Being a Trespasser*

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I. Disciplinary Entanglements, Collective Reflections

One of the major developments of public law scholarship in the last half century has been the enlargement of the study of public law, from studying the law itself to also studying the various approaches to the law and their developments over time.

This is a process of self-consciousness comparable to the revolution produced by the publication of 'Essais' by Michel de Montaigne in the second half of the 16th century, because now lawyers study not only law, but also legal scholarship (that is, how lawyers study law). This development has introduced a new canon in legal culture.

For this reason, a collective reflection on the history of the Max Planck Institute for Comparative Public Law and International Law is particularly important and useful, if we succeed in situating this reflection within the larger framework of the history of legal thought in the area of public law.

Disciplinary entanglements among public international law, European public law, and comparative public law (but also between public law and private law) have progressed in time as the product of a double development, one at the level of legal change, with the other situated in the scholarly

* Paper presented at the Max Planck Institute Seminar 'The MPIL in the Context of the History of Science' (MPIL Institutional History Seminar Series Workshop I, Part 2, 'Disciplinary Entanglements. Public International Law, European Public Law, and Comparative Public Law', Heidelberg, 23 February 2023. A shorter version has been published as inaugural post on MPIL's centennial blog <www.mpil100.de> (Armin von Bogdandy, Philipp Glahé, Alexandra Kemmerer, Anne Peters [eds]) on 11 November 2023, <https://mpil100.de/2023/11/being-a-trespasser/>, last access 13 March 2024.

DOI 10.17104/0044-2348-2024-1-27 ZaöRV 84 (2024), 27-38

dimension. The first development is the erosion of State power, the second the crisis of the positivistic approach to science and to legal scholarship.

II. Erosion of State Power

There are many signs of the erosion of the State power. Firstly, the emergence of global problems that cannot successfully be addressed and resolved at the purely national level, and therefore require States to join forces. Secondly, the growth in number of supranational bodies acting either as orchestrators, or as mediators, or as regulators. Thirdly, the growing need of nations to obtain support or cooperation from other nations, prompting a growing need for bilateral or multilateral agreements.

It is therefore necessary to give up nationalism, to free oneself of the traditional (exclusive) State paradigm (the 'Machtstaat'),[1] to free legal scholarship from the omnipresence of the concept of the State as a monad (in the sense of *Gottfried Wilhelm Leibniz*), to take into account that many nations developed by emulation (for example Japan, Korea, and Vietnam)[2] and that hidden paradigms had an impact by stealth (French absolutism after *Richelieu*, British constitutionalism,[3] American deliberative democracy), to observe that national governments act more as hubs of networked negotiation then like command mechanisms, to re-evaluate the role of consensus building and of hegemony both inside national legal orders and out in the global legal space.

Another consequence of that erosion of State power are the growth of compound institutions made of different elements, a mixture of different components with connected histories (like empires),[4] and the revival of ancient types of power different from the traditional state model, like tributary systems, constellations of indirect rule and star-shaped systems with their nonlinear power and communications dynamics.

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1 Hermann Heller, Hegel e il pensiero nazionale dello Stato di potenza in Germania. Un contributo alla storia dello spirito pubblico (Il Formichiere 2021).

2 Chin-hao Huang and David C. Kang, *State Formation through Emulation. The East Asian Model,* (Cambridge University Press 2022).

3 Sabino Cassese, 'La Costituzione inglese come modello. Invenzione e diffusione nella comparazione giuridica', Riv. Trimestr. Dir. Pubbl. 3 (2022), 805-811.

4 Sabino Cassese, 'Che tipo di potere pubblico è l'Unione Europea?', Quaderni fiorentini per la storia del pensiero giuridico moderno 31 (2002), 141-167; Peter H. Wilson, *The Holy Roman Empire. A Thousand Years of Europe's History* (Penguin Books 2017); Pieter M. Judson, *The Habsburg Empire: A New History* (reprint ed., Harvard University Press 2018); David Do Paço, 'De l'État composite à l'État décomposé: le retour de l'Ancien Régime', Histoire@Politique 38 (2019), en ligne: <www.histoire-politique.fr>.

