LAW LAND: GERMANY AS A LEGAL SUPER POWER

GERMAN-AMERICAN**ISSUES**

Russell A. Miller

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FOREWORD

Germany has increasingly found itself in a leadership role in the twenty-first century. On challenges ranging from Russian aggression in Ukraine, to the European economic crisis, to the turmoil and resulting refugees from the Middle East, it is Germany who has been in the driver's seat. This role was nearly unthinkable seventy years ago.

The German approach to these and other twenty-first century challenges is underpinned by a legal outlook that is deeply rooted in civil law and a tendency to depict issues through "a formalistically legal lens." This outlook has at times put Germany at odds with its partners, but it has allowed Germany to assume a position of strength and legitimacy on the world stage.

This volume of AICGS' German-American Issues series discusses the evolution of the German legal system and its use in various contexts, including economic and security. It portrays Germany's legal foundation as a particular strength that has allowed the country to gain soft power in international affairs.

AICGS is grateful to Russell Miller, a DAAD/AICGS Research Fellow in 2015, for sharing his insights into this fundamental issue. We also wish to thank the German Academic Exchange Service (DAAD) for its generous support of this publication, and Jessica Riester Hart for her editorial input.

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INTRODUCTION: A FABLE OF GERMAN POWER

The New "German Question"

Germany—and its power—are once again atop the geopolitical agenda,[1] even if we are not faced anew with the "German problem."[2] There are many intertwined reasons for this, including Germany's economic clout and the authority it wields within the European Union. The recent "Greek Debt Crisis," in which Germany has taken a decisive role, particularly revealed Germany's new, strong position within the European Union. Greek officials, expressing their anxiety over the sovereign debt crisis, have pointed a finger at their largest creditor as the cause of their difficulties. Manolis Glezos, a member of the European Parliament for the Greek governing party Syriza, argued that Germany's "relationship with Greece is comparable to that between a tyrant and his slaves."[3] Some Spanish, Italian, French—and even American—policymakers and commentators share this view of German power. Protests have erupted around Europe during visits from German officials to debtor countries, marking strong public discomfort with German power.[4] According to *Der Spiegel*, some Europeans see "the Fourth Reich" when they see Germany today.[5] Many now worry that "the euro crisis … has allowed Germany to dominate Southern Europe and to suffocate it in order to impose its principles even as its export policy has meant that the country has profited from that same currency crisis more than any other country. Germany's image in some countries has become one of an egotistical economic occupier flanked by smaller Northern European countries from the same mold."[6]

Is modern Europe a "German Europe"? Are there other indications that Germany has emerged as the essential European power, if not a true "superpower?"

It is clear that Germany is the most prominent economic power within the euro zone. But the country also enjoys the world's highest trade surplus. Germany leverages this economic strength to press for its interests both within and outside the EU. For example, Germany often is able to dictate terms of internal and external agreements.[7] Still, German power has its limits. By design, Germany does not have complete control over the EU. Germany is not, and cannot be, an unchecked hegemon. This neither seems to be Chancellor Angela Merkel's intent, nor is it within the realm of possibility. Germany needs the EU every bit as much as the EU needs Germany.

Henry Kissinger once quipped that Germany is "too big for Europe, [and] too small for the world."[8] He insisted upon this characterization again in his recent book *World Order*, concluding that "German unification altered the equilibrium of Europe because no constitutional arrangement could change the reality that Germany alone was again the strongest European state."[9] According to Kissinger, the European Union and the euro have been more or less effective at reining in German ambition and the potential power associated with Germany's strong economy by binding the country to a common European fate.[10] The Union tempers Germany's self-interest and German leaders are obliged to serve two masters: those at home and those in Brussels. The result is that German power is limited in scope through a strong balance of power between national and European structures and interests.[11]

German power today is both constrained and bolstered by the EU. This means that Germany is not a hegemonic power in the same way as the United States has been the last decades. It might be better to understand Germany as a "half-hegemon."[12]

According to Hans Kundnani, "Germany is once again a paradox. It is strong and weak at the same time—just like in the 19th century after unification, it seems powerful from the outside but feels vulnerable to many Germans."[13] Kundnani noted, for example, that Germany "does not want to 'lead' and resists debt mutualization, but at the same time it seeks to remake Europe in its own image in order to make it more 'competitive.'"[14] In Kundani's view, Germany is steering the fate of the EU but also relies critically upon the Union to foster its dominance. Walter Russell Mead also sees German power anchored by and exercised in the European Union. But he also sees how that posture has given Germany the ability to project power outside the EU. "Not since the 1940s," Mead explains, "has Germany played such an important role in world politics. The rift between Russia and the West gave Germany the ability to determine the West's response and gave it the decisive voice in the shaping of a new European security order. At the same time, Germany continued to benefit from its pivotal position within the European Union. It holds the balance between north and south and east and west in Europe, giving it a place in the European order that no other country can challenge."[15]

Some commentators have argued that Germany has only cautiously accepted its new power. Stephen Green, in his book *Reluctant Meister: How Germany's Past is Shaping Its European Future*, argued that Germans resent the fact that they are the ones who have to take charge.[16] Green explained that Germans' reluctance stems from two sources: the fact that Germany hates being the "paymaster," and because "the German psyche remains deeply sensitive about anything which stirs memories of leadership as exercised by the Third Reich."[17] One can turn to the contemporary crisis in Ukraine to see how well this argument holds up. Germany's strength allows it to stand up to Russia, but only if it is doing so for Europe as a whole. Germany can play the role of broker between larger powers.[18] Germany performs well as a leader in this constrained role, where it is strong enough to see eye-to-eye but not threaten.

But, can Germany exert influence beyond these economic and European realms?

Germany is widely seen as a global leader in "green" technology and energy initiatives. A policy initiative such as the *Energiewende* (Energy Shift), which has concentrated German society on the development of sustainable and renewable resources, is representative of Germany's leadership on other topics. Thomas Friedman celebrated Germany's accomplishments in this regard, referring to Germany as a "green superpower."[19]

German law also is immensely influential as a model around the world. This is the particular form of German soft power I intend to examine in this report.

To do so, however, I find it useful first to turn to one of Germany's foundational myths.

The Nibelungenlied

The *Nibelungenlied*,[20] parts of which have been immortalized in Wagner's Ring Cycle operas, is one of Germany's foundational myths. It is a saga of self-discovery, love, heroic conquest, betrayal, and—ultimately—revenge. Herfried Münkler has argued that the *Nibelungenlied* has become the central German national myth, "linking past and future to serve as a guide for present conduct."[21] It also helps us understand the power of German law in the world.

The saga partly tells the story of Siegfried who is sent away from his ancestral home to search for himself in the world.[22] Nudging their boy out the door, Siegfried's parents explained "wenn du etwas gefunden hast, von dem du meisnt, dass es nur dir gehort, dann kommen wieder zuruck" ("when you've found something in the world that belongs only to you, then you can come home.").[23] Along the way Siegfried discovers his immense strength, slays a dragon, becomes (nearly) invincible, claims a massive treasure hoard, acquires a magic cloak that makes him invisible, marries the king's sister Kriemhild, wins some wars for his brother-in-law, vanquishes the stubborn and indomitable queen Brunhilde (his brother-in-law's wife), and is murdered with a stab-in-the-back after a jealous plot against him.[24] That is the myth's opening act. The second act details Kriemhild's bloody campaign of revenge, which ends when she burns and decapitates her brother and his scheming advisor Hagen.[25]

Although a Norse version of the saga exists, it is likely that the core of the *Niebelungenlied* is German, with elements borrowed from the Nordics.[26] Many scholars have attempted to understand the meaning of the *Nibelungenlied* for the German character and popular conscience.[27] It has been argued, for example, that the myth makes a statement about feudalism in German society, and about the complex quasi-legal obligations that already existed in Germany at the time of the *Nibelungenlied*.[28] It could be that Siegfried's adventures mean to teach us something about the social contract. The saga shows us that, for "society to function, to be considered a just and moral organization, it is the duty of each member to behave in a moral and responsible manner, not merely for his own good but for that of society as a whole."[29] Some scholars have found in that social commitment signs of Germany's fundamental legalism, which ordains and maintains the individual's role in the community. How else, except through their familiarity with law, can Germans over the centuries make sense of the complexities revolving around Siegfried's death and Kriemhild's unquestioned "wild desire for revenge"?[30]

Two elements of the *Nibelungenlied* provide particularly colorful metaphors for this reflection on German legal power in the world.[31]

First, the saga is set in the Germanic tribal kingdom of Burgundy.[32] Besides serving as the backdrop to the myth, Burgundy also produced one of the earliest-known, formalized Germanic legal systems. This includes the fifth century *Lex Burgundionum*,[33] the law code promulgated by the Burgundian King Gundobad in a period that is roughly contemporary with the events chronicled in the *Nibelungenlied*.[34] The saga's intersection with the *Lex Burgundionum* allows me to draw attention to German law's deep and rich pedigree. Some features of that pedigree have facilitated German law's reception as a model around the world. This is especially true of German law's kinship with Roman law, which was already a central component of the *Lex Burgundionum*.[35] This Roman heritage is a prominent part of the constellation of factors that links German law with the Civil Law tradition,[36] an approach to the law that it shares with the vast majority of the world's legal systems.[37]

Second, there is an impressive episode early in the saga in which Siegfried first comes to recognize and assert his extraordinary strength and virtue. As an unassuming apprentice to the master-smith Mime, Siegfried smashes the master's anvil into oblivion with a single, crushing blow of his hammer.[38] This scene left little doubt about Siegfried's supernatural superiority and it launched him on the adventures that would make him one of the central figures of the saga.[39] The episode might serve as a metaphor for German law's significant prominence and influence in the world. If not as striking as Siegfried's hammer-blow, German law is a mighty force in the world nonetheless. Germany, for example, has the second largest share of the global market for legal services.[40] German law's prominence is also evident in the significant influence it has had in comparative law research and as a model for law reform and modernization around the world. In public law, Germany's Constitutional Court has been widely emulated and some comparative constitutional lawyers credit Germany with having greater global legal influence than the United States.[41] This might be most true with regard to the principle of proportionality, which is largely viewed as a distinctly German contribution to jurisprudence and is now thought to have conquered the world as a universal technique for the resolution of public law issues.[42] It is true of German criminal law, which has influenced domestic regimes as well as the emerging regime for international criminal law. Finally, in private law, the venerable German Civil Code has served as a model for private-sector law reform and modernization around the world.

