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Transatlantic Models: Influences between German and American Law*

Mathias Reimann**

INTRODUCTION

Law is a strange, multifaceted thing. In one sense, particularly when understood as a set of positive rules enforced by the state, it has traditionally been regarded as an emanation of national sovereignty.¹⁾ As such, it does not travel easily across national borders. Yet, in another sense, especially when considered from a broader, cultural and historical, perspective, law is one of the most astounding export-import articles in recorded history. Cultures and countries have borrowed from each other almost since time immemorial and will continue to influence each other in the future.²⁾ Korea, having imported ideas from both Asian and European nations, is among the most striking illustrations of this phenomenon, and

* This article is a somewhat expanded version of a talk I gave at the meeting of the Korean Society of the Sociology of Law at Seoul National University on June 6, 2000. I thank Professor Dai-Kwon Choi and the Society for their kind invitation and hospitality.

** Professor, University of Michigan

- 1) This was not always so. Before the rise of the modern nation state, the making and enforcement of law was not concentrated in the hands of a supreme political mire. The strong ties that exist today between the nation state and the law may also be weakening again. The emergence of international organizations and corporations, the revival of federal structures and of local autonomy is about to reduce the nation State to just one law-maker among many others.
- 2) The most prominent contemporary author in the common law world on this subject is probably Alan Watson, see e.g., Alan Watson, *Legal Transplants* (1974). For a spirited critique of Watson's general approach, see William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, *43 American Journal of Comparative Law* 489 (1995).

Korean lawyers are keenly aware of that.

Which countries export, and which import, legal ideas keeps changing overtime. In the last thousand years, leading exporters in the Western world include Italy as the original seat of revived (Roman law) scholarship as well as the major colonial powers, i.e. Spain Portugal, England, France, and, to a lesser extent, the Netherlands. In the last hundred years, however, the most important export counties have been Germany and the United States. The German legal system occupied a leading role in the late nineteenth and early twentieth centuries while American law assumed the dominant position after World War II. Both have made a worldwide impression, and the literature on their influence is vast.

My focus here is much narrower because it is limited to the mutual influence between these two countries. Even that is not entirely novel terrain since many aspects of this influence have already been explored. Yet, there is, to my knowledge, no general overview of the German-American exchanges of law³⁾. Drawing on the existing literature, this essay provides such an overview. As such, it is neither complete nor detailed but offers only a sketch and some illustrations.

When I refer to influence, or exchange, of law, I do not mean that a rule, idea, or institution from one country has simply been taken over by the other. Full-scale adoptions of this kind do exist but they are the exception, not the rule. Most of the time, the importing culture reshapes the foreign element by fitting it into the existing framework, or simply draws inspiration or support from a foreign model. Thus, I conceive of influence broadly and include all instances in which rules, ideas, or institutions from one country have had a visible impact on the legal system in the other. Understood in this general fashion, foreign influence is just one factor among many others in shaping law, its strength is a matter of degree, and its result is not identity, but at best similarity between two systems.

3) On a separate occasion, I attempted to give an overview that encompassed all of Europe but also considered only the European influence on the United States, not vice versa, see Mathias Reimann, *Continental Imports — The Influence of European Law and Jurisprudence in the United States*, *LXIV Tijdschrift vor Rechtsgeschiedenis* 391 (1996).

Reception processes can, and normally do, affect legal systems on at least two levels. On the one hand, foreign ideas may influence the positive law of the receiving country, i.e. its written or unwritten rules. On the other hand, foreign models can inspire and foster changes in the legal culture, i.e. in the institution, professional, and intellectual environment in which rules function. The exchange of ideas between Germany and the United States is a case in point and we will consider both aspects in each chapter.

I will proceed in three simple steps. First, I will look at the German influences on American law; the main period here is roughly 1870 through 1950. Second, I will summarize the American influences on Germany; here, we are focusing on the second half of the twentieth century. Finally, I will try to draw some general conclusions from what we have found.

I . GERMAN INFLUENCES ON AMERICAN LAW

For about a hundred years, roughly from the middle of the nineteenth century through the post World War II years, Germany was the exporting, the United States the importing, country. To be sure, there was some German influence on American law before and after that⁴⁾, but the 1860s through the 1950s were its core period. And of course, there were considerable cross-currents, particularly since 1945, but for most of the time envisaged here, the predominant flow of legal ideas across the Atlantic was from East to West.

The period of German influence can be divided into two phases characterized by different modes of transmission. During the first sixty or so years, i.e. roughly until the early 1930s (and especially before World War I), American jurists imported ideas from Germany. They studied in, or visited, its universities, read its scholarship, and sought to learn from it in other ways, e.g. by inviting German colleagues or “carrying on correspondence with them.”⁵⁾ After the mid-1930s, American scholars lost interest in foreign

4) For the early nineteenth century see Michael Hoeflich *Roman and Civil Law in the Anglo-American World Before 1850*, in: Mathias Reimann (ed.), *The Reception of Continental Ideas in the Common Law World 1820-1920* (1993), pp. 19-43.

law. Now, however, the Germans began to export their ideas to the United States. The generation of emigrant jurists, mainly Jewish refugees from the Nazi-terror brought their legal knowledge with them when they fled across the Atlantic.⁶⁾ Both processes took place almost exclusively on the scholarly level, i.e. among legal academics.

1. Law in the Narrow Sense: Positive Law and Legal Doctrine

In the eighty years preceding World War II, American jurists showed an interest in many doctrines of German positive law. While the picture has not been fully explored, it is clear that it is rather diverse. Some imports succeeded in taking permanent root in American law but others failed to establish themselves. In addition, We must not overlook that many areas of Law were not affected at all.

a. Successes: Contracts and Obligations

In the latter half of the nineteenth century the common law of contracts was in serious need of modernization and rationalization. The ancient forms of action officially abolished but still “ruling [the present] from the grave”⁷⁾ did not fit modern market conditions. When the cannon lawyers, both in England and in the United States, substantially revised their contract law, they drew heavily first on French, then on German doctrine⁸⁾. The teachings of Savigny, Windscheid, and often pandectist school generally show their influence in the footnotes throughout the leading Anglo-American textbooks of the time. Under this German influence, the common lawyers partially reconceptualized the field. Formerly, they had conceived of a contract primarily as a (unilateral or bilateral) promise, now they came to regard it in the civilian fashion as an agreement. Thus they now employed German

5) See *Mathias Reimann, Historische Schule und Common Law* (1993) pp. 39-35; for a study of the Romanist influences on American scholarship, see Michael Hoeflich, *Roman Law and Civil Law and the Development of Anglo-American Jurisprudence in the Nineteenth Century* (1997).

6) See *infra* note 40 and text.

7) This is Maitland's famous phrase, See William Maitland, *The Forms of Action at Common Law* (1985, orig. 1909) 1.

8) The seminal article is AW. Brian Simpson, Innovation in 19th Century Contract Law, *91 Law Quarterly Review* 247 (1975).

notions of alter and acceptance, condition and obligation.⁹⁾ In addition, particularly American common lawyers imported a variety of other elements from the German law of obligations. These elements range from the declaration of intent (Willenserklärung) and the legal transaction (Rechtsgeschäft) to the distinction between obligatory and dispositive contracts (Verpflichtungs- und Verfügungsgeschäfte) and the doctrine of failure of a presupposed condition.¹⁰⁾

A generation or two later German concepts influenced American Contract law in a different direction when they provided models for developments in modern equity. A major example is the idea that courts should police the substantive fairness of so-called contracts of adhesion, i.e. of agreements where one side has used its overwhelming bargaining power to dictate standard terms.¹¹⁾ Another instance is the emergence of the notion of an inherent good-faith requirement in the United States. There is little doubt that this notion has been inspired by German law, in particular by art. 242 of the German civil code (BGB)¹²⁾. Today, art. 1-203 of the Uniform Commercial Code provides that “every contract or duty within this Act imposes an obligation of good faith in its performance and enforcement.”

