

Comparative Law's Coming of Age? Twenty Years after *Critical Comparisons*

By Peer Zumbansen*

A. Introduction

From its first line, Günter Frankenberg's article *Critical Comparisons*, published twenty years ago,¹ leaves no doubt as to its radical claim and aspiration. Nothing short of attempting to "re-think" comparative law, the article sets out to attack many of the dearly held beliefs in the scholarship and practice of comparative law. The beliefs, the history, the believers, their work and struggles – they are all there. Frankenberg plows through them in order to lay bare what he conceives of as being an incorrectly defended *myth of scholarly objectivity* among many of the field's pioneers and contemporary protagonists. Not being alone in his struggle of fiercely assailing the citadels of a nearly century-old comparativist scholarly venture,² his crucial contribution to the field cannot now be denied. Whether we consider its open, frank, almost casual style, or its wide reaching theoretical reach, *Critical Comparisons* remains one of the most eminent articulations of the crisis of comparative law in its first century.³ At the time of the article's 20th birthday, it is

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¹ Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411-455 (1985).

² See, e.g., Jonathan Hill, *Comparative Law, Law Reform and Legal Theory*, 9 OXFORD J. LEG. STUD. 101-115 (1989). More recently, see Ralf Michaels, *Im Westen Nichts Neues? Zum Stand der Rechtsvergleichung 100 Jahre nach dem Pariser Kongress*, 66 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 97 (2002); Ralf Michaels, *Book Review – Annelise Riles (ed.) Rethinking the Masters of Comparative Law (Hart Publishing 2001)*, 4 GERMAN LAW JOURNAL 411-417 (2003); Ralf Michaels, *Fünf Minuten Rechtsvergleichung*, 4 RECHTSGESCHICHTE 239-242 (2004).

³ For a collection of contemporary explorations into the contested discipline, see COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS (Pierre Legrand and Roderick Munday eds., 2004). Certainly, one could also consider how the writing on the "masters of comparative law" unfolds in writing about comparative law today. See Michaels, *Book Review*, *supra* note 2.

time to recollect, reassess and reconsider its main arguments and to play them back to the author and his readers. After a brief reconstruction of the article's main contentions (Part B), this brief homage will contextualize the article within a larger attempt among comparativists and legal theorists to work towards a transnational legal science (Part C).

B. Overcoming the *Cinderella Complex*

Critical Comparisons picks up Harold Gutteridge's characterization of comparative law as a sleeping Cinderella, waiting for her prince to recognize her beauty and to kiss her into life.⁴ Frankenberg analyzes the "Cinderella Complex" and cautions against casual dismissal of its causes and symptoms. "The lack of interest among law teachers and students is real," Frankenberg warns.⁵ In presenting the most common objections that lead to a marginalization of comparative law in academic teaching and research, not to mention the almost total neglect of the field in the practice of law, Frankenberg lays out a panorama of constraints under which legal education has to exist, which, in many ways, parallels contemporary assessments of what law students supposedly "need from law school."⁶ We see here, again, a "closing of the mind" (a la H Bloom), only that it cannot be opened by returning to the study of the classics. Instead, Frankenberg's analysis of the Cinderella Complex succeeds in striking a fine balance in acknowledging the weight of the obstacles in the discipline's attempted rise to relevance (if not fame) on the one hand and its hidden potentials for an overcoming strategy on the other.

I. The Reign of Functionalism

Frankenberg's shattering critique of the wide-ranging absence of theory in comparative law and, therewith, of the ultimate lack of critical self-examination, culminates in the exposition of what he identifies as the two reigning paradigms in comparative law. The first is called the "*juxtaposition plus*" paradigm and it is

⁴ Frankenberg, *supra* note 1, at 418-9; HAROLD COOKE GUTTERIDGE, AN INTRODUCTION TO THE COMPARATIVE METHOD OF LEGAL STUDY AND RESEARCH (1949). However, some have observed that the Cinderella debate regarding comparative law - while still echoing here and there - has come to an end. See Vernon Valentine Palmer, *From Leretholi to Lando: Some Examples of Comparative Law Methodology*, 4 GLOBAL JURIST FRONTIERS 1-29 (2004), available at <http://www.bepress.com/gj/frontiers/>.

