



A Bastion in Troubled Waters? The MPIL in the Mobilisation Process of the 1968 Movement

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Unimpressed by the protests? Hartmut Schiedermaier, Michael Bothe, Karl Josef Partsch, an unknown person, and Kay Hailbronner on the occasion of the celebration of the 50th anniversary of the Institute at Heidelberg University, 1975¹

Prologue

“1968 is a date in which the imaginary has ensconced itself” wrote the author and essayist Hans Magnus Enzensberger, who as editor of the *Kursbuch* (roughly: “textbook”, a key cultural and political publication of the time) was one of the spokespersons of the extra-parliamentary opposition (*Außerparlamentarische Opposition, APO*) in the Federal Republic of Germany, in notes for his 1968 diary. In 1968, “the forbidden sentences took to the streets”, he noted: “Two thousand, twenty thousand, two hundred thousand words, processions,

¹ Photo: MPIL.





resolutions [...] The contradictions towered to heaven. Every attempt to make the tumult intelligible had to end in ideological gibberish.”² The words that took to the streets – an apt metaphor to underline the novelty of the occupation of streets and squares – did not spare Heidelberg. Loud protests and performative happenings began after 2 June 1967 and continued long after the mobilisation had died down in other places, leading to the coining of the term “Heidelgrad”.³ How did the Max Planck Institute for Comparative Public Law and International Law (MPIL) position itself in and in relation to the conflicts? Did it act as a bastion in troubled waters? Did it continue its work, far from the old town (*Altstadt*, where most university buildings are located), in a kind of ivory tower? At first glance, it would appear so, but a well-founded study of the institute against the backdrop of the critical events of 1967 to 1970 is still lacking. Moreover, in order to produce such a study, there are no records, statements, [recollections of the staff](#) of the institute during these years – unlike other institutes, I have no commentaries by the assistants, no contemporary ones, no retrospective ones.⁴ Last but not least, a systematic search for minutes of discussions and meetings, notes, flyers, posters and photos is still pending. This contribution on the role of the institute in the mobilisation process of the 1968 movement can therefore only be an approximation in the subjunctive. It is guided by two analytical frames of reference: Pierre Bourdieu’s reflections on the juridical field and the questions and hypotheses of social movement research. It is subdivided into two points.

I. Social Movements and the Juridical Field

The wave of protests culminating in almost all industrialised Western countries in 1968 was more than just a student or generational revolt. The transnational protests were social movements, analytically defined as a “process of protest” by individuals and groups who, rejecting the existing social and power structure, sought fundamental changes in society as a whole and mobilised support for them.⁵ In May 1968, as the philosopher Michel de Certeau

² *Hans Magnus Enzensberger*, Erinnerungen an einen Tumult. Zu einem Tagebuch aus dem Jahr 1968, in: Rudolf Sievers (ed.), 1968. Eine Enzyklopädie, Frankfurt am Main: Suhrkamp 2004, 23-26, 23, 25, translated by the editor.

³ *Katja Nagel*, Die Provinz in Bewegung. Studentenunruhen in Heidelberg 1967-1973, Heidelberg: Gunderjahn 2009; *Dietrich Hildebrandt*, „und die Studenten freien sich!“. Studentenbewegung in Heidelberg 1967-973, Heidelberg: esprit 1991.

⁴ One notable exception is the correspondence between Hartmut Schiedermaier (habilitation student of Herrmann Mosler) and Helmut Ridder, which was published under the title: [Die Heidelberger Rechtsfakultät im Jahre 1970 – Ein Briefwechsel](#), *Kritische Justiz* 3 (1970), 335-339; see also [Karl Doehring's memories of the student movement as described in his 2008 memoir: Karl Doehring. Von der Weimarer Republik zur Europäischen Union. Erinnerungen](#), Berlin: wjs 2008, 137-152.