While these doctrines are firmly established in modern American Contract law,¹³⁾ their foreign origins are by and large forgotten. In part, the reason is that when hundred years have passed, doctrinal history is scarcely relevant anymore. In part, it is because those who imported the doctrines, especially in the 1930s through 1950s, were often careful for political reasons not to mention their German pedigree, lest an idea be rejected on that ground.¹⁴⁾

9) See Reimann, *supra note 5*, pp. 137-140.

10) See Uniform Commercial Code sec. 2-615; see generally, Stefan Riesenfeld, *The Impact of German Legal Ideas and Institutions on Legal Thought and Institutions in the United States*, in Reimann, *supra note 5*, pp. 88-97.

11) The fundamental article is Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 *Columbia Law Review* 629 (1943). See generally Jutta Klapisch, *Der Einfluß der deutschen und österreichischen Emigranten auf contracts of adhesion und bargaining in good faith im US-amerikanischen Recht* (1991), pp. 30-110.

12) See E Allan Farnsworth, *Duties of Good Faith and Fair Dealing under the Unidroit Principles*, 3 *Tulane Journal of International and Comparative Law* 47 (1995) at p. 51.

13) See E Allan Farnsworth, *Farnsworth on Contracts* (2d ed.1998) pp. 339-348 (§ 7.17).

b. Failure: Culpa in Contrahendo and Administrative Law

The story of German legal ideas in the United States is not only one of successes but also of failures. Several imports which seemed destined for ultimate adoption failed to take permanent root in American soil. Among the most Salient examples are the concept of culpa in contrahendo and the basic doctrines of German administrative law. In the postwar years, the doctrine of culpa in contrahendo was repeatedly discussed, and often recommended for adoption in the United States. At times, the German model was mentioned in this context, at times it loomed in the background.¹⁵⁾ For a while, it seemed that even American courts and scholars might extend the notion of good faith to the pre-contractual phase.¹⁶⁾ Ultimately, however this has not happened. There is little talk about culpa in contrahendo in American contract law today.¹⁷⁾ Freedom at the bargaining stage has by and large prevailed over the notion of general obligations before agreement.¹⁸⁾

A perhaps even more spectacular failure of German ideas is their defeat in the development of modern American administrative law. With the rise of the administrative state around the turn of the century, building a legal framework for the activities of bureaucracies and agencies became an urgent agenda. The most prominent scholar in this field, German-American Ernst Freund, drew heavily on continental European, especially French and German, concepts and established such a framework of principles. Yet, after

14) Stefan Riesenfeld often recounted how Karl Llewellyn advised him during a visit at Columbia in 1935 never to mention the foreign origin of an idea because it would be “the kiss of death”; see Riesenfeld, *supra* note 10, at p. 91.

15) See, e.g., Friedrich Kessler and Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith and Freedom of Contract*, 77 *Harvard Law Review* 401 (1964). See also Klapisch, *supra* note 11, pp. 111-168.

16) The most frequently cited case in this context is *Hoffmann v. Red Owl Stores, Inc.*, 133 N.W. 2d 267 (Wisc.1965).

17) The discussion if any, is by and large limited to the academic level, see, e.g., E Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 *Columbia Law Review* 217 (1987); Nicola Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 *Seton Hall Law Review* 70 (1993).

18) To be sure, other remedies may be available in American law if one party makes a promise that induces justified reliance which is then frustrated, see American Law Institute, *Restatement (Second) of Contracts* (1981) § 90.

about 1930, American administrative law took a completely different direction. It abandoned most of Freund's teachings and embraced a common law, i.e., court centered, approach.¹⁹⁾ To this very day the United States has not developed a general substantive administrative law. It consists mainly of procedural safeguards and of standards for judicial review of administrative action.

c. Blank Spaces: Constitutional Law and Procedure

In assessing reception processes, it is also important not to overlook that they typically affect only a few, albeit perhaps central, areas of law while they leave most others untouched. The lack of influence in such other areas may be the result of sheer accident. Often, however, it has much to do with cultural differences or simply with timing. In the German-American context, procedure is an example of the former, constitutional law of the latter phenomenon.

Many countries in the world, Korea included have leaned a lot from continental, especially French and German, procedural law. Yet, while the continental approach has been studied comparatively in the United States²⁰⁾ and even been strongly suggested as a model²¹⁾, it has never found much favor in practice. The main reason is probably that procedure, both civil and criminal, is too fundamental a feature of the American legal system to be substantially altered by adopting foreign ideas. Discovery and jury trials, the adversarial role of counsel and the detached position of the judge, the desire for a public pageant and a day in court, all tie American procedure so

19) The early history of American administrative law has explored and perspectivevely analyzed by Oliver Lepsius, *Verwaltungsrecht unter dem Common Law* (1997).

20) There was considerable interest in German procedure over a generation ago, see Benjamin Kaplan, Arthur von Mehren and Rudolf Schaefer, Phases of German Civil Procedure, *71 Harvard Law Review* 1193, 1443 (1958); Benjamine Kaplan Civil Procedure-Reflections on the Comparison of Systems, *9 Buffalo Law Review* 409 (1960).

21) See especially Rudolf Schlesinger, Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience, *26 Buffalo Law Review* 361 (1971); John Langbein, The German Advantage in Civil Procedure, *52 University of Chicago Law Review* 823 (1985); Ernst Stiefel and James Maxeiner, Civil Justice Reform in the United States-Opportunity to Lean from "Civilized" European Procedure Instead of Continued Isolation, *42 American Journal of Comparative Law* 147 (1994).

closely to the cultural, professional, and institutional environment that transplants from other systems seem close to impossible.²²⁾

While many countries in the world also have been inspired by German Constitutional law, the United States has not. Here, a major reason among others is bad timing. American constitutional law developed at a time when Germany had little to offer—first because it had virtually no constitutional law in the modern sense, then because it was a (constitutional) monarchy, then because its constitution worked poorly in practice, and finally because it fell prey to a terror regime. Only after 1949 has German constitutional law become highly developed. Comparative lawyers in the United States are studying it extensively today²³⁾ but it is unlikely to have much of an impact in practice because the indigenous law is so highly developed. This does not mean that Americans have nothing to learn but rather that their widespread unwillingness to do so is psychologically understandable and practically, hard to overcome.

2. Law in the Broad Sense: Methods and Institutions

When we look beyond positive law to the legal system and the legal culture of the United States, we find considerable German influence on American legal method, institutions, and theories. In particular, this influence has affected four major areas: the conception of law as a systematic science, the concomitant institution of law as an academic subject, the shaping of twentieth century American legal theory, and the development of comparative and foreign legal studies. But we should, again, also note failures to influence of which the defeat of the codification movement provides a vivid illustration.

22) For a more expansive treatment, see John Langbein, *The Influence of German Emigrés on American Law: the Curious Case of Civil and Criminal Procedure*, in: Markus Lutter, Ernst Stiefel and Michael Hoeflich, *Der Einfluß deutscher Emigranten auf die Rechtsentwicklung in den USA und in Deutschland* (1993) p. 321.

