The Ugly German

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Lederer's and Burdick's best-selling 1958 novel *The Ugly American* gave us a first, sharp-eyed portrayal of the post-war American hegemon. Commenting on the unconvincing and ineffective American diplomats he encounters, one government official from the fictional, South East Asian country Sarkhan remarks:

> *"For some reason, the American people I meet in my country are not the same as the ones I met in the United States. A mysterious change seems to come over Americans when they go to a foreign land. They isolate themselves socially. They live pretentiously. They are loud and ostentatious."*

Needless to say, that's an all-too-accurate characterization of Americans today, no matter where you find them. But at the time it clashed with Americans' self-image as the modest citizen soldiers who had sacrificed so much to contribute to the liberation of Europe and Asia. With the Cold War heating up, the novel spurred Americans to begrudgingly recognizing that they were locked in a battle for hearts and minds with their communist adversary. And it was a shocking disappointment to look at ourselves in the mirror only to discover that our power had turned us into an obnoxious, arrogant caricature. Looking back at us from the pages of that classic novel was the ugly American hegemon.

The Ugly American is credited with spurring President Kennedy to establish the Peace Corps as a corrective to the Americans depicted in the novel. The book also dogged American decision-making, fateful and disastrous as it was, throughout the long, bloody, and dysfunctional "police action" in the actual countries of South East Asia. In the Viet Nam War's middle years the Americans invested immense resources in a "pacification" effort that sought to win-over Vietnamese hearts and minds by providing security for South Vietnamese hamlets, assisting war refugees, improving basic services, and ensuring the reliable availability of food. But it's hard to escape the logic and momentum of hegemony, which often serves as shorthand for domination. So, of course, the American operatives charged with implementing these programs also were accused of brutal detentions and executions of suspected Viet Cong sympathizers.

One detail is routinely overlooked with respect to *The Ugly American*. The book's use of the title "ugly American" wasn't meant to refer – as a critique – to the "loud and ostentatious" American government officials imperiously striding about the globe – although the book laid bare that stereotype of the Americans. Instead, "ugly American" referred to the book's plain and practical protagonist, Homer Atkins. Atkins was the foil for the aloof and garish American diplomats. He settled in a Sarkhan village, learned the local language, observed and respected the local customs, and provided the locals some engineering know-how as they set-up a bicycle powered water pump. Atkins was the epitome of humble, grassroots intercultural engagement that, in the end, generates something like mutual benefit and understanding. The novel insists that we see Atkins as he sees himself: pragmatic, unrefined, down-to-earth – a man of the American heartland: "His hands were laced with big, liverish freckles. His fingernails were black with grease. His fingers bore the tiny nicks and scars of a lifetime of practical engineering. The palms of his hands were calloused... But he was... proud and confident of his ugly strong hands." This is the book's neglected lesson. It extols Atkins, who may have been ugly in body but not in spirit. He was the rare hegemon – still every bit American – who nevertheless managed to be modest, curious, respectful, decent, and ruggedly productive.

The novel's two ugly Americans provide useful models for two facets of hegemony as Gramsci theorized it. Hegemony, he insisted, is more than a state of

cultural domination. It is better understood as a process of socio-historical change that takes place before power is institutionalized. The two drivers of the hegemonic process Gramsci theorized are *consensus* and *coercion*. Atkins as the (*consensus*-oriented) ugly American, on the one hand, and the insufferable American officials as the (*coercive*) ugly Americans, on the other hand. In Gramsci's understanding of the process of hegemony, the aspiring hegemon seeks to secure the priority of its principles and power against the resistance of subaltern perspectives first through moral or intellectual strategies of *consensus*. But, as subaltern perspectives persist or proliferate or provoke, the aspiring hegemon must uphold and insist on its dogma through *coercion*. The result of the hegemonic process, according to Gramsci, is this exercise of coercive power in the absence of legitimacy – a legitimacy crisis.

