

BOOK REVIEW

Frankenberg G *Comparative Constitutional Studies – Between Magic and Deceit* (2018 Edward Elgar Publishing UK)
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Abstract

This contribution reviews the book by Günter Frankenberg titled *Comparative Constitutional Studies – Between Magic and Deceit* published by Edward Elgar Publishing in 2018.

Keywords

Comparative constitutionalism; postmodernism; critical legal thinking

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Review

If there ever could be something like a constitutional artist, it would be Günter Frankenberg. A German scholar who is a disciple of the Critical Legal Studies approach for which Harvard's Institute for Global Law and Policy is well known – and with clear sympathies for postmodern thinking in the mould of Jacques Derrida, Michel Foucault, Pierre Legrand and their ilk.

Before proceeding with the actual review, a reviewer's word to those for whom this characterisation of an author may be off-putting: don't be repelled, because, in contrast to much of the work of his deconstructive referents, Frankenberg's writing (including this latest tome) is (mostly) a joy to read. The book is hugely informative, provides many fresh perspectives and is even entertaining in places, even though there is much in it with which the normal reader interested in the theory and substance of constitutional law and comparison will not agree or feel comfortable with.

The book has eight chapters, the first being an introductory explanation of the subtitle "between magic and deceit". The rest is divided into three Parts, and following the last chapter, there is a brief "Epilogue" outlining the disastrous trends in current affairs characterised by concurrent crises. Following this bleak outline, the last paragraph of the epilogue (and the book, at pp 290-291) reveals the essence of the author's intentions:

Too sombre a note on which to end these Comparative Constitutional Studies? Then this epilogue should be read as a prologue, just as this textbook should be read as a workbook. And constitutions should not be worshipped as documents containing magical energies but texts with the force of law commanding close reading and critique to bring to the fore their ideas, ideals and ideologies.

The narrative of magic and deceit addresses the ambitious dogmatic idealism characteristic of constitution writing, often hiding a strong dose of

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cynicism on the part of those endowed with constituent and constituted power. On page 7 the author refers to the *Constitution of the Republic of South Africa*, 1996 in which the "development clauses most clearly express the message of the egalitarian project and what many thought would be the magical transformative power of the document", and on page 11 he suggests that constitutional "magic" may be "nothing but the bright side of deceit".

Part I of the book groups two chapters together under the heading "Theory and Method". Chapter 2 is focused on constitutional idiom and design. For Frankenberg a constitution is "an essentially contested and highly polysemous concept, generating a strong dose of symbolism" (p 25) and at pages 26-27 he concludes that "a modicum of deceit is required to buttress the belief in law and sustain the notion that political power is exercised within the terrain of constitutional rules, constraints and arguments". Students of constitutional law (for whom the author rather idealistically intended the book as an instrument of instruction) will indeed find much in chapter 2 to clarify basic notions, although only after having read one or more less demanding introductory texts. The notions discussed include contextual history and theory, classification of constitutional archetypes (manifesto, contract, codification and programme), the elements of constitutional construction (rights and principles, values and duties, allocation of political power and the resolution of conflict) and the impact of constitutional "writteness".

Chapter 3 addresses the increasingly contested field of the theory and methodology of constitutional comparison. While rejecting the notion that comparing constitutions is a novel and underdeveloped endeavour, the defensibility of seeking similarity in constitutions, striving for unitary solutions, normalisation of the foreign through assimilation and what is labelled "constitutional ethnocentrism", is disputed. Frankenberg leaves no stone unturned to denounce "mainstream scholars" who "not only operate

with a rather narrow focus, but also pursue a unitary project that confirms their belief in a cross-culturally coherent body of constitutional law" (p 69). Functionalism (supported by structuralism and factualism) is described as a magic carpet allowing the comparatist not to be too concerned about understanding the "strange laws of strange cultures" (pp 71-72). As a postmodernist, being equally distrustful of all methods, he presents the idea of comparison as narrative helpful when comparatists "create a second social reality" (p 85), "joining description, explanation and argumentation as a further rhetorical mode of discourse" (p 91). Frankenberg finds "constitutionalism" as an almost universally accepted idea to be a useful "intellectual framework" for comparison, despite the various forms it takes (which he discusses on pp 94-107). He concludes that there are plural forms of constitutionalism, in fact "constitutionalisms".