Building on these two themes—the broad appeal of German legal history and its practical influence on other systems' legal institutions and culture—I advance the thesis that Germany is now a legal superpower.[43]

LEX BURGUNDIONUM: GERMAN LAW'S POWERFUL PEDIGREE

Today's superpower stands upon foundations laid in the past. This is no less true for Germany's status as a legal superpower. In fact, Germany might rightfully claim the deepest and richest legal culture among the world's varied legal systems.[44] Significantly, that heritage links German law with the culture of most of the world's legal systems in a way that facilitates its reception as a model around the world.

Tacitus, writing in the first century, gave us early insight into the Germans' commitment to law and justice.[45] The Chaucians, the northern German tribe that Tacitus called the "most noble," were distinguished by their reliance on justice—not violence—for their superiority.[46] But Tacitus credited the Germans generally with a sophisticated legal system that consisted of law councils charged by the chiefs with the administration of justice in the villages.[47] He reported on a nuanced legal regime that sought distinct social signals from its discrete forms of punishment. "Diversity in their executions [for capital crimes]," he explained, allowed the Germans to express "that in punishing of glaring iniquities, it behooves likewise to display them to sight; but effeminacy and pollution must be buried and concealed."[48] This subtlety, Tacitus explained, applied to minor transgressions as well.[49] It was a legal system that encompassed private matters and not just criminal law. Tacitus noted, for example, that "laws of matrimony" were strictly observed by the Germans.[50] Finally, Tacitus remarked that a common legal tradition often served as a bridge between the splintered and varied German peoples.[51] This is an old theme, a dream really, that still holds immense power over the Germans: that law might forge unity out of diversity.[52]

The *Lex Burgundionum*,[53] a Germanic law code thought to have its origins in the fifth century and with traces of its continuing relevance even in the eleventh century, reveals that the German legal culture did not deteriorate after the more significant—and brutally violent—encounters between Tacitus' Roman successors and the northern Germanic barbarians.[54] Just as the Germans themselves, their law adapted and evolved without losing its distinctly Germanic character.[55] Already with the *Lex Burgundionum* Germanic law was beginning to show the influence of the Roman law. The code, for example, consisted in several books providing different legal regimes for Burgundians and Romans, the former regime consisting especially in the codification of the customs that would have governed the events in the *Nibelungenlied*.[56] In fact, the Burgundian King credited with the promulgation of the *Lex Burgundionum* is Gundobad, who succeeded his father King Gundioc in 473 A.D.[57] Gundioc, in his turn, had assumed the throne after King Gundahar—or Gunther—lost the kingdom in a great conflict with the Romans and Hun mercenaries.[58] Gunther is none other than the historical Burgundian King who plays a central role in the *Nibelungenlied* as Kriemhild's brother and, eventually, Siegfried's brother-in-law and persecutor.[59]

The mere act of codifying tribal custom in the *Lex Burgundionum* was itself a dramatic concession to Roman jurisprudence,[60] a concession no doubt secured by the time of Gundobad thanks in part to the new balance of power in Burgundy that resulted from Gunther's defeat.[61]

Roman codification remains one of the most distinct features of German law. This is part of the pedigree that gives German law its contemporary global relevance among Civil Law countries. Largely credited to

the theoretical work of Friedrich Carl von Savigny, who is said to have triumphed in the nineteenth century's long *Kodifikationsstreit*,[62] Germany's modern codification marries the Pandects' Roman law with German customary law (*Gewohnheitsrecht*),[63] which might even carry echoes of the ancient *Lex Burgundionum*.[64] At the very least, the 1900 Civil Code (*Bürgerliches Gesetzbuch*) occupies itself with the subjects covered by the *Lex Burgundionum*: The Law of Obligations (including obligations arising out of physical harm done to others); Property Law; Family Law; and Succession Law. Of course, those are also the grand divisions of the ancient Roman law.[65]

German law is now regarded as one of the prominent contemporary heirs of the Roman legal tradition, which very often is treated as the essence of what comparative lawyers call the Civil or the Continental Law family.[66] There are a number of ways to slice the Civil Law tradition so that it accounts for its distinct branches, including a "Germanic family" that is distinct from the "Roman family" (as exemplified by the French Code Civil), the Scandinavian Family, or the Latin American and Asian families. There are good reasons to doubt the integrity of any of these categories. But the thing each of these supposed groupings have in common—in different conditions and colors—is the influence of Roman law.[67]

In Germany the Roman law has had a substantive influence. It also has shaped the method and mentality of the German lawyer.

The substantive remnants of Roman law are too many to catalogue here.[68] It might be enough to note—as just one example—that Hans Hermann Seiler concluded that "especially in the areas of the law of property and the law of obligations, [the German Civil Code has] done practically nothing else than ratify Roman law regulations."[69]

I want to linger instead on the idea that the Roman law has especially shaped the way Germans think about and do law as a cultural matter. This is a distinctly scholarly, systematic, and conceptual legacy—"a tradition of rationality in the law."[70] The Roman law, after Europe's Dark Ages, had its revival chiefly in the Italian universities where the Digests and Institutes were subjected to intensely systematic, scientific analysis.[71] The jumble of European laws at the time left the jurists with very little else that was coherent or portable enough to study in the law faculties in Europe's new universities.[72] The Italian-trained scholars—scientific scrutinizers of the Roman law—came to dominate the academy, also in Germany where their theoretical work was given an early and warm welcome.[73] At the turn of the fifteenth century, for example, half of the judges at the Imperial Chamber Court (*Reichskammergericht*), sitting in Frankfurt am Main, were Romanist scholars who were resolved to apply the Roman law as the common law of the empire.[74] This scholarly, scientific tradition—uniquely keyed to the study of the Roman law—would eventually be entrenched by a program of codification that aspired to a similar systematic vision of the law. That process began in the sixteenth century and ended in the still-functioning German Civil Code of 1900,[75] which "advanced systemic legal thought still further."[76] Matthias Reimann called the German Civil Code "the last fruit of the systematic Romanist legal science"[77] and he concluded that the Germans pursued this legal science (*Rechtswissenschaft*) "more consistently, debated it more intensely, and refined it more highly than any other contemporary legal culture."[78]

The Civil Code's scientific approach to the law drew from the emerging natural sciences of the late nineteenth and early twentieth centuries. It is meant to be similar to physics or mathematics in that it aims for a "higher state of aggregation" that suggests particular, correctly stated, objective legal concepts.[79] The result is imagined to be a legal order that is "vastly more intelligible and manageable [consisting in] a logical system containing all fundamental principles [and producing a] gaplessness and completeness."[80] This would be possible only with a system of law that is governed by its own scientific, logical perfection and not bound to the circumstances to which the rules are applied.

At the time of its enactment and entry into force the German Civil Code was seen as having fulfilled this vision to a remarkable degree. It was described in nearly breathless terms as "the greatest among [Germany's] exploits,"[81] as "a monument of legal learning and … one of the ripest expressions of the

aims and methods of modern civil jurisprudence,"[82] and as "the most carefully considered statement of a nation's laws that the world has ever seen."[83] More than a century after its enactment, the Civil Code remains in force almost exactly in its original form. One commentary summed up the wonder of its endurance in these terms: "The fact that the [German Civil Code] has lasted so long, providing legal solutions to a variety of social and economic problems arising under imperial, social democratic, totalitarian and liberal social state political regimes, provides a lasting tribute to the wisdom and foresight of its drafters."[84] More recently the German Civil Code was described as "one of the masterpieces of European legal culture."[85]

It is the Civil Code's abstract, conceptual, systematic method—inherited from the study of the Roman law, which was itself a highly rational and systematic regime—that now serves as the Roman law's most significant impact on contemporary German law. The life of the law in Germany is abstraction and rationality, system and concept, objectivity and science. It is nothing like the inductive, fact-specific culture of the Common Law tradition. Oliver Wendell Holmes, Jr. famously endorsed the Common Law approach with the quote "The Life of the law has not been logic. It has been experience."[86] But that is not the way of the German Civil Code. Reimann explained that the Code "was … the fruit of nineteenth-century German legal science and especially shaped, in its style and structure, by its Romanist branch (Pandectism). As a result, the [Civil Code] was not only based on fundamental principles but also rigorously (although not flawlessly) systematic in its organization. It was highly integrated through the complex interplay of its five main books and its many chapters, sections, etc. And it was terse as well as precise in its formulations which required very close reading and great care in application. On the whole, the Code was like a complex and finely-tuned machine, built by highly trained experts for highly trained experts."[87]

German law's scientific character has enhanced its appeal around the world, where it is seen as objective and less burdened with parochial habits and distortions and adaptations. It is just one example, but German law's Roman heritage partly explains its appeal as a model for South African lawyers. As Christa Rautenbach & Lourens Du Plessis noted, "Traditionally, exchanges between South African and German jurists remained restricted to contact and co-operation between legal scholars. These exchanges were triggered and facilitated by the shared civil-law traits in their respective legal systems, which are traceable to ancient as well as "learned" medieval Roman law. In some circles, cordial academic fellow-feeling emerged from ideological and dogmatic affinities. A so-called purist movement among South African jurists—with its heyday roughly between the late 1930s and middle 1980s—preached and promoted in class, but eventually also in courtrooms, exemplified an adherence to pure, civil-law-like Roman-Dutch law, untainted by English legal influence and unperverted by English-minded judges' (mis)understanding of it. The purists also bore the torch of 'principled legal thinking,' understood to be of learned Roman-law extraction and therefore shared a heritage with civil-law legal systems. This accounts for the purists' heartfelt empathy with the German historical school and nineteenth century pandectism, which shaped key facets of the private-law theory, taught, mainly but not exclusively, at Afrikaans-speaking law faculties in South Africa even to this day."[88]

SIEGFRIED'S HAMMER: THE RISE OF A LEGAL SUPERPOWER

Standing on a deep and rich jurisprudential history, from which it has inherited a sophisticated legal framework that it shares—in some form—with most of the legal systems of the world, Germany has emerged as a legal superpower. Germany has sought this role. The government has pursued it as a deliberate policy.[89] Legal actors and legal institutions have contributed to the effort of giving German law greater priority and expanding the influence of the country's legal system. German law's prominence has also resulted from less calculated dynamics. For example, so long as the German economy remains strong, the German legal system will thrive alongside it, necessarily playing some part in managing trade in and with the world's fourth largest economy.[90] Some share of the prominence of German law can also be attributed to the attractiveness of its institutions and doctrine. The following are mere glimpses of Germany's jurisprudential gravitas as a model for law reform and development around the world.

As with that single, devastating hammer-blow on Mime's anvil, which left no doubt about Siegfried's power, the following points suggest Germany's emergence as a legal superpower.