⁵ Frankenberg, *supra* note 1, at 419.

⁶ See the critique by Harry Arthurs. Harry Arthurs, *Poor Canadian Legal Education: So Near to Wall Street, So Far from God*, in: 38 OSGOODE HALL LAW JOURNAL 381 (2000).

characterized by an allegedly objective confrontation of comparable institutions, rules and doctrines from one legal culture to the other. Certainly, one does not have to seek far to uncover the very subjective inclinations of the scientist in searching out his examples and targets of comparison.⁷ Their classification on the basis of their “likeness” and their grouping in “families,” “styles” and “traditions” assumes the “commonality of problems in, say, Botswana, the People’s Republic of China, Egypt and California (representing the West).”⁸ This gives the comparativist “a ‘method’ of doctrinal jurisprudence” with which she can compare “legal rules and statutes and theories of different systems in order to formulate or at least indicate the general principles and precepts, common cores or the constants of law.”⁹ There is a crucial home bias that is driving the comparativist’s strategy and research: “The implied adequacy of *law* to solve what appear to be universal and perennial problems of life in society betrays and underscores not only how the comparativist’s own country’s approach is supposed and privileged, but more particularly with respect to the United States, British German, and French studies [...] how their notion of law is itself privileged.”¹⁰ Ultimately, the *juxtaposition-plus* approach is based on a fundamental legocentric position,¹¹ one that is characterized by treating law “as a given and a necessity, as the natural path to ideal, rational or optimal conflict resolutions and ultimately to a social order guaranteeing peace and harmony.”¹² We shall come back to this thought.

The second approach identified by Frankenberg as central to contemporary comparative studies is labeled “*comparative legal functionalism*.”¹³ It is indeed characterized by a painful avoidance of what – according to Frankenberg – would regularly have to be the prerequisite of any meaningful functional comparison. It would be of vital importance to “assay either what ‘the law’ is or what ‘the same function’ could be.”¹⁴ Instead, the comparativist will hardly ever engage in the former while usually providing quite arbitrary justifications for the latter. In reducing the problem of dealing with several unknowns to an assertive and

⁷ Frankenberg, *supra* note 1, at 430-1.

⁸ *Id.*, at 431.

⁹ *Id.*, at 433.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*, at 445.

¹³ *Id.*, at 434.

¹⁴ *Id.*, at 436.

pragmatic strategy, the comparativist will seek to compare what is comparable, and hereby target similar or functionally comparable laws as well as functions. While adopting an evolutionary theory of law to grasp a large, wide-open range of societal activities and values that shape the foreign legal field, the comparativist will regularly target “certain specialized agencies (courts, legislatures, etc.), negating or marginalizing the effects of legal forms and ideas in the realm of consciousness as ideologies and rituals.”¹⁵ It is here that the legocentric bias unfolds in its fullest potential. “By stressing the production of ‘solutions’ through legal regulations, the functionalist dismisses as irrelevant or does not even recognize that law also produces and stocks interpretive patterns and visions of life which shape people’s ways of organizing social experience, giving it meaning, qualifying it as normal and just or as deviant or unjust.”¹⁶

Frankenberg leaves no doubt as to the affirmative and reactionary thrust in the functionalist approach when he observes that “[f]unctionalism has no eye and no sensitivity for what is not formalized and not regulated under a given legal regime. What started out as a fascinating hypothetical experiment has turned into a rather dry affirmation of legal formalism.”¹⁷ Its reactionary content and its alleged objectivity’s “false modesty” is revealed when the language of legal problem is translated into the language of universal problems. Frankenberg’s right-on targeting of Zweigert’s and Kötz’s crystal clear exposition of this functionalist approach¹⁸ lays bare the still very powerful functionalist approaches in private law oriented comparative research.¹⁹ In light of a continuously defended, un-political, value-neutral private law, now available to govern and organize trade exchanges on global markets,²⁰ the critique put forward by Frankenberg and elsewhere cannot be loud enough.²¹

¹⁵ *Id.*, at 438.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Compare ZWIEGERT AND KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 25 (T. Weir trans., 3d ed. 1977).

