MPIL 100

100 Years of Public Law

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In 1963 the transportation company van Gend & Loos made history when the ECJ established the direct applicability of community law in a decision on the retrospective imposition of import duties[1]

The development of the discipline and of the MPI

100 years ago, when the Institute for Comparative Public Law and International Law was founded, a sharp boundary divided international law and constitutional law. International law regulated the external relations among states, constitutional law the internal relations within states. However, both shared the notion of sovereignty, which was ascribed to states and in essence referred to the right to self-determination both externally and internally. External sovereignty gave states the right to freely regulate their relations with each other, on the one hand. On the other hand, it protected them from interference in their internal affairs by foreign states. Internal sovereignty referred to the right of states to freely determine their system of

[1] Photo: Creative Commons.

governance and social order and found its highest manifestation in the act of constitution-making. Both sides of sovereignty were related insofar as external sovereignty is a prerequisite for internal sovereignty.

Consequently, the disciplines of international law and constitutional law could exist independently of each other. Where one ended, the other began. It was possible to research and teach international law without being familiar with constitutional law, and vice versa. Both were legal disciplines, but they dealt with different types of law. International law was based on treaties and lacked a supranational public authority that could have enforced it. Public law emerged from legislation and was characterised by the possibility of sanctions. This was still the case when I started studying law in 1957, even though a fundamental change in circumstances had already occurred with the founding of the United Nations, which, however, was not immediately reflected in a changed perception. I might even go so far as to say that this was still the case when I became Professor of Public Law in Bielefeld in 1979. My office neighboured that of Jochen Frowein, who held the Chair of Public International Law before becoming Director of the Max Planck Institute in Heidelberg. We had a good neighbourly relationship, but I had nothing to do with his field.

The transformation that was brought forth by the founding of the UN was fundamental, even if it remained latent for a prolonged period of time due to the onset of the East-West conflict, which paralysed the UN Security Council. Nevertheless, it was a fundamental change because the UN differed from older international associations and alliances in that states had transferred sovereign rights to it, which it was now authorised to exert on them, if necessary by using military force, without the states being able to defend themselves by invoking their sovereignty. Above the states, there existed now an international public authority with legislative powers and enforcement mechanisms that in the long term would not leave national law untouched. The three-hundred-year-old identity of public authority and state authority had thus come to an end. The boundary between the two bodies of law and consequently between the disciplines became porous. In terms of significance, this change equals the emergence of the state in the 16th century and its constitutionalisation in the 18th century.

International Law

As a result of this development, the importance of international law increased considerably. The increase manifested itself particularly in the transgression of the border with national law. Since then, state sovereignty is no longer absolute, both internally and externally. War, formerly permissible due to the lack of other enforcement mechanisms for the realisation of law, became illegitimate. It remains permissible only for purposes of self-defense. Furthermore, a jus cogens has developed, which binds states when concluding treaties. The individual has gained a legal status in international law. States are no longer completely free to regulate their internal relations. International humanitarian law imposes limits on them. Fundamental rights – in the

American and French revolutions already perceived as human rights – are now human rights also in terms of their impact, even if their effectiveness still lags far behind the protection of fundamental rights by the state. Humanitarian interventions are in principle recognised. International jurisdiction has seen a considerable upswing. Other supranational institutions have come into being under or alongside the UN. The academic discipline, which in part anticipated this development, has in turn seen its importance increased considerably.

European Law

In Europe, this development has once again accelerated and intensified. It began soon after the emergence of the UN with the founding of the Council of Europe in 1949. In the form of the European Convention on Human Rights, it has a legal instrument at its disposal that is intended to guarantee a minimum standard of human rights protection in the member states and can be enforced by the European Court of Human Rights. The ECHR remains within the framework of traditional international law insofar as decisions of the ECtHR do not have direct domestic effect, i.e. they do not annul state acts found to be contrary to the Convention. However, they exceed the limits of traditional international law in that individuals can sue member states for violations of convention rights. The Council of Europe does not have the power to enforce judgements. However, it can impose fines on states if they do not comply with the judgements of the ECtHR.

