The European “Market” for Constitutional Ideas

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It was already clear to Seneca, almost 2000 years ago, that “[i]f a man knows not to which port he sails, no wind is favourable”.

Now, almost 2000 years later, as mentioned by Armin von Bogdandy in his inspiring introduction to this symposium, we are faced with a crucial question of existential significance: Are we moving towards a *Europeanised Germany* or a *Germanised Europe*?

In order to answer to the question, we have to draw a distinction between **intention** and **practical effect**.

The **goal** of creating a Europeanised Germany is endorsed by (amongst others) most German academics, alongside also judges and politicians. However, the **practical effect,** especially of some rulings of the German Federal Constitutional Court, is to move towards a Germanised Europe, and with it the amplification of the existing German legal hegemony. The implications of this further rise in German dominance are highly problematic. And a particularly difficult issue is the risk of “manipulative” borrowing by the most illiberal legal systems in Central and Eastern Europe, including first and foremost by Poland and Hungary.

Let us consider another revealing example of the mismatch between **intention** and **practical effect** as regards the tension between a Germanised Europe and Europeanised Germany. One of the original aims underlying the idea of German legal hegemony might be, in the words of Schmitt (as quoted by Armin von Bogdandy), to protect against interference that “secret crypt in which the spirit of European jurisprudence takes root”. However, here too, the practical effect of growing legal hegemony might be diametrically opposed to this.

Let us consider, for instance, the impact of the (in)famous decision of the Federal Constitutional Court on the Public Sector Purchase Programme (PSPP).

As Sabino Cassese rightly points out, this ruling may be viewed as an attempt to rein in the European institutions with a German leash. However, as the former Italian constitutional judge goes on to emphasise later on in the same editorial, one of the practical effects of the ruling was to attract harsh criticism in western Europe (including in Frankfurt and Luxembourg), whilst being warmly welcomed by the Hungarian and Polish Governments. These governments interpreted the ruling (and in this respect the thin line between interpretation and manipulation has never been quite so thin) as providing further justification for aggressively sceptical approach towards the process of European Union integration.

In other words, once again, there is a mismatch between **intent** and **effects**.

Whilst the intention behind the ruling may have been to create, as Cassese points out, “a German dog leash for the European institutions”, there is a risk that the effect will be exactly the opposite: to “unleash” the most populist and illiberal tendencies within the weakest democracies in the European Union.

In other words, the PSPP judgment of the Karlsruhe Court has been, not unexpectedly, exploited and manipulated in Budapest and Warsaw in order to further expand their populist narrative.

This is a risk inherent within the judicial migration of constitutional ideas from west to east. Moreover, it is not the first time it has manifested itself. The “identity test” case law of the German Federal Constitutional Court, from the *Lisbon Urteil* to the OMT rulings, offers a perfect case study for examining manipulative borrowing within comparative constitutional adjudication.

Leaving aside the clear responsibility of “manipulative borrowers” from Hungary and Poland, another form of responsibility has to be shouldered by the German Federal Constitutional Court: despite its best intentions, this Court risks taking on the uncomfortable role of a *Bad Master*.

In other words, can it be argued that, as the *de facto* judicial hegemon in Europe, the German Federal Constitutional Court is under a special responsibility to avoid a risk of manipulative borrowing?

I suggest that metaphoric language can help us to answer this question. This is because metaphors have a constitutive value not only in language itself but also in legal reasoning. They help us to make conceptual shifts from a familiar prototype to a less familiar manifestation of that prototype. The mechanism by which this occurs is the migration (and manipulation) of constitutional ideas from west to the east.

Metaphorical language offers a particularly powerful tool for examining this dynamic because the metaphor itself incorporates the very concept of migration. This is so both ontologically and etymologically. More specifically, the notion of *meta-pherein*, or carrying “beyond” through different fields of experience, implies a process of carrying over or transferring knowledge across domains. For this reason, every metaphor has a source domain and a target domain, so as to enable the migration of a conceptual prototype from its natural (familiar) source domain to another unfamiliar target domain.