To wonder about the hegemonic status of German law is to deconstruct the process of its praxis at this time relative to the subaltern perspectives of law it aspires to regulate through institutionalized power. But what is German law's dogma? What are German law's subaltern voices? What are its methods of gaining subaltern *consensus*? Has it already slipped into a *coercive* mode and the attending legitimacy crisis? Is German law in the Atkins phase of its hegemonic ugliness, building consensus around its principles and praxis with modesty and rolled-up sleeves. Or is German law in the officious, coercive phase of its hegemonic process such that one might say, to paraphrase the novel, "The German lawyers I meet in Brussels aren't like the Germans one encounters in the old factory towns of the Ruhr valley or the pastoral farms of Oberbayern. A mysterious change seems to come over German lawyers when they go abroad. They insist on the priority of their way of doing things, on their approach to the law. They are arrogant and inflexible."

I object to the suggestion that German law might be reduced to a singular and compact dogma or defining quality. I have argued that it is possible, and more productive, to see German law as the site of a discourse among a plurality of normative approaches and understandings. But even in that work I have conceded that there are some core cultural attributes that provide useful handholds for a foreigner's encounter with German law. A prominent touchstone is the positivistic ambition that law should be perceived as an objective science. That ambition is manifested in hypertextualism, conceptualism, and systematization. As Pierre Legrand put it, Germany is "the land of *Rechtswissenschaft*, of seemingly relentless legal conceptualism and systematization, of apparently incessant categorical thinking, the country where one still appreciates being told one is a good dogmatician." It seems that the dogma of German law is dogmatics.

This is the hard bone on which successive subaltern claims to normativity have broken their teeth: Free Law, Interest-Jurisprudence, Legal Realism, Critical Legal Studies, Law and Economics. And if we broaden the aperture to imagine German law's hegemonic process on a European scale, then it's easy to understand that the English common law tradition – amplified by the weight and influence of its American cousin – has been a subaltern irritant. In spirit, the common law's inductive and analogical argumentation – its facticity and residual uncertainty – fit uneasily with German continental law's deductive and categorical argumentation – its abstraction and certainty. But there are other subaltern provocations to the logic of German *Rechtswissenschaft*. German legal science – with its claim to objectivity – can pretend to be decontextualized, to have transcended its national anchorage and contingency in Germany, to be expressive of logical universals. The legal nationalisms in Poland and Hungary are obvious challenges to that dream. They may not have coined the phrase "constitutional identity," but the Visegrád states are determined to take it seriously. The project of European law itself poses a challenge to German legal science. More than German code-thinking, European law is political, it is addled by compromise, and it is unsystematic. It is nothing like legal science. Maybe the best evidence of this irritation is the fact that one of Germany's chief contributions to the European project has been its support – both *consensual* and *coercive* – for European-

level efforts at continental legal harmonization, often by way of codification.

What have been German law's moral and intellectual strategies for gaining consensus around its approach to law? What are the tools of German law's Homer Atkins? I can think of a few stories.

Germany's thoroughgoing post-war national modesty has been an immense reassurance as the principles and praxis of its law have attracted interest elsewhere. Even if suspicion towards the Teutons has rooted itself in Europe's DNA, for most of Germany's post-war history no one needed to worry that Germans' insistence on the superiority of their way of doing law was an attempt to aggrandize German power generally. Pounded into the role by successive, catastrophic military defeats, Germans were the first Europeans, maybe even the first authentic cosmopolitans. This has been an incredibly valuable instrument for fostering consensus around its cultural forms, especially its approach to law. Of course, it was easy to overlook the fact that supranationality had become definitive of Germanness. Germanness, which was really anti-Germanness, might have been reassuring to Germans and others. But it involved a denationalized posture not shared, or not shared in anything close to the same degree, by nearly any other people in the world, few of whom had drunk so deeply and calamitously from the bitter draught of patriotism. Not even Germany's partners in Europe seemed to have gone so far down the European rabbit hole. And, as we have consistently seen in decisions issued by the Federal Constitutional Court, Germany itself might not have believed it. In any case, Germany's supposed post-modern, post-national transfiguration fit neatly with the posited decontextualized, logical universalism at the heart of its *rechtswissenschaftliches Dogma*. As the idea of the state – not to mention the nation – persists, Germany and German law will have to resort to coercion to insist on their priority, which is packaged as a non-German state-of-being and a non-German fate. What could be more German?

