg* does not alienate his reader by assuming that the partisan language of the “crits” must be accepted by all – his text is more playful, sympathetic to the reader, and explanatory than that of most authors whose deconstructive focus is on “the other”, tend to be. Although some passages in the book must be read more than once to make sense of them (for instance the introductory paragraphs of Chapter 4 on p. 77), the author guides the reader dexterously through the haze of critical thinking, while acknowledging that “[c]ritical thought does not occupy a unified space” (p. 21).

This is not a textbook, but it certainly is instructive. It does not occupy a dark corner of deconstructive nihilism or puerile rebelliousness expressed in

mysteriously creative or pseudo-artistic language, but it is unapologetically intended to “challenge the routines of mainstream legal comparison”. Furthermore, the author hopes that his “project supports attempts to deconstruct Anglo-Eurocentrism in comparative law and provincialize Western law, civil and common” (p. x). Taking into account *Günter Frankenberg*, (Critical Comparisons. Re-thinking Comparative Law, Harv. Int. L. J. 26 [1985], 411-456), the unmasking of hegemonic Western legal thinking has been the author’s ambition for more than thirty years. That paper was labelled by *Peer Zumbansen* (Comparative Law’s Coming of Age? Twenty Years after *Critical Comparisons*, in: GLJ 6 [2005], 1073-1084, 1073) “one of the most eminent articulations of the crisis of comparative law in its first century”.

Chapter 1 of this neatly presented book deals with comparative law (neither private, nor constitutional) as a field that some comparatists consider to be a *discipline*. The author characterises the distinction between the designation “comparative *law*” and “comparative *legal studies*” respectively as “mainstream”, and preferred by “a significant number of dissenters” (p. 11). He does not consider this to be more than a “semantic distinction and the theoretical-methodological orientation that comes along with it”, evoking the “positivism debate” (p. 12). Nevertheless, *Frankenberg* left the “mainstream” concept, *comparative law*, encapsulated in the title of his book.

In dealing with the issue of what legal comparison is about, the author might have used the German terminology to inspire a further analytical step before settling for the convention: *Rechtsvergleichung* translates into “comparison of law”, which does not suggest, as the Anglo-American usage might be (mis)understood to do, a discipline characterised by a coherent set of legal norms, principles, doctrines, etc. as for instance in “criminal law”. Setting the tone of his book, he chides “comparative law”, as an orthodox discipline operating in an ahistorical and intra-disciplinary mode (p. 13). He describes (p. 15) the “good practice” of orthodox comparatists rather uncharitably as the work of “legal positivists bent on determining what the law is in another country, *the law* as contained in statutes and court decisions and accompanied by scholarly commentary.” Following *Derrida* and *Legrand*, *Frankenberg* typifies orthodox or mainstream comparative law as being unflinchingly “legocentric, positivist and Anglo-Eurocentric” (p. 14). Mainstreaming, he states, (p. 15) fails to “capture the variety of motivations, spirits, and practices”, in short determining “who is in and who is out”.

Despite the sweeping and uncompromising nature of his disparagement of orthodox comparative approaches, there is considerable merit in *Frankenberg*’s perspective that, given the global assimilation of the legal language

of the West, some comparatists tend to aggregate meaning according to the liberal convention, often in environments where the conventional terminology signifies substantially different meanings than those intended in their original settings.

An honest and refreshingly curt exposition of the meaning and history of “critique/critical” in the context of legal academia is provided in Chapter 2. The critical approach’s vagueness of purpose, non-conformism, dissatisfaction with orthodoxy and liberalism, and philosophical linkages to peripheral trends (Western Marxism, feminism, preoccupation with burning social issues such as racism and Queer theory) are clearly described in a few pages and substantiated with reference to the relevant representative literature. The author makes it clear that there is no single version of a “critical” approach to comparative law. The chapter significantly ends (p. 34) with the summary statement that “[c]ritical comparatists don’t want to be governed by the dominant discourse”.

