III.
DERECHO PÚBLICO EUROPEO

OF CENTERS AND PERIPHERIES OF THE EUROPEAN LEGAL SPACE: LEGAL COMPARISON FROM THE GERMAN PERSPECTIVE

SABRINA RAGONE

SUMARIO

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SABRINA RAGONE[1]

University of Bologna

I. METHODOLOGICAL ISSUES

This piece aims to offer reflections concerning the development and core elements of legal comparison in public law in Germany, considered as the ideal center of European public law, as much as it can be understood by a scholar "from the outside". This is the topic addressed in a recent volume edited by Armin von Bogdandy and Eberhard Schmidt-Aßmann[2] who have collected a large body of seminal pieces reflecting upon the scope and features of this discipline. The article does not aim to provide a strict evaluative assessment of the current state of German (public) comparative law scholarship; instead, its central aim is to identify some of the German peculiarities and differences vis-à-vis other European academic/scholarly traditions, in order to grasp common trends or divergencies due to both intrinsic and extrinsic features of the legal systems and cultures.

The external perspective offered in this article comes from somebody who has received her education in Italy —where comparative law is an established, widespread field (with chairs, compulsory classes in all Political Science Departments and the

[1] Profesora titular de Derecho Público Comparado, acreditada como catedrática. Universidad de Bolonia, Strada Maggiore 45 – 40125 Bologna. E-mail: sabrina.ragone2@unibo.it. ORCID ID: 0000-0002-9516-503X T.

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[2] VON BOGDANDY, Armin, SCHMIDT-AßMANN, Eberhard. (2024). *Theorising Comparative Public Law. A Reader from Germany*, Baden-Baden, Nomos.

majority of Law Schools) and where German legal philosophy and theory of state have influenced generations of students and scholars[3]—— but also has a long-standing research and teaching career in Spain (habilitation to teach in Universities), Germany, France and several Latin American countries, as well as has recently had (the opportunity) to engage in the endeavor of putting comparative law in a nutshell[4].

From an Italian perspective, the first observation to be made concerns the division of academic branches into different fields, and in a distinct fashion, vis-à-vis the twenty-one different areas into which the Italian legal field is divided (the last of which is public comparative law). From the outside, it is thus striking that German academia is based on the (much more) basic distinction between the fundamental fields of public law, private law, and criminal law. Such differentiation affects comparative law as well, for, according to the German understanding, the latter does not amount to a single separate branch of legal scholarship. By contrast to Italy, there are academic positions for public or private lawyers that are held by experts of legal comparison who specialize their research and teaching in this direction.

Similar to the evolution of comparative studies in the past in Italy, "comparative public law was and still is overshadowed by its more powerful sister: comparative private/civil law" (this statement concerning Germany dates back to the 60s)[5]. This is due to the fact that research groups and institutions dedicated to private comparative law already began to emerge in the 19th century, labeled by Nietzsche as the "age of comparison". At that time, private law scholars dominated the scene with the seminal publications and journals of the caliber of the *Zeitschrift für Deutsches Bürgerliches Recht und französisches Civilrecht* (1869), replaced in 1909 by *Rheinische Zeitschrift für Zivil-und Prozessrecht*, with Josef Kohler and Ernst Rabel on the editorial board. In fact, the latter author became the most influential comparativist of the first half of the century,[6] as he set the basis for the functionalist method in legal comparison[7]

[3] The *vulgata* is that until the 1970s at least nobody could become a law professor without speaking German. Studies by von Jhering, Schmitt, Leibniz, von Humboldt, Forsthoff, Böckenförde, Leibholz, Jellinek, or Husserl, among others, were translated, published and studied as "classics".

[4] See RAGONE, Sabrina, SMORTO, Guido. (2023). *Comparative Law. A Very Short Introduction*, Oxford, Oxford University Press.

[5] BERNHARDT, Rudolf. (1964). "Eigenheiten und Ziele der Rechtsvergleichung im öffentlichen Recht". *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 24, pp. 431-452. Other specializations, such as the ethnological branch called *Vergleichende Rechtswissenschaft* which emerged in the 19th century, did not succeed.

[6] See RABEL, Ernst. (1924). "Aufgabe und Notwendigkeit der Rechtsvergleichung", in LESER, Hans G. (ed.), (1967), Ernst Rabel, *Gesammelte Aufsätze*, vol. III: *Arbeiten zur Rechtsvergleichung und zur Rechtsvereinheitlichung*, Tübingen, Mohr Siebeck. His speech on the aims and targets of legal comparison summarizes his conception of the functional method. On his role, see SCHWENZER, Ingeborg. (2019). "Development of Comparative Law in Germany, Switzerland, and Austria", in REIMANN, Mathias, ZIMMERMANN, Reinhard (eds.), *The Oxford Handbook of Comparative Law*, 2nd ed., Oxford, Oxford University Press, pp. 60-62.

[7] GERBER, David J. (2001). "Sculpting the agenda of comparative law: Ernst Rabel and the facade of language", in RILES, Annelise (ed.), *Re-thinking the Masters of Comparative Law*, Oxford-Portland, Hart, pp. 190-208.

which still prevails in German scholarship[8]. Additionally, as far as institution-building is concerned, Rabel founded the Institute for Comparative Law at the University of Munich (1916), then followed by several similar endeavors in Heidelberg, Würzburg, Hamburg and Berlin, among others. From the outside, the reliance on research institutes of this kind represents another unique, or at least peculiar, feature of the legal field in Germany, when compared to other European academia (with the partial exception of the UK).

Rabel later became the director of the *Kaiser-Wilhelm-Institut für ausländisches und internationales Privatrecht* established in 1926, two years after the homologous Institute for Public International Law. The denomination of the Institute, which was then echoed by posterior institutions, shows that the distinction between comparative law and foreign law has never been so clear-cut, as *ausländisches* would be translated as "foreign", although it is normally intended as "comparative", as if it were a synonym of *Rechtsvergleichung*[9].

The influential *Zeitschrift für ausländisches und internationales Privatrecht* was published under the auspices of the Institute starting in 1927 and until 1942, including relevant sources (statutes, judgments, etc.) from "important" countries. The importance of Rabel was later obviated due to his Jewish origins, he fled to the USA and "his" Institute, like nearly every other German institution, came to be aligned with the Nazi regime. Still, it must be said that the Hamburg Institute was far more coopted and compromised than the Institute for Public International Law[10].

The public law-private law divide in international and comparative studies continued to be a constant element also when German scholarship revitalized after World War II, as best shown by the founding of the *Gesellschaft für Rechtsvergleichung* (1950)[11]. The Society was (and still is) divided into sections according to the distinct branches of law. One year earlier, the *Max-Planck-Institut für ausländisches und internationales Privatrecht* (Hamburg) and the *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht* (MPIL, Heidelberg) had formally replaced the former *Kaiser-Wilhelm* Institutes. The fame of the Institute in Hamburg owes much

[8] It is defined as the "classical" approach by SCHWENZER, "Development of Comparative Law in Germany, Switzerland, and Austria", cit., p. 82.

