

1997

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Recommended Citation

Paolo G. Carozza, *Continuity and Rupture in "New Approaches to Comparative Law"*, 1997 Utah L. Rev. 657 (1997).

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Continuity and Rupture in "New Approaches to Comparative Law"*

Paolo G. Carozza**

In the course of this conference on "new approaches to comparative law," it has struck me as curious that so little has been said about the "old" approaches to comparative law. In such a self-conscious effort to distinguish ourselves from our predecessors, one would expect at least *some* articulation of distinctive criteria, if not a full-fledged manifesto of novelty. Günter Frankenberg gave us three ideal-type identities of the comparative lawyer;¹ David Kennedy boxed up the old approaches in his taxonomical chart.² They and others have referred to the expansion of capitalist market economics and liberal democratic political structures as the materialist catalyst for opportunities to "deploy" comparative law. But while these may help explain the sources of renewed interest in comparative law, they have not on the whole addressed what makes the current examples of comparative legal scholarship "new" in approach.

Perhaps this is just evidence that the "new approaches" are not really all that new after all. Cole Durham, for instance, remarked that what he read largely consisted of excellent examples of comparative law within the discipline's existing terms of reference. In this view, perhaps our appeal to "new approaches" is simply the vanity and ambition of the young. We construct the old approaches just as the *juristes inquiets* constructed *l'École de l'Exégèse*.³ In the peren-

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** Associate Professor of Law, Notre Dame Law School. The following is a slightly edited version of remarks delivered at the closing plenary session of the 1996 *Utah Law Review* Symposium on "New Approaches to Comparative Law." I am grateful to the organizers of the New Approaches conference for their invitation to participate.

1. See Günter Frankenberg, *Stranger than Paradise: Identity & Politics in Comparative Law*, 1997 UTAH L. REV. 259.

2. See David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545.

3. See Marie-Claire Belleau, *The "Juristes Inquiets": Legal Classicism and Criticism in Early Twentieth-Century France*, 1997 UTAH L. REV. 379.

nial dynamic of the academy, we validate ourselves as new scholars with the *frisson* that comes from rebellion against the tradition, not dynamic continuity within it. Then again, maybe the New Approaches constitute such a radical break from "old" comparative law that we cannot even meaningfully speak of a continuity of discourse at all. There is a hint of this rupture in the several protestations we heard throughout the weekend from authors like Brenda Cossman who insisted that they had never even thought of themselves as comparatists at all until their friends recently persuaded them otherwise.⁴ With outsiders thus colonizing the discipline perhaps the discontinuity is too great to warrant paying attention to the distinguishing features of the New Approaches. In fact, however, I think that the distinctive characteristics of the New Approaches we have seen at this conference reflect different degrees of both continuity and rupture with the traditional discipline of comparative law.

In contrast to most traditional comparative law conferences and presentations, the New Approaches did not limit themselves to expositions on some technical doctrinal legal points. Instead of setting forth, say, the requirements for the formation of leasing contracts in Continental European and Anglo-American law, the discussions here tended to address broad themes and critiques of law, comparative jurisprudential approaches, or trends in the uses of comparative legal methods. As refreshing as this is, however, it is consistent with preexisting movement in the discipline of comparative law. For some time, comparatists have been moving away from the sterile statements of formal doctrine to wide-ranging inquiries on questions of law and society, and in doing so have been bringing into comparative perspective entire areas of law and jurisprudential approaches previously beyond the comparatist's gaze.⁵

A related development is the expansion of comparative studies in geographic terms. The New Approaches welcomed studies involving India, Latin America, and Fiji into the conversation of comparatists, reaching far beyond the U.S. comparatists' stereotypical preoccupation with Europe and the civil law/common law distinction. But again, in spite of Frank Upham's convincing description of the marginalization of Japanese legal studies from the comparative law mainstream,⁶ the trend toward broader geographic in-

4. See Brenda Cossman, *Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial Project*, 1997 UTAH L. REV. 525.

5. See, e.g., Symposium, *Individualism and Communitarianism in Contemporary Legal Systems: Tensions and Accommodation*, 1993 BYU L. REV. 385.