Another curious phenomenon in the consensual mode of German law's hegemonic process has been the ascendance of the proportionality principle as the dominant, global method for understanding, interpreting and applying human and basic rights. No one doubts proportionality's German pedigree. And – except for some profound, insightful and necessary critical reflection of the kind Jacco Bomhoff has produced – no one seems to doubt proportionality's global conquest. This triumph was seemingly achieved by consensus and not coercion. It would have been impossible to impose this German construct in such a far-flung manner – from the constitutional jurisprudence of Asia's apex courts, to Canada, to Israel, and to Europe's supranational and international legal regimes. As Stone Sweet and Mathews insist "the principle of proportionality has become a core component of global constitutionalism." The principle itself is remarkably well-suited to wide-spread adoption because its final step – weighing interests or "proportionality in the narrow sense" – permits the consideration and evolving expression of local values. But in this sense the consensual-hegemonic conquest of proportionality is not a very German triumph at all. The principle's judicially-administered flexibility, its contingency, and its indeterminacy is what seems to make it so persuasive and transplantable. But it bears almost no kinship to the steely dogmatics of German *Rechtswissenschaft*. Is it possible that Germany's proportionality principle has been the unknowing vehicle for the further, hegemonic dissemination of common law thinking about the law? At the very least, as Eric Engle put it, "proportionality … is one of the main vectors that drives convergence of common law and civil law into a globalised *jus commune* ." Proportionality's reception might have been consensual. But it wasn't very German.

A third tool for German law's hegemony has been the immense financial resources that stand behind it and with which it is conjoined. These can be deployed to secure comfort with (through *consensual* processes) or acquiescence to (through *coercive* processes) German law's values. German Euros – channeled by the state, charitable and non-governmental foundations, and the legal community – have poured into efforts to familiarize lawyers from around the world with German legal culture. Who could know about this

dimension of German law's hegemony better than me? I received a Robert Bosch Foundation Fellowship with literally no German-language competence. But Bosch invested resources in my language training and then, through internships and thoughtful programming, set me on a course for a comparatist's life-long journey to discover the soul of German law. Along the way I've been supported – and I've met many other colleagues from around the world who have been supported – by the DAAD, the Max Planck Society, the political parties' foundations, by the Alexander von Humboldt foundation, and other German institutions that support academic exchange and foreign research in Germany. This has produced an undeniable – but probably unquantifiable – multiplying effect for German law's acceptance and reception. But that is not a straightforward or antiseptic process. As Armin von Bogdandy notes in his introductory text, the *German Law Journal* project, which is a child of such a more-or-less consensual affair with German legal culture, has been about the transnationalization of German law every bit as much as it has been about the Germanification of transnational (not to mention foreign) law. After all, the *German Law Journal* publishes in English and, for most of its two decades, it was coordinated and published by scholars and students based in North America. This is exactly the development Gramsci theorized. The authority that German legal culture gains through *consensual* processes nevertheless puts it on the path to encounter the stubborn subaltern perspectives that will consistently betray it and eventually require a resort to *coercion*. Having convinced me of the merits of German law, the foundations that have supported me only ended up Americanizing or transnationalizing German law.

Yet, for proof of the darker, coercive potential of the wealth that fuels German law's hegemonic process, you only have to look at the atomic force with which Germany asserted the priority of its fiscally conservative legal-economy when negotiating the successive bail-outs for the struggling countries in the south of Europe. Talk about a legitimacy crisis.

German law's hegemony – which is a process of hegemony – has its own cast of ugly Germans. Ugly in both senses that the classic novel suggests. There are consensual devices – ugly in their banality – such as German law's studied cosmopolitanism, proportionality serving as the face of German law (even as it might be the least German of legal principles), and generous programs supporting foreigners' encounters with German law. And there are coercive devices – ugly in their arrogance and reliance on power – such as German law's insistence on German-style cosmopolitanism, proportionality (even as it might be the least German of legal principles) serving as a common law front for ever-deeper incursions of more dogmatic forms of German law, and generous programs of wealth redistribution that are conditioned on submission to German legal-economic values. Maybe the only way to say it is that German law's hegemony is "Himmelhoch jauchzend, zu Tode betrübt".

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