

Constitutional Borrowings, Not Hegemony

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The question about the legal hegemony of Germany was raised by comments from lawyers, but also politicians, in connection with the – undoubtedly – controversial decision of the German Constitutional Tribunal in the PSPP case. [Armin von Bogdandy's introduction](#) refers primarily to the problem of the Europeanization of Germany vs. the Germanization of Europe in the context of European integration and Sabino Cassese's description of "some specific decisions of these more recent EU-specific decisions of the Second Senate of the German Federal Constitutional Court as an attempt to put a German dog leash on European institutions". But it also refers to the past of the countries of Central and Eastern Europe and the "imposition" of "an enlightened, soft neo-liberalism" on the countries of this region (Bogdan Iancu). In the case of Poland, because Kaczyński's government seems to be a persecutor against the proceedings which the German jurisprudence provides, "the secret crypt in which the seeds of its spirit will be protected...". (Carl Schmitt).

I.

The starting point is to understand the term "hegemony". This is all the more important because the concept of hegemony obviously has a negative, or even hostile connotation. This connotation is particularly evident in Poland because of the difficult history of German-Polish relations in the 20th century. Hegemony presupposes the leadership of one state over another, which it voluntarily acknowledges. It is also the predominant influence of supremacy or domination of one country over another. And yet the very idea of the European integration, its axiological, political and normative foundations are supposed to create the premise for a non-hegemonic concept and construction of relations between states and members of the European Union, i.e. the very opposite of hegemony.

From the Polish perspective, the issue of a non-existent hegemony can be considered on several levels: the creation of constitutions, judicial decisions, scientific research and legal doctrine, as well as training of lawyers.

II.

The change of the political and constitutional regime in Poland in 1989 was a result of the political arrangements of the Round Table and then of the parliamentary coup d'état as a result of the partially free and democratic parliamentary elections. The starting point of the fundamental change of the socialist constitution from 1952 was the repeal of the preamble and the first two chapters (the basis of the political system and the basis of the social and economic system). Instead of these chapters

seven articles were adopted. The new regulation concerned such issues as the *Rechtsstaatlichkeit*, political pluralism, the social market economy, the guarantee of private property, local government, national sovereignty and the status of the army.

As an expression of the reception, but not of the hegemony, of German constitutional concepts, the surprising career of the *Rechtsstaat* realizing the principles of social justice can be pointed at. In December 1989, I served as a parliamentary expert and in this capacity, I proposed the constitutionalization of the *Rechtsstaatlichkeit*. The whole constitution-making process took a few hours and finished late in the evening. The same night, at around 3 a.m. I was woken up by a phone call from the chairwoman of the parliamentary committee asking me for an explanation and justification of the proposed constitutional clause. The task was not easy, but feasible. I took Klaus Stern's "Das Staatsrecht der Bundesrepublik Deutschland", Vol. I (1st edition 1977) and on page 616 I found about ten definitions of the *Rechtsstaat*. Then I was able to prepare a synthesis, which was presented the next day (actually the same day) by the chairwoman of the committee at the parliamentary plenary session.

III.

When analyzing the role of experts, it is worthy to recall the work of the Constitutional Committee of the Sejm (the lower chamber of the parliament). The subcommittee prepared the draft of the chapter on freedom and human and civil rights. When the finished draft was presented, it turned out that it is very similar to the first chapter of the German *Grundgesetz*. Had everyone known that four of the five permanent experts on the committee have been Humboldt Foundation scholars (their supervisors: Rudolf Bernhardt, Peter Badura, Bruno Simma and Klaus Stern), the amazement of some and the recognition of others would not have been so great.

Further constitutional work between 1991 and 1997 took into account the German model of a constructive vote of no confidence as a concept to stabilize the political system in the face of the need for coalition rule. The final drafting and adoption of the constitution led to the acceptance of a model that was largely based on the construction of the "Kanzlerdemokratie" or rather, due to negative associations with Chancellor von Bismarck in Poland, of the "Ministerpraesidentendemokratie".¹⁾M. Wyrzykowski: 'Von der Verfassungsrezeption zum Dialog – Das Grundgesetz und der polnische Konstitutionalismus', in: K. Stern (Hrsg.): *60 Jahre Grundgesetz. Das Grundgesetz fuer die Bundesrepublik Deutschland im europaeischen Verfassungsverbund*, C. H. Beck 2010, p. 159ff.

It is worth mentioning that in the preparation of the Freedom of Assembly Act of 1990 the parliament based its principles and structures on the German *Versammlungsgesetz*.

IV.

Further an academic cooperation should be indicated, both at the scientific and student level. The role and importance of institutions such as, for example, Deutscher Akademischer Austauschdienst (DAAD), Alexander-von-Humboldt Stiftung or the Polish-German Science Foundation have become a model for similar initiatives in other European states. More than 20 years ago, the very first German Law School has been established at the University of Warsaw (in cooperation with University of Bonn) and then at several other Polish universities. These German Law Schools have become a stable element of the academic landscape and an expression of the institutional and intellectual links between the law faculties of the partner universities. For example, since 1996, the German School of Law at the University of Warsaw has had almost 800 graduates. If we multiply the number of schools and annual graduates, we will see how important knowledge of the German legal system and the value of German legal culture is for future generations of Polish lawyers.

V.

There is dialogue on different levels. There are joint publications, research projects, bilateral conferences, such as the colloquia of German and Polish lawyers, which have been held for 40 years – initially only administrative lawyers, but now public and European law experts. There is a dialogue between parliamentarians at the level of national parliaments and the European Parliament. Finally, there is the exchange between judges. Europe today is the Europe of law and even more so the Europe of judges.

And there is also the constitutional dialog. In its case law, the Polish Constitutional Court has directly referred to the German *Grundgesetz* as well as to the case law of the Federal Constitutional Court or the Federal Supreme Court. These are the cases where the reference to the particular articles of the *Grundgesetz* are connected with the jurisprudence of the Federal Constitutional Court, legal regulations and doctrine of law.

The aims and functions of references to the Basic Law are different. Sometimes it had merely an ornamental character. In most cases, however, the Polish Constitutional Court refers to corresponding provisions of the Basic Law as a supporting argument for the similarity of Polish constitutional standards. The similarities should serve as an auxiliary element of the justification, which is based on the argument of authority (“Autoritaet”): if in other states those are considered democratic and human rights based, then their constitutionality is strengthened by the comparative argument.

VI.

Back to the PSPP judgment: The judgment of the *Bundesverfassungsgericht* (BVerfG) in the PSPP case triggered an immediate, enthusiastic reaction of Polish

politicians. They assumed that the BVerfG ruling claimed ultra vires and that the ECJ was called to order by the BVerfG. The BVerfG verdict was presented and commented as confirmation of two fundamental arguments so close to the hearts of Polish politicians and, increasingly, a number of lawyers, including judges of the Constitutional Tribunal appointed lately by Law and Justice party, extremely reluctant to the EU. Firstly, the constitutional courts should have the right to the last, final word in relation to the courts of the European Union. Secondly, Polish politicians found in the BVerfG's guarantee of the sovereignty of the Federal Republic of Germany. It seems that they deeply believed that the level of Polish sovereignty could be measured by the BVerfG judgment. This political view is to be reinforced by a ruling of the Polish Constitutional Court suggesting that the national constitutional courts have the general power to decide when the case-law of the CJEU can be ignored.²⁾S. Biernat: 'How Far Is It from Warsaw to Luxembourg and Karlsruhe: The impact of the PSPP Judgment on Poland', *German Law Journal*, Vol. 21, Issue 5 p. 1104 ff.

In conclusion, borrowing the most appropriate element from the German constitutional system is clearly not a legal hegemony. In the context of the PSPP judgment, on the other hand, there is a political abuse of argumentation in Poland. The abuse lies in the fact that the judgment of the German Constitutional Court is cited as an example and proof of the supremacy of national constitutional court rulings over the ECJ in a situation where the PSPP is to lead (Vosskuhle, Grimm) to an even more intense and far-reaching control of the ECJ over the law of the EU member states.

References

- 1. M. Wyrzykowski: 'Von der Verfassungsrezeption zum Dialog – Das Grundgesetz und der polnische Konstitutionalismus', in: K. Stern (Hrsg.): 60 Jahre Grundgesetz. Das Grundgesetz fuer die Bundesrepublik Deutschland im europaeischen Verfassungsverbund, C. H. Beck 2010, p. 159ff.
- 2. S. Biernat: 'How Far Is It from Warsaw to Luxembourg and Karlsruhe: The impact of the PSPP Judgment on Poland', *German Law Journal*, Vol. 21, Issue 5 p. 1104 ff.