[9] There is a longstanding discussion on the possibility of considering the study of foreign law as "comparative law" or just as "constitutional chronicles", as Lucio Pegoraro defines them. Also the preeminent scholar Rodolfo Sacco, who was a well-respected methodologist, stated that reaching the level of comparing at least two elements was necessary. The majority of Italian scholars advocate for such a reconstruction, while in Germany (like in Spain) the distinction seems blurrier.

[10] See KAUFMANN, Doris (2000). *Geschichte der Kaiser-Wilhelm-Gesellschaft im Nationalsozialismus*, vol. II, Göttingen, Wallstein.

[11] Already in the second half of the 19th century there were the *Gesellschaft für vergleichende Rechts- und Staatswissenschaft* (Association for Comparative Legal and Political Science) and the *Internationale Vereinigung für vergleichende Rechtswissenschaft und Volkswirtschaftslehre* (International Association for Comparative Legal Science and Political Economics). See the website of the organization, which refers to the different sections: www.gfr.jura.uni-bayreuth.de.

to its director Konrad Zweigert, who set the foundations of legal comparison for generations of German comparativists, focusing on the use of comparative law for the interpretation of existing norms consistent with the functional method[12]. His *Introduction to Comparative Law*, written with Hein Kötz[13] (1969) is a canonical, discipline-defining piece and was translated into English already in 1977 spreading beyond German boarders. The contemporary *ouvrage* by Léontin-Jean Constantinesco's on legal comparison has been translated into different languages as well[14].

The heritage of private law within public comparative law studies has been questioned especially with respect to the potential use of the classification into legal families[15], which cannot be exported *tout court* into constitutional or administrative studies[16]. Therefore, there has been debate concerning the possibility of adopting similar criteria opened in public law[17], due to the relevance of extra-legal (mainly political) factors and the difficulties of successful imitations[18]. Of course, there remain two methodological and ideological issues (affecting German, Italian, and all other comparative constitutional endeavors), namely, a) whether there are universal or basic principles of constitutionalism that operate in all constitutional systems and b) whether there are intrinsic non-negotiable identity values belonging to each constitution that impede successful comparisons.

[12] See ZWEIGERT, Konrad. (1949/50). "Rechtsvergleichung als universale Interpretationsmethode". *Zeitschrift für ausländisches und internationales Privatrecht*, vol. 15, no. 1, pp. 5-21.

[13] ZWEIGERT, Konrad, KÖTZ, Hein. (1969). *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, 1st ed., Tübingen, Mohr Siebeck. The text was published and spread as well in Italy: see for instance the edition by Adolfo Di Majo and Antonio Gambaro, with translation by B. Pozzo, Giuffrè, 1998.

[14] CONSTANTINESCO, Léontin-Jean. (1971). *Einführung in die Rechtsvergleichung*, Köln, Heymann.

[15] TSCHENTSCHER, Alex. (2007). "Dialektische Rechtsvergleichung — Zur Methode der Komparistik im öffentlichen Recht". *JuristenZeitung*, vol. 62, n. 17, p. 810. This opinion was defended by ZWEIGERT, KÖTZ,*Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, cit., p. 70.

[16] ZWEIGERT, Konrad. (1952). "Neue Systeme und Lehrmittel der Rechtsvergleichung." *Zeitschrift für ausländisches und internationales Privatrecht*, vol. 17, no. 3, p. 398. On the relationship between private law and constitutional law, see the de-construction of the distinction by GRIMM, Dieter. (2017). *Verfassung und Privatrecht im 19. Jahrhundert. Die Formationsphase*, Tübingen, Mohr Siebeck.

[17] GROTE, Rainer. (2001). "Rechtskreise im öffentlichen Recht". *Archiv des öffentlichen Rechts*, vol. 126, no. 1, p. 17. On the difficulty to find overlapping theoretical tasks, see VON BUSSE, Carl-David. (2015). *Die Methoden der Rechtsvergleichung im öffentlichen Recht als richterliches Instrument der Interpretation von nationalem Recht*, Baden-Baden, Nomos, p. 294.

[18] VON BUSSE, *Die Methoden der Rechtsvergleichung im öffentlichen Recht als richterliches Instrument der Interpretation von nationalem Recht*, cit., pp. 294-296. A similar approach is advocated for by TSCHENTSCHER, "Dialektische Rechtsvergleichung — Zur Methode der Komparistik im öffentlichen Recht", cit., p. 815.

In administrative law, there has been increasing scholarly interest[19] and also a circulation of models. Rudolf von Gneist studied the English system, and Otto Mayer elaborated a *Theorie des Französischen Verwaltungsrechts* (1888), adapting German administrative law to French standards. Nevertheless, proper imitations took place later than in private law and referred more to individual institutions or certain sub-materials of administrative law, rather than to major institutions analyzed in mainstream studies[20]. Like other Member States, the Europeanization of domestic bureaucracies has led to some important changes in Germany involving the organization of Ministries and administrative bodies (for instance, with respect to independent authorities), which has fostered studies in this field from other perspectives.

Overall, the Italian obsession for methodology does not resonate either in German academia (or within the Spanish approach to comparative law). The chapters gathered in von Bogdandy's and Schmidt-Aßmann's volume pay much attention to it, though, in particular as far as the scope of the comparison in geographical terms or the use of specific terminology (for example, "transfer" instead of "transplant" in Günter Frankenberg's approach[21]) are concerned. Also, the importance of "context" seems to have been revived by recent studies, and the cultural component plays a role in the comparative legal discourse as well. Engaging in comparative law requires intersubjective and intercultural competences[22]. Not only as the core of Peter Häberle's approach[23], which seems more focused on the cultural roots of constitutionalism, but it also appears as a relevant element in the comparative theory of Günter Frankenberg (not surprisingly), as well as in Anne Peters' and Heiner Schwenke's scholarship[24]. Even Voßkuhle's chapter, which focuses on constitutional case law, recalls the need for a specific "sensitivity for the cultural character".

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[19] Also proved by the three chapters devoted to this field in VON BOGDANDY, SCHMIDT-AßMANN (eds.), *Theorising Comparative Public Law. A Reader from Germany*, cit., namely, "The Germanic Tradition of Comparative Administrative Law" by Karl-Peter Sommermann, p. 11; "Comparative Administrative Law: Particularities, Methodologies, and History" by Christoph Schönberger, p. 275, as well as "Comparative Administrative Law: Contexts and Topics" by Eberhard Schmidt-Aßmann, p. 333.

[20] VON BUSSE, *Die Methoden der Rechtsvergleichung im öffentlichen Recht als richterliches Instrument der Interpretation von nationalem Recht*, cit., p. 296.

[21] FRANKENBERG, Günter. (2024), "Legal Transfer", in VON BOGDANDY, SCHMIDT-AßMANN (eds.), *Theorising Comparative Public Law. A Reader from Germany*, cit., pp. 381-403.

[22] BAER, Susanne. (2004). "Verfassungsvergleichung und reflexive Methode: Interkulturelle und intersubjektive Kompetenz". *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 64, pp. 735-758.

[23] See for instance HÄBERLE, Peter. (2013). *Der kooperative Verfassungsstaat - aus Kultur und als Kultur. Vorstudien zu einer universalen Verfassungslehre*, Berlin, Duncker & Humblot.