6. See Frank K. Upham, *The Place of Japanese Legal Studies in American*

quiry has been an important dynamic of traditional comparative law for a long time. The Paris Congress of Comparative Law of 1900 advocated limiting comparison to continental European legal systems. Systematic comparisons of civil law and common law only began between the World Wars, and that development in turn contributed significantly to widening comparative law's vision to other legal systems.⁷

Two other common characteristics of much of the work presented at this conference relate to the politics of law. On the one hand, we heard a great deal about the internal politics of foreign law. On the other hand, the "project" of comparative law itself was presented as a strategic political intervention. In one sense the exercises in historical retrieval illustrated at this conference have served to demonstrate precisely that the politics of foreign and comparative law have been an implicit feature of comparative legal scholarship all along. Jorge Esquirol, for instance, showed how René David's classifications not only recognized the politics of Latin American law but allied him with one contested vision of it in the service of—in his view—expanding the liberal democratic European tradition.⁸ At the same time, however, where "old approaches" may have quietly carried the card of political affiliations, the New Approaches have taken up the flag of politics in a clearly more self-conscious and explicit way. This difference may be significant for reasons that I will return to later.

Finally, and in greatest contrast to "old approaches," the approaches evident here have belatedly brought to the work of comparative law the critical tools of feminism, literary criticism, critical theory, and postcolonial theory. It may seem odd that methods and theories long present and developed virtually everywhere else in legal scholarship could be even remotely considered "new approaches," but such has been the degree of comparative law's insulation from the mainstream academy.

In what ways, then, do these characteristics, taken together, really constitute innovation in the field? And what use are they? Some of the conference participants' personal descriptions of their cognitive experience of involvement in comparative projects suggest to me that one instructive way of understanding and evaluating

Comparative Law, 1997 UTAH L. REV. 643.

7. See KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 58–62 (Tony Weir trans., 2d rev. ed. 1992). Of course, this is not to say that American comparative law is no longer overly Eurocentric.

8. See Jorge L. Esquirol, *The Fictions of Latin American Law (Part I)*, 1997 UTAH L. REV. 425.

current developments in comparative law is by redescribing the identities of Günter Frankenberg's comparative lawyers according to what we could call their epistemological posture.⁹ To compare things we must be able to *know* what they are. Different approaches to how we know (and whether we even can know) a foreign legal system thus represent different possible responses to the problem of comparability.¹⁰

Frankenberg's "mainstream" "hegemonic self" is basically a conceptualist whose faith is in invariant, or at least critically unexamined transcultural norms.¹¹ These implicitly are rooted in fixed logical and metaphysical foundations.¹² The "mainstreamer" is untroubled by the empirical and historical plurality of normative frameworks and cultures. His ability to know other systems' legal norms is thus a relatively uncomplicated matter and "comparison" is an unproblematic weighing of the other in one's own balance.¹³

By contrast, Frankenberg's "tributary-streamer" is at an epistemological level a liberal relativist. She rejects the universalist aspirations of the "mainstreamer" out of her "tormented" awareness of irreconcilable epistemic, moral, and cultural differences. She cannot even genuinely know, let alone "compare" and adjudicate between, different legal cultures.¹⁴ Hence her being labeled the "tragic comparatist."¹⁵ Her faith in the contextualizing power of history and culture to determine knowledge and value makes her acutely sensitive to ethnocentrism but mired in a philosophical skepticism that leaves her almost no way to make critical judg-

9. See Frankenberg, *supra* note 1. While I am not convinced that Frankenberg's comparative lawyers ever quite exist in the pure forms described either here or in his article, use of the types is a helpful heuristic device for sorting out the dilemmas of comparison. Note that throughout the following discussion I use gendered pronouns in the same way that Frankenberg does in his article.

