The Fading International Influence of German Constitutional Thinking

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German constitutional thinking has been central in EU law, in ECHR law, and even in some domestic constitutional systems outside of Germany. It is, however, gradually and unstoppably losing influence in Europe. This is largely due to the fact that Karlsruhe has lost its status as the most influential court in constitutional issues in Europe, with this title now belonging to the Strasbourg Court and likely to do so for the foreseeable future. This trend (i.e. the fading international influence of German constitutional thinking) cannot be reversed by German constitutional lawyers, as it is the result of major institutional and structural ("tectonic") changes that have taken place over the last 20-25 years. German lawyers can, however, somewhat mitigate this trend by constructively participating in the formation of a common European Constitutional Language (in English).

1. The Rise of a Doctrinal Superpower

The highest level of conceptual-doctrinal legal thinking (*Rechtsdogmatik*) emerged in Germany (at the time still fragmented) in the 19th century: conceptual elaboration became the main goal of legal scholarship (see in particular Friedrich Carl von Savigny, Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft, 1814). It first conquered private law, then criminal law and (with the extension of the judicial review of administrative acts) administrative law as well. The end of the Wilhelmine Empire in 1918 also meant that the very basics of constitutional law (or "state law") had to be reinvented, which during the Weimar Republic made German constitutional theory blossom, and resulted in a number of memorable theoretical and methodological debates. Since then, the four classics of this period (Hans Kelsen, Carl Schmitt, Hermann Heller, Rudolf Smend) have also been well-known abroad. From amongst these four, Kelsen has been the most influential internationally – paradoxically, much less so in Germany, where the vocabulary and the ideas of Smend and Schmitt have had a longer-lasting impact.

The final boost was given by the establishment of the *Bundesverfassungsgericht,* which resulted (in combination with the German doctrinal traditions) in the most sophisticated legal doctrine of fundamental rights in human history (with a special emphasis on proportionality tests, theorised by Robert Alexy in his 1985 *Theorie der Grundrechte*). German constitutional doctrines directly influenced both other domestic constitutional cultures and international-supranational discourses (ECJ, ECtHR). Establishing and solidifying the rule of law in Germany after the *Gräueltaten* of the Second World War was a remarkable achievement in terms of both legal technique and moral determination. Moreover, Germany, also as a substitute for its past feared hard power, built up a grant system for foreign scholars after the Second World War on an unprecedented scale, which made it into the unquestionable beacon of conceptual-doctrinal legal thinking in Europe (actually, in the entire world).

The above projected soft power also radically transformed the badly tainted image of Germany into an example to be followed. After the end of communism in Europe, most of the newly emerging democracies imported German constitutional solutions: partly because these were specifically designed for post-authoritarian situations, and partly because many of the Eastern European lawyers who wrote the new constitutions for these emerging democracies (or became judges at constitutional courts) had actually spent one or two years as guest researchers in Germany in the 1980s. By the 1990s, it was not exag-

geration to say that you were only considered to be a serious constitutional lawyer in Europe if you spoke German and if you had spent some time at a German university or a Max Planck Institute.

2. Fading International Influence: The New Karlsruhe is Strasbourg

However, since the 1990s, things have been going downhill for the international influence of German constitutional thinking. Karlsruhe has been losing its leading role to Strasbourg in human rights issues. The reasons are manifold, and actually they are beyond the scope of what Karlsruhe can do. These are tectonic changes, where no one is to blame.

It is difficult to measure the influence that one constitutional culture has on another. A possible proxy is to count the number of citations of the judgments of a constitutional court by another constitutional court. Such research has actually been conducted by Groppi and Ponthoreau, who have established that the number of references to foreign constitutional courts is diminishing all over the world. (It is sad and surprising news for comparative lawyers!) The reason for this development is that international human rights tribunals (especially the ECtHR) are taking over this role. Since 1998, the ECtHR has been a permanent court with a growing case-law (in which many elements of German constitutional doctrine have been borrowed). Moreover, it has legal authority over its Member States, and it is also available in English. There is nowadays a clear tendency in most European constitutional courts to take into account the case-law of Strasbourg, but not to care about Karlsruhe – a situation that is very different from the beginning of the 1990s.