Against this backdrop, I propose competition law as the source domain and European constitutional law as the target domain. As such, I propose that we frame the approach taken by the German Federal Constitutional Court as the **abuse of a judicial dominant position within the marketplace of constitutional ideas in Europe**.

It is clear that the metaphor suggested here is inspired by the legendary “free marketplace of ideas” proposed for the first time by US Supreme Court Justice Oliver

Wendell Holmes in his dissenting opinion in *Abrams*[1)]Abrams v. United States, 250 U.S. 616 (1919)..

The source domain for Holmes' metaphor is economic competition, embodied by a free marketplace of competing traders, whilst its target domain is the protection of pluralism in relation to freedom of speech. For our present purposes, antitrust law, and the parallelism inferred with European constitutional law, offers a powerful account – through the metaphor of the existence (or abuse) of a dominant position by the German Federal Constitutional Court within the "European market of constitutional ideas" – of how the concept of constitutional identity has been used and abused. In doing so, it reveals the wider effect of self-centred arguments based on constitutional patriotism.

In order to enable the metaphor proposed to be better understood, it is essential to start from the source domain of the metaphor, that is the antitrust concept of a dominant position and the abuse of a dominant position, as interpreted within the case law of the European Court of Justice (ECJ). As early as 1979,[2)]Court of Justice of the EU, 13 February 1979, 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities.* the ECJ defined a dominant position as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers". As regards on the other hand the concept of abuse*,* the Court specified in the judgment that the concept of abuse is an objective notion, and that an abuse may be committed by any conduct by the dominant undertaking that is liable to *influence* the structure of the market. **The intention of the undertaking is not relevant for the purposes of establishing whether or not an abuse has occurred, but rather only the effect**, that is the objective impact on the structure of the market. This is very important as far as our target domain is concerned, in the light of the bifurcation mentioned above between intention and practical effect. Only the effect is relevant.

The ECJ has also held[3)]Court of Justice of the EU, 9 November 1983, 322/81, *NV Nederlandsche*. that a dominant position does not in itself represent a problem for competition law purposes but that, due to the ability to exert an influence on the structure of the market, it subjects undertakings that are in a dominant position to a *special responsibility*, which is not by contrast imposed on others, and where this responsibility is not heeded an abuse will be committed.

If we now turn to the process of migration, which – as mentioned above – is inherent to the constitutive nature of the metaphor, namely a shift or transfer from a source domain to a target domain, the characteristic aspects of the abuse of a dominant position on the marketplace for businesses can be carried over to the marketplace for constitutional ideas.

More specifically, the main players in the market for constitutional ideas are obviously not businesses holding a dominant position but rather constitutional courts. Due to its influence as well as the structure of the market itself, within this period of

democratic regression that is affecting much of Europe (and indeed beyond), the German Federal Constitutional Court is capable of influencing the argumentative frameworks used by courts. This dynamic is a particularly sensitive one for those courts that are increasingly losing independence and the ability to play a counter-majoritarian role in limiting political power.

If this is the case, we may conclude that the German Federal Constitutional Court occupies a dominant position on the European market for constitutional ideas. Consequently, shifting the metaphor proposed here from the source domain (antitrust) to the target domain (European constitutional law), we may conclude that the Court is subject to a specific “special responsibility”.

German federal constitutional judges should, in my view, bear responsibility, in particular, for avoiding the use of language that is liable foster national intolerance and constitutional patriotism, a clear example being that used in the judgment of 5 May. This language can even be distorted by illiberal governments and packed courts into theoretical justification for undermining the rule of law and enhancing the strength of populist and undemocratic powers.

During the current pandemic, this is the most dangerous and contagious virus.

References

- 1. Abrams v. United States, 250 U.S. 616 (1919).
- 2. Court of Justice of the EU, 13 February 1979, 85/76, Hoffmann-La Roche & Co. AG v Commission of the European Communities.
- 3. Court of Justice of the EU, 9 November 1983, 322/81, NV Nederlandsche.