[24] PETERS, Anne, SCHWENKE, Heiner. (2024). "Comparative Law Beyond Post-Modernism", in VON BOGDANDY, SCHMIDT-AßMANN, *Theorising Comparative Public Law. A Reader from Germany*, cit., pp. 89-129.

II. POSITIONING COMPARATIVE LAW

As was previously mentioned, in Germany, there are no specific chairs open exclusively for comparativists, as they combine also other fields of international or public law. Instead, domestic lawyers devote part of their scholarship and teaching to comparative law. In practice, when a *Lehrstuhl* (chair) is advertised, the position is open for academics with a *Habilitation* (a second major piece of research resulting in a book, after the PhD thesis) in domestic law, and in some cases the profile requires an additional interest or qualification in comparative studies.

For many years, private law scholars had enjoyed a dominant role within German academia, vis-à-vis their public law colleagues[25] (and they have also come to dominate the field in the US)[26]. This situation compares to that of Italy after World War II, although chairs and other positions in comparative public law quickly emerged throughout the country's academic institutions.

Nevertheless, after World War II, there was a group of eminent German scholars belonging to different generations who pursued their postgraduate studies in the USA, specializing in public law and publishing comparative studies of the German and the American legal systems: For instance, Jochen Frowein was a graduate student — and received a master in comparative law — at the University of Michigan Law School in 1957-1958 and later became director of the MPIL (1981-2002); Dieter Grimm earned his LLM from Harvard University (1960), then publishing a piece on *Europäisches Naturrecht und amerikanische Revolution* (1970); Uwe Kischel obtained his LLM from Yale (1993) and now holds the chair in Public Law, European Law and Comparative Law (*Lehrstuhl für* ***öffentliches*** *Recht, Europarecht und Rechtsvergleichung*) at the University of Greifswald; Susanne Baer, former judge of the Federal Constitutional Tribunal, completed her LLM at the University of Michigan Law School in 1993, and wrote her PhD on "Dignity or Equality: The Appropriate Fundamental-rights Concept of Anti-discrimination Law — a comparison of the approach to sexual harassment in the workplace in the Federal Republic of Germany and the U.S." at Goethe University Frankfurt; she was later (2010) appointed William W. Cook Global Law Professor at the University of Michigan Law School.

In addition to the interest in American law, bilateral exchange fora were organized with Italian scholars. One example is the *Deutsch-Italienischen Verfassungskolloquium*,

[25] Overall comparative law has a long tradition in the country. See FORSTER, Doris. (2018). "Zur Methode des Rechtsvergleichs in der Rechtswissenschaft - On the Methods for Comparative Law Research in Legal Studies". *Ancilla Iuris*, pp. 98-109.

[26] Let's just recall that the *American Journal of Comparative Law* has been run by "Germans" over the past decades, the editors in chief being Flemming (German born and trained in the UK) between 1971 and 1987; Buxbaum (German born and trained in the USA) between 1987 and 2003; Reimann (German born and educated in Germany, with a dissertation at the University of Freiburg) between 2003 and 2013; Dedek (German born and educated in Germany, with a dissertation at Friedrich-Wilhelm University Bonn) since 2013.

which has regularly met since 1977. Another example involves the activities of the German-Italian Center for the European Dialogue that was founded in 1986 and organized at Villa Vigoni[27].

Over the years, the traditional functional approach has prevailed, at times combined with taxonomy or structuralism. Outside of mainstream scholarship, Peter Häberle argued that legal comparison should serve as the fifth method of constitutional interpretation. This plea has been translated into numerous languages and debated in international fora[28], but it has never become an established, or even widely embraced, approach in Germany.

Other viewpoints have had an impact on comparative scholarship; e.g., critical legal studies have been influential, especially due to the work of Günter Frankenberg, who used to be Professor of Public law, Legal Philosophy and Comparative Law at the University of Frankfurt (recently retired). Frankenberg initiated a critical approach to legal comparison in Germany and beyond since the mid-80s[29]. His novel outlook obliges scholars to admit their biases, their prejudices, their positionality (also see the scholarship by Philipp Dann, or Michael Riegner, who have addressed it with respect to countries from the Global South). In the end, Frankenberg's project urging self-reflection has emerged as a very sharp critical voice in comparative studies from Germany.

III. PROGRESSIVE IN *FIERI* OPENING TOWARDS PERIPHERAL JURISDICTIONS…

Over the past decades, however, new trends have emerged in comparative public law scholarship and begun to characterize the German comparative legal landscape as well. Those trends are, namely, the progressive opening to what the mainstream used to treat as the periphery of the world, a scholarly interest in *diversity* (which, in itself, is quite different from the approach of Zweigert and Kötz who made *similarity* the basis for any meaningful comparison—an agenda that obliged them to work primarily from Western cases) and finally, the growing need to publish in English and/or Spanish to improve the diffusion of national scholarship. All things considered, it is not by chance, that globalization has become a recurring word in the ongoing debates on legal comparison.

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[27] www.villavigoni.eu.

[28] HÄBERLE, Peter. (1989). "Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat — Zugleich Zur Rechtsvergleichung als „fünfter" Auslegungsmethode". *JuristenZeitung*, vol. 44, no. 20, pp. 913—919.

[29] FRANKENBERG, Günter. (1985). "Critical Comparisons: Re-thinking Comparative Law". *Harvard International Law Journal*, vol. 26, no. 2, pp. 411-455; Id. (2016). *Comparative Law as Critique*, Cheltenham, Elgar.

The work carried out at the MPIL in Heidelberg testifies to such trends, as best demonstrated by its interest in and research on Latin America. The successful project named ICCAL (*ius constitutionale commune in America Latina*) is based on the collaboration with Latin American legal scholars and practitioners, with the aim of promoting the advancement and respect of human rights, democracy and the rule of law, enhancing the opening of domestic systems to international and supranational standards[30].

The broad scope of comparative studies and, in particular, the interest in parts of the world that used to be neglected in German (and Western) scholarship for decades, is as well impressively demonstrated by the journal *Verfassung und Recht in* **Übersee**/*World Comparative Law (VRÜ/WCL)* founded in 1968 and led by Herbert Krüger and, subsequently, Brun-Otto Bryde.[31]

Currently managed by Fabia Fernandes Carvalho, Phillip Dann, and Michael Riegner, *VRÜ/WCL* became an online publication in 2000 (after thirty years of existence since its foundation as a project focusing on decolonization processes) and addresses legal developments in Asian, African and Latin American countries[32]. To this end, this journal accepts papers in English and, only exceptionally, in other languages[33].

Nevertheless, the turn towards the acceptance of these "peripheral" legal (constitutional) systems in comparative legal studies is still ongoing.

Also, one of the most relatively recent comprehensive books, "Comparative Law" (2019, OUP) by Uwe Kischel addresses not only the Civil Law and Common Law tradition, but also attempts to introduce systems from Africa, Asia, the Islamic and Jewish traditions, alongside transnational contexts such as public international law, European Union law, and *lex mercatoria*. The extensive reach of the volume (but not only) has been debated and criticized[34], but, in spite of its flaws, it still testifies to an attempt to include in the research non-Western understandings of the law.