Chapters 4 and 5 are presented as Part II under the heading "History and Transfer". In chapter 4 the range of notions current in the language of constitutional comparison describing the modalities of dissemination of constitutional concepts around the world (borrowing, reception, import/export, transplant, adaptation, influence, translation, mutation, migration, transfer), is played upon. The author deals with constitutional information as a commodity in order to "clear away the ideological mist and deconstruct the idealist myths that generally enshroud the practice of constitution-making" (pp 111-112). With some wry humour he devises an imaginary constitutional IKEA where "utterly formalist and positivist" ideas gleaned from liberal constitutionalism are made readily available in the "global showroom", however without "sufficient background information that could guide the application of norms or situate arguments in the new (domestic) epistemic community and political context" (p 126). Frankenberg denounces the reality that "constitutional architects" use "the same vocabulary and interchangeable construction manuals" (p 136) and urges the comparatist to go in search of the "odd details", for "[s]earching for odd details liberates comparative constitutional studies from the straightjacket of

unitary thinking" (p 153). He is primarily interested in how legal transfer (not transplant) happens, and "what happens when it happens" (p 155).

In chapter 5 we find an adroit lesson in history, the constitutional history of 19th Century Europe (a laboratory). The results of the experiments of that age continue to reverberate in the constitutional thinking and language of the present. An understanding of that history is essential for constitutional comparison. Writes Frankenberg: "[u]nless reduced to a mythical founding era of Great Democratic Revolutions, nineteenth-century Europe reveals a series of struggles between the forces of revolution and restoration" (p 161), and on the next page he finds that "[i]n the realm of political legitimacy, religion was superseded by constitutionalism." An important but seldom realised truth emerges from the descriptive historical discussion, namely that constitutions are useful ("handy") from different perspectives, because they "magically de-personalize political power and manifest the abstraction of the modern idea of the state as pure script" (p 187).

"Order" is the theme of the three chapters of Part III. Chapter 6 deals with "order from conflict", but with a difference. On page 195 we read that "constitutional law is believed" (suggesting that the author believes differently) "to be primarily concerned with ordering politics", and then takes it in different directions, *viz.*: presenting the constitution as "an order of signs", and by extending the focus on authority to the modalities of coordination and cooperation. This rather obscure chapter seems to pursue the agenda of cerebral denunciation of conventional or mainstream constitutional comparison whose devices "displace the foreign, privilege the domestic constitution and thus turn out to be useful for quite familiar and political purposes" (p 198), demonstrating "a remarkable lack of concern about the aspect of how a social-political regime is *constituted* and what the contribution of constitutions to establish 'orderly' social-political, also economic relations might be" (p 199). Constitutions, it is argued, are attempts at balancing the struggles between individual (egoistic) demands

with those of society. This, he demonstrates, is done differently in constitutions characterised by constitutionalism in respectively the liberal, egalitarian and social(ist?) moulds (p 204).

Although Frankenberg wrote in his Preface (p ix) that he did not intend "encyclopaedic comprehensiveness", Chapters 7 and 8 consist of a *tour de force* of concrete comparison of countless existing and some historical constitutions and constitutional elements. The purpose is presumably to serve as a demonstration of how he prefers to do actual (read "different from that which is purveyed by the 'textbook hegemony'") constitutional comparison in order to present conflictive social reality instead of the "wishful thinking and theoretical pipe dreams" based on assumptions of social homogeneity (p 223). Key concepts that he uses for flexing his impressive comparative muscles in Chapter 7 include "deep division", "fragmentation", "partition", "denial", "counterfactual narratives", "cooperative disagreement", and "institutional segregation", and in Chapter 8, which deals with constitutional states of exception, the unification of "mystery and demons", leading to constitutional orders being "subverted by processes of normalization" (p 289).

This book is good, but not easy read. Günter Frankenberg has developed a flair for disrupting and defying what many (especially the "mainstream" comparatists who are the antagonists in Frankenberg's postmodern universe) have come to consider core notions of constitutional comparativism. He does this with style, subtly ridiculing those whose efforts to contribute to the exploding field of constitutional comparison and its methodologies are different from his. It is done with such style that one might almost expect the denounced conventional comparatists to thank him for the refined (although in places less than delicate) intellectual insults directed at them.

Those who feel insulted must however not refrain from reading this work which is so packed with information, novel ideas, fresh interpretations,

theorisation and cerebral challenges, that it is hardly of concern whether the readers are persuaded by the bold approach and innovative conceptualisations: it is likely that every reader with an interest in constitutional law and comparison (not only the imagined brilliant students for whom the author said he intended this to be a text book) will gain fresh insights – and may perhaps even adapt the methods they use for constitutional comparison against which Frankenberg has made a *prima facie* case.