Chapter 3 surveys “mainstream” approaches to comparative law. It opens with the branding of the view that comparative law should be seen as a method (which does not produce binding law), as typically positivist (p. 38). Considering it to be a science, leads to the elevation of Western legal forms above others (p. 39). The 20th Century desire for legal universalism and scientism comparable to mathematics and the natural sciences brought about a “seemingly innocent – because scientific – preoccupation with method that permitted most of them to remain silent over politics” (p.46). This is no doubt an accurate assessment which is particularly true of comparative undertakings in the context of private law. *Zumbansen* (2005, 1076) said it well: “In light of a continuously defended, apolitical, value-neutral private law, now available to govern and organize trade exchanges on global markets, the critique put forward by Frankenberg and elsewhere cannot be loud enough.” In the next section the author skilfully paints the post-war replacement during the second half of the 20th Century of the push for universalism with the triumphal advance of functionalism and the taxonomy of legal systems into “families”, followed by the notion of “legal traditions” as classificatory mechanism. He concludes that, although these approaches have lost their rigidity, “the practice of taxonomic mapping law and legal systems, despite having added nuances, dynamism and a relational view, still suffers from the vice of ethnocentrism”. Section 4 of the chapter incisively deals with the functionalist approach. According to *Frankenberg* (p. 54) the functionalist “reifies ‘function’ as a principle of reality and totalizes it as *the* container of reality”, following “the narrow purpose of comparative legal problem-solving on the level of doctrine and legislation” (p. 55). Counter to

the critical approach, functionalists “are not likely to either recognize or respect, let alone cherish, significant differences” (p. 57). Following an analysis in section 6 of the ongoing factualist search for “common cores” in the law of European Union member-states, and denouncing it (p. 70) as “a comparative enterprise whose members have yet to call into question objectivity and neutrality, facticity and reliability, and have to consider the political context of their work”, Chapter 3 is concluded with a promotion of distancing and differencing in legal comparison. *Frankenberg* makes it clear (also further in the book, e.g. p. 78) that he considers “mainstream” methodology to be naïve, “aloof from epistemological battles”, blind to related non-law disciplines, in a “state of denial” regarding ethics and politics, nurturing “the ambivalent legacy of scientism”, “far from innocent” (p. 91) and occasionally even foolish (p. 89) and amateurish (pp. 104-107).

The six pages of section 6 of Chapter 3 arguably constitutes the core of the book and of *Frankenberg's* thesis on “[l]earning about the foreign legal regimes and cultures as well as one's own legal regime and culture” (note 142 on p. 70). *Distancing* requires acceptance of “the otherness of the ‘other’ without *othering* it” (p. 71). This comparative action is demonstrated in Chapter 5, in which the controversial matter of Muslim veiling is discussed. *Differencing* concerns the fact that comparatists “do not view the phenomena they study from ‘nowhere in particular’” (p. 72). *Frankenberg* interestingly points out the Western conviction that law is “thoroughly secularized”, unconvincingly implying a capacity for neutrality and universality (p. 73-74), whereas distancing/differencing (*d/d*) “calls on the comparatist to decenter her worldview and to consciously establish subjectivity and context in the comparative space, that is, to take into account the observer's perspective” (p. 74). *D/d* is required, according to *Frankenberg* (p. 75), for a critique of the usual assumptions underlying Western comparative law. This would reveal the (misguided) hope of conventional legal comparison that its results would be “purged from perspectival distortion, ideological misreading and the cannibalization of difference” and the notion that a “scientific” methodology is unproblematic (p. 76).

In Chapter 4 *Frankenberg* devises a “grid” of styles of comparative law, situating them along the horizontal axis to represent *distancing* between *detachment* and *commitment* as the extreme poles, and vertically on an axis of *differencing* between *similarity* and *difference* at its poles. Mainstream approaches appear in the quadrants closer to similarity, and are respectively (and mischievously) designated “Country and Western” style, characterized by *detachment*, and “Universal Dreams Inc.” indicating universalism gravitating towards *commitment*. The characteristics of these are dealt with at

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relative length (pp. 85-104). The approaches showing greater interest in difference are named “Skepticism” on the *detachment* side, and “Sentimental Journey” tending towards *commitment*. Regardless of one’s opinion of *Frankenberg’s* critical analysis, this chapter demonstrates his deep and comprehensive knowledge of the literature and trends in the field of legal comparison.