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[30] See VON BOGDANDY, Armin. (2017). "Ius Constitutionale Commune En América Latina: A Regional Approach to Transformative Constitutionalism", in ID., MAC-GREGOR, Eduardo Ferrer, MORALES ANTONIAZZI Mariela, PIOVESAN, Flávia (eds.), *Transformative Constitutionalism in Latin America*, Oxford, Oxford University Press, pp. 3-23.

[31] On the journal's initial programmatic statement, see KRÜGER, Herbert. (1968). "Verfassung und Recht in Übersee. Das. Programm". VRÜ 1, pp. 3-29; cf. also BRYDE, Brun-Otto. (1997). "Überseeische Verfassungsvergleichung nach 30 Jahren, Verfassung und Recht in Übersee". VRÜ 30, pp. 452-464; and BRYDE, Brun-Otto. (2018). "50 years of "VRÜ / Law and Politics in Asia, Africa and Latin America": History and Challenges". VRÜ 51, pp. 3-11.

[32] By way of illustration, since 2008, the journal's special issues have been dedicated to topics such as the globalization of constitutional law, law and development, social constitutionalism, or law and culture, and have mostly focused on the Global South.

[33] https://www.vrue.nomos.de/en/. On this "Southern turn", see DANN, Philipp. (2023). "Southern Turn, Northern Implications: Rethinking the Meaning of Colonial Legacies for Comparative Constitutional Studies". *Comparative Constitutional Studies*, vol. 1, no. 2, pp. 174-196.

[34] FRANKENBERG, Günter. (2016). ""Rechtsvergleichung" — A New Gold Standard?"". *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 76, pp. 1001-1009, described the

With respect to the use of English as an acceptable language for scholarship, a significant contribution in this direction has been provided as well by the *German Law Journal*, founded in 2000 as an open access peer-reviewed periodical that publishes studies from a transnational-legal perspective and provides maximum visibility[35]. Also the *Zeitschrift **für** ausländisches **öffentliches** Recht und Völkerrecht* (ZaöRV)/ *Heidelberg Journal of International Law* (HJIL), published since 1929 under the auspices of the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, accepts papers in both German and English often including comparative legal studies (and not only international law). Similarly, the *Verfassungsblog* represents an online journalistic and academic forum for debates on comparative, constitutional, foreign and international issues[36].

Generally speaking, still the majority of University institutes devoted to comparative law focus on private law (for instance, the Institute for comparative law, conflict of laws and international business law, University of Heidelberg; or the Institute for Comparative Law, University of Munich, among others) and the courses taught at academic institutions relegate legal comparison to a marginal role. Nevertheless, new generations of scholar are leading to an increase in number and variety of courses which, in spite of "domestic" denominations, have syllabi open to comparative studies.

IV. …BUT WITH A LONGSTANDING PREVAILING INTEREST IN THE EUROPEAN LEGAL SPACE

The Europeanization of the law has had an impact on both private and public legal domains, fostering studies on the harmonization in private/commercial aspects (see the work of Reinhard Zimmermann, one of the current directors of the Max Planck Institute in Hamburg) as well as on the transformations of public law in the numerous volumes of the series *Ius Publicum Europaeum* directed by Armin von Bogdandy, one of the current directors of the Max Planck Institute in Heidelberg, first published in German (2007-2019) and more recently in English for Oxford University Press (2017-ongoing).

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intention of the author as "an ambitious attempt (once translated) to replace, bypass or update the standard textbooks, notably Zweigert & Kötz", contesting the alleged global approach that still pays uneven attention to the relevant parts of the world, as well as.the ultimate acceptance of functionalism in spite of the prior critiques mentioned in the volume (p. 1006). LEGRAND, Pierre. (2020). "Kischel's Comparative Law: Fortschritt ohne Fortschritt". *Journal of Comparative Law*, vol. 15, no. 2, pp. 292-346 underlines that he only engages with legal cultures with which he enjoys personal acquaintance, leading to "asymmetrical treatment", and proving little authority in studying parts of the of the world where he has never been on a professional basis (pp. 294-295).

[35] https://germanlawjournal.com/.

[36] https://verfassungsblog.de/.

Generally, methodology and aims of legal comparison have been at the core of research for decades. Particularly in European scholarship, the scientific and methodological nature of comparative law has been discussed at length. In the 1950s, after World War II, these studies received a new impulse, thanks to Gutteridge's now classic introduction; to David in France; to Gorla and later Sacco in Italy; and, as previously noted, Zweigert and the (re-)establishment of the Max Planck Institute for Foreign and Private International Law in Germany. Additionally, the spread of comparative law could also have been favored by the particular working conditions in Europe: comparatists were participating in the Europeanization project and had a clearly defined goal, which was the establishment of a common private law of Europe and instruments for cooperation[37].

All things considered, comparative law developed steadily in the European context, even more after the "constitutional transformation" of the European Union in the 90s, due to the evolution of integration through the adoption of the European Treaties, and with the expansion of intellectual horizons. Doubts about the role and purpose of legal comparison are still present[38], although the practical results of comparative work have confirmed the importance — and status — of the discipline[39], as well as its connection with European integration. The multifaceted nature of European law was already understood by a prominent German scholar, Hermann Mosler, who intended it to be a plurality of norms aiming at the target of integration[40], anticipating the understanding of the intertwined complexity of European law.

Over the decades, legal public scholarship has also devoted specific journals to European public law, often in conjunction with comparative law. Already in 1989, in the first issue of the *European Review of Public Law*, Timsit and Flogaitis set their goal as the foundation of a multi-national and multi-lingual journal "designed to assist in promoting knowledge of the public law of each European country to fellow members of the Community" by creating a "parallel forum" to existing reviews in

[37] REIMANN, Mathias. (2002), "The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century". *American Journal of Comparative Law,* vol. 50, no. 4, pp. 671-700.

[38] «What is a comparatist: a scholar without decision and an advocate of non-law? A student of governance, a specialist in the hermeneutic conventions and diplomatic protocols by means of which social hierarchies are propagated?», asks GOODRICH, Peter. (2012). "Interstitium and Non-Law", in MONATERI, Pier Giuseppe (ed.), *Methods of Comparative Law*, Cheltenham, Elgar, p. 219.

[39] BASEDOW, Jürgen. (2016). "Hundert Jahre Rechtsvergleichung. Von wissenschaftlicher Erkenntnisquelle zur obligatorischen Methode der Rechtsanwendung". *JuristenZeitung*, vol. 71, no. 6, pp. 269-280 (on European law, see in particular p. 274). With specific reference to private law, see VAN DER MENSBRUGGHE, François. R. (2009). "La place du droit comparé dans la construction des droits européens", in BAILLEUX, Antoine, CARTUYVELS, Yves, DUMONT, Hugues, OST, François (eds.), *Traduction et droits européens: enjeux d'une rencontre*, Bruxelles, Presses universitaires Saint-Louis Bruxelles, pp. 201-224. With reference to administrative law, see the work by SCHMIDT-AßMANN, Eberhard. (2018). "Zum Standort der Rechtsvergleichung im Verwaltungsrecht". *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 78, no. 4, p. 851.