23) See, e.g., David Currie, *The Constitution of the Federal Republic of Germany* (1994); Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd ed. 1996); see also generally, Vicki Jackson and Mark Tushnet, *Comparative Constitutional Law* (1999).

a. Law as a Science: The Striving for System and Order

Nineteenth century American lawyers were virtually obsessed with the idea of turning law from a mere craft into a real “science”. The label “science” implied sophistication, dignity, and an intellectual status co-equal with the other (mainly natural) sciences with their impressive discoveries and inventions. Yet, perhaps most importantly, it also implied system and order.²⁴⁾

The common law had developed in an unsystematic, if not haphazard, fashion and lacked a comprehensive, logical structure. With the accumulation of ever more cases and statutes in ever more states in the Union, it threatened to degenerate into unmanageable chaos. Nineteenth century American common lawyers almost desperately looked for countermeasures, i.e., for means to put their house in order. One attempt to do so was the importation of analytical jurisprudence from England. This jurisprudence was itself strongly influenced by early nineteenth century German legal thought which thus came to America via the British Isles. The other attempt was the American orientation towards late nineteenth century German legal science with its combination of a historical and systematic approach.²⁵⁾ The historical school and the conceptual jurisprudence of the pandectists became revered models for many American jurists between ca. 1870 and 1920. German legal science in this classical form provided enormous intellectual support for American attempts to develop a logical and ordered approach to law at that time.²⁶⁾

Civil lawyers, especially on the European continent, have considered a logical order an indispensable element of a legal system for at least five hundred years and continue to do so today. In the United States, in contrast, the belief in such an approach was a comparatively shortlived phenomenon. Legal science in the sense of a logical and systematic method also meant conceptualism and formalism and, as of the 1920s, these features came under

24) See Michael Hoeflich, *Law and Geometry, Legal Science from Leibniz to Langdell*, 30 *American Journal of Legal History* 95 (1986); Reimann, *supra* note 5, pp. 121-155.

25) See Mathias Reimann, *Nineteenth Century German Legal Science*, 31 *Boston College of Law Review* 837 (1990).

26) See Reimann, *supra* note 5, pp. 173-176.

heavy attack with the advent of sociological jurisprudence and legal realism. Classical legal science soon fell into almost complete disrepute. American jurisprudence forsook it for its weaknesses and has never recaptured its benefits. In this regard, therefore, German influence was strong for a generation or two but it did not last.²⁷⁾

b. Law as an Academic Subject: The University and the Professional

The nineteenth century belief in law as a science also meant that the discipline was an appropriate object for academic study. The common law had traditionally been taught practically. In the nineteenth century, law in the United States was essentially a craft acquired either through self-study or as an apprentice in a law office. This began to change after the civil war. Law schools became more prominent and ever more universities opened law departments or faculties. By the turn of the century, a substantial and rapidly growing portion of young American lawyers were law school graduates. Today virtually all of them are.²⁸⁾

In this development from practical to academic training, the German university and German law teaching was the most powerful model. In part, this was simply by default. Neither the United States nor England as the mother country of the common law had a tradition of academic legal study so that the turn to the European continent for guidance came naturally. In part, the reason was that German law faculties were widely considered the leading institutions of this kind in the world at the time. As a result, a considerable number of aspiring or accomplished American legal academics went to Germany to study law and returned with a conviction that American universities should be built along similar lines. Many of them actually were, although the English college, the French law faculties, and indigenous American conditions also played a role in shaping American law schools.²⁹⁾

A major element in the establishment of academic law teaching in the

27) See Reimann, *supra note 5*, pp. 249–270.

28) The standard work on this development is Robert Stevens, *Law School, Legal Education in America from the 1850s to the 1980s* (1983).

29) See Reimann, *supra note 5*, 180–189.

United States was the rise of professional legal academics.³⁰⁾ Until the late nineteenth century, law teachers had by and large been retired judges, part-time attorneys, or other instructors coming from legal practice. After 1870, being a legal academic became a career in itself. It began to require training as a scholar full-time devotion to academic work, and it normally meant a lifelong commitment to teaching and writing. In this emergence of the modern American law professor German legal academics were the most important role model. Americans admired, and often envied, them as carefully selected, government appointed, and highly specialized scholars and teachers who had chosen an academic life over one in practice. When this model took hold in the United States around the turn of the century, the result was a significant change in the common law culture. For the first time in history it acquired an element that the civil law tradition had taken for granted since the middle ages: a class of professional legal academics. In this regard, the effects of German influence had a lasting impact: today legal academics are more firmly established and more influential in the American legal culture than ever before.³¹⁾

c. Modern American Legal Theory: Sociological Jurisprudence, Legal Realism, and Beyond

The rise of a professional class of legal academics boosted the development of an indigenous American legal theory. Most of this theory was critical of the status quo. The two main branches of revolt against the conceptualism and formalism of the classical, i.e., post-civil war, period were sociological jurisprudence and legal realism. Both are twentieth century movements, and both are heavily indebted to German (and other European) legal thought.³²⁾

30) See Mathias Reimann, A Career in Itself—the German Professoriate as a Model for American Legal Academia, in: Reimann, *supra* note 4, pp. 165–202.

31) Of course, there are considerable differences between the careers, working-styles, and self-images of German and American law professors even today. A major source of these differences is the recruitment process, see Jürgen Kohler, Selecting Minds: The Recruitment of Law Professors in Germany, *41 American Journal of Comparative Law* 413 (1993); James Gordley, Mere Brilliance: The Recruitment of Law Professors in the United States, *id.* at p. 367.

32) See generally, James E Herget, The influence of German Thought on American

Sociological jurisprudence, represented mainly by Roscoe Pound, was an express reaction against the “mechanical jurisprudence” (i.e., the formalism and conceptualism just mentioned) prevailing in the United States at the turn of the century.³³⁾ Pound conceived of law primarily as a reflection of struggles between competing social groups and demanded that it be shaped as an instrument of social policy. He drew heavily on the writings of Rudolf von Jhering, Herman Kantorowicz, Eugen Ehrlich, and others.³⁴⁾ In a sense, Pound’s teachings were the American version of a free school of law and of a jurisprudence of interests, albeit with the addition of some new tenets and directions. All this is widely known today.³⁵⁾

What is rarely acknowledged, however is that even American legal realism, long considered a purely homegrown product, in fact owes many of its principal ideas to German (and Austrian) scholarship. Comparison between the texts and ideas on both sides of the Atlantic has forcefully demonstrated that the German free school of law provided much of the material from which American legal realism was built.³⁶⁾ This should not come as a surprise, given that many of its chief proponents, especially Karl Llewellyn and Jerome Frank, were intimately familiar with contemporary German jurisprudence.³⁷⁾

There is also a visible influence of German legal theory on several other early twentieth century American thinkers who do not easily fit in a the categories of sociological jurisprudence or legal realism but who were closely related to these movements. One example is John Chipman Gray whose major work contains many references to German jurisprudence.³⁸⁾ The other

Jurisprudence, 1880–1918, in: Reimann, *supra note 4*, pp. 203–228.

33) See Roscoe Pound, Mechanical Jurisprudence, 8 *Columbia Law Review* 605 (1908).

34) See Roscoe Pound, The Scope and Purpose of Sociological Jurisprudence, 3 parts, 24 *Harvard Law Review* 591, 25 *Harvard Law Review* 140, 25 *Harvard Law Review* 489 (1911/12).

35) See James Herget, *American Jurisprudence 1870–1970* (1990), pp.158–170.

36) James Herget and Stephen Wallace, The German Free Law Movement as the Source of American Legal Realism, 73 *Virginia Law Review* 399 (1987).

