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Constitutional Law and the Comparative Method

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Comparison in the Field of Constitutional Law

The formation of nation states, which were consolidated in the nineteenth century, often ruptured the unity of the great pre-existing legal and political systems. This led to the emergence of numerous self-sufficient and sovereign state systems (Grossi 2018, p. 104 ff.). That said, large-scale regional organizations oriented toward the creation of common political and legal spaces – such as the European Union, transnational law, and globalization – have significantly compromised the principle of sovereignty.

Although one cannot ignore the influence derived from the integration into a wider international community, each state bears claim to a legal system derived from its own regulatory sources to respond to the needs of its community. Self-sufficiency and the capacity of a system to appropriately regulate with its own legislation do not exclude external systems from being taken into consideration. Disparate legal systems can therefore impact each other in various ways, from mere acknowledgment to enhanced evaluation and revision of new constitutional drafts, and even the incorporation of legislation developed and operating in other jurisdictions.

An awareness of different legal systems encourages inter-systemic and inter-institutional comparison. Of course, the comparison will depend on the interests of the individuals conducting such evaluations. Comparative law thus constitutes an intellectual operation of comparison between the orders, institutions, and policies of different systems, which, if conducted systematically in accordance with legal methods, assumes the characteristics of a scientific discipline (Gorla 1964, p. 928 ff.).

Comparative methods in the field of constitutional law differ significantly from those applied to private law. Comparative private law revolves around the legal concerns of the individual, while comparative constitutional law is related to the way that different legal systems govern the organization and the exercise of civil authority, and the position of individuals and groups in relation to power (Pizzorusso 1981, p. 151 ff.).

Comparative legal scholars concentrate on the identification and examination of institutional legal frameworks. Knowledge of political

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institutions is an important prerequisite for an in-depth examination of the legal regimes under scrutiny. This evokes the well-known debate on the relevance of politics for law students. To solve such a problem, one should differentiate the intrinsic features of constitutional law from other disciplines, such as political science, sociology, and history. The latter are often essential in understanding topics encompassing constitutional doctrines and fundamental rights and freedoms because they provide a broader framework of state and government structure, and political organization on a global scale.

It must be stressed that the comparative constitutionalist's attention focuses upon a geopolitical scenario that has been subject to profound changes since the initial emergence of comparative law.

In the past, comparisons were conducted between legal systems and institutions within homogeneous cultural and political spheres, gravitating around European states and, more generally, the Western World. The systems and institutions featured in these comparisons all subscribed to the same liberal democratic model, taken for granted as the "natural" political form of any state on the international stage, and deviations from this classic model were deemed "degenerative." Therefore, scholars tended to focus on European and American legislation, traditionally linked to that of the United Kingdom, and neglected legislation from beyond this constitutional and geographical area. This essentially Eurocentric vision began to dissolve following the First World War with the creation of the Soviet Union. The latter was too large to be ignored despite its divergence from the "classic" model of democracy. The Eurocentric vision eventually collapsed altogether under the force of post-war decolonization. There was no longer consensus on what constituted the "model state" according to comparative constitutional theory: Authoritarianism, with its stark deviations from the "classic" democratic model, became identified as a third form of state, while newly independent states often resisted easy classification within either liberal democracy or Soviet socialism, with their respective principles and organizational structures.

An awareness of diverse forms of state has enabled neither their scientific categorization, nor the creation of a satisfactory comparative method. Only the liberal and socialist states offer clearly identifiable characteristics for the classification of state forms. The most recent independent states are the hybrid products of principles and organizational practices of historical-political origin: legal systems inspired by local traditions and principles derived from the liberal or socialist state. More recently, state systems have increasingly adopted liberal constitutional organizational principles even while maintaining authoritarian practices, which evidently compromise the guarantee of rights (Arnold 2006, p. 253 ff.). Reducing these states to a collective unit proved to be problematic; only an analytical investigation of each separate legal system or group of legal systems could produce scientifically acceptable typologies.

Due to the fact that comparative analysis has difficulties encompassing states that are not liberal democracies, the practice has long consisted of purely descriptive analyses of individual systems, juxtaposed within a single compilation and superficially classified as a comparative study (Lauvaux and Divellec 2015). These difficulties persist and, despite extensive debates by comparativists, a consensus has yet to be reached on the criteria for the comparative method in the field of constitutional law. Although the discipline has made some progress, it remains largely isolated to scholarship within Western cultural spheres (Reimann 2002, p. 671 ff.), as comparative law studies are, in principle, ignored in other cultural fields. However, this by no means prevents scholars from venturing beyond analyses of the Western cultural tradition into comparison of rights in more diverse cultural settings (Siems 2014, p. 101 ff.).

The comparative work of modern constitutional law scholars has taken on a particular relevance in light of both the growing intensity of relations between nations and their increasing collaboration and integration – the understanding of each of which requires comparisons between their respective conceptions of constitutional values. Such relations concern not only political and

economic, but also cultural profiles, and the interactions between scholars from the different scientific, and especially legal, disciplines (Ponthoreau 2010, p. 225 ff.; Adams and Bomhoff 2012; Hirschl 2014). The flux of information between academic practitioners, legislators, and judges will inevitably produce a shared awareness of different legal systems, of common problems, and of the need to compare similar or divergent experiences. Social scientists have thus become increasingly convinced that they operate in a culturally diverse and cosmopolitan environment, frequently controversial but fundamentally characterized by common values that enable a mutual comprehension of the phenomena that affect the societies in which they operate (Häberle 1999, p. 207 ff.; Cervati 2009, pp. 139 ff. and 233 ff.). The ability to identify common cultural spaces and an accentuated awareness of the close relationship between constitution and culture (Frankenberg 2006, p. 439 ff.) facilitate a constructive working environment. However, one must refrain from the assumption that shared cultural spaces, a mutual appreciation of diverse realities, and the exchange of information and research will naturally lead to comparative analysis. If this were the case, a climate of intercultural communication would automatically generate a sort of *comparative mentality*, which at best can be considered a "prerequisite" for comparison. The exchange of knowledge between scholars, the study of institutions from diverse legal systems, and a mere sensibility towards diverse legal experiences as such do not constitute comparisons. Comparative analysis in the scientific sense is always an explicit and well-argued process (Reitz 1998, p. 617 ff.), and the common cultural substratum is but a premise on which to establish a comparative framework for political systems and, therefore, constitutions.

We will need to address the impact of common cultural spaces on comparative studies before we can approach a systematic understanding of comparative constitutional law or an examination of its function, purpose, and methodology.

The Imitative Diffusion of Constitutional Ideas and Constitutional Convergence

Following the Second World War, the international transfer of political concepts and agendas multiplied and accelerated (Tripathi 1957, p. 319 ff.; Dorsen et al. 2016). The values inherent in constitutional principles designed to influence political communities have circulated following the restructuring of national spheres of influence, decolonization, the formation of new multinational institutions, and, finally, the resolution of conflict between the Western and Eastern blocs. The proliferation of international conventions addressing human rights has progressively affected all nations, especially in Europe and the United States. Modern constitutional transitions (de Vergottini 1998; Mezzetti 2003; de Vergottini 2007a, b, p. 701 ff; Biagi 2020, pp. 8–15) have, in many cases, involved a transition from various models of authoritarian constitution to constitutional models molded on the principles of constitutionalism. The rapid shifts of Central and Eastern European countries from socialist to liberal constitutional models are cases of particular significance (von Beyme 1994; Arnold 2005a, p. 389 ff.). The concept of "migration of constitutional ideas" (Choudhry 2006) was established within this complex framework.

Migration alludes to the dynamic flow of stimuli resulting from the superficial or in-depth transmission and awareness of the founding principles of constitutions. This does not assume that any given state's solutions, following the process of so-called legal "transplant" and "reception" (Watson 1993; Ewald 1995, p. 489 ff.; Legrand 2001, p. 55 ff.), will be accepted as a model by other states. Instead, the concept helps the observers of these systems create plausible explanations for the influence these guiding principles have on the formation and revision of constitutional law. In a similar manner, systems can also be affected by the *dissemination of ideas* (Slaughter 1994, p. 118) resulting in *cross-fertilization* (Scheppele 2003, p. 296 ff.). This cross-fertilization emerges when other parties engage in a process of imitative absorption,

using a variety of legislative measures and court rulings to address and resolve specific issues affecting multiple legal systems before assimilating the broader regulatory framework, judgment, or resultant ideas in a process of fertilization.

Besides the more or less suggestive way of qualifying the phenomenon, we are evidently witnessing an accelerated *process of diffusion* that has, with varying intensity, always been present in inter-system relations, involving the diffusion of principles and rules objectively presented as models worthy of consideration and imitation (de Vergottini 2001, p. 1367 ff.).

The model deemed exemplary, and therefore worthy of imitation, will be replicated by other legal systems through legal or regulatory procedures. Strictly speaking, the process does not involve exact replication, in so far as the application of a model will be influenced by the imitating system. This is why the *circulation of models* entails the adaptation of the original model to the requirements of the imitating systems. One cannot expect the relationship between imitator and imitated to be characterized by strict "fidelity" to the model, and absolute equivalence remains a historically unverifiable concept.

Circumstances influence the extent and significance of replication, either pursued due to demand or spontaneous in nature: one can see, for example, a blatant difference between the spontaneous adoption of liberal constitutionalism in Central and Eastern European countries in the period following the fall of the Berlin Wall and the forcefully attempted export of democracy during the Iraqi conflict (Lollini and Palermo 2009, p. 301 ff.; Horwitz 2009, p. 535 ff.; Graziadei 2009, p. 723 ff.; Engelbrekt 2015, p. 111 ff.). The migration of constitutional ideas assists the *progressive alignment* of constitutional legislation and implementation procedures, at least in geographical regions where states have established new organizations to facilitate the integration of their respective legal systems, exemplified by European organizations (such as the European Union and the Council of Europe). Moreover, comparative analysis remains set against the backdrop of irrefutable convergence between diverse legal systems – not only between the fields of *civil law* and co*mmon law*, but also between systems featuring variations in ideology and values (van Caenegem 2002). *Convergence between legal systems,* or between legal disciplines and their respective legal implementations, is particularly evident in the field of fundamental rights (Kokott 1999, p. 74 ff.). This has consequently driven the evolution of legal agreements (Chang and Yeh 2012, p. 1165 ff.). Once states, regardless of their political and constitutional regimes, are bound through international ties, they are required to comply with international court rulings that ultimately act as a unifying factor for national regimes. Convergence (Siems 2014, p. 234 ff.) thus does not equate to uniformity, despite the fact that it exemplifies a regime's *tendency for homogenization.* A variety of situations exist, from the harmonization of state systems that remain separate, to the effective hybridization of distinct laws, specifically deriving from processes of collaboration and integration implemented by international human rights conventions (Delmas-Marty 2004, 2006). Depending on one's perspective, convergence could also be considered a symptom or consequence of the more vague but widespread notion of globalization.

The Universalization of Constitutional Law and the Principle of Sovereignty

The distinctiveness of a common cultural space and notion of convergence do not undermine the prevailing self-sufficiency of state systems, which remain grounded on the *principle of sovereignty* (Grimm 2012, p. 547 ff.) and continue to (or believe to) act as arbitrators, occasionally determining the degree of receptivity towards external contributions. This is despite the fact that the "Westphalian system," wherein each nation state is endowed with exclusive sovereignty over its territory, has suffered due to increased international collaboration and integration (Ridola 2010, p. 241 ff.; Ridola 2018, p. 323 ff.; Sheuerman 2014, p. 102 ff.).

It is in light of this observation that the principles of the universalization of constitutional law, understood as the diffusion of constitutional

values, must be assessed, not only because these are shared amongst different state systems, but also due to the progressive assertion of regulatory constraints, deriving from the formation of super-state institutions with homogenizing powers (regulatory and jurisdictional powers that bind the states).

Part of the legal scholarship focuses on the aforementioned *shared values* at the core of constitutions, which for some time now have featured in the relations of a substantial part of the international community (Häberle 2000, p. 57 ff.; Häberle 2005, p. 278 ff.; Frankenberg 2006, p. 439 ff.; Fassbender 2007, p. 307 ff.; von Bogdandy 2008, p. 397 ff.; de Wet 2006, p. 51 ff.). Included in this legal scholarship is also the *universalization* of constitutional law. On one hand, this universalization of constitutional law consists of the rediscovery in a pre-existing natural law (Ackerman 1997, p. 771 ff.) and, on the other, new systems of constitutional review entrusted to special judges (Groppi and Ponthoreau 2013). The contributions of Häberle highlight the need to expose the pluralistic constitutional state system to principles developed on an international scale and endorsed by an increasing number of states. In this way, one has a gradual convergence of legal systems, and comparison in this context proves essential (Häberle 1989, p. 913 ff.; Häberle and Kotzur 2016, p. 246 ff.). The concept of "*cosmopolitan*" (Slaughter and Burke-White 2002) or "*open*" (Zagrebelsky 2008, p. 390 ff.) *constitutional law* tends therefore to prevail as the expression of interdependence between different legal systems in relation to principles which are considered to shape a common branch of constitutional law.

In this context, national and international jurisdictions are vital and the judge plays a leading role in overcoming the isolation of national legal systems, promoting a rupture in the idea of the closed legal system and enabling the judge to solve a matter of constitutionality using extrasystemic parameters from an undefined number of legal systems. Their law circulates by means of electronic technology which facilitates knowledge and assimilation, hence the emphasis on establishing intercourt dialogue (Slaughter 2003, p. 191 ff.; de Vergottini 2010).

International and national courts are called upon to address and resolve cases that transcend state borders, and despite there being no clear division of powers between international and state courts, both are expected to apply a combination of domestic and international law. The system tends to assume a more open character, facilitating a *global community of courts*, comprising of judges who convene at conferences to exchange ideas, cite one another in their verdicts, and participate in a shared enterprise (Benvenisti and Downs 2013–2014). This results in *cross-fertilization* and *active dialogue*, signifying a departure from the passive acceptance of the rights of others, and also encourages *judicial comity*, an approach which applies mutual understanding and deference to alternative judgments in the process of reaching a solution. Despite being presented as a global phenomenon (Glenn 2010, p. 52 ff.; Siems 2014, p. 190 ff.), only a selection of the positive legislation is involved, even if these systems are the ones that feature in the prevailing comparative analyses and are represented by systems based on liberal values (Reimann 2002, p. 671 ff.). In fact, the research conducted to date is largely affected by a conventional Eurocentric perspective (European state courts, the Courts of Strasbourg and Luxembourg), with substantial deviations from the courts of countries that are culturally linked to developing Western constitutionalism in different continents (the United States, the former Dominions, Latin America & the Court of San José, and certain Asian and African states emerging from decolonization). In practice, the scholar's horizons are limited to the scope of the legal systems examined by judges referencing exogenous precedents, and it is proven that judges typically refer to the precedents of courts pertaining to legal systems that share the same values and form of state. This was signaled by Cappelletti, who identified the emergence of the comparative method in the efforts of some courts who sought to apply the verdicts of other judges who shared the same ideological principles (Cappelletti 1969, p. 31 ff. and p. 273 ff.). In certain cases, it is the

constitution itself that guides the court's approach. Article 39 of the 1996 Constitution of South Africa, which stipulates that interpretations of the Bill of Rights allow judges to consider foreign law in order to "promote the values that underlie an open and democratic society," has prompted one South African judge to reiterate on several occasions how his interpretation would be oriented in accordance with pre-established principles guaranteeing "human dignity, equality and freedom," presumably shared by judges of liberal systems. All the aforementioned illustrates an openness on behalf of judges, but still falls short of overcoming the limitations imposed by traditional principles of sovereignty. The formation of a supraconstitutional right would assume that the conventional principle of state sovereignty and the predominance of positive state law have been compromised or surpassed. Moreover, it would present a clear challenge to the solidity of the classic principle of separation of powers, since the growing role of judges, and especially of constitutional and international courts, highlights a limitation of the role of legislative power. The active role of the judge in ensuring the protection of fundamental rights, by appeal or by determining the constitutionality of laws, takes precedence over the role of parliaments and executives. One can see how this state of affairs has caused some to question the *legitimization* of the judges, which does not derive from the endorsement of popular will but from the act of guaranteeing rights that derive directly from the constitution and from international law (Huls et al. 2009; Lenaerts 2013, p. 1302 ff.).

Considering these theories, one must distinguish the indisputable notion of the emerging culture of rights, which transcends state boundaries in the area of liberal-democratic legal systems, from the formation of a supra constitutional right, a problematic task given that it is not clear how a specific positivity can be identified.

Convergence – as well as other notions that indicate the alignment of phenomena such as globalization, standardization, homogenization – tends to require comparison to highlight fundamentally shared principles and similarities between the profiles of the examined systems. The *praesumptio similitudinis* might be exploited because developed nations are responding to similarly – or identically generated sets of expectations (Zweigert and Kötz 1998, p. 34 ff.). In reality, however, comparison is not confined to the mere search for similarities and convergences between constitutions, laws, and jurisprudence. One must also be mindful not to neglect diversity (Legrand 2003, p. 240 ff. and p. 292 ff.): The *prioritization of difference* prevents us from neglecting values such as pluralism and the various "cultural memories" and, therefore, from erasing the antinomies that arise in critical comparative analysis (Legrand 2003, p. 294).

