

BOOK REVIEW

Critiquing Günter Frankenberg's *Comparative Law As Critique*

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Abstract

Frankenberg has offered an erudite, critical, humorous, and often sly account of comparative law and its politicized discourses. It is both, as its title indicates, comparative law as critique and equally a critique of comparative law. The assessment of his critique offers some alternative perspectives while endorsing his project and admiring his achievement.

Keywords: Comparative law; comparative law methodology; prisms of understanding; Günter Frankenberg

The remarks that follow were presented as part of a colloquium organized by Professors Russell Miller and Mila Versteeg on comparative constitutional law in Virginia in the fall of 2018. I am most grateful for their kind invitation to open a conference which allowed me to meet Professor Frankenberg in person for the first time. His work has inspired me for as long as I have been in the field of comparative law.

Comparative law theorizing ebbs and flows. Günter Frankenberg is someone who has never stopped thinking about comparative law theory, and he brings to it a wealth of erudition. His new book, *Comparative Law as Critique*, is an extraordinary compendium of existing comparative law scholarship, and, indeed, not just of comparative law, but also of considerable literature from neighboring fields like anthropology, philosophy, and psychology, to name a few. It is a treasure trove of valuable sources.

Despite its title, the book is not just an assessment of comparative law as critique, but rather, it is also a critique of comparative law. Just as it shows the role of comparative law in debunking myths and surface narratives, it also debunks comparative law's own pretensions, pretensions of neutrality, scientism, and apoliticism. The observer's role in affecting the observed has been a central issue in many areas for quite some time, including the natural sciences, as Heisenberg famously argued. Some of Professor Frankenberg's positions have gained acceptance in mainstream comparative law circles, and his work has been an important factor in the field's taking note.

When I was starting out almost thirty years ago, comparative law still had a distance to go to come to grips with some of the basic problems of assessing the other, the different, with the very fact that these were issues, as well as how to frame them. A real measure of success was achieved in persuading scholars in the field of the importance and depth of differences, of the pervasive presence of un-translatables, and of our existence within semiotic systems that are not easy to expand so as to permit us to see with clarity or the eyes of those within another system and society. These

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messages have been communicated with utmost lucidity by Professor Frankenberg throughout his career, as they are in his latest book.

It was the task that felt urgent to me to accomplish in the United States when I was starting out because the generation of émigrés who founded comparative law there was retiring and dying. They knew how to read and observe two legal cultures, to a large extent instinctively because they had been immersed in both due to the unusual circumstances of their lives. For a new generation of U.S. scholars, the process the émigrés applied effortlessly, and perhaps unconsciously, would have to be dissected and explicated so that it could be implemented by those less steeped in the legal systems they were studying and in their surrounding societies. Even the émigrés who had studied law in in both civil- and common-law countries in my opinion often remained primarily civilians at heart. They were sufficiently immersed in U.S. or British legal culture that their writings were effective in communicating, but there are many indications in their writings that their prisms ultimately remained civilian, including, most simply, the fact that many of them wrote to instruct a judicial audience.

The decades that have passed have seen changes I had not foreseen in American law school faculties. There has been a turn away from Eurocentrism, such that the common-law/civil-law divide that was the principal object of study has been greatly enhanced by the study of systems of the non-western world and the appreciation of their importance. But equally as important, it is being taught and studied by scholars from those systems who have the same intuitive advantages as the émigrés of a previous generation, including the phenomenon I had once attributed to the singular catastrophe of the Second World War: namely, a legal education in two different systems of law. This time, the reasons fortunately have not always come about through personal catastrophe, although sometimes they have. Most saliently, a new generation of comparatists once again is immersed in two legal cultures.

