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# **Structures of Japanese and German International Legal Co-operation**

## **With Formerly Socialist Countries Compared**

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## 1. International legal co-operation with formerly socialist countries

Between Germany in the West and Japan in the East, we find a vast area covered by countries that at one time adhered to and in some cases continue to adhere to the doctrine of state socialism: Eastern Europe, North and Central Asia, East Asia and South East Asia. In Eastern Europe, socialism has collapsed totally, giving way to entirely different systems. In North and Central Asia, i.e. the successor states to the Soviet Union, the Soviet order transformed into post-socialist systems that continue certain traditions developed under socialism, including legal traditions, but do not consider themselves to be socialist any more. In contrast to this total demise of official socialist state identity in Eastern Europe and the former Soviet Union, we still find states that call themselves “socialist” in other parts of Asia: the PR of China, North Korea, Vietnam and Laos, whereas Cambodia has given up socialism.

The change from a socialist to a non-socialist system obviously requires comprehensive legal reforms, in fact the re-writing of the entire legal system if you take the law seriously. But also those countries that continue the adjective “socialist” in their state name or official ideology have left the path of ‘orthodox’ socialist legal culture, as developed in the Soviet Union and adapted in East Asia, and have embarked on a way towards systems that are at least ‘hybrid’<sup>1</sup>. As a consequence, these more or less ‘socialist’ states as well need to change their law. In all these countries legal change means – to various degrees – the adoption of legislative values, regulatory models and techniques familiar to and in practice in advanced market economies such as e.g. Japan, Western Europe, or North America.

It is obvious that countries facing the need of a comprehensive law reform will seek for outside models and sometimes for outside help. Learning from the outside world does not only save labour but also minimizes risks because it may help to avoid the mistakes that others have already made. On the other hand, it may lead to an increased influence of the country that is taken as a model or is active as a helper. Therefore, after a first wave of enthusiasm immediately after the end of socialism<sup>2</sup>, the recipient countries started to select

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<sup>1</sup> For details on the current constitutional and political systems of the Asian countries mentioned, cf. AIKYŌ, Masanori (ed.): *アジア法ガイドブック*. The Handbook of Asian Legal Systems, Nagoya University Press, Nagoya 2009. On the hybrid character of the recent legal systems of Asian ‘socialist’ systems cf. KÜPPER, Herbert: Einführung in die Rechtsgeschichte Osteuropas, Studien des Instituts für Ostrecht München vol. 54, Peter Lang Verlag, Frankfurt/Main 2005, pp. 630-647.

<sup>2</sup> This enthusiasm was not shared by all countries that had abandoned socialism. Especially Hungary, being the country with the farthest reaching legal reforms during the socialist era, was very cautious in inviting active outside help. On

stronger among the help offered and the helpers<sup>3</sup>. A sort of market has evolved for the so called “international legal co-operation” which is the current term for advice given on legislation, on its implementation, on legal education and on the development of the soft factors of a legal culture, by actors from one country (the donor) to institutions of mostly an official nature of another country (the recipient).<sup>4</sup>

As a consequence, we experience to-day a certain competition among the donor countries and international donor institutions such as the World Bank as well as among the models and regulatory philosophies, i.e. the contents and methods, offered to recipient countries. Since legal reforms in formerly and present socialist countries aim at creating a legal system which is identical with or at least similar to the developed market economies and democracies, these countries are the role models and thus the ‘natural’ donor states.<sup>5</sup> A certain dividing line among donors seems to exist between common law countries on the one hand and the countries of codified law, which may be termed “continental countries” or civil law countries, on the other. Many advisers from European civil law countries deplore the aggressiveness of advisers from common law countries, especially from the U.S. This aggressiveness has been experienced by Japanese co-operation initiatives as well although Japan takes what may be termed a ‘hybrid’ position in the civil law / common law divide, true to its own hybrid legal system and culture<sup>4</sup>. Germany clearly defines its legal system and legal culture as ‘continental’ and uses this argument to advertise German legal co-operation vis-à-

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the Hungarian point of view cf. SAJÓ, András: Was macht der Westen falsch bei der Unterstützung der Rechtsreformen in Osteuropa?, *Kritische Justiz* 30 (1997) 495-503.

<sup>3</sup> For the current discussion in one of the most important recipient countries, the PR of China, cf. SCHICK-CHEN, Agnes: *Der Diskurs zur chinesischen Rechtskultur in der Volksrepublik China*, Peter Lang Verlag, Frankfurt/Main 2009.

<sup>4</sup> In Japan, where international legal co-operation is more strongly embedded in the overall structures of development aid (‘technical assistance’), the expression ‘technical legal assistance’ is widely used: 法整備支援 or 法制度整備支援. The term 整備 (seibi) means maintenance or adjustment, usually of buildings or technical equipment. In combination with ‘law’/‘legal system’ (法/法制度) it gives the legal assistance a very technical aspect which makes it fit in the overall concept of a ‘technical’ assistance given to developing countries.

<sup>5</sup> The dominant role of ‘Western’ law as a role model is so strong that transitional countries hardly co-operate to learn from each other. This is especially true in the Eastern parts of Central Europe and in South East Europe where the formerly socialist countries wanted respectively want to join the EU and therefore strongly concentrate on achieving EU-compatibility of their legal system. For this, they heavily rely on advice given by EU organs and, as the case may be, by old member states but very rarely compare their respective experiences with each other although they all face rather similar problems. However, the formerly socialist countries that did already join the EU now actively take part in EU-sponsored programmes to assist the candidate states or to co-operate with other formerly socialist countries, thus sharing their experiences in achieving EU-compatibility.

<sup>4</sup> MATSUO, Hiroshi: *International Affairs in Relation to Legal Assistance and Law and Development Studies as a Base for Consideration of Japan’s Legal Assistance*, *ICD News* December 2009, 97-157 (122-124); MORINAGA, Taro: *Legal Technical Cooperation by Japan – Who we are and What we Do*, *ICD News*, December 2010, 1-21.

vis (potential) recipients with a civil law background. Japan, on the other hand, tends to avoid a clear position in this divide by stressing that it shapes its assistance to the needs of the recipient country. Since most recipients have a law more similar to civil than to common law, this pragmatic stance leads to a certain prevalence of civil law ideas in Japanese legal assistance programmes. Japanese advisers tend to react flexibly if in the course of a project common law ideas are introduced.<sup>7</sup> On the ‘market of international legal co-operation’ Japan rather tends to advertise its unique combination of experiences as a recipient and as a donor country<sup>5</sup> as well as its hybrid legal system which equips Japanese lawyers with insight into civil law elements as well as into common law elements.

Countries with an advanced market economy tend to think that exporting their own regulatory models and legislative philosophy will create in the recipient country a legal culture similar to their own, which in turn will help the donor’s economy because it will have an advantage on a market with a familiar legal setting<sup>6</sup>. Although there is no empirical proof for this assumption<sup>7</sup>, it is widely spread in potential donor countries, and it adds to the competition among donors mentioned before. This is true not only for Germany, but for Japan as well<sup>8</sup> although the official position, enshrined in the ‘Japan’s Official Development Assistance Charter’<sup>9</sup> by the Ministry of Foreign Affairs, presents altruism as the principal motive. The Ministry of Economy, Trade and Industry, on the other hand, stresses the advantages of ‘exporting’ Japanese law more openly and sees international legal co-operation also as one way to better understand the law of the recipient countries, especially of China. They hope that this will give Japan a better position in the competition for Chinese markets.

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<sup>7</sup> An example is the Japanese assistance in creating a new administrative procedure law in Uzbekistan; this is described by KODAMA, Shigeru: Administrative Law Reform Assistance in Uzbekistan and the Necessity for New Comparative Administrative Law, in KÜPPER, Herbert / BRENN, Wolfgang (eds): Die Rolle des Rechts und der internationalen juristischen Zusammenarbeit bei der Schaffung einer Zivilgesellschaft in Asien, Studien des Instituts für Ostrecht München vol. 64, Peter Lang Verlag, Frankfurt/Main 2010, 149-168.