The application of the author’s grid is demonstrated in his extensive consideration in Chapter 5 of the ongoing controversy of Muslim veiling as it is dealt with in jurisprudence and the literature. The similarity/detachment quadrant is named “controlling the covered”; the similarity/commitment quadrant is headed “colonizing the oppressed”; the “skepticism” quadrant between detachment and difference is called “Veiling? Who am I to tell you what to wear?” and the difference/commitment quadrant is headed “protecting the oriental”. The central point of convergence, i.e. the intersection of polar opposites is labelled “recognizing sartorial ambiguity, motivational diversity of veiling, etc.” This is an impressive exercise in critical comparison, the grid providing “a heuristic device to chart and deconstruct the dichotomization of the secular/modern West versus the religious/traditional East” (p. 162). The chapter concludes with the author’s plea that if only the comparatists inhabiting the extremes of the four quadrants would change their perspectives, “then the monologs comparing dress codes might end up in the delirious diversity of voices at the crossroads of, perchance, *similarity/difference* and *detachment /commitment*” (p. 164).

If the first five chapters might be considered to demonstrate the author’s boldness as a critical observer of the world of legal comparison, chapter 6 goes beyond audaciousness in confronting the West’s holy cow, human rights, with hugely insightful presentations of a range of the leading human rights “narratives” in circulation. Most human rights lawyers do not consciously show an awareness of the underlying “stories” being used to justify any particular view of human rights, but *Frankenberg* proves himself in this chapter to be a raconteur with powerfully compelling abilities. This chapter is too rich to justify an attempt to summarize its substance. Suffice it to say that all who believe that they know and understand human rights law, should reconsider, and must read the 38 pages of this chapter to test their convictions. On page 201 the author points out that the narratives about human rights moved from naturalism and traditionalism to positivism, and then he describes the path along which human rights “journeyed” pithily: “Along that path from religion to democracy, as their foundations were secularized, they began to share properties of a modern mythology, replacing the ancient gods and heroes by more up-to-date, secular authorities.”

Gaining access to the law “is fraught with tribulations” (p. 207). Chapter 7, headed “‘Before the Law’: The Discourse About ‘Access to Justice’”, is presented in full post-modern mode, building a “discourse” around *Franz Kafka* and *Jacques Derrida*’s work. In the process *Frankenberg* warns against placing too much hope in constitutional access to justice provisions, because they are not self-executing and can only be evaluated after implementation (p. 215). The chapter ends with the *Derridian* observation that the law is not visible or tangible, but that it must be “deciphered” (p. 224).

Throughout this book the author’s admiration for the work of anthropologist *Clifford Geertz* and other social scientists constantly shines through. Perhaps *Frankenberg*’s most poignant message to legal comparatists is that the law is not as autonomous or as hegemonic as most lawyers tend to perceive and present it. The following statement in the final chapter of the book captures this message: “Comparatists interested in a thicker, that is more narrative, quality of comparison, which is open to local knowledge and context-sensitive, have to overcome the reductionism characterizing mainstream projects” (p. 227). Although legal consultants, arbitrators and judges do need to engage in comparison (p. 229-230), *Frankenberg* points out that comparative law is not necessarily “geared toward decision-making” (p. 228). Therefore “comparative law has the advantage, generally speaking, that it can confront with impunity the abstract – formalist, positivist – version of law, so dominant in doctrinal legal thought, practice and education” (p. 228-229).

This is a book that reflects a scholarly ripeness in the author, who has demonstrably been engaged in critical thinking and legal comparison over decades: The bibliography lists fifteen of his previous publications relating to the theme of the book, stretching from 1985 to 2014.

Comparative Law as Critique should be read by everyone interested or engaged in legal comparison. The intellectual condescension towards those who have not been converted to post-modernism that shines through, typical of the amorphous congregation of crits, must not dissuade established comparatists from taking this book very seriously. One does not have to agree with the theory, the style, the approach or the commentary to benefit greatly from the razor-sharp analysis and categorisation. In places the biting critique may be painful and exposed to valid criticism, but more often than not agonising truths are revealed. It is not far-fetched to declare that this relatively short, albeit intentionally destructive, overview of comparative work in law is more instructive than many a voluminous conventional “comparative law handbook”.

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