⁵ *Friedhelm Neidhardt/Dieter Rucht*, The Analyses of Social Movements: The State of the Art and some Perspectives of further Research, in: Dieter Rucht (ed), Research on Social Movements: The State of the Art in Europe and the USA, Frankfurt am Main: Westview Press 1991, 421-464, 450; *Roland Roth* (ed), Die sozialen Bewegungen in Deutschland seit 1945. Ein Handbuch, Frankfurt am Main: Campus Verlag 2008, 13; Cf. *Ron Eyerman*, How social movements move, in: Jeffrey Alexander/Bernhard Giesen/Jason L. Mast (eds), Social Performance. Symbolic Action, Cultural Pragmatics, and Ritual, Cambridge: Cambridge University Press 2006, 193-217, 195.





put it, “*on a pris la parole comme on a pris la Bastille en 1789*“. What was all of that about? What was at stake? The protests were characterised by a by a “reserve of trust in the possibility of changing the world through action” that had not yet been used up as the philosopher Hannah Arendt put it who closely followed the development of protest movements in the USA, the Federal Republic of Germany and France from New York.⁶ Fuel for mobilisation and source of legitimacy was the discrepancy between reality and an imagined, ‘different’, new order, characterised by two guiding principles: self-determination/self-realisation (*Selbstbestimmung/Selbstverwirklichung/autogestion*) on the one hand and *participatory democracy* (*Selbstorganisation/Selbstverwaltung/Mitbestimmung*) on the other. In order to generate support for their goals, social movements are forced to act and form themselves out of action. Beyond the charisma of its central idea, the dynamic mobilising effect of the 1968 movement was based on a strategy of direct performative action, of limited rule-breaking. Inspired by the anarchist movement and the artistic avant-garde – Dadaism, Surrealism – the actions were often situated in the grey zone between legality and illegality. What happens in the legal field when such a movement emerges and gains momentum?

According to French sociologist Pierre Bourdieu, law is a “structured structure[...], historically constituted” and contributes to the “production of the world”. According to his thesis, it “would not be excessive to say that it creates the social world, but only if we remember that it is this world which first creates the law.”⁷ Bourdieu defines the juridical field as a “field of struggles in which actors compete with each other with different means and ends depending on their position in the structure of the force field and in this way contribute to maintaining or changing its structure.”⁸ Alongside the education system, the law makes a decisive contribution to the reproduction of existing power relations, according to Bourdieu. After all, it contributes to the consolidation of criteria of vision and division that orientate the perception of the social world according to the criteria of the prevailing order. In this way, jurists contribute to what Bourdieu calls the “suspension of doubt that the world could be a different one”.⁹ Accordingly, the conclusion is clear: the legal field is diametrically opposed to the goals of social movements.

However, according to Bourdieu, the juridical field – which follows a relatively autonomous logic – can potentially be set in motion from the outside: by intellectuals, social movements and art. Voltaire’s role in the Calas affair, which made him a pioneer of criminal law reform, should

⁶ *Hannah Arendt*, *Macht und Gewalt*, München: Piper 1970, 19, translated by the editor; this work was also published in English as: *Hannah Arendt*, *On Violence*, San Diego: HBJ Book 1970.

⁷ *Pierre Bourdieu*, *The Power of Law. Elements of a sociology of the juridical field*, *Hastings Law Journal* 38(1987), 814-853, 839.

⁸ *Pierre Bourdieu*, *Praktische Vernunft. Zur Theorie des Handelns*, Frankfurt am Main: Suhrkamp 1998, 18, translated by the editor.