Germany in the Global Market for Legal Services

In 2009 the global market for legal services produced revenues of $546.8 billion.[91] The United States claimed the largest share of that massive market.[92] Germany was a distant second.[93] If that sounds inauspicious, then some additional perspective lends Germany's runner-up status greater meaning. First, Germany's share of the global market for legal services was nearly 2 percent greater than its share of world GDP.[94] This substantiates two conclusions the United States International Trade Commission (USITC) reached in its 2011 Annual Report on Recent Trends in U.S. Services Trade.[95] The USITC saw growth in Germany's legal services sector over the preceding years even while the traditional powers in the market saw declines.[96] The USITC also noted that Germany saw these gains despite sluggishness in the economy.[97] "The German market did relatively well," the USITC concluded, including "substantial growth not associated with performance of the economy."[98] Second, the growth Germany managed while others slumped allowed it to move ahead of the United Kingdom on the table.[99] This triumph over America's Anglo-American Common Law cousin,[100] which had perennially been the second largest player in the global market for legal services,[101] came despite the fact that the German legal services market labors under the comparative disadvantage of its inaccessible language.[102] Third, Germany's status as a legal superpower might seem to be contradicted by the fact that no German law firm cracks the list of the 100 top-grossing global societies.[103] But this reflects Germany's tradition of smaller and less-specialized firms.[104] Notably, the United Kingdom fell behind Germany in total share of the global legal services market despite placing a large number of its firms among the world's top-100.[105] According to the USITC, small firms such as those that dominate the German market fared better during the recent global economic downturn than did the large, cosmopolitan firms.[106] While the large American law firms were shedding more than 4 percent of their legal services employees in 2008-2009, employment in the German legal services sector grew by 1 percent.

Major players in the German legal market have sought to foster German law's emergence as a global force.

Even if their efforts appear bumbling, they nevertheless help tell the story of Germans' desire for German law's prominence. In 2008 a number of the leading legal institutions and organizations in Germany formed the *Bündnis für das deutsche Recht* (Alliance for German Law). The charter members include, among others, the Federal Ministry of Justice, the German Association of Judges, the German Federal Bar, and the German Bar Association.[107] One of the Alliance's first efforts was the publication of a glossy, lushly illustrated promotional brochure—in German and English—presenting the many strengths of German law. The brochure, entitled *Law—Made in Germany*,[108] boasts that German law is "global, effective, and cost efficient."[109] Those, and other, creditable characteristics are largely attributed to German law's heritage as "part of the codified legal system that has developed across the European continent."[110] The brochure's introduction repeatedly emphasizes Germany's membership in "the long-standing legal family of continental legal systems," a legal family that is "characterized by its codified system of legal provisions."[111]

The Alliance's loud insistence on associating Germany with the Civil Law family seeks to tap into the pathways of kinship and familiarity—rooted in the Roman heritage of the Civil Law—that I described earlier. But the real purpose of the project is to offer a bit of salesmanship in response to the increasing competition in the global market for legal services. Above all, this means positioning German law and German legal professionals against the Common Law's champions: the United States and the United Kingdom. Despite its admirable climb to second place in the global rankings, Germany still claims only a modest fraction of the Common Law jurisdictions' combined share of the global market. Considering the remarkable strength Germany shows in other sectors of the global economy,[112] German law's mortal performance seems to chafe.[113] The brochure expresses dismay at these circumstances and seeks to connect, at least symbolically, German law with Germany's general tradition of industrial quality and technical excellence.[114] "Made in Germany is not just a quality seal reserved for German cars or machinery," Federal Minister of Justice Sabine Leutheusser-Schnarrenberger explained in the brochure's introduction, "it is equally applicable to German law."[115]

The not-very-subtle subtext of *Law—Made in Germany* is that peripheral, feckless, and expensive Common Law lawyers are unjustifiably winning the day. In this bizzaro-world Dodge has stolen the advantage on Daimler.

More than just market share is at stake. The World Bank has stoked the legal-cultural chauvinism and economic nationalism that is at the heart of *Law—Made in Germany* with its *Doing Business Report*, which routinely gives priority to Common Law jurisdictions when scoring countries' policies that impact the following indicators: "starting a business," "protecting investors," "employing workers," "getting credit," "paying taxes," and "dealing with licenses."[116] The *World Competitiveness Report*, published by the International Institute of Management Development (IMD) and evaluating analogous policy concerns, produces similar results.[117] Comparative law scholars in the legal origins and comparative law and economics schools,[118] seizing on this data, have helped bait Germany into this response with their interpretation of these rankings and other research in which they claim that comparative law (including the World Bank's and IMD's data) supports the conclusion that the Anglo-American world can attribute its economic superiority, in no small part, to its Common Law heritage.[119] There is enough here to drive the Germans mad.[120] But it is the suggestion that the Civil Law tradition is somehow congenitally flawed that animates *Law—Made in Germany*. That account harshly conflicts with what some see as the Civil Law's internalized attitude of superiority. Comparative law scholars John Henry Merryman and Rogelio Pérez-Perdomo, for example, claimed that the Civil Law believes itself to be "culturally superior to the Common Law, which seems [to Civilians] to be relatively crude and unorganized."[121] Repeatedly, *Law—Made in Germany* makes the point that German law—as part of the Civil Law family—is clear, certain, concise, and consistent. It is everything that the chaotic Common Law is not. For further proof that jurisprudential pride is also at issue, it should be noted that the Germans have formed a unified front for a mutual defense with that other prominent member of the Civil Law family. In the companion brochure Continental Law, stakeholders in the German and French legal communities explain that "[b]ecause of… codification, continental law is accessible to everyone.

It is easy to comprehend: by reading the codes, any person, whether an entrepreneur or a consumer, can learn the rules of law that apply to him. It is also easy to understand because each rule is formulated in simple and general terms. The legal certainty that ensues is a major advantage for citizens, enabling them to anticipate the outcome of litigation and to assess the financial risks of legal action.

In common law countries, the search for the applicable law often requires consulting a long series of court decisions in order to find an appropriate precedent – if one even exists. Understanding all of these court decisions is often difficult for non-lawyers, who therefore must rely on professional legal advisers. The need for such legal assistance greatly increases the costs for those seeking to enforce their rights."[122]

Old enemies now find themselves bound to the common cause of advancing the priority and power accorded the Civil Law tradition in a brutally competitive global market for legal services. Germany may want to improve on its second-place ranking in that market. But it will do so from an incredible position of strength. It is already a tremendously influential model for law reform and development around the world.

Law Made in Germany: A Global Brand

In the grand struggle—as it is imagined by the World Bank and the Alliance for German Law—between Germany's Civilian legal culture and the Anglo-American Common Law, what is the evidence that Germany has scratched out the right to be regarded as a legal superpower? There are impressive signs of Germany's global prominence in the fields of public law, criminal law, and private law.

PUBLIC LAW

German constitutional law is one of the most admired, studied, and emulated regimes in a world that has an intensifying interest in foreign constitutional systems.[123] In that "market," "Germany and Canada are America's principal competitors in the export of constitutional norms."[124]

The prominence of German constitutional law has an institutional facet. The German Constitutional Court, which is said to be the "guardian of the constitution,"[125] pioneered the distinct constitutional court model that has taken root in every corner of the globe. The story of Germany's constitutional law export success also has a substantive facet. The Constitutional Court's practice of the proportionality principle—one of its distinct approaches to constitutional interpretation—has also conquered the world.

The German Constitutional Court as a Model

The German Federal Constitutional Court is closely identified with the so-called "Kelsenian model" of constitutional adjudication.[126] The Kelsenian model is the most widely distributed approach to constitutional tribunals.[127] It has been adopted in emerging or reforming democracies in Europe, Asia, Africa, and Latin America.[128] As this list might suggest, the Kelsenian model has found particular resonance in post-authoritarian legal systems. That, of course, was the case in postwar and reunification Germany.

In the first half of the last century Hans Kelsen formalized—and implemented in Austria—nascent legal theory that suggested the need to isolate a legal system's constitutional jurisprudence in a centralized and specialized tribunal that would not be aligned with or integrated into the so-called "ordinary" judicial system.[129] This was necessary, Kelsen explained, because constitutional law—unlike the formalist and positivist *Reine Rechtslehre* to which he hoped ordinary courts would aspire—is inherently and thoroughly political.[130] Constitutional law would be political because it would inevitably involve the reinforcement of the new Austrian Republic's political ideal of a federal state against powerful forces of centralization.[131] And constitutional law would be political because it would inevitably involve the judicial defense of minority interests, on the basis of constitutional rights, against the majority's political will. The latter tension can be expressed as the conflict between judicial review, on the one hand, and parliamentary legalism, on the other hand.[132] Kelsen argued that the activist-political character of constitutional law judging—which he described as the expression of the political forces of a particular people—was not an appropriate subject for traditional judicial resolution.[133] It would be better, he thought, if constitutional politics were done by a new and

wholly separate institution: a constitutional court. This, of course, is distinct from the diffuse and integrated approach to constitutional adjudication practiced in the United States.[134] It is true that the Supreme Court has the last say on the interpretation of the U.S. Constitution.[135] But it is by no means the only judicial organ with the power to rule on and apply American constitutional law. Every court—state or federal, trial or appellate—can consider and reach constitutional conclusions in the American system.[136]

Kelsen helped to conceptualize, and he eventually served as a justice on, the Austrian Constitutional Court after World War I.[137] After the Nazis came to power, he abandoned his faculty chair in Cologne and passed the World War II years in exile in the United States.[138] Kelsen returned to Europe after the war and he and his pupils had significant influence on the postwar German constitution, including the new Federal Constitutional Court envisioned by the *Grundgesetz*.[139] The German Federal Constitutional Court, along with the postwar Italian Constitutional Court, is now seen as exemplary of the Kelsenian model. Alexander Somek, largely because it is the best-known example of Kelsen's vision, conflated the German Court with the Kelsenian model in his wide-ranging study of global constitutionalism.[140] Somek's examples of a Kelsenian court are drawn almost exclusively from the practice and procedure of the German Federal Constitutional Court.[141] Tom Ginsburg, when writing about the global expansion of "specialized constitutional courts," noted that Kelsen's model was "adopted in post-war Germany" before reaching as far afield as Latin America.[142] According to some surveys, the German Kelsenian model has even attracted enthusiasts in both France and in Francophone Africa. Former German Constitutional Court Justice Brun-Otto Bryde, as a blunt matter of fact, acknowledged Germany's close identification with the Kelsenian model and that model's global popularity: "[I]n the friendly competition in the constitution-drafting business in reform countries in the 1980s and 1990s between the American model of judicial review through ordinary courts and the Kelsenian model of a specialized constitutional court, a competition often fought on the ground between American and German foundations and their legal missionaries, the constitutional court model regularly won."[143]

German Constitutional Law's Substantive Influence

The substance of German constitutional law also attracts the interest of the world's comparative lawyers. In the leading American textbooks on comparative constitutional law, for example, German constitutionalism is given extensive coverage.