[40] MOSLER, Hermann (1968). "Begriff und Gegenstand des Europarechts". *Zeitschrift für ausländisches Recht und Völkerrecht/ Heidelberg Journal of International Law*, vol. 28, pp. 481-502.

the light of the implementation of the Erasmus program[41]. The *Rivista Italiana di Diritto Pubblico Comunitario*, directed by Chiti and Greco, was issued in 1991 with a focus on public law and with a comparative flavor. Since 1994, the *Maastricht Journal of Comparative and European Law* offers a forum for debates concerning the scope and difficulties of the concept of *Ius commune Europaeum*, which the journal characterizes as "the new legal pluralism in Europe, its new unity, and the strong elements of diversity which remain"[42]. In 1995, Birkinshaw, in his editorial foreword to the first issue of *European Public Law*, stated that "European public law is concerned with the development of the public law of European states and their influence upon, and the way they in turn are influenced by, the developing law of the European Community or European Union, as it is increasingly called. Our interest is not restricted to the public law of Member States but potentially covers the public law of all European states. It is also concerned with the influence of the European Convention on Human rights on the substantive law of nations which are members of the Council of Europe and the influence of the Convention on the judicial decisions of the European Court of Justice [..]"[43]. Ferrari, when inaugurating the journal *Diritto Pubblico Comparato ed Europeo* in 1999, claimed that one factor had been essential for the decision of creating a new academic forum of discussion was "the need to adapt scientifically and culturally to the interlocking of comparative public law and EU law". According to this author, it was already clear twenty years ago that domestic legal systems of European countries could not be compared without taking into account European law[44].

European comparative studies could already refer to existing journals. Since 1949, the *Revue internationale de droit comparé* has featured different sections "Studies" and "Varieties" but also a section concerning comparative legislation and foreign case law elaborated by the Senate and Center for Legal Research and Dissemination of the Council of State[45]. Since 1963, the *Common Market Law Review* has encompassed several aspects of European law thanks to the contribution of the Europa Institute of the University of Leiden and the British Institute of International and Comparative Law in London. Finally, a great contribution to legal comparison, also with reference to European law, has been given by the *Annuario di Diritto Comparato e di Studi Legislativi*, founded in 1927 and the abovementioned *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (ZAÖRV), since 1929.

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[41] TIMSIT, Gérard, FLOGAITIS, Spyridon. (1989). "Foreword". *European Review of Public Law*, vol. 1 no. 1.

[42] See https://home.heinonline.org/titles/Law-Journal-Library/Maastricht-Journal-of-European-and-Comparative-Law/ (last accessed on the 20th of March 2021).

[43] BIRKINSHAW, Patrick J. (1995). "Editorial Foreword". *European Review of Public Law*, vol. 1, no. 1, pp. 5-10. An update of those ideas can be found in BIRKINSHAW, Patrick J. (2014). *European Public Law: The Achievement and the Challenge*, 2nd ed., Alphen aan den Rijn, Wolters Kluwer, p. 6.

[44] FERRARI, Giuseppe F. (1999). "Presentazione". *Diritto Pubblico Comparato ed Europeo,* vol. 1, no. 1, p. XII, available at http://www.dpce.it/.

[45] See the first number of the *Revue Internationale de Droit Comparé* (1949), https://www.persee.fr/issue/ridc_0035-3337_1949_num_1_1.

Over the last two decades several new publication endeavors have focused on European law encompassing a comparative mission. From a constitutional perspective, the *Revista de Derecho Constitucional Europeo* was inaugurated in 2004, the same year in which the constitutional mission of the EU seemed to be accomplished. Balaguer Callejón, in his presentation of the *Revista*, explained that the process of constitutionalization would need further collaboration between European institutions and Member States in order to respond to inequalities and asymmetries throughout the EU[46]. This is truer in the present critical times, as is the call for the intervention of academics. Two years earlier, in 2002, the first issue of *Rassegna di Diritto Pubblico Europeo* (directed by Lucarelli, Bifulco, Chieffi and Patroni Griffi) was published, with the aim of collecting studies on Italian public law, alongside the evolution of European integration. *The European Constitutional Law Review* (EuConst), founded in 2005 and edited by Besselink, Claes and Reestman, intends to be "a platform for advancing the study of European constitutional law, its history and its evolution"[47].

Additionally, the journal *Federalismi.it* since 2003 combines three perspectives of public law, namely domestic, European and comparative[48]. The same year, the *Revista Europea de Derechos Fundamentales* (2003-2017) was founded as well, with a focus on fundamental rights which had become a major part of the scholarly debate after the proclamation of the Charter. The blurry borders separating the branches of law involved are also the starting point of the *International Journal of Constitutional Law* (2003), as "ICON recognizes that the boundaries between the disciplines of 'constitutional law', 'administrative law', 'international law' and their comparative variants have become increasingly porous"[49]. *La cittadinanza europea* (2002) promotes European legal studies from "a global look and, therefore, necessarily a comparative approach"[50]. More recently, as a joint project between Italian and Spanish academics, the *Revista General de Derecho Público Comparado* was founded in 2007, with the specific objective of providing methodologically comprehensive studies in the field of comparative public law. Although no specialized focus on European law is claimed by the journal, several pieces and special issues have been devoted to European-related legal issues[51]. Of course, all major journals publish comparative (and/or foreign) public law papers, even when legal comparison is not one of their focal points[52].

[46] See the first issue of the *Revista de Derecho Constitucional Europeo* (2004), http://www.ugr.es/~redce/ReDCE1/ReDCEportada1.htm.

[47] See https://www.cambridge.org/core/journals/european-constitutional-law-review.

[48] See www.federalismi.it.

[49] See https://academic.oup.com/icon.

[50] See http://www.centrospinelli.eu/pages/cittadinanza_europea.html#: ..

[51] See Portal Derecho Iustel, *Revista General de Derecho Público Comparado* https://www.iustel.com//v2/revistas/detalle_revista.asp?id=14&z=5 (last accessed on the 20th of January 2025).

[52] An excellent example would be the *German Law Journal*, a major open-access forum for scholarly discussion on European, international and comparative law since 1999, in spite of its original focus on developments in German law. The examples could be numerous: for instance, the first focus of this journal, even if the denomination refers to "global" studies, is comparative law. Just to mention

The European scholarly debate on legal comparison has progressed thanks to textbooks and volumes as well. Concerning the method/science debate, de Cruz said: "Comparative law is undoubtedly a method of comparing legal systems, and such comparison produces results relating to the legal systems being analyzed. However, writers have argued over whether the data obtained should be regarded simply as part of the method, or whether they should be regarded as a separate body of knowledge". Then, he added: "Those who have advocated the method theory [meaning they considered legal comparison as a method] include eminent comparatists such as Pollock, Gutteridge, Kahn-Freund, and David, who have regarded comparative law purely as a method of comparative study and research as applied to law. On the other hand, supporters of the social science theory include Saleilles, Levy-Ullman, Kohler, Arminjon, Nolde, Wolff, Rabel, Yntema, Rheinstein, Hall, and Brutau, who regarded comparative law as a body of knowledge and, thus, a social science"[53]. Again, Frankenberg's critical reconstructions on comparative law have repeatedly shown that the preference for the method, often portrayed as an outcome of neutrality and agnosticism, is just a façade[54].