¹⁹ For a critique, see, e.g., Zumbansen, *Europe’s Darker Legacies. Notes on ‘Mirror Reflections’, the ‘Constitution as Fetish’, and other such linkages between the Past and the Future*, 43 OSGOOD HALL LAW JOURNAL (forthcoming 2005).

²⁰ KLAUS PETER BERGER, THE CREEPING CODIFICATION OF TRANSNATIONAL LAW (1996).

²¹ For the field of labor law, see the harsh critique by Manfred Weiss. Manfred Weiss, *The Future of Comparative Labor Law as an Academic Discipline and as a Practical Tool*, 25 COMPARATIVE LABOR LAW AND POLICY JOURNAL 169-181 (2003). Weiss argues for a much wider functional approach, that reaches out to the larger regulatory, hard and soft law, environment as well as to underlying methodological questions and concerns of comparing different functions. See also William Scheuermann, *Franz Neumann – A Legal*

Frankenberg rightly states that a minimal requirement of a functionalist comparative method would be the recognition of the need to provide for at least a rudimentary assessment of the underlying understanding of “law” as such, in the comparative enterprise. However, it is precisely this perspective that is not taken. In asserting that legal regimes generally serve similar purposes, the functionalist approach can gloss over the unanswered question of what defines the *legal* regime in the first place.²² The fundamental assertion, as a result, leads to the assimilation of the foreign legal system to the domestic legal system as only those things already recognized as familiar (and thus comparable) appear on the comparative radar screen.

But, what would be the alternative? “Are we obliged to study the history, economy, sociology, psychology and politics of law?”²³ Surely, this would surpass anybody’s capacities. In appropriating, thus, the comparative research agenda, a “realistic” approach wins the day and muddling through – alone and in international teams – emerges as a possible approach. Frankenberg deciphers the strange dilemma constantly faced by the functional comparativist: “suppressing the context and considering it,” “moving from the general (function) to the specific without knowing what makes the specific specific.”²⁴ “The functionalist negates the interaction between legal institutions and provisions by stripping them from their systemic context and integrating them in an artificial universal typology of ‘solutions’. In this way, ‘function’ is reified as a principle of reality and not taken as an analytical principle that orders the real world. It becomes the magic carpet that shuttles between the abstract and the concrete, that transcends the boundaries of national legal concepts, that builds the system of comparative law, the ‘universal’ comparative legal science of ‘the general law.’”²⁵

II. Comparative Law Thrown Back Onto Itself: Seeing, Learning, Changing

It is against this background or, to put it differently, in this dimly lit room of comparative law scholarship, that Frankenberg ignites a torch of critique and

Theorist of Globalization?, 35 KRITISCHE JUSTIZ 79-89 (2002); A. CLAIRE CUTLER, PRIVATE AUTHORITY, PUBLIC POWER (2003).

²² Frankenberg, *supra*, note 1, at 436 (with references to ZWEIGERT AND KÖTZ, *supra* note 18).

²³ *Id.* at 439.

²⁴ *Id.* at 440.