37) On Llewellyn, see William Twining, *Karl Llewellyn and the Realist Movement* (1985, Orig. 1973) pp. 89–90, 106–109; On Jerome Frank, see the citations to German authors (Berolzheimer Jhering, Kohler, etc.) in his *Law and the Modern Mind* (1970, orig. 1930).

example is Benjamin Cardozo whose instrumental view of the judicial process, then a revolutionary proposition, was indebted to German, but also to Austrian and French, legal theorists.³⁹⁾

The foreign elements introduced into American legal theory have long been thoroughly absorbed, reshaped in the process, and they have become an integral element in modern American jurisprudence. As in many other cases, their origins are by and large forgotten. Nonetheless, their influence has been profound and lasting because the teachings of sociological jurisprudence, legal realism, and related functional approaches dominate current American legal consciousness.

d. International Perspectives: Comparative and Foreign Law

After American jurisprudence had absorbed the foreign ideas just mentioned and integrated them into its own legal theory in the 1920s and 1930s, it took an almost radical turn inward and lost virtually all interest in law and legal thought beyond United States borders. This was in part by choice, in part by necessity. After all, continental Europe, the major area of interest, was ravaged by totalitarianism and then war and other parts of the world were still too far away culturally, linguistically, and economically.

To the extent the American legal culture recovered from this self-inflicted parochialism at all, it was through the import of foreign ideas and new initiatives brought to American shores by emigrant scholars. Beginning in the 1930s, German jurists flocked to the United States in considerable numbers, most of them as refugees from the Nazi-regime, a few because they sought a better life than seemed possible in post-war Germany. Some of these emigrants found new academic homes in American Universities, and a few became prominent scholars in their new environment.⁴⁰⁾

Their most important accomplishment was the (re-)introduction of comparative, foreign, and to some extent international law into American

38) John Chipman Gray, *The Nature and Sources of Law* (1909).

39) Benjamin Cardozo, *The Nature of the Judicial Process* (1921).

40) The most detailed study of their careers and accomplishments is the collection of essays by Marcus Lutter Ernst C. Stiefel, and Michael Hoeflich, *Der Einfluß deutscher Emigranten auf die Rechtsentwicklung in den USA und in Deutschland* (1993). See also Ernst C. Stiefel and Frank Mecklenburg, *Deutsche Juristen im amerikanischen Exil(1933-1950)* (1991).

scholarship and teaching. Max Rheinstein, Rudolf Schlesinger and others, established comparative legal studies.⁴¹⁾ Ernst Rabel, Albert Ehrenzweig, and Kurt Nadelmann were prominent conflicts scholars. Edgar and Brigitte Bodenheimer Friedrich Kessler, Stefan Riesenfeld, Eric Stein, and many others too numerous to mention became leaders in a whole variety of areas. This forced braindrain hugely enriched the law faculties in the United States. Slowly but steadily, it began to led American scholarship out of its insularity and laid the groundwork for the comparative and international legal studies found in American law schools today. It was also the emigrant generation that built the personal bridges across the Atlantic which have since been used by generations of jurists from Europe to come to the United States and to maintain the extensive contacts we take for granted today.

e. Failure: The Issue of Codification

As in the realm of positive law, American jurists sometimes rayed with foreign ideas in the broader sphere of their legal culture but did not embrace them in the long run. Probably the most striking example of this phenomenon is the issue of codification. To be sure, there are many “codes” in the United States today of which the Uniform Commercial Code is the most widely adopted. Yet, while they share same features with the traditional continental model, they are not truly codes in the sense prevalent in the civil law tradition. By and large, they are neither comprehensive nor highly systematic, they are not the centerpieces of the legal culture nor the practice turf on which all young lawyers learn the basics of legal reasoning. Instead, most of them are compilations of statutes that exist side-by-side with other legal sources.

It was not that the idea of truly codifying their law had never occurred to American lawyers. Codification was a major and recurrent issue throughout the nineteenth century.⁴²⁾ In fact, it was on the verge of success in the 1860s when New York as the most important American jurisdiction almost

41) Rudolf Schlesinger, *Comparative Law* (1950), became the leading casebook and defined the field in the United States; it is currently in its 6th edition (with Hans W. Baade, Peter E Hersog, and Edward M. Wise,1998).

42) See generally, Maurice Lang, *Codification in the British Empire and America* (1924).

enacted a full-fledged civil code⁴³⁾, and when some, mainly Western states, actually did enact one, among them California in 1872. Moreover at the end of the nineteenth century, the prestige of German legal science was at its zenith in the United States, the German Civil Code as the fruit of that science was enacted, and many American observers were fascinated by the BGB.⁴⁴⁾ Yet, at the end of the day, comprehensive codification (especially of private law) was never undertaken in the United States.

The story of American codification is complex and it would lead too far astray to delve deeply into the reasons for this failure here. They were a mix of fear for the beloved common law (i.e., caselaw) tradition, distrust on political grounds, opposition by special interest groups, and a variety of other factors.⁴⁵⁾ Whatever the causes, the idea of codification in the German sense never took firm hold in the American legal culture. Whether this has been for better or worse is, of course, a different question.

II. THE AMERICAN IMPACT ON GERMAN LAW⁴⁶⁾

Around the middle of the twentieth century, the tables were turned. German influence across the Atlantic quickly tapered off and the United States, becoming the world's leading exporter of law⁴⁷⁾, began to exercise

43) See Alison Reppy, The Field Codification Project, in: *Field Centenary Essays* (1949) 17; Mathias Reimann, The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code, *37 American Journal of Comparative Law* 95 (1989).

44) See, e.g., Arthur Ameisen, Some Features of the New Civil Code of the German Empire, *33 American Law Review* 398 (1899); Rudolf Dulou, Interesting Features of German Law, *36 American Law Review* 565 (1902); Ernst Freund, The New German Civil Code, *13 Harvard Law Review* 627 (1900); Charles Sumner Lobingier, The Evolution of the German Civil Code, *1 Southern Law Quarterly* 330 (1916); G.A.F., The New Civil Code of Germany, *30 American Law Review* 905 (1896); William Smithers, The German Civil Code, *51 American Law Register* 15 (1903).

45) See Reimann, *supra note* 43, at pp. 107-118.

46) For a fuller, and more nuanced, account of the American influence on European law in recent decades, see Mathias Reimann, *Positive Law and Legal Culture, The Americanization of European Law as a Reception, forthcoming in Archives de philosophie du droit* (2001).

47) For an essay on the forces behind the rise of the United States to leadership, see

considerable influence on German law. This is true with regard to both positive law in particular and features of its legal system more generally.⁴⁸⁾

1. Law in the Narrow Sense: Private Law, Economic Regulation, and Constitutional Doctrine

In the realm of positive law, American ideas have provided models and guidance in a large number of fields. It is impossible to give a complete picture because much of the American influence has not been fully explored and because even what little we know would fill a book. We must also keep in mind that this influence is not only a matter of the past but of the present and, most likely, of the future as well. In other words, we are looking at an ongoing process the end of which is not in sight. Suffice it here to mention just three areas in which the impact of American law has been particularly strong so far.

a. Traditional Areas of Private Law: Torts and Contracts

If we begin with the classic subjects of private law, we find American influence mainly in two fields.

One area is contract law where new forms have emerged. Franchising, leasing, and factoring are the most obvious examples. Know-how contracts, the law governing credit cards and electronic means of payment provide other illustrations. The American labels, Commonly used in Germany as well, already indicate the origin of these constructs.⁴⁹⁾ Yet, again, in all these instances, one must not overlook that beneath the common labels, considerable differences may exist between the American and the German versions of such agreements. German law has often borrowed the basic idea but then designed its own particular rules to make the construct fit into the

Ugo Mattei, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 *American Journal of Comparative Law* 195 (1994).

48) For a more detailed account of American influence on German law, see Rolf Stürmer, *Die Rezeption des U.S.-amerikanischen Rechts in der Bundesrepublik Deutschland*, in: Heinz Eyrich, Walter Odersky and Franz Jürgen Säcker, *Festschrift für Kurt Rebman* (1989) 838. See also Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 *American Journal of Comparative Law* 229 (1991); of course, both articles are by now somewhat dated.