 DOI 10.17104/0044-2348-2024-1-27

III. Reuniting Academic Disciplines

18th and 19th-century-positivism has structured and divided legal knowledge in branches called disciplines, with particular emphasis on identity (often called 'unity', or 'Einheit') and method. Law was construed as a separate body of norms and principles, legal scholarship as a self-contained system, legal education as providing an exclusive formation for professional lawyers.

And yet: *Francesco Petrarca, Torquato Tasso, Gottfried Wilhelm Leibniz, Carl Philipp Emanuel Bach, Nicolò Copernico, Robert Schumann, Max Weber, Luigi Einaudi, Igor Stravinskij, Luigi Nono* studied law, but subsequently devoted themselves to other activities, while *Roscoe Pound* and *John Henry Merryman* were not trained as lawyers: the first studied botanics, the second chemistry.

Skeptical statements about the value and purpose of methodological dispute range from *Ernest Rabel*'s famous phrase according to which 'every good jurist has a method, he just doesn't talk about it'[5] to *Vernon Palmer*'s observation that methodological discussions are a good remedy for insomnia.[6]

The traditional demarcations or dividing lines between academic disciplines as branches of knowledge have played an important role shaping the epistemic architecture of legal scholarship and the professional attitude of legal scholars: focusing their research on just one area, developing methods primarily adequate for that very area, training specialists for the study of that area.

But in many areas, these epistemic demarcations have become a limitation to an innovative and thorough understanding of current legal affairs, and are hence superseded by contemporary epistemology.

Disciplines are not immutable, they change from time to time. After all, they have a history: suffice it to notice that only in the 17th century new branches of scholarship (anthropology, ethnology, psychology, sociology) were born which are very popular and indeed indispensable today.[7]

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5 Wolfgang Fikentscher, *Methoden des Rechts in vergleichender Darstellung*, Vol. I (Mohr Siebeck 1975), 10.

6 Vernon Valentine Palmer, 'From Lerothodi to Lando: Some Examples of Comparative Law Methodology', Global Jurist Frontiers 4 (2004), 1-29; Tommaso Amico di Meane, *Sulle spalle dei giganti? La questione metodologica del diritto comparato e il suo racconto* (Editoriale Scientifica 2022), 23.

7 Laurent Versini, 'Introduction' in: Denis Diderot, *Oeuvres. Tome III. Politique* (Bouquins 1995), 6 and 16.

Instead of fragmentation and subdivision, emphasis is now laid on cross-fertilisations and interaction among disciplines – in order to overcome the limited horizon of scholarly fields and disciplinary divide, and in order to discover beneath the various branches the unity of science (including legal science), the interconnected cognitive structures and knowledge networks that allow for nuanced understanding and progressive development.

The scientific demarcations by branches remain, but only for limited pedagogical purposes. For example, in Italy, the so-called scientific sectors (*settori scientifico-disciplinari*, *s. s. d.*) have been continuously designed and re-designed by acts of Parliament or by ministerial decrees since 1973, and subsequently in 1990, 2010, and 2015. They now number 370 sectors, assembled in 14 groups.

One important example of the merger of different areas of scholarship into a new branch of science are the life sciences. Life sciences include zoology, botany, anatomy, genetics, molecular biology, biochemistry, immunology, psychology, neuroscience, and other branches, and the field is subdivided, in the Italian taxonomy, in more than thirty different branches. According to experts in this area, research in life sciences in the last century has provided advances in agriculture and industrial development while transforming the practice of medicine.

An opposite trend is that of combination of different areas and development by subdivision. An example of the growing multiplicity of branches of knowledge is the development of the 'law and […]'-areas, like law and economics (or economic analysis of law), law and literature, law and music.

In the field of public law, there are many examples for topics that, if studied in a purely legal or formal manner, according to an exclusively juridical method, cannot grasp the reality of legal phenomena. Is it possible to study the State without taking into account the political forces that were behind its establishment, and that support it? How to understand the features of a bureaucracy without considering its mechanisms of recruitment, selection, and training of civil servants? Can administrative law be studied without bearing in mind basic social features of the administrative system?

