

On the Road to German Hegemony in EU Law?

Daniel Sarmiento

2020-10-07T11:00:52

The influence of the German legal tradition in the European legal community is unquestionable. No other European country has displayed, like Germany has, such an articulate and institutionalized effort of promotion of its own legal system and thinking. The project paid off. EU Law displays an obvious German imprint that is now enforced in twenty-seven Member States. Lawyers throughout the European continent learn German to read the high-quality legal literature produced in German universities and research centers, courts and public institutions. The ultimate sign of intellectual distinction of a European lawyer is to “read the Germans”. No other feature can surpass in pedigree a lawyer’s fluency and ability to dominate German concepts in their very own words.

Recent developments have raised a legitimate question about German influence in the European community of lawyers, particularly within the European Union: has it gone too far? Are we facing a rising tide of German dominion over legal thinking, surpassing and overriding national traditions attached for centuries of national legal development? European harmonization of laws has made national rules look ever more German. The fiercely autonomous case-law coming from German courts has pushed other national courts into dancing to a German tune. An impressive effort in displaying research funds that attract lawyers and researchers from all European countries to Germany has made thousands flock to German lands and institutions. Brexit and the demise of British influence in the continent has left a vacuum that Germany will easily fill with its highly efficient machinery of promotion of intellectual influence.

So are we heading inevitably towards a new age of German hegemony, in which EU Law will also inevitably mute into a German vehicle of promotion of German influence?

I very much doubt it.

EU Law is still very much a national product, enforced by national lawyers in the national fore. EU Law is taught to law students by national academics in national Universities, in the language of that country and only exceptionally through English language courses. Textbooks in Dutch, French, Italian, Czech, Polish, Danish, Spanish, German, are the rule. Students learn direct effect through national terminology explained by national academics that quote other academics from the same country who publish in the same language. The “nationalization” of EU Law has always been the rule and it will carry on like this for years and decades to come. It is difficult to see how can German hegemony play a role in this very crude national and atomized reality.

In my view, German legal thinking is a dominant force in EU law, but not *the* dominant force alone. German legal thinking, because of its rigor, its historical roots and its powerful machine of promotion, plays a significant role in shaping EU law and the EU's legal discourse throughout the continent. However, it is one (the most powerful), but only one among other traditions that strive to influence and preserve their own ways too. A glimpse into the current state of EU Law and its sources of influence and thinking provides good proof of this fact.

The prestige and influence of the Common Market Law Review, the European Law Review and the European Constitutional Law Review, to name only three journals published in English, the current *lingua franca* of EU Law, show a surprising lack of dominance of German voices. German lawyers publish regularly in these journals, but they are far from being the predominant influence in these international scholarly fora. The same applies to the Editorial Boards of these journals and, as a result, the style and approach of EU legal research do not reflect the editorial practices of German scholarly legal works.

The two European courts, the Court of Justice and the European Court of Human Rights, are far from being a German product or a vehicle of German legal influence. Quite the contrary, they still breath and speak with the spirit of a French lawyer, whilst their product, European case-law, after decades in the making, enjoys a considerable degree of autonomy from all national legal traditions, including Germany's. The reaction from the German Constitutional Court in the Weiss case shows how frustrating this autonomy can be for national courts that intend to impose on European courts a national way of exercising the judicial task.

A glimpse around national constitutional and supreme courts of European countries will also show how parochial and domestic the judiciary still is throughout Europe. No matter how intense the harmonization of national law under EU law has become, the truth is that the high courts of the Member States still work and develop their case-law under the umbrella of a national vision in which national concepts and national traditions weigh heavily in the rulebook of the domestic judge, as well as the domestic lawyer that pleads before that judge. French case-law is profoundly French and it will carry on like this. Italian case-law is still the product of Italian minds implementing the law in Italian cases, pleaded by Italian lawyers that have been taught in Italian Universities reading and studying textbooks in Italian authored by Italian academics. The ghost of German hegemony is difficult to find in the buildings of constitutional and supreme courts of the Member States.

But influence there is. No hegemony, but definitely a presence that weighs heavily and exerts its authority in subtle ways. As a result of its high quality, German scholarship instills a sense of inevitability in those who are familiarized with it that turns them into radical defenders of an absolute truth. The fact that the German language associates the notion of a "flaw" with a "falsity", instills a sense of rightfulness in the believers that brings them close to a religious faith. A French or a Greek lawyer brought up in German scholarship can purport the German vision of the law with a vehemence and an arrogance that is difficult to find in other cosmopolitan lawyers, generally more tamed and used to assume the malleability of law and legal concepts. This combination of scholarly rigor and a warrior-like

defense of the virtues of the German vision of the law have contributed to promote the country's vision of the law like no other Member State.

Of course, German legal thinking is far from perfect. Those who have not fallen under the hypnotic effect of German legal influence are well aware of many of its flaws. And these flaws will prevent the German tradition from being hegemonic in the development of EU Law.

First, there is the rigidity and an incentive to think and act within a pre-existing conceptual framework. By sticking to a world of preordained concepts which hardly anyone dares to question, German lawyers frequently end up trapped in an imaginary world of their own making that can cut their wings and limit their imagination as lawyers, judges and scholars. Unmovable concepts are an asset for a legal system, but only as long as the concepts are adaptable to society and not vice versa. German law does evolve, but it takes decades to do so, thousands of hours of scholarly debate and a disproportionate waste of resources that could be used in simply moving forward to fix the problems that society demands from law and lawyers.

And second, there is the science-oriented approach of German legal thinking. By turning German legal thinking into a scientific endeavor, the German tradition has created a unique notion of law. The assumption that law can be an object exposed to scientific research and discovery turns the equation of legal development upside down, as if rules, principles and decisions could be deduced through the scientific method.

Law is flexible and requires pragmatism. Law is a product of society and demands a close connection with the political community whose disputes it is intended to prevent and, eventually, resolve. Law can be the ultimate outcome of rational thinking, particularly in liberal democracies, but its imperfections and weaknesses turn it into a very human (and imperfect) product. The more complex and diverse a political community is, the more imperative is the need for the Law to be malleable and adaptable to the complexity of the society it is intended to serve.

These reflections lead me to conclude that EU law will hardly ever be a German product, for the simple fact that its social sources are too complex, too contentious and too diverse to come under the lens of a dominant tradition that looks at the law through a scientific presumption of correctness. As an EU lawyer, I feel grateful to the German legal tradition for having provided consistency and conceptual coherence to so many of EU Law's tools. But fortunately, this dominion has not reached the point of eradicating the inherently pragmatic vision underlying EU law and its practice. And in my view, the very nature of European integration will prevent this dominion from turning into hegemony. As long as EU Law carries on being tightly attached to its twenty-seven national roots, in which several legal traditions will struggle to impose their views, EU lawyers will continue to work in a complex framework in which German concepts will instill consistency to the legal order, but together and in competition with other legal traditions claiming a voice of their own.