One example, from among many, of German constitutional law's institutional and substantive prominence is the considerable influence German constitutional law has had on post-apartheid constitutional developments in South Africa. It was not obvious that German public law would attract South Africans' attention. South African law had more natural affinities with Dutch and English jurisprudence.[144] The linkages between the South African and German scholarly communities, while important, were not so profound that they would have privileged German law over other constitutional regimes as a model.[145] But, as one set of scholars remarked, the countries' shared experience transitioning away from racist and totalitarian regimes in the second half of the twentieth century "served to forge [a] sense of understanding between them, marked dissimilarities notwithstanding. Germany is an example of a relatively young, post-World War II, democracy from whose experience a new South Africa … stood to learn a lot."[146] In fact, the most recent stage of Germany's constitutional reckoning with the past—the country's reunification in 1990—immediately preceded South Africa's peaceful transition to democratic constitutionalism and majority rule.[147] South Africa established a German-style Kelsenian constitutional court and not an American-style Supreme Court.[148] And a number of German constitutional provisions were directly incorporated into the post-apartheid South African constitution.[149] Despite the significant differences between German and South African law, language, and culture, the South African Constitutional Court has relied extensively on the decisions of the German Federal Constitutional Court when citing to foreign jurisprudence.[150]

German Proportionality Conquers the Globe

Another example of the reception of German constitutional law is the remarkable global embrace of the German constitutional principle of proportionality.

Drawing on a sophisticated administrative law tradition, especially Prussian police law, the German Constitutional Court developed a systematic analysis for interpreting and applying basic rights that it referred to as the "proportionality principle."[151] The Court eventually elevated this interpretive system to the status of a constitutional guarantee. That is, individuals can claim that the state's failure to act proportionately when infringing upon a fundamental right is itself a constitutional violation. Proportionality—more than the enjoyment of the underlying fundamental rights—has become the essence of constitutional protection.

Proportionality review, as practiced by the German Constitutional Court, is more than a mere exercise in balancing interests. Instead, it is a highly methodical system that only involves weighing as the last of four discrete, successive considerations. Before determining whether measures that encroach upon basic rights are proportional to the benefits they are intended to produce, the Court first examines whether the measures are legitimate, suitable, and necessary.[152] The Court faithfully resolves each of these threshold standards before taking up the less-bounded challenge of balancing or weighing interests.[153]

To believe the consensus view among comparative constitutional lawyers, this systematic approach to constitutional proportionality review has bewitched the whole world, perhaps with the exception of the United States. David Beatty, in his book *The Ultimate Rule of Law*, explained that "judges all of the world have converged on a framework of analysis that allows them to evaluate the work of the political branches of government from a common perspective … [this] working model of judicial review … relies, almost exclusively, on the principle of proportionality … In all areas of government regulation, no matter the nature of the right or freedom that is alleged to have been violated, … the test is always the same. Laws … must … respect a basic principle of proportionality."[154]

Beatty understood this to be a German global phenomenon. Tracing the doctrine's transmission he begins, of course, by noting the principle's German roots.[155] But like an exotic travel itinerary, Beatty finds the principle in prevalent use in Canada, South Africa, and Israel. The last reference might be something of a surprise. It suggests that law in the Jewish and Democratic State founded by exiles and survivors of Germany's Holocaust have embraced—and integrated into their legal identity—a principle of law first developed in Germany. This would be remarkable evidence of Germany's global legal influence. And it is true. Justice Aharon Barak, the former president of the Israeli Supreme Court, has written extensively on the principle of proportionality and he unhesitatingly acknowledges Israeli law's debt to German law, even if it is an attenuated lineage. He explained that "The Supreme Court of Israel has been influenced on this matter by the Supreme Court of Canada. I assume that the Supreme Court of Canada was influenced by the case law of the Supreme Court of Germany, or by the European Court of Human Rights, which, in turn, was influenced by German law."[156] Proportionality, as a guiding principle for the judicial enforcement of the rule of law, is in ascendance everywhere.[157] And no one doubts its provenance in late-nineteenth century German police law.[158] In their studies of proportionality's global reception, Moshem Cohen-Eliya and Iddo Porat put the matter as a matter of fact: "The principle of proportionality first arose in Germany,"[159] and "spread beyond" its origins in German law.[160]

CRIMINAL LAW

German criminal law has also had significant influence around the world. This has been true in Europe as well as in Asia and Latin America. It is true of both Civil Law and Common Law countries. Markus Dubber, a leading comparative criminal law scholar, has identified a rambling litany of countries in which German criminal law has had a very significant influence, including: Spain, Portugal, Croatia, Greece, Turkey, Austria, Switzerland, Finland, Sweden, Israel, Taiwan, South Korea, Japan, and the countries of Latin America.[161] Besides these domestic successes, German criminal law is also very influential in international criminal law. In fact, the global reach and influence of German criminal law prompted Dubber to proclaim that "the sun never sets on German criminal theory."[162]

One prominent example of German criminal law's

influence in other countries is the reception of German criminal law doctrine's three-step analysis of criminal liability.[163] This structured, tripartite system includes assessments of: (i) satisfaction of the elements of an offense; (ii) wrongfulness; and (iii) culpability.[164] Although it only awkwardly fits with the traditional American theory of criminal liability,[165] this approach—with the nuance and precision it allows—has even started attracting the attention of scholars and judges in the United States.[166] George Fletcher has explained that the tripartite approach is now completely taken for granted in many countries, including "Italy, Spain, Portugal, Japan, Korea, Taiwan, Greece, and virtually all of Latin America."[167]

Argentina, among many other Latin American countries,[168] has looked to German criminal law for inspiration.[169] After the country overcame its dictatorship, Professor Julio Maier of the University of Buenos Aries was appointed to lead the reforms of the criminal justice system. Maier, who had studied in Germany,[170] made extensive comparative use of the German *Strafprozessordnung* (Code of Criminal Procedure).[171] German criminal law, for example, grants prosecutors only limited discretion.[172] This approach—and not America's unlimited prosecutorial discretion—was implemented in Argentina's newly drafted Code of Criminal Procedure.[173] In another example, Argentina adopted Germany's mixed-entity for making criminal law decisions, including both professional and lay judges sitting together in a criminal court.[174]

Argentina's Andean neighbor Chile is another example of German criminal law's influence in Latin America. In 1995 the Chilean government invited the German government "to support the drafting process of a new Criminal Procedure Code."[175] Unsurprisingly the result bore significant resemblance to German criminal procedure.[176] It is only symbolic, but the comic book that was published to help introduce the reforms to the broadest spectrum of Chilean society featured the logos of the Chilean Ministry of Justice and the German Agency for Technical Cooperation on the back page.[177] After the reformed Code of Criminal Procedure was promulgated the German government continued its deep involvement in Chilean criminal justice by providing assistance in drafting processes for "prisoner's rights … criminal offenses, and a reform of the juvenile justice system."[178] Additionally, the German government shared policing policies, preventative detention regulations, and aided in training law enforcement officers.[179]

All of the comparative interest in German criminal law is justified, in the view of some scholars, by the fact that the German Penal Code is "either theoretically convincing, pragmatically useful, or both."[180] To put the matter more plainly, Markus Dubber reported that "[a]n eminent Spanish criminal law scholar recently praised the German system of criminal law as 'an imposing construct that must be considered one of the great achievements of the human sciences.'"[181]

The esteem in which it is held helps explain why German criminal law has also had such a significant influence in international criminal law, where some have even begun to whisper about a "German invasion."[182] Jens Ohlin documented (and apologized for) this development by reference to just one example. He reported on the International Criminal Court's (ICC) adoption of the German approach to co-perpetration, which many critics see as evidence of Germany's "outsized influence on the direction of the Court's jurisprudence."[183]

The ICC has rejected Anglo-American approaches to the venerable problem of criminalizing the conduct of leaders and organizers of major crimes, preferring instead the "Control Theory of Perpetration" developed by the German scholar Claus Roxin.[184] Motivated by the difficulty of assigning criminal liability that emerged during the trial of Adolf Eichmann in Israel, Roxin proposed that a criminal mastermind might be charged as a principal, even if the actus reus of the crime is committed by an underling, on the basis of the mastermind's "control" over or use of the underling as "an instrument to perform" the crime.[185] Ohlin explained that "Roxin's theories were highly influential in German academic circles" and were especially relevant for Germany's prosecution of East German leaders after reunification.[186]

In the Lubanga Case, as it has done with other elements of German criminal law doctrine, the ICC adopted and adapted the German Control Theory of Perpetration.[187] In fact, the Court portrayed this

distinctly German approach to co-perpetration as representative of the way this issue is handled around the world.[188] Others have acknowledged this German coup at the ICC. Neha Jain concluded that "co-perpetration and indirect perpetration are based on established forms of participation in German criminal law and are currently the favored doctrines at the International Criminal Court."[189]

This is a broader trend, which James Stewart characterized by concluding that "in the past years, the ICC has embraced German criminal theory as a tool to interpret its own statute."[190]

PRIVATE LAW

The Civil Code's Global Appeal

In 1814 the eminent German law professor Anton Friedrich Justus Thibaut proposed that the Germans adopt a legal code as a way of unifying the diverse legal systems of Germany's many kingdoms and principalities. The ambition was to prepare a code with the simplicity, coherence, and modernity of Napoleon's Code Civil, which was the much-admired, if revolutionary, example of the age.[191] It would take the rest of the century to achieve it—not the least because Prussia would first have to unite the cacophonous Germans as a single nation under the firm grip of the "iron chancellor" Otto von Bismarck.[192] When they at last got their *Bürgerliches Gesetzbuch* (Civil Code or BGB) in 1900,[193] the Germans would have a very different private law regime than the one ordained by the French Code Civil.[194] The latter is based on the principles of "rationalism and ius-naturalism," whereas the former is "scientific, technical, and heavily influenced by the Pandectist system."[195] The term "Civil Law" comes from a German translation of the Roman "ius civile."[196] It designates that part of private law that is contained in the Civil Code and in *Nebengesetze*—laws that have been enacted in order to carry out the principles laid down in the Civil Code or to amend its provisions.[197] The Civil Code includes the law of contracts and quasi-contracts, the law of torts, the law of property (excluding the law of patents, copyrights, and designs), the law of domestic relations, and the law of succession.[198] In addition to these discrete legal subjects the Civil Code deals in its first book with a number of legal questions and issues that are of general importance and with all other relations of private law.[199]