As Pegoraro recently described, there is a wide group of scholars who have argued that comparative law is nothing but a method (Lambert, Kaden, Jescheck, David, Gutteridge, Pollock). Several scholars even view it as an instrument for other fields of study (Rabel, Rothacker, Ficher)[55]. Ponthoreau confirmed that from the French perspective[56]. Tusseau connected the claim to the discipline's failure to achieve recognition as a scientific academic domain[57]. David focused on the fact that comparative law does not address a specific legal system (therefore, it would not be a science)[58]. Italian (public and private law) scholarship has assessed this point for long, providing insightful reflections for the advancement of the field[59]. Biscaretti di

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the Italian situation, *Rivista Trimestrale di Diritto Pubblico*; *Diritto Pubblico*; *Il Foro italiano*; *Rassegna Parlamentare*; *Il Diritto dell'Unione Europea*; *Quaderni Costituzionali*; *Le Regioni*; *Nomos*; *Jus*; *Osservatorio sulle Fonti*, among others, often include comparative law studies.

[53] DE CRUZ, Peter. (2009). "Comparative Law: Functions and Methods". *Max Planck Encyclopedia of Public International Law*, https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1018?rskey=EQWcAt&result=1&prd=EPIL.

[54] See FRANKENBERG, *Comparative Law as Critique*, cit.

[55] PEGORARO, Lucio. (2016). *Derecho constitucional comparado: La ciencia y el método*, Buenos Aires, Astrea; and also PEGORARO, Lucio, RINELLA, Angelo. (2024). *Sistemi costituzionali comparati*, 2a ed., Torino, Giappichelli, pp. 8 ff.

[56] PONTHOREAU, Marie-Claire. (2005), "Le droit comparé en question(s) entre pragmatisme et outil épistémologique". *Revue internationale de droit comparé*, vol. 57, no. 1, pp. 7-27.

[57] TUSSEAU, Guillaume. (2014). "Quelques impressions sur la comparaison juridique en France: une croissance inorganique et sous-theorisée", *Revista General de Derecho Público Comparado*, no. 14, pp. 1 ff.

[58] DAVID, René. (1950). *Traité élémentaire de droit civil comparé: introduction à l'étude des droits étrangers et à la méthode comparative*, Paris, R. Pichon et R. Durand-Auzias.

[59] See GRANDE, Elisabetta. (2006), "Development of Comparative Law in Italy", in REIMANN, Mathias, ZIMMERMANN, Reinhard (eds.), *The Oxford Handbook of Comparative Law*, Oxford, Oxford University Press, pp. 87-110.

Ruffia's textbook assumed that it was a science[60]; de Vergottini affirmed the same as long as research is carried out systematically and consistently with the legal method, aiming at specific targets through particular instruments of verification; and Scarciglia followed a similar path[61]. Pizzorusso used to speak of comparative law as a legal discipline[62], without engaging with the science/method dichotomy too much. Lombardi had a similar approach[63]. Bognetti's introduction to comparative constitutional law expressly favored the classification of comparative law as a method[64]. Private lawyers, such as Gorla[65], Sacco[66], Procida Mirabelli di Lauro and Alpa — all of whom first dealt with the methodological aspects of comparison and started to develop its methodological potential — are more prone to seeing it as a science.

Within this European debate, German scholars have assessed the objectives of legal comparison and its broader aims from a transnational perspective. Already decades ago, Zweigert and Kötz started to explain how useful comparison can be to reduce prejudice, improve better mutual understanding, provide impulses for legislative reform, and give judges grounds for the interpretation of national law[67]. Thanks to the work of Häberle, and his claim for comparison as the fifth method of interpretation[68], studies (especially outside the country) have flourished that examine the potential exploitation of comparison in public law[69] and have progressively devoted greater attention to the methodology.[70] Within German academia, as was recalled, Günter Frankenberg has been an outstanding critical voice with respect to methodology since his seminal piece from 1985, mentioned above. He has called for comparative legal scholars to distance themselves from the object of study, and to

[60] BISCARETTI DI RUFFA, Paolo. (1988). *Introduzione al diritto costituzionale comparato,* Milano, Giuffrè.

[61] DE VERGOTTINI, Giuseppe. (2019). *Diritto costituzionale comparato*, 10th ed., Padova, CEDAM, pp. 46 ff.; SCARCIGLIA, Roberto. (2021). *Metodi e comparazione giuridica*, 3rd ed., Milano, Wolters Kluwer, pp. 35 ff.

[62] PIZZORUSSO, Alessandro. (1998). *Sistemi Giuridici Comparati*, 2nd ed., Milano, Giuffrè, pp. 145 ff.

[63] LOMBARDI, Giorgio. (1986). *Premesse al Corso di Diritto Pubblico Comparato: Problemi di Metodo*, Milano, Giuffrè, pp. 7 ff.

[64] BOGNETTI, Giovanni. (1994). *Introduzione al diritto costituzionale comparato (Il metodo)*, Torino, Giappichelli, p. 107.

[65] GORLA, Gino. (1963). "Diritto Comparato", in *Enciclopedia del diritto*, vol. 12, Milano, Giuffrè, pp. 928 ff.

[66] SACCO, Rodolfo. (1992). *Introduzione al Diritto Comparato*, Torino, UTET, pp. 1 ff.

[67] ZWEIGERT, Konrad, KÖTZ, Hein. (1996). *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, 3rd ed., Tübingen, Mohr Siebeck.

[68] HÄBERLE, "Grundrechtsgeltung und Grundrechtsinterpretation Im Verfassungsstaat — Zugleich Zur Rechtsvergleichung als „fünfter" Auslegungsmethode", cit., pp. 913 ff.

[69] From this perspective, see the volume by VON BUSSE, *Die Methoden der Rechtsvergleichung im öffentlichen Recht als richterliches Instrument der Interpretation von nationalem Recht*, cit.

[70] KISCHEL, Uwe. (2015). *Rechtsvergleichung*, Munich, C.H. Beck.

honestly admit to being part of the picture and not "objective" external participants in the investigation.

Although David and Brierley had already foreseen the utility of comparative law in the 1980s[71], French scholarship still does not devote abundant attention to this field from an advanced methodological perspective, as it was explained a few years ago by Tusseau[72]. This author provided a comprehensive critical reconstruction of how comparative studies evolved in France from the perspectives of both scholarship and teaching. The main factors that do not favor the development of comparative studies are the reduced (although increasing) number of University courses and masters, the lack of posts only for comparative lawyers and the absence of a true academic community. Scholars like Agostini or Fromont devoted little space to methodology in their textbooks, while it was given more relevance in the joint book by Gambaro, Sacco and Vogel[73] since 2011. The scholarship by Ponthoreau should be considered an exception from this perspective[74]. Still, in 2016, Grewe expressed doubts about the autonomy of comparative constitutional law with respect to human rights[75].