In recent years, I have been with scholars, usually younger than I and from different parts of the world, who seem to detest the look of the westerner so much that they suggest we look only at ourselves, worry about ourselves, describe only ourselves, and especially our shortcomings, and forget about them. Thus, for instance, we should stop analyzing altogether issues like the one Professor Frankenberg discusses at some length in Chapter 5 of *Comparative Law as Critique*: Western interpretations or misinterpretations of veiling for Islamic women.¹

The comparatist's look abroad itself comes from curiosity and interest, a genie that won't go back into the lamp. Professor Frankenberg says comparative law does not lend itself to decision-making, but to critique, to elucidation and recognition, and he tries to provide the tools, building on already existing ones that others have suggested. He advises us to employ differencing and distancing to capture "the other" most effectively.²

One of the few places where I somewhat differ from Professor Frankenberg is in the depiction of comparative law's development from before the Second World War to after. Where he sees the aftermath of the war as being a loss of hope in universal ideals, with the result that "comparatists were no longer disposed to dream of a better world"³ and therefore turned to micro-comparison and functionalism, I see instead a reaction that may strike one as paradoxical. Thus, even though one might have expected just such a reaction as Professor Frankenberg describes, the fervor for the universal ideal was only strengthened by the war, not diminished. Martti Koskenniemi has quoted the rueful comment of a refugee international law scholar who was among the very few who did turn away from universalism because of the Second World War's horrors; he showed contempt for the widespread reaction he saw around him by saying his colleagues were hopeless examples of "*le roi est mort, vive le roi*."⁴

Universalism had been the cudgel taken up by those many interwar internationalists, like René Cassin and the whole Hague group whom Nathaniel Berman described in an article with the

¹GÜNTER FRANKENBERG, *COMPARATIVE LAW AS CRITIQUE* 113–61 (2016).

²*Id.* at 70–76.

³*Id.* at 48.

⁴"The King is dead. Long live the King."

telling title of “*But the Alternative Is Despair*.”⁵ In the account Berman tells, they toiled after 1918 right through 1939 until war was declared in order to write up a set of what we would call today universal human rights. The idea was to enact into law the hope and belief that the earlier war was the war to end all wars. The location in which these internationalist toilers for universal human rights chose to meet for the last time in 1939, before the Second World War disrupted their work, was most ironically in the Polish town of Oswiecim, or Auschwitz.

Astonishingly, the very moment the war was over, those of the group who had survived just started up again, as if the pause of the war had done nothing to alter their faith in universalism, with Cassin becoming a major drafter of the U.N. Universal Declaration of Human Rights and de Gaulle’s Minister of Justice.

On the other hand, there may be some logic to this response beyond merely being an alternative to despair. René Cassin, for example, had joined de Gaulle in London in 1940 where he became legal advisor to the general. In October of that year, he gave a speech to the Free French in London titled “The Resurrection of France,” in which he contrasted Vichy France’s defeatism with Britain’s refusal to compromise its values. It is not hard to imagine that the lesson such a man would have drawn from the Allies’ victory was that the return to the pre-war universalist human rights ideals he had championed was not only the ethical and honorable course, but also that, in practice, it need not be doomed to failure.

I see men such as Schlesinger and Raabel as being of a similar bent. Their attitude need not be incompatible with Nathaniel Berman’s more skeptical view. I also suspect that, at some level, they all knew that the Enlightenment philosophers’ universalism had been proven wrong by Hitler, but they concluded there was no other way to live than to behave as though they had been right. Consequently, I don’t view Schlesinger’s functionalism as contradicting universalism and therefore establishing that he wasn’t a universalist, but rather as an outflow of universalism. I see the same in Zweigert and Kötz, and the same with Erich Stein, and Professor Frankenberg concedes that René David in France espoused a universalist outlook after the war.⁶

Professor Frankenberg takes us on a humor-filled road as he characterizes some scholars who have turned to universal ideals as belonging to *Universal Dreams, Inc.*, and others who observe out of pure curiosity, without a particular motive or bias, as the *Amateurists*.⁷ He devotes a chapter to international human rights and the modern-day cynicism with which it can become imbued as it has become politicized and competitive discourses jockey for position.⁸ Professor Frankenberg is entirely right to question the possibility of any universals, particularly from the vantage point of a comparatist; yet, if we keep track of *why* it is that the human rights narrative has been so successful, as Professor Frankenberg describes it, it is because of what preceded its rise: the violations of civilian rights during the Nazi era. To say that one must leave each semiotic system as it is, that the outsider cannot understand, and that all knowledge is local, inevitably at some level is also to say that one must leave Hitlers to their own devices in their own lands.