Comparison and Criteria for the Formulation of Classifications of Forms of State and Government

The main priority in comparison regards the criteria for classification (Sherwin 2009), which are relative and non-absolute, varying according to the investigated area of law and to the purposes of the investigation. Classification is a logical process that seeks to identify classes that can be distilled into subclasses. In the study of public law and comparative constitutional law, the state legal system is traditionally used as a reference, identified according to its specific features as defined by legal science (Schmitthoff 1939, p. 94 ff.; Gutteridge 1946). Within this category, which includes systems that can be classified as states, different forms of state are grouped into subclasses, and potentially further distinguished into subclassifications, based on factors such as form of government, regulation of the sources of law, fundamental rights, and so on. There is undoubtedly a need to establish distinctions between orders and institutions grouped together within systems that merely appear to be similar (Morlino 2005), and the variables that are of relevance to any comparison must belong to the same category. Classification involves determining and specifying the qualities of subjects of analysis and dividing them into systematic categories, common contexts, within which cases which demonstrate features of the corresponding

categories may be recorded. In practice, this comes down to establishing the various "criteria" on the basis of which to construct the different divisions of classification. For example, the primary criterion for the classification of state systems may constitute the entitlement to power, distinguishing between systems that diverge between models of concentration or separation of powers. Alternatively, the criteria for classifying constitutions may involve the presence or absence of mandatory review procedures, distinguishing between rigid and flexible constitutions, or the presence or absence of structures which maintain the constitution through the constitutional courts. Once classification frameworks and their criteria have been established, it is possible to trace the subjects of investigation back to a corresponding category. A sound set of criteria ought to ensure that any practical case under examination be encompassed within a classification framework. Of course, the generic nature of the basic classification system facilitates a relatively straightforward organization of cases. Verifying whether a constitution qualifies as a system of concentration or separation of powers, as rigid or flexible, or as possessing a constitutional court or not, is therefore a simple procedure. However, this discourse increases in complexity with the elaboration of distinctions for criteria, as witnessed, for example, when constructing the classificatory framework for forms of government: The most frequently examined components of such frameworks are: the role of constitutional bodies and of the political system, the political components of legal systems and of political parties and electoral legislation. As a rule, the classification frameworks used by constitutionalists are developed starting from the examination of existing systems that serve as a prototype (Lanchester 1990, p. 798 ff.): for example, the American system of government provides a reference for the presidential system, the French system based on the dual executive system, the Swiss for the directorial system, and the British for the parliamentary government. Rarely does the prototype that serves as a guide for defining classification criteria encompass all the potential elements that could contribute to refining the structure of the framework, which will require further revision and enrichment, and an examination of multiple historical realities. Only experience-based enrichment will enable the development of adequate classification frameworks that distinguish relevant forms of government, advancing beyond outdated traditional frameworks. *Exhaustivity and exclusivity* characterize classification: categories must be clearly sorted under their specific classes (Troper 1989, p. 945 ff.; Eisenmann 1968, p. 8 ff.). However, it has been noted that classification in the field of comparative law cannot be performed with the same rigor as when conducted in natural sciences. The challenges that arise in the establishment of adequate classifications largely derive from the fact that the objects of study are the legal systems of states, but also increasingly of complex international organizations with a federal vocation such as the European Union, characterized by heterogeneous constitutive elements that render the experience of these prototypical state models only partially applicable (de Vergottini 2009, p. 319 ff.; Fabbrini et al. 2015). Despite this, some constitutionalists strive to produce classifications, though the results are not always satisfactory.

Considering the acknowledged position of the states as a historical source of political power and the study of state systems as an instrument of constitutional law, it seems appropriate to resort to forms of state and forms of government as a preferred framework for comparative purposes. The categorization of the diverse groups of state systems based on their mutual homogeneity is the premise for their comparison, though the comparison between systems of different groups is still possible, since all classifiable systems belong to a broader category of study within the general principle of state system. In other words, the category of "state system" encompasses several subsections under which different political regimes that have already been examined can be grouped. One is not limited to internal comparisons within a specific regime or between homogeneous orders: it is possible to compare divergent regimes which are characterized by "heterogeneous" variables, such as liberal and socialist orders, but which are

all ultimately considered homogeneous, insofar as they fall within the broader categories of "state" or "state order" (Raz 1970).

It is for the researcher to select criteria that are most suited to the type of investigation, in order to identify some of the associated properties shared by the constant parameters of their analysis. From a practical perspective, the classification of forms of state and government fulfills several objectives, whether these be for purely theoretical, descriptive, or evaluative purposes, or to identify historical successions and extract prescriptive information. The doctrine of forms of state and of government provides the most appropriate framework within which comparative analysis that covers subjects pertaining to constitutional law can be encompassed. The comparative study of orders and their institutions is habitually preceded by the re-evaluation of components through which state political power is manifested within various constitutions. Research contributions and texts on constitutional law tend to focus on the analysis of forms of state based on the principles of political liberalism and the various forms of government that this encompasses. This holds true in both countries central to the development of classic Western constitutionalism and in countries unsatisfied with (or in the process of critiquing or rejecting) formally accepted liberal principles, both of which decisively favor the study of government structures under liberal state systems and their epigones.

Types, Models, and Their Circulation

If one reads the legal scholarship, one can see that the divisions regarding forms of government are defined based on the establishment of specific identificatory elements, usually of a stable and constant nature, which are reduced to *types* (ideal types, archetypes) (Bernhardt 2007, p. 704 ff.). The capacity to identify multiple typologies is essential for the purposes of classification, since legal science, in ordering its concepts, depends on logical reference categories for the examination and classification of knowledge. The typologies are identified with consideration of the reality of the orders or in reference to abstract forms. Thus, one can conclude that when legal scholarship refers to a semi-presidential form of government, this form may be based on a model that is deemed exemplary, such as the French constitutional model of 1958 (historical type). It can also proceed to the comparative analysis of constitutions besides the French system (Germany, 1919; Finland, 1919; Austria, 1929; Ireland, 1937; Iceland, 1944; Portugal, 1976). The outcome of this analysis enables the researcher to infer that a president of the republic elected by direct universal suffrage with significant duties and a government that is accountable to the elective assembly are common identifiers which tend to identify an abstract semi-presidential form of government. Within the liberal political regime, constitutional scholarship frequently refers to government models, including parliamentary, presidential, semi-presidential, and directorial, fields in which there are numerous variables to consider. Divergent regulatory approaches to fundamental rights form a third such typology, internally divided by the classification of rights catalogs (such as a bill of rights, declarations, and charters) and their connections to form of government, which together allow for reasonably clear identification of the basic characteristics of different political regimes.

The introduction of constitutional reforms may require shifts in the classification of a form of government, while the adoption of a new constitution may problematize the classification of models all together. The aforementioned forms of government occasionally assume – whether by virtue of their importance or of the interest attributed to them by legal scholarship – an emblematic and exemplary role. In this respect, during legislative or constitutional shifts, they may be referred to as "models." Consider, for instance, the model of the French semi-presidential government, which has been repeatedly examined with a view to introducing possible constitutional reforms in Italy. However, *correspondence between type and model is not essential*, although the two terms are often used in equivalence. The group of elements used for identification constitutes a type, but not every type can be used as a reference for other orders. This does

exclude the possibility that once identified, a type could potentially serve as a real model for the purpose of examining other experiences. By way of example, it can be said that the Swiss form of government is certainly a type characterized by collegiality of the executive, an initial vote of confidence of the assembly, and a fixed term of office. This form of government also has the potential to serve as a model, but in practice its imitation has posed problems. By contrast, the form of government provided for in the 1993 Russian constitution of the "ruling president" represented a new type of government, far from the classic presidential and semi-presidential forms. When it first appeared, it only bore the status of a potential model, but was quickly adopted by various constitutions of post-Soviet Asia (Ismayr 2004). Generally speaking, the typology that distinguishes forms of government has a merely descriptive value to the constitutionalist, insofar as the jurist analyses and classifies the orders, but any given type that is considered as a model still has the potential to gain prescriptive value when a constitution defines an organizational structure and consequently adopts that precise form of government. This is normally the result of a specific discipline in the constitutional text: when, for example, the text refers to the relationship of confidence between parliament and government, this means that the constitution has chosen in a binding manner the form of government that is conventionally defined as parliamentary, as one of its variables. In some cases, not only does the constitution contain all the rules concerning the institutions that constitute this form of government, but it also officially qualifies the State as such. Thus, the Greek Constitution of 1975 states that "The form of government of Greece is that of a parliamentary republic" (Article 1.1) and, the Spanish Constitution of 1978 proclaims that, "The political form of the Spanish State is that of a parliamentary monarchy" (Article 1). In these cases, the reference to such forms of government implies an acceptance on behalf of the constituent of a set of institutions that are commonly linked, in historical, political, and institutional practice, solely to the identifying traits of the form of parliamentary government, and which therefore could not hypothetically allow these systems to be turned into other forms of government. As *an exemplary model* worthy of imitation, its reproduction is planned in other orders: however, such a process is not without flaws, as it is concretely influenced by the particular exigencies of the imitating order. This explains why the so-called circulation of models never signifies the faithful reproduction of a model but rather involves adaptations of the model to the needs of the constituent bodies or the bodies of constitutional revision of a previously experimented model (Perju 2012, p. 1304 ff.). Imitations may concern the official constitutional text. Notably, the success of an adopted model often risks being apparent only at a point when the imitating order has not suitably ensured the functioning of the solutions, often due to substantial divergences between their historical, political, social and economic, and generally cultural foundations and those of the imitated order.

The success of the transposition of a model from one order to another is predicted purely based on the correspondence between the fundamental values of the imitated and imitating orders. Therefore, for example, it is inappropriate, from the perspective of the effectiveness of the constitutional guarantee, that the principle of safeguarding fundamental rights (Wesensgehaltsgarantie) referred to in Article 19(2) of the German Basic Law be implemented by constitutions such as that of Kazakhstan in 1995, Article 12(5), or that of Kyrgyzstan in 2010, Article 20(2). (e.g., Poland, 1997, Art. 31, 3; Romania, 1991, Art. 49, 2; South Africa, 1997, Art. 33, 1b).

While most potential imitations are usually those formalized in normative texts, imitations made in judicial contexts by constitutional courts are of considerable importance. We recall, for example, that the references made by the South African Constitutional Court are particularly broad in scope regarding the decisions of other courts, including those of Germany, Canada, Austria, and the United States (see Bernstein and others v. Von Wielligh Bester and others, Dec. 27-3-1996, CCT 23/95).

The Object of Comparison in Constitutional Law

State systems and their institutions are conventionally subjects of comparison in constitutional law, although it should be noted that the comparison may affect public systems within the state systems or systems of international organizations.

The Internal and External Comparison of State Systems

The subjects of comparison in the field of constitutional law and public law are typically systems, institutes, and rules pertaining to state systems, but given the plurality of the latter, both internal and external comparisons can be conducted. Comparison within a constitutional system is required, for example, when comparing the criteria for political representation and electoral procedures at municipal, provincial, regional, and state level (in such cases comparison is performed between the various levels of a hierarchical or vertical system). Comparison is also needed for contrasting corresponding regional laws adopted in the same policy area, such as agriculture or spatial planning (in this case involving sets of rules that may operate at the same level). The comparative analysis between legal systems or between organizational sectors of interstate disciplines corresponds to specific canons of comparative analysis, which is conventionally a matter of domestic public law (even if a consensus is yet to be reached as to whether the comparison made within the federal legal systems is included within the scope of this field – Weber 2010, p. 4 ff.). Legal comparison as an independent discipline is conventionally confined to the relationships between different state systems and thus operates outside a given reference system, both in the private and public sector. But if comparison usually operates between state systems, it is notable that the state system can also be compared with legal entities of systems that do not qualify as states. Thus, comparisons on the subject of fundamental rights can be drawn between the rules of a state and those of an international organization. Moreover, state rules can be compared with supranational rules that unite specific legal elements regardless of the territory they pertain to, such as various religious orders. This concerns comparisons between state systems or between the latter and other systems, and comparative constitutional law presupposes that at least one of the systems examined under the comparative procedure is a state. It is of course possible to compare the most diverse legal systems, in accordance with regular scientific procedure.

Foreign Law and Comparative Law

In the study of the legal comparative method, a recurring question arises as to the role of foreign law, here defined as law that differs from that of the state system of the author and usually of those that read and employ the comparative study. (The author is usually assumed to conduct comparisons between foreign law and the legal system that they are affiliated to, though comparison between positive systems which are both "foreign" to the author are of course possible). The study of foreign law should be as accurate as possible, in order to obtain an in-depth understanding which will benefit subsequent comparative examinations. This should facilitate a general understanding of constitutional history, legal sources, and of the effective implementation of constitutional rules, in order to integrate individual institutions (subject to ensuing comparative analysis) into an appropriate referential framework. The study should also ensure a familiarity with legal terminology, exercising caution with similar terms employed in the author's legal system, as homologous terms often refer to distinct legal realities (Frankenberg 1985, p. 411 ff.). Knowledge of the languages of the texts of the foreign legal system under scrutiny is of particular importance (Reitz 1998, para. 7; Ponthoreau 2010, p. 90 ff.; Husa 2011, p. 209 ff.). Reliance on translations is often inevitable when the language is unknown to the scholar and the translator's version must therefore be relied upon, usually in the widely recognized and diffused English language (Markesinis 2003, p. 76). Whenever possible, the text's original version should be consulted, in combination with a sufficient knowledge base of the positive legal order and the legal culture in which it operates.

It is essential to avoid any reliance on apparent coincidences or lexical proximities between the systems being referenced and the legal systems that are subject to comparison, and it is good practice to consistently identify elements that underpin the legal concepts, elements that may differ despite apparent similarities between the terms used to define them (Gerber 1998, p. 719). To be treated as comparative law, foreign law must be examined in terms of comparison with another law, such as when comparing different nations' copyright laws. From this angle, an understanding of foreign law is an indispensable prerequisite for further comparison. Nothing excludes the possibility for comparison between two foreign jurisdictions. From a methodological perspective, the difference between the examination of a foreign system for purposes of study or for comparison lies in the fact that the product of the former is purely descriptive, while the latter, in addition to an understanding of multiple systems, requires an examination and subsequent establishment of a systematic comparative procedure to reach definitive conclusions (Merryman 1983, p. 67 ff.).

Macrocomparison and Microcomparison

The comparison may involve the entire system (macrocomparison) or individual sectors or institutions (microcomparison) (Constantinesco 1972, vol. I, p. 209 ff; 1974, vol. II, *passim*; 1983 vol. III, p. 85 ff, p. 227 ff). Comparison between two legal systems is certainly achievable, but due to the extremely broad scope of legal provisions, any such holistic examination will likely encounter difficulties and produce generic results. It is more common for legal systems to be compared in parts or by their subsystems; comparing, for example, French and Italian parliamentary law instead of the entire French and Italian legal systems. Even more common and valuable is a comparison between institutes or groups of institutes within the two subsystems, for example, between their respective standards for political enquiry in parliament-government relations, or even between the standards that govern a specific institution in the context of such inquiries. The comparison of specific institutions should always be conducted with consideration for the overall context of the legal systems they belong to. Errors of perspective can arise when comparisons refer to the texts of official categories within an institution whose elements can appear to share similarities (Häberle 2005, p. 82). The values and the constitutional culture of legal systems must be clarified (Claes and De Visser 2012, p. 143 ff.). Therefore, even "micro-comparison" still requires consideration for the broader legal context.

Positive Law as a Subject of Comparison

An area of law that is subject to potential comparison is positive law (Bognetti 2009, p. 7), which is applied in the jurisdictions that are involved in comparative investigation, while examinations of legislation that is no longer in force pertain to the field of historical research. This acknowledgment serves as an introduction to an argument that often arises among comparative scholars, who question whether the examination of positive systems should be restricted to investigations of written law.

To address this matter, it should be noted that constitutional law is often a politically charged law, as a set of rules that tend to regulate the course of political action. As such, its formalization is often impossible or unsuitable, and therefore the formation and modification of standards of conduct of political "actors" tend to be influenced by the conventions rather than being established in constitutional provisions. In addition, many forms of conduct deemed necessary are pursued by political forces and constitutional entities, even if they are not formalized in the constitution (customs). In fact, in some legal systems, unconsolidated constitutional law assumes a concurrent or prevailing role over the written law (countries of common law, newly independent Asian and African states, among which the Islamic states are of particular importance (see Grote and Röder 2012, 2016)). Finally, formal constitutional law is often amended during the course of its application, and these amendments distort the formal provisions (Albert 2015, p. 287 ff.).

The tendency to limit the comparison to written law is linked to the very origins of the modern

studies of comparative law. The concept originated in the nineteenth century under the guise of "comparative law," intended to facilitate the unification of national laws, in contrast to "comparative history," whose practice was intended to scientifically define the origins of laws within the broader framework of social evolution, according to Lambert's formulation at the International Congress on Comparative Law (1900), which would greatly influence comparative legal studies (Lambert 1905, p. 167 ff.).

The comparative study of national law remains a cornerstone of comparative law. As they progressed, however, comparativists soon realized the importance of considering law within its social reality, beyond the strictly formal examination of the incorporation of rules into constitutions and laws. The contributions of legal sociology have been influential in this respect. Thus, for some time now, many authors have recognized the inadequacy of comparing conflicting legislative texts.

Mirkine-Guetzevich, in concluding one of his essays, noted precisely how "the study of comparative constitutional law teaches us the relativity of texts, formulas and dogmas. It is not texts that create democracies; men and ideas, parties and principles, mystics and slogans, customs and traditions are the determining factors of a regime. The texts only create certain conditions for development, transformation and political implementation." Finally, he noted: "The examination of constitutional practices remains the primary task of comparative constitutional law" (Mirkine-Guetzévich 1951, p. 195). Today, it is generally accepted that the comparativist cannot ignore the reality and practical functioning of the constitutions, with consideration for the elements of formal individuation (constitutions, legislation, and jurisprudence) and the nonformal elements (customs, conventions, and interpretative practices) (Weber 2010, p. 11). Of particular relevance is the comparison of the principles of law developed by constitutional jurisprudence because of the increasingly significant role played by state and international judges in their efforts to protect laws. We can, therefore, endorse the traditional emphasis placed by scholars on comparative private law when they assert that *law in action,* when examined for comparative purposes, does not necessarily coincide with *law in the books* (Gutteridge 1946; Newmayer 1973; Ascarelli 1955, p. 508 ff.; Pound 1910, p. 12 ff.). A further development can be accomplished by widening the scope of comparative interest to the manner in which law is considered and evaluated, thus moving from its production (written and unwritten sources) to its *interpretation*. Therefore, reference to legal scholarship must encapsulate the materials being compared in their entirety, whether this means including the series of provisions adopted by the legislator, the attitudes conveyed by legal scholarship, the pronouncements of the judge (so-called "formants" of an order), or the nonformalized law which is manifested through behavioral practices, and which can be traced back to the mindset of the jurist (Ponthoreau 2007, 219 ff.; Ponthoreau 2010, p. 118 ff.), or to the cultural environment of the work itself (so-called "cryptotypes") (Sacco 1991, p. 22 ff.). In practice, it is a question of taking into account, and therefore exploiting for the purposes of comparative analysis, both the law expressed in legal, jurisprudential, and doctrinal texts, and the unwritten laws that are nonetheless considered to be operative (law "in force"). A final remark concerns the need to consider the compared law within the overall context in which it operates (Dorsen et al. 2016, p. 3 ff.), to ensure that the information is comprehensive, an essential prerequisite for sufficient understanding and accurate comparative analysis.

The Comparability and Relevance of the Constitutional Tradition

For some time, constitutionalists (as well as civil lawyers and scholars of other legal disciplines) have pondered the fundamental conditions that must be identified prior to comparative studies. As a general rule, only values or ideologies that are deemed homogeneous by the standards of legal systems (macrocomparison) and homogeneous from a practical perspective for individual institutions (microcomparison) are comparable. Therefore, there is a tendency to compare

institutions pertaining to the same culture and constitutional tradition, and which fulfill the same functions regardless of their formal classification.

The Value of the Comparison

A prerequisite for comparison is the distinction between the intended use, whether for practical purposes, which usually require homogeneity, or for scientific purposes. Comparisons must be of value: it would be impractical to refer to laws which differed to such an extent as to render them unsuitable. Legal processes can require comparison to draw up constitutional and legislative texts for future use and for an indefinite number of cases and users.

