German Legal Hegemony?

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The German legal discourse on Europe solemnly professes the idea of a Europeanized Germany: *Kooperation, Verfassungsgerichtsverbund, Europafreundlichkeit, Integrationsverantwortung*. However, some cast doubt on these assertions. *Sabino Cassese*, for instance, interprets some of the more recent EU-specific decisions of the 2nd Senate of the German Federal Constitutional Court as an attempt to put a German dog leash on European institutions (Il guinzaglio tedesco, Il Folgio 19 May 2020). These rulings accordingly seem to promote a Germanized Europe, not its opposite. At the same time, German voices that oppose the 2nd Senate's stance, such as the *Verfassungsblog*, sometimes face a similar charge of promoting Germanization. For *Bogdan Iancu*, they potentially embody an enlightened, soft neo-liberalism that is then imposed particularly on Central and Eastern European countries.

Ought we thus to speak of a German legal hegemony? This question does not come out of thin air, and it has a long pedigree. Time and again, the German discourse on European legal matters has facilitated the charge that it attempts to create a German-dominated space, even after World War II. To be sure, Schmitt's adjuration of European jurisprudence in his homonymous book, which was published in 1950 and is often considered a master piece, does not openly call for German legal hegemony. Yet, he locates the "seeds of the spirit" of European jurisprudence in German jurisprudence. Thus, Schmitt rejects both French and English legal thought as inadequate and considers only two legal scholars as examples of a European jurisprudence rightly understood: explicitly Savigny, and implicitly himself, Schmitt. According to his book, German jurisprudence provides "the secret crypt in which the seeds of its spirit will be protected against every persecutor". Today one might associate such persecutors with power-grabbing European institutions or Kaczyński's government.

In the context of European integration, Charles de Gaulle from the outset understood Hallstein's legal imaginations of the EEC as a tool for the pursuit of German interests. And today, the issue of German hegemony has been a recurrent theme ever since the financial crisis, and quite a few have even welcomed it as a sensible answer to the challenges of the future. As regards the legal field in particular, non-German lawyers report that the 'German legal mindset', which originates in German jurisprudence, has come to assert itself more and more in the legal services of European institutions. The professorial law of the Federal Constitutional Court dominates European discourses. Compared to other EU Member States, Germany probably invests the most resources in legal research as well as in propagating its legal thought. No other European country has set up institutions of the scale of the Deutsche Akademische Austauschdienst, the Humboldt-Stiftung or the various foundations that allow for meaningful encounters of foreigners with German jurisprudence. Moreover, Brexit might weaken the British—and perhaps even the Anglo-American—dominance in pan-European jurisprudence, leaving a huge void that other forces could fill.

We should also bear in mind that Germany, while going to great effort in order to advance its legal thought abroad, does little, conversely, to Europeanize German academia. Of course, German highfliers are sent to the most prestigious foreign universities, and many foreign students toil in German doctoral programmes. Yet, the access of *Bildungsausländer* (foreign-educated persons) to the core academic positions, be it university chairs or editorships of important journals, is severely restricted. Contrary to the Netherlands and the United Kingdom, the two current hubs of pan-European jurisprudence, Germany limits

the use of its resources to *Bildungsinländer*, who are mostly German citizens. Thus, the requirement that professors should possess two German state examinations in law casts long shadows.

For all these reasons, research from Germany, even if it strives for a pan-European perspective, is often deeply German in character, and for this reason alone propagates German positions and ways of thinking. Of course, there is a way to defend this: in a legal space where the protection of national identity is a constitutional principle, a self-centered jurisprudence represents a legitimate, albeit one-sided, proposal on the European marketplace of ideas, not a hegemonic endeavour. What is more, this argument will most often reflect reality: I have no doubt that most German academics publish their work, that most German judges craft their judgments, and that most German politicians develop their policies without striving for German legal hegemony. Indeed, many of those who have come forward with the idea of German hegemony since the turn of the century have stressed German reluctance in that respect. But that does not mean that academic research, judicial rulings or government policies does not have the practical effect of advancing it.

At the same time, sceptics might point to numerous constraining factors, of which language is the first. The common European language for legal communication is English, and there is no sign that Brexit does anything to affect this dominance. As much of the power of a legal text depends on its literary quality, foreign speakers face an uphill struggle. But the hill might become less steep if less native speakers are around. Another constraining factor is the constitution of the pan-European marketplace of ideas. Both Heinrich Triepel and Antonio Gramsci believed that intellectual leadership is key to hegemony. However, if one looks at the editors and the most frequently cited papers in the leading journals (such as the Common Market Law Review, the European Law Journal (before its fall), the European Journal of Constitutional Law, the European Journal of International Law, the Leiden Journal of International Law and the International Journal of Constitutional Law), no such German leadership becomes apparent. Instead, one can observe decidedly transnational or Anglo-American orientations. Even the *German Law Journal* and the *Verfassungsblog*, which do play a prominent role in the European legal space as a whole, advocate the idea and practice of a *Europeanized Germany*, not of a *Germanized Europe*.

Nevertheless, Cassese's concern requires a convincing answer. We need to digest Brexit. And we cannot rule out the possibility that the decidedly transnational orientations of the *German Law Journal* and the *Verfassungsblog* might inadvertently push concepts, doctrines and critiques that suit German interests more than others. Thus, we need to reflect on the path of European legal scholarship in a deeply unsettling time. To me, historical experience as well as legal and normative considerations strongly militate against moving towards German legal hegemony.

For this reason, we have asked a number of eminent scholars and practitioners of constitutional and EU law in Europe and beyond to share their thoughts on whether or not German legal hegemony is, in fact, a matter of concern in contemporary EU law, and, if so, what could and should be done about it. This question not only matters to the academic community of EU and constitutional lawyers. In these times of challenge to the European constitutional space, the question is also of pressing concern to the European public at large, and in particular to the Germans. Most Germans like to perceive their own position of power within Europe in an innocent light of Europhile benevolence, a perception which may be less widely shared abroad than they are prepared to acknowledge. In the end, one might even ask whether this denial can itself be construed as a token of the very hegemony it seeks to disavow.

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