Concerning Spain, comparative law was paramount during Franco's regime because it was the only possible approach to constitutional law[76]. After the Constitution entered into force in 1978, nevertheless, the autonomous configuration of comparative legal studies diminished, as it was argued by García Roca in 2013, despite the influence that the Constitution itself received from other European legal systems[77]. Legal comparison would be pursued mainly as an informal, somehow

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[71] DAVID, René, BRIERLEY, John E.C. (1985). *Major Legal Systems in The World Today: An Introduction to the Comparative Study of Law*, London, Stevens & Sons. Many scholars follow the same approach based on the idea of the major legal systems: see CUNIBERTI, Gilles. (2015). *Grands systèmes de droit contemporains*, 3rd ed., Paris, L.G.D.J.; LEGEAIS, Raymond. (2016). *Grands systèmes de droit contemporains. Approche comparative*, 3rd ed., Paris, LexisNexis; FROMONT, Michel. (2018). *Grands systèmes de droit étrangers*, 8th ed., Paris, Dalloz.

[72] TUSSEAU, "Quelques impressions sur la comparaison juridique en France: une croissance inorganique et sous-theorisée", cit.

[73] GAMBARO, Antonio, VOGEL, Louis, SACCO, Rodolfo. (2011). *Traité de droit comparé — Le droit de l'Occident et d'ailleurs*, Paris, L.G.D.J.

[74] On this issue, see also PICARD, Étienne. (1999). "L'état du droit comparé en France, en 1999". *Revue internationale de droit comparé*, vol. 51, no. 4, pp. 885-915; FAUVARQUE-COSSON, Bénédicte. (2002). "L'enseignement du droit comparé", *Revue internationale de droit comparé*, vol. 54, no. 2, pp. 293-309; FAUVARQUE-COSSON, Bénédicte. (2006). "Development of Comparative Law in France", in REIMANN, ZIMMERMANN (eds), *Oxford Handbook of Comparative Law*, cit., pp. 35-67.

[75] GREWE, Constance. (2016). "L'impact de la protection des droits de l'homme sur le droit constitutionnel comparé". *Revue internationale de droit comparé*, vol. 68, no. 4, p. 942.

[76] See at least GARCÍA PELAYO, Manuel. (1951). *Derecho Constitucional Comparado*, Madrid, Manuales de la Revista de Occidente; JIMÉNEZ DE PARGA Y CABRERA, Manuel. (1962). *Los regímenes políticos contemporáneos: teoría general del régimen. las grandes democracias con tradición democrática*, Madrid, Tecnos; or SÁNCHEZ AGESTA, Luis. (1963). *Curso De Derecho Constitucional Comparado*, Madrid, Editora Nacional.

[77] Further arguments on the use of comparison in constitutional law can be found in the questionnaire published in 2018 by a prominent journal: "Encuesta: el método comparado en el

"natural" and "intuitive" way of studying specific topics without a particular methodology that would be required for achieving sound results. According to García Roca, in any case, it is exactly the process of European integration that is bringing new force to the field, with reference to the debate on constitutional pluralism and judicial dialogue, legal networks in the European legal space, and because of the EU and the European system of protection of human rights[78].

As García Roca explains, Europeanization of domestic laws is an extremely relevant factor for the understanding of one's own legal system and of the importance of comparative law. Belonging to the European Communities first, and to the European Union later, has had a significant impact on every field of national law, including private and commercial law, labour law, and all branches of public law encompassing administrative and constitutional law[79]. "All these concepts call for an elaboration based on a comparison of deep layers of domestic legal thought, not just of positive law. That evolution is by no means limited to the transnational level: Community law has led to a 'Europeanization' of domestic law (and its institutions)"[80]. The fuzziness of this concept does not imply that a scholar shall avoid engaging with the comparative implications of the phenomenon. On the contrary, there is an impulse towards a new understanding of comparative law in the European legal space, the core idea being that practical aims of legal comparison can be better achieved in this particular context.

The unique legal space provided by Europe has been sharply and comprehensively analysed by Armin von Bogdandy, who has elaborated upon Europe's common constitutional values as well as the evolution of European integration as catalysing and preserving commonalities and (a certain level of) differences. Von Bogdandy connects these dynamics with the emergence of a newly understood European

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Derecho Constitucional". *Teoría y Realidad Constitucional*, no. 41, pp. 15-56. The scholars who replied were Benito Aláez Corral, Francisco Balaguer Callejón, Raúl Canosa Usera, María Jesús García Morales, Javier García Roca and Pablo Pérez Tremps.

[78] GARCÍA ROCA, Javier. (2013). "El desarrollo de la comparación jurídica como ciencia y como materia en la enseñanza en España", in *Annuario di diritto comparato e di studi legislativi*, pp. 459-475.

[79] CHITI, Mario P. (2018). *Diritto amministrativo europeo*, 2th ed., Milano, Giuffrè; DÍEZ-PICAZO, Luis, ROCA, Encarna, MORALES MORENO, Antonio Manuel. (2002). *Los principios del derecho europeo de contratos*, Madrid, Civitas; TIZZANO, Antonio (ed.). (2006). *Il diritto privato dell'Unione europea*, 2nd ed., Torino, Giappichelli; ZIMMERMANN, Reinhard. (2006). *Die Europäisierung des Privatrechts und die Rechtsvergleichung*, Berlin, De Gruyter; SIEBER, Ulrich. (2009). "Die Zukunft des europäischen Strafrechts". *Zeitschrift für die gesamte Strafrechtswissenschaft*, vol. 121, n. 1, pp. 1-67; GÓMEZ-JARA DÍEZ, Carlos. (2015). *European Federal Criminal Law*, Cambridge, Intersentia.

[80] VON BOGDANDY, Armin. (2016). "The Transformation of European law: The Reformed Concept and its Quests for Comparison". *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper Series*, no. 14, p. 5. On the unique interconnection between comparison and Europeanization of law, see BERGÉ, Jean-Sylvestre. (2013). "La comparaison du droit national, international, européen: de quelques présupposés et finalités", *Liber Amicorum: Mélanges en l'honneur de Camille Jauffret-Spinosi*, Paris, Dalloz, p. 89.

society[81]. Therefore, the relevance of the constitutional traditions common to the Member States[82], far from diminishing, shall be grasped as part of the process of balancing between commonalities and differences within the EU.

The European and Europeanizing processes described by von Bogdandy also account for the changing attitude of the *Bundesverfassungsgericht* vis-à-vis other domestic courts (and even the ECJ). Being left outside of the European judicial dialogue, especially when constitutional standards are elaborated within a multi-layered judicial system like the one entrenched in the EU, would be the same thing as renouncing any role in the elaboration of those supranational standards. In spite of still being the "exception" in the case law, comparative references have slowly begun to appear in German constitutional adjudication[83]. The Italian and the Spanish constitutional courts have probably been more prone, over time, to engage in a dialogue with other jurisdictions and also with supranational adjudicators.

V. META-COMPARATIVE FINAL REFLECTIONS

Compared to the Italian development of the field, German scholarship seems thus to lack a truly collective effort, based on diffuse and shared streams of thought or even "schools". Rather, it appears as an endeavour for fewer scholars, evolving mainly through separate projects with reduced systematic outcomes.