<sup>5</sup> JICA (ed.), Capacity Development for Legal and Judicial Sectors in Developing Countries. JICA’s Co-operation for ‘Rule of Law Promotion’, June 2009, iii-iv, 8-9, 15-16; the paper is available at the website <http://lvzopac.jica.go.jp/external/library?func=function.opacsch.mmdsp&view=view.opacsch.mmindex&shoshisbt=1&shoshino=0000252223&volno=0000000000&filename=11988995.pdf&seqno=1>; MORINAGA (fn. 6).

<sup>6</sup> MATSUO (fn. 6), 103.

<sup>7</sup> CAROTHERS, Thomas (ed.): Promoting the Rule of Law Abroad in Search of Knowledge, Carnegie Endowment for International Peace, Washington, D.C., 2006.

<sup>8</sup> MATSUO (fn. 6), 108-110; Yamashita, Terutoshi: What Legal Technical Assistance Brings Us, ICD News, December 2010, 35-42.

<sup>9</sup> Available on the website of the ministry: <http://www.mofa.go.jp/policy/oda/reform/revision0308.pdf>.

In the case of Germany and Japan, the interest in the legal order of the formerly socialist countries is even stronger than a mere interest in advancing their own economies: Both countries are immediate neighbours to the formerly and, in the case of Japan, also present socialist world. Therefore it is in their political and humanitarian interest, too, that their neighbours do not fail but manage their reforms successfully.

Despite the potential competition between Japan and Germany as donor countries, alliances in legal co-operation with formerly socialist countries may be helpful for both donors<sup>10</sup>. In order to co-operate efficiently both parties need to know the structures of international legal co-operation that the other country has. A good knowledge of the other donor can make a partnership more successful.

Therefore, the aim of this paper is to compare the infrastructure for international legal co-operation in Japan on the one hand and in Germany on the other. Given this aim, the perspective will necessarily focus on the donor side, abstracting more or less totally from the recipients. Yet, the recipient side will play a certain role insofar as the focus of the analysis lies on donor infrastructure for the co-operation with formerly or present socialist countries; infrastructure for the co-operation with other areas of the world – which at least in Germany is conducted partially by different agents – will remain outside the scope of this paper.

The focus on the infrastructure – i.e. the agents active in this field – has another consequence: the contents, the regulatory philosophy of both donor countries, will not be a major issue. It is interesting, of course, to compare the intentions to finance, organise and conduct legal co-operation that Japanese and German governments may harbour<sup>11</sup>. It is equally interesting to see how both countries and their co-operation agents position themselves in the competition between common law and civil law and whether they feel that they export models pertaining to one of these families of law, or that they give ‘abstract’ advice trying to pick out those solutions that seem to be best for the specific situation of the recipient. However, for mere reasons of quantity, these questions need to be left unanswered in this paper which focuses on the co-operation infrastructure.

The proposed comparison is interesting not only under the aspect of possible donor co-operations and strategic or momentary ‘alliances’. Germany and Japan tackle the task of

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<sup>10</sup> KÜPPER / BRENN (fn. 7).

<sup>11</sup> Are both donor countries really as unselfish in their help as they sometimes purport to be? Or are economic factors relevant, i.e. creating a legal environment in the recipient countries that tends to favour the economy of the donor country? Or is there a political interest in creating stability or in gaining influence in the recipient country?

international legal co-operation with a somewhat different set of instruments. Although reducing both countries to one adjective is necessarily an over-simplification, for the sake of convenience, the Japanese way may be labelled as ‘concentrated’, whereas German infrastructure is ‘decentralised’. By comparing the two systems, both countries may learn something not only about the other side, but also about themselves.

In the following, the infrastructure of international legal co-operation is analysed according to the special functions the agents fulfil in the overall framework:

- Infrastructure of knowledge in the donor country on the laws of the recipient countries;
- Infrastructure to spread the knowledge on the law of the donor country in the recipient countries;
- Infrastructure for an academic analysis of the co-operation process;
- Infrastructure of agents for the operative co-operation work;
- Political, financial and other co-ordination of the various activities and agents.

This paper will deal with ‘official’ agents only, i.e. state organs, state-sponsored and/or state-controlled institutions. This concentration on state activities does not underestimate the enormous amount of helpful work that NGOs from both countries carry out in recipient countries. Apart from the NGOs, which may be defined as founded in private law and not profit-oriented, there is also a commercial sector of law firms and advisers that offer specialised services for legal assistance projects. Given the enormous amount of money that donors spend for their legal co-operation and the fact that these programmes are put to tender by some donors<sup>12</sup>, an expanding market has emerged where quite often official agents, NGOs and commercial advisers compete for projects<sup>13</sup>. However, analysing both state and private structures would be more than this paper can do. Therefore, it focuses on the official part of the co-operation infrastructure, bearing in mind that making law and enforcing law basically are activities of the state.

## **2. Infrastructure of knowledge in the donor country on the laws of the recipient countries**

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<sup>12</sup> International and supranational donors such as the World Bank and the European Union practically always put programmes to tender, but also some donor states practice public or semi-public tenders as a way to find an appropriate organisation to administer and/or carry out co-operation projects.

<sup>13</sup> MATSUO (fn. 6), 100-103.

In German projects of international legal co-operation, the adviser usually is a practitioner of German law or an academic specialised in some field of German law<sup>14</sup>. This choice of advisers reflects the wish and need of the recipient country to get advice from persons who have sound theoretical and/or practical knowledge of a model that is perceived as functioning well and therefore is interesting, even if the aim of projects usually is not to export an ‘exact copy’ of the German law. This means that the advisers know their own donor law well, but have little or no knowledge of the law and the legal culture of the recipient country. As a consequence, they cannot participate in the analysis neither of the fields of law that require reform, nor of the goals, aims and instruments of the reform, nor of the coherence of the overall legal system. Therefore, they are not in a position to adapt their advice and counselling to what may be the ‘true’ needs and deficiencies of the recipient country, but can adapt only to what their project partners of the recipient country communicate them.

Typically, Japanese experts have a similar background: They are practitioners, drawn often from the public sphere (judges, public prosecutors, lawyers from the various fields of public administration). Sometimes, attorneys are included, especially when access to justice forms part of a project, or scholars with a theoretical knowledge are invited to participate. In projects targeting the legal education system, university professors can be found quite frequently. As experts for their respective field on Japanese law, they have little or no knowledge of the law and the legal culture of the recipient country.

Both Germany and Japan have a certain scholarly infrastructure that provides information and knowledge about the legal systems of the recipient countries. Since this paper focuses on the international legal co-operation with formerly and present socialist countries, the following presentation is limited to institutions dealing with these legal systems.

### *2.1. Germany: the special role of ‘Ostrecht’*

Within the research on foreign law, the research concerning Eastern Europe has traditionally enjoyed a special position in the German-speaking countries. This regional specialisation within comparative law is called ‘*Ostrecht*’ (East European law, in literal translation: 東欧法). Its academic and institutional consolidation as a specialised branch of

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<sup>14</sup> There also is the type of the ‘professional adviser’ who does not practice his or her own law but has found a living in acquiring and conducting assistance projects. This type is found in commercial ‘donors’, i.e. law firms and similar institutions that specialise in this market. Since this paper concentrates on the official agents (cf. point 1), the ‘professional adviser’ does not need to be dealt with here.

research on foreign law dates back to the 1920ies. After World War II the geographical focus of *Ostrecht* narrowed down to the then socialist countries in Eastern Europe, including the Soviet satellites in Asia and elsewhere<sup>15</sup>. Although some of the research infrastructure on Eastern Europe and the socialist world were closed down after the end of the cold war, several institutions survived and maintain a special knowledge on the legal systems of Eastern Europe, North and Central Asia – and to a lesser extent of East and South East Asia.