49) see Stürmer, *supra* note 48, at pp. 846–847.

overall structure of its private law.

The other major area is consumer protection through tort law. Important elements of modern European product liability, of the law of medical malpractice, and some rules on the liability for Services more generally, have been inspired by American models.⁵⁰⁾ The same is true for the protection of the right to privacy although this right has strong constitutional underpinnings in the German Grundgesetz as well.⁵¹⁾ Despite these influences, substantial differences remain between American and German law. Especially with regard to damages, German legislators and courts have continued to be more conservative than their American counterparts. Punitive damages, for example, are unknown and considered unacceptable, and compensatory damages, especially for pain and suffering, are usually much lower than those awarded in the United States.⁵²⁾ Thus, while the rules often look very much alike on paper, in practice, the consequences of liability frequently differ dramatically.

b. Economic Regulation: The Law of the Market

In recent years, American law has had a particularly significant influence on the German law of the capitalist market economy and its principal actors. In the area of corporate governance and liability this is true, for example, for the idea of piercing the corporate veil and of derivative shareholder actions.⁵³⁾ In competition law, modern antitrust rules have been inspired by American models Securities regulation has come under American influence, especially with regard to insider trading.⁵⁴⁾ And recent bankruptcy reform has looked to reorganization schemes in the United States as well.⁵⁵⁾

50) See, e.g., Werner Ebke, *Wirtschaftsprüfung und Dritthaftung* (1983); more generally Stürner, *supra note 48*, at p. 845.

51) See Stürner, *supra note 48*, at pp. 844-847 (with copious further references).

52) See *Entscheidungen des Bundesgerichtshofs* 118, 312 (1992).

53) See, e.g., Ulrich Drobnig, *Haftungchgriff bei Kapitalgesellschaften* (1959); Strürner, *supra note 48*, at p. 846.

54) See §§12-15 of the Wertpapierhandelsgesetz (1994); for a text and commentary, see Frank Schäfer, *Wertpapierhandelsgesetz* (1999). Yet, again, the German legislation is neither simply a copy of American models nor necessarily based on American legal and economic theories, see *id.* at 98 (marginal note 19 vor § 12). For the influence on Swiss law, see Wiegand, *supra note 48*, at p. 239.

55) The concept of an Insolvenzplan in the 1994 German Insolvenzordnung (§§ 217-269)

The influence of the American law of the market is not particular to Germany. It affects most of Europe, in part because American ideas often help to shape European Union law which is then binding on, or must be implemented in, the member states. In fact, American ideas affect large part of the capitalist economics in the world. In this regard, the influence of American law is simply: reflection and result of the globalization of markets and of the economic and political power of the United States.

c. Constitutional Doctrine: The American Model and the Grundgesetz

The third major area of impact is constitutional law.⁵⁶⁾ Here, American influence has a long history in Germany. It is traceable in the early nineteenth century, became particularly significant in the making of the 1848/49 constitution (which never entered into force since the revolution quickly failed), and is also visible during the Weimar period (1919-1933). Yet, American Constitutional law has had its greatest impact since 1949, i.e., on the making and interpretation of the post World War II German constitution, known as the Grundgesetz. The reason was in part that the American constitution provided the most impressive model for the German drafting Committee, and in part American influence was exercised directly through the American occupational authorities and their allies.⁵⁷⁾

It particularly affected three areas. Most importantly, the American constitution provided powerful support for the institution of full-fledged judicial review. Moreover, the American Bill of Rights helped to shape some of the fundamental rights listed in the Grundgesetz, especially with regard to due process. Finally, the design of the federal structure of the government had to take the American model into account.

None of this means, however, that the Grundgesetz was substantially shaped after the US Constitution. Most of the features of the Grundgesetz have deep roots in German political history and reflect independent choices

allowing the reorganization of an enterprise, was inspired by chapter 11 of the United State Bankruptcy Code.

56) For a lucid and highly informative overview see Helmut Steinberger, *200 Jahre amerikanische Bundesverfassung* (1987) (with further references).

57) See Currie, *supra note 23*, at pp. 8-10.

by the drafters. And while it is true that there are significant similarities between the American and the German constitutions, it is equally true that there are many important differences.⁵⁸⁾ German judicial review differs substantially from its American counterpart in style and scope; the catalog of basic rights guaranteed in the Grundgesetz is much more modern, detailed and substantive than the Bill of Rights; and German federalism has many features unknown in the United States.

Nor has the Bundesverfassungsgericht considered the United States Supreme Court its principal guide. Of course, many German justices are aware of American constitutional law but they have never hesitated to decide differently. A striking example of their independence is the issue of legalizing abortion. In 1973, the United States Supreme Court decided that the states *cannot outlaw* abortion during the first trimester; two years later, the Bundesverfassungsgericht decided that the state *must punish* it.⁵⁹⁾

2. Law in the Broad Sense: Teaching, judging, Practicing

In the last few decades, American ideas and practices have had a significant impact on German legal culture as well. They have affected how Germans think about and teach law, how they decide cases and rank legal sources, how they organize law firms and represent clients. This is illustrated by recent changes in the work of German legal academics, appellate judges, and practicing attorneys.

a. The Academic Side: Scholarship and Teaching

On the academic level, American ideas are being brought to Germany by the many scholars who cross the Atlantic in one direction or the other. After all, there are few, if any, countries in the world with which American law schools have academic exchanges as lively as those with Germany. A very substantial, and increasing, number of German professors have spent

58) See, e.g., the dated but still useful studies by Paul Kauper, *The Constitutions of West Germany and the United States: A Comparative Study*, 58 *Michigan Law Review* 1091 (1960); Donald Kommers, *Judicial Politics in West Germany: A Study of the Federal Constitutional Court* (1976).

59) Compare *Roe v. Wade*, 410 U.S. 113(1973) with *Entscheidungen des Bundesverfassungsgerichts* 39, 1 (1975).

time in the United States, be it as a graduate student in an LL.M. program or as a visiting professor. Conversely, there is a considerable contingent of American law teachers who come to Germany for teaching or research purposes.

It is no surprise then that American legal theory is slowly beginning to influence German legal scholarship. Critical legal studies have found followers in Germany⁶⁰), and particularly the economic analysis of law is becoming more and more widely known⁶¹). It is true that German legal theory is still overwhelmingly traditional, i.e. doctrinal and formalist, but the trend toward more critical, economically informed, and functional approaches is undeniable.

It is also no surprise that American teaching methods are becoming increasingly popular. To be sure, the lecture form still dominates, and there is little, if any, true Socratic teaching in Germany. But the days when students were not allowed, or did not dare, to ask questions are by and large gone. Many professors, mostly among the younger generation and especially those who have studied or taught in the United States, seek active student participation, focus on concrete problems rather than abstract doctrines, and emphasize policies rather than logical constructs.

Especially in the reform debates of the last few years, the American law school has repeatedly been advertised as an ideal, often in sheer ignorance of the fundamental differences between the two worlds on the institutional and economic level. Recently, the first private law school was founded in Germany, and the influence of the American model on its design is obvious⁶²). It may be a harbinger of future developments although it is too soon to tell.

60) See Christian Joerges and David Trubek (eds.), *Critical Legal Thought: A German American Debate* (1989).

61) There is a growing literature on law in economics in Germany, see, e.g., Peter Behrens, *Die ökonomischen Grundlagen des Rechts* (1986).