What also is clear, however, is that the West’s reaction to the barbarism reflected its shock that a Western nation had perpetrated such a horror on other Westerners. It jarred us into the realization that maybe every one of us is capable of doing the same. In fact, a relatively little known fact is that Germany’s acts in Germany and elsewhere in Europe in the 1930s and 1940s had been presaged by acts of cruel massacres in Africa at the end of the 19th and beginning of the 20th centuries against helpless Africans, massacres now recognized as genocidal.⁹ No similar reaction

⁵Nathaniel Berman, “*But the Alternative Is Despair*”: *European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792 (1993).

⁶FRANKENBERG, *supra* note 1, at 46.

⁷FRANKENBERG, *supra* note 1, at 96–107.

⁸Frankenberg, *supra* note 1, at 225–31 On this issue, readers may be interested in PHILIPPE SANDS, *EAST WEST STREET: ON THE ORIGINS OF “GENOCIDE” AND “CRIMES AGAINST HUMANITY”* (2016).

⁹See *Rukoro v. Federal Republic of Germany*, 363 F. Supp. 3d 436 (S.D.N.Y. 2019) (appeal filed in the Second Circuit on March 11, 2019).

had been forthcoming in the West. A lawsuit has been brought in a New York federal district court by their survivors. As of this writing, the lawsuit was dismissed for lack of jurisdiction by a federal district court under the Foreign Sovereign Immunities Act; it is now on appeal to the Second Circuit.¹⁰

Professor Frankenberg devotes a substantial chapter of the book to Muslim veiling, with the subtitle “A critique of a comparative discourse.”¹¹ While we have become used to hearing the phrase “the West and the rest,” this chapter is a *tour de force* which turns that outlook on its head and exemplifies a bit of the “West as the rest.” It looks to Western legal treatment of Muslim veiling in a number of countries from the perspective of those choosing to be veiled without making many distinctions among various countries, exemplifying an immersion into the optic of Islamic societies looking at western measures from non-western prisms.

As metacritique, I attempt here an immersive look into France, whose history has some concrete distinctions from Germany’s, to explain some of the differences between the more tolerant German court decisions and the French ones Professor Frankenberg describes. His chapter presents the French explanation of anti-veiling laws as excuses for discriminating against Muslims, notwithstanding the fact they apply equally to religious symbols of other religions too. Very short shrift is given to the defense of secularism in the public space, what is called “*laïcité*,” as anything more than a hypocritical excuse for discrimination against a feared religion and a people deemed a threat.

From within the French perspective, there are two arguments, one that supports Professor Frankenberg’s, and one that doesn’t. Culturally, historically and socially, the perception by many in France of *laïcité* is that there can be no legitimate presence of the religious in the public sphere; or that the Rousseausistic ideal on which the Republic was built means that each person has freedom to be an individual at home, but that each person becomes a citizen in public. A commonly and sincerely held belief of the Republic, as Rousseau’s social contract influenced it, is that it calls for giving up considerable personal autonomy to become a citizen. In France, children are brought up with the phrase that the country is “one and indivisible” (“*une et indivisible*”).

As France has teetered between republics and monarchies, empires and back to republics, a strong and rancorous relationship developed between the Catholic Church and the anti-clericalism of the republicans. After the Revolution, there were mass murders of priests and nuns, with the destruction of monasteries and convents. The resolutely anti-republican Church did whatever it could to support the return of the monarchy. These old fault lines have not been completely covered over.