Compared with the restricted margins of maneuver that holders of constitutional roles are subjected to, researchers benefit from a certain degree of freedom. Moreover, in practice, scientific studies cannot overlook comparisons of systems founded on different values. This is due to the importance of analyzing the relationships between the systems of the states that became independent following the Second World War and those of the European colonial powers (almost all of the African and Asian systems), or between the different historical phases of systems that transitioned from liberal to authoritarian state principles, or vice versa (Ibero-American systems and Greece, Spain and Portugal). Comparisons between legal orders within different forms of state must engage in in-depth studies of the basic profiles of their respective constitutional orders, wary of superficial formal similarities which could produce premature, inaccurate, and misleading conclusions.

Therefore, the comparative study of heterogeneous systems is entirely justifiable within the field of comparative science. Legal scholarship's emphasis on the requirement for system homogeneity for comparison, or on cautioning against simplistic comparisons, arises from the fact that the comparison is responsible for providing resources that will determine the adoption of constitutional and legislative texts or the harmonization or unification of law. These functions are undoubtedly best achieved by operating within the framework of homogeneous regulatory systems. Therefore, even if it seems evident that the comparison of homogeneous systems should be facilitated by the commonalities and mutual characteristics of the identifying elements, the comparability of heterogeneous systems should not be dismissed. Comparisons of the latter derive from the objectives of the researcher and the research outcomes: as well as similarities and equivalences, such comparisons can in turn highlight diversities. In conclusion, the comparison of state legal systems within different forms of state (or political regimes) is scientifically legitimate, as long as it is relevant to the research objectives.

But comparison for scientific purposes, as previously clarified, does not entail a disregard for radical differences between cultures and their conceptions of law and the organization of power, which end up conditioning the holders of constitutional functions. It must be added that it is not permissible to claim that differences can be overcome through globalization. Even where there are evident degrees of permeability between cultures, this does not engender the disappearance of differences, with "divisions and fractures" between the Western world and other geopolitical spheres remaining an inescapable reality.

That said, the concept of comparability can be understood in two senses. First of all, it is necessary to identify the requirements for comparison between legal systems or between institutions. In this sense, it may be assumed, for example, that a comparison can be drawn between the judicial precedents of the US, Canadian, Australian, New Zealand, and South African courts, as has been the case in South African jurisprudence. The (partially) shared cultural roots, typical of the common law area, seem to justify and rationalize the approach that precedes the comparison. Similarly, in the European legal area, there are systemic prerequisites for comparative legal arguments. In this area, the comparison takes place between legal systems which are subject to the common principles set out in Article 2 TEU, supplemented by the guarantees provided by the ECHR (von Bogdandy 2016, p. 519 ff.).

Secondly, the reference to external law encourages an examination of whether the precedents of

a certain legal system, which are in principle comparable, are considered by the person making the comparison to be useful for reaching a judgment. From this perspective, judges are selective (Markesinis and Fedtke 2006, p. 61) in concretely proceeding with the use of foreign law. It is said that a comparison can be made if the precedent is useful, and that it is valuable for a court to find both similarities and differences in meaning.

In a number of instances, the South African Constitutional Court has implicitly considered comparison, for example, with the United States system, considering it relevant and useful to review the jurisprudence of the Supreme Court. In some cases, it declared the potential for comparison with the Court's precedents, and in others it did not. Such references during the *Ntandazel Fose v. Minister of Safety and Security* (Judgment of 5 June 1997, CCT14/96 [1997]) case, relating to violations of constitutionally guaranteed rights, were found to be useful, and thus comparisons were made with the precedents of the Supreme Court. However, in the *State v. Zuma* case on presumption of guilt and in *The State v. T Makwanyane and M Mchunu* case on the subject of the death penalty, the Court considered references to precedents of other judges to be more fruitful than to those of the United States.

Comparability between legal systems and institutions operating within different legal systems has traditionally been based on their homogeneity, though the concept of homogeneity differs when referring to the relationships between legal systems and the relationships between institutions operating within different legal systems. In principle, homogeneity between legal systems refers to an alignment of principles and values. Homogeneity between institutions additionally assumes a functional dimension. The bearers of constitutional roles tend to resort to external law that corresponds ideologically to the values of their own systems for comparative purposes, rendering cultural homogeneity a precondition for comparability. Constitutional role-holders consider comparability to be dependent upon its execution within precise cultural spaces which coincide with geopolitical areas which are usually identified for the classification of legal entities both on behalf of private parties (families of rights) and public entities (forms of state, political regimes). Classification would be allowed to operate within these spaces, but not beyond them.

The question appears sufficiently clear surrounding the exercise of judicial power. A distinction can be made between the preparatory stages and the final decisive moment. In fact, while deciding, the judge cannot seek reason in legal systems that do not share the constitutional principles of her/his own system, and this circumstance could change if the focus were to shift to the moment of reasoning that precedes the decision. In the preliminary phase, judges enjoy complete freedom of maneuver in the pursuit and discovery of laws and external precedents, and thus can extend consideration to laws that fall significantly beyond the scope of their own constitutional principles. This explains, for example, why the South African Constitutional Court, in its famous decision concerning the death penalty (The State v. Makwanaye), also took into account, among the many legal systems, the laws of the US Supreme Court in favor of capital punishment, but then deviated considerably judging capital punishment to be ultimately irreconcilable with its own constitutional values.

Comparability and Constitutional Traditions

It is therefore clear that the judges, in formulating their ruling, can consider external law but only employ it in practice if it is valuable to the decision-making process and if it proves compatible with the constitution that it must adhere to. As previously noted, researchers occupy a diverse position, since they are not constrained by the requirements of the constitution of the order in which she/he habitually operates.

To clarify this difference in approach, we begin by considering the value of the constitutional traditions of each country, that is, the set of values that have been established over time in different geopolitical areas. After all, the common legal tradition can be considered as a factor that justifies the practice of comparison. For the purposes of these reflections, it is essential to consider the principles and values of the constitutional tradition of the Euro-Atlantic area, which encompasses

the European area, principles which are currently enshrined in the European Convention on Human Rights, the Nice Charter, and the Inter-American Convention on Human Rights. The relevance of this derives from the fact that it is within this cultural, and therefore legal area, that constitutionalism and comparative studies that concern these principles were established. After all, even if it is done unconsciously and without considering the ability or need to accept any logical and methodical criteria as a reference when making the comparison, those who venture into such operations, either as institutional actors (legislators or judges) or as researchers, cannot ignore the complex traditions, values, and principles that are proper to the European legal culture. The latter has given rise to codification, case law, constitutions, and constitutional principles on which the European Union itself now stands. This set of values and principles is very well articulated from a linguistic, conceptual, and operational standpoint. What is interesting here is the recognizable data provided by their progressive convergence, which manifests a different degree of intensity according to the scope of the geographical area in question.

The principles in question can be traced back to the area of the Western legal tradition, to which some even attribute "universal validity," which implies a distinction between Western culture and systems belonging to different cultural areas. The Western legal tradition is principally characterized by the clear distinction between legal institutions and other types of establishments, especially religious institutions. Distinctions between politics and law constitute another fundamental feature. In this context, a further notable distinction can take place within the "systems of Western law," between continental European systems (area of civil law) and Anglo-American systems (area of common law), both of which can be traced back to the same traditions which are founded on Christian principles and by extension on those adhering to liberal democracy. Some speak of a "Western model" to highlight different ways of conceiving the fundamental rights of the individual. In this context, the "classical" liberal phase is distinguished from that of the more recent democratic-social state. The Western tradition includes the common constitutional traditions addressed by the European Union's regulatory instruments (preamble to the Nice Charter of 2000; draft Constitutional Treaty of 2004; Lisbon Treaty of 2009). But discussing common constitutional traditions does not necessarily imply identifying a perfect convergence: European historical realities are particularly detailed, and consequently, both similarities and divergences can be detected between different European systems. The use of comparison remains essential in order to highlight common values (de Witte 1995, p. 145 ff.).

The values and principles that comprise the constitutional tradition that characterizes the legal system represent, for both legislators and judges, a limit to the applicability of incompatible values from different systems.

It is therefore clear that the judges, in reference to judicial activity, inform their convictions only with comparisons drawn from legal sources within their own cultural area.

An example of this is the provision in Article 35(1)(c) of the South African Interim Constitution of 1993. This provision foresaw the constitutional judge's referral to the "comparable foreign case law," referring exclusively to the law and jurisprudence of constitutional courts of democratic-liberal orders, that is, of the same cultural area that the most recent South African constitution adheres to. The example of the European Court of Human Rights is also valuable, since in various circumstances, in addition to considering systems which are part of the Convention, it broadens its perspective to include external systems which share its principles despite not being part of the ECHR. The judgment of December 4, 2003, MC v. Bulgaria (appeal 39272/98), identifies the lack of victim as central to the notion of sexual violence after a long excursus of the ECHR's legal framework, to which that of the United States is added (sub-paragraph 129 ff.). The ruling of 15 January 2013, Eweida and others v. The United Kingdom (appeals 48420/10, 59842/10, 51671/10 and 36516/10) compares the legislation relating to the display of religious symbols in twenty-six member countries of the ECHR (sub-paragraph

47) and extends the examination to the United States and Canada, countries which pertain to the same cultural area. The subsequent ruling of 17 December 2013, Perincek v. Suisse (appeal 27510/08) on legislation surrounding negationism, examines the regime envisaged in 14 member countries and once again extends the comparison to the United States and Canada (sub-paragraph 30).

The Italian Constitutional Court, when examining the system of administrative powers aimed at authorizing company mergers on the grounds of compliance with the principle of freedom of competition, has taken into account, on a comparative basis, the provisions of English, German, and French law (ruling 270/2010, paragraph 8.4). The same Court, intervening on the subject of the temporary effects of the ruling of unconstitutionality (10/2015, sub-paragraph 7), turned its attention to the regime of "democratic and pluralist constitutions," emphasizing that "the comparison with other European Constitutional Courts – such as the Austrian, German, Spanish, and Portuguese courts, has demonstrated that the containment of the retroactive impact of decisions of constitutional illegitimacy constitutes a widespread practice, even in interlocutory procedures, irrespective of whether the Constitution or the legislature has explicitly granted such powers to the Court." Consequently, "such a discipline must also be deemed permissible within the Italian system of constitutional justice."

Because of the judge's reference to the rules or implementation practices of external legal systems with mutual principles and values appears compatible with the observance of constitutional principles, it is also conceivable that the employment of laws pertaining to systems whose values are incompatible or contradict the values in question could be denied. The data emerging from the analysis of the constitutional law of the courts of Eastern Europe (Arnold 2005b) is of particular significance. Despite their long-standing cultural, political, and constitutional ties with the Soviet Union, none of these courts ever resort to current Russian law, because such references could appear to conflict with the democratic values of traditional Western constitutionalism that they have upheld.

An illustrative example is the case of the Czech Court on social laws (Pl. US 1/2008, 23 September 2008). In reconstructing the historically developed constitutional protection of these rights, the Court refers to the precedent (in chronological order) of the Stalinist constitution of 1936, but subsequently asserts the incomparability of the current Czech system with the Soviet legislative data, despite the formal protection of social rights that the latter guaranteed.

In the case of comparative analysis for scientific purposes, the aforementioned limits do not apply. It is up to the individual researcher to establish the horizons of her/his scientific engagement. Furthermore, comparison can highlight differences as well as similarities, enabling the definition of models and the establishment of classifications. In conclusion, the comparison between state systems is scientifically legitimate, as long as it is relevant to the research objectives.

It is also noteworthy that the fundamental values which underlie systems based on distinct values should not always be regarded as totally divergent. A classic case is that of environmental conservation: legal scholars have pointed out how this issue, both from the perspective of state duty and from that of recognizing individual and collective demands to achieve it, has long been a common value that has emerged from the constitutions and legislation of liberal, socialist, and recently independent states. In this case, the environmental values are politically neutral and the fundamental heterogeneity of the legal systems does not undermine their homogeneity concerning the specific values of environmental protection. An analysis of the regulatory framework indicates a tendency to adopt similar solutions, which facilitates a more straightforward reading and evaluation of these solutions (Sik Cho and Pedersen 2013, p. 401 ff.).

Homogeneity and Comparability of Institutions

Differing significantly from the previous notion is the concept of homogeneity, concerning institutions inserted into multiple systems

(homogeneous or heterogeneous). In this case, homogeneity refers to the detection of elements that are common to the two (or more) institutions being compared, elements representing the commonality of interests of the different legal systems and the identification of the procedures which aim to fulfill this. This means that a pure examination of the formal profiles of an institution does not suffice to establish a priori equivalence between institutions of legal systems characterized by different forms of state. The concept of constitutions and sources of law, such as those relating to rights and freedoms, political parties, representation, parliament, and so on, are common to the most diverse systems, but it would be inappropriate to claim equivalence of content from merely formal equivalences in liberal, socialist, and authoritarian legal systems. This derives from an awareness of the considerable difficulties encountered when handling systems inspired by markedly heterogeneous principles which exhibit substantial differences beneath obvious formal similarities. Additionally, it is possible to envisage that, regardless of findings which initially give the impression of a systems' homogeneity based on their classification, homogeneous rules can still be identified substantially.

One example is the Ombudsman (public prosecutor or parliamentary commissioner), a parliamentary inspection body and, above all, a body for the protection of citizens' interests against administrative malpractice. It is a Swedish institute that has been "exported" to several other countries. There is no doubt that a comparative analysis can be undertaken with ease in such cases. But the situation is significantly different when the comparison is extended to countries that have not welcomed the Ombudsman, such as Italy, but which nonetheless employs alternative measures for the protection of citizens. For example, the case of Italy involves administrative and judicial appeals, interventions made by the Court of Audit against the administration, and others. In these cases, comparisons between the institution and heterogeneous institutions, such as the Court of Audits' review of administration, are not inappropriate.

This highlights the importance of a pragmatic approach (Zweigert and Kötz 1996, p. 28 ff.; Friedman 1978, p. 46; Constantinesco 1974, p. 73) to comparative analysis, so that when comparing institutions pertaining to different legal systems, one cannot overlook the functions that inspire different organizational solutions. In fact, comparison cannot be limited to involving institutions with similar or equivalent formal classifications (which are not always comparable). In the above case, if the function of the Ombudsman is to provide a distinct and supplementary protection service according to subjective interests, beyond that which is offered by the judiciary, it may be useful for the comparatist to refrain from searching for institutions with similar formal profiles and instead verify whether there are other systems which fulfill the same function of protection.

The Reference Parameter in the Comparative Assessment: Tertium Comparationis and Functional Identity

As previously mentioned, comparison is a logical operation of investigation into orders and institutions, evaluating, comparing, and reaching conclusions on findings, while producing critical assessments that in the strict sense of the term constitute a comparative judgment. Critical analysis of the elements of two or more systems, which involves comparison, only acquires meaning if the researcher sets a reference parameter on the basis of which to form their judgment. This parameter (the *tertium comparationis*) serves as a point of reference in the comparison between that which is compared (*comparatum*) and which will be compared (*comparandum*) (Radbruch 1903–1905, p. 423 ff.; Oesch 2008, p. 34; Reitz 1998, p. 622).

Thus, if one compares parliamentary inquiry in Italy with that of other parliamentary systems, one should first determine what constitutes a parliamentary inquiry. Only after this acknowledgment, and after having chosen an abstract model of investigation that can serve as a benchmark, should the investigated institution in the Italian

Parliament (object of comparison) be examined against the institution governed by other systems (parameter of comparison). Subsequently, a system-by-system examination will reveal the similarities and differences of the Italian institute with respect to the reference model and those found in the examined foreign legal systems in relation to the same model.

In practice, it is common for the comparatist, especially when examining current and tested national institutes, to blur the abstract module within the national institute, so that the terms of comparison appear reduced to two: "already compared" and "yet to be compared." Therefore, as witnessed in past examples, the elements identified from the investigation are deduced from the national system that is being compared against others.

The need to identify a reference module is more prominent when the institution is not governed by positive law, but is experiencing a phase of legislative proposals or is the object of study by legal scholars. In this case, the work of extraction for the construction of the model is more evident. For example, after the model of ombudsman has been extracted from the experience of different legal systems, the national model of standards will be compared with the existing regulatory standards in other countries, with consideration for the reference model.

Having clarified the importance of the abstract reference model, it should also be noted that this may not always correspond to the organizational formula (e.g., in systems with structures referred to as "parliamentary committees," "ombudspersons," or "parliamentary commissioners") or to the identification of formal rules governing such structures. Rather, it appears to be more reliable and scientifically sound to identify the underlying function of the organizational arrangement and of the formal definition. This is not aimed at excluding the importance of organizational and formal profiles, but rather at highlighting the prevalence of the *functional* dimension.

Comparative study should be structured according to practical considerations, without mandatory referral to the specific concepts of different legal systems, but rather with consideration for proposed solutions, regardless of their form, for the problems that subsist within the social structure. The proposal of Rabel, Zweigert, and Kötz is worthy of support: comparative law is not the law that emerges from the simple comparison of legislative texts, but that which derives from the comparison of the different legal solutions that have been proposed for the same *de facto* problems that also affect different legal systems (Rabel 1937, p. 77 ff.; Rabel 1937, p. 180 ff.; Zweigert and Kötz 1996, p. 25 ff).

Thus, institutions of different legal systems can only be compared if they pursue the same goals and perform the same functions. The function constitutes a starting point and foundation of any legal comparison, the tertium comparationis, for so long the object of futile disagreement amongst comparativists. Therefore, in the science of comparative law, only elements that fulfill the same function are comparable, and if the reference criteria are the function, the danger of using materials for comparison that have been identified solely based on formal similarities is evident.

In practice, for many years now, practical approaches in the field of comparison have acquired a large following. In conclusion, it must be agreed that establishing the essential function of an institution is a prerequisite and parameter for comparative analysis between institutions of different legal systems.

The Function of Comparison in Constitutional Law

Comparison assumes different functions depending on the requirements of those who practice it. The aim is to respond to the simple need to understand and examine an argument of law in greater depth and to the desire of the legislator or judge to respond effectively to matters of constitutional relevance. The theoretical and practical objectives of law underlined by scholars of comparative private law are also useful in identifying the functions of comparison in constitutional law. (Constantinesco 2000, p. 257; Markesinis 2003, p. 75 ff.; Glenn 2006a, b, p. 57 ff.). It is essential to

analyze the functions of the comparison by clearly distinguishing the hypothesis of doctrinal research from that linked to the exercise of a public function of standardization or jurisdiction. The scholar who employs comparison for the purpose of reasoning also works for a cultural purpose. The legislator uses the comparative data to better shape the production of new standards which are theoretically destined for future use. The judge participates in this sense only from the perspective of whether her/his decision, which is intended solely to resolve the specific case brought to her/his attention, will be of use.