When the BGB came into force on 1 January 1900 it was considered to be the most scientific legal regime ever promulgated.[200] The highly systematic framework has given rise to highly systematic treatises, produced by German legal scholars. These treatises are based on principles originally drawn from the study of Roman law.[201] The BGB—and the scientifically refined treatises that accompany it—have been immensely influential throughout the Civil Law world.[202] The methods and the concepts created and developed by German scholars in their engagement with the BGB have been applied around the world. They have come to have influence on other fields of law, including public law, and for this reason it is possible to say that German private law and its methods have come to "dominate legal scholarship."[203] Joseph Darby remarked that the fact that the BGB has lasted so long—providing legal solutions to a variety of social and economic problems arising under imperial, social democratic, totalitarian, and liberal social state political regimes—is one of the factors that has burnished the Code's global credibility.[204] Here I want to offer just a few representative examples of the profound impact the BGB has had on modern codification around the world.[205] The German Civil Code, for example, has influenced developments in private law in Europe, Latin American, and Asia, including: Japan, Estonia, Brazil, China, and Taiwan.[206] In some of these cases the BGB was the principle model for new national codifications.[207]

Japan

The Japanese Civil Code was decisively influenced by the German Civil Code.[208] Structurally, the two are nearly identical, with five separate "books" covering the General Part (Book I), Property (Book II), Obligations (Book III), Family Law (Book IV), and Succession (Book V).[209]

Based on the sources of influence on the development of Japanese private law, that history can be divided into three stages.[210] In the first stage—the "commentaries era"—scholars made efforts to

provide commentaries on the Japanese Civil Code, which had been compiled under the influence of German and French law as well as other foreign legal regimes[211] In the second stage—the "theory reception era" running from the end of Meiji dynasty to the end of World War I—Japanese private law was reconstructed on a theoretical system that drew explicitly from German Civil Law jurisprudence.[212] In the third stage—the "comparative law era"—that Japanese Civil Law scholars stopped making nearly-exclusive reference to German private law and began to show interest in other countries' private law regimes.[213] The Japanese Civil Code, therefore, is the result of various parts of foreign private law regimes, mainly the German and French Civil Codes. Despite this wide inheritance and hybrid character, Japanese Civil Law is unmistakably a product of the legal theories received from German private law jurisprudence.[214] For many years German jurisprudence served as an almost definitive authority for Japanese law, even for some time after the World War II.

Throughout the late-nineteenth century and early-twentieth century modernization reforms, the Japanese looked in particular to German law for inspiration. Acutely conscious of the Western countries' dominant role in China and other Asian countries, in this period Japan adopted a new form of government and new governing institutions.[215] Lansing and Wechselblatt concluded that, in some respects, the Japanese have been struggling with these westernizing shifts for the last one hundred years.[216] The embrace and reception of western-style commercial activities was one of the biggest changes in Japanese society during this period.[217] This, however, required the adoption of the legal framework needed to govern and facilitate the new commercial sector.[218] English Common Law was thought to be too "individualistic and adversarial" for the Japanese people, who preferred "wa."[219] German law, with its well-known "drops of social oil," was seen as a better fit.[220] The German Civil Code also fostered paternalistic values that the Japanese favored. It—along with many other elements of German law—became the basis for Japan's private and commercial legal regimes.[221] Lansing and Wechselblatt have assembled the following chart surveying a selection of Japanese law reforms from the turn-of-the-century. It clearly demonstrates the profound influence of German law in the development of Japan's modern private law regime:[222]

YEAR	ITEM	INFLUENCE
1880	Criminal Code	French
1880	Criminal Procedure Code	French
1889	Constitution	German
1890	Civil Code	French
1890	Civil Procedure Code	German
1890	Commercial Code	Eclectic
1890	Criminal Procedure Code	Eclectic
1898	Civil Code (II)	German
1899	Commercial Code (II)	German
1905	Secured Bonds Trust Act	Common Law
1907	Criminal Code (II)	German
1922	Criminal Procedure Code (II)	German
1922	Bankruptcy Act	German

Estonia

Estonia declared its independence for the first time in 1918 after Germany defeated the retreating Russian Army in World War I. In 1940, and again in 1944 after the retreat of the German occupation forces during World War II, Estonia was occupied by the Soviet Union. The Baltic country regained its independence in 1991. Only then did it have the opportunity to codify its private law on its terms.[223]

As Irene Kul explained it, the modernization of private law—including the adoption of a new Civil Code—began in 1920 during Estonia's first period of independence.[224] The process was nearly completed before the Soviet takeover in 1940 and the draft Civil Code was never formally enacted. [225] Kul noted, however, that the Civil Code was heavily influenced by Germanic civil codes, including those in Germany, Switzerland, and Austria.[226] In this respect, the draft law also followed the traditions of Pandect civil codes.[227]

Kul concluded that Germany's influence over Estonian private law did not end in the mid-twentieth century. The General Part of the Civil Code Act (GPCCA) was adopted in 1994 and was later replaced by a new version in 2002.[228] Kul explained that the GPCCA largely follows doctrines borrowed

from German and Swiss law.[229] The Property Law Act (PLA), for example, almost exclusively relied on the main concepts and provisions of the German Civil Code.[230] Kul offered several indications of this, including the fact that the Property Law Act used the German system of transfer based in a real agreement and delivery of possession.[231] According to Kul the German influence did not stop with the Civil Code. The German Commercial Code and Insurance Contract Act also played important roles as models for Estonia's post-communist reforms. Other German laws regulating issues surrounding the law of obligations were also extremely influential.[232] The Estonian Family Law Act (FLA) from 1995 was rewritten and adopted as a new law in 2010. According to Kul, it was also based on the German Civil Code, including the enduring German conception that a marriage is a private law contract.[233]

Mainland China and Taiwan

Considering China's immense power in the world today, one attenuated but important vehicle for the power of German law in the world will be its immense influence over Chinese private law.

Reform of the Chinese legal system began in the late Qing dynasty after the First Opium War. The British and other westerners introduced the concept of private law. Several Chinese politicians, including Zhang Zhidong and Liu Kunyi, called on the reformers of the late Qing to draft a civil code.[234] It was patterned on the German Civil Code, via German private law's influence over reform of Japanese private law, because a judge of the Tokyo court participated in these efforts.[235] The first three books of the Draft Civil Code of the Great Qing—General Principles, Obligation, and Rights Over Things—were finished by 1911, but shortly thereafter the dynasty succumbed. For this reason the draft Code never entered into force under the Qing.[236] Still, the Qing Code, with its German heritage, had a great influence on the Civil Code that would be drafted and enacted in the years to come.[237] China began a process of political and legal reform at the beginning of twentieth century, at the same time that Germany's new, celebrated Civil Code entered into force. The attraction of the new BGB, combined with the historical influence of German law on Chinese private law, made Germany a natural and influential point of reference for Chinese reformers.[238] This coincidence of timing was one of the reasons that Chinese private law came to be based on a model of German private law.[239]

China eventually adopted a Civil Law-style legal system composed of the Six Laws of China, which were modeled on European legal codes.[240] The six laws—or codes—were the Organic Law of the Courts, Commercial Law, Civil Code, Criminal Code, Civil Code of Procedure, and Criminal Code of Procedure.[241] The codes and other laws governing commercial and business activities were drafted by foreign-law-trained Chinese with the help of western legal scholars and they were mainly used in big cities, especially coastal cities, to govern business transactions and relations with foreigners.[242] The new, western-style codes had clear European and Roman pedigree, which placed an emphasis on a liberal understanding of individuals' freedom to determine their lives.[243] But the majority of Chinese living in the countryside never heard about these legal codes and they clung to Confucian teachings and the notions of natural law they embraced.[244] Largely for this reason the Civil Code regime failed, a fact used by western interests to criticize the supposed backwardness of the Chinese legal system and to insist on the continuing application of their foreign law to govern their actions in China.[245]

The inability to bring an end to the extraterritorial application of foreign law in China led the Nationalist government to restart the process of drafting a Civil Code.[246] The Second Draft Civil Code (published in 1926) was largely based on the first draft of Civil Code (from 1911). Again, the Chinese Code was significantly influenced by German law, as well as the Swiss Law of Obligations.[247] The second draft fared no better than the first, failing due to the political upheaval that plagued China in the first-half of the twentieth century.[248]

Recognizing the desperate need for a unifying and functioning legal framework, the Nationalist government called the Civil Code Draft Board back to its work in 1929. The result, just two years in the making, was the Nationalist Civil Code.[249] Occupation, war, and revolution meant that the Nationalist Civil Code was only implemented in Taiwan and had no applica-

bility in Mainland China after the communists defeated the Nationalist government the civil war.[250]

The legislator Wu Jingxiong stated that "if you read the new [Nationalist] Civil Code from Article one through Article 1225 carefully and compared them with German and Swiss civil codes, you would find that 95 percent of these articles were either completely copied or slightly revised based on these foreign civil codes."[251] Professor Mei Zhongxie also noted that "the contemporary Civil Code consisted of 60–70 percent German law and 30–40 percent Swiss law, with small percentage of French, Japanese, and Soviet Russian laws."[252]

The Nationalist Civil Code's form and substance show reliance on German law.[253] According to Chen, the Nationalist Civil Code includes a chapter on General Principles that is structured around the same elements as the German Civil Code's general provisions: the subject, the object, and juridical act.[254] Percy Luney explained that a "juristic act" is a free exercise of will constituting self-determination and is perhaps the most distinctive feature of the German Civil Code. He noted that juristic acts can be contracts, deeds, and wills.[255] This applies with equal force in the Taiwanese Code. Chen concluded that the content of the General Principles of the Code and the Law of Obligations were almost the same as those provided in the German Civil Code,[256] even if the Chinese drew on Japanese methodology for adapting the German Civil Code to a natural law tradition.[257]

After the Chinese Communist Party declared the establishment of the People's Republic of China in 1949, the country abandoned Republican legal systems and adopted Soviet legal forms in the 1950s.[258] The party used the law as a tool to settle civil matters through politicized mediation under Marxist-Leninist totalitarianism principles.[259]

Since the fall of the Communist Party's Gang of Four in the 1970s, the Chinese government has sought to strengthen and to improve the stature and integrity of the legal system, with the goal being a socialist legal system with Chinese characteristics, which is consistent with its ideological concept of socialism with Chinese characteristics.[260]