Another result of the dominance of scientific subdivision is the refusal (by legal scholars) to study certain topics that require non-legal methods of analysis. A major example of this determined resistance is the lack of interest for the study of a subject once popular in the field of social and administrative studies: the functions of the State and of their growth and development. Without any attention to this topic, States and their executives become lifeless constructions.

As noticed by sociologist and economist *Gunnar Myrdal*, 'it has become recognized that the most promising field for research is the "no man's land"

 DOI 10.17104/0044-2348-2024-1-27

between the traditional disciplines. There is one concept which the economist or the sociologist can keep blurred, namely the concept of "economics" or "sociology"; for it can never be premise for a rational inference. In reality, what exists are merely problems to be solved, theoretical or practical; and the rational way of attacking them is to use the methods which are most adequate for solving each particular problem.'[8]

With a growing awareness that refined division and subdivision of science could endanger the progress of knowledge, it has become popular among scholars to talk of multidisciplinarity, transdisciplinarity, interdisciplinarity – also where the step to make is much bolder than within a broad scientific field, namely when crossing disciplinary borders and invading other fields. One cannot simply place side by side law and other disciplines (for example, law and politics) because the former is often not just impacted but permeated by the latter.[9]

IV. Five New Developments

The erosion of State power and the rediscovery of the unity of knowledge prompts major developments.

A first development is the blurring of the frontiers between the national dimension of the law and the foreign and supranational dimensions. As in the 16th and 17th centuries national European courts, the 'lex alius loci' (the law of another country) becomes relevant.[10]

Article 6(3) Treaty on European union (TEU) provides that: '[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'.[11] A similar clause is found in the Treaty on the Functioning of the European Union (TFEU), Article 340. The reference to the legal orders of the Member States of the European Union as

8 Gunnar Myrdal, 'The Relation Between Social Theory and Social Policy', The British Journal of Sociology 4 (1953), 210-242 (232). See also Karl Popper, *All Life is Problem Solving* (Routledge 2001).

9 On these different interpretations of interdisciplinarity, see Amico di Meane (n. 6), 342. See also Stefano Osella, 'When Comparative Law Walks the Path of Anthropology: The Third Gender in Europe', GLJ 23 (2022), 920-942.

10 Gino Gorla, 'I tribunali supremi degli Stati italiani, fra i secoli XVI e XIX, quali fattori di unificazione del diritto nello Stato e della sua uniformazione fra Stati' in: Bruno Paradisi (ed.), *La formazione storica del diritto moderno in Europa* (Olschki 1977), 447-532 (447 ff.).

11 On the origins of the general principles of EC law, see Paul Craig, *UK, EU and Global Administrative Law. Challenges and Foundations* (Cambridge University Press 2015), 323.

sources of Union law is reiterated in the Charter of Fundamental Rights of the European Union, albeit with different wording (first 'principles' and later 'traditions': Article 41(3) and Article 52(4)).

These provisions introduce an entirely new manner of law-making. The first is that the higher law is made up of the lower law, through a process of absorption. Therefore, in the area of fundamental rights, the 'general principles' of European law are the result of a complex 'two-way' process, as they first proceed from the bottom up, and then from the top down. The higher law can derive from lower law; the 'general principles' do not drop down from the top. This process launches a 'dialogue' between the two levels of government and attests to their reciprocal openness. 'The inclusion of Member States' law in the concept of European law' produces a 'European conglomerate of legal norms of different legal orders'.[12]

The second peculiarity is that this vertical two-way procedure also requires a horizontal, comparative process, because the commonalities must be discovered through a comparison of traditions. Comparison becomes a part of the norm-setting procedure. However, at the same time, this use of comparison has an impact on the identity of this branch of legal scholarship, which thus becomes an instrument to develop concepts and institutions that transcend individual national legal orders. As such, comparative law replaces legal comparison and to some extent can be considered as binding law.[13]

A second development is the blurring of the borders between public and private law. To overcome the different national approaches to the public/private law divide, European law has introduced the notion of 'body governed by public law' 'established for the specific purpose of meeting needs in the general interest, not having any industrial or commercial character'.[14] This new notion crosses the public/private law divide, is based on substantial and not formal elements, and therefore goes beyond the national dividing lines of private and public law.