62) The Gerd Bucerius Law School Hamburg opened its doors in the fall of 2000; its approach, structure, and curriculum are outlined in its first Bulletin (2000).

b. Deciding Cases: Courts and Their Opinions

Since World War II, there have been significant changes in the role of judges, the importance of their workproduct, and in the style of their decisions. To a considerable extent, these changes have been driven by factors other than foreign influence but the role and status of American judges as well as the importance of caselaw in the common law systems have provided guidance and support for these developments in Germany.

To begin with, German judges have become very self-confident in recent decades, vis-a-vis scholars as well as towards the other branches of government. They still take scholarship under advice but are far from considering it gospel and every now and then flatly decide against the overwhelming academic opinion. They sometimes defy the legislature or the executive, occasionally decide contra legem, and openly make law almost as a matter of routine.⁶³⁾

As a result, caselaw has become a highly important legal source in virtually all areas of German law. In some, it completely dominates the field, in others, it fills gaps in or interprets, the statutes. Today, all German jurists-academics and students, judges and prosecutors, attorneys and notaries-deal with cases all the time, and Justinian's time-honored maxim "non exemplis sed legibus iudicandum est"⁶⁴⁾ is often honored in the breach.

The style of court decisions has changed in the American direction as well, especially on the appellate level. Decisions are decreasingly driven by formalist, syllogistic arguments and are increasingly oriented towards social and economic goals. They adhere less rigidly to statutory language and often take considerable liberty with enacted rules. To be sure, German decisions still emphasize logical order and consistent reasoning more strongly than their American Counterparts but beneath this often thin veneer of form, one can often discern conscious choices of substantive policy.

63) The courts' power to make law has long been recognized by the Constitutional Court, see, e.g. *Entscheidungen des Bundesverfassungsgerichts* 34, 269, at pp. 287-288; 49, 304 at p. 318.

64) Stated in (Justinians) *Codex* 7.45.13 (529 A.D.).

c. Legal Practice: Big Firms and Big Business

Yet, the aspect of German legal culture most strongly affected by American influence is probably the practice of law. Law offices are increasingly modeled after the big American firms, and legal practice is rapidly changing from a liberal profession to big business. Again, these developments are not limited to Germany but are taking place in virtually all highly developed countries.

German attorneys used to practice either alone or in small groups of up to five colleagues. In the last twenty years, and especially in the last decade, however, American-style big firms have sprouted like mushrooms. Today, there are more than a dozen German firms with over a hundred lawyers.⁶⁵⁾ Just like their American counterparts, they are powerful, hierarchically structured, and internally diversified enterprises. They have branch offices all over the country and abroad, and some have now merged with other European firms to form international conglomerates⁶⁶⁾. They prefer to hire young associates with American (or English) law degrees and offer highly specialized legal services for clients worldwide. In all these regards, they have become virtually indistinguishable from the American firms with whom they compete. In international cases, even their working language is often English.

In these big firms, law has already become big business. There is tough competition for clients, glossy brochures advertise the firms and their work, and fees are overwhelmingly charged by the hour. Financial considerations predominate and incomes are high. To be sure, this is mostly true on the top level but the effects trickle down from there to a large segment of legal practice. Whoever wants to compete with the big business firms is virtually forced to emulate their style. Slowly but steadily, German legal practice is becoming part of the service industry⁶⁷⁾.

65) See International Centre for Commercial Law, Germany, Major law firms listed by size, at http://www.icclaw.com/lfe/de_size.htm.

66) On August 1, 2000, the German firm of Bruckhaus, Westrick, Heller, Löber merged with the English firm Freshfields, Deringer to form a conglomerate of more than 1800 lawyers in 30 offices around the world.

67) See Rudolf Nirk, 50 Jahre NTW: Die Entwicklung der Anwaltschaft, *Neue Juristisch Wochenschrift* 1997, p. 2625.

Differences do remain. Contingency fees are still forbidden in Germany, litigated cases are normally compensated according to a statutory fee schedule, and advertisement is closely regulated. But the drift in the American direction will continue as a result of the rapid internationalization of the market for legal services in which American law firms are the leading trendsetters.

III. SUMMARY AND CONCLUSION

Faced with the many instances in which German and American law have mutually influenced each other over the last century and a half, it is easy to get drowned in details. But if we take a step back from the mass of minutiae, we can venture some general observations. We should, again, distinguish between the realm of positive law on the one hand and the legal system in the larger sense on the other.

On the level of positive rules, Germany and the United States have exchanged concepts and doctrines in a variety of areas. Most German ideas received in the United States concerned the law of contracts and of obligations more generally. American ideas influential in Germany pertained principally to torts, the law of the capitalist market, and constitutional law. On the whole, it is fair to conclude that on this level, American law had more influence on Germany than vice versa.⁶⁸⁾

The number of affected areas of positive law and of concrete exchanges seems impressive at first glance. But in fact, transatlantic influences were narrowly circumscribed in at least three regards. First, many, if not most, areas of positive law remained virtually untouched. In subjects as diverse as property, inheritance, and family law, criminal law, civil procedure, tax law, and many others significant influence was never even a real option. Second, even in the affected areas, foreign influence did not lead to a radical reshaping of domestic law. The two systems adopted some concepts and constructs from each other but they did not replace their own rules with

68) Stürner, *supra* note 48, at pp. 855-857, agrees with this assessment; Riesenfeld, *supra* note 10 at 97, considers the exchange more balanced.

imported substitutes on a broad scale. Third, even where foreign ideas were imported, they were reshaped in the process of adoption and mixed with indigenous elements. Comparing the American with the German concept of an obligation, or American and German approaches to judicial review, shows that the differences lurking beneath the common labels are often as significant as the similarities.

As a result, one cannot say that American positive law has ever been Germanized to any significant extent. And despite the greater American influence in the opposite direction, it would also be wrong to conclude that modern German positive law has been Americanized in any pervasive sense. Both systems of positive law have adopted bits and pieces from each other, no more.

On the level of the legal systems in the wider sense, the mutual influences are perhaps more pervasive. The American legal culture took significant guidance from the German academic side of law, from German legal theory, and from the internationalist and comparative approaches imported by the emigrant generation. Conversely, German legal culture has taken inspiration from the United States especially with regard to modern legal theory, judicial decisionmaking, and private legal practice. Again, one must be careful not to overvalue these influences. They also concern just some parts of the respective legal cultures while most other parts have not been touched at all. In many regards, German and American legal culture are still worlds apart.

Yet, in two regards, mutual influence did have a broad and lasting impact on the respective legal cultures. When the German model guided the institution of legal studies in the American universities it profoundly affected the American legal system because it helped to establish a new, academic, element. Ever since, American law has been not only the realm of judges and attorneys, as was the common law tradition, but also the subject of scholars and theoreticians, as in the civil law world. Unlike a century ago, virtually all American lawyers today are university trained jurists, just like their European colleagues. Conversely, as the American model boosts the rise of big law firms in Germany (and elsewhere) it has a deep impact on the German legal system because it contributes to farreaching changes in

the practice of law. Thus legal work, once the domain of scholars and jurists closely affiliated with state officialdom, is becoming part of the service industry. Unlike before World War II, a growing number of German attorneys today are players in the Commercial world, much like their American Counterparts.

These influences reflect the different strengths of the two legal systems. A hundred years ago, the pride of German legal culture was its leadership in the academic realm while today the pride of the American legal system is its dominance in the world of commerce. No wonder the Americans learned from the Germans that legal studies belong in the universities while the Germans are learning from the Americans that legal practice is part of the market.

<Abstract>

유럽과 미국간의 모델: 독일법과 미국법의 상호 영향*

마티아스 라이만**

법은 의학이나 물리학과는 달리 특정한 국가에 고유한 학문영역으로서 국가의 주권과 연결되어 국경에 구속된다. 그러면서도 법은 국가간, 문화간에 가장 놀라운 수출입 품목이다. 법제도는 오랜 옛날부터 서로 배워왔고, 오늘날은 물론 미래에도 여전히 상호 영향을 주고받을 것이다. 이는 한국도 예외가 아니며, 한국의 법률가들도 이를 의식하고 있다.