On 1 January 1987 the People's Republic of China adopted a new civil code: the General Principles of Civil Law of the People's Republic of China (GPCL). It now provides the foundation and framework for all laws concerning private matters. According to Chen Yin-Ching, under the influence of the late-Qing and the Republican civil codes, "the GPCL is modeled after the continental-European Civil Law, especially the German Civil Code."[261] For Whitmore Gray it was obvious that the GPCL was drafted by persons with a direct knowledge of French and German civil codes, which are also systematic codes based on the abstract concept of a "legal act."[262] Wang Tze-Chien concluded that the GPCL was greatly influenced by the German BGB, with particular appreciation being shown for the German Code's conceptual and systematic integrity.[263]

Still, the GPCL was not a comprehensive code in the German tradition. It had just nine parts and featured only 156 articles. These provided the most important Civil Law principles and institutions. It most closely resembles the first "book" of the German Civil Code, which provides general principles and is referred to as the "General Part." In Germany this foundational framework has been supplemented—in the code and in *Nebengesetze*—with "books" or statutes that address specific legal sectors.[264] These are known as the "Special Parts" of German Civil Law. The General Principles define general legal concepts in such areas as agency, civil liability, property, and obligations law, but must be read in light of special statutes.[265] The GPCL also includes general principles of "honesty and good faith" that are applicable to all civil affairs in China.[266] These have a clear relation to Germany's general clauses. In the 1990s Chinese legal scholars urged the government to create a more unified and comprehensive regime of contract law to replace the existing contract laws because they were outdated.[267] Drafted from 1993 to 1999, the resulting unified contract law consisted of 428 articles.[268] According to Professor Liang Huixing, one of the drafters, the unified contract law adopted the concepts and systems of German Civil Code. Many principles, doctrines, and provisions could be traced to German, Japanese, and Taiwanese civil codes.

The enactment of the property law of China in 2007

was a remarkable private law reform in modern Chinese legal history because of the potential violation of principles of socialism.[269] Chen argued that this Act also follows the structure and concepts of the German Civil Code, including the registration requirements and the regulations on residual property.[270] But he noted that it recognized three categories of ownership: collective ownership, private ownership, and special protection for state ownership. The latter, Chen explained, was a vestige of the GPCL.[271]

Professor Liu Jingwei of Xiamen University has acknowledged Chinese private law's deep reliance (both in Communist and Nationalist China) on German law: "The civil code modeled in German style has become a "tradition" of Chinese civil law theory. I might not be able to find any textbooks on civil codes published in China not to follow German style but choose French, Anglo-American, or any other styles….Therefore, in my opinion, with respect to the compilation of civil code, we had to adopt the system of German Civil Code, which was an integral code that included General Principles and specific chapters…. What must be pointed out was that to adopt German law system was not to completely copy German Civil Code, since it was necessary to pay attention to the shortages found in German law. For instance, German Civil Code did not provide rules for some important rights to personality."[272]

Referring to Taiwan's Nationalist Civil Code, Professor Wang Tze-chien concluded that, "[I]n Taiwanese area, due to the Japanese occupation with the implementation of its Civil Code for five decades, and Japanese civil code and our Civil Code had the same origin in German law, the Nationalist civil code could be implemented smoothly without any obstacles. This was a coincidence in legal history."[273]

CONCLUSION

The great power Germany is discovering itself to possess in world affairs—in its own right and as the leading force in an ever-closer Europe—draws on many strengths. The country's status as a legal superpower is one of the most important forms of German soft power.

This is an important insight for anyone hoping to understand Germany today. First, in rather straightforward terms, it simply reveals an oft-neglected area of German strength. Those who might want to watch—or even counter—Germany's rising power would err if they overlooked this distinct area of German prominence. Second, it sheds light on the nature and character of other more-widely recognized forms of German power. In other contexts—including economic and security issues—Germany frequently depicts things through a formalistically legal lens. After all, the European Union—and the common market at its core—are strictly legal inventions. And, in 2003, Robert Kagan was bemused by Germany's (and other European countries) objections to the American-led invasion of Iraq on the grounds of international law. Kagan took this as a sign of "weakness." Or, considering this paper's thesis, it might be playing to Germany's particular strength—as a legal superpower.

There is a final reason to give this paper's thesis some attention. No superpower is eternal. Over-reach and resentment eventually bring great powers back down to size. That was also Siegfried's fate. The height of his unquestioned power and authority was only the beginning of the end. He led his brother-in-law's forces in their successful counter-attack on the invading Saxons and returned a hero. He used his immense strength and the advantage bestowed by his magic invisibility cloak to help his brother-in-law woo and subdue the beautiful but mighty princess Brunhilde. But Siegfried would rue these conquests because they planted the seeds of the jealousy and resentment that ultimately led to his demise. Always skeptical of Siegfried's standing in the kingdom, Brunhilde mocked him to Kriemhild, saying "your husband calls himself a king, but he is nothing more than a vassal to my husband, a real king."[274] In the resentful voices raised against German legal power—from Greece to Hungary to the Hauge—we may be hearing the first stirrings of developments pointing in that direction. How Germany reacts to the resistance to its legal power will give us glimpses into the answer to the "new German question."

NOTES

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Nikolaus Blome, *et al.*, *"The Fourth Reich": What some Europeans See When They Look at Germany*, Der Spiegel, 23 March 2015, available at http://www.spiegel.de/international/germany/german-power-in-the-age-of-the-euro-crisis-a-1024714.html.

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Id.

See Blome, *supra* note 3.

[13] Hans Kundnani, The Paradox of German Power (2014).

[14] *Id*.

[15] Walter Russell Meade, *The Seven Great Powers*, The American Interest (4 January 2015), *available at* http://www.the-american-interest.com/2015/01/04/the-seven-great-powers/

[16] *See* Stephen Green, Reluctant Meister: How Germany's Past Is Shaping Its European Future (2014).

[17] *Id*.

[18] *See* Speck, *supra* note 7.

[19] Thomas L. Friedman, *Germany, the Green Superpower*, NY Times (6 May 2015), *available at* http://www.nytimes.com/2015/05/06/opinion/thomas-friedman-germany-the-green-superpower.html?_r=1.

[20] Michael Köhlmeier, Die Nibelungen Neu Erzählt (26th ed. 2015).

[21] Herfried Münkler, Die Deutschen und ihre Mythen (2009).

[22] Köhlmeier, *supra* note 20, at 27-29.

[23] *Id*. at 27.

[24] *Id*.

[25] *Id.* at 121.

[26] *See* Mary Thorpe, *The Archetype of the Nibelungen Legend*, 37 Journal of English and Germanic Philology 7 (1938).

[27] Nicole Glass, *Word of the Week: Nibelungentrue* (28 February 2014), *available at* http://www.germany.info/Vertretung/usa/en/__pr/GIC/TWIG__WoW/2014/08-Nibelungentreue.html.

[28] *See* Francis Gentry, *Hagen and the Problem of Individuality in the* Nibelungnenlied, 68 Monatshef 1 (1978).

[29] *Id*.

[30] Ursula R. Mahlendorf & Frank J. Tobin, *Legality and Formality in the "Nibelungenlied"*, 66 Monatshef 225 (1974); Dawn Osselman, *The Three Sins of Kriemhilt*, 49 Western Folklore 226, 227 (1990).

[31] *See* Köhlmeier, *supra* note 20.

[32] Arthur Regan, *Folktale Morphology and the Structure of the Nibelungenlied*, 13 Pacific Coast Philology 78 (1978).

[33] Katherine Fisher Drew, The Burgundian Code (1972).

[34] Regan, *supra* note 32, at 78.

[35] Drew, *supra* note 33, at 5.

[36] *Id.*

[37] H. Patrick Glenn, Legal Traditions of the World: Sustainable Diversity in Law (2014).

[38] Köhlmeier, *supra* note 20, at 33.

[39] *Id.* at 38.

[40] Recent Trends in U.S. Services Trade, Inv. Nos. 332-345, USTIC Pub. 4243 (July 2011) (Annual).

[41] Frederick Schauer, *On the Migration of Constitutional Ideas*, 37 Conn. L. Rev. 907, 910 (2005); Frederick Schauer, *The Politics and Incentives of Legal Transplantation*, *in* Governance in a Globalizing World 253, 259 (Joseph S. Nye Jr. & John D. Donahue eds., 2000).

[42] *See* Mosche Cohen-Eliya & Iddo Porat, *American Balancing and German Proportionality: The Historical Origins,* 8 Int. J. Con. L. 263 (2010); George A. Bermann, *The Principle of Proportionality,* 26 Amer. J. Comp. L. Supp. 415 (1977).

[43] Others see Germany as a different kind of superpower. *See* Friedman, *supra* note 19. *But see* Parke Nicholson, *The Myth of a Mighty Germany*, Foreign Affairs – Online (1 June 2015), *available at* https://www.foreignaffairs.com/articles/germany/2015-06-01/myth-mighty-germany.

[44] *See* Nigel Foster & Satish Sule, German Legal System and Laws (2010).

[45] Tacitus, Germania 1 (J.B. Rives trans., 1999).

[46] *Id.*

[47] *Id.*

[48] Tacitus, Voyages and Travels: Ancient and Modern Vol. XXXIII 102 (Eliot ed., 2009).

[49] *Id.*

[50] *Id.*, at 105.

[51] *Id.*

[52] Daniel Halberstam & Mathias Reimann, Federalism and Legal Unification: A Comparative Empirical Investigation of Twenty Systems 254 (2014).

[53] Drew, *supra* note 33.

[54] *See* Tacitus, *supra* note 45; Drew, *supra* note 33.

[55] Drew, *supra* note 33.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] Regan, *supra* note 32, at 78.

[60] Drew, *supra* note 33, at 1–5.

[61] *Id.* at 1.

[62] Martin Immenhauser, Das Dogma von Vertrag und Delikt: zur Entstehungs- und Wirkungsgeschichte der zweigeteilten Haftungsordnung 207 (2003).

[63] Paul Jörs, *et al.*, Römisches Recht § 2.2 (1987).

[64] Drew, *supra* note 33, at 6.

[65] William Burdick, The Principles of Roman Law and Their relation to Modern Law (2004).

[66] James Q. Whitman, The Legacy of Roman Law in the German Romantic Era 29–30 (1990).

[67] H. Patrick Glenn explained that the reception of Roman law was "most influential in Germanic countries," which understood themselves as "descendants of the first Roman empire and the second (Holy) Roman empire of Charlemagne." H. Patrick Glenn, The Legal Traditions of the World (5th ed. 2014).

