MPIL 100

Comparative Law for a Post-Hegemonic World

Michaela Hailbronner

The Institute building in 2010[1]

The Max Planck Institute for Comparative Public Law and International Law (MPIL) is celebrating its centenary. I have many fond memories of my short 8-month stay there a decade ago: memories of warm-hearted colleagues, interesting conversations, and of an impressively large resident rabbit whose appearances on the lawn stole the audience from more than one speaker.

But back then, I did not find it an ideal academic home, at least for me. Sometimes that is just how things happen, but I do not think it was only that. It also had something to do with the fact that I was becoming a comparative lawyer, and the 'comparative public law' part of its mission seemed more marginal at the institute than public international or European law.

Reading up on the history of the MPIL has reinforced this impression. For one thing, it was always, foremost, dedicated to the study of public international law proper. This is most

[1] Photo: Miriam Aziz.

obviously apparent from the choice of directors of the institute. They have almost always been international lawyers first and domestic constitutional lawyers second, and not primarily comparativists. This naturally shaped the research agenda and staff profiles of the MPIL. The partial exception to this is, of course, Armin von Bogdandy, who became a director with a strong profile in European law in particular, and who has since pushed comparative perspectives. But this is a fairly recent development.

This is not to say that comparative law was absent from the institute. There have long been colloquia on select themes of foreign law (such as on the rights of minorities, standards of judicial scrutiny of administrative decisions, and so on). There have been visitors from abroad whose work opened up windows into their own jurisdictions. The institute has also advised German institutions on foreign law for a long time. These formats fit into the broader tendency to pursue a practice-oriented approach to law and legal scholarship in the postwar years, which Felix Lange has detailed in his work.

This practice-oriented approach, however, did not create a very receptive environment for comparative research. If comparative work is measured based on its ability to assist in the interpretation of legal texts and thus for doctrine, it will seem both subsidiary and usually of rather limited worth. It is not surprising, against this backdrop, to see the institute's former director, Rudolf Bernhard, adopt a somewhat skeptical view of comparative law and its value in a speech published in the ZaöRV in 1964.

The rotunda in 2010 (Photo: Miriam Aziz)

This focus on practice also drove a particular approach to comparative law, insofar as it was present at the MPIL. The picture that emerges from the roundtables and the resulting publications is one of comparative law as a mainly encyclopedic and/or functionalist project. The early colloquia seem to have mostly assembled one-country studies on particular themes. The current Max Planck Encyclopedia of Comparative Constitutional Law, which complements the more well-known Max Planck Encyclopedia of International Law, takes an explicitly comparative approach, but it is, well, an encyclopedia. There is nothing wrong with collecting information

as a resource of course, but as a scholarly activity, it is not the place where new and original ideas are developed. Encyclopedias do not lie on the cutting edge.

This also seems to me the tradition continued today by the Max Planck Foundation. It continues the longstanding role of the institute in providing "technical" advice "as a politically neutral and unbiased actor" to organizations and governments abroad, typically through projects funded by the German government. This is not the place to engage in a wholesale review of such advisory work, which is, in any event, today not part of the MPIL itself. Nor should it be read as an argument against the value of comparative work in informing institutional design. But it is hard to view this advisory work, and the tradition on which it builds, without at least some Frankenbergian skepticism, given just how many projects in so wide a range of jurisdictions are undertaken.

I. Going forward

There is the question of whether it is even possible, or wise, to have one institute tackling public international law, European Union law, and comparative public law. To me, these three topics are connected in many ways and it does make sense to have them under one roof – but I would want to insist on an equal role for comparative law in the trio. I would also advocate for a somewhat different approach to it than the one that has prevailed in the past and continues to be felt today, albeit certainly to a lesser extent. I am of course first and foremost a comparativist, and an international and European lawyer only second, so it is no surprise that I take this position – but I am also far from the only one who does so.

The case for taking comparative public law academically seriously is a strong one today – and I believe it requires transcending the encyclopedic approach to foreign law. There is ample support for this claim, both in German and English scholarship. Comparative constitutional law has grown into a global subdiscipline of its own in in the last 20 years, with several dedicated journals, conferences and edited series. This new discipline of comparative constitutionalism is heavily influenced by the US law school tradition and by the early work on these developments by political scientists such as Martin Shapiro, Tom Ginsburg or Ran Hirschl, to name just a few. The German legal tradition – and indeed the MPIL's tradition here – is a different and more positivist one including in international law, as Felix Lange so convincingly demonstrates. Perhaps this is why Germany still often remains at some distance from these global developments. But German lawyers have much to contribute to them, including from a theoretical perspective.