Also, there still seems to be little self-reflection and critical thinking, especially in connection with the very slight inclination to inter- or multi-disciplinarity. That, however, has been one of the key achievements of numerous Italian scholars, especially (but not exclusively) in comparative public law[84]. Since the very beginning, the interconnections with history[85], political science, sociology, or anthropology[86] (also in combination[87]), have been at the center of methodological debates. Already in the 80s, at least with respect to other social sciences, the "Law and Econom-

[81] VON BOGDANDY, Armin. (2024). *The Emergence of European Society through Public Law: A Hegelian and Anti-Schmittian Approach*, Oxford, Oxford University Press.

[82] See HUBER, Peter M. (2024). "The Constitutional Traditions Common to Member States: Identification and Concretisation", in VON BOGDANDY, SCHMIDT-AßMANN, *Theorising Comparative Public Law. A Reader from Germany*, cit., pp. 405-422.

[83] MARTINI, Stefan (2018). *Vergleichende Verfassungsrechtsprechung*, Berlin, Duncker&Humblot.

[84] RESTA, Giorgio, SOMMA, Alessandro, ZENO-ZENCOVICH, Vincenzo (eds.). (2020). *Comparare. Una riflessione tra le discipline*, Milano, Mimesis.

[85] Already BOGNETTI, *Introduzione al diritto costituzionale comparato (Il metodo)*, cit., p. 27, who affirmed that history is the main discipline providing the true knowledge of legal phenomena.

[86] SACCO, Rodolfo. (2007). *Antropologia giuridica*, il Mulino, Bologna. Even Sacco, one of the major methodologists of comparative law, towards the end of his career fully shifted towards anthropology.

[87] As PEGORARO, RINELLA, *Sistemi costituzionali comparati*, cit., explain, the inductive and empirical approach of these two disciplines is particularly useful for constitutional scholars which aim to reach beyond liberal-democratic states.

ics" agenda became a reference in Italy. That development has become progressively more nuanced with increasing interest in economic analysis and later in economic fallacies of hegemonic patterns of dominance[88]. Now that interdisciplinarity is opening up to other fields, such as geography[89].

Probably, the mainly "doctrinal" approach of legal education in Germany has played and continues to play an important role in this respect. Students are mostly trained to reach the correct interpretation of a legal norm or provide the correct solution to a specific legal problem, as to become potentially sound adjudicators. *Dogmatik* is the major reference and target in educational paths[90]. This approach favours domestic norms over foreign or comparative law. From such a perspective increasingly *lato sensu* European binding norms become relevant, and this seems consistent with the trends in German comparative law. Similarly, the study of "federal" models may also be one of the factors that have made European comparative law appear more frequently in German scholarship.

The methodological and epistemological distance between comparative law and constitutional law is plainly more established in Italy, where scholars devote their studies either to one or the other, while in Germany, as was recalled, frequently there is an overlap between the two aforementioned disciplines.

Additionally, comparative law has acquired in Italy increasing autonomy vis-à-vis domestic law and the mere study of foreign law[91], leading to the encounter of experts of both private comparative law and public comparative law for that purpose[92], in scientific associations and even in what is named the "habilitation" (a quite different process from the German one), in which the two branches have merged into one bigger category, labelled as "12/E2", Comparative Law.

The German approach seems to endorse a more pronounced "hegemonial" understanding of legal comparison, in spite of the few attempts, some of them recalled in the text, to invert the logic of comparative studies[93] (see, e.g, Michaela Hailbronner who applies to Northern countries the category of "transformative constitutionalism", a category conceived for South Africa and normally used to describe

[88] GRANDE, Elisabetta, MÍGUEZ NÚÑEZ, Rodrigo, MONATERI, Pier Giuseppe. (2021). "The Italian Theory of Comparative Law Goes Abroad". *The Italian Review of International and Comparative Law*, vol. 1, no. 1, p. 12.

[89] NICOLINI, Matteo. (2022). *Legal Geography: Comparative Law and the Production of Space*, Springer, Cham. On geopolitics, MONATERI, Pier Giuseppe. (2013). *Geopolitica del diritto*, Roma-Bari, Laterza; LOSANO, Mario G. (2011). *La geopolitica del Novecento*, Milano, Mondadori.

[90] A critical view was offered by LEGRAND, Pierre. (2015). "Negative Comparative Law". *Journal of Comparative Law*, vol. 10, no. 2, pp. 405-454.

[91] See already GORLA, Gino. (1989). "Diritto comparato e straniero". *Enciclopedia Giuridica*, XI, Istituto Enciclopedia Italiana, Roma, Treccani, p. 1 ss.

[92] As proved also by RAGONE, SMORTO, *Comparative Law. A Very Short Introduction*, cit.

[93] Even Uwe Kischel's volume from 2019, which encompasses non-Western parts of the world, has been criticized for implying a certain western moral superiority (see LEGRAND, "Kischel's Comparative Law: Fortschritt ohne Fortschritt", cit., p. 323).

experiences of the Global South[94], or Michael Riegner's studies on decolonization[95]). Therefore, a minor opening to non-western traditions and systems can be envisaged, if compared to Italy, where Latin American, African, and Asian law have been in the debate for long already. Still, both countries seem far from that "European academic legal community" (certainly not a global community), envisaged by Armin von Bogdandy, as public law scholars are embedded in systems that constrain them with requirements for completing their studies (let's think of the *juristischen Staatsprüfungen*) or accomplishing their highest qualification (*Habilitation*). Comparative law is becoming more accepted and widespread, but more traditional domestic methodologies aren't close to being considered anachronistic.

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Título:
De centros y periferias en el espacio jurídico europeo: la comparación jurídica desde la perspectiva alemana

Sumario

Resumen

Este texto examina la evolución y los logros de la comparación jurídica en el derecho público dentro del espacio jurídico europeo, con especial énfasis en la evolución alemana en términos de temas y países analizados. Aborda la inclusión progresiva de jurisdicciones periféricas dentro de los estudios, contrastando estos desarrollos con otras academias europeas (especialmente la italiana, la francesa y la española), también con respecto a la aplicación de métodos interdisciplinarios y la difusión de revistas dedicadas. Revela los sesgos y las concepciones doctrinales del derecho que han llevado a diferentes resultados y objetivos dentro del derecho público comparado.

Abstract

This article examines the evolution and achievements of legal comparison in public law within the European legal space, with particular emphasis on the evolution of German comparative law scholarship and its central topics and countries of interest. More specifically, the article sheds light on the progressive inclusion of the so-called "peripheral" jurisdictions within said scholarship, in order to contrast those developments with other European (especially Italian, French, and Spanish) scholarly groups with respect to the application of interdisciplinary methods and the spread of dedicated journals. By doing so, the article unveils the biases and doctrinal understandings of the law that have led to different outcomes and objectives of public comparative law in the analyzed jurisdictions.

Palabras clave

Derecho público comparado; Metodología; Espacio jurídico europeo; Interdisciplinariedad; Doctrina.

Key Words

Public Comparative Law; Methodology; European Legal Space; Interdisciplinarity; Scholarship.