²⁵ *Id.*

reconstruction. In short: comparative law is to become a learning experience and for it to become one, we must first acknowledge the complexity of the challenge, which alone defies all easy answers and remedies. "Comparative Law never had too little baggage in the overhead compartment. To this very day it is crammed with thoughts and oughts, with aims and claims."²⁶ His central and ultimately liberating proposal consists in the suggestion to understand comparative law as "empowering and liberating, provided that we do not take our terms of and perspective on law for granted but are open to a radical re-evaluation of the domestic legal consciousness."²⁷

Following this intuition to a much more un-defined, "ambiguous"²⁸ and open-ended approach to legal analysis, Frankenberg can indeed formulate a radically more powerful and uncompromising self-critique of the very instruments employed in the comparative undertaking. Reflecting on the un-defining, negating, non-identical potential of an always already appropriated and biased legal understanding, comparative law becomes (just) another exercise in legal critique *per se*. Beginning with a critique of comparative law's placing of "law" in the center of its endeavor, the next step is to critique law itself. Surely, this is reflective of a basic distrust in or, even fear of law's power.²⁹ And, it reaches out to embrace other avenues of legal critique, as there are legal anthropology³⁰ and political science.³¹ Frankenberg posits comparative law as an empowering critical exercise through which to illuminate the marginalized, the excluded and silenced voices in the other – and one's own – legal (socio-economic, political and cultural) regime. In this respect, Frankenberg premeditates the central gist of Harold Koh's powerful evocation of domestic legal theory and legal discourse as a prerequisite and core element of transnational legal critique.³² Reconstructing a particular legal discourse will ultimately help in identifying the hidden agendas and background assumptions that inform our appropriation of foreign legal systems, their –

²⁶ *Id.* at 441.

²⁷ *Id.*

²⁸ *Id.*

²⁹ See Douglas Hay, *Time, Inequality, and Law=s Violence*, in *LAW=S VIOLENCE* 141-173 (Austin Sarat and Thomas Kearns eds., 1992); Cornelia Vismann, *Jurisprudence: A Transfer Science*, 10 *LAW AND CRITIQUE* 279-286 (1999); Costas Douzinas, *Violence, Justice, Deconstruction*, 6 *GERMAN LAW JOURNAL* 171-178 (2005).

³⁰ See, e.g., Sally Merry Engle, *Anthropology, Law, and Transnational Processes*, 21 *ANNUAL REVIEW OF ANTHROPOLOGY* 357-379 (1992).

³¹ A. CLAIRE CUTLER, *PRIVATE POWER, PUBLIC AUTHORITY* (2003).

³² Harold Hongju Koh, *Transnational Legal Process*, 75 *NEBRASKA LAW REVIEW* 181-206 (1996).

assumed – differences and similarities. Comparative law, then, is akin to a fundamental critique of “law and development,” which has convincingly been shown to be crucial for importing as well as for exporting countries.³³ Whereas the neo-liberal strand in law and development continues to carve out the quasi-natural, market based self-ordering mechanics of contract and property law,³⁴ the rules of contract law are as little “natural” as they are “pre”- or “extra legal”, or merely technical.³⁵

Redirecting the focus back to the domestic legal order, legal rules, principles and institutions need to be exposed to critique as much as other phenomena of the political order. Only then can we identify law’s power in shaping social order and, simultaneously, being shaped by it.³⁶ In this light, we can regain a perspective on the frailty of law, its very fragility and vulnerability as a guarantor of political voice. In taking law for granted, in understanding it as our “second nature,” we fail to engage in legal critique. “A pervasive legal consciousness keeps us in a Kafkaesque, fascinating and terrifying world of rights and duties, rules and standards, procedures and punishments.³⁷ It is not so much the law’s institutional framework or symbolic representation, not so much courts, texts and arguments or conscious use of the instruments of law. It is rather its hidden-ness and pervasiveness as a social agenda and as our ‘second nature’ framing our minds, kindling fantasies, structuring and limiting our social visions, and influencing our actions – that account for its mystique and magic spell.”³⁸

Comparative law, ironically, provides for a distance to the domestic legal order, while it redirects the analytical focus back onto it. Studying law in a foreign system, analyzing the ambiguity of legal and social and political and economic rule, reminds us of law’s other, social nature. This has a strong impact on our understanding of the emergence and creation of law, as it will likely illuminate the

³³ See KERRY RITTICH, RECHARACTERIZING RESTRUCTURING (2002); Kerry Rittich, *Enchantments of Reason/Coercions in Law*, 57 *MIAMI LAW REVIEW* 727-742 (2003).