Legal Scholarship and Comparison

The Primary Function of Understanding

The Comparison of Constitutional Law as a Science. For the jurist, comparison remains an indispensable tool that can facilitate knowledge, an occasion to connect the history of law, legal theories, and positive law, including the role of the courts (Samuel 2003, pp. 111–115; Osiatynski 2003, p. 244 ff.). Comparison, as well as being instrumental for the verification of generalizations and for other purposes that will be elucidated subsequently, is a method that facilitates new understanding. The comparative study of systems, or institutes of different systems, produces knowledge that is indispensable for the science of constitutional law (Cervati 2009, pp. 1 ff. and 26 ff.; Lemmens 2012, p. 302 ff.). A classic example is the comparative analysis that provides an understanding of the legal orders, enabling the development of categories for classification which encompass the diverse constitutional experiences. The concepts of "form of state" and "form of government" (Frosini 2018, pp. 33 ff) derive from attempts to clarify concepts on behalf of scholars of political and legal systems, through a comparative analysis of past and present institutional experiences.

Comparison can encompass an extremely wide range of subjects of investigation aimed at improving knowledge both within the constitutional and legal organization.

Studies of organization do not just cover the aforementioned forms of government, but have also investigated parliament (Wheare 1968), parties and electoral legislation (Sartori 1976; Butler et al. 1981) bicameralism (Luther 2006) and constitutional justice (Favoreu 1996; Brewer-Carías 1989; de Visser 2015; Delaney and Dixon 2018). Legal scholars, meanwhile, have conducted several studies on freedoms, (Rosenfeld and Sajó 2012, p. 891 ff.), minority rights (Capotorti 1991; Karayanni and Gargarella 2013, p. 337 ff.), linguistic rights (Poggeschi 2010; Adhikari and Viver PiSunyer 2013, p. 387 ff.), religious freedom (Sajó and Uitz 2012, p. 909 ff.), bioethics (Sándor 2012, p. 1142 ff.), and social rights (Iliopulos-Strangas 2010, p. 699 ff.; Davis 2012, p. 1020 ff.; Katrougalos and O'Connell 2013, p. 375 ff.).

Another consideration that usually serves to highlight the informative role of comparative law is the observation that no study that is confined to events occurring within national borders merits the reputation as a science. Even though legal sciences thus far have been predominantly confined within domestic borders, working with the constitutions of nation states, true scientific inquiry cannot be limited to knowledge of a single state order. Comparative law allows legal science to transcend national borders and become a science in the strict sense. More generally, the function of legal comparison, even in the field of constitutional law, amounts to knowledge (Zweigert and Kötz 1996, p. 12). But knowledge is not only the necessary premise for a variety of applications based on the results of the comparison: it is also the epitome of an autonomous scientific discipline. In this regard, it suffices to refer to the long controversy between critics who argued that legal comparison was a method of scientific research and those who maintained that it ought to have been accorded the status of a genuine scientific discipline (de Vergottini 1986, p. 165 ff.; Sartori 1990, p. 397 ff.; Lijphart 1971, p. 67 ff.; Zadorozhnyi 2016, p. 85 ff.).

In this respect, comparative law does not correspond to a sector-specific discipline within a specific field of knowledge which pertains to a sector of positive law. Comparative law does not

constitute positive law, but concerns the comparison among different positive legal systems and therefore is centered on logical operations of analysis and synthesis. This comparison requires a specific methodology, and the comparative method is therefore an essential tool and opportunity for knowledge. Many scholars have, at first glance, understandably reduced comparison to a single comparative method. But when the comparative method is constructed individually – when the comparison involves particular fields of research, serves specific purposes and adopts its own criteria verifying the acquired knowledge, that is, it follows rules which are specific to it and not to other scientific disciplines – it may well merit recognition as an independent science (Reimann 2002, p. 671 ff.).

The Purpose of Knowledge Verification

Comparison gives the researcher the opportunity to verify the data in relation to the acquired knowledge of the examined legal systems. It therefore serves as a "control feature" to ascertain the merits of what may already be apparent thanks to other research methods, and is part of the broader framework of options available to interpreters of constitutional systems. Comparative checks can accompany the data that has been provided through the examination of positive law, practice, and constitutional history.

Take, for example, the establishment of the relationship of confidence in the Italian constitution. In order to understand this, written legislation and republican constitutional practice would have to be examined. However, in order to substantiate certain evaluations, the (customary) discipline of confidence would be re-examined during the period of validity of the monarchal constitution of 1848 (Statute of Carlo Alberto), using the historical method, and we would refer to the introduction of the relationship of confidence and its development in a series of other systems that are historically or conventionally connected to the Italian one using the comparative and historical method.

On the basis of these considerations, a convincing argument expressed by scholars of comparative politics, according to which the essential function of comparative science is to verify the generalizations made on the basis of empirical knowledge, also appears to be relevant to the study of comparative constitutional law. For example, Sartori observed that of the methods pursued by social scientists (experimental, statistical, comparative, and historical), the use of the comparative method is essential in order to proceed with the verification of the results obtained through other methods, especially the empirical one, which in principle, appears to be the most reliable and satisfactory (Sartori 1991, p. 25 ff.).

It is particularly worth noting that the empirical method is suitable for dealing with circumscribed issues, such as analyses concerning well-defined institutes, whereas it is difficult to apply it to far-reaching analyses; the statistical method can be used when suitable data is available for a statistical analysis; the historical method when competent and thoughtful attention to relevant historic details can reveal significant differences from the present. Therefore, where empirical, statistical, and historical data do not suffice, the only response would be to compare solutions from different jurisdictions in order to verify the accuracy of the available information.

The following example supports the findings. As is well known, the investigative body plays a significant role in parliamentary inspection procedures in systems of separation of powers. It can be performed by either statistically analyzing the criteria for data used in similar previous Italian commissions, or by referencing historical precedents from within both the modern republican order and the previous monarchical order. As a rule, the methodological criteria used by the researcher should be complemented by considerations of comparative nature that serve, typically in an implicit manner, to prove the legitimacy of data obtained through the direct analysis of the national legal system. By means of the comparison, which involves systems that are homogeneous to the Italian one, the researcher is able to verify the investigative institutions of almost all parliaments, the political discretion of the majority, and, in general, the extent that the decision to proceed adheres to government guidelines. They can also test the exceptional nature of

parliamentary competences for political enquiry into government and public administration, the parallelism between parliamentary powers of inquiry and judicial powers, the separation of the constitutional role of the ad hoc committee and the assembly from that of the former's powers of inspection and the latter's political control. The researcher should be able to highlight divergent elements between the Italian system and almost all the systems examined. But on the whole, knowledge obtained through comparison will provide a solid reference framework for an investigator's analysis within the framework of national law. In fact, the clarification of essential concepts within the form of government in other legal systems will facilitate in-depth reflections on the legitimacy of the empirically collected data. It can therefore be concluded that even within constitutional law, comparative analysis of other legal systems, in relation to topics such as Italian parliamentary enquiries, enables the creation of clearer distinctions between the profiles of the institution and of the Italian legal system (de Vergottini 1985, p. 37 ff.). It is therefore appropriate to recognize the comparative method as a means of validating the results of research that has been conducted using alternative methods.

Standardization and Comparison

Assisting the Development of Regulatory Texts: Models and Their Circulation

The elaboration of legal texts has characterized the traditional role of comparison.

In the constitutional and legislative texts, reproductions of institutions established within other legal systems (referred to as "reception" or "transplantation") can be occasionally observed. This does not necessarily imply that a comparison has been used, as it may simply amount to a case of imitation. The decision to adopt an institution within a system, which assumes it has made an optimum selection, does not necessarily involve comparative operations (Legrand 1997, para 4.2, p. 111 ff.). The choice to incorporate foreign institutional structures may derive from a comparative analysis of various solutions offered by different legal systems, which may lead to the incorporation of specific rules, or simply of principles which are shared by different legal systems. Thus, the widespread adoption of institutions under the German Basic Law by the Spanish Constitution of 1978 was preceded by an evaluation of solutions proposed by other legal systems (Cruz Villalón 1989, p. 65 ff.; Herrero de Miñón 1984, p. 97 ff.). The critical debate concerning the Portuguese and Spanish constitutions and the German and Italian institutions influenced the choices of the framers of the 1988 Brazilian Constitution (Afonso Da Silva 2009, p. 59 ff.).

The connection between the comparison and the implementation within a system of institutions that have been matured and consolidated within another system is of particular interest.

There are certainly systems or institutions that serve as reference models for others. The reasons for this phenomenon may vary, from enforcement by a hegemonic power of their own organizational measures (such as is the case of the constitutional measures left by the colonial powers during the granting of independence), to reflection of the prestige associated with a constitution (e.g., the influence of the United States' presidential system on the Ibero-American republics during their emancipation). Reasons may also include clashing visions for the constitution (witnessed, for instance, in how constitutions in states abandoning socialist principles attributed different levels of credibility to liberal constitutional principles), or a mixture of force and prestige (like when popular democracies at the end of the 1940s were forced to adopt socialist principles in line with the already-prestigious Stalinist constitutional model). The choice of institutions founded on democratic principles and on the guarantees of human rights underpins the "conditionality" which has obliged the countries of Eastern Europe to accept Western constitutionalism as a compulsory condition for joining the current European Union (Sacco 1992, p. 148).

In addition to forms of conditioning that affect the entire conception of the state, there are those that concern specific institutes. One example is the case of personal or collective rights, which have been developed in some legal systems and then

transferred to many others (e.g., the right to privacy and the right to a healthy environment), or forms of protection of interests and rights external to the judicial realm (such as the Ombudsman) which has been transferred from Sweden to a considerable number of legal systems.

In order to define the circumstances referred to by legal scholarship, the term "export" is used to describe the reception of, for example, forms of government, rules, institutes, together with imitations and transplantations. Since the exported or imitated solutions have assumed an exemplary character, they are often qualified as "models" (to be imitated and emulated), and the phenomenon of the permeability of a legal order to principles developed in other countries derives from the notion of "circulation of models." For the sake of clarity, it must be reiterated that, even if there is a clear connection between the comparison and the circulation of models, it is possible to adopt externally matured institutional solutions without conducting a comparison. The most obvious example is the enforcement by a ruling power of institutions or even of the entire form of the constitution on a conquered state, such as the imposition of the constitution on Japan in 1946 by the US military government (Matsui 2011, p. 3 ff.). A similar case is the preparation of constitutional texts by the colonial power upon granting independence, which occurred in the case of numerous French and British colonial dependencies (Wolf-Phillips 1970, p. 18 ff.).

Comparison and New Constitutions

In the development of written constitutional texts, systematic references have been made to comparisons (Weber 2010, p. 6 ff.) between tested constitutional solutions, or between such solutions and the reference models elaborated by the affected … affected constitutional bodies (Landau and Lerner 2019). The most common references include the influence of the North American model . . . on the Iberian-American constituents (Brewer-Carías 1996, p. 218 ff.), of the liberal and socialist state models on the constituents of many recently independent states (Ganshof Van Der Meersch 1962; Bihari 1979, p. 75) and of the Soviet model on the constituents of the totality of socialist states (Bihari 1979, p. 76 ff.).

The preparatory phase of a new constitution or its revision often requires contributions from previous constitutions. At this stage, comparative analyses can be reliably determined.

Comparative studies preceded the establishment of the Italian Constitution in 1948, the Basic Law of Bonn in 1949, the French Constitutions of 1946 and 1958, and marked the preparatory processes for the Portuguese Constitution of 1976 and the Spanish Constitution of 1978. The problematic receptiveness to liberal constitutionalism produced a wide debate, which involved the examination of Western experiences in the preparation of the constitution of the Russian Federation of 1993. Comparative analyses, handling the regime of rights and the organizational structures of the most effective forms of government, have been carried out by specialized bodies which, within the framework of international organizations, provide assistance with the formulation of new constitutional texts, especially in countries devastated by serious crises and armed conflicts (such as Afghanistan, 2004; Iraq, 2005; Kosovo, 2008; Egypt, 2014; Tunisia, 2014). The implications of this type of approach in the preparatory stage often manifest themselves in the final constitutional text itself. There are indirect indications of analyses of a comparative nature that have involved the form of French government, commonly referred to as "semi-presidential," which has been found in the constitutional arrangements of various countries in Central and Eastern Europe following their departure from Soviet-style constitutions.

One can recall the introduction of the system of direct popular vote for the President of the Republic, alongside the institutes of parliamentary confidence and early dissolution of parliament in the constitutions of Poland (1997), Romania (1991), Bulgaria (1991), Croatia (1990), Slovenia (1991), Serbia (2006), and Montenegro (2007). Comparative analyses are conducted by the European Commission for Democracy through Law (better known as the Venice Commission) of the Council of Europe in order to assist states in their constituent operations and constitutional revision.

Comparison and Legislation

Comparison plays a significant role in the preparatory phases of legislation (Glenn 1999a, b, p. 843 ff.). At a sub-constitutional level, each legislator retains complete freedom to examine exterior legislation, and to conduct comparative analyses. There is no systematic criterion governing the use of comparison in Parliament: specific requirements determined by local factors or by the particular historical moment, or the reputation of selections made in other jurisdictions, may prompt comparative analysis. Attention to exterior legislative decisions is certainly stimulated by increasingly intense relations between parliaments of different geographical areas, through the exchange of information and by the implementation of various collaborative procedures. In this respect, there has been talk of establishing dialogue between legislators (Barak-Erez 2006, p. 532 ff.; Lupo and Scaffardi 2014) and of interparliamentary cooperation.

Of particular interest was the work of the Law Commissions in many English-speaking countries, the National Conference of State Legislatures in the United States, as well as the research commissioned by experts from the various departments within the European Parliament, which concern both the law of Member States and of systems outside the European Union. For example the study "A Comparative Study on the Regime of Surrogacy in EU Member States" (15 May 2013), in addition to considering the different systems of member countries, also examines Russia, Australia, and South Africa.

Finally, it has been noted that comparative studies ultimately are employed in areas of legislative intervention which display certain technical features or a uniformity of interests amongst the systems under consideration (e.g., criminal law, commercial law with particular reference to competition, consumer protection), whereas it is difficult to deal with areas in which the strictly national orientation of the relevant concerns becomes a matter of priority or in which well-established national institutions exist.

The study of foreign law and comparative research is entrusted in the national parliaments to specific entities. It appears clear that the preparatory phase of a legislative text involves the use of foreign law and potential comparison, while during the stages of deliberation and final judgment, the prevailing political demands of members of parliament and government representatives tend to overshadow comparisons with other legal systems.

The French experience places great emphasis on comparative analysis in the legislative drafting process. Based on the new Article 39 of the Constitution implemented by Organic Law No 2009-403, which identified the conditions for drafting rules, foreign legislation is especially considered in the "statement of reasons" and in the "impact assessments" of the rules. Comparative references and genuine comparative investigations can be detected in the preparatory stages of Italian legislation. By way of example, the lawmaker largely resorted to comparison when introducing "independent authorities" into the system following the US model of Authorities. Among the countless examples of legislation preceded by comparative analysis, one can cite the British Crime and Security Act 2010 and Law No. 2010-1192 of October 11, 2010, "Banning Concealment of the Face in the Public Space."

The comparison produced by the legislator can leave traces in the accompanying notes of a draft law, as is frequently the case in Italy (cf. draft law of 22 January 2013 on the reform of the judicial districts, draft law 29 April 2008 on the biological will constitutional draft law 24 July 2014 on the right to Internet access). The preamble to the Spanish law on the Statute of Radio and Television (Law 4/1980 of 10 January) explicitly states that the adoption of the legislation was dependent upon "the experience of other countries with democratic systems which operate in the same manner" as the Spanish system.

Dialogue is of particular importance in the crucial sphere of human rights. Broadly speaking, it can be assumed that all legislation concerning biolaw undergoes a comparative preparatory phase. This case confirms that comparison is undertaken between systems that share the same or similar values from an ethical and legal perspective. Using comparison for the introduction of new legislation may also affect relations between

legal systems with different legal traditions. Up until two decades ago, in socialist countries, comparison tended to be limited to the experience of systems that shared the same ideological foundations. Today in China, as far as certain specific areas of legislative intervention are concerned, comparison has expanded to include references to Western legislation, as evidenced in the preparation of the most recent legislation on environmental protection, for which the preparatory work undertaken by the committees of the National People's Congress has involved a careful examination of the precedents offered by Canadian and French legislation. Recognizing the importance of comparing national draft legislation with legislation of other legal systems must not lead to the misunderstanding of believing these texts to have been "transplanted" into the legal order making the comparison. Rather, the purpose of the comparison is to produce suggestions or verify proposals that have matured in the relevant legal system and, beyond the examined "texts," the national law maker is also interested in the "ideas" behind the legislative proposals (Watson 1993, p. 17) or solutions offered to problems encountered in the country.

Assisting in the Harmonization and Unification of Rules

The emergence of new states and of interstate political cooperation has prompted experimentation involving ways of integrating different legal systems, often by means of comparison. The terminology used to describe these integration processes differ, involving terms such as unification, standardization, approximation, coordination, and harmonization of state rules, but these uncertain definitions can indicate significantly different processes. The concept of convergence of rights or models is also used to refer to the processes in question. Convergence can be understood as a form of approximation and consideration of different national legal models with the goal of harmonization within the framework of organizations such as the European Union, so as to enable the development of common rules which both influence national regulations and are inspired by them. It can also result in the development of a unifying model that imposes itself upon others, as in the case of common law in certain areas of commercial law and trade (Ponthoreau 2005a, b, p. 1534 ff.). In this case, one can also refer to "model competition," a process at the end of which a dominating law is identified. Competition requires that models be interchangeable, which must be structured in such a way as to be fungible. In the field of economic law, an investor decides where to invest after reviewing the rules of different legal systems. The situation in the field of personal rights is more complex. Only in certain cases can the individual have access to laws that offer the choice of where to conduct political operations, where to practice euthanasia, where to have an abortion, and so on. Just as it has been discussed in the context of the progressive rapprochement of the common law and civil law systems, convergence can be referred to as a matter of scientific analysis. Traditionally, following in the footsteps of Dicey (1915), only systems which used common law to govern relations between citizens and public power (most common law systems) or which used administrative law to grant a privileged position to public administration were subjects of comparison. In the former, there is a tendency to apply general rules that apply to both private and public actors, with special derogations which favor public authorities; in the latter, there are specific provisions that distinguish the privileged position of the administration, since the application of the rules for the latter under private law is minor. The experience of the last decade indicates a decrease in the divide between the two categories of legal systems. In common law systems, rules favoring public authorities are multiplying. In spite of this, in civil law systems, there is a reduction in the scope of administrative privilege and an increasing reliance on private law. This represents a significant case of convergence between the two traditional models, despite the fact that some (Legrand 1996, p. 52 ff.; Boele-Woelki et al. 2014; Van Caenegem 2002) refuse to consider convergence as a phenomenon to be generally relied upon. Broadly speaking, the implemented measures are intended to simplify or remove the

disparities between legal systems, to be overcome by using methods of coordination until a genuine degree of uniformity is achieved. Conventionally, speaking of harmonization implies a coordinated process of homogenization of state laws that retain their intrinsic individuality while ultimately sharing common characteristics, but referring to unification in fact involves identifying a process of standardization of the systems that are to be unified, so that the result of homogenization is as complete as possible.