Typically, all German research infrastructure is divided in universitarian and extra-universitarian research. This is true for *Ostrecht* as well.

### 2.1.1. University institutes

At German universities, several institutes for *Ostrecht* can be found. They have a theoretical focus and take part in the teaching activities of their respective faculties.

The largest institution of the kind is the *Institut für Ostrecht* (Institute for East European Law) of the University of Cologne<sup>16</sup>. It is headed by Professor Dr. *Angelika Nußberger* who has two academic assistants and more staff financed on a project basis. The institute has a large library and publishes ‘*Osteuropa-Recht*’, a quarterly on East European Law with a strong focus on constitutional and judicial questions.

The second university institute is the *Institut für Osteuropäisches Recht* (Institute for East European Law) of the University of Kiel<sup>17</sup>. Its director is Professor Dr. *Alexander Trunk*, and its staff comprises one post-doc and two Ph.D.-students financed mostly by project funds. Library and research activities strongly concentrate on Russia and the other formerly socialist countries at the Baltic Sea.

The Faculty of Law of the Humboldt University in Berlin continues the tradition of a chair for Russian law, established during GDR times. However, it was merged with other subjects and is now the *Lehrstuhl für Öffentliches Recht, Russisches Recht und*

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<sup>15</sup> For a history on the German-speaking *Ostrecht*, cf. KÜPPER (fn. 1), 686-703. The then contemporary discussion on the role, the legitimacy and the methods of the *Ostrecht* during the socialist period is documented in Meissner, Boris / Roggemann, Herwig / Schroeder, Friedrich-Christian / We sten, Klaus (eds.): Grundsatzfragen der Ostrechtsforschung, Studien des Instituts für Ostrecht München vol. 28, Tübingen 1980.

<sup>16</sup> Website: [www.ostrecht.uni-koeln.de](http://www.ostrecht.uni-koeln.de).

<sup>17</sup> Website: [www.uni-kiel.de/eastlaw](http://www.uni-kiel.de/eastlaw).

*Rechtsvergleichung* (Chair for Public Law, Russian Law and Comparative Law<sup>18</sup>). The director, Professor Dr. *Alexander Blankenagel*, concentrates on publishing and teaching in Russia itself.

The Free University of Berlin has an interdisciplinary *Osteuropa-Institut* (Institute for East European Studies<sup>19</sup>). The two professorships for East European law the institute used to have until the 1990ies were both terminated. After a long vacancy, an assistant professorship, limited to a maximum term of six years and without any assistants or other infrastructure, was created and is currently being held by Professor Dr. *Burkhard Breig*. The research strongly focuses on Russia, the other successor states to the Soviet Union, and Poland. The library contains considerable legal materials, but only comparatively few are of recent date.

Other institutions were discontinued after 1990 when becoming vacant: the Institute for East European Law of the University of Hamburg (Professor Dr. *Otto Luchterhandt*) and the chairs for East European Law at the universities of Regensburg (Professor Dr. Dres. h.c. *Friedrich-Christian Schroeder*) and Passau (Professor Dr. Dr. h.c. *Martin Fincke*).

Some professors without a formal attachment to *Ostrecht* developed a special focus on the formerly socialist countries, their law and its transformation, usually because of their participation in long-term legal co-operation programmes. The best example is Professor Dr. *Rolf Knieper*, professor for civil and commercial law at the University of Bremen who created a special research unit for the legal transformation of formerly socialist countries. This research unit was funded largely by foundations und underwent certain changes upon the emeritation of Prof. *Knieper*. His successor as director of this research project ‘*Transformation Zivil- und Wirtschaftsrecht in den Staaten des Kaukasus und Zentralasiens*’ (Transforming Civil and Commercial Law in the States of Caucasia and of Central Asia<sup>20</sup>) is the former President of the Supreme Court of Georgia, Professor *Lando Chanturia*.

### 2.1.2. *Ostrecht* research outside universities

Germany has strong traditions of high-quality research outside universities. Several institutions exist in the field of comparative law.

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<sup>18</sup> Website: [www2.hu-berlin.de/blankenagel](http://www2.hu-berlin.de/blankenagel).

<sup>19</sup> Website: [www.oei.fu-berlin.de](http://www.oei.fu-berlin.de).

<sup>20</sup> Website: [www.cac-civillaw.or](http://www.cac-civillaw.or).

The *Institut für Ostrecht München* (Institute for East European Law Munich<sup>21</sup>) is the only extra-universitarian research facility for comparative law with a regional focus on the formerly socialist countries, i.e. Eastern Europe. It is financed by the Federal Ministry of Justice (3/4 of the budget) and by the federal state of Bavaria (1/4 of the budget). Its Academic Director, Professor Dr. Dres. h.c. *Friedrich-Christian Schroeder* held the chair for Criminal Law, Criminal Procedure and East European Law at the University of Regensburg until emeritation; he has been Academic Director of the institute since 1973. The Institute for East European Law has six research fellows who specialise in one or two countries each; thus, all countries in Eastern Europe are covered by a specialised researcher, except Albania and the three Baltic republics. In this system of country specialists, no specialisation as to fields of law takes place: Every research fellow monitors the development of the entire legal order of ‘his’ or ‘her’ country/countries.

The institute maintains a large library, issues a book series called *Studien des Instituts für Ostrecht München*, publishes the semi-annual periodical *Jahrbuch für Ostrecht* (Yearbook for East European Law) that contains mostly scholarly analyses and essays as well as translations of important legislative acts, and edits the monthly *Wirtschaft und Recht in Osteuropa* (Economy and Law in Eastern Europe) which has a more practical outlook. *Wirtschaft und Recht in Osteuropa* is the periodical where the institute publishes its monthly *Chronik der Rechtsentwicklung in Osteuropa* (Chronicle of the Legal Developments in Eastern Europe) where new legislation and court decisions are briefly described country by country and within the country by fields of law.

Apart from this basic research, the focus of the institute is more practical than that of university research since its researchers write the necessary expert opinions when German courts and authorities have to apply the law of an Eastern European country. Furthermore, the institute maintains close ties to enterprises, law firms and chambers of commerce in order to present its research to the German legal and business community.

The *Institut für Ostrecht* entertains a wide-spread network with the academic legal world as well as with legal practitioners in Eastern Europe. Furthermore, it serves as a receiving institution for East European (sometimes also for West European or overseas) researchers who conduct comparative research in Germany. For this purpose, the institute

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<sup>21</sup> 東欧法研究所. Website: [www.ostrecht.eu](http://www.ostrecht.eu). The institute was relocated to Regensburg in 2008 but continues to have Munich in its name, both for tradition and for practical reasons. On the institute, cf. SCHROEDER, Friedrich-Christian: *Das Institut für Ostrecht München im Wissenschaftszentrum Ost- und Südosteuropa Regensburg. Tätigkeit – Entwicklung – Perspektiven*, published by the Institut für Ostrecht München, Regensburg 2009.

maintains close contacts with the institutions that sponsor academic exchange, such as the Humboldt Foundation or the German Academic Exchange Service (DAAD)<sup>22</sup>.

This structure of the *Institut für Ostrecht München* makes a continuous up-to-date knowledge on the law of the East European countries available. Basically, this knowledge is of a scholarly comparative nature, but has a strong practical perspective. Thus, it can be used for purposes of international legal co-operation any time.

Apart from the *Institut für Ostrecht München*, several Max Planck institutes are active in the field of comparative law: the Max Planck institutes for foreign and international private law (Hamburg<sup>23</sup>), for foreign and international public law (Heidelberg<sup>24</sup>), for foreign and international criminal law (Freiburg<sup>25</sup>), for foreign and international social law (Munich<sup>26</sup>), for intellectual property (Munich<sup>27</sup>) and for European legal history (Frankfurt/Main<sup>28</sup>). As can be seen by their names, the Max Planck institutes for comparative law do not possess a regional or country focus, but specialise in one field of law each. Within this focus, some have certain country specialists for some East European states. All Max Planck institutes have large libraries and are very active in the international academic exchange. Many lawyers from formerly socialist countries were and are invited to spend some time for research in these institutes. This is why the Max Planck Institutes for comparative law are very important in the ‘export’ of German law.