The kind of constitutional complacency most Americans feel is not shared in France where the Republic is perceived and felt to be more vulnerable to destruction from within and without. Issues of religion remain highly fraught, entirely aside from the presence of a large Muslim population. For instance, last year, on the eve of the celebration of the anniversary of the law of 1905 that established the separation of Church and State,¹² Jean-Luc Mélenchon, the candidate who lost to Emmanuel Macron in the last presidential election, publicized his indignation that President Macron was present in a church to attend the singer Johnny Halliday’s, known as France’s Elvis’, funeral mass.¹³ On the other hand, in support of Professor Frankenberg’s position, the major law in France governing the issues his chapter discusses is the above-mentioned law of 1905 which, although not widely known by the general French public, emphasizes religious

¹⁰*Id.*

¹¹FRANKENBERG, *supra* note 1, at 113.

¹²Loi du 9 décembre 1905 concernant la séparation des Églises et de l’État [Law of December 9, 1905 Concerning the Separation of the Churches and the State], LÉGIFRANCE, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000508749>.

¹³Mathilde Heitzmann-Patin, *Entre crèches et croix : à la recherche d’une cohérence dans l’application de la loi de 1905*, 4 RFDA 624 (May-June 2018).

tolerance and coexistence, and does not forbid the presence of religious signs in the public space in terms of clothing, although it does forbid its display in State buildings.

The dress prohibitions concerning the Muslim veil originally evolved in the courts, and French courts don't make law in the sense of "*loi*." The Conseil d'État, one of the supreme courts, forbade signs of religion in schools that were "*ostentatoire*," a word which signifies something more than "conspicuous."¹⁴ The term "*ostentatoire*" required courts to determine a subjective intent on the part of the defendant to be noticed or to proselytize.¹⁵ Then, in 2004, the courts unobtrusively slipped from referring to "*ostentatoire*" and began to use the term "ostensible." "Ostensible" sounds close to "*ostentatoire*" but means something slightly different. An appropriate translation would be "conspicuous" or "noticeable." "Ostensible" is objective, such that the legal issue became whether the sign of religion was somewhat prominent. This standard resulted in barring smaller, less noticeable signs that "*ostentatoire*" would not have banned.¹⁶ Finally, laws were passed in 2004 and 2010 regarding banning conspicuous religious symbols in schools and banning veiling that covered the whole face in any public place.

Most recently, the courts have ruled on whether certain structures violate the law of 1905 with respect to the required strict neutrality of the State in two cases that do not concern the Muslim religion. One involved a nativity scene in a public building, and the other concerned a statue that a Russian sculptor was donating to a French town depicting Pope John Paul II overhung by a large arch from which a cross was suspended. In the first case, the Conseil d'État said that the nativity scene was permissible because it was part of the year-end traditions of France that were celebrated by more than the Catholic citizenry, and that these festivities included the New Year. It noted that in France one often wishes people "joyous end-of-year holidays" ("*joyeuses fêtes de fin d'année*") which encompass both Christmas and the New Year. The court said that where an originally religious display has entered into the country's cultural tradition, it does not violate State neutrality to have it in a public building. In the second case, while the arch above Pope John Paul II (and the cross around the Pope's neck) on the donated statue did not violate the law in the eyes of the court, the large cross hanging from the arch would not be permitted in the public square because it could only be interpreted as religious in meaning.

Finally, the most recent case involved a plaintiff who sued for an injunction against the yearly *Procession des Rameaux*, or procession of the palms on Palm Sunday, a town tradition that starts in the plaintiff's very small town, with a population of only 245, in front of his house on a public street. The procession goes from his house and ends at the town Church where Palm Sunday mass is celebrated. The *Rapporteur public à la cour d'appel* of Nantes, who has a role similar to that of a European Union Advocate General, and whose recommendation the court adopted, noted that this sort of question has once again become an issue of an impassioned nature, evoking a controversy around Muslim street prayers. In those events, Muslim men prayed on the rue de Clichy in the middle of the day, blocking traffic at inopportune times, to protest their expulsion from a downtown Paris area. The Minister of the Interior had declared that there could not be prayers in the middle of the street, but at the same time said that an adequate place of worship had to be found for the protesters.¹⁷ In September of 2018, the Mayor of Nanterre was successful in bringing a criminal suit for fines against the organizers of the street protests in his Paris suburb and at least

¹⁴"*Ostentatoire*" is, however, often translated as "conspicuous," whereas the English idiom "conspicuous consumption" is translated as "*consommation ostentatoire*" in French.