Unification or harmonization can be achieved by means of interstate agreements aimed at simplifying rules of mutual interest, as has occurred in the field of private and commercial law, in one of two ways: agreement at the international level on uniform rules, which become incorporated into individual state laws through ratification and execution of orders, or commitment to adopt state-level rules compliant with uniform principles, thus granting each state autonomy in implementation. However, despite the advances made in this direction, unification via agreements can only operate within very limited fields.

Satisfactory prospects of integration, principally involving new forms of coordination but, at times, also regulatory unification, arise in circumscribed regional contexts: the European area, the Commonwealth, the former socialist countries, and areas of prevailing Muslim law have all been deemed potentially suitable for productive experimentation. Such initiatives are facilitated by the homogeneity of the principles of the relevant state's legal systems. The legal systems of federal and international organizations can provide the institutional framework against which to proceed. In these cases, an attempt is made to reconcile the demand for respect for autonomy (member states of federal states) or sovereignty (member states of international organizations) while operating within a regulatory framework that is as homogeneous as possible. To this end, solutions are envisaged to provoke forms of coordination that may even extend to the formation of a harmonized law. The use of comparison is practical both when states decide to implement common rules in the field of protection of rights, witnessed, for example, with the decision to provide the European Community with its own charter of rights (Charter of Fundamental Rights of Nice, 2000), and when international multi-state bodies such as the current European Union develop new rules that will be enforced in their area.

In general, in the European Union's legal system, uniformity in the legislation of Member States can be achieved by adopting rules which operate throughout the entire Community legal order, or by using directives which establish mandatory uniform goals for all the States concerned, who are then obliged to implement them (Article 288 TFEU). Specific provisions in the treaties concern the "approximation" of law in order to ensure the functioning of the internal market. (Article 115 et seq. TFEU). The Treaties incorporate the constitutional principles of the Member States, all of which are based on constitutional traditions inspired by the principles of liberal constitutionalism (see in particular Title 1 and 2 of the TEU), which facilitates the adoption of broadly homogeneous views regarding the premises on which to base legislative measures. Regarding the eventual use of comparison for the adoption of measures of Union bodies, one can draw on the experience of individual legal systems, or even conduct a genuine comparison prior to legislative intervention. This is based on proposals from the European Parliament itself to the Council to "allow elections by direct universal suffrage, in accordance with a uniform procedure or in accordance with principles common to all the Member States."

Comparison between member state systems and, in particular, between the institutions that define their form of state and government remained an essential premise for analyses aimed at verifying what was perceived as a progressive federalization of the systems incorporated within the EU area.

Courts and Comparison

The comparative method forms part of the interpretative procedures employed by constitutional institutions for systematic interpretation by courts, in particular constitutional courts. In the aftermath of the Second World War, a progressively shared

culture of rights began to spread as a result of the proliferation of international charters, and the number of specialized bodies entrusted with constitutional jurisdiction multiplied, producing what some have described as a sort of "universalisation of constitutional law." The "dialogue" between the constitutional courts, these specialized bodies, and the international courts of justice has increased, and this contact encourages a mutually increased awareness of demands and normalizes attempts by judges to make references to institutions of other legal systems or their case-law (Slaughter 2003, p. 194 ff.; Ponthoreau 2005a, b; Ayala Corao 2012). It is in this cooperative climate of reciprocal communication that the use of comparison is consolidated, since in practice, one can observe the straightforward use of foreign law (Markesinis and Fedtke 2006, p. 109 ff.) as well as the search by means of comparison for principles that the judge can utilize. However, some authors (Alford 2005, p. 639 ff.; Lollini 2009, p. 165 ff.) suggest that international dialogue between courts may be further improved by establishing a concrete theory of legal comparison, which would require explaining why investigation into the methodology of comparison is needed in the first place. Irrespective of this, however, it remains clear that comparison constitutes an essential tool which facilitates knowledge and provides an opportunity to establish links between the history of law, legal theories, and positive law, which incorporates the role of the courts (Samuel 2003, p. 111 ff.; Osiatynski 2003, p. 244 ff.). When employed by the constitutional court, the purpose of comparison is to facilitate a better understanding of the national law that is applicable to the individual case by conducting a critical comparison with other laws (Pinto Bastos 2007, p. 102). If performed meticulously, it becomes a "constitutive element of constitutional interpretation," in contrast to the function it fulfills when utilized by the legislator, which usually merely fulfills a role of "reconnaissance" in order to help prepare the legislative text. Comparison is only one of the methods used by the constitutional courts to interpret provisions relating to fundamental rights: in addition to the literal, systematic, historical, and teleological methods, which date back to the classic Savigny approach, Häberle has placed the comparative method as the fifth method of interpretation, an essential stage in the exegesis of constitutional clauses on rights (Häberle 1992, p. 3 ff.). Thus, by reflecting on various cultural experiences, the scope of reasoning available to the judge is broadened. This is confirmed, in relation to national legal systems, by the progressive references of constitutions to the significance that international agreement rules have on the rights in their respective national systems. An example of this is how the Spanish Constitution of 1978, Article 10(2), stipulates that the provisions relating to fundamental rights shall be interpreted in accordance with the Universal Declaration of Human Rights and the treaties on such matters which have been ratified by Spain; the Portuguese Constitution of 1976, Article 16(2) is similar. Moreover, concerning the legal systems of international bodies, the Court of Justice of the European Union refers to the principles of rights that are proper for the various state systems. It is thus comprehensible that the integration of legal systems inevitably entails comparative analysis when interpreting laws by the constitutional courts and those established by international instruments. As for the interpretative practice of constitutional courts, the use of foreign or international law can be done on purely academic grounds ("ornamental") to complement the judge's reasoning and can serve to strengthen or negate an interpretative thesis (Bobek 2013, p. 220 ff.), affecting the ratio decidendi or the obiter dicta (Ponthoreau 2005a, b, p. 167 ff.). At times, it proves essential inasmuch as the judge finds her/himself having to resolve a case in the absence of explicit rules (in a case of a genuine lacuna).

Interpretation by Comparison in the Courts

The use of foreign law, to be distinguished from international law (Koh 2004, p. 44 ff.; Barak-Erez 2004, p. 611 ff.; Saunders 2007, p. 415), and, potentially, the use of comparison, acquires a highly specific profile within the context of the courts compared to when it is used in other domains, for example, by researchers and

legislators. The judge intervenes only in a limited perspective of usefulness for the formation of her/his decision aimed at resolving the case brought to her/his attention (Samuel 2004, p. 253). This is true both when she/he limits her/himself to an exhortative or merely reinforcing quotation of her/his pronunciation, and when she/he feels driven to a more targeted analysis that allows him to form his own conviction. In the event of the latter, a lack of input from external sources would, in practice, prove problematic.

Of course, to claim that the judge relies on foreign law and resorts to comparison only in order to resolve a specific case does not undermine her/his practice, or imply that the effects of her/his judgment are limited to the case in question. Indeed, the judgment may well impact the future decisions of other judges, who are persuaded by the value of the precedent (Groppi and Ponthoreau 2013). This is plausible within common law systems according to the doctrine of stare decisis, which is debated within the civil law systems. Regarding judicial interpretation, comparison assumes a subsidiary role in the judge's inquiry and ruling. In this respect, one can consider the approach followed by those who consider comparison as a mere methodology (Alford 2005, p. 704). Such an opinion aims to emphasize that constitutional comparison does not possess features that could render it a self-sufficient theory: comparison could be related to a theory, but it would not constitute a theory in itself. Thus, original or pragmatic approaches may well utilize comparison, but this alone cannot contribute to a critical and structured understanding of the constitution. If this view is to be endorsed, it should be stressed that the comparison can be useful or necessary for the judge in the resolution of a case and in such circumstances must be practiced in accordance with certain methodological parameters that correspond to scientifically based criteria (Hirschl 2018, p. 403 ff.). Therefore, comparison in and of itself is not a theory of constitutional interpretation (no interpretation is possible solely by means of comparison), but if comparison is attempted, it must be done according to scientifically verified and verifiable criteria.

There are multiple examples of judges who have considered the use of foreign law and comparison useful or necessary (Ferrari 2019). Furthermore, the justification for resorting to a precedent of a foreign court depends on a very complex set of factors, including the necessity of bridging a gap in the interpretation of the applicable law, shared values, and constitutional traditions, and the particular reputation of the judge to whom reference has been made (Hirschl 2014, p. 20 ff.). The recourse to the Oviedo Convention and to certain judgments of US, English, and German courts, as well as to the case law of the European Court of Human Rights, constitutes an essential point in the argumentation of the Italian Court of Cassation in the Englaro case (Judgment of 16 October 2007, section I civ., no. 21748). Here, comparison was useful for the Court in filling a legal void in the Italian legal system which had no legislation to address end-of-life matters. The references to UK, US, Australian, New Zealand, German, and ECHR precedents proved essential in the reasoning of the South African Constitutional Court in the case of Du Plessis and Others v. De Klerck & Another (Judgment of 15 May 2003 (1996 (3) SA 850 (CC)) in relation to the horizontal effects of human rights, and in The State v. Makwanaye case concerning the death penalty. Similarly, the Canadian Supreme Court's references to the precedents of the United States Supreme Court and the European Court of Human Rights regarding negative freedom of association rights (R. v. Advance Cutting and Coring Ltd, Judgment of 19 October 2001, 2001 SCC 70) proved essential. The Portuguese Constitutional Court referred to the provisions of the Spanish, Italian, and German Constitutions to compensate for the Portuguese Constitution's absence of legal restrictions on the subject of interventions restricting the right to ownership (judgment 421/2009). Numerous references to the legislative framework and to previous jurisprudence of European and non-European legal systems can be found in the famous judgment of the Spanish Constitutional Court, which rejected claims on the unconstitutionality of the law on same-sex marriage (judgment 198/2012 of

6 November 2012, in particular sub-paragraph 9). Another interesting decision is Judgment 42/2014, regarding the 2013 Declaration on the Sovereignty and Right to Decide of the People of Catalonia, where the Court made reference to the decision of 20 August 1998 of the Supreme Court of Canada concerning the secession of Quebec. Another example is Judgment 8/2017 – a decision concerning the violation of the fundamental right to presumption of innocence – where the Spanish Constitutional Court made reference to the German, Austrian, French, and Italian legislations.

The Italian Constitutional Court rarely makes references that explicitly reveal the use of comparison, despite it being well known that the Court, in the preliminary phase, makes references to foreign law and therefore potentially adopts the comparative method (Barsotti et al. 2016, p. 80). Legal texts occasionally show signs of a comparative preparatory phase. In the references in legal considerations, one can find affirmations to substantiate the judgment of the committee. In the judgment 250/2010, in rejection of the argument presented, the constitutionality of the crime of "clandestinity" is acknowledged, and the comparative analysis reveals that several EU countries with legal traditions which resemble those of Italy (such as France and Germany) or differ (UK) have even stricter legislative standards. In judgment 13/2012, which addresses the "revival" of norms in the case of a revocation of referendums, we recall that, as a rule, the reinstatement of provisions following legislative repeal is not permitted in other legal systems (UK, USA, Germany, France, and Spain). In the judgment of 10/2013 concerning the limitation of retroactive effects of the decisions of the Constitutional Court, it is reminded that comparison with other European Constitutional Courts such as Austria, Germany, Spain, and Portugal indicates that the practice is widespread in this respect. In the judgment of 1/2014 it is noted that in constitutional systems that are identical to the Italian system, if proportional electoral legislation prevails, there must be no imbalance in the effects of voting. Finally, judgment 35/2017, once again on the subject of electoral legislation, contains a fleeting reference to foreign electoral law.

The extremely limited number of references that allude to comparisons does not exclude the possibility that there was a comparative argument in the previous phase of the investigation. In reality, it is easier to verify references to foreign law and to comparison in legal systems in which the judges' dissenting or concurrent views are published. In such cases, material may be available to prove the use of the comparative method. When we refer to the significance of foreign law for the judge, it is usually in consideration of the relevant system's positive law and the case law that has developed from it. Furthermore, the methodology applied in the development of the legal reasoning that produces a judicial decision can also be investigated and used. In this case, therefore, the legal method itself is relevant in the consideration of positive law.

One such example is the progressive application of the principle of proportionality in constitutional and international law. A historical analysis shows that the proportion of judges who have used the principle, based on the example of the Bundesverfassungsgericht, has increased significantly since the 1970s. The principle has been referred to by the European Court of Human Rights (Handyside v. UK judgment, Judgment of 7 December 1976, appeal No 5493/72) and the Court of Justice (Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary, Judgment of 15 May 1986, Case C-222/84), as well as by other courts in Canada (R. v. Oakes, Judgment of 28 February 1986, (1986) 1 S.C.R. 103), South Africa (State v. Zuma, Judgment of 5 April 1995, 1995 (2) SA 642), Israel (United Mizrahi Bank Lmt. v. Migdal Cooperative Village, Judgment of 9 November 1995, C.A. 6821/93, 49, P.D. 221 (1995)), Australia (Kartinyeri v. The Commonwealth, Judgment of 1 April 1998, (1998) HCA 22), New Zealand (Ministry of Transport v. Noort, (1992) 3 N.Z.L.R. 260 (C.A.)), and Ireland (Blascaod Mor Teoranta v. Commissioners of Public Works in Ireland, Judgment of 27 February 1998, (1998) IECH 38). The use of the proportionality principle surfaces in the jurisprudence of the US Supreme

Court (District of Columbia v. Heller, Judgment of 26 June 2008, 554 U.S. (2008)) whereby, in reference to the comparison between the individual right to carry a weapon and the general interest in arms control, Justice Breyer's dissenting opinion makes explicit reference to this doctrine of importation to suggest a comparison on "proportionality" between the two demands. The reference and the comparison of the methodology is the premise for the use (through comparison) of constitutional ideas deriving from systems of civil law and, therefore, of foreign law (Cohen-Eliya and Porat 2009, p. 412).

Comparative Reasoning and Comparative Judgment

The comparison that courts can use, being open to other systems and thus regarded as being in a state of "dialogue," can be attributed to the theories of judicial interpretation.

This signifies that the judge uses comparison as part of the process of interpreting the law. Therefore, in the process of reasoning, references to principles, norms, and external precedents produce factual data, as is the case for historical data and doctrinal opinions. In this sense, they are mere facts used in theoretical (and rarely in practical) decision-making processes. Therefore, no reference to external sources can be specified. In common systems, the precedent of a different legal system is still considered not only as an authoritative source of persuasion but also as a genuine resource that can be used by judges in the field. Therefore, as a general rule, the judge in her/his argument does not "apply" foreign law or precedents, but rather, employs them as useful factual elements in order to interpret the law in a more effective and fruitful manner. Undoubtedly, comparison is one of the most interesting aspects of the judge's interpretative role. In cases where comparisons are used to fill regulatory gaps, they demonstrate the blurred boundaries between interpretation/application of standards and creative interpretation in a standardization exercise (Troper 2005, p. 24). At the moment of the decision, it may emerge that the comparison is conceived as a critical tool by which to identify the principle of law that will resolve the case in question (comparative judgment). However, even during the prejudgment procedural stages, references to foreign law and comparisons may emerge in support of different procedural theories. Such a state of affairs is usually considered when referring to the application of the comparative argument which appears in the procedural documents, in addition to the judgment. The comparative analysis identifies the suggestions, of varying magnitude, that can manifest during the various procedural stages in which the participating actors present arguments drawn from foreign law in support of their theses and propose comparisons. The use of comparative argumentation may emerge from the decision and the obiter dicta and, where applicable, from the competing or dissenting opinions of the panel of judges. However, there is an important distinction between a more general reference to comparative reasoning and a judicial decision based on such a comparison. As a general rule, the judge uses the comparative argument on the grounds that it is considered to be particularly authoritative, as it falls within the range of 'authoritative' arguments available to the interpreter (to the contrary, see Rosenkrantz 2003, p. 269 ff.). The argument has a utilitarian value, either for or against a certain interpretation, and materializes when a reading of the text fails to locate textual pronouncements which are in line with the stance of the judge who must reach a conclusion on a case (Alexy 1998, p. 194). Therefore, comparison is used when the judge is not convinced of being able to employ simpler and more customary canons such as the semantic and systematic one, a use which does not present itself as necessary as it would be problematic to reach a consensus on a hierarchy amongst canons of interpretation (Alexy 2003, p. 18). According to a well-known theory (Häberle 1989, p. 913) in pluralist democracies comparison would always be a preferential canon of interpretation, since these systems are by definition open to transnational dialogue. Once it has been established that judges exercise discretion in the use of comparison, it is then necessary to verify whether they encounter limits in the selection of the material to be used. However, while the use of the laws of legal systems marked by values that are irreconcilable with

those of the judges' own constitution would be possible in the preparatory phase, such use would prove to be inadmissible at the point of decision. This is because the judge cannot draw from systems which do not share the same constitutional principles of her/his own system (Pfersmann 2005, p. 43 ff.).

Comparison and Foreign Law

There are instances in which the judge resorts to the comparison of various judicial decisions and constitutional provisions. In particular, the experiences of Canada, Australia, and South Africa show that the judge makes use of specific constitutional provisions, general legal principles, provisions of international conventions on rights, and judgments of international judges and legal scholarship. Thus, it is not necessarily a matter of purely comparing previous case law. From the reconstructive comparison of a legal principle making use of a wide variety of sources – for example, on the subject of the death penalty, or on inhuman and degrading treatment – the result that is produced is intended as a benchmark for ascertaining the constitutionality/unconstitutionality of the law which is under review by the court. The constitutional provision of South Africa enabling the judge to use foreign law is quite exceptional. The provisional constitution preceding the current one (Interim Constitution, 1993–1996, art. 35, paragraph 1) included explicit authorization for the use of comparison: in the interpretation of the Bill of Rights, the courts could, where applicable, consider public international law in relation to rights and "have regard to comparable foreign case law." Thus, the use of international comparative law was expressly provided for. The current Constitution, in Article 39, merely provides for the use of foreign law, but the South African Court has continuously operated as though the first formulation were still in force. Therefore, even if the provision was of a merely enabling nature, the Court continued to take advantage of the opportunity conferred on it by the Constitution, demonstrating that it does not split hairs between comparable foreign case law and foreign law.

The South African Constitutional Court is the first jurisdiction to have developed an interpretative practice that is strongly oriented towards legal comparison on the basis of specific constitutional constraints (Rinella and Cardinale 2019). In S v. Makwanyane, a leading case that contributed to the development of the conception of human dignity, the Court confirmed the interpretative relevance of both binding public international law and general or regional international regulatory systems, of which South Africa is not part:

> "International agreements and customary international law accordingly provide a framework within which… the Bill of Rights can be evaluated and understood," while on the other, "decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Court on Human Rights, the European Court of Human Rights and, in appropriate cases, reports of specialized agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of the bill" (S v. *Makwanyane and Another* CCT/3/94, 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC)).