## 2.2. *Japan: focus on Asia*

Being situated East and not West of the former socialist world, Japan’s geographical outlook naturally differs from Germany’s. A parallel perspective lied in the formation of regions according to political factors in the past: until 1990, Japanese science, too, treated the

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<sup>22</sup> On these institutions cf. *infra*, point 3.1.

<sup>23</sup> Website: [www.mpipriv.de](http://www.mpipriv.de).

<sup>24</sup> Website: [www.mpil.de](http://www.mpil.de).

<sup>25</sup> Website: [www.mpicc.de](http://www.mpicc.de).

<sup>26</sup> Website: [www.mpisoc.mpg.de](http://www.mpisoc.mpg.de).

<sup>27</sup> Website: [www.ip.mpg.de](http://www.ip.mpg.de).

<sup>28</sup> Website: [www.rg.mpg.de](http://www.rg.mpg.de).

socialist ‘block’ as a meso-region which deserved and received a comprehensive regional approach and institutionalised research<sup>29</sup>. But whereas Germany looked at this block from the West and focussed on its Eastern vicinity, i.e. Eastern Europe’s people’s republics, as well as on the Soviet Union as the core state of that block and one of the four occupying powers, Japanese research primarily dealt with its Asian neighbours, i.e. the Soviet Union and the Asian communist states. Japanese research on Eastern Europe was marginal to the same extent as West German research on Asia’s communist states was.

Therefore, the German *Ostrecht* as an institutionalised branch of regional comparative law does not have a Japanese equivalent, and in Japanese, its literal translation 東欧法 is not a fix expression, unlike its German counterpart. Nor does a fix expression for comparative law studies on (East) Asia exist: there is no such thing as (東)亜法. As a matter of fact, Japanese researchers in comparative law as well as the practitioners in international legal co-operation with Asian countries usually stress the differences between the various legal systems and legal cultures in Asia. ‘Asia’ is defined much more as a purely geographical expression and not so much a region of shared cultural values as ‘Europe’ denotes<sup>30</sup>.

### 2.2.1. The Centre for Asian Legal Exchange at Nagoya University

The primary institution where knowledge on the law of recipient countries is concentrated is the Centre for Asian Legal Exchange (CALE)<sup>31</sup>. It developed out of the so called ‘Asia-Pacific Region Studies Project’ and was founded in 2000 within the Graduate School of Law of Nagoya University. In 2002, CALE was made an independent entity within Nagoya University. However, as an institution of legal research it maintains close ties to the Graduate School of Law. It is unique in Japan.

CALE is headed by Professor *Katsuya Ichihashi* and its staff consists of five associate professors or associate assistant professors who are teachers at the Graduate School of Law and have a background useful for CALE’s work such as international law, comparative law or

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<sup>29</sup> MATSUZATO, Kimitaka (ed.): *Emerging Meso-Areas in the Former Socialist Countries: Histories Revived or Improved?*, Sapporo 2005.

<sup>30</sup> MOTO, Hidenori: *Possibilities of Multi-Layered Public Spheres from a Japanese Perspective*, paper presented the international symposium “Functions of Multi-Layered Fundamental Rights Protection in a Globalized World – The Human Rights Convention and Constitutional Courts in Integrated Europe”, Nagoya University, Centre for Asian Legal Exchange, 27<sup>th</sup> November 2010.

<sup>31</sup> 名古屋大学法政国際教育協力研究センター, website: <http://cale.law.nagoya-u.ac.jp>.

foreign law. Most of these professors are Japanese lawyers. The same is true for CALE's research associate. Other professors of the Graduate School of Law or of other universities are involved in CALE's work without a formal association into CALE's staff. Some of the staff is paid from the normal budget, whereas others are employed on the basis of project funds.

The finance of CALE rests upon a mixed system of regular and project funds. Regular funds are provided by the state; they are research subsidies forwarded to CALE through the university. CALE receives project funding from, *inter alia*, the Ministry of Education<sup>32</sup> and from JICA<sup>33</sup>. Additional means are contributed occasionally by private donors.

This structure of funding shows that CALE is not so much an ordinary university institute for foreign or comparative law but designed as an institution within the network of international legal co-operation. The special task of CALE is reflected by its self-definition and its work. CALE considers itself part of the network of international legal co-operation. Within this field, CALE provides the scientific basis as well as certain services.

First, CALE collects legal information on the target countries of Japanese legal assistance, i.e. predominantly South, South East, East and Central Asia. These are described as "former socialist, socialist and developing countries". For this purpose, CALE has specialised literature on and from the recipient countries of the region as well as access to related data bases.

CALE staff has expertise on one or more of the countries concerned. To give one example, its former director, Professor *Masanori Aikyô*, besides being professor for comparative law at the Graduate School of law, is an expert on Vietnamese law, especially on its constitutional law<sup>34</sup>. Other CALE staff have knowledge on e.g. Uzbek, Mongolian, Vietnamese or Cambodian law. Nevertheless, CALE does not conduct institutionalised systematic research on the law and legal development of foreign countries the way for instance the German institutes for *Ostrecht* do. CALE research on foreign law (i.e. the law of the recipient countries) happens less systematically and more on a case to case basis as

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<sup>32</sup> This project funding is largely connected to CALE's role as the headquarter of the Research and Education Centre for Japanese law; cf. *infra*, point 3.2.

<sup>33</sup> This project funding is related to CALE's participation in various JICA projects, e.g. in Uzbekistan. On JICA, cf. *infra*, point 5.2.2.

<sup>34</sup> AIKYÔ (fn. 1), 156-187.

required to aid some initiative on legal assistance<sup>35</sup>. CALE also serves as a centre for other Japanese scholars active in research on the law of CALE's target countries.

Second, the experts of CALE take an active part in projects of legal assistance. They are invited by the Ministry of Education, which is responsible for the vast majority of the projects with CALE participation, by JICA or other organisers of projects.

Third, CALE provides scientific services for the agents of Japanese legal assistance e.g. by publishing scientific findings on that field. Apart from the *CALE News* and the *CALE Journal*, both in Japanese, information in English is available in the periodical *CALE Updates*. All of these periodicals report on international legal co-operation initiatives, reflect co-operation methods and goals and report on legal developments in Asian target countries. The CALE book series contains PhD dissertations of Nagoya graduates and conference proceedings in English. Furthermore, CALE organises conferences that serve as a forum to exchange ideas and experiences and are designed to interest students of Nagoya University and other law schools for international legal co-operation. Conferences, workshops and similar conventions are organised not only in Japan, but also in recipient countries. CALE maintains contacts with scholars, the institutions of legal assistance in Japan and abroad and with the pertinent institutions of the recipient countries, thus creating a network designed to further the purposes of legal assistance.

Fourth, CALE takes part in the academic exchange by inviting researchers, lecturers and students to Japan and specifically to Nagoya University Graduate School of Law. This way, students and practitioners from recipient countries may become acquainted with Japanese law and will then create in their countries a demand for Japanese legal assistance. On the other hand, lawyers from recipient countries enlarge CALE's knowledge basis for comparative studies. CALE also invites experts from other donor countries in order to promote the debate among donors. For this purpose, CALE and the *Institut für Ostrecht München*<sup>36</sup> concluded a co-operation agreement in 2009. CALE's activities in respect to

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<sup>35</sup> The lack of systematic comparative law studies as a basis for legal assistance is very much deplored by the experts of CALE and of other Japanese experts in the field: ICHIHASHI Katsuya: 行政法整備支援の「メタ理論」と比較行政法への示唆 (The 'metatheory' of technical assistance in administrative law suggests comparative administrative law), *Hōritsu jihō* vol. 82 no. 12, November 2010, 106-111; KODAMA, Shigeru: Helping to Reform the Administrative Procedure: Japan's Legislative Assistance Programmes in Central Asia and the Need for a Strong Science of Comparative Administrative Law, *Jahrbuch für Ostrecht* 50 (2009), 491-506; KODAMA Shigeru: 行政法整備支援の経験からみた比較法の課題 (The task of comparative law seen from the perspective of the experiences made in the technical assistance in administrative law), *Hōritsu jihō* vol. 82 no. 12, November 2010, 100-105.