⁹ *Pierre Bourdieu*, *Zur Kritik der scholastischen Vernunft*, Frankfurt am Main: Suhrkamp 2001, 221, translated by the editor.





be emphasised as an example.¹⁰ However, in order for criticism – articulated by intellectuals, social movements and the arts – to be effective, mediators are needed in the institutional system. Voltaire had such mediators. In the case of the extra-parliamentary opposition, it was the lawyers who reinforced the judicial criticism of the 1968 movement by experimenting with new defence strategies such as *Konfliktverteidigung* (roughly: “confrontational defence”, a strategy of criminal lawyers to call into question not just the legitimacy of the charges at hand, but of the court as a whole) in order to expose hierarchical structures in court.¹¹ In addition to lawyers and judges, legal scholars were also among the actors in the legal field. How did they position themselves when confronted with the 1968 movement, which, it should be emphasised once again, was a transnational phenomenon and led to barricade struggles in France and the largest general strike of the post-war period? Specifically: What happened at the MPIL? Business as usual? Scholarly work in an ivory tower? Not at all.

II. The 68 Movement and the MPIL



Solidarity rally by students in Kiel in 1970 on the occasion of the ban on the SDS (Socialist German Students' League) university group in Heidelberg. The banners read: “Heidelberg: Precautions for the next crisis” and “Solidarity with Heidelberg comrades!!”¹²

¹⁰ Cf. *Voltaire, Die Affäre Calas*, edited and with an epilogue by Ingrid Gilcher-Holtey, Berlin: Insel 2010.

¹¹ Cf. *Ingrid Gilcher-Holtey*, Einleitung, in: Gisela Diewald-Kerkmann/Ingrid Holtey (eds), *Zwischen den Fronten. Verteidiger, Richter und Bundesanwälte im Spannungsfeld von Justiz, Politik, APO und RAF*, Berlin: Duncker & Humblot 2013, 7-13.

¹² [Photo: Stadtarchiv Kiel, 22.135/Magnussen, Friedrich, CC-BY-SA 3.0.](https://www.stadtarchiv-kiel.de/22.135/Magnussen,Friedrich,CC-BY-SA%203.0)





The MPIL was directly confronted with the questions and consequences of the movement and instructed ‘from above’, by the state, to take a stand. How did it position itself? Basically, according to Bourdieu, statements of the actors in the legal field are determined by their position in the field and the balance of power within it. Two factors influence the balance of power, which is formed by “competence struggles over competence” and “the right to adjudicate”: *firstly*, the hierarchy of courts and fields of law, and *secondly*, the homologies between the legal field and other fields – such as the proximity to the field of power. If these criteria are applied to the MPIL as an actor, its position in the hierarchy of legal fields and its proximity to power give it a prominent position within the field. What does it do with this? It does not act as a collective intellectual in the tradition of Voltaire. It takes on the role of the “*conseiller du prince*“, the prince’s counsellor, the expert who advises the state. It uses its specific expertise and provides comparative legal opinions to the Ministry of the Interior. If one recalls that in the extra-parliamentary opposition in the Federal Republic of Germany, the *Studentenbewegung* (student movement), the movement against the proposed *Notstandsgesetze* (German Emergency Acts, reintroducing martial law into the constitution) and the *Ostermarschbewegung* (“Easter march movement”, a campaign for democracy and disarmament) interacted, the institute took a stand on central issues of the movement.

Firstly, on the German Emergency Acts. The first request for a comparative legal opinion on the “restriction of fundamental rights”, as it is called in the correspondence, is dated 3 February 1964. The director of the MPIL, Hermann Mosler, gave a statement in the *Bundestag* on 7 December 1967 on what was now called the “draft law to supplement the Basic Law” (“*Entwurf eines Gesetzes zur Ergänzung des Grundgesetzes*“)¹³. Mosler spoke to the members of parliament about the subject of his enquiry: martial law in France.

Secondly, on the new forms of demonstration, the occupation of streets and squares. Commissioned by the Federal Ministry of the Interior in autumn 1969, completed in January 1970, as the correspondence shows, and finally delivered in February 1970, the report on “Freedom of demonstration and road traffic” („*Demonstrationsfreiheit und Straßenverkehr*“) covered the legal situation in Belgium, the Federal Republic of Germany, France, Great Britain, Italy, the Netherlands, Austria, Sweden, Switzerland and the USA.¹⁴

Thirdly, on the movement’s demand for “direct democracy”. At the request of the Federal Ministry of the Interior in September 1969, i.e. initiated still under the “grand coalition” of

¹³ Emphasis added by the author.