From this perspective, therefore, there is an analogy concerning the way in which judges can attribute interpretative relevance to international practices, even regional or non-binding, and to foreign law; in fact, the ultimate state objective of open and democratic society prevents the exact demarcation of the systems from which the judge must, or from which the judge simply may, draw inspiration.

The Canadian Supreme Court systematically employs comparison as a valuable and even essential tool for interpreting the Canadian Charter of Rights and Freedoms (Olivetti Rason and Pennicino 2019). A well-known example includes the judgment on hate speech, that is, on the constitutional legitimacy of the legal limits imposed on manifestations of racism, which made an analysis of the related legal principles and of the jurisprudence of various legal systems, including that of the ECHR (R. v. Keegstra, 1990). Early examples of this comparative reasoning include Hunter v. Southam Inc. (1984), Shapinker v. Law Society of Upper Canada (1984), Suresh v. Canada (2002), Mugesera v. Canada (2005),

and Brucker v. Marcovitz (2007). The comparative approach seldom encourages the implementation of exterior solutions on behalf of the Canadian Court; instead, it guides the latter towards identifying its own, individualized judgments (Glenn 1999a, b, p. 59 ff.; Lefler 2001, p. 190 ff.; Sharpe 2004). The German Constitutional Court (Haberl 2019, p. 295 ff.) endorsed provisions derived from the legal systems of various countries with constitutions founded on liberal-democratic principles (Italy, France, Switzerland, and United States) which had established schemes to limit the formation or activity of parties pursuing objectives that were incompatible with state values, to arrive at an interpretation of Article 21(2)(c) of the Basic Law that would result in the dissolution of the Communist Party (judgment no. 17 of 17 August 1956). It also made use of the provisions of similar legal systems to help define the "treaties which govern the political relations of the Federation" in accordance with paragraph 2 of Article 59 of the Basic Law, while also evaluating the concept of treaties that are of a political nature referred to in Article 80 of the Italian Constitution.

As a general rule, courts resolve cases concerning the constitution without resorting to foreign law, or even comparison. The Spanish Constitutional Court explicitly stated that, after examining the issue of the constitutionality of rules on equal opportunities and after considering Italian and French legislation that the state constitution would serve as its sole constitutional framework (see judgment of 29 January 2008, STC 12-2008). Therefore, any reliance on external sources can only be justified under the discretion of the judge's reasoning process. There are certainly cases where the influence of external precedents is evident, albeit not explicitly declared, and one can ascertain the varying degrees that many constitutional courts, as well as the broader system of jurisdiction, resort to foreign law and comparison. The following scenarios arise: the consideration of external law is rejected; it is used without official confirmation or independently from the ratio decidendi; or instead, it is found to inspire the decision.

Some judges claim to use only the law and related case law, and deny any potentiality of resorting to external law and comparison. One example of this is provided by the jurisprudence of the United States Supreme Court. The Lawrence v. Texas case (Tribe 2004, p. 1893 ff.), in which the Court pronounced a Texas state law sanctioning sodomy as unconstitutional, provoked a heated debate both within the court and in academic and political spheres. For the first time, the Supreme Court had expressly referenced foreign law, including English law, and the case law of the ECHR. The prevailing opinion (expressed by Judge Kennedy) was opposed by Judge Scalia, who rejected the extension of reference frameworks beyond that of the Constitution (Calabresi 2004, p. 556). The same situation arose from the judgment in Roper vs. Simmons (Judgment of 1 March 2005, 543 U.S. 551 (2005)) when the Court decreed that a law allowing the execution of minors was unconstitutional. In this case, too, the Court resorted to the legislation of other countries and international acts and also met strong opposition from those who considered the Court to have purely executive functions within the constitution (Bickel 1962, p. 333 ff.). Any form of creativity and broadening, including references to law which falls outside the scope of the original constitutional order, would have been inadmissible, as only elected and therefore democratically legitimate bodies can exercise creative powers. The clash between supporters and opponents of the isolationist approach of the Supreme Court (Childress 2003, p. 193 ff.; Epstein and Knight 2003, p. 196 ff.) has not, however, resulted in a resolution regarding the exclusion of references to foreign law. Originalism essentially continues to fuel a degree of isolation in the US legal system and constrains the reasoning of the Supreme Court within the confines of national law (Rosenfeld 2008, p. 15 ff.; Tushnet 2008).

Some judges are nevertheless receptive to foreign law despite not explicitly making use of it. Such is the case of the French Constitutional Council, which appears to be open to the precedents of other courts, in particular the German, Italian, and Spanish courts, but only in an indirect

manner (Carpentier 2009, p. 475 ff.). Other judges merely cite foreign law or the rulings of foreign courts. This is a form of discursive scholarship or citation intended to substantiate and reinforce the judge's argument. The references implicate a particular recognition of norms and judicial precedents which are in some way linked to the case, but there is no certainty that foreign law and the comparison between sources and jurisprudence will be incorporated into the ratio decidendi. This phenomenon of references serving as an act of recognition is relevant to the experience of the Italian Constitutional Court.

There are many examples of judgments which reference general principles shared by several legal systems, especially the principles of the ECHR and the European Union (Zeno-Zencovich 2005, p. 1993 ff.). Recalling the rule of law (Const. Court, judgment of 17 May 2001, no. 136, orders of 25 July 2001–27 July 2001, no. 319), the democratic state (see Const. Judgments of 24 January 2005, No 28 and Orders of 12 April 2005, No 151 and 29 April 2005, No 170), and the democratic state of law (Const. Court, Order No 26 of 4 March 1999) does not mean comparing them. Asserting that "in the principal European countries the regulation of political advertising, in recent years, has been oriented, despite the inevitable diversity of the guiding criteria, on models of regulation for broadcasting spaces that are generally governed by the principle of equal opportunities" (Const. Court, judgment of 7 May 2002, no. 155), does not explicitly indicate the use of comparative analysis; it merely presents generic and widely accepted information. It is also stated that "the publication of the administrative procedure is a principle of the shared constitutional heritage of European countries; a principle established, among other things, by Article 253 of the Treaty establishing the European Communities, which imposes the obligation to state reasons for Community measures (judgment of the Court of Justice of the European Union, 2 April 1998 in case C-367/95)" (C. Const., judgment of 4 March 2006, no. 104).

In a small number of examples, the Court has referred more closely to specific institutions, thereby implying knowledge of other legal systems and, perhaps, the use of comparative analysis. However, such references reinforce already oriented decisions and do not in themselves appear to be conclusive for the decision-making process.

A comparative assessment of some legislation (Western German, Austrian, Swiss, Greek, Polish, Yugoslav, Japanese, etc.) was conducted in order to arrive at a judgment on ignorance of law (Const. Court, judgment of 24 March 1988, no. 364). The reference to the concurrent legislation of the German constitutional system (konkurrierende Gesetzgebung) or to the Supremacy Clause of the US federal system is somewhat brief, so as to illustrate how, for reasons of uniformity, it is possible to assign the state with the regulation of administrative functions that would otherwise be the responsibility of the regions (Const. Court, judgment of 1 October 2003, no. 303).

Another example is offered by the Hungarian Constitutional Court, which, after having to rule on the constitutionality of laws concerning the personal data protection (Judgment of 13 April 1991, No 15) in relation to the identification codes required by law for the registry office and for social security requirements, has referred to similar legislation "in Belgium, Denmark, Iceland, the Netherlands and Norway, for the first case, and in Finland and Switzerland for the second." Rules prohibiting or authorizing the codes were then recalled in Portugal, France, and Germany.

The constitutional courts of several European countries frequently face difficulties when comparing EU law and ECHR law due to the need to exercise caution in balancing the principles of their underpinning Treaties and the principles of national constitutions themselves, which are still the primary basis for their legal entitlement (Ferreres Comella 2009, p. 525).

International Courts and Comparison

With international courts, it is worth noting that, as a rule, the scope of the positive laws applied is

rather limited. The principles which may be considered by international judges (defined as "common" and "general") (Mosler 1971, p. 381 ff.) are incorporated into the international legal order (general or specific), but also derived from the legal systems of the member states of an organization (e.g., of the United Nations in relation to the International Court of Justice and the International Criminal Court, or of the European Union in relation to the Court of Justice). Principles may also derive from the legal systems of states which are interested in the solution of a dispute, such as the judgment of an arbitration tribunal, or even of third states. The international judicial body identifies the legal principles with a considerable margin of discretion and experience, which suggests that not all jurisdictions that could potentially be examined by the judge are considered, or that only a limited number of state jurisdictions are actually deemed worthy of attention. However, it is often assumed that the judge, in order to establish legal principles, performs a comparative analysis of different legal systems.

Article 38(c) of the Statute of the International Court of Justice stipulates that, in addition to conventions and customs, the Court shall also apply the "general principles of law recognised by civilised nations." These principles were originally part of the national legal system and can also be applied internationally, subject to comparative examination, and include those relating to the interpretation of legal provisions. In addition, the fragmented nature of the procedural rules in the Court has led to the search for a framework that can be applied to cases that are not explicitly covered by international standards, and suggests that comparison should be adopted as a means of bridging the gaps (von Mangoldt 1980, p. 561 ff.; see also Lobba and Mariniello 2017). Article 21 of the Statute of the International Criminal Court stipulates that, in addition to the statutory sources and the sources proper to international law, the International Criminal Court shall apply the general principles of laws pertaining to the legal systems of states of the world, including the laws of states which would normally hold jurisdiction over the crimes that are brought to its attention (Pellet 2002, p. 1053 ff.; Vasiliev 2009, p. 72 ff.).

The use of comparison has also been discussed for international courts operating in the European context. It is clear that the Court of Justice of the European Union and the European Court of Human Rights, when proceeding with comparative analysis, mainly refer to the law of the Member States. It may therefore be of interest for these judges to consider the particularities of using state law and employing comparative analysis.

The Court of Justice of the European Union

The Court of Justice is sometimes referred to as a comparative judge par excellence (Lenaerts 2004, p. 99 ff.; Lanaerts 2005, p. 75 ff.). And, in fact, in exercising its functions, it may be called upon to invoke the law and jurisprudence of Member States, and even of third countries. This situation is, in some cases, explicitly attributable to the provisions of the Treaties. Thus, in the field of non-contractual liability, it is the Treaty which explicitly requires that the Court use the general principles of the law of the Member States (Article 340 TFEU, formerly Article 288 TEC). In such a case, therefore, the Court has had to rely on the law and jurisprudence of the State courts on the basis of the principle of common denominators. However, the diversity of the State's laws may render such a task difficult and, therefore, the Court considers that it has the freedom to select the laws which are best suited to the particular case (Kakouris 1999, p. 100). In this respect, the Court can establish appropriate principles by comparing the laws of Member States (Chiti 1995, p. 661 ff.), but in practice this does not involve a methodical comparison of national laws, but rather the application of certain elements of those laws which are instrumental in resolving the current cases (Jacob 2014).

The law on liability for legislative acts is proof of this. In the case of a consultancy firm which experienced prejudice following the introduction of a Council Regulation blocking trade with Iraq and Kuwait in the absence of a "ruling principle" in State legislation, the Court of First Instance (Dorsch Consult v. Council and Commission, Judgment of 28 April 1998 in Case T-184/95), and then the Court (Dorsch Consult v. Council and Commission, Judgment of 15 June 2000,

Case C-237/98) decided to limit themselves to referring to the German legal concept of "exceptional sacrifice" (Sonderopfer) and to that of discharge of burdens under Belgian and French law. However, in the majority of cases where there is a lack of formal provisions for reference to state principles, the Court, in the interpretation and application of the body of legislation established by the Treaties and by secondary Community law, may also have to rely on the law and precedents of state systems. In the interpretation of Article 220 TEC, now Article 19 TEU, which states that the Court shall guarantee observance of the law in the interpretation and application of the Treaty, the Court deemed this provision to also include, where necessary, the "general principles common to the legal principles of Member States" (Brasserie du Pêcheur and Factortame).

In such cases, it is generally assumed that the Court makes comparisons, though the situation is not so straightforward in practice. The judge's discretion prevails in this case, and thus the idea of seeking a common denominator from a comparison of state laws or precedents is sometimes accepted in law. The Court freely selects, within the framework of a particular system, any provision or precedent which may be deemed relevant to its reasoning. In reality, this seems to be a tendency, since the analysis of its law clearly reveals that it draws occasionally from the body of laws of the state that can be best adapted in order to resolve the case under consideration by the Court.

A distinction should be made between the preliminary investigative stage, during which the possibility often arises for the Court to engage in a process of in-depth examination of state law, and potentially carry out a comparative assessment of the available sources, and the decisive moment during which the reference to the law of the Member State(s) is incorporated in the Court's judgment. In the Algiers case (Dineke Algera et al. High Authority, Judgment of 12 July 1957, paragraph 56, in Joined Cases C-7/56, C-3/57 and C-7/57), it was the first time that the Court delivered a ruling which incorporated the comparison into the ratio decidendi. In a case of revocation of appointment of officials, having noted an absence in the Treaty of specific provisions on the subject, and having conducted a comparative study of the legal traditions of the then-six Member States, the Court accepted the "principle of revocability of illegitimate measures within a reasonable timeframe." Therefore, the lacunae within the Community's legal system gave rise to the impetus to carry out comparisons in order to deduce suitable legal measures, a notion supported by multiple examples.

In the same way as it was necessary to deduce the principle of confidential communications between lawyers and their clients from the State legal systems, a brief examination revealed that in some State legal systems this safeguard derived from the lawyer's cooperation in maintaining the law, and in others it was incorporated within the framework of the right of defense (A.M. & S. v. Commission, Judgment of 18 May 1982, paragraphs 18–21, in Case C-155/79). Furthermore, in the absence of provisions of Community law, comparative analysis became necessary in the search for the right for the individual to abstain from providing self-incriminating evidence. This right did not arise from the comparison itself, and was thus disregarded by the Court, though they subsequently acknowledged an infringement upon the rights of the defense in this particular case (Orkem SA vs. Commission, Judgment of 18 October 1989, paragraphs 28–32, in Case C-374/87). In another case, identifying a principle of mitigation for penalties in criminal proceedings in favor of the accused was achieved through the comparative examination of the constitutional practices of Member States from which a general principle of applicable law was inferred (Berlusconi et al., Judgment of 3 May 2005, paragraph 68, in joined cases C-387/02, C-391/02, C-403/02. See also on this point the Taricco 2 judgment (Court of Justice (Grand Chamber), judgment of 5 December 2017, in Case C-42/17).

Another legal ground for comparison relates to the provision whereby the fundamental rights (also) resulting from the constitutional traditions of the Member States are included in the law of the Union as general principles (Art. 6, 3rd para. TEU) (Opinion of Advocate General Cruz Villalón of 14 January 2015, Case C-62/14,

Gauweiler and Others, ECLI:EU:C:2015:7, para. 61).

It is only due to the incomplete nature of the legislation on rights arising from the Community Treaties that, in the 1970s, the Court of Justice was forced to turn to the constitutional systems of the Member States to find legal principles that were essential to its judgments. In addition to the available treaty law, there was, therefore, another law derived from the state systems. In the absence of a Community framework of rights, the Court began by identifying principles for the protection of fundamental rights which were inherent in the constitutional traditions of the Member States. These common traditions were in keeping with the process of the Court's interpretation. "General principles of Community law" were therefore ascertained from legal sources of constitutional traditions. It would perhaps be difficult, however, to conclude that the Court carried out a genuine comparison for the purposes of developing fundamental rights (de Vergottini 2007a, b, p. 663 ff.). The common constitutional traditions have rather assumed the function of a "screen" whose shelter has enabled the Court to independently develop an unwritten charter of rights that complements the existing provisions of the ECHR, which constitutes a more extensive view of the common traditions of the states (Lenaerts 2004, p. 104). The subsequent references to the common constitutional traditions found in the Treaties should therefore be read as the result of the adoption of the Luxembourg case-law.

The reference to shared constitutional traditions, alongside other concepts relating to cultural values (and thus also to common legal values), is progressively materializing in numerous documents of legal significance, thereby facilitating the consolidation of a *collection of common values*, the sharing of which is essential to fostering the process of European integration. The Nice Charter of 2000 reiterates the common constitutional traditions in its preamble and presents the first comprehensive overview of EU laws undergoing a process of positivization.

The Court's employment of the general principles identified through comparison has been regarded as a resource capable of operating as a producer of law within the Community legal order, and consequently within the sphere of State legislation in matters which fall within the Community's jurisdiction, even if more caution is exercised when considering them as primary criteria in the interpretation of Community law.

The European Court of Human Rights

The use of comparison has also been identified in connection with the work of the European Court of Human Rights within the Council of Europe, also known as the "comparative judge par excellence" (Rozakis 2006, p. 338 ff.), since its legal system utilizes, on a comparative basis, the law of Member States. The Court considers itself an interpreter, not of a simple international treaty but of the ECHR, which can be classified as a "constitutional instrument of European public order" (Loizidou v. Turkey, Judgment of 23 March 1995, Case No 15318/89, paragraph 75). The review it frequently carries out on shared rules is designed to identify, like in the case of the EU Court, the presence of a common denominator.

For instance, in the rulings of Etxeberria, Barrena Arza, Nafarroako Autodeterminazio Bilgunea, and Aiarako and others v. Spain (Judgment of 30 June 2009, Appeals No 35579/03, No 35613/03, No 35626/03 and No 35634/03), the Court was called upon to determine whether a two-day period for challenging the refusal to register candidates in the electoral process established under Spanish law was in breach of the provisions of the ECHR (Article 13). An analysis of the legislation of the Member States was deemed a useful means of orientation and decision-making. The comparative analysis of the systems established in Europe has thus prompted the Court to consider the Spanish decision as "not unreasonable" and, in any event, not capable of preventing the action from being brought, thereby ruling out any infringement of Article 13 ECHR.

In other cases, the Court relies especially on what it draws from the law of certain member states in its interpretation of the ECHR. In fact, most of the principles in the conventional text are common to the law of the European states that are signatories to the ECHR. It is natural, therefore, to

make use of the provisions of law, jurisprudence, and legal scholarship which have developed in their legal systems. However, the Court has also defined "autonomous concepts," that is, ways of defining traditional concepts that are to be evaluated independently from overall assessments of state systems. In other words, the Court intends to independently assess certain concepts in accordance with the principles and terms of the ECHR. The Court has repeatedly stressed that the ECHR is subject to evolutionary development on account of the rapidly shifting social environment and the approach to rights in the member states. The ECHR, qualified as a "constitutional instrument of the European public order," is also regarded as a "living instrument." Its interpretation by means of comparative analyses of state constitutions and case law facilitates a potential evolution of European law (Canivet 2006, p. 309 ff.).