¹⁵Mathilde Philip-Gay, *L'ostentatoire dans l'application du principe de laïcité*, 4 RFDA 613 (May-June 2018).

¹⁶*Id.*

¹⁷Eléa Pommiers, *Prières de rue à Clichy: comprendre le conflit entre la mairie et les associations musulmanes [Street Prayers in Clichy: Understanding the Conflict Between the Town Hall and Muslim Associations]*, LE MONDE (Nov. 16, 2017, 5:23 PM), https://www.lemonde.fr/religions/article/2017/11/16/prieres-de-rue-a-clichy-comprendre-le-conflit-entre-la-mairie-et-les-associations-musulmanes_5215991_1653130.html

so far he has personally been absolved of liability for acts taken against those involved in disturbing the peace, the *ordre public* Professor Frankenberg alludes to as a method of control.¹⁸

France's courts are seeing many kinds of anti-religion suits today, as they also did in the past. In the anti-Easter Palm Procession, anti-clerical French mayors at the beginning of the 20th century not infrequently forbade such processions in the name of *laïcité* and State neutrality.¹⁹ In the 2007 case, the court held that the law of 1905 requires that the State be neutral, but not that public roads never be used for the external manifestation or expression of religious convictions. Finding both in the particulars that this procession posed no serious challenge to *l'ordre public*, and in the general aspects that it conformed to French constitutional and European Court of Human Rights guarantees of religious freedom, the court dismissed the claim.²⁰

In Germany, the law does not forbid students from wearing the veil, but, like France, the courts have an integrative model as their goal.²¹ Thus, in a case in which an eleven-year-old Muslim student asked for dispensation from school swimming lessons, the Federal Constitutional Court ("FCC") held that she could wear a *burkini* but not be dispensed from the lessons.²² Where teachers were dismissed for displaying signs of their religion, the FCC held that their fundamental rights had been violated, noting the absence of specific *Länder* laws banning the same.²³ Some of the *Länder* subsequently did enact such laws.

Gay rights issues have also been a matter of constitutional concern in recent days. In France, assisted fertility has been granted coverage in the national health system, but the Conseil d'État has held that this applies only to heterosexual couples with a medical diagnosis of infertility. A lesbian couple with such a diagnosis sued to have a procedure to enhance fertility covered by the national health insurance system, and petitioned the Conseil d'État to refer the constitutional law objection that they had been denied equal treatment to the Conseil constitutionnel, the supreme adjudicatory body on constitutional law matters. The Conseil d'État refused, saying that no equal treatment issue was involved where, as here, unequal treatment was given in unequal situations.

Professor Frankenberg has referred to unbridled hypocrisy with respect to the Muslim veil decisions. Is it rank hypocrisy or the blinkered prisms through which the courts are adjudicating, or both? Or is the lesbian health insurance suit also part of something else: another wrinkle in the new rivalry of the two French supreme courts ever since, due to the supranational European Court of Human Rights, the constitutional court has in recent years begun to impinge on the administrative court's once-inviolable territory by having a kind of last say over it? On this, and many other issues, Professor Frankenberg's book impels his reader to think and rethink, for which we remain in his debt.

¹⁸FRANKENBERG, *supra* note 1, at 120–21.

¹⁹François-Xavier Bréchet, *Les manifestations extérieures du culte : Conclusions sur cour administrative d'appel de Nantes, 8 juin 2008, M. Bernard Favot, no. 17NT02695, 4 RFDA 632, 633 (May-June 2018).*

²⁰*Id.* at 636–37.

²¹See Elise Daniel, *Le burkini à la Cour constitutionnelle fédérale allemande ou le choix de la prévalence de la mission éducative de l'État*, 6 RFDA 1211 (Nov.-Dec. 2017).

²²See *id.* at 1212.

²³See *id.*