The End of the German Legal Culture?

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In this post, I argue that: (I) the influence of German jurisprudence on the legal systems in Central and Eastern Europe results from transfers of legal knowledge and “cooperative adaptation” of elites in the new democracies; (II) the German legal hegemony is in fact a hegemony of reason and a culture of justification; (III) the decision of *Bundesverfassungsgericht* in *PSPP* is an attempt to maintain the culture of justification in view of its inevitable end.

I. The Role of German Foundations and Transfers of Legal Knowledge

In Central and Eastern Europe (CEE), the question of German hegemony may appear unseemly. However, it is hard to deny that German legal doctrine was an important source of influence and inspiration in this part of the world – at least until recently. It is therefore more appropriate to talk about the influence of German legal culture on the legal systems in the new democracies after the regime change, as well as on the European institutions. The principle of proportionality is an example of exporting German legal culture but not as a commodity but as knowledge (art of thinking).

In post-communist Poland, the constitution contained solutions inspired by *Grundgeset*z (such as the rule of law and social justice, political pluralism, church autonomy, protection of fundamental rights, albeit subject to limitations and prohibition of encroachment upon their essential core, the procedure for appointing the Council of Ministers, or a constitutional complaint to the Constitutional Tribunal). However, the detailed layout of the afore-mentioned institutions in the law, and its interpretation and application remained in the hands of the locals, driven by the political animosities of the time, the fears (of the past) and social amnesia, all outside the control of the “hegemon”. Due to the geographical proximity of Germany as a well-established democracy, some Poles, Czechs or Hungarians took the opportunity to learn constitutional craftsmanship in Germany. These processes of knowledge transfers served the mutual interest in establishing friendly neighborly relations and reliable conditions for trade and investment.

The German academic, political and religious foundations should therefore be praised for creating educational, research, training and professional cooperation programs for Eastern Europeans. In the perception of the fellows, usually born after 1945, and their families, Germans could finally be good neighbors and friends, not invaders. Additionally, participation in such exchange programs was usually an advantage in the evaluation of candidates for various posts in the public administration. As a result, lawyers with research experience in Germany held many important positions, including the positions on the benches of the newly

established constitutional courts in the region. For them, German jurisprudence was a natural source of reference, but not the only one. For example, in 1598 judgments of the Polish Constitutional Court issued since 1987, 86 cases refer to the Federal Constitutional Court (FCC), and 164 – to the case-law of the European Court of Human Rights.

However, the “elite” of Polish lawyers with some professional experience acquired in Germany did not change the local culture based on authority and not on justification. It was therefore the authority of the Federal Constitutional Court or the European courts, rather than their argumentation that was adopted as a new dogma, often for pragmatic reasons. In a Gramscian sense, the German legal cultural hegemony did not touch the “masses” that had not received civic legal education for generations. Even in law schools, the work of Robert Alexy or Jürgen Habermas was presented as an authority to be quoted, and not an invitation to critical thinking and self-reflection. In other words, the Socratic contestation method was not part of the educational systems in Poland (and, as I assume, in other Central and Eastern European countries), even in law schools. Although in recent decades the social spirit has begun to change due to increased social mobility, the new political circumstances of authoritarian, ethnonationalist populism, which requires political loyalty and subordination, have strengthened the culturally rooted inclination to believe in charismatic leaders rather than in legal-rational power (and institutions).

To conclude, the transfer of legal knowledge to the Polish legal elite did not and could not transplant the “German mindset,” shaped by the philosophy of Immanuel Kant and his successors, or change the dominating attitude in the Polish nation (or other nations in Central and Eastern Europe), which had lacked statehood for centuries and inherited the experience of a phantom state.[1)] Jan Sowa, *Fantomowe cia#o króla. Nowoczesne zmagania z form#*, Universitas 2011. Therefore, the acceptance of legal authority – the rule of law and bureaucratic (and later European) institutions – is a form of “cooperative adaptation”, but in essence, yet another form of surrender. Although on both sides of the Oder River human dignity is a fundamental constitutional principle, in Poland human dignity is read in accordance with the teachings of John Paul II and Christian personalism. Given the attachment of Poles to Christian tradition, in particular cases, human dignity may mean something different than in Germany.

II. Hegemony of Reason and Culture of Justification

Postwar Germany itself was subject to the legal cultural hegemony of the United States. The German legal system created after 1945 was based on “continental positivism (…), but with a strong position of legal expert bodies – the high courts of law and constitutional courts in particular”.[2)] Adam Sulikowski, „Apolityczno## w prawoznawstwie : kryzys idei a zjawisko populizmu,” *Archiwum Filozofii Prawa i Filozofii Spo#ecznej* 3 (2018), pp. 74-85. Its creation was supported by legal sciences, which promoted the idea of apolitical law and remained uncritical of liberal strategies of legal expert bodies. The liberal order therefore gained a hegemonic position and gave meaning to legal texts, including constitutions, and consequently,

to the concept of justice. The postwar liberal world order relied on the idea of political consensus and the power of reason.

As Moshe Cohen-Elya and Iddo Porat pointly explain, the hegemony of reason could develop "as result of the combination of four influences and processes, with the first two the product of the traumatic effects of WWII: 1) decline of nationalism and the rise of humanism and internationalism; 2) elitism and suspicion toward popular democracy; 3) the traditional European organic conception of the state; and 4) a European-based deep-seated and optimistic belief in legal objectivity and rationalism".[3)]Moshe Cohen-Eliya, Iddo Porat, "Proportionality and the Culture of Justification", *American Journal of Comparative Law* 59 (2011), pp 463-490. The culture of justification was to a large extent created by judicial and expert bodies whose role was to control decisions of the "Sovereign" and its representatives. In this project, the courts were perceived as "bulwarks of reason" and it was assumed that they are "immune from populism, biases, and irrational motives".[4)] Ibid.

Notably, confidence in rationality and objectivity of judges derived from the German tradition of viewing law as a science. Yet, paradoxically, for the same reasons, theology can be considered a science.[5)]Leszek Nowak, „Metodologiczne kryterium demarkacji i problem statusu teologii," *Nauka* 3 (2004). On the one hand, the culture of justification assumes that legal interpretation is a scientific undertaking based on logic, and on the other hand, it resembles interpretation of a sacred text, which adopts a certain dogma (rationality of law and law-makers). It is also blind to the fact that decoding the core values of the law may not always be perceived as strictly scientific, but political, especially if it goes beyond the legal text or the intent of its drafters.

Proportionality as a principle of law has a central role in the culture of justification. Due to its global spread as a standard of judicial review, in particular in the area of rights adjudication, proportionality has become a tool for promoting judicial power and judicial "coercion of liberal values". The standard proportionality analysis entails three questions regarding the government measure in terms of its suitability, necessity and proportionality in the strict sense. However, there is no uniform standard of application of proportionality review in courts that followed the example of the German Federal Constitutional Court. Even *Bundesverfassungsgericht* occasionally departs from the model proportionality analysis, merging or skipping the subtests for pragmatic reasons.[6)]Andrej Lang, „Proportionality Analysis by the German Federal Constitutional Court", in: Kremnitzer/Lang/Steiner (eds.), *Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice*, CUP 2020. Moreover, its case-law has gradually shifted the focus on the last subtest of proportionality analysis which requires balancing between the colliding values and is more susceptible to ideological preferences of judges than the fact-based assessment of suitability or necessity.[7)]Raanan Sulitzeanu, Mordechai Kremnitzer, Shalon Alon, "Facts, Preferences, and Doctrine: An Empirical Analysis of Proportionality Judgment," *Law & Society Review* 50(2) (2016), pp. 348–382.

III. The End of the Age of Reason

The *PSPP* decision (2 BvR 859/15) is the voice of the legal elite represented in *Bundesverfassungsgericht* which seeks to maintain its position as the ultimate arbiter over constitutional matters but disregards the role of the CJEU as the highest judicial authority in the European Union. By granting itself, in particular, but also, indirectly, other constitutional courts of the Member States the power to carry out *ultra vires* review in areas that undoubtedly fall within the competence of the EU, the FCC fails to recognize that only the CJEU may declare invalid acts of EU law that violate the principle of proportionality.[8)]Editorial Comments, *Common Market Law Review* 57(2020), pp. 965–978.

Labelling the CJEU's decision as "not comprehensible and therefore objectively arbitrary," the FCC insisted that the burden of proportionality analysis in *Weiss* should have been in the balancing stage. Yet, not only the wording of Article 5(4) TEU, but also the strategy of judicial restraint requires that the CJEU does not engage in assessments that rely on the attribution of values to policy choices which are not clearly arbitrary or which clearly require expert knowledge. Therefore, limiting its assessment to the suitability and necessity stages, the CJEU recognizes the limits of its own competence.

On a more general level, the Weiss/PSPP controversy marks the end of the culture of justification as we know it. Today, public discourse is dominated not by justification (or reason), but by plurality of conflicting authorities. What matters, then, is not the question "why?" but "who is the expert?" or "what is the source of the expertise?". Now that populism and other anti-systemic movements are challenging the existing liberal *status quo*, the struggle to maintain the power of the last word continues. In particular, populism seeks to ensure the primacy of political power over rationalized procedures and discourses of legal expert bodies. In countries like Poland, the delegitimization of institutions controlled by allegedly apolitical professionals by the populists is relatively easy to implement in conditions where authority had its cultural roots in tradition and charismatic leadership rather than reasons and rational argumentation. More recently, however, the global pandemic has revealed a crisis of political representation whose function is often limited to appointing proper experts or using proper expertise.

We are therefore witnessing the end of the age of reason, while governments are seizing the opportunity to govern human fear, hatred and uncertainty of tomorrow. In such conditions, we understand less and less what is happening here, who is governing us, and even less so WHY we have to follow rules that are often not even provided for by statutory law.

The question concerning the path of European legal scholarship is thus open. Although reason will continue to strive for hegemony, in many parts of the world, the politically captured courts will only pretend to be guided by public reason and in fact obey the political majority. If, however, emotions win the battle for the hegemon's throne, solidarity should take the place of reason. There is an opportunity for Europe and Germany to deepen this idea, even at the cost of changing the current mindset.

References

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