

Kischel (and Frankenberg)

Even as Günter Frankenberg was reprimanding Kischel's one-thousand-page *Rechtsvergleichung* for its "glorifi[cation] [of] a narrowly utilitarian, positivist version" of comparative law,¹ rebuking it as "little more than a 'Fehlerlehre'",² admonishing its "professional naiveté",³ for example as regards its "presumption of neutrality",⁴ chiding its intellectual confinement to "authors in agreement or voicing only mild dissent" and its censorship of unaligned views,⁵ castigating its "kind words" towards the orthodoxy as "an attempt to accommodate or pacify the discipline's mainstream",⁶ berating its assumptions as "artificially constructed" and indeed as "occasionally scary",⁷ deploring at once the book's "generalizations" and its "narrow discussion[s]",⁸ regretting the argument's colonial contention to the effect that "Latin America belongs to the continental European context",⁹ denouncing the author's pretentious assertion that he can supply "a blueprint for the understanding of all Asian legal orders",¹⁰ lamenting the dismissive heading "Common Law in the Rest of the World", beneath which Canada, Australia, and New Zealand find themselves addressed as "Some Former Colonies",¹¹ and branding the entire effort as "oblivious to the ethical challenge of any good comparative practice";¹² even as Frankenberg was unhesitatingly holding that Kischel founders somewhat dramatically in his attempt to "renovat[e] the textbook-tradition in comparative law";¹³ and even as Frankenberg was confessing that his "[h]igh expectations [...], nourished by the monumentality of the volume, [had been] disappointed",¹⁴ I somehow kept hoping against hope.

PL, summarizing PL, "Kischel's Comparative Law: *Fortschritt ohne Fortschritt*" [review article on U. Kischel, *Comparative Law* (Oxford, 2019)], (2020) 15/2 J. Comp. L. 292, pp. 292-93.

¹ G. Frankenberg, "'Rechtsvergleichung' – A New Gold Standard?", (2016) 76 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 1001 (2016), p. 1004.

² *Id.*, p. 1007.

³ *Id.*, p. 1003.

⁴ *Id.*, p. 1005. As Frankenberg writes, "[t]he presumption of neutrality is not a very promising way to meet the foreign at eye-level": *Ibid.*

⁵ *Id.*, p. 1004. Kischel's intellectual policing is so striking that it is legitimate to speak of epistemic injustice vis-à-vis a number of comparatists who have had a significant impact within comparative law, say, since the 1980s (which means a "window" spanning roughly a half-century). The reasons for Kischel's apprehensive monitoring are not hard to devise and must ultimately resolve themselves in terms of an unwillingness or an inability to engage. Either way, such a fraught renunciation drastically erodes the creditability of the framework being propounded, effectively an untested template.

⁶ *Id.*, p. 1006.

⁷ *Id.*, pp. 1009 & 1008.

⁸ *Id.*, pp. 1008 & 1003.

⁹ *Id.*, p. 1008.

¹⁰ *Id.*, p. 1009.

¹¹ *Id.*, p. 1005n18.

¹² *Id.*, p. 1005.

¹³ *Id.*, p. 1008.

¹⁴ *Id.*, p. 1007.

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“Kischel offers a resounding endorsement (in fact bordering on cringing obsequiosity) of Zweigert and Kötz’s [...], which he variously calls ‘seminal’, ‘iconic’, ‘impressive’, ‘straightforward’, ‘directly appealing’, ‘clear’, and ‘exemplary’. Indeed, he reckons, ‘[a] short textbook could limit itself to [a] discussion [of Zweigert and Kötz’s], add a few examples, and then bring the treatment [...] to a close”.

PL, summarizing PL, “Kischel’s Comparative Law: *Fortschritt ohne Fortschritt*” [review article on U. Kischel, *Comparative Law* (Oxford, 2019)], (2020) 15/2 J. Comp. L. 292, p. 309, and referring to U. Kischel, *Comparative Law* (A. Hammel transl., Oxford 2019 [2015]), pp. 88-89.

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“The basic mindset of the functional method can [...] be approved without reservation”.

U. Kischel, *Comparative Law* (A. Hammel transl., Oxford 2019 [2015]), pp. 173.

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Zweigert and Kötz’s textbook, despite the fact that it has long been “in need of dire revision”,¹⁵ “still sets the standard”.¹⁶

PL, summarizing PL, “Kischel’s Comparative Law: *Fortschritt ohne Fortschritt*” [review article on U. Kischel, *Comparative Law* (Oxford, 2019)], (2020) 15/2 J. Comp. L. 292, p. 342, and referring to G. Frankenberg, *supra*.

¹⁵ *Id.*, p. 1002.

¹⁶ *Ibid.*