법사상의 수출입은 시대에 따라 변화한다. 18세기에서 19세기초까지는 영국과 프랑스가 두드러진 수출국이였다. 그러나 100여 년이 지난 지금은 독일이 첫째이고, 둘째가 미국이다. 독일의 법제도는 19세기 후반과 20세기 초까지 세계적으로 지도적인 역할을 맡아 왔고, 미국법은 제2차 세계대전 이후 선도적인 위치를 잡고 있다. 이제 두 나라 모두 세계적인 영향력을 가지고 있다. 이 두 제도의 상호 영향에 관하여는 많은 논문이 있으며, 이에 대하여 필자는 다른 기발한 생각을 갖고 있는 것도 아니고, 다만 대략적인 소묘와 몇 가지 예를 통해 흥미있는 관점을 보여주고자 할 뿐이다.

여기서 법의 영향이나 변화라는 것은 법률, 사상, 제도가 그대로 한 나라에서 다른 어느 나라로 넘어가는 것을 뜻하는 것이 아니라, 다른 나라의 법과 제도를 형성하는 데 도움을 준 경우를 말한다. 대개의 경우 외국의 영향력은 다른 여러 가지 요소 중의 하나일 뿐이고 정도의 문제이다. 그리고 영향을 준 부분은 수용하는 국가에 의해 새로운 모습을 갖게 되며, 따라서 동일성이 아니라 유사성으로 나타난다.

수용과정은, 외국의 사상이 수용국가의 실정법에 영향을 미치는 경우와 외국의 모델이 법문화에, 예를 들면 제도와 법이 작용하는 직업이나 지식 기반 등에 변화를 가져오는 경우라는 두 가지 차원에서 일어난다. 이를 중심으로 하여 다음의 세 단계로 논의를 진행할 것이다. 첫째, 미국법에 대한 독일의 영향으로 대략 1870~1950년이다. 둘째, 독일법에 대한 미국의 영향으로 20세기 후반이 중심이다. 끝으

* 본 초록은 任相嫻, 서울大學校 法學研究所 研究員이 작성하였음.

** Professor of Law, University of Michigan Law School.

로, 살펴 본 것들을 토대로 몇 가지 결론을 끌어내고자 한다.

I. 미국법에 대한 독일의 영향

제2차 세계대전 이후부터는 미국법이 유럽에 점차 영향을 끼쳐오고 있지만, 18세기 중반에서 1950년 무렵까지는 독일이 수출국이었다. 특히 1930년대까지는 미국의 법학자들이 독일법학을 배우는 데 열심이었다. 그 이후 미국의 학자들은 외국법에 대한 관심을 잃어갔지만, 이후 외국으로부터의 이민, 주로 나찌로부터 피난한 유대인 법학자들에 의해 유럽법과의 교류는 이어졌다.

1. 좁은 의미의 법: 실정법과 학설

제2차 세계대전 중에 미국의 학자들은 독일 실정법의 학설에 관심을 보였고, 그 가운데 더러는 수용되기도 하였고, 영향을 끼치지 못한 요소들도 있었다.

19세기 후반 프랑스와 독일 학설은 커먼로 상의 계약법이 근대적이고 합리적으로 변화하는 데 영향을 끼쳤다. 사비니와 빈트샤이트와 몇몇 판덱텐학자들의 교재가 영미법 교재의 각주에 등장하였고, 법률가들은 의사표시, 법률행위, 처분행위, 채무부담행위 등에 이르는 독일 채권법의 요소들을 수입하였다. 그러나 결국에는 이러한 이론 가운데 일부분만이 주류에 들어가게 되고 많은 부분들은 자리잡지 못한 채 잊혀지게 되었다.

계약체결상의 과실 이론은 자주 논의되고 도입의 필요성이 지적되었지만, 결국 정착하지 못했고 현재도 이에 관한 이론은 미흡하다. 행정법 학설 또한 독일계 미국학자인 에른스트 프로인트가 도입에 힘쓰기도 했지만, 이후 발전이 없었다. 헌법과 절차법에 있어서는 거의 영향을 받은 것이 없다고 할 만하다.

2. 넓은 의미의 법: 방법론과 제도

미국의 법제와 법문화를 살펴볼 때, 법학 방법론, 법제도, 법이론에 독일의 영향을 발견할 수 있다. 특히 과학으로서의 법, 교수 과목으로서의 법, 20세기 미국법 이론의 형성, 비교법의 발전이라는 네 가지 주요 영역에서 그러하다.

(1) 과학으로서의 법: 체계와 질서의 추구

19세기 미국의 법률가들은 법을 단순한 기능에서 “과학”으로 전환시켜는 생각에 빠져 있었다. 커먼로는 비체계적으로 발전해 와서, 포괄적이고 논리적인 구조가 결여되어 있었다. 이를 극복하기 위한 한 시도는 독일의 영향을 강하게 받은

분석법학을 영국으로부터 도입하려는 것이었고, 또다른 모색은 역사적 접근과 체계적 접근이 결합된 19세기 독일 법학의 도입이었다. 1870~1920년 판택텐학자들의 개념법학과 역사법학과는 많은 미국법률가들에게 모델이 되었고, 논리적이고 체계적인 접근을 발전시키는 데 이바지하였다. 논리적 체계적 방법론의 고전법학은 개념주의, 형식주의로 받아들여졌는데, 이들은 1920년대에 들어 리걸 리얼리즘의 강한 공격을 받게 되었고, 이후 독일법의 영향은 위축되어 갔다.

(2) 교수 과목으로서의 법: 대학과 전문가

커먼 로의 전통 아래 19세기 미국에서 법기술은 독학하거나 법률사무소에 도제로 들어가 배우게 되었다. 그러나 남북전쟁 이후 로 스쿨이 주목되고, 많은 대학에서 법학부나 법학과를 개설하게 되었다. 이러한 과정에서 실무와 학교 교육에서 독일 대학의 교수 방법은 가장 영향력 있는 모델이었다. 그 까닭에는 미국이나 영국은 법학 교육의 전통이 없어 유럽 대륙으로부터 방법을 배워올 수밖에 없었던 것과, 독일의 법학교가 당시에 선도적인 기관으로 여겨지고 있었던 점이 있다. 그리고 19세기 후반까지 은퇴한 법관이나 시간강의하는 법률가에게 맡겨져 있던 법학교육이, 대륙식으로 전문적인 법학교수들로 채워져 나가기 시작하였다.

(3) 현대 미국 법이론: 사회학적 법학, 리걸 리얼리즘, 기타

남북전쟁 이후 고전적인 개념주의와 형식주의에 맞서 사회학적 법학과 리걸 리얼리즘이 등장하였는데, 이들은 독일의 법사상의 영향을 깊이 받았다. 전자는 주장자는 로스코 파운드였다. 그는 “기계적 법학”에 반대하였으며, 법을 경쟁하는 사회집단간의 투쟁의 반영으로 보고, 법이 사회 정책의 기구로서 형성되어야 한다고 주장하였다. 그는 루돌프 폰 예링, 헤르만, 오이겐 예얼리히 등의 저작들을 많이 인용하였다. 리걸 리얼리즘의 형성에도 독일의 자유법학과가 많은 영향을 주었음이 확인된다. 특히 칼 르웰린, 제롬 프랭크는 당시 독일 법학에 깊은 관심을 가졌다. 20세기 초반 미국의 사상가들에서도 독일의 영향을 볼 수 있다. 예를 들면, 존 치프먼 그레이는 많은 독일 법학 문헌들을 인용하였고, 사법과정에 관해 도구적 관점을, 나아가 혁명적 입장을 지니고 있는 벤자민 카도조도 독일, 오스트리아, 프랑스 법학의 영향을 받고 있다. 수입된 외국의 요소들은 현대 미국 법학의 내적 요소들이 되어갔지만, 그 기원은 거의 잊혀졌다.

