The Two Faces German Legal Hegemony?

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07.10.2020 doi: 10.17176/20201007-121618-0

I write this blog post just as I complete my fourth year as a professor of international law in Berlin. I am, as von Bogdandy calls, a *Bildungsausländerin*. My university education was first in Turkey and then in the United Kingdom. My academic career has been, for the most part, in the UK and then in Turkey. When I moved to Berlin from Istanbul four years ago to take up the professorship of international law at the Hertie School, I imagined Berlin to be somewhere between Istanbul and London. I hoped that it would be the best of both worlds, I would find a home in a city with a handsome Turkish speaking community at a university that conducts education and research in English. I also hoped that speaking Berlin's two oft-spoken languages, Turkish and English, I would survive with my basic German, and learn more of it along the way and become a late Berliner.

Four years on, as an academic that has made a small contribution to the internalisation of German legal academia, I still think that Berlin is somewhere in between London and Istanbul, but for different reasons. I have found traces of both legal cultures I am familiar with in German legal academia. The culture is, at times, hierarchal and gendered, as it often is in Turkey, but, at other times, is quickly on first name basis as in the UK. When I think back to the many welcoming interactions, I have had with my colleagues in German legal academia over the past four years, I now see that these were with internationalised *Bildungsinländer*. The interactions with colleagues were well embedded in international networks, who published in English, held their research colloquia in English or studied questions of human rights and international law in Germany from internationalised perspectives.

So, here is a caveat. I cannot comment much on the non-English side of things — with one exception. This is my encounter with the two anonymous reviewers of an unsuccessful DFG grant application. As welcomed, I wrote my application in English, but received my reviews in German. One reviewer found the application outstanding on all grounds (at least, according to Google translate). The second, however, found two main flaws in the proposal. They raised doubts about its interdisciplinary nature and cited my lack of German as a flaw (I must say it has improved since). There was not much further feedback on the adequacy of the state of the art or the justification and description of the proposed methods. As a regular reviewer of grant applications in multiple countries, I was surprised as to the brevity of feedback, and the lack of a discussion of weaknesses of the project's design (which, no doubt, were there). This was the first and, so far, only time I felt that I had hit a hegemonic legal research culture wall. It was a strange experience. This is perhaps what von Bogdandy calls the 'deeply German' character of public law legal hegemony'. Perhaps it was simply a not-so-good legal research proposal. For the journal article that came out of this unsuccessful DFG application with the *German Law Journal* on 'Hard Protection through Soft Courts? *Non-Refoulement* before the United Nations Treaty Bodies' see, here.

International Human Rights Law and the two faces of German legal hegemony

Is there a German legal hegemony in international human rights law (IHRL)? If so, does it run parallel to my personal experience of an open, welcoming and internationalised posture on the one hand, and a deeply German one on the other? The juxtaposition of two recent judgments of the German Constitutional Court, one by its First Senate and the second one by its Second Senate, on central questions in international human rights law — namely the extra-territorial scope of states' human rights obligations and the protection

of freedom of religion — may lend some support to this observation.

First, consider the BND judgment of the First Senate of the German Constitutional Court of May 2020. This ruling is outstanding in the way in which it promotes fundamental rights in Germany as flowing from international human rights law with such ease and confidence. It identifies the need to address the accountability gap of German public power wherever it may be used as flowing from the human rights obligations of public powers. As such, it does not seek to promote Germanised human rights law, but promote the accountability of Germany through international human rights law. It internationalises the German Basic Law. I find striking parallels between the open, internationalised and vibrant school of German legal academia of which the Verfassungsblog forms part and the German Constitutional Court's position in holding that human rights law and Germany's legal obligations under it must informing the interpretation fundamental rights based in the German Constitution. I read the effort of the GCC not to create a German-dominated space on extra-territorial surveillance law, but as an effort to sow the seeds of global public law as holding states to account for their extra-territorial activities. If we see this approach later reflected in the case law of the European Court of Human Rights or in other countries, it may well be a very welcome German international law export.

Second, however, consider the case of January 2020, of the Second Senate, where the German Constitutional Court found the ban on legal trainees wearing an Islamic headscarf as constitutional. Here, the German Constitutional Court relied on its proportionality analysis, perhaps the archetype of the German legal hegemony's systemic external effect in international human rights law. Courts around the world look up to the German Constitutional Court's model of proportionality in addressing conflicts between competing rights and between competing rights and public interests. The GCC found that the constitutional principles of the German state's religious and ideological neutrality, the proper functioning of the justice system and the negative freedom of religion of others outweighed the complainant's right to wearing a headscarf in the court room as a legal trainee. This application of the proportionality test left me with a sense of a 'deeply German' outlook. Specifically, the Court states: „Aus Sicht des objektiven Betrachters kann insofern das Tragen eines islamischen Kopftuchs durch eine Richterin oder eine Staatsanwältin während der Verhandlung als Beeinträchtigung der weltanschaulich-religiösen Neutralität dem Staat zugerechnet werden." (para. 90) This position is not without dissent. In their separate opinion, Justice Maidowski asks how merely wearing a headscarf can be understood as actively promoting a religion and goes beyond due to the duty of neutrality that also applies to all legal trainees. In the words of Anna Katharina Mangold, this is „imaginierte Empirie", that is imagined empiricism. This is when the proportionality test in international human rights law (to which German legal culture has made important contributions) becomes opaque as a form of reasoning and, in so doing, must be charged with unconscious bias. Importantly, this ruling further has the effect of excluding practicing Muslim women *Bildungsinländerinnen* from the German legal profession in a way that it does not exclude other practicing religious women or, indeed, practicing Muslim men from it.

Here are the two faces of German legal hegemony, produced by the two Senates of the German Constitutional Court. In the case of the BND, Germany offers leadership in the development of international human rights law, where what is exported is not the 'German legal mindset' but a transnational human rights law mindset internalised by German legal academia. Yet, in its application of the proportionality test in its legal trainee judgment, Germany promotes a self-centred jurisprudence with no systematic assessment of counterarguments to its position that may be easily found in international human rights law, say in UN human rights treaties and their case law, for example. This in turn can also have the effect of transnationally promoting a black box of constitutional identity jurisprudence, where it is only the real insiders who are able to produce and be part of. It is not a co-incidence that Germany's constitutional identity case law

has already been referenced by constitutional courts as a shield to international human rights law in other states, such as in Russia, for example. These two faces of German legal hegemony beg the question of what the legacies of German legal thought will be for international human rights law in Europe and globally. Whilst one may see the endeavours of Germany's contributions to international human rights law not as striving for legal hegemony at all, its oscillations between an internationalised German outlook and a national outlook can and will have the practical effects of creating an ambivalent legacy. And what a loss this is — especially in times when the world desperately needs leadership to uphold and develop international human rights law globally. A glance at the state of the world tells us that Germany is one of the states that is best positioned to provide this for our times.

Going back to the personal from the jurisprudential, I too have found myself in the receiving end of this tension, standing between, on the one side, an internationalised German legal academia comfortable with itself in an endeavour of self-reflection, critique and positive influence and, on the other side, deeply German moments, where I found myself to be a Turk in a land whose esoteric language I cannot understand.

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SUGGESTED CITATION

Çalı, Başak: The Two Faces German Legal Hegemony?, Verfassungsblog, 07.10.2020, doi: 10.17176/20201007-121618-0.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20201007-121618-0.