This is reflected in the judgments on the rights of illegitimate children (Mazurek v. France, Judgment of 1 February 2000, Case No 34406/97), transsexualism (B. v. France, Judgment of 25 March 1992, Case No 13343/87), family structure (Marckx v. Belgium, Judgment of 13 June 1979, Case No 6833/74; Johnston v. Ireland, Judgment of 18 December 1986, appeal No 9697/82), and same-sex marriage (Cossey v. UK Schalk and Kopf v. Austria, Judgment of 24 June 2010, Case No 30141/04). One of the most significant examples of the shift in law prompted by a noticeable change in social attitudes and legal developments is the ruling on the right to privacy and the right to marry a postoperative transsexual person (Christine Goodwin v. UK, Judgment of 11 July 2002, Case No 28957/95).

In principle, the broader the scope of the interpretation that can be inferred from an analysis of the State laws is, the easier it is for the Court to infer the legal principles that are necessary for interpretation. Therefore, the identification of common indexes in state law facilitates the monitoring of state discretion in relation to the protection of rights and enables the implementation of the role of verification of the ruling judge. Only when convergence is undetectable is it possible for the Court to allow the acknowledgment of the State's margin of appreciation, which allows the continuation of restrictive derogating measures (García Roca 2010, p. 107 ff). It should also be noted that the comparative role of the Strasbourg Court is not limited to the consideration of the law of Member States. There are many cases in which it refers to the laws of systems that are external to the ECHR (Rozakis 2006, p. 355), to international law, to the law of other international conventions on human rights, and to the jurisprudence of the Inter-American Court. The European Court of Human Rights has made reference to the case law of the Inter-American Court – in particular, in the decisions concerning the right to life, and the prohibition of torture and inhuman treatments (see e.g., Judgment 13.11.2012, Marguš v. Croatia, application 4455/10; Judgment 18.12.2012, Aslakhanova and others v. Russia, applications 2944/06, 8300/07, 50184/07, 332/08, and 42509/10)). There are additional references to the International Court of Justice, the UN Committee on Human Rights, and the UN Committee against Torture. The openness to external sources is, therefore, remarkably broad.

The impression that emerges from reviewing a large portion of the judgments where the Court demonstrates an interest in assessing the procedures adopted in other legal orders, including those external to the ECHR, is that the acknowledgment of the constitutions, legislation, legal scholarship, case law, and even the preparatory work that precedes legislation and reports by the Venice Commission, may all serve as a yardstick for the judge to "form an idea," to inform themselves and to verify the common trends among the legal systems of the Member States, as well as those external to the ECHR's sphere, in order to identify the common denominator and, therefore, to ascertain whether a state measure might result in a potential violation of the Convention. These reviews are often debatable when they involve systems that are far removed from European ones. To conclude, this entry allows us to question the utility of verifying Mauritian legislation to gain an insight into the amount of deposits required by Ukrainian law to be able to stand as a candidate in the general elections (*Sukhovetskyy v. Ukraina*, judgment of 28 March 2006, appeal 13716/02).

References

Ackerman, Bruce. 1997. the rise of world constitutionalism. *Virginia Law Review* 83: 771–797.

Adams, Maurice, and Jacco Bomhoff, eds. 2012. *Practice and theory in comparative law*. Cambridge: Cambridge University Press.

Adhikari, Bipin, and Carlos Viver PiSunyer. 2013. Linguistic and cultural rights. In *Routledge handbook of constitutional law*, ed. Mark Tushnet, Thomas Fleiner, and Cheryl Saunders. London/New York: Routledge.

Afonso Da Silva, José. 2009. *Um pouco de direito constitucional comparado*. São Paulo: Malheiros.

Albert, Richard. 2015. How unwritten constitutional norms change written constitutions. *Dublin University Law Journal* 38 (2): 387–417.

Alexy, Robert. 1998. *Teoria della interpretazione giuridica*. Milan: Giuffré.

Alexy R. 2003. *On Balancing and Subsumption*. A Structural Comparison, 16 Ratio Juris.

Alford, Roger P. 2005. In search of a theory for constitutional comparativism. *UCLA Law Review* 52 (3): 639–714.

Arnold, Rainer. 2005a. *Die Auslegung des Rechtsstaatsbegriffs in der Rechtsprechung des tschechischen Verfassungsgerichts*. Regensburg: Universitätsbibliothek Regensburg.

———. 2005b. Constitutional development in Central and Eastern Europe as a contribution to emerging European constitutional law. In *Internationale Gemeinschaft und Menschenrechte*, ed. Jürgen Bröhmer. Cologne: Heymanns.

———. 2006. Fundamental rights in Central and Eastern Europe: A basic analysis. In *Governing Europe under a constitution*, ed. Herm.-Josef Blanke and Stelio Mangiameli, 253–263. Berlin: Springer.

Ascarelli, Tullio. 1955. *Interpretazione del diritto e studio del diritto comparato, Saggi di diritto commerciale*. Milan: Giuffré.

Ayala Corao, Carlos. 2012. *Del diálogo jurisprudencial al control de convencionalidad*. Caracas: Centro de Estudios de Derecho Procesal Constitucional.

Barak-Erez, Daphne. 2006. An international community of legislatures? In *The least examined branch: The role of legislatures in the constitutional state*, ed. Richard W. Bauman and Tsvi Kahana, 532–546. Cambridge: Cambridge University Press.

———. 2004. The international law of human rights and constitutional law: A case study of an expanding dialogue. *International Journal of Constitutional Law* 2 (4): 611–632.

Barsotti, Virttoria, Paolo Carozza, Marta Cartabia, and Andrea Simoncini. 2016. *Italian constitutional justice in global context*. Oxford: Oxford University Press.

Benvenisti, Eyal, and George W. Downs. 2013–2014. Democratizing courts: How national and international courts promote democracy in an era of global governance. *New York University Journal of International Law and Politics* 46 (3): 741.

Bernhardt, Rudolf. 2007. Reflections on comparative law in public law. In *Festschrift C. Starck*. Tübingen: Mohr Siebeck.

Biagi, Francesco. 2020. *European constitutional courts and transitions to democracy*. Cambridge: Cambridge University Press.

Bickel, Alexander M. 1962. *The least dangerous branch: the Supreme Court at the Bar of Politics*. Indianapolis: The Bobbs-Merrill Company.

Bihari, Ottó. 1979. *The constitutional models of socialist state organization*. Budapest: Akadémiai Kiadó.

Bobek, Michal. 2013. *Comparative reasoning in European supreme courts*. Oxford: Oxford University Press.

Boele-Woelki, Katharina, Nina Dethloff, and Werner Gephart, eds. 2014. *Family law and culture in Europe: Developments, challenges and opportunities*. Mortsel/Cambridge: Intersentia.

Bognetti, Giovanni. 2009. L'oggetto e il metodo. In *Diritto costituzionale comparato*, ed. Paolo Carrozza, Alfonso di Giovine, and Giuseppe F. Ferrari, 721–736. Roma/Bari: Laterza.

Brewer-Carías, Allan-Randolph. 1989. *Judicial review in comparative law*. Cambridge: Cambridge University Press.

———. 1996. *Instituciones políticas y Constitucionales*, 1. Caracas: Edit. Jurídica Venezolana.

Butler, David, Howard R. Penniman, and Austin Ranney. 1981. *Democracy at the polls. A comparative study of competitive national elections*. Washington, DC/London: AEI.

Calabresi, Steven G. 2004. Lawrence, the fourteenth amendment, and the Supreme Court's reliance on foreign constitutional law: An originalist reappraisal. *Ohio State Law Journal* 65 (3): 1097–1131.

Canivet, Guy. 2006. The practice of comparative law by the supreme courts. In *Judicial recourse to foreign law. A new source of inspiration?* ed. Basil Markesinis and Jorg Fedtke. London/New York: Routledge-Cavendish.

Capotorti, Francesco. 1991. *Etude des droits des personnes appartenant aux minorités éthniques, religieuses et linguistiques*. New York: United Nations.

Cappelletti, Mauro. 1969. *Processo e ideologie*. Bologna: Il Mulino.

Carpentier, Elice. 2009. La utilizacion de la jurisprudencia constitucional extranjera por el Consejo Constitucional francès. *Memoria del X Congreso iberoamericano de derecho constitucional* 2.

Cervati, Angelo Antonio. 2009. *Per uno studio comparativo del diritto costituzionale*. Turin: Giappichelli.

Chang, When-Chen, and Jiunn-Rong Yeh. 2012. Internationalization of constitutional law. In *The Oxford handbook of comparative constitutional law*, ed. Michel Rosenfeld and András Sajó, 1165–1184. Oxford: Oxford University Press.

Childress, Donald E., III. 2003. Using comparative constitutional law to resolve federal questions. *Duke Law Journal* 53: 193–221.

Chiti, Mario P. 1995. *The role of the European court of justice in the development of general principles and their possible codification*. Rivista Italiana di Diritto Pubblico Comunitario.

Choudhry, Sujit. 2006. *The migration of constitutional ideas*. Cambridge: Cambridge University Press.

Claes, Monica, and Maartje de Visser. 2012. Reflections on comparative method in European constitutional law. In *Practice and theory in comparative law*, ed. Maurice Adams and Jacco Bomhoff, 143–169. Cambridge: Cambridge University Press.

Cohen-Eliya, Moshe, and Iddo Porat. 2009. The hidden foreign law debate in Heller: The proportionality approach in American constitutional law. *San Diego Law Review* 46 (2): 367–414.

Constantinesco, Léontin-Jean. 1972. *Traité de droit comparé*. Paris: Economica.

———. 1974. *Traité de droit comparé*. Paris: Economica.

———. 1983. *Traité de droit comparé*. Paris: Economica.

———. 2000. *Il metodo comparativo*. Turin: Giappichelli.

Cruz Villalón, Pedro. 1989. *La recepción de la Ley Fundamental de la República Federal Alemana*. Anuario de Derecho Constitucional y Parlamentario.

Davis, D.M. 2012. Socio-economic rights. In *The Oxford handbook of comparative constitutional law*, ed. Michel Rosenfeld and András Sajó, 1020–1035. Oxford: Oxford University Press.

de Vergottini, Giuseppe. 1985. *Les investigations des commissions parlementaires en Italie*. RDPSP.

———. 1986. La comparazione nel diritto costituzionale: Scienza e metodo. *Diritto e società* 2.

———. 1998. *Le transizioni costituzionali*. Bologna: Il Mulino.

———. 2001. Modelos constitucionales e innovación. In *Estudios de teoria del estado y derecho constitucional en honor de Pablo Lucas Verdu*, ed. AA. VV, 1367–1384. México/Madrid: UNAM. Instituto de Investigaciones Jurídicas.

———. 2007a. Gemeinsame Verfassungsüberlieferungen und europäische Verfassung, Die Ordnung der Freiheit. *Festschrift für Christian Starck*: 661–677.

———. 2007b. Transitions constitutionnelles et consolidations de la démocratie dans les ordonnancements d'Europe centre-orientale. In *Mélanges en l'honneur de Slobodan Milacic*, ed. AA. VV. Brussels: Bruylant.

———. 2009. Forma di governo della Unione Europea. *Enciclopedia del XXI secolo*: 319–239.

———. 2010. *Oltre il dialogo fra le corti*. Bologna: Il Mulino.

De Visser, Maartje. 2015. *Constitutional review in Europe. A comparative analysis*. Oxford: Hart.

De Wet, Erika. 2006. The international constitutional order. *International & Comparative Law Quarterly* 55 (1): 51–76.

de Witte, Bruno. 1995. Sovereignty and European integration: The weight of legal tradition. *Maastricht Journal of European and Comparative Law* 2 (2): 145–173.

Delaney, Erin F., and Rosalind Dixon, eds. 2018. *Comparative judicial review*. Cheltenham: Edward Elgar.

Delmas-Marty, Mireille. 2004. *Le rélatif et l'universel*. Paris: SEUIL.

———. 2006. *Le pluralisme ordonné*. Paris: SEUIL.

Dicey, Albert Venn. 1915. *Introduction to the study of the law of the constitution*. London: MacMillan.

Dorsen, Norman, Michel Rosenfeld, András Sajó, Susanne Baer, and Susanna Mancini, eds. 2016. *Comparative constitutionalism. Cases and materials*. St. Paul: West Academic.

Eisenmann, Charles. 1968. Essai d'une classification théorique des formes politiques. *Politique*: 41–44.

Engelbrekt, Antonina Bakardjieva. 2015. Legal and economic discourses on legal transplants: Lost in translation. *Scandinavian Studies in Law* 60: 111–140.

Epstein, Lee, and Jack Knight. 2003. Constitutional borrowing or nonborrowing. *International Journal of Constitutional Law* 1 (2): 196–223.

Ewald, William. 1995. Comparative jurisprudence (II): The logic of legal transplants. *American Journal of Comparative Law* 43 (4): 489–510.

Fabbrini, Federico, Ernst Hirsch Ballin, and Han Somsen, eds. 2015. *What form of government for the European Union and the Eurozone?* Oxford: Oxford University Press.

Fassbender, Bardo. 2007. The meaning of international constitutional law. In *Transnational constitutionalism: International and European perspectives*, ed. Nicholas Tsagourias, 307–328. Cambridge: Cambridge University Press.

Favoreu, Louis. 1996. *Les Cours Constitutionnelles*. Paris: Dalloz.

Ferrari, Giuseppe F., ed. 2019. *Judicial cosmopolitanism. the use of foreign law in contemporary constitutional systems*. Leiden/Boston: Brill/Nijhoff.

Ferreres Comella, Victor. 2009. *Constitutional courts and democratic values*. New Haven: Yale University Press.

Frankenberg, Günter. 1985. Critical comparisons: Re-thinking comparative law. *Harvard International Law Journal* 26 (2): 411–448.

———. 2006. Comparing constitutions: Ideas, ideals, and ideology – Toward a layered narrative. *International Journal of Constitutional Law* 4 (3): 439–459.

Friedman, Lawrence M. 1978. *Il sistema giuridico nella prospettiva delle scienze sociali*. Bologna: Il Mulino.

Frosini, Justin O. 2018. Forms of state and forms of government. In *Introduction to Italian public law*, ed. Giuseppe F. Ferrari, vol. XVI, 272. Milan: Giuffré.

Ganshof Van Der Meersch, Walter. 1962. *Les tendences constitutionnelles des états ayant accédé récemment à l'indépéndence*. Hambourg/Brussels: Rapport au V.me Congrès international de droit comparé.

García Roca, Javier. 2010. *El margen de apreciación nacional en la interpretación del Convenio Europeo de Derechos Humanos: soberanía y integración*. Cizur Menor, Navarra: Civitas.

Gerber, David J. 1998. System dynamics: Toward a language of comparative law? *The American Journal of Comparative Law* 46 (4): 719–737.

Glenn, Patrick H. 1999a. The use of comparative law by common law courts in Canada. In *The use of comparative law by courts*, ed. Ulrich Drobnig and Sjef Van Erp. La Haye/London/Boston: Kluwer Law International.

———. 1999b. Vers un droit appare intégré? *Revue International de droit comparé*: 841-852.
———. 2006a. Comparative legal families and comparative legal traditions. *The Oxford Handbook of Comparative Law.*
———. 2006b. The aims of comparative law. In *Elgar encyclopedia of comparative law*, ed. Jan M. Smith, 57–64. Cheltenham: Edward Elgar.
———. 2010. *Legal traditions of the world*. Oxford: Oxford University Press.
Gorla, Gino. 1964. Diritto Comparato. *Enciclopedia del Diritto*: XII.
Graziadei, Michele. 2009. Legal transplants and the frontiers of legal knowledge. *Theoretical Inquiries in Law* 10 (2): 723–743.
Grimm, Dieter. 2012. La souveraineté. In *Traité international de droit constitutionnel*, ed. Dominique Chagnollaud and Michel Troper. Paris: Dalloz.
Groppi, Tania, and Marie-Claire Ponthoreau. 2013. *The use of foreign precedents by constitutional judges*. Oxford: Oxford University Press.
Grossi, Paolo. 2018. *L'Europa del diritto*. Roma/Bari: Laterza.
Grote, Rainer, and Tilmann J. Röder, eds. 2012. *Constitutionalism in Islamic countries. Between upheaval and continuity.* Oxford: Oxford University Press.
———. 2016. *Constitutionalism, human rights, and Islam after the Arab spring*. Oxford: Oxford University Press.
Gutteridge, Harold Cooke. 1946. *Comparative law: An introduction to the comparative method of legal study and research*. Cambridge: Cambridge University Press.
Haberl, Sonja. 2019. Comparative reasoning in constitutional litigation: Functions, methods and selected case law of the german federal constitutional court. In *Judicial cosmopolitanism. The use of foreign law in contemporary constitutional systems*, ed. Giuseppe F. Ferrari, 295–324. Leiden/Boston: Brill/Nijhoff.
Häberle, Peter. 1989. Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat – Zugleich zur Rechtsvergleichung als "fünfter" Auslegungsmethode. *Juristenzeitung*: 913–964.
———. 1992. *Rechtsvergleichung im Kraftfeld des Verfassungsstaates*. Berlin: Duncker & Humblot.
———. 1999. Der Verfassungstaat und seine Reformbedürfnisse. In *Die Zukunft des Rechts*, ed. Christian J. Meier-Schatz, 207–226. Basel/Genf/München: Helbing & Lichtenhahn.
———. 2000. Zeit und Verfassungskultur. Zeit und Verfassungsstaat – kulturwissenschaftlich betrachtet. In *Reflexionen über die Zeit*, ed. Heinrich Nöth, 57–74. Munich, Bayerische Akademie der Wissenschaften.
———. 2005. *Lo stato costituzionale*. Roma: Istituto della Enciclopedia Italiana.
Häberle, Peter, and Markus Kotzur. 2016. *Europäische Verfassungslehre*. Baden/Baden: Nomos.
Herrero De Miñón, Miguel. 1984. Les sources étrangères de la Constitution. *Pouvoirs* 8: 97–107.
Hirschl, Ran. 2014. *Comparative matters*. Oxford: Oxford University Press.
———. 2018. Judicial review and the politics of comparative citations: Theory, evidence and methodological challenges. In *Comparative judicial review*, ed. Erin F. Delaney and Rosalind Dixon, 403–422. Cheltenham: Edward Elgar.
Horwitz, Morton J. 2009. Constitutional transplants. *Theoretical Inquiries in Law* 10 (2): 535–560.
Huls, Nick, Jacco Bomhoff, and Maurice Adams, eds. 2009. *The legitimacy of highest courts' rulings: Judicial deliberations and beyond*. The Hague: Asser Press.
Husa, Jaakko. 2011. Comparative law, legal linguistic and methodology of legal doctrine. In *Methodologies of legal research. Which kind of method for what kind of discipline?* ed. Mark Van Hoecke, 209–228. Oxford: Hart.
Iliopulos-Strangas, Julia. 2010. Soziale Grundrechte in den Mitgliedstaaten der Europäischen Union im Rechtsvergleich unter Berücksichtigung des europäischen Rechts. In *Soziale Grundrechte nach Lissabon. Eine Rechtsvergleichende Untersuchung der nationalen Rechtsordnungen und des europäichen Rechts*, ed. Julia Iliopulos-Strangas. Baden Baden: Nomos.
Ismayr, Wolfgang, ed. 2004. *The political systems of Eastern Europe*. Opladen: Leske + Budrich.
Jacob, Marc A. 2014. *Precedents and case-based reasoning in the European court of justice: Unfinished business*. Cambridge: Cambridge University Press.
Kakouris, C.N. 1999. L'utilisation de la méthode comparatif par la Cour de Justice des Communautés Européennes. In *The use of comparative law by courts*, ed. Ulrich Drobnig and Sjef Van Erp. La Haye/London/Boston: Kluwer Law International.
Karayanni, Michael M., and Roberto Gargarella. 2013. Minority and group rights. In *Routledge handbook of constitutional law*, ed. Mark Tushnet, Thomas Fleiner, and Cheryl Saunders. London/New York: Routledge.
Katrougalos, George, and Paul O'Connell. 2013. Fundamental social rights. In *Routledge handbook of constitutional law*, ed. Mark Tushnet, Thomas Fleiner, and Cheryl Saunders. London/New York: Routledge.
Koh, Harold Honhju. 2004. The United States constitution and international law. *American International Law Journal*: 44.
Kokott, Juliane. 1999. From reception and transplantation to convergence of constitutional models in the age of globalization – With particular reference to the German basic law. In *Constitutionalism, universalism and democracy – A comparative analysis*, ed. Christian Starck, 71–134. Baden-Baden: Nomos.
Lambert, Édouard. 1905. *Congrès international de droit comparé (1900).*
Lanaerts K. 2005. *Inter-Court Constitutional Dialogue After Enlargment – Implications of the Case of Professor Köhler*, in *Croatian Yearbook of European Law and Policy*, 2005, Vol. I, 75ff.