[68] *See* Reinhard Zimmermann, *Roman Law and European Culture*, N.Z. L. Rev. 341, 347-49 (2007) ("When we refer today in modem German law to claims for the recovery of property, we distinguish between a claim

based on ownership (*rei vindicatio, Vindikation*) and another one based on unjustified enrichment (*condictio, condiktion*). Where a possessor makes improvements on an object that does not belong to him and that he is not entitled to keep (ie, that he has to return the object under a *rei vindicatio*), he may ask for compensation from the owner. The relevant rules are laid down in §§ 994 ff BGB; they are inspired by the Roman rules on the restitution of *impensae*. … These are just a few random examples that cannot do more than provide a cursory impression of the BGB's Roman impregnation and that have, moreover, been taken from only one specific area of private law, namely, the law of obligations. Similar lists can be compiled for other areas, particularly property law and the law of succession.").

[69] Hans Hermann Seiler, *Roman Law in Germany Today*, 2 Journal of South African Law 60 (1978).

[70] Glenn, *supra* note 67.

[71] "Roman law came crashing back in the tumultuous events of the eleventh to thirteenth centuries in Europe." *Id.*

[72] Whitman, *supra* note 66.

[73] Charles Sumner Lobingier, *The Reception of Roman Law in Germany*, 14 Michigan Law Review 562 (1914).

[74] *Id*.

[75] Ernest J. Schuster, *The German Civil Code,* 1 J. Society Comp. Legis. 191 (1896); Ernst Freund, *The New German Civil Code*, 13 Harv. L. Rev. 627 (1900).

[76] Glenn, *supra* note 67.

[77] Mathias Reimann, *Ninetheenth Century German Legal Science*, 31 B.C.L. Rev. 837, 867 (1990).

[78] *Id.* at 863.

[79] *Id.* at 863.

[80] *Id.* at 865.

[81] Frederic William Maitland, *The Making of the German Civil Code*, *in* 3 The Collected Papers of Frederic William Maitland 474, 476 (H.A.L. Fisher ed., 1911).

[82] Ernst Freund, *The Proposed German Civil Code*, 24 American Law Review 237, 254 (1890).

[83] A. Pearce Higgins , The Mak ing of the German Civil Code , 6 JOURNAL OF T HE SOCIET Y OF COMP ARAT IVE LGISLAT ION 95, 105 (1905) (quoting Otto Friedrich von Gierke, Political Theories of the Middle Age xvii (Frederick William Maitland trans., 1900)).

[84] Joseph J. Darby, *The Influence of the German civil Code on Law in the United States*, 1999 Journal of South African Law 84 (1999).

[85] Karl-Heinz Ladeur, *The German Proposal of an "Anti-Discrimination"-Law: Anticonstitutional and Anti-*

Common Sense. A Response to Nicola Vennemann, 3 German Law Journal (2002).

[86] Oliver Wendell Holmes Jr., The Common Law 5 (2005).

[87] Mathias Reimann, *The Good, the Bad, and the Ugly: The Reform of the German Law of Obligations*, 83 Tulane Law Review 877 (2008-2009).

[88] Christa Rautenbach & Lourens Du Plessis, *In the Name of Comparative Constitutional Jurisprudence: The Consideration of German Precedents by South African Constitutional Court Judges*, 14 German Law Journal 1539 (2013).

[89] Wolfgang Babeck, Stolpersteine des internationalen Rechtsexports, 15 ForumRecht Online (2002), available at http://www.forum-recht-online.de/2002/402/402babeck.htm.

[90] *See* World Bank – DataBank, Gross Domestic Product 2014, *available at* http://databank.worldbank.org/data/download/GDP.pdf. *See also* United States International Trade Commission, Publ'n No. 4243, Recent Trends in U.S. Services Trade – 2011 Annual Report 7-2 (2011) ("Demand for legal services correlates with the level of business activity in an economy and consequently fell in many developed markets as a result of the economic downturn.").

[91] United States International Trade Commission, Publ'n No. 4243, Recent Trends in U.S. Services Trade – 2011 Annual Report 7-2 (2011).

[92] Accounting for 47.6% of the global trade in legal services. *Id.* at. 7-3.

[93] Accounting for 6.5% of the global trade in legal services. *Id.* at 7-3.

[94] *Id*.

[95] *Id.*

[96] *Id*.

[97] *Id*.

[98] *Id.*, at 7-7.

[99] Accounting for 4.7% of the global trade in legal services. *Id.* at 7-4.

[100] Germany within Europe had 21.4% of market and the United Kingdom had 15.5%. 2% greater than the UK. *Id.* at 7-3.

[101] *Id.*

[102] Additionally, the German firms are typically smaller and less specialized in financial areas. *Id.* at 7-7.

[103] Hengeler Muller, with revenues of Euro 207 million , falls about Euro 40 million shy of the 100th ranked law firm.

[104] United States International Trade Commission, Publ'n No. 4243, Recent Trends in U.S. Services Trade – 2011 Annual Report 7-2 (2011).

[105] *Id*.

[106] *Id.*

[107] *Id.*

[108] Law—Made in Germany (2nd ed., 2012), *available at* http://www.lawmadeingermany.de/Law-Made_in_Germany.pdf. The project is ripe for thorough study—and critique—from a comparative law perspective. *See, e.g.,* Peter Rawert and Markus Baumanns, *Auf nach Transstemien*, Frankfurter Allgemeinen Zeitung (4 March 2009), available at http://www.faz.net/aktuell/wirtschaft/recht-steuern/rechtswissenschaften-auf-nach-transsystemien-1927667.html. The brochure is now available in Chinese, Russian and Spanish.

[109] Law—Made in Germany, *supra* note 108, at 5.

[110] *Id.* at 3.

[111] *Id.* at 7.

[112] This is especially true of the export market for cars, chemicals, industrial equipment and premium niche items. *See* Zanny Minton Beddoes, *Special Report Germany—The Economy: Dissecting the Miracle*, The Economist (15 June 2013), at 8-10 ("Manufacturing's share of GDP in Germany is bigger than in other rich countries and German exports, particularly to fast-growing emerging economies, are stronger. Half of Germany's growth over the past decade has come from exports. The external surplus, at €188 billion ($243 billion), or 7% of GDP, is the world's biggest in absolute terms, one of the biggest relative to size of the economy, and rising. …McKinsey … predicts another decade of strong, export-led growth based on Germany's traditional sectors. … The report forecasts that between now and 2025 German exports will rise by 80%, pushing their share in the economy from 50% to 68% of GDP. If McKinsey is even half right, German exporters have a rosy future."). This story, of course, cannot now be told without acknowledging the still-developing scandal over VW's manipulation of emissions controls of millions of its cars sold around the world. *See Dirty Secrets*, The Economist (26 September 2015), *available at* http://www.economist.com/news/leaders/21666226-volkswagens-falsification-pollution-tests-opens-door-very-different-car.

[113] *See, e.g.*, Richard Anderson, *German Economic Strength: The Secrets of Success*, BBC News Online (16 August 2012), *available at* http://www.bbc.com/news/business-18868704; Steven Rattner, *The Secrets of Germany's Success*, Foreign Affairs (July/August 2011), *available at* https://www.foreignaffairs.com/articles/germany/2011-06-16/secrets-germanys-success; Geoffrey Smith, *Eurozone Economy Gathers Strength as Germany Revs-Up*, Fortune (26 February 2015), *available at* http://fortune.com/2015/02/26/eurozone-economy-gathers-strength-as-germany-revs-up/.

[114] *See*, *e.g.*, Burke W. Shartel and H. J. Wolff, *German Lawyers—Training and Functions*, 42 Mich. L. Rev. 521 (1943) ("Before Hitler, Germany took justifiable pride in the quality of its judiciary, its bar and its legally trained officials. . . The solid quality of all legal personnel was merely a consequence and manifestation in one sphere of a general stress on expertness which characterized all aspects of German life.").

[115] Law—Made in Germany, *supra* note 108, at 3. The parallels with the German auto-industry were tossed about more confidently before the recent VW emissions scandal.

[116] World Bank Independent Evaluation Group, Doing Business: An

Independent Evaluation—Taking the Measure of the World Bank-IFC Doing Business Indicators 69 (2008).

[117] The U.S., Singapore, Canada, Australia, Ireland, the United Kingdom, Israel and New Zealand (most of the so-called "common law world") occupy places in the top 25. India, another major "common law country," is ranked 40th. See IMD, *World Competitiveness Scorecard 2013*, *in* World Competitiveness Yearbook (2013), *available at* http://www.imd.org/uupload/imd.website/wcc/scoreboard.pdf.

[118] *See* Ugo Mattei, Comparative Law and Economics (1999); Edward L. Glaeser & Andrei Shleifer, *Legal Origins*, 117 The Quarterly Journal of Economics 1193 (2002); Florian Faust, *Comparative Law and Economic Analysis of Law*, *in* The Oxford Handbook of Comparative Law 837 (Mathias Reiman & Reinhard Zimmermann eds., 2006); Mark J. Roe, *Legal Origins, Politics, and Modern Stock Markets*, 120 Harv. L. Rev. 460 (2006); Ralf Michaels, *The Second Wave of Comparative Law and Economics?*, 59 University of Toronto Law Journal 197 (2009); Vivian Grosswald Curran, *Symposium on Legal Origins: Comparative Law and the Legal Origins Thesis: "[N]on scholae sed vitae discimus"*, 57 Am. J. Comp. L. 863 (2009); Ralf Michaels, *The Functionalism of Legal Origins*, *in* Does Law Matter? On Law and Economic Growth 21 (Michael Faure & Jan Smits eds, 2011); Legal Origin Theory (Simon Deakin & Katharina Pistor eds., 2012).