(4) 국제법 관점: 비교법과 외국법

유럽 전역이 전체주의에 의해 유린되자, 많은 학자들이 미국으로 이민하였고, 그들의 소개로 미국은 외국법에 대한 이해를 넓히게 되었다. 막스 라인쉬타인, 루돌프 쉴레징거 등은 비교법 연구를 확립하였고, 에른스트 라벨, 알버트 에렌즈바히, 쿠르트 나텔만, 보덴하이머, 프리드리히 케슬러, 스테판, 리젠펠트, 에릭 쉬

타인 등 많은 학자들이 미국 법학계에서 주도적인 인물들이 되었다. 이로 인해 비교법학과 국제적 법학 연구의 지평이 서서히 넓혀져 왔다.

(5) 실패: 법전편찬 논쟁

미국에도 유명한 통일상법전과 같은 것이 있지만, 커먼 로 체제는 유럽식의 포괄적인 법전 편찬의 전통을 갖고 있지 못하다. 그런 법전을 편찬하려는 노력은 일찍부터 이루어졌고, 독일의 BGB에 강한 자극을 받기도 하였다. 1860년대 뉴욕에서 1872년 캘리포니아에서 포괄적인 법전 편찬의 시도가 이루어지기도 했으나, 지금은 그런 작업은 없다. 독일의 법전 편찬 사고는 미국의 법문화를 전혀 장악하지 못했다.

II. 독일법에 대한 미국법의 영향

20세기 중반 이후 상황은 바뀌어 미국법이 주도적인 법수출국의 지위에 서게 되고, 독일법에도 영향을 미치게 되었다.

1. 좁은 의미의 법: 사법, 경제 규제, 헌법이론

(1) 전통적인 사법 영역: 불법행위와 계약

사법의 고전적 주제로 말하자면 크게 두 가지 부문에서 미국의 영향이 두드러진다. 첫째는 계약의 영역이다. 프랜차이즈, 리스, 팩토링 등 새로운 형식이 많이 등장하였고, 노우하우 계약, 신용카드, 전자 지불 수단 등에 관한 입법 등이 영향을 미쳤다. 다음은 불법행위법을 통한 소비자 보호이다. 제조물 책임, 의료과오, 서비스 책임, 사생활 보호 등에는 미국의 예가 주요한 모델이 되었다. 그러면서도 징벌적 손해배상 같은 것은 도입되지 않았다.

(2) 경제규제: 시장의 법칙

미국법에 나타나는 법인의 쌍벌 규정, 독점금지법, 내부자 거래 규제, 파산법 등은 독일뿐 아니라 유럽전역에 영향을 끼치고 있다. 이 경향은 시장의 세계화와 미국의 정치·경제적인 영향력에 의해 뒷받침된다.

(3) 헌법: 미국 모델과 기본법

미국의 헌법은 초기부터 독일에 많은 영향을 주었다. 특히 1848/49년 헌법에 중대했으며, 바이마르 시대에도 두드러진다. 제2차 세계대전 이후에 기본법 형성에도 영향을 주었고, 현재까지 가장 영향력 있는 모델이다. 권리장전 같은 것은 독

일에도 주지되어 있고, 미국 연방대법원의 판결이 독일 헌법재판소의 판결에 영향을 미치는 일도 나타난다.

2. 넓은 의미의 법: 교육, 판결, 실무

(1) 학술 부문: 학문과 교육

학술 차원에서 미국은 많은 유럽의 학자들을 끌어들이고 있다. 많은 이들이 LL.M 과정이나 방문 교수로서 미국 대학을 접하고 있으며, 이를 통해 미국의 법이론이 독일에 영향을 주고 있다. 비판법학이나 법의 경제적 분석 등이 아직도 도그마틱과 형식주의적인 전통을 고수하는 독일에 점차 영향을 끼치고 있다. 그리고 강의 형식에 있어서도 소크라테스 교수법이 퍼져 나가고 있다. 그리고 최근에는 독일에 처음으로 사립 로 스쿨이 설립되었다.

(2) 판결: 법원과 그 의견

제2차 세계대전 이후 법관의 양태에 중요한 변화가 있었다. 미국 법관들의 영향으로 케이스 로를 중시하게 되었고, 자신감을 가지고 판결을 통해 입법부에 맞서는 경향도 나타났다. 판결 스타일에서도 형식주의적, 삼단논법적 논변이 줄어들고 사회적, 경제적 목적을 추고하는 경향이 증가하는 모습을 보여주고 있다.

(3) 법률 실무: 대규모 법률회사와 대규모 경영

독일의 법문화에 가장 큰 영향을 준 것은 법률 실무라 할 수 있다. 대규모 법률 사무소들이 미국 회사를 모델로 삼는 경우가 증가하고 있으며, 이는 독일에 한정되는 일이 아니다. 독일의 변호사들은 혼자서 일하거나 5, 6명의 동료와 그룹을 짜서 일했지만, 이제는 100명이 넘는 변호사를 가진 회사가 10여 개에 이른다. 미국 회사는 내부를 위계적으로 운영하고 고객을 위한 전문 서비스를 제공한다. 서로 광고하며 경쟁하고, 시간제로 수입료를 계산하며, 세계적으로 경영 범위를 넓히고 있다. 독일도 법률 실무가 서비스 산업으로 되어가고 있다. 아직도 수입료가 법정되고 광고가 규제되는 등의 차이가 남아있지만, 미국적 경향은 이어질 것이다. 그것은 미국의 법률회사가 법률 서비스에 있어 급속한 시장 국제화에 대한 선도적 역할의 산물이기 때문이다.

III. 요약과 결론

독일과 미국의 상호 영향을 크게 실정법의 영역과 넓은 의미의 법제도로 나누어 생각해 볼 수 있다.

실정법 차원에서 독일과 미국은 많은 부문에서 개념과 이론을 주고받았다. 일반적으로 미국은 계약법과 채권법은 독일로부터 개념을 얻었고, 불법행위, 자본주의 시장, 헌법에 관한 법률들은 독일에 영향을 주었다고 할 수 있지만, 다음 세 가지 부문에서는 제한되었다. 먼저, 친족·상속법, 형법, 민사소송법, 세법 등 많은 영역에서는 거의 영향이 없었다. 둘째로, 외국법의 영향이 수용국가의 법제를 대체하지는 않았다는 것이다. 끝으로, 외국의 사상이 수입되더라도 수용 과정을 거쳐 다듬어지고 토착의 요소와 섞이게 되었다. 결론적으로 미국의 실정법이 독일화되지도, 독일법이 미국화되지도 않으면서, 서로의 법제에 영향을 주고받은 것이다.

넓은 의미의 법제 차원에서 보면, 미국은 독일로부터, 학술적인 면, 법이론, 국제적, 비교법적 접근 등에서 안내를 받았고, 독일은 미국의 현대 법이론, 사법 결정, 법률 실무 따위에서 영감을 얻었다. 많은 점에서 미국과 독일의 법문화는 서로 떨어져 있지만, 서로의 영향은 넓고 지속적으로 이루어져 왔다. 이러한 영향을 두 법제도의 서로 다른 위력을 보여 준다. 100여 년 전에는 독일 법문화의 궁지가 학문 영역을 주도하였지만, 지금은 미국 법제도가 상업 세계를 지배하고 있다.