10. The following discussion is inspired in part by Michael McCarthy, *Towards a New Critical Center*, Lecture at Boston College (June 1992) (transcript on file with author).

11. Frankenberg, *supra* note 1, at 264 (noting "mainstreamer's" "belief in the existence of a unitary sense of justice" and "a common order underlying the diversity of law").

12. Indeed, Frankenberg's playfully ironic use of the metaphor of "paradise"—whether immanent, lost, or merely strange—suggests not surprisingly that the problem of comparative law is modernity's rejection of the foundational role of religious faith. See *id.* at 259, 264.

13. See *id.* at 264–65 ("[T]he [mainstream] comparatist praises the superiority—and with it the authority—of his home law and does not even need to export or transplant it because, wherever he goes and looks, it is always already there, if only in a similar or dissimilar, derivative of rudimentary form.").

14. See *id.* at 266–67.

15. *Id.* at 266.

ments about that history and culture.

To this point, Frankenberg has exposed some of the potential failings of comparative law all too well. Caught on the horns of the hopelessly ahistorical consciousness of the "mainstreamer" and the unbearable paralysis of the "tributary-streamer," comparative law would have nowhere to go.

But in fact, Frankenberg points out, the tragic comparatist has simply transferred her faith in the source of knowledge, order, and value from static transcultural foundations to an equally repressive cultural and linguistic context.¹⁶ The way out for comparative law, then, is for the tragic comparatist to "deconstruct[] the hegemonic grid" by extending her skepticism to the "conceptual repression" of culture, and indeed of knowledge, itself.¹⁷ It is what Paul Ricoeur called the "hermeneutics of suspicion."¹⁸ In this way the comparatist would no longer find others' prevailing cultural narratives to be obstacles to knowledge, but instead would subject them to the same deconstructive criticism that reveals actual power dynamics in his/her own society.

Here is a possible key to the philosophical inspiration of the New Approaches. While Frankenberg's "Professor Y" basically oscillates between the "old" comparatists' classical certainty of knowledge and relativist skepticism, the hermeneutics of suspicion allows Frankenberg himself, as the detached, politically conscious and ironic narrator of Professor Y's consulting adventure, to break out of the tragic comparatist's predicament and see some small hope for the political project of comparative law.¹⁹ This move underscores the significance of colonizing the discipline of comparative law with the critical tools of feminism, literary criticism, and postcolonial

16. See *id.* at 266-70.

17. *Id.* at 270.

18. PAUL RICOEUR, *The Critique of Religion*, in THE PHILOSOPHY OF PAUL RICOEUR: AN ANTHOLOGY OF HIS WORK 213, 214 (Charles E. Reagan & David Stewart eds. & R. Bradley DeFord trans., 1978).

With Marx, Nietzsche, and Freud, a new type of critique of culture appears.

. . . .

. . . [E]ach of them, disengaged from his narrowness, cooperates in a *general exegesis* of false-consciousness and belongs by this fact in a *hermeneutics*, in a theory of interpretation, under the negative form of demystification. But with Marx, Nietzsche, and Freud, beyond their economism, biologism, and psychiatrism respectively, demystification is characterized in the first place as the exercise of *suspicion*.

Id.; see also PAUL RICOEUR, FREUD AND PHILOSOPHY: AN ESSAY ON INTERPRETATION 32-36 (Denis Savage trans., 1970).

19. See Frankenberg, *supra* note 1.

theory. It certainly accounts for the explicit emphasis on the politics of foreign law and the politics of comparative legal studies. It may even help explain the New Approaches' greater ability to extend the geographic and intellectual horizons of the discipline. There is no question that it can give us new ways to revisit the basic questions of comparative law and can generate important insights.