³⁴ Richard Posner, *Creating a Legal Framework for Economic Development*, 13 *WORLD BANK OBSERVER* 1-11 (1998).

³⁵ RITTICH, *supra*. note 33.

³⁶ This theme is unfolded by Frankenberg himself. See Günter Frankenberg, *The Learning Sovereign*, in 2 *ANNUAL OF GERMAN & EUROPEAN LAW* 2004 (Russell Miller and Peer Zumbansen eds., forthcoming 2005).

³⁷ Douglas Hay, *Time, Inequality, and Law’s Violence*, in *LAW’S VIOLENCE* 141-173 (Austin Sarat and Thomas Kearns eds., 1992).

³⁸ Frankenberg, *supra* note 1, at 447.

alternatives to legal order as well. This will ultimately not only open our eyes for the complex regulatory scheme in the studied foreign jurisdiction but also for the ambiguities of hard and soft law, official and non-official law in our domestic legal regime. Using the example of the comparative study of abortion rights in foreign jurisdictions, Frankenberg powerfully unfolds a re-conceptualized comparative agenda, one that aims at critiquing its own terminological and conceptual baggage in order to gain a clearer view on the dispute “there” as well as “here.” In tracing the steps of “juridifying” the political struggle over abortion, the comparativist contributes to a deeper understanding of how societal conflict gets translated into law and ultimately isolated, detached and “alienated” from its social context.³⁹

Laying bare the isolating thrust of juridification, the icing effect of legalization of a dynamic and constantly evolving social practice,⁴⁰ reconnects this re-conceptualized comparative analysis to both the radical critique of legal formalism⁴¹ and of the wide-reaching regulatory reforms of the 1970s and 1980s.⁴² It reassesses various national narratives of law reform and exposes them to a fundamental critique of their impetus and outcomes. Frankenberg’s re-thinking of comparative law, then, must be seen in unfolding a radical program of legal critique as part of societal practice in the context of historical, political struggles. While some of *Critical Comparisons’* connecting points with parallel undertakings in legal critique – such as law and development or anthropology – have already briefly been alluded to, there is yet another dimension worth extrapolating. Frankenberg’s article, in its very last pages, points to yet another potential of re-conceptualized comparative legal thinking, one that indeed takes away the ground on which comparative legal science has come to rest and on which it can no longer sit too comfortably. “Critical comparison extracts from beneath the claims of legal rationality competing political visions and contradictory normative ideals. Not mesmerized by intricacies of legal reasoning in terms of the public/private distinction and arguments for or against judicial activism or self-restraint, the

³⁹ Gunther Teubner and Peer Zumbansen, *Rechtsentfremdungen: Über den Mehrwert des Zwölften Kamels*, 21 ZEITSCHRIFT FÜR RECHTSZOLOGIE 189-215 (2000) [English version: *Alienating Justice: On the Social Surplus of the Twelfth Camel*, in CONSEQUENCES OF LEGAL AUTOPOIESIS 21-44 (Nelken and Priban eds., 2001)].

⁴⁰ See the illuminating analysis in CUTLER, *supra* note 21.

⁴¹ Most recently, see Duncan Kennedy, *The Disenchantment of Logical Formal Legal Rationality*, 55 HASTINGS LAW JOURNAL 1031-1076 (2004).