¹⁴ Contributors were Albert Bleckmann, Konrad Buschbeck, John D. Gorby, Meinhard Hilf, Klaus Holderbaum, Alfred Maier, Georg Röss, Axel Werbke. The expert opinion was published as a book under the title: *MPI für ausländisches öffentliches Recht und Völkerrecht* (ed), *Demonstration und Straßenverkehr*. Landesberichte und Rechtsvergleichung, Berlin: Carl Heymanns 1970.





Germany's two major parties at the time, the institute finally drafted an expert report on "Plebiscitary elements in the constitutional life of European democracies" („*Plebiszitären Elemente im Verfassungsleben europäischer Demokratien*“, 1970).

According to Bourdieu, law reproduces existing power relations. To what extent does this also apply to the interpretation of the law by experts? An analysis of the interpretation of the law by the MPIL could examine, among other things, whether the expert opinions, in addition to reconstructing the legal situation in other states, also reflect (on) the application practice and thus the contradiction between constitutional law and constitutional reality, denounced not only by the extra-parliamentary opposition. The concept of democracy on which the expert opinions are based should also be examined. The New Left (*Neue Linke*, intellectual *Nouvelle Gauche*), which fuelled the mobilisation process of the 1968 movements in all Western industrialised countries, opposed the prevailing concept of democracy, reduced to elections. It sought to replace the understanding of democracy as a form of state and government with an understanding of democracy built on participation in all areas of society, i.e. democracy as a way of life and a social order. Last but not least, it should be examined whether, when and how the institute embarked on paths of interdisciplinary cooperation between law and social sciences (and thus took up an impulse of the movement) that led to a new conception of international law.



Gottfried Zieger and member of the institute Georg Rössel at Heidelberg University in 1975. The graffiti in the background reads: "For free research"¹⁵

¹⁵ Photo: MPIL.





This leaves the question of structural changes within the institute. In many MPIs – including the ones I studied in Starnberg and Frankfurt¹⁶ – the staff rebelled against the authoritarian leadership of the directors. Even within the Max Planck Society, the “House of Lords of German science” (as it was called by the German newspaper DIE ZEIT), employees felt compelled by the pressure of events to criticise and demand reform. And: employees from 37 of the 52 Max Planck Institutes met in Heidelberg on 9 May 1970 to establish a “Representation of Scientific Staff at Max Planck Institutes” („*Vertretung der an Max-Planck-Instituten wissenschaftlich Tätigen*“). They criticised the existing structure of the Max Planck Institutes as an “undemocratic ‘hierarchy’”.¹⁷ To structure the work of this representation, a Statutory Committee (*Satzungsausschuss*) was set up to draft an organisational statute. Were employees of the MPIL among them? Or, to put it another way, was it possible not to be moved by the movement? Dieter Grimm, a member of staff at the MPI for Legal History in Frankfurt and personal advisor to the institute’s director Helmut Coing, explained in an interview:

“You couldn’t escape the events of the protesting students, you encountered them in demonstrations, happenings, sit-ins, graffities (‘Take your freedom of science – research what you want’ was written on a university building for a long time), on lecture hall walls, which were transformed into protest or announcement areas (‘Demonstration, today 16.00 – all come’ – no one could tell which day that was, but that did not matter, it applied almost every day). You had to take a stance.”¹⁸

How did the staff of the MPIL view the demands of the 1968 movement for more participation in democracy? How did they feel about more participation in their own institute? Did Karl Doehring’s constitutional complaint (*Verfassungsbeschwerde*)¹⁹ against the University Reform Act (*Hochschulreformgesetz*) of Baden-Württemberg set the pace? Was the Harnack principle not perceived as a barrier – in view of the calls to “research what you want”? Even in the Max Planck Society, reform considerations had been underway since 1969. Fearing that the unrest at the universities could spread to their institutes, President Adolf Butenandt had set up a reform commission – known as the *Strukturkommission* (Commission on Structure). And indeed, the employees demanded participation: in the election of institute directors and the definition of research programmes, a time limit and control of institute