Lanchester, Fulco. 1990. Stato (forme di). *Enciclopedia del Diritto*: XLIII.

Landau, David, and Hanna Lerner, eds. 2019. *Comparative constitution making*. Cheltenham: Elgar.

Lauvaux, Philippe, and Armel Divellec. 2015. *Le grandes démocraties contemporaines*. Paris: PUF.

Lefler, Rebecca. 2001. A comparison of comparison: Use of foreign case law as persuasive authority by the United States supreme court, the Supreme Court of Canada and the High Court of Australia. *Southern California Interdisciplinary Law Journal* 11: 165–191.

Legrand, Pierre. 1996. European legal systems are not converging. *International and Comparative Law Quarterly* 45 (1): 52–81.

———. 1997. The impossibility of 'legal transplants'. *Maastricht Journal of European and Comparative Law* 4 (2): 111–124.

———. 2001. What «Legal Transplants»? In *Adapting legal cultures*, ed. David Nelken and Johannes Feest, 55–69. Oxford: Hart Publishing.

———. 2003. The same and the different. In *Comparative legal studies: Traditions and transitions*, ed. Pierre Legrand and Roderick Munday, 240–311. Cambridge: Cambridge University Press.

Lemmens, Koen. 2012. Comparative law as an act of modesty: A pragmatic and realistic approach to comparative legal scholarship. In *Practice and theory in comparative law*, ed. Maurice Adams and Jacco Bomhoff, 302–236. Cambridge: Cambridge University Press.

Lenaerts, Koen. 2004. Interlocking legal orders of the European Union variant of E Pluribus Unum. In *Comparative law before the courts*, ed. Guy Canivet, Mads Andenas, and Duncan Fairgrieve. London: British Institute of International and Comparative Law.

———. 2013. How the ECJ thinks: A study on judicial legitimacy. *Fordham International Law Journal* 36 (5): 1303–1371.

Lijphart, Arendt. 1971. Il metodo della comparazione. *Rivista Italiana di Scienza Politica* 1 (1): 67–92.

Lobba, Paolo, and Triestino Mariniello, eds. 2017. *Judicial dialogue on human rights: The practice of international criminal tribunals*. Leiden: Brill.

Lollini, Andrea. 2009. Confronting comparative methods: Approaches to using extra-systemic parameters by the Canadian Supreme Court and the South African constitutional court. In *Highest courts and internationalisation of law*, ed. Sam Muller and M.A. Loth, 165–182. The Hague: Hague Academic Press.

Lollini, Andrea, and Francesco Palermo. 2009. Comparative law and the «Proceduralization» of constitution-building processes. In *Facets and practices of state-building*, ed. Julia Raue and Patrick Sutter, 301–326. Leiden/Boston: Brill Nijhoff.

Lupo, Nicola, and Lucia Scaffardi. 2014. *Comparative law in legislative drafting. The increasing importance of dialogue among parliaments*. Den Haag: Eleven International Publishing.

Luther, Jörg. 2006. The search for a constitutional geography and historiography of second chambers. In *A world of second chambers. Handbook for constitutional studies on bicameralism*, ed. Jörg Luther, Paolo Passaglia, and Rolando Tarchi, 3–32. Milan: Giuffré.

Markesinis, Basil. 2003. *Comparative law in the courtroom and classroom. The story of the last thirty-five years*. Oxford/Portland: Hart Publishing.

Markesinis, Basil, and Jorg Fedtke. 2006. *Judicial recourse to foreign law.* In *A new source of inspiration?* London/New York: Routledge-Cavendish.

Matsui, Shigenori. 2011. *The constitution of Japan: A contextual analysis*. Oxford/Portland: Hart.

Merryman, John Henry. 1983. Modernización de la ciencia jurídica comparada. *Boletin Mexicano de Derecho Comparado* XVI (46): 67–92.

Mezzetti, Luca. 2003. *Teoria e prassi delle transizioni costituzionali e del consolidamento democratico*. CEDAM: Padova.

Mirkine-Guetzévich, Boris. 1951. I metodi di studio del diritto costituzionale comparato. *Il Politico* 16 (2): 181–195.

Morlino, Leonardo. 2005. *Introduzione alla ricerca comparata*. Bologna: Il Mulino.

Mosler, Hermann. 1971. Rechtsvergleichung vor völkerrechtlichen Gerichten. *Internationale Festschrift für A. Verdross* 80: 381–411.

Newmayer, Karl Hans. 1973. Law in the books, law in action et les méthodes du droit comparé. In *Buts et Méthodes du droit comparé*, ed. Mario Rotondi. Padova: CEDAM.

Oesch, Matthias. 2008. *Differenzierung und Typisierung. Zur Dogmatik der Rechtsgleicheit*. Bern, Stämpfli.

Olivetti Rason, Nino, and S. Pennicino. 2019. Comparative law in the jurisprudence of the supreme court of Canada. In *Judicial cosmopolitanism. The use of foreign law in contemporary constitutional systems*, ed. Giuseppe F. Ferrari, 140–176. Leiden/Boston: Brill/Nijhoff.

Osiatynski, Wiktor. 2003. Paradoxes of constitutional borrowing. *International Journal of Constitutional Law* 1 (2): 244–268.

Pellet, Alain. 2002. Applicable law. In *The Rome statute of the international criminal court: A commentary*, ed. Antonio Cassese, Paola Gaeta, and John R.W.D. Jones. Oxford: Oxford University Press.

Perju, Vlad. 2012. Constitutional transplants, borrowing and migrations. In *The Oxford handbook of comparative constitutional law*, ed. Michel Rosenfeld and András Sajó, 1304–1327. Oxford: Oxford University Press.

Pfersmann, Otto. 2005. Le sophisme onomastique: Changer au lieu de connaître. L'interprétation de la constitution. In *L'interprétation constitutionnelle*, ed. Ferdinand Melun Soucramanien, 33–60. Paris: Dalloz.

Pinto Bastos, Luiz Magno. 2007. Utilización del derecho constitucional comparado en la interpretación

constitucional. Nuevos retos a la teoría constitucional. *Revista peruana de derecho público* 15.

Pizzorusso, Alessandro. 1981. Organizzazione dei pubblici poteri. *Enciclopedia del Diritto* XXXI.

Poggeschi, Giovanni. 2010. *The linguistic rights. A comparative analysis*. Rome: Carocci editore.

Ponthoreau, Marie-Claire. 2005a. L'internationalisation du droit public. Effets et interprétations. *Rivista italiana di diritto pubblico comunitario* 6: 1523–1544.

———. 2005b. Le Recours A L'argument De Droit Comparé Par Le Juge Constitutionnel. Quelques Problèmes Théoriques Et Techniques. In *L'interprétation constitutionnelle*, ed. Ferdinand Melun Soucramanien. Paris: Dalloz.

———. 2007. Cultures constitutionnelles et comparaison en droit constitutionnel. Contribution à une science du droit constitutionnel. In *Mélanges en l'honneur de Slobodan Milacic*, ed. AA. VV. Brussels: Bruylant.

———. 2010. *Droit(s) constitutionnel(s) comparé(s)*. Paris: Economica.

Pound, Roscoe. 1910. Law in books and law in action. *American Law Review* 44: 12–36.

Rabel, E. (1937). *Die Fachgebiete des Kaiser Wilhelm-Instituts für ausländisches und Internationales Privatrecht, 25 Jahre Kaiser Wilhelm-Gesellschaft zur Förderung der Wissensschaften*, III, now in *Gesammelte Aufsätze*, 1967. Mohr.

Radbruch, Gustav. 1905. *Ueber die Methode der Rechtsvegleichung, Monatsschrift für Kriminalpsychologie und Strafrechtsreform*. Heidelberg.

Raz, Joseph. 1970. *The concept of a legal system*. Oxford: Oxford University Press.

Reimann, Mathias. 2002. The progress and failure of comparative law in the second half of the twentieth century. *American Journal of Comparative Law* 50 (4): 671–700.

Reitz, John C. 1998. How to do comparative law. *American Journal of Comparative Law* 46 (4): 617–636.

Ridola, Paolo. 2010. *Diritto comparato e diritto costituzionale Europeo*. Turin: Giappichelli.

———. 2018. *Il principio di libertà nello stato costituzionale. I diritti fondamentali in prospettiva storicocomparativa*. Turin: Giappichelli.

Rinella, Angelo, and Valentina Cardinale. 2019. The comparative legal tool-kit of the constitutional court of South Africa. In *Judicial cosmopolitanism. The use of foreign law in contemporary constitutional systems*, ed. Giuseppe F. Ferrari, 217–259. Leiden/Boston: Brill/Nijhoff.

Rosenfeld, Michel. 2008. Principle or ideology? A comparativist perspective on the U.S. controversy over supreme court citations to foreign authorities. *Cardozo Legal Studies Research Paper* 213.

Rosenfeld, Michel, and András Sajó. 2012. *The Oxford handbook of comparative constitutional law*. Oxford: Oxford University Press.

Rosenkrantz, Carlos F. 2003. Against borrowing and other Non-authoritative use of foreign law. *International Journal of Constitutional Law* 1 (2): 269–295.

Rozakis, Christos L. 2006. The European judge as a comparatist. In *Judicial recourse to foreign law. A new source of inspiration?* ed. Basil Markesinis and Jorg Fedtke. London/New York: Routledge-Cavendish.

Sacco, Rodolfo. 1991. Legal formants; a dynamic approach to comparative law. *American Journal of Comparative Law* 39 (1): 1–34.

———. 1992. *Introduzione al diritto comparato*. Turin: Giappichelli.

Sajó, András, and Renáta Uitz. 2012. Freedom of religion. In *The Oxford handbook of comparative constitutional law*, ed. Michel Rosenfeld and András Sajó, 909–928. Oxford: Oxford University Press.

Samuel, Geoffrey. 2003. *Epistemology and method in law*. London/New York: Routledge.

———. 2004. Comparative law and the courts. In *Comparative law before the courts*, ed. Guy Canivet, Mads Andenas, and Duncan Fairgrieve. London: British Institute of International and Comparative Law.

Sándor, Judit. 2012. Bioethics and basic rights: Persons, humans, and boundaries of life. In *The Oxford handbook of comparative constitutional law*, ed. Michel Rosenfeld and András Sajó, 1142–1164. Oxford: Oxford University Press.

Sartori, Giovanni. 1976. *Parties and party systems. A framework for analysis*. Cambridge: Cambridge University Press.

———. 1990. Comparazione e metodo comparato. *Rivista Italiana di Scienza Politica* 3: 397–416.

———. 1991. Comparazione e metodo comparato. In *In: La comparazione nelle scienze sociali*, ed. Giovanni Sartori and Leonardo Morlino. Bologna: Il Mulino.

Saunders, Cheryl. 2007. Judicial dialogue in common law countries. In *Renouveau du droit constitutionnel. Mélanges en l'honneur de Louis Favoreu*, ed. AA. VV. Paris: Dalloz.

Scheppele, Kim Lane. 2003. Aspirational and aversive constitutionalism: The case for studying cross-constitutional influence through negative models. *International Journal of Constitutional Law* 1 (2): 296–324.

Schmitthoff, Clive M. 1939. The science of comparative law. *The Cambridge Law Journal* 7 (1): 94–110.

Sharpe, Robert J. 2004. Judicial activism: The debate in Canada. In *The protection of fundamental rights in Europe: Lessons from Canada*, ed. Carlo Casonato. Trento: Università di Trento.

Sherwin, Emily. 2009. Legal taxonomy. *Legal Theory* 15 (1): 25–54.

Sheuerman, William. 2014. Globalization, constitutionalism, and sovereignty. *Global Constitutionalism* 3 (1): 102–118.

Siems, Mathias. 2014. *Comparative law*. Cambridge: Cambridge University Press.

Sik Cho, Hong, and Ole W. Pedersen. 2013. Environmental rights and future generations. In *Routledge handbook of constitutional law*, ed. Mark Tushnet, Thomas Fleiner, and Cheryl Saunders. London/New York: Routledge.

Slaughter, Anne-Marie. 1994. A typology of transjudicial communication. *University of Richmond Law Review* 29 (1): 99–137.

———. 2003. A global community of courts. *Harvard International Law Journal* 44 (1): 191–219.

Slaughter, Anne-Marie, and William W. Burke-White. 2002. An international constitutional moment. *Harvard International Law Journal* 43 (1): 1–21.

Tribe, Lawrence H. 2004. Lawrence v. Texas: The fundamental right that dare not speak its name. *Harvard Law Review* 117 (6): 1893–1955.

Tripathi, Pradyumna K. 1957. Foreign precedents and constitutional law. *Columbia Law Review* 57 (3): 319–347.

Troper, Michel. 1989. *La classification en droit constitutionnel*. RDPSP.

———. 2005. L'interprétation constitutionnelle. In *L'interprétation constitutionnelle*, ed. Melin Soucramanien. Paris.

Tushnet, Mark. 2008. *Weak courts, strong courts*. Oxford: Oxford University Press.

Van Caenegem, Raoul C. 2002. *European law in the past and in the future*. Cambridge: Cambridge University Press.

Vasiliev, Sergey. 2009. General rules and principles of international criminal procedure: Definition, legal nature, and identification. In *International criminal procedure: Towards a coherent body of law*, ed. Göran Sluiter and Sergey Vasiliev. London: Cameron May.

von Beyme, Klaus. 1994. *Systemwechsel in Osteuropa*. Frankfurt/Main: Suhrkamp Verlag.

von Bogdandy, Armin. 2008. Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law. *International Journal of Constitutional Law* 6 (3–4): 397–413.

———. 2016. European law beyond 'Ever closer union': Repositioning the concept, its thrust and the ECJ's comparative methodology. *European Law Journal* 22 (4): 519–538.

Von Mangoldt, Hans. 1980. La comparaison des systèmes de droit comme moyen d'élaboration de la procédure des tribunaux internationaux. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 40 (3): 554–572.

Watson, Alan. 1993. *Legal transplants: An approach to comparative law*. Athens/London: University of Georgia Press.

Weber, Albrecht. 2010. *Europäische Verfassungsvergleichung*. München: Beck.

Wheare KC, *Legislatures*. 1968. 2nd ed., London, Oxford University Press.

Wolf-Phillips, Leslie. 1970. Post-independence constitutional change in the Commonwealth. *Political Studies* 18 (1): 18–42.

Zadorozhnyi, Oleksandar. 2016. On the question of comparative international law or on the comparative method of research in the science of international law. *Journal of Comparative Law* 11.

Zagrebelsky, Gustavo. 2008. *La legge e la sua giustizia*. Bologna: Il Mulino.

Zeno-Zencovich, Vincenzo. 2005. Il contributo storico-comparatistico nella giurisprudenza della Corte costituzionale italiana: una ricerca sul nulla? *Diritto Pubblico Comparato ed Europeo* IV.

Zweigert, Konrad, and Hein Kötz. 1996. *Einfuhrung in Die Rechtsvergleichung: Auf Dem Gebiete Des Privatrechts*. Tübingen: Mohr Siebeck.

———. 1998. *An introduction to comparative law*. Oxford: Oxford University Press.

Essential Reading

Bognetti, Giovanni. 2015. *Diritto costituzionale comparato. Un approccio metodologico*. Modena: Mucchi.

Clementi, Francesco, and Giuliano Amato. 2006. *Forme di stato e forme di governo*. Bologna: Il Mulino.

Ginsburg, Tom, ed. 2012. *Comparative constitutional design*. New York: Cambridge University Press.

Ginsburg, Tom, and Rosalind Dixon, eds. 2011. *Comparative constitutional law*. Cheltenham, UK/Northampton, MA: Edward Elgar.

Häberle, Peter. 2006. Legal comparison for constitutional development: The relevance of federalism and regionalism. In *A world of second chambers. Handbook for constitutional studies on bicameralism*, ed. Jörg Luther, Paolo Passaglia, and Rolando Tarchi, 47–64. Milano: Giuffrè.

Jacobsohn, Gary, and Miguel Schor. 2018. *Comparative constitutional theory*. Edward Elgar Publishing.

Lutz, Donald S. 2006. *Principles of constitutional design*. Cambridge: Cambridge University Press.

Masterman, Roger, and Robert Schütze, eds. 2019. *The cambridge companion to comparative constitutional law*. Cambridge: Cambridge University Press.

McCrudden, Christopher. 2017. What does it mean to compare, and what should it mean? *Public Law and Legal Theory Research Papers* 538.

Michaels, Ralf. 2005. The functional method of comparative law. *Duke Law School Legal Studies Research Paper Series* 87: 48.

Palermo, Francesco, and Karl Kössler. 2017. *Comparative federalism: Constitutional arrangements and case law*. London: Hart Publishing.

Reimann, Mathias. 2002. The progress and failure of comparative law in the second half of the twentieth century. *The American Journal of Comparative Law* 50 (4): 671–700.

Reimann, Mathias, and Reinhard Zimmermann, eds. 2007. *The Oxford handbook of comparative law*. Oxford: Oxford University Press.

Tushnet, Mark, Thomas Fleiner, and Cheryl Saunders, eds. 2013. *Routledge handbook of constitutional law*. London/New York: Routledge.

van den Bos, Kees. 2020. *Empirical legal research*. Cheltenham, UK: Edward Elgar Publishing.