⁴² See Rudolf Wiethölter, *Proceduralization of the Category of Law*, in CRITICAL LEGAL THOUGHT: AN AMERICAN-GERMAN DEBATE 501-510 (Christian Joerges and David M. Trubek eds., 1985); Gunther Teubner, *Juridification – Concepts, Aspects, Limits, Solutions*, in, JURIDIFICATION OF SOCIAL SPHERES 3-48 (GUNTHER TEUBNER ED., 1987); PEER ZUMBANSEN, *ORDNUNGSMUSTER IM MODERNEN WOHLFAHRTSSTAAT. LERNERFAHRUNGEN ZWISCHEN STAAT, GESELLSCHAFT UND VERTRAG* (2000).

'distanced' comparativist uncovers the political underpinnings of legal doctrines and decisions, thus working towards a political theory of the law."⁴³ It is this emerging utopia that the concluding section of this paper attempts to outline.

C. The 'Oath of the Comparativists' and the Crusade of 'Critical Comparisons'

I. What's in a picture?

David's painting *The Oath of the Horatians* of 1784 depicts the conflict between heroic men willing to die for the public good – standing at the center of the picture – and disconcerted, allegedly weak, family members and relatives, *feminine*, should there be any doubt, on the right hand side, gazing upon the rallying of the heroes in despair and hope that none of what they see is actually true. To spare many men's and women's lives, it is decided that the conflict between Rome and Alba Longa be resolved by the fight among six of their best men. In spite of expectations of Rome's inevitable victory, two Horatians fall instantaneously and the third, facing inevitable death, escapes. The three Curatians, bearing wounds of different intensity take up the chase with various aptitude. The least wounded catches up with the fleeing Horatian who takes him by surprise. The same fate will end the lives of the other two hunters, leaving the Horatian surviving. Returning, he is hailed victor, but his sister, mourning the death of her husband – one of the fallen Curatians – and calling her brother a murderer, is killed by him. He is now a triumphant warrior – and a murderer. As a murderer he is killed, as both a murderer and a triumphant savior of peace, he is commemorated.

What does the painting actually show of all this? We know that (one of) the men in the public sphere shall carry away first triumph, then condemnation while the women congregating in private will suffer irreparable losses. The French Revolution is upon David and his contemporaries and heroic acts are in demand. The demarcation of the warriors and the worriers is brought to its extremes under extreme circumstances. Whether it is the war between Rome and Alba that necessitated the courageous battle among a handful of chosen representatives for their cities, or whether it is a different *crisis* or *state of exception*, the pressure on identifying the place of decision-making power will regularly lead to the exclusion of alternatives.⁴⁴ In Bertolt Brecht's drama *The Horatians and the Curatians*, we only

⁴³ Frankenberg, *supra* note 1, at 452.

⁴⁴ See Martti Koskenniemi, "The Lady Doth Protest Too Much." *Kosovo and the Turn to Ethics in International Law*, 65 MODERN LAW REVIEW 159-175 (2002); Martti Koskenniemi, *Book Review* - GIOVANNA BORADORI (ED.), PHILOSOPHY IN A TIME OF TERROR. DIALOGUES WITH JÜRGEN HABERMAS AND JACQUES DERRIDA (2003), 4 GERMAN LAW JOURNAL 1087-1094 (2003), available at

learn of the deadly fight between the six warriors, while the drama ends before the return of the surviving warrior and the death of this widowed sister.⁴⁵ Heiner Müller's drama, *The Horatian*, in contrast, focuses only on this aftermath, exploring the fate of the returning warrior being "victor and murderer." Here, the warrior is convicted for the murderer of his sister, executed and then re-assembled, thereby expressing the irreconcilable and yet inseparable dimensions of his doing.⁴⁶ Both plays make clear – as does the painting – that how we tell the story determines how we remember what happened.