<sup>36</sup> On the *Institut für Ostrecht München*, cf. *supra* point 2.1.2.

teaching Japanese law are dealt with in connection with the Research and Education Centre for Japanese Law<sup>37</sup>.

### 2.2.2. Infrastructure of Comparative Law

Unlike Germany, Japan does not have an institutionalised research on foreign and/or comparative law outside universities. This is not a speciality of this field of research but reflects the general Japanese attitude towards research. Legal research is concentrated at the universities.

In Japanese universities, most faculties of law (law schools) have professors or units (chairs) for comparative law. Their role is quite comparable to that of chairs or institutes for comparative law at German faculties of law. These comparatists devote their studies usually to Western legal systems such as English, French, German or US-American law. The reason is that these laws, which in Japan sometimes are summarized under the heading “advanced legal systems”, at one time or another in the more recent history<sup>38</sup> served as a source of inspiration or reception for Japanese legislation; therefore their study ultimately serves the better understanding of Japanese law itself. During the Soviet era, some Japanese law professors specialised on Soviet – and more general on socialist – law<sup>39</sup>; some of them now pursue studies in Russian law.

Some law faculties go beyond this and put a certain emphasis on foreign law and comparative studies. The leading faculty in this field is the University of Nagoya with its long-standing tradition of international perspectives and contacts. Other universities with important research on foreign and comparative law are two private universities in Tokyo: Keio and Waseda<sup>40</sup>, as well as the University of Kōbe.

Even in these universities, the emphasis lies on the large Western legal systems, sometimes on Russian law. From among recipient countries of Japanese legal co-operation,

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<sup>37</sup> On that centre, cf. *infra* point 3.2.

<sup>38</sup> In a long historical perspective, Chinese law had a strong influence on ancient Japanese law. This, however, has little practical bearing on modern Japanese law: Maruschke, Hans-Peter: Einführung in das japanische Recht, 2<sup>nd</sup> edit., C.H. Beck, München 2009, 14-16; Oda, Hiroshi: Japanese Law, 2<sup>nd</sup> edit., Oxford University Press, Oxford 2003, 12-33; Rahm, Guntram: Rechtsdenken und Rechtsauffassung in Japan, C.H. Beck, München 1990.

<sup>39</sup> On this Japanese version of ‘*Ostrecht*’, cf. KÜPPER (fn. 1), 697-698.

<sup>40</sup> Waseda University Institute of Comparative Law has the following website: <http://www.waseda.jp/hiken/index-j.html>.

only Chinese law has enjoyed some attention in the last years. Infrastructure of studies on Chinese law is growing because of the economic weight of China in the region which creates a certain interest among students. Research and teaching on the legal systems of other recipient countries is either marginal (e.g. Vietnam, Indonesia) or practically inexistent (e.g. Mongolia, Laos, Cambodia, Myanmar, Timor Leste). In some cases, law professors who had come into touch with one of these countries in past co-operation projects have developed a research interest; however, such interests are not institutionalised and are of a more ‘private’ nature.

This leaves CALE<sup>41</sup> as the only institutionalised research unit on the law of recipient countries on university level – though not on faculty level because CALE is independent of faculties.

Like Germany, Japan has a research institute with the regional specialisation of the formerly socialist countries in Eastern Europe, Northern and Central Asia: the Slavic Research Centre at Hokkaido University, Sapporo<sup>42</sup>. It started as an institute of the Faculty of Law in the 1950ies, but became independent from the faculty and thus interdisciplinary in the 1970ies. To-day, there is no lawyer among its researchers. Sometimes, legal scholars from outside the institute are included to cover the legal side of a project. Basically, however, the Slavic Research Centre is no longer an institution that can provide knowledge on the law of e.g. the successor states of the Soviet Union. In its library a certain amount of legal and law-related literature can be found.

Outside the academic world, the Japan External Trade Organisation (JETRO<sup>43</sup>), a government-related body to promote foreign trade interests, conducts certain research on Japan’s major trade partners. This includes the law of some Asian countries such as China. Given the scope of JETRO, this research specialises on questions of commercial law.

### *2.3. The function of foreign legal research institutions in international legal co-operation*

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<sup>41</sup> On CALE, cf. *supra* point 2.2.1.

<sup>42</sup> 北海道大学スラブ研究センター, website: <http://src-home.slav.hokudai.ac.jp/index.html>.

<sup>43</sup> 日本貿易振興機構, website: <http://www.jetro.go.jp/indexj.html>.

Research on the legal systems of the recipient countries fulfils an important function in international legal assistance: It provides the donors with knowledge on the recipient countries. This enables them to shape their offers according to the needs of the recipients, and the individual advisers – who are experts on their own domestic law and its practice, but not on the law of the recipient country – may have access to information on the recipient country in their own language and by lawyers who have the same professional and national background.

In Germany, professors and researchers active in *Ostrecht* take part in the co-operation with formerly socialist countries on a regular basis. This is especially true if they possess profound knowledge on some field of German law as well, i.e. are scholars of their own national law as well as of *Ostrecht*. Thus, Professor *Schroeder*, who held a chair for criminal law, criminal procedure and *Ostrecht* and is the Academic Director of the Institute for East European Law Munich, has been a senior adviser in co-operation projects on the reform of criminal law and criminal procedure for many years, e.g. in Mongolia and Kyrgyzstan. Professor *Küpper* who is a professor for public law and for *Ostrecht* as well as the managing director of the Institute for East European Law Munich is active in a project on creating the basic institutions for the *Rechtsstaat* / rule of law and for a modern legal education in Kosovo.

An equally important role of the *Ostrecht* experts is to present information to the German advisers and experts. These German advisers usually are academic or practical experts of a certain field of German law and want to pass their theoretical or practical expertise to their colleagues in the recipient country. These colleagues usually have a very different background of legal thinking and legal culture. Furthermore, their positive law often strongly differs from German law. This makes professional communication between German experts and lawyers from recipient countries difficult. The biggest danger consists of misunderstandings which do not become obvious because both parties think that the other party understood what they meant, but this is not so. This may happen, e.g., if the same legal term has a different connotation in both systems. Different meanings are quite obvious when ‘open’ terms such as *Rechtsstaat* / rule of law, democracy or fairness are concerned, but it may and does happen even with seemingly precise terms e.g. of a procedural nature<sup>44</sup>. Apart

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<sup>44</sup> One example: In Hungarian, the term ‘fellebbezés’ means legal scrutiny both by the higher administrative forum and by the second court instance. In German, these different forms of legal redress are described by two terms: ‘Widerspruch’ if an administrative decision is challenged before the higher administrative authority, and ‘Berufung’ if a court decision is challenged before the higher court. Hungarian lawyers tend to translate their expression ‘fellebbezés’ always with ‘Berufung’ because dictionaries indicate this translation first. So it may happen that a Hungarian lawyer speaks about redress before the

from communication problems, German experts and advisers often have the wish to know more about the legal system of the recipient country they are co-operating with. They feel that they can give advice more precisely and adequately and understand their counterpart better if they have some insight in the recipient legal system. Apart from giving precise information on the recipient country's legislation and its implementation, *Ostrecht* scholars may raise the advisors' awareness where the recipient's legal order or, often more important still, their legal culture differs from German law and its standards. The *Ostrecht* researchers, who usually are trained German lawyers with an additional expertise in foreign and comparative law, can give German experts information in German language and arranged in a way a German lawyer can understand easily: Having the same background, i.e. being both trained German lawyers, they 'speak the same language' and therefore can communicate easily without linguistic, cultural, or professional barriers.

In practical terms, this means that e.g. the IRZ Foundation<sup>45</sup>, when sending German experts to a recipient country in a given co-operation programme, may ask the research fellow of the Institute for East European Law Munich who deals with the country in question to present literature or to elaborate internal papers on the pertinent field of law or its special problems. This material will be presented to the German expert who then may better understand the law and the legal thinking in the recipient country. Sometimes German experts have an interview with the institute's research fellow before leaving for the recipient country. On other occasions, *Ostrecht* specialists may be included in a German delegation to act as an 'interpreter' between the legal cultures. Since both IRZ and Institute for East European Law Munich are financed by the Federal Ministry of Justice this sort of co-operation can be conducted without bureaucratic hurdles. Other *Ostrecht* institutions, too, co-operate with agents of legal co-operation in order to make their offers and work more efficient, yet in a less institutionalised manner and more on a case-to-case basis.

In Japan, the small and less institutionalised structure of the study of recipient countries' law leads to a stronger merger of roles. The most important institution for the study

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higher administrative authority but uses the German word 'Berufung'. His German counterpart will think that the Hungarian colleague talks about judicial review, not of redress within the administration itself. Both parties mean different things but may not realize that they do. In such a situation, it takes an expert on both German and Hungarian law to clarify this misunderstanding. In Germany, such an expert typically would be a scholar of *Ostrecht*.

In Japan, these problems of combined linguistic-legal translations are often dealt with by translators, not always with satisfying results: SUGIYAMA, Noriko: Activities of the International Co-operation Department and Interpretation and Translation Services, ICD News, December 2009, 159-164.

<sup>45</sup> On the IRZ, cf. *infra*, point 5.2.1.

of the law of recipient countries, CALE, was founded with the express intention to give international legal co-operation an academic scholarly basis. Therefore, the participation of CALE experts in legal assistance programmes is quasi natural. Institutions like JICA or the International Co-operation Department of the Research and Training Institute of the Ministry of Justice often include CALE experts in their activities. Also, other experts on the law of recipient countries – e.g. professors at universities – are frequently addressed to contribute their knowledge to assistance projects. Due to the low degree of institutionalisation of research on the foreign law of the recipient countries, the Japanese experts are much more rooted in their domestic Japanese law, and their knowledge on foreign law and on foreign legal culture usually is less systematic than that of their German counterparts with an institutional *Ostrecht* background. Thus, academic expertise on Japanese law and certain knowledge on the law of the recipient state(s) are united in one person. To give one example, the director of CALE, Professor *Ichihashi*, is a professor of administrative law at the Nagoya University Graduate School of Law and was involved, *inter alia*, in a Japanese assistance project on a new administrative procedure law in Uzbekistan in his capacity both as an expert on Japanese administrative law and as a member of CALE with knowledge of the Russian language and of Soviet and post-Soviet law. He acquired special knowledge on Uzbek law only during the course of the project. Another participant in this assistance project, Professor *Shigeru Kodama*, has a similar background of previous studies on Soviet and post-Soviet law; he, too, started to deal with Uzbek law only in the course of the co-operation project.

Compared to Germany, the lower institutional degree of specialisation in foreign law in Japan may have advantages and disadvantages in the assistance work in recipient countries. If the expert on the donor's law, i.e. the person who will have to do the assistance work, has knowledge of the recipient as well there is no need for an 'interpreter' between legal languages and legal cultures but the adviser can unite both functions in one person. On the other hand, knowledge on the recipient countries is much less systematic and less deeply rooted. It is often acquired only before or in the course of an assistance project and therefore does not encompass the recipient's legal system and culture on the whole. A German *Ostrecht* expert, on the other hand, has the overall knowledge of the recipient country's law, legal language and legal culture, but the price of this specialisation usually is a certain remoteness from the own law and its practice. As a consequence, the *Ostrecht* expert – unless he or she

has a second professional pillar in German law – will be in position to give advice to German advisers rather than to the recipient’s lawyers.

### **3. Infrastructure to spread the knowledge on the law of the donor country in the recipient countries**

One way of advancing legal change in the recipient countries and a future legal transfer from donor to recipient countries is to educate young lawyers – and sometimes not so young practitioners – of the recipient countries in the donor’s legal system. The usual channel to do so is to invite students from recipient countries to the universities and law schools of the donor country, and practitioners either to special training units or specialised academic institutions like the CALE (the Japanese way) or to internships of some length at courts or administrative organs equivalent to their place of work back home (the German way)<sup>46</sup>. Sometimes academics and practitioners of the donor country go to teaching and training institutions in the recipient country in order to give lectures, courses and summer schools.

Beyond this framework of conventional academic exchange, both Germany and Japan maintain in some recipient countries a certain infrastructure for teaching German resp. Japanese law. These institutions are of a more permanent and institutionalised character than academic exchange and therefore ensure a more sustainable knowledge on the donor country’s legal system in the recipient country.

#### *3.1. Germany: Schools of German Law*

There is a rich variety of institutions teaching German law abroad, especially in the former socialist countries.

In two German border towns, there are transnational law courses the diploma of which is recognized in both countries: in Saarbrücken on the French border, there is a German-French law course<sup>47</sup>, and modelled on this, there is a Polish-German law course in

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<sup>46</sup> In Japan, the Supreme Court opposes internships of foreign judges in Japanese courts because of, *inter alia*, the workload of the courts. The executive branch has strong reservations, too.

<sup>47</sup> The organisational background is the French-German Law Centre of the Faculty of Law, website: [www.cjfa.de](http://www.cjfa.de).

Frankfurt/Oder on the Polish border<sup>48</sup>. These bi-national courses acquaint German students with the law of the neighbouring country, but they also attract many students from the neighbouring country. These learn German law together with their own domestic law in Saarbrücken and Frankfurt/Oder.

Beyond the immediate border areas, Germany maintains several so called *Schulen des Deutschen Rechts* (Schools of German Law). These institutions are attached to local law faculties and do not offer a full law diploma but additional qualifications such as an LL.M. or similar degrees. They exist e.g. in Kraków (Poland<sup>49</sup>), Gdańsk/Danzig (Poland<sup>50</sup>) and Wrocław/Breslau (Poland<sup>51</sup>). Schools of German law are usually founded jointly by one or several German law faculties (Universities of Heidelberg and Mainz for Kraków; University of Cologne, especially its Institute for East European Law for Gdańsk; Humboldt University Berlin for Wrocław) and the Polish law faculty by an agreement between the partners. Initially, a School of German Law is often financed by the *Deutsche Akademische Auslandsdienst* (German Academic Exchange Service, DAAD<sup>52</sup>). However, the DAAD can only give initial financing but not a durable institutional financial framework. Therefore, schools of German law usually depend on sponsors such as large foundations. The staff consists partly of German lawyers sent there by the DAAD for a certain period (usually several years, the term may be renewable), and of local teaching staff familiar with German law. The academic overview over the teaching is usually conducted by the German partner law faculties; these may also take part in selecting the German lawyers sent to teach at the school of German law.

These Schools of German Law in Poland help Germany to go even further east: the Kraków School of German Law organises summer schools of German law at the Mohyla Academy in Kyiv (Ukraine). On the other hand, the schools of German law try to attract more and more German students as well by organising schools of Polish law where German law students may acquire knowledge about and an additional qualification in Polish law without having to go through a full Polish law school curriculum. The School of Polish Law of the

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<sup>48</sup> Website: [www.jura-viadrina.de/de/kurse-und-studiengaenge-der-juristischen-fakultaet?q=node/70](http://www.jura-viadrina.de/de/kurse-und-studiengaenge-der-juristischen-fakultaet?q=node/70).

<sup>49</sup> Website: [www.sddr.org](http://www.sddr.org).

<sup>50</sup> Website: [www.ghst.de/index.php?c=38&cms\\_det=73](http://www.ghst.de/index.php?c=38&cms_det=73).

<sup>51</sup> Website: [dprs.ebugz.de](http://dprs.ebugz.de).

<sup>52</sup> For details, cf. *infra*.

Kraków-Heidelberg-Mainz co-operation is held mostly in Kraków, whereas the School of Polish Law of the Wrocław-Berlin co-operation functions at the Humboldt University Berlin. The Cologne-Gdańsk co-operation works as a one-way to spread knowledge on German law in Poland, but not on Polish law in Germany.

Fully equipped schools of German law exist in Poland only. This probably has two reasons. First, Poland is an immediate neighbour, the largest neighbour in the East and therefore of special importance to Germany. Second, the burdens of the past are especially heavy between Germany and Poland where Germany committed more and worse crimes than anywhere else during World War II. This is why reconciliation with Poland is an especially delicate matter. It is widely felt that reconciliation may be advanced by numerous activities designed to bring about a rapprochement between the people of the two countries. One of these activities in the field of scientific co-operation are the Schools of German Law in Poland.

Apart from these institutionalised schools of German law, German universities organise numerous courses on German law all over the world. A distinctive geographical focus lies on Eastern Europe. Courses on German law exist at many Russian universities, but also in practically all other formerly socialist countries from the Baltic republics (the German law course in Vilnius/Lithuania bears the title “*Schule des Deutschen Rechts*”) via East Central Europe and Ukraine as far as Southern Caucasia where there are extensive teaching activities on German law in Tbilisi (Georgia). There are also similar courses at Chinese and other Asian universities, but the geographical focus lies on Eastern Europe and the former Soviet Union. These courses are financed sometimes by the DAAD, sometimes by foundations<sup>53</sup> and other sponsors of science. Unlike the Schools of German Law, these courses on German law do not require many resident German teaching staff, but teaching is mostly done by visiting professors, usually of or chosen by the German partner faculty. Students will obtain not a full law degree, but some additional qualification such as an LL.M. Germany maintains several so called German universities abroad around the world<sup>54</sup>. None of these universities, however, possesses a law faculty. Therefore, German universities abroad are not involved in teaching German law.

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<sup>53</sup> The courses on German law at the University of Dnyepopetrovsk are organised by the IRZ foundation. On this foundation, cf. point 5.2.1.

<sup>54</sup> Examples are the German Universities in Almaty, Cairo, Jakarta, Shanghai, Yongin (South Korea) or the German Institute of Science & Technology in Singapore.

A university with a unique structure is the multinational *Deutschsprachige Andrassy Gyula Universität Budapest* (German-Speaking Andrassy Gyula University Budapest, AUB<sup>55</sup>). It was founded as a joint project of the Republic of Hungary, the federal state of Bavaria and the federal state of Baden-Württemberg. Later, the Republic of Austria, the Swiss Confederation and the Federal Republic of Germany joined the initiative. As an intergovernmental institution, it is co-financed by the partner countries. It started with a purely post-graduate teaching programme, but a change in Hungarian legislation forced it to offer a doctor school and master courses as well. Teaching is conducted in three faculties one of which is the Faculty of Comparative Law. Its teaching and research concentrate on all-European comparative studies. The AUB was not designed to spread the knowledge of German law in Hungary<sup>56</sup>. It is true that the focus of the AUB is comparative law; nevertheless German law is quite present there because half of the teaching staff is German. They often use German law as a starting point for comparisons, and as a consequence German law has a strong presence in the teaching of the AUB.

Students need to have a degree when applying, and most students of the Faculty of Comparative Law have a law degree from their home country. Half of the students come from German-speaking countries, the other half is Hungarian-speaking either from Hungary itself or from the Hungarian minorities in the neighbouring countries. There are a small number of students from other – usually Central – European countries as well.

It is true that most German activities to teach German law outside Germany take place in Europe and the successor states of the Soviet Union. Nevertheless, there is a certain presence in Asia as well. German law courses exist, e.g., at Nanking University<sup>57</sup>. A very special institution is the China-EU School of Law at Beijing<sup>58</sup>. It is not a German initiative, but a co-operation between the EU and the PR of China with a bilateral steering committee. On the European side, academic affairs are administered by a consortium of EU universities

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<sup>55</sup> Website: [www.andrassyuni.hu](http://www.andrassyuni.hu).

<sup>56</sup> German law is taught in DAAD-sponsored courses on German law that exist at every law faculty in Hungary.

<sup>57</sup> The organisational background is the Sino-German Institute for Legal Studies, website: [law.nju.edu.cn/deutsch/main.asp](http://law.nju.edu.cn/deutsch/main.asp).

<sup>58</sup> Website: [www.cesl.edu.cn](http://www.cesl.edu.cn).

under the leadership of the University of Hamburg (Germany)<sup>59</sup>. The European half of the law professors come from more or less all EU member countries.

Academic exchange is financed by the *Alexander von Humboldt Stiftung*<sup>60</sup> and the *Deutsche Akademische Auslandsdienst*<sup>61</sup>. Apart from these state-sponsored institutions, many other donors support academic exchange. Sponsoring concerns both directions: sending German students or scientists abroad as well as inviting foreign students or scientists. In the state sponsored programmes, there are no distinctions as to the discipline. Considered the size of the law faculties, lawyers are not very well represented in these programmes. Nevertheless, a considerable number of East European law students and legal scientists have studied in Germany for some time with Humboldt Stiftung or DAAD grants. There is no geographical restriction in German exchange programmes, but among German students and scientists who wish to go abroad, Western countries enjoy more popularity than Eastern Europe. On the other side, many East Europeans can be found among the visitors to German institutions. The institutions presented in this paragraph sponsor exchange with grants and similar payments but are not involved in the organisation of programmes or teaching curricula. This is done by the receiving organisation.

### *3.2. Japan: Centres of Japanese Law*

Japan, too, undertakes certain activities to spread the knowledge of Japanese law abroad, especially in Asia.

The most institutionalised teaching of Japanese law is conducted through the Research and Education Centre for Japanese Law at the Graduate School of Law of Nagoya University<sup>62</sup>. The Nagoya Graduate School of Law started organised exchange programmes for students from transitional countries in Asia in 1998. Based on the idea that Japanese law should be taught in Japanese language and taking into account that the knowledge of Japanese language is not widely spread in Asia, the Centre combines teaching Japanese language and

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<sup>59</sup> The relevant website of Hamburg University is <http://www.jura.uni-hamburg.de/cesl>.

<sup>60</sup> Website in English language: <http://www.humboldt-foundation.de/web/home.html>.

<sup>61</sup> Usually referred to as DAAD; website: <http://www.daad.de/de/index.html>.

<sup>62</sup> 名古屋大学日本法教育研究センター; websites: <http://www.nagoya-u.ac.jp/en/international/other-act/ja-law/>, <http://cjl.law.nagoya-u.ac.jp/content/en>.

Japanese law. For this purpose, so called Centres of Japanese Law were established in co-operation with universities in the target countries. Such centres exist in Cambodia (established in 2008), Mongolia (2006), Uzbekistan (2005) and Vietnam (2007). There are plans to establish a new centre at China, possibly at Shanghai or Beijing. The Research and Education Centre for Japanese Law and the centres abroad are financed by the Ministry of Education.

The Centres on Japanese Law conduct the combined teaching of Japanese language<sup>63</sup> and law. Students are selected from among qualified law students of the partner university. Besides their usual studies of their respective domestic law, they start with Japanese language courses, and from the third year on, they receive teaching in Japanese law as well. They also may participate in summer seminars at Nagoya University. After completing the four or five year course<sup>64</sup>, successful students may come to Nagoya for further studies to specialise in Japanese law. The most successful students are formally invited to come to Nagoya.

The Research and Education Centre for Japanese Law does not have an office and staff of its own, but the function of its headquarters is assigned to CALE<sup>65</sup>. The Director of CALE is at the same time in charge of the Research and Education Centre for Japanese Law. Teaching and textbooks are overseen by committees composed of Nagoya Graduate School of Law members.

In addition to their teaching function, the Centres of Japanese Law serve as a general representation of CALE and the University of Nagoya – sometimes of other Japanese donors as well – and collect information about the local law, administer and co-ordinate Japanese institutions' activities in those countries.

Apart from this ambitious programme of Japanese law centres abroad, Nagoya University and some other law schools in Japan continue the tradition of offering special courses on Japanese law in English. These courses aim at foreigners, and in Nagoya there is a special emphasis on inviting students and lawyers from neighbouring countries and potential recipients of Japanese legal assistance. In that university, a special master programme in comparative law and political science exists that is designed to acquaint law students from

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<sup>63</sup> The courses that the Research and Education Centre for Japanese Law offer on Japanese language focus on the needs of legal education. A more general promotion of the knowledge of Japanese language and culture and of Japanese studies abroad is organised and financed by the Japan Foundation.

<sup>64</sup> The diploma these students receive is the domestic one of their university; they do not receive any formal extra grade or title by the Research and Education Centre for Japanese Law.

<sup>65</sup> On CALE, cf. *supra*, point 2.2.1.

other Asian countries, *inter alia*, with international legal co-operation. However, based on past experiences, Japanese law schools consider teaching Japanese law in English as an insufficient method because access to information in English language is limited, materials are usually outdated, and their use depends very strongly on the quality of translation. Another advantage of Japanese law education in Japanese language is being stressed more and more: The learning of Japanese language gives access to the understanding of Japanese culture, and without the underlying culture, Japanese law – just like any other law in the world – cannot be understood properly.

International students' exchange is also a task of the Japan Foundation<sup>66</sup>. In the framework of its Intellectual Exchange Programme, foreign students and scholars of law may be invited to Japan to become acquainted with Japanese law. These exchange programmes do not focus on lawyers, but are open to lawyers. However, as far as sending teaching staff abroad is concerned, the Japan Foundation concentrates on teachers of Japanese language and therefore does not sponsor sending law teachers to recipient countries. This can only be done in the framework of the Research and Education Centre for Japanese Law.

#### **4. Infrastructure for a scientific analysis of the co-operation process**

International legal co-operation, i.e. advice and support with legislation and its implementation, is an activity that combines scientific (theoretical) and practical elements. Therefore, it is conducted by both scholars and practitioners. Ideally, both groups combine their respective strong points in order to achieve optimal results. It is obvious that such a demanding process needs to be monitored, analysed and evaluated in order to ensure a high quality. Such monitoring and analysis as well as the evaluation are in principle a task for science, as far as methods and contents are concerned. However, there are no clear universally recognised standards yet<sup>67</sup>.

At the same time, international legal co-operation means the expenditure of public money. This requires an at least indirect parliamentary (budgetary) control.

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<sup>66</sup>国際交流基金; website: <http://www.jpfa.go.jp>.

<sup>67</sup> An overview of the current situation can be found in the volume edited by Carothers (fn. 10). In Japan, the wish for reliable standards that can be put at the disposal of the practitioners in the field work of international legal assistance is voiced under the heading of a "metatheory" on technical legal assistance: JICA, Capacity Development (fn. 8), ix, 40-41; ICHIHASHI (fn. 35).

#### *4.1. Germany*

German activities in international legal co-operation may take place in a bilateral relationship between Germany (which may be the Federation or one or more federal states) and a recipient state, or they may be embedded in initiatives sponsored by the European Union. Monitoring and evaluation are slightly different in both cases.

##### *4.1.1. Purely German co-operation programmes*

There is no institutionalised monitoring, analysis and evaluation of the scientific or technical quality of the work done in projects of international legal co-operation beyond the project level<sup>68</sup>. German experts usually are trained lawyers, i.e. they hold a degree in German law and thus underwent legal education in Germany with its high methodological and scientific standards. Therefore they are expected to know what they are doing, and they are expected to reflect their work and to adapt it to the circumstances where necessary. This expectation exists irrespective of the fact that legal education – despite the high standards it may have in Germany – does not teach the students the knowledge, techniques and professional distance towards the own law required from a donor-side expert in international legal co-operation programmes. Larger projects have a project leader who is not so much involved in the day-to-day work but who administers the funds and who is expected to exercise some sort of methodological and scientific oversight. However, project leaders usually are not provided with any training or abstract standards for monitoring and evaluation but are expected to possess or develop these skills themselves. It is hoped that their academic education will enable them to do so. Projects and their progress usually are evaluated by external experts. However, these external experts do not possess abstract standards because science so far has not been able to elaborate such universally accepted standards. External experts can only rely on some theoretical knowledge and their own experience gained in former projects – which necessarily is quite subjective. Nevertheless, these evaluations are valuable forums to discuss aims, goals and methods of a project as well as the recipient's response.

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<sup>68</sup> BRÜNE, Stefan: Evaluierung als öffentliche Kommunikation, in BRÜNE, Stefan (ed.): Erfolgskontrolle in der entwicklungspolitischen Zusammenarbeit, Hamburg 1998, 1-26; GAUL, Wolfgang: Sinn und Unsinn internationaler Rechtsberatung, in: BOULANGER, Christian (ed.): Recht in der Transformation. Beiträge zur Debatte, Berliner Wissenschaftsverlag, Berlin 2002, 102-124, [http://www.fize.de/pdf/f.ize\\_gaul.pdf](http://www.fize.de/pdf/f.ize_gaul.pdf).

Self-reflection is the typical way of monitoring and evaluating the co-operation activities for experts with an academic background just as much as it is for expert practitioners. Some law professors involved in co-operation projects with recipient countries later reflect their experiences and sometimes try to develop more general standards for project work in international legal co-operation. Yet, they too base their reflections on their own personal experiences gained in practical co-operation work and on their general scientific background. There is not yet a widely acknowledged methodology or standard with which to measure the contents, the procedures or the success of co-operation work. So far, all scientific analysis and monitoring is very much individual. Most of this sort of literature is written by US authors<sup>69</sup>, but some German professors as well publish on methods and standards in international legal co-operation. In this context, Prof. *Knieper* has to be mentioned first<sup>70</sup>. In one of his books, he defined his role as that of an ‘observing participant’ (*beobachtender Teilnehmer*). Recently, the *Institut für Ostrecht München* has become one centre of the German scholarly discussion about international legal co-operation since both in the *Jahrbuch für Ostrecht* and in the *Studien des Instituts für Ostrecht München* articles and books on this subject were published<sup>71</sup>.

In programmes conducted by official or semi-official institutions and sponsored from the state budget (either by the Federation or a federal state) one ministry will have the leadership in the administrative oversight over the project. This oversight may include the analysis whether the goals of the co-operation agreement with the recipient state were realised. This control, however, usually is a rather formal one, limited to outward appearance, and does not question methods, contents or similar scientific questions more than superficially.

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<sup>69</sup> An overview of the discussion can be found with Carothers (fn. 10).

<sup>70</sup> Many of his writings reflect on international legal co-operation. Here, only a few can be mentioned: KNEPER, Rolf: *Juristische Zusammenarbeit: Universalität und Kontext*, Schriftenreihe der GTZ vol. 275, Wiesbaden 2004; KNEPER, Rolf: *Rechtsreformen entlang der Seidenstraße. Aufsätze und Vorträge während der beobachtenden Teilnahme an einem gewaltigen Transformationsprozess*, Berliner Wissenschaftsverlag, Berlin 2006; KNEPER, Rolf: *Was ist national am nationalen Recht?*, in KÜPPER / BRENN (fn. 7), 29-37; BOGUSLAWSKIJ, Mark / KNEPER, Rolf (eds): *Konzepte für Rechtsberatung in Transformationsstaaten*, GTZ, Eschborn 1995; BOGUSLAWSKIJ, Mