

Mirror Mirror on the Wall – Who is the Most Beautiful of All?

Joseph H.H. Weiler

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I have been politically aware for around, sigh, five decades. And with unerring regularity once every ten years or so, we have been treated to a kind of decennial Oktoberfest of German public hand-wringing. Very public – group therapy writ large. Sometimes it comes with the label of ‘Legitimacy Crisis’. Oftentimes it is a variation on the theme of ‘Are We Back to Weimer Times – and You Know What Followed That!’ It has all the hall marks of a ritual: An anguished (and at times angry) large article, written by one of the Grandees of German public intellectuals almost invariably a Prof. Dr. Dr. (better if he – it’s always been a he – can add a Dr. h.c. and even better Dr. h.c. (mult.) in the pages of FAZ (or Die Zeit). Long letters to the editor follow and then, two or three weeks later a reply appears in the pages of Die Zeit (or FAZ). Then numerous Talking Head programs on TV jump on the bandwagon and we are treated to interminable solemn and sober discussions. The ritual culminates with a cover page of Der Spiegel and with that the crisis can be declared over: We are legitimate. We are not Weimer and it is back to more mundane and interesting stuff such as Are We Germans Getting too Fat?

There are different variants to this decennial virus but its Wuhan epicenter is always the same: That *Vergangenheit, die nicht vergehen will*.

Now, when I write a “German Ritual” this needs qualification: It’s the Germany of FAZ, Die Zeit, SZ etc. readers. Normally, it doesn’t make it to the pages of, say, Bild, and when the Talking Heads pontificate on TV, the rest of Germany, sanely, watch Lewandowski.

From the outside we observe the ritual with bemused indifference mixed with some envy. The bemusement is obvious – it’s like your intelligent, successful happily married uncle or aunt having a mid-life crisis. Buy a Porsche and be over with it! But Why envy? Nobody seriously entertains even the slightest fear that Germany now or in the future risks becoming another Weimar (Oh, you don’t get it, my German friends admonish me). There is envy because this ritual of introspection might be one of the secrets explaining how Germany has managed to be, despite its huge successes in multiple fields, a model democracy and, even more importantly when compared to many others, a thoroughly civil and even decent society, some nefarious elements notwithstanding (and where do these not exist?).

Indeed, German success is often the catalyst for a hand-wringing eruption. Yes, we handled this or that crisis magnificently, yes, our economy is doing nicely, yes we saved the EU, but Shhh, not so loud. Please don’t crow about it. God Forbid “they” will think we are back to *Deutschland Deutschland über alles* days.

The Grandees who have typically been the celebrants of those happy days have been historians (remember the delicious Historikerstreit of the 80s?), sociologists, politologists and fellow travelers.

Now it seems, that the lawyers, too, (penis envy?) want in on the action and have conjured up a brewing Hegemony Crisis. What triggered this is beyond me. *Weiss* no doubt? But then the title of the symposium should have been the *Demise* of German Legal Hegemony. After all, despite very pressing structural and contingent problems within the EU legal order and its Court to which, totally commendably, the German Constitutional Court decided to address its mind, they ended up choosing the wrong case with which to flex their muscle, and scored a painful own-goal which toppled them from their pedestal of the unofficial but widely accepted *Primus inter Pares* of Member State constitutional and supreme courts. Some Hegemony. There was no small measure of Schadenfreude in the torrent of European critique of the German Court. How the Mighty have Fallen! (2 Sam. 1:19).

Hegemony of German legal scholarship or doctrine perhaps? With the exceptions of some scholarly islands within, say, Spain or Italy, the mainstream of that scholarship is barely known and cited outside Germany and the only contemporary German legal scholars widely admired and referred to outside the Fatherland are for the most part that generation of “Americanized” scholars (meaning mostly those who did an LL.M at Harvard, or Yale or Columbia etc – a fact they never fail to mention in signing any letter or article) writing in English. It’s not because German legal scholarship is defective in any way; quite the opposite. Its only “vice” is that it’s in German. Likewise, it is not as if all English or American legal scholarship is so breathtaking to explain the attention it gets. But it has the “virtue” of being in English. If you want to talk of Legal Hegemony, put in first place the English Language.

Yes, there is one extremely successful German legal export that can rival Mercedes or Siemens. And the Winner is: Pro... propo ... proportionality! But when you examine the fate of the product in the export markets, its relationship to German Proportionality is like the relationship of a Russian Lada to an Italian Fiat. It looks the same from the outside, but take a drive....

I have detected this sentiment, explicit but mostly implicit, in quite a bit of the torrent of commentary on *Weiss*. So Armin von Bogdandy and Max Steinbeis deserve our thanks by openly bringing this issue out into the open, putting it on the table and inviting comment.

My own view is emphatic: There is no German Legal Hegemony, and there is no risk of German Legal Hegemony any time soon, the antics of its Constitutional Court notwithstanding. And those who fall into this trap are suffering from a mild case of that most endearing of failings of the human condition, Hubris.

So what’s going on? I think it is true that not a few German scholars believe, in total good faith and among themselves, in the superiority of German legal doctrine and scholarship – a conceit that is by no means reserved to Germany and Germans. (You don’t have to spend too much time in an American law faculty to experience the trans-Atlantic version of such.) It is a common and a forgivable sin. But it is not *bon*

ton, is it, to broadcast such hubris from the rooftops? But *voilà*, here is an elegant solution: Wrap it up in a big Oy Vey – the danger of German Legal Hegemony — and you can sneak in your hubris with a pretense of the ‘It’s not me, it’s them... and shouldn’t we do something about it’ excuse. Oy vey indeed.