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12 Armin von Bogdandy, The Current Situation of European Jurisprudence in the light of Schmitt's Homonymous Text. Four Critical Topics in a Misleading but Insightful Perspective (26 March 2020). Max Plank Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2020-08, available at SSRN: <https://ssrn.com/abstract=3561655>, 15.

13 I have developed these points in Sabino Cassese, 'Ruling from Below: Common Constitutional Traditions and Their Role', N. Y. U. Environmental Law Journal 29 (2021), 591-618. On the methodologies of comparison, see Ran Hirschl, 'Comparative Methodologies' in: Roger Masterman and Robert Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019), 11-39 (11 ff.).

14 Art. 1 directive 18 of 2004; see also ECJ, *Gemeente Arnhem and Gemeente Rheden v. BFI Holding BV*, judgment of 10 November 1998, case no. C-360/96, ECLI:EU:C:1998:525.

A third development is the rediscovery of the role of legal scholarship as a major element of the legal order: culture and epistemic communities become a part of the study of law as they have an impact on the legal order through system building and interpretation. Therefore, it is vital to study the historical developments of legal scholarship as a part of the legal systems at the national and at the supranational levels, taking into account the divergent legal approaches and crossing borders between States, disciplines and the public and private divide.

A fourth development is the overcoming of the traditional border between the legal space and the non-legal (political, social) dimension. Thanks to this development, it becomes possible to study and understand the reciprocal influences of scientific management and Taylorism on the one hand, as well as the regulation of administrative procedure by judges and legislators on the other. This convergence of learning overcomes fragmentation of science and encourages the integration of points of view and cultures that were separated: the life of law is not only norms and judgments, not only legal orders and systems, not only legal concepts, but also history, culture, and 'mentalité'. Our task is to reassemble what has been divided in the last two centuries.

A fifth development is the recognition that foreign, transnational, supranational, and global law are not only objects of scientific analysis by national scholars belonging to a different legal system, but also 'goods' or 'merchandises' imported from the outside into a different legal order that have effect due to their normative or quasi–normative role both in the original system and in the importing country. This is because legal systems are open or porous (treaties and agreements abolish barriers to money transfers and to trade; and money and trade are instrumental to the transplant of legal institutions); there are some characteristics, institutions, procedures, rules, and practices common to more than one national legal system; legislators get 'inspiration' from comparison, and, therefore, they have to adjust national legal systems to the prevailing institutions in the most developed nations; national courts, for their part, establish links with foreign legal orders via comparison; legal scholarship is not bound to a nationalistic approach, and comparative law experts may not only study, but also suggest or advise, on the basis of comparison; comparison is not a pure intellectual effort to know each other; it assumes a practical function; as a consequence, legal scholarship can proceed – as already remarked – from legal comparison ('Rechtsvergleichung') to true comparative law; comparative lawyers establish a transnational legal discourse and act as 'merchants of law'; finally, comparison becomes a 'source of law', with donor countries and receptor countries (that

in some cases improve the model and become donors for other countries in turn).[15]

V. Looking to the Future

Due to these developments, public law has changed and is changing. Three important aspects of this change are the overcoming of the national limitation of law, the transdisciplinary opening of the splendid isolation of the legal method, and the modifications of the grammar of law (and its traditional conceptual grounding in Roman law).

In the preface to the Italian translation of an important contribution of *Georg Jellinek*, *Vittorio Emanuele Orlando* wrote in 1911: 'We certainly do not want to return to theories of natural law, nor to claim that there is a right inherent in the human personality, almost a proper and inalienable endowment of it: a law that rationally precedes the State and limits its empire. No, we believe that all rights derive from the State.' Only three years after this phrase had been written, with the noble simplicity and quiet grandeur that were proper to its author, Europe would be the scene of the First World War in which States stood against each other, and another conflict would follow some thirty years later.[16]

Is it true today that there are no human rights independent of States, and that all law derives from States?

A long series of charters, conventions and treaties have consecrated the rights of man, woman, and children on a world scale, establishing international bodies to guard them and courts to settle the conflicts arising from their violation.