Even if the *Bundesverfassungsgericht* were to translate some of its judgments (which it has actually done recently), it would not be able to compete with an international court that interprets an international human rights treaty that is binding on its signatories. For the South African Constitutional Court, it can be an open question whether to look at Karlsruhe or at Strasbourg. For a European constitutional court, however, it is clear: you have to consider Strasbourg, and if you still have some additional time and resources then you *might* have a look at Karlsruhe. (A somewhat similar development can be observed in Latin American countries, where the Inter-American Court of Human Rights has taken over most of the role formerly occupied by the US Supreme Court and the *Bundesverfassungsgericht* in human rights cases.) The fact that throughout Europe the younger generations of constitutional lawyers are increasingly more likely to speak English than the older ones, aggravates the situation even more for Karlsruhe. This is an unfair competition, which structurally favours Strasbourg.

We have recently conducted a large empirical research and have established that the topic of leading cases have become more and more fundamental rights oriented in the last couple of decades at every analysed constitutional court (as opposed to state organisation law, or to generic sovereignty questions). Constitutional law is becoming human rights law, or more precisely: human rights case-law. In human rights cases, however, Karlsruhe is internationally becoming an exotic footnote, and the standards are determined by Strasbourg (which does not mean at all that the doctrinal sophistication is any better in Strasbourg). Moreover, the diminishing international influence of Karlsruhe leads (with some delay) to the diminishing international influence of the German scholarly constitutional discourse, with the exception of a few German scholars who become part of the international and supranational constitutional discourse (in English). The average German human rights *Habilitationsschrift* about the *Grundgesetz* is today much less likely to be read by foreign constitutional scholars then at the beginning of the 1990s. The irresistible wind of international irrelevance just keeps blowing from Strasbourg towards Karlsruhe.

3. Mitigating the Decline of International Influence: New Responses to Supranational Questions

There is a newly emerging set of open questions in constitutional law nowadays: How to deal with supranational organisations (more precisely: with the European Union)? The EU poses serious challenges to traditional constitutional doctrines, and some German

scholars did offer promising new theories and doctrinal frames to deal with these (multilevel constitutionalism, international public authority, open statehood, etc.), but none of these became THE dominant scholarly opinion and especially none of these was able to fully conquer the *Bundesverfassungsgericht*. Instead, since the 1990s Karlsruhe has been trying to answer these novel questions with a traditional state-centred conceptual frame. The etatistic tradition in German constitutional thinking has an impressive intellectual history, and it is still influential (as was evident in the last PSPP judgment).

Whereas many German constitutional scholars have strongly and convincingly criticised this approach, in the *Bundesverfassungsgericht* it is still the dominant one when dealing with the European Union. On the one hand, this makes the *Bundesverfassungsgericht* (and its case-law) less appealing to many foreign scholars. On the other hand, those who are consciously trying to dismount European integration, the rule of law and democracy have discovered a new love for the *Bundesverfassungsgericht* – a newly emerging fan club that the *Bundesverfassungsgericht* most definitely did not wish for.

Constitutional issues of state organisation are always more local, in human rights issues (which is the most important part of constitutional law, see above in Section 2) the ECtHR has taken up the international pole position for the foreseeable future, but issues of supranational organisations are a dynamic and complicated field of constitutional law, where some open questions still need to be answered. Hopefully, German scholarship can actively and constructively participate in the supranational constitutional discourse by contributing to a European Constitutional Language (in English). For this purpose, it needs to embrace critical voices about its own work that also come from abroad, and it should try to open up the German discourse (Europeanise it, as Armin von Bogdandy put it here).

The Strasbourg academic discourse is more case-note oriented, more essayistic, more pragmatic, more analogical, more open to use metaphors for explanations, but less conceptual, less abstract and less systematic than its German counterpart. In many ways, its style is nearer to common-law countries, than to the German discourse. This Strasbourg style is most likely going to keep influencing constitutional thinking on both an EU and national level. Therefore, the gradual common-lawisation (without being bound to any specific common-law country) will probably continue in Europe, despite Brexit.

Germany is still the most influential European constitutional culture, both intellectually and financially (especially via scholarship programmes in Germany for foreign constitutional scholars) promoting its own ideas. But it is most likely never going to reach its peak of the 1990s again, and the slow decline of its international influence is probably going to continue. Constitutional issues of the EU do not present a continuous flow of key questions, thus even though the German debates are relevant for other European constitutional systems, this cannot undo the continuing loss of international doctrinal influence which is due mainly to the institutional pre-eminence of the Strasbourg human rights case-law.

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