The European Economic Community, which was founded in the same year that I started studying law, was another step forward, although it had no impact on my law studies. The EEC, now the EU, surpasses all other supranational organisations in terms of powers and organisational density, and exercises the public authority delegated to it by the member states not only on an ad hoc and selective basis like the UN, but permanently and comprehensively. Since the landmark decisions of the European Court of Justice in the van Gend & Loos and Costa v. ENEL cases of 1963 and 1964, European law claims precedence over national law. It is only through the jurisprudence of the Court that the EU has become what it is today: an unprecedented entity between a supranational organisation and a federal state, but closer to the latter than to the former. The ECJ not only persistently enforces primacy, but also extends the scope of application of European law by means of an extraordinarily extensive interpretation, which only some national constitutional courts attempt to draw ultimate limits to.

European law changed the object of public law, the state, and the national legal order, more permanently than international law. Nevertheless, for a long time it was treated without reference to constitutional law, or indeed to national law in general. Initially, the new area of law was dealt with partly by international law experts and partly by constitutional law experts. Soon, however, the treatment of European law became a matter for specialists. Chairs, courses, associations, journals, and congresses on European law were established. One peculiarity of the new discipline was that its members predominantly identified with the political project of

European integration and therefore lacked a critical distance to the subject matter. For a long time, the discipline of European law was apologetic and thus did not fully fulfil its scholarly function.

Constitutional Law

Dieter Grimm as Federal Constitutional Court judge, 1987 (Photo: Dieter Grimm)

Meanwhile, an ambivalent development has taken place in constitutional law. The growing importance of international law entails a loss of importance of national constitutions. Every transfer of competences to supranational organisations reduces the scope of application of national constitutions. They can no longer fulfil their claim to comprehensively regulate the public authority exercised on the territory of the state. The law of the land can only be ascertained by way of a synopsis of national and international law. However, it must be emphasised that this is not necessarily directed against the constitution. German Basic Law, for example, has always been open to the application of supranational law within its area of application. The development should not only be seen from a perspective of loss. International human rights protection, for instance, has led to a considerable improvement in the protection of human rights in many states where fundamental rights had previously played no legal role.

On the other hand, the spread of constitutional jurisdiction in the second half of the 20th century led to a completely new relevance of the constitution for political action and social relations. The starting point for Germany (and subsequently for numerous other countries) was the Lüth judgement of the Federal Constitutional Court, issued in the same year in which the EEC came into being. Over the course of time, it has resulted in the constitutionalisation of the entire national legal system. The discipline of "Staatsrecht", almost exclusively referred to as constitutional law as a consequence of this increase in the importance of the constitution, played a significant role in this. Contrary to a well-known thesis, the Federal Constitutional Court has not "dethroned" the discipline of "Staatsrecht". On the contrary, the Court was able to draw on new insights from constitutional law theory for important judgements.

The existence of constitutional jurisdiction has, however, spurred constitutional law doctrine on to ever new dogmatic refinements, so that today there are already warnings of an over-dogmatisation. Nevertheless, the public significance of the discipline has increased considerably due to the paramount importance of the Constitutional Court. While the Weimar Republic, with its constantly jeopardised constitution, was a high point of constitutional theory, the Federal Republic, with its firmly rooted constitution, is a high point of constitutional

dogmatics. Although the progress of international law and even more so the effects of European law – the ECHR and Union law – have permanently changed the subject of the study of public law, the state and its law, it took a long time for the discipline to recognise the changes and acknowledge them as relevant for the study of its own subject.

Comparative Law

The increasing interdependence of legal systems, both vertically and horizontally, has given comparative constitutional law, and indeed comparative public law in general, a considerable impetus. For a long time, comparative law was not an independent discipline. This does not mean that it did not exist, but merely that it had not yet crystallised into a discipline. Comparative legal research was largely the result of the inclination of individuals and usually related to a few favoured countries, often just one's own and one further country. Since the new millennium, comparative law has been a booming field, especially in constitutional law. The reasons for this lie on the one hand in the intensification of state relations and on the other in internationalisation, which has considerably increased the need for an understanding of foreign law. Added to this is the large number of new constitutions and new constitutional courts towards the end of the 20th century, which has fuelled comparative law.