[119] La Porta, Lopez-de-Silanes, Shliefer and Vishny are the leading figures in this movement. In a 2008 resumé of their work—and the responses to it—they reaffirmed their uncritical, paradigmatic embrace of the concept of legal families, noting summarily that "legal scholars believe that some national legal systems are sufficiently similar in some critical respects to others to permit classification of national legal systems into major families of law." La Porta, Rafael, Florencio Lopez-de-Silanes, and Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 Journal of Economic Literature 285, 287 (2008). Relying on the legal families framework, legal origins scholars have produced research that these authors described in the following terms:

Subsequent research showed that the influence of legal origins on laws and regulations is not restricted to finance. In several studies conducted jointly with Simeon Djankov and others, we found that such outcomes as government ownership of banks (La Porta et al. 2002), the burden of entry regulations (Djankov et al. 2002), regulation of labor markets (Juan C. Botero et al. 2004), incidence of military conscription (Casey B. Mulligan and Shleifer 2005a, 2005b), and government ownership of the media (Djankov et al. 2003a) vary across legal families. In all these spheres, civil law is associated with a heavier hand of government ownership and regulation than common law. Many of these indicators of government ownership and regulation are associated with adverse impacts on markets, such as greater corruption, larger unofficial economy, and higher unemployment. In still other studies, we have found that common law is associated with lower formalism of judicial procedures (Djankov et al. 2003b) and greater judicial independence (La Porta et al. 2004) than civil law. These indicators are in turn associated with better contract enforcement and greater security of property rights.

Id. at 286. Legal origins research, which is wholly dependent on the legal families approach to classifying the world's legal systems, has been immensely influential, especially with respect to some part of the billions of dollars in development loans and grants issued by the World Bank and its affiliated countries. An independent evaluation of the *Doing Business Report* confirmed two things. First, it revealed how thoroughly the World Bank system had assimilated the concept of legal families. Second, it confirmed the conclusions reached by legal origins scholars on the basis of the *Doing Business Report's* data: "This appendix explores whether legal origins affect the performance of countries on the [*Doing Business*] indicators. The results show that common law countries perform better in four

Indicators… There are 4 indicators and 13 subindicators where civil law countries perform significantly worse than common law countries." World Bank Independent Evaluation Group, Doing Business: An Independent Evaluation—Taking the Measure of the World Bank-IFC Doing Business Indicators 69 (2008). In turn, a country's *Doing Business Report* scores play a role in International Development Association and Millennium Challenge Corporation policies regarding concessional lending and grants, on one hand, and monitoring progress of lending operations, on the other hand. *Id*. at 47.

[120] "It may surprise other Europeans just how closely Germans identify themselves with their legal system and their law. The familiar claim that Germany is ruled by 'law and order' does not adequately reflect this phenomenon." Martin J. Schermaier, *German Law*, *in* Elgar Encyclopedia of Comparative Law 273 (Jan M. Smits ed., 2006).

[121] John Henry Merryman & Rogelio Pérez-Perdomo, The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America 3 (2.007). Thomas Jefferson is said to have conceded the superiority of the Civil Law over the Common Law. Vernon V. Palmer, *Two Worlds in One*, *in* Lousiana: A Microcosm of a Mixed Jurisdiction 23 (Vernon V. Palmer ed., 1999).

[122] *See* Continental Law, *available at* http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/Kontinentales_Recht_2011.pdf?__blob=publicationFile.

[123] *See, e.g.,* David S. Law and Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N. Y. Univ. L. R. 762 (2012).

[124] Miguel Schor, *Judicial Review and American Constitutional Exceptionalism*, 46 Osgoode Hall Law Journal 535 (2008).

[125] *See, e.g.,* Gerhard Casper, *Guardians of the Constitution* 53 Southern Cali. L. Rev. 773 (1980).

[126] *See* Mark Thatcher & Alec Stone Sweet, *Theory and Practice of Delegation to Non-Majoritarian Institutions*, 25 W. Eur. Pol. 1, 15 (2002); Christoph Bezemek, *A Kelsenian Model of Constitutional Adjudication: The Austrian Constitutional Court*, 67 Zeitschrift für öffentliches Recht 115 (2012); Nuno Garoupa & Tom Ginsburg, *Building Reputation in Constitutional Courts: Political and Judicial Audiences*, 28 Ariz. J. Int'l & Comp. L. 539, 539-541 (2011); Lech Garlicki, *Constitutional Courts Versus Supreme Courts*, 5 Int'l J. of Const. L. 44, 44 (2007); Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 4 J. Pol. 183, 187 (1942).

[127] *See* Garoupa & Ginsburg, *supra* note 126; Herman Schwartz, *Eastern Europe's Constitutional Courts*, 9 Journal of Democracy 100 (1998); Donald P. Kommers, *An Introduction to the Federal Constitutional Court*, 2 Ger. L.J. (2001), *available at* https://www.germanlawjournal.com/index.php?pageID=11&artID=19 ("Variations on Kelsen's model now constitute a majority of the world's institutions exercising constitutional review, including the constitutional courts (or constitutional chamber of the supreme courts) of more than 70 nations."). *See also* Alec Stone Sweet, *Constitutional Courts and Parliamentary Democracy*, 25 W. Eur. Pol. 77 (2002).

[128] *See, e.g.,* Garoupa & Ginsburg, *supra* note 126.

[129] *See, e.g.,* Hans Kelsen, *La garantie juridictionnelle de la Constitution* [The Jurisdictional Protection of the Constitution], 44 Revue de Droit Public 197 (1928).

[130] *Id.*.

[131] *Id*. *See, e.g.,* Manfred Stelzer, The Constitution of the Republic of Austria: A Contextual Analysis 151 (2011).

[132] Kelsen, *supra* note 126. *See* Alec Stone Sweet, *Constitutional Courts and Parliamentary Democracy*, 25 West European Politics 77 (2002).

[133] Kelsen, *supra* note 126. *See* Stone Sweet, *supra* note 127.

[134] *See, e.g.,* Michael J. Perry, The Constitution in the Courts (Oxford 1994).

[135] *Id.*, at 3.

[136] Toni M. Fine, *How the U.S. Court System Functions*, 4 Issues of Democracy: How U.S. Courts Work 2,6 (1999).

[137] Jochen von Bernstorff & Thomas Dunlap, The Public International Law Theory of Hans Kelsen 277–278 (2010).

[138] *Id.* at Page 281.

[139] Thilo Tetzlaff, *Kelsen's Concept of Constitutional Review Accord in Europe and Asia: The Grand Justices of Taiwan*, 1 National Taiwan U. L. Rev. 77 (2006).

[140] *See* Alexander Somek, The Cosmopolitan Constitution (2014).

[141] *Id.* at 89.

[142] Garoupa & Ginsburg, *supra* note 126.

[143] Brun-Otto Bryde, *Fundmental Rights as Guidelines and Inspiration: German Constitutionalism in International Perspective*, 25 Wisconsin International Law Journal 189 (2012).

[144] Francois du Bois & Daniel Visser, *Symposium: Export of the Rule of Law: The Influence of Foreign Law in South Africa*, 13 Transnational Law & Contemporary Problems 593, 593–94 (2003).

[145] *Id.*.

[146] Rautenbach & du Plessis, *supra* note 88.

[147] Basil Markesinis & Jorg Fedtke, *The Judge as Comparatist*, 80 Tul. L. Rev. 11, 68-69 (2005).

[148] Mark Tushnet, *et al.*, Routledge Handbook of Constitutional Law 184 (2013).

[149] Markesinis & Fedtke, *supra* note 147.

[150] *Id*.

[151] Jeremy Kirk, *Article: Constitutional Guarantees, Characterisation And The Concept Of Proportionality,* 21 Melbourne U. L.R. 1, 4 (1997).

[152] Aharon Barak, *Proportional Effect: The Israeli Experience*, 57 University of Toronto Law Journal 369, 370 (2007).

[153] Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 University of Toronto Law Journal 383, 387 (2007) (“Only a legitimate purpose can justify a limitation of a fundamental right…. [T]he German Court asks whether the law is suitable to reach its end[,] whether the law is necessary to reach its end or whether a less intrusive means exists that will likewise reach the end[, and t]he third step…is a cost-benefit analysis, which requires a balancing between the fundamental rights interests and the good in whose interest the right is limited.”).

[154] David M. Beatty, The Ultimate Rule of Law 159-60 (2004).

[155] *Id*. at 162.

[156] Aharon Barak, *Proportional Effect: The Israeli Experience*, Faculty Scholarship Papership Series, Paper 3695, 370.

[157] Bernhard Schlink, *Proportionality in Constitutional Law: Why Everywhere but Here?*, 22 Duke Journal of Comparative & International Law 291 (2012).

[158] *Id*.

[159] Moshem Cohen-Eliya & Iddo Porat, *American Balancing and German Proportionality: The Historical Origins*, 8 International Journal of Constitutional Law 263, 271 (2010).

[160] Moshem Cohen-Eliya & Iddo Porat, Proportionality and Constitutional Culture 103 (2013).

[161] *See* Markus Dirk Dubber, *Theories of Crime and Punishment in German Criminal Law*, 53 American Journal of Comparative Law 679 (2005). *See also* Krise des Strafrechts und der Kriminalwissenschaften? (Hans-Joachim Hirsch ed., 2001).

[162] Markus Dirk Dubber, *Comparative Criminal Law*, *in* Oxford Handbook of Comparative Law 1287 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

[163] *See* Dubber, *supra* note 161; George O. Fletcher, *Contemporary Legal Scholarship: Achievements and Prospects: Criminal Law: Criminal Theory in the Twentieth Century*, 2 Theoretical Inq. L. 265 (2001).

[164] Dubber, *supra* note 161.

[165] Fletcher, *supra* note 163.

[166] Dubber, *supra* note 161.

[167] Fletcher, *supra* note 163.

[168] German legal culture has defeated American legal culture in terms of influence on the law of Latin American countries. *See* Daniel Pulecio-Boek, *The Genealogy of Prosecutorial Discretion in Latin America: A Comparative and Historical Analysis of the Adversarial Reforms in the Region*, 13 Rich. J. Global L. & Bus. 67, 142 (2014); James M. Cooper, *Competing Legal Cultures and Legal Reform: The Battle of Chile*, 29 Mich. J. Int'l L. 501, 562 (2008).

[169] *See* Pulecio-Boek, *supra* note 168.

[170] *Id*.

[171] *Id*.

[172] *Id*.

[173] *Id*. Germany's “opportunity principle” was selected over the U.S. version. *See id*. at 118.

[174] *Id*. at 117.

[175] *See* James M. Cooper, *Competing Legal Cultures and Legal Reform: The Battle of Chile*, 29 Mich. J. Int'l L. 501, at 526 (2008).

[176] *Id.*

[177] *Id*. at 501.

[178] *Id.*

[179] *Id*. at 532.

[180] *See* Jens David Ohlin, *Co-Perpetration: German Dogmatic or German Invasion?*, *in* The Law and Practice of the International Criminal Court 517 (Carsten Stahn ed., 2015).

[181] Markus Dirk Dubber, *The Promise of German Criminal Law: a Science of Crime and Punishment*, 6 German Law Journal 1049 (2005).

[182] *Id*.

[183] *Id*.

[184] *Id*.

[185] *Id*.

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