And yet, returning to Frankenberg's illustrative narrative, the danger inherent in this development is precisely the slightly schizophrenic, "tragically hegemonic" predicament of Professor Y. How he/she should judge the situation reasonably and responsibly depends on how he/she *knows* the Albanian legal, cultural, and political context. But if the deconstructive tools of the new comparative law available to Professor Y were to reduce that knowledge *only* to a mask for the hegemonic exercise of power, then Professor Y is in a bind and so is comparative law. Professor Y, and we as comparatists, would be incapable of making any normative judgments, both because we would be incapable of self-criticism and because there would remain no norm available except power. Of course, this doesn't stop us in actual practice from making comparative judgments. Professor Y, in both personae, does make decisions and does act. So, we are left wondering what the implicit judgments of Professor Y were. More to the point, we are left wondering what the implicit judgments of Professor Y's narrator are. We cannot deconstruct oppressive domination without an implicit account of truth and freedom.²⁰ This, essentially, was Fran Olsen's point in response to Frankenberg: we need to ask and be explicit about what those underlying normative commitments are, or else we have no way of judging them and criticizing them.²¹ Her comment could be applied generally to a number of the projects discussed at this conference. Following one presentation, a very insightful critique of certain decisions of the European Court of Human Rights, the first question was, "How then are you judging what is illegitimate power and what is legitimate authority?"

In this light, the New Approaches' self-conscious and explicit treatment of the normative stance of comparative law could prove to be more significant than it first appeared. Its significance depends,

20. Charles Taylor makes this point brilliantly in his critique of Michel Foucault, a master of the hermeneutics of suspicion if ever there was one. See Charles Taylor, *Foucault on Freedom and Truth*, in FOUCAULT: A CRITICAL READER 69 (David Couzens Hoy ed., 1986). Among other things, Taylor points out how Foucault's "monolithic relativism" also leads to "total incomparability" across history and culture.

21. Frances Olsen, *The Drama of Comparative Law*, 1997 UTAH L. REV. 275.

however, on recognizing also the dynamic structure of the comparative lawyer's cognitive processes. We should no doubt articulate our prior conceptual and normative frameworks and critically examine the way that they give direction to our knowledge, understanding, and judgment regarding the objects of our study. At the same time, we must recognize that knowledge, understanding, and judgment is constitutive of our ever-evolving conceptual and normative frameworks. Let me point to a more concrete example: Brenda Cossman's description of how her studies of India led her to turn a comparative gaze back on herself and to reevaluate the categories of thought she had been using at home cogently illustrates the dynamic process of comparative analysis.²²

To the extent that the New Approaches are able to bring us to a more critical self-awareness, they also reveal in the end a deeper and more basic continuity with "old" comparative legal studies. The value of comparative methods has always been in forcing us into sympathetic yet critical knowledge of law in another context, thereby disrupting our settled understandings, provoking us to new judgments, and demanding our response with new decisions, commitments, and actions.²³ If comparative law does not do that, I would submit that it is hardly worth doing at all. To be sure, it requires the painstaking work of seeking to know law, language, politics, and culture in other contexts. But if comparative law is successful in this respect, there will be many more "new approaches" conferences in the future that will break with our work by characterizing it as hopelessly out of touch and that in that rupture will continue the critical tradition of comparative law of which we are a part.

22. See Cossman, *supra* note 4.

23. See Paolo Wright-Carozza, *Organic Goods: Legal Understandings of Work, Parenthood and Gender Equality in Comparative Perspective*, 81 CAL. L. REV. 531, 535 (1993); Mary Ann Glendon, *Comparative Law as Shock Treatment: A Tribute to Jacob W.F. Sundberg*, in SÄRTRYCK UR: FESTSKRIFT TILL JACOB W.F. SUNDBERG 69, 70 (1993); Gunther Teubner, *Two Faces of Janus: Rethinking Legal Pluralism*, 13 CARDOZO L. REV. 1443, 1453 (1992). This process is not limited to comparative law, of course, but is in important senses merely a particular example of the more general conditions for authentic human knowing. See BERNARD J.F. LONERGAN, *Cognitive Structure* (discussing nature and implications of dynamic structure of human knowing), in 6 COLLECTED WORKS OF BERNARD LONERGAN 205 (1988).