Nowadays, one can observe a growing independence of comparative law at universities and research institutions. Comparative courses are now routinely taught, and the number of comparative publications, periodicals, associations, and conferences continues to grow. Constitutional comparison is pursued with different epistemological interests and methods than the academic study of positive law. Both are dedicated to a normative subject. Yet on the one hand, the focus is on the validity and correct interpretation and application of the law in force, and on the other hand on the legal effect and actual practice. In the former, research is conducted with normative intent, in the latter with empirical intent. Accordingly, the legal interpretation dominates in one case, and the legal-sociological analysis in the other.

Comparisons are often still relatively unambitious. There are text comparisons, comparisons of institutions, comparisons of case law, sometimes even comparisons of methods, but often without taking into account the context in which the law unfolds its effect and on what the effect depends. This type of legal comparison is not useless, but it is of limited use. Only the inclusion of the actual application of the law provides in-depth and realistic insights into foreign law and allows conclusions to be drawn about one's own law. For one's own law, one may get along to a certain extent without regard to the context, because the contextual knowledge always runs in parallel, often unspoken or even unconsciously. For foreign law, the context must be made explicit. This makes comparative law difficult, but it also makes it rewarding.

A similar situation applies to the theory-led nature of comparative research. It prejudices the view of the object. In the context of this short presentation, there is only time to discuss two major theories. There is comparative law based on the assumption that public law (like law in

general) enjoys relative autonomy and that legal operations follow a specific legal logic. For others, this is reality-blind idealism. Constitutions are not there for the legitimisation and limitation of rule, but rather serve as hegemonic projects for securing power over time. For this research direction, which sees itself as realistic, jurisprudence is a process that follows criteria deviating from legal standards, because judges, like political or economic actors, are utility maximisers and only retrospectively present their results as if derived with necessity from the law. Doctrine and method therefore appear as professional ideology. They do not deserve academic attention. This explains the lack of interest shown by many comparative lawyers in the process of interpreting and applying the law. Although this perspective is widespread in the USA, it has not yet gained prevalence in Europe.

The MPIL

When I finally turn to the question of how this development is reflected in the Max Planck Institute, I rely on the one hand on impressions that are not based on my own research, and on the other hand on information that I have gathered from Felix Lange's research. According to this, international law dominated the period between the founding of the Institute and the end of the war. This was in line with the Institute's founding motives of strengthening the German Reich's position on international law in the post-war period, which was characterised by the Treaty of Versailles. Even after its re-establishment in the year the Federal Republic of Germany was founded, international law was initially prioritised despite the changed conditions. The practical relevance of the research was obvious. The methods corresponded with this. In contrast to a more philosophical-historical approach to the subject matter, which prevailed elsewhere, the approach was of a legal nature. For a long time, newer questions and theoretical approaches had no real prospect.

The impact of the Institute was, however, considerable. You could find habilitation graduates from the MPI in international law departments all over Germany. The MPI was particularly important for the protection of European human rights because two of its directors were judges at the ECHR, Hermann Mosler from 1959 to 1981 and Rudolf Bernhardt from 1981 to 1998, who eventually became its president. Another director, Jochen A. Frowein, was a member of the European Commission of Human Rights from 1973 to 1993, which operated as first instance until the reform of 1999. Georg Ress, who served as an ECtHR judge from 1998 to 2004 and had previously been a member of the Commission, had also emerged from the MPI.

The Institute did not cover German constitutional law, but it did cover foreign public law from the very beginning. Nevertheless, it was only from the end of the 1950s onwards that comparative law became more prominent, particularly through broad-based comparative colloquia, some of which were documented in extensive publications. Many, however, give the impression of an additive rather than integrative comparison. Nevertheless, the Institute was particularly influential when it came to providing expertise on the public law of foreign states.

However, this expertise was not inherently comparative. In this respect, 2002 marked a turning point in the Institute's history. For the first time, a director was appointed whose focus of interest was not international law, but rather European law and comparative public law, with recognisable theoretical ambitions that were primarily aimed at explaining public law under conditions of internationalisation and globalisation. As a result, the international influence of the MPI increased once again.

Translation from the German original: Áine Fellenz