Then, in law, there is more and more competition of normativity, because there are more producers of norms, particular and universal rights, the former subject to the States, the latter above the States. Law is presented in a binary order, where particularisms coexist with common principles, unity and differentiation alternate, and where uniform archetypes are born from national legal experience (for example, the principle of proportionality, now widespread on a global scale) which are universally affirmed, and then diversify

15 I have made these points in Sabino Cassese, 'Beyond Legal Comparison', Annu. Dir. Comp, e di Stud. Legis 17 (2012), 387-395.

16 Vittorio Emanuele Orlando, 'Prefazione' in: Georg Jellinek, *Sistema dei diritti pubblici subiettivi* (Societa Editrice Libraria 1911), XI, published with the title 'Sulla teoria dei diritti pubblici subiettivi di Jellinek', in: Vittorio Emanuele Orlando, *Diritto Pubblico Generale. Scritti vari (1881 – 1940) coordinati in sistema* (reprint ed., Giuffrè 1954).

when they are shaped by different national contexts. All this because no legal order can solve all the problems it faces on its own.

These observations apply, in particular, to Europe: here, there is now a legal area defined as *European*, we are discussing a properly *European* legal method, a *European* model of public administration has developed, a *European* jurist is taking shape, thanks to a properly *European* legal education, and a 'European Law Institute' has been set up in the footsteps of the American Law Institute.

On January 8, 1889, in the opening address of his course in constitutional law, *Vittorio Emanuele Orlando* set himself an ambitious goal: a 'fundamental critical review', an 'essential reform of public law'. Starting from the principle that 'every science has its own particular technique', he added: '[…] we complain that the experts of public law are too much philosophers, politicians, historians, sociologists and too little jurisconsults'.[17]

But is it true that every science has (and must have) its own particular technique? And that to study law it is necessary to resort to the 'legal method', and exclusively so?

In reality, just as the historian makes use of many different disciplines, from archival research to meteorology, the anthropologist of history and sociology, the political scientist of law, the jurist makes use of economics, political science, sociology. Law is not a world separated from ideology, society, politics. On the contrary, it has a dual relationship with them: it is the product of ideologies, values, society, politics, and, at the same time, rules or influences these fields. The jurist, therefore, must be able to understand values, social movements, political life. How could a legal scholar study the relations between religions and the State, the sanctioning of blasphemy, the regulation of the end of life, abortion, divorce, with examinations merely internal to the world of law, without transcending it and also considering problems of moral philosophy, politics, justice? When we set out to study and evaluate the performance of institutions such as bicameralism, electoral formulas, systems of leadership selection, we make continuous references to other systems, but we would not understand them if we did not also consider their history, social roots, political context. To do this, we must make use of historical, sociological, and political studies, and be able to evaluate them and to incorporate the results of this examination into our writings as jurists.

17 Vittorio Emanuele Orlando, 'I criteri tecnici per la ricostruzione giuridica del diritto pubblico', Archivio giuridico, A. XLII, Vol. I, 1889, 3-6, published in Vittorio Emanuele Orlando, Diritto Pubblico Generale (n. 16).

In the opening address of his 1889 course, *Vittorio Emanuele Orlando* noted that in public law 'the sense and intuition of law is deficient' and proposed to take private law as an example as it 'reached a degree of legal perfection that I could not consider greater', because of the 'centuries-old elaboration that private law has had in Roman law'.[18]

Almost a century later, a great and controversial German jurist, *Carl Schmitt*, in an autobiographical writing about his long life, wrote that, having begun his studies in law, he discovered 'how wonderful this subject could be, since in the first semester it began with Roman law. […] The *Corpus iuris* was extraordinarily interesting to me.'[19]

Is it still true that all legal science must draw on Roman law and private law to find its own foundations?

Now, one hundred and twenty years later, we must recognise that legal experience has been developing: the law now includes complicated universal networks of powers, increasingly powerful states, very large administrations. All this has produced important reflections, which have enriched the various areas of law, mainly that of legal bodies and that of decision-making processes. Important areas of scholarship have been established, global law detaching itself from international law, constitutional law joining universal constitutional prescriptions, procedural law in which all the remedies aimed at guaranteeing rights converge, administrative law now largely no longer exclusively State law.