Impressions from the institute in 2010 (Photo: Miriam Aziz)

This work has clearly begun in a series of the institute's contemporary projects, which go beyond the encyclopedic approach of the past. The change has been led by Armin von Bogdandy, who initiated a number of large-scale comparative legal projects, first on Europe (Ius Commune) and then on Latin America (Transformative Constitutionalism). In both, the search for common legal ideas and concepts is in the foreground.

There is much to like and admire about these projects, and the change they signal. However, there is also something of a universalizing or "regionalizing" approach to them, which still leaves out a lot of the world, and typically comes with a unifying normative agenda of its own. Whether this is a remnant of the encyclopedic tradition, or due to something else, is a good question – but the result remains a set approach to comparative law that will not fit, or admit, everyone.

My second argument for strengthening the comparative law angle is more substantive, but at the same time more provocative. The thesis is that we are entering a post-hegemonic world order –and this should prompt globally-minded public lawyers to adopt a comparativist's rather than a universalist's mindset. By this I mainly mean two things, which are connected, at least in my own head.

First, comparative law will become relatively more important as compared to the universalizing discipline of human rights. Secondly, and consequently, those who study human rights law should be engaging with comparative law, and its local varieties, much more than is currently the case. The reasons for this have much to do with the current crisis of human rights, and not just that part of it that is about right-wing political backlash. There is also a sense of academic disillusionment with human rights, as apparent in many critical scholarly writings on the subject, from varying ideological angles (e.g. in the work of John Tasioulas, Samuel Moyn or Stephen Hopgood). It seems to me that the solution to this crisis cannot be to come up with ever more encompassing theories of universal rights. Instead, we need to rethink our approach, in a way that takes difference and variety, and the need for it, more seriously, both analytically and normatively.

Without offering a comprehensive blueprint for action here, it seems to me that comparative law offers some tools that will assist us here. Published in the institute's own "Schwarze Reihe",

Jens Theilen's excellent recent critique of the European Court of Human Right's concept of the European consensus as a tool for assessing the margin of appreciation in concrete cases points us into the right direction. Rather than counting existing rules to determine the existence of a consensus or the lack of it, Theilen argues, the court should adopt a more contextualist comparative approach. We might also say that what we want here is simply serious comparative analysis, instead of just measuring the extent to which a putative universalizing project has or has not yet manifested and entrenched itself.

This might sound like something confined to the European Convention system, given that the Inter-American Court for example has not adopted the concept of a margin of appreciation. But for me it illustrates a broader point. If we think about what human rights are and should become, and how we may try to interpret them, I think there is no way around this kind of analysis. In particular, if we are going to treat human rights documents as 'living instruments', then supranational human rights analysis needs to engage with the local discourses and practices where most of that living is actually done. Or, in other words, it needs to involve contextualized comparative analysis. Too often, however, human rights analysis either floats in a fairly abstract theoretical sphere or turns into just another language for good governance advice. Human rights, and perhaps public international law more broadly, need to turn comparative if they are to survive and thrive in an era in which the postwar Atlantic system no longer suffices either to explain the world or stabilize it.

The kind of comparative work we need in order to grapple with this reality is above all interested in understanding. It is only secondarily interested in advising or unifying: in making normative arguments, advancing overarching theories, or making recommendations. Indeed, it is often not much interested in any of these things at all.

This kind of work requires time and space to think and reflect. It also requires – not benefits from, but requires – exchange with others, outside of one's own system, domestic networks, or familiar conceptual lenses. Most of these are things the MPIL could offer and offers to some already. It can provide a place to think and to study foreign jurisdictions without being subject to constant teaching obligations or funding pressures. It already offers access to resources not always part of a standard German law library. And it affords ample opportunity to talk with colleagues and visitors from other systems, and to connect to transnational networks.

And if we think in more radical terms still – I am truly pushing the boundaries now – the Max Planck Society might even consider offering a few more permanent positions, including for foreigners. The lack of realistic opportunities for long-term employment is one of the major disadvantages of German academia in the eyes of foreign researchers, as a recent study has shown. This is particularly true for law, where the need to train students to pass the *Staatsexamen* (state examination) often serves as a wholesale argument against hiring foreigners. I believe this is a mistake. But while we can hope that German universities will do

more to open up their feudal structures, including to the rest of the world, it would be encouraging to see the Max Planck Society taking a lead in this regard. It would be so well placed to do so.