¹⁶ *Ingrid Gilcher-Holtey*, *Verfassung gestern: Rebell in Robe*. Dieter Grimm zum 80. Geburtstag – ein Vortrag geschrieben für mehrere Stimmen, in: *Ulrike Davy/Gertrude Lübke-Wolff (eds.)*, *Verfassung: Geschichte, Gegenwart, Zukunft*. Autorenkolloquium mit Dieter Grimm, Baden-Baden: Nomos 2018, 45-61.

¹⁷ *Helmut Coing*, *Für Wissenschaften und Künste*. Lebensbericht eines europäischen Rechtsgelehrten, edited and annotated by Michael F. Feldkamp, Berlin: Duncker & Humblot, 2014, 212.

¹⁸ *Dieter Grimm*, „Ich bin ein Freund der Verfassung“. Dieter Grimm im Gespräch mit Oliver Lepsius, Christian Waldhoff, Matthias Roßbach, Tübingen: Mohr Siebeck, 2017, 74-75, translated by the editor.

¹⁹ ACC 48/16, Ak-Nr.1, Estate of Karl Doehring, Heidelberg University Archive.





management, a change in the system of temporary contracts and a critical reflection on the conceptualization of performance.

An employee from the MPIL also took part in the consultations, as I was able to find out by interviewing the contemporary witness and actor Dieter Grimm: Michael Bothe. I sought contact with him. Due to illness, he was unable to fulfil my request for an interview. However, documents in the estate of Werner Conze, who was Rector of the University of Heidelberg in 1969/70, show that Bothe was the Rector's personal advisor and thus involved in the introduction of a new *Grundordnung* (basic regulations) for the University of Heidelberg in accordance with the University Reform Act.²⁰ Perhaps there are other former employees who could comment on this. I hope so, or legal experts will have to leave the last word to a law school dropout and his (linguistic) criticism of the authorities in the legal field, namely Peter Handke in *Ich bin ein Bewohner des Elfenbeinturms*.²¹ I cannot go into detail about this text, but I would like to conclude with the words that Handke set in motion at the end of his play "Offending the Audience" in order to break down the fourth wall (between stage and audience) and which reflect the zeitgeist of 1968:

„You luminaries of science. You beacons in the dark. You educated gasbags. You cultivated classes. You befuddled aristocrats. You rotten middle class. You lowbrows. You people of our time. You children of the world. [...] You wretches. You congressmen. You commissioners. You scoundrels. You generals. You lobbyists. You Chief of Staff. You chairmen of this and that. You tax evaders. You presidential advisers. You U-2 pilots. You agents. You corporate-military establishment. You entrepreneurs. You Eminencies. You Excellencies. You Holiness. Mr- President. You crowned heads. You pushers. You architects of the future. You builders of a better world. You mafiosos. You wiseacres. You smart-alecs. You who embrace life. You who detest life. You who have no feeling about life. You ladies and gents you, you celebrities of public and cultural life you, you who are present, you brothers and sisters you, you comrades you, you worthy listeners you, you fellow humans you.

You were welcome here. We thank you. Good night."²²

Translation from the German original: Sarah Gebel.

²⁰ Letter by Werner Conze to the Baden-Württemberg Ministry of Education, dated 30 July 1969, Estate of Werner Conze, Heidelberg University Archive, Ref 101/32.

²¹ Peter Handke, *Ich bin ein Bewohner des Elfenbeinturms*, Frankfurt am Main: Suhrkamp 1972; the title translates to „I am an inhabitant of the ivory tower”.

²² Peter Handke, *Publikumsbeschimpfung*, translation following: Peter Handke, *Offending the Audience and Self-Accusation*, translated by Michael Roloff, London: Methuen & Co Ltd 1971, 38.