Therefore, modern law has developed along lines that lead it to outcomes different from those of Roman law, putting into the foreground themes and institutions unknown to ancient rights.[20]

At this point, it has been necessary to recognise and to admit that today's law has moved away from its tradition and that Roman law can provide answers to the jurist interested in living law only if he can explain and contextualise the ancient institutes, immersing them in their history.

Today's imperative is to abandon exclusive legal nationalism. This does not mean no longer cultivating national law, but recognising its necessary, its indispensable interdependence with other national laws, regional legal orders, and universal principles.

The second imperative is to build bridges between law, the 'humanities', and the 'social sciences', because law is itself a social science. This does not mean to abandon the 'legal method', but to integrate it with other disciplines.

18 Vittorio Emanuele Orlando, I criteri (n. 17), 6.
19 Carl Schmitt, *Imperium* (Quodlibet 2015), 77.
20 Jorg Benedict, 'Savigny ist tot!', JZ 66 (2011), 1073-1084 (1073).

 DOI 10.17104/0044-2348-2024-1-27

The third imperative is the construction of more comprehensive language and grammar. The vernacular legal language is now English, spoken by a billion and a half inhabitants of the earth. The grammar is that developed by the various branches of the science of law almost everywhere in the world.

VI. MPIL's Pasts and Futures

In its centennial history, the Max Planck Institute for Comparative Public Law (MPIL) and International Law has become an innovative and attractive forum and a centre of the world's epistemic community in public law.

Through the scientific work promoted, MPIL has become the protagonist of the world's epistemic community in public law. Hosting so many young researchers every year from different parts of the world, it has become the most important nursery for junior researchers. With its library, the largest library on the subject (almost 700,000 volumes and 25,000 journals and periodicals) and excellent Information and Communication Technology (ICT) infrastructure, it has become a hub in the area of study on the State. The combination of open-mindedness, richness of seminars and discussions, efficiency, flexibility and continuity, attracts the best scholars in the field, junior and senior (among its hosts of outstanding alumni and alumnae, let me mention *Christian Tomuschat*, who worked from 1965 as a research assistant at the Law Faculty of Heidelberg and at the Max Planck Institute for Comparative Public Law and International Law, and *Giulio Napolitano*, who was repeatedly, over the years, a guest of the Institute). This combination has produced some of the best comparative pieces in the field of public and international law.

Scholars employed by the Institute participate in collective projects in the area of public law, scholars from all over the world visit the Institute for periods from several weeks to months or years and, involved in the Institute's activities.

Finally, an important success factor of the Institute are the currently two directors, both highly recognised and appreciated scholars at the centre of a dense network of national and international research cooperation, involved in many international research projects, members of several advisory bodies for research programs.

Public law has changed and is changing. Three important aspects of this change are the overcoming of the national limitation of law, the transdisciplinary opening of the splendid isolation of the legal method, and the mod-

ifications of the grammar of law (and its traditional conceptual grounding in Roman law).

One can only hope that the Institute will continue with its well-established traditions. One can expect and wish that in the future it will also combine research on the State with the study of non-State actors and indirect rule and match the study of legal doctrine and theory with a problem-oriented approach, open to non-legal methodologies.

As next to the State-pyramid the State-network, and recently the State-archipelago, have developed, while the borders between internal and external public law have become blurred, and as the State is now flanked by non-State supranational and global actors, attention must also be given to these new entities.

Legal institutions and processes do not live in a vacuum, their study cannot proceed without taking into account political, sociological, and cultural aspects. Therefore, while using the tools of the trade, possessing full mastery of the legal techniques, and having perfect command of the principles, lawyers assembling at the Institute should also strive for a more open study of law.

My final conclusion is an invitation: cross borders, be a trespasser, go 'beyond the State, beyond the West, beyond the law'![21]

21 This is a synthesis made by Amico di Meane (n. 6), 336.

 DOI 10.17104/0044-2348-2024-1-27