The painting captures and eventually eternalizes a set of conceptions that could just as well be proven correct by subsequent historical events as they could also be mere images of what the artist had in mind with regard to the real world. That the painter had chosen to depict the time *before* the tragedy instead of a later moment, inevitably works towards the consolidation of the public, heroic oath and all that follows while dismissing, marginalizing, and ultimately silencing the weak elements of this historical moment. While David's depiction of the world of men and of the world of women already premeditates the coming of civil society with the slowly beginning erosion of the private sphere and a subsequent need of re-orientation and re-definition of female identity, both worlds are still hyper-stated in their polarity. One is not the other and both are held as counterpoints between which only a strong hand shall strike the balance. Historical differences – here between the conflict of Rome and Alba Longa and the dawning French Revolution – are made to disappear by the usage of the imagery in its present time.⁴⁷

II. Words Conflicts Are Made Of

So, the conflict(s) that we find expressed in the painting – what are we to do with them today? In what language are we to speak of them? Doing history justice is just as presumptuous a project as rendering an adequate picture of foreign legal order. The insightful comparativists have consistently pointed to the domestic learning effects of comparative law, and we are well advised to pursue this idea a little

http://www.germanlawjournal.com/pdf/Vol04No10/PDF_Vol_04_No_10_1087-1094_Legal_Culture_Koskenniemi.pdf.

⁴⁵ Bertolt Brecht, *Die Horatier und die Kuriatier*, in *DER OZEANFLUG/ DIE HORATIER UND DIE KURIATIER/DIE MAßNAHME* 29 (1980).

⁴⁶ Heiner Müller, *Der Kuratier*, in *WERKE 4: DIE STÜCKE 2* (2001).

⁴⁷ Most remarkably, see Reinhart Koselleck, *Vergangene Zukunft der frühen Neuzeit*, in *VERGANGENE ZUKUNFT. ZUR SEMANTIK GESCHICHTLICHER ZEITEN* 17, 18 (1979).

further. In a world in which the struggle of “transnational” legal discourses against the predominance of “international” ones⁴⁸ marks contemporary debates,⁴⁹ we can clearly recognize a parallel struggle within our domestic legal disputes. Frankenberg’s article *Down By Law* of 1989 is exactly that,⁵⁰ a very concise reconstruction of the progression of legal theory’s grand themes. Assuming a transatlantic perspective, *Down By Law* succeeds in bringing together poignant writings from Europe and the US and Canada to sketch the progress in theoretical thinking about the law – what it is, what it is not and what it might come to be⁵¹ – has taken in the course of the last 150 years. His article is congenial to accounts such as Robert Gordon’s *Critical Legal Histories*,⁵² Roberto Unger’s *Critical Legal Studies Movement*⁵³ and Harold Koh’s *Transnational Legal Process*.⁵⁴ All these contributions share a powerful narrative that has immense repercussions for the further development of comparative law. They reflect the very nervousness and sensibility of domestic legal discourses as their participants recognize and unfold the connections between “their” critical discourses and those unfolding in other social, political, economic and legal cultures.⁵⁵ This sense of being directly affected by “legal” struggles elsewhere is shared in an emerging global legal discourse. This is not to say that we have attained a global civil society, or a cosmopolitan global law.

⁴⁸ See PHILIP JESSUP, *TRANSNATIONAL LAW* 6-13 (1957). For a restatement of this struggle, see, e.g., Neil Walker, *Postnational Constitutionalism and the Problem of Translation*, in *CONSTITUTIONALISM BEYOND THE STATE* 27 (J.H.H. Weiler and M. Wind eds., 2003); Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 *COLUMBIA JOURNAL OF TRANSNATIONAL LAW* 209-274 (2002); Peer Zumbansen, *Transnational Law*, in *ENCYCLOPEDIA OF COMPARATIVE LAW* (Jan Smits ed., forthcoming 2005).

⁴⁹ See Ralf Michaels, *The Re-State-ment of Non-State Law*, *WAYNE LAW REVIEW* (forthcoming 2005).

⁵⁰ *Id.*

⁵¹ Rudolf Wiethölter, *Recht-Fertigungen eines Gesellschaftsrechts*, in *RECHTSVERFASSUNGSRECHT: RECHT-FERTIGUNGEN ZWISCHEN PRIVATRECHTSDOGMATIK UND GESELLSCHAFTSTHEORIE* (Christian Joerges and Gunther Teubner eds., 2003).

⁵² Robert Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57 (1984).

⁵³ Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 *HARV. L. REV.* 563-675 (1983).

⁵⁴ *Supra*, note 32.

⁵⁵ See Sally Falk Moore, *Law and Social Change: the semi-autonomous field as an appropriate subject of study*, 7 *LAW AND SOCIETY REVIEW* 719-746 (1973); Laurence R. Helfer, *Constitutional Analogies in the International Legal System*, 37 *LOY. L. A. L. REV.* 193-236 (2003); Russell A. Miller, *Lords of Democracy: The Judicialization of ‘Pure Politics’ in the United States and in Germany*, 61 *WASHINGTON & LEE LAW REVIEW* 587-662 (2003); Paul Schiff Berman, *From International Law to Law and Globalization*, 43 *COLUMBIA JOURNAL OF TRANSNATIONAL LAW* 485 (2005); Michaels, *supra* note 49; Viktor Winkler, *Dubious Heritage: The German Debate on the Anti-Discrimination Law*, *IOWA JOURNAL OF TRANSNATIONAL LAW AND CONTEMPORARY PROBLEMS* (forthcoming 2005).

For now, pluralism and conflict, colliding discourses,⁵⁶ seem to determine the emergence of a global legal order.

Terminology (the “state,” “rights,” private autonomy,” “rule of law,” “sovereign equality,” etc.) continue to distort the dialogue and learning relationship between the discussants in different discourses, while at the same time providing starting points for respective deconstructions of the underlying history of the terms’ use in respective legal etc. cultures.⁵⁷ The parallelism of legal inquiry between the international/transnational level and the domestic level – there between states and non-state actors, here between state and non-state law, “form and substance,” “public and private,” must be taken into account for comparative law to realize its aspirations of actually explaining what the law is elsewhere. The erosion of boundaries of intellectual discourses and the interpenetration of political, economical and cultural struggles with little regard to territorial boundaries has for a long time already led to cross-fertilizations,⁵⁸ transplants⁵⁹ and irritants.⁶⁰

Comparative Law is not unfrozen in time, or is it? Just like David’s painting or, just like transnational legal discourses, comparative law is part of a deeper critique of law itself. It is always already part of an ongoing process of reflection, critique and – irony. The irony of the fast world of legal publications, the frenzy of getting another piece out and circulating it even beyond the ever increasing number of witnesses in footnote 1, lies in the fact that an article on comparative law, written some twenty years ago, still has got it right.

⁵⁶ See Andreas Fischer-Lescano and Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICHIGAN J. INT’L L. 999-1045 (2004).

⁵⁷ Peer Zumbansen, *Piercing the Legal Veil: Commercial Arbitration and Transnational Law*, 8 EUROPEAN LAW JOURNAL 400-432 (2002); Peer Zumbansen, *Sustaining Paradox Boundaries: Perspectives on the Internal Affairs in Domestic and International Law*, 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW 197-211 (2004).

⁵⁸ Helfer, *supra* note 55; ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

⁵⁹ ALAN WATSON, *LEGAL TRANSPLANTS* (2^d ed. 1993). For a recent self-reassessment, see Alan Watson, *Legal Transplants and European Private Law*, 4 ELECTRONIC JOURNAL OF COMPARATIVE LAW (December 2000), available at <http://www.ejcl.org/ejcl/44/44-2.html> (defending his approach against the attack of Pierre Legrand).

⁶⁰ Gunther Teubner, *Legal Irritants: How Unifying Law Ends Up in New Differences*, in *VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE* 417-441 (Peter Hall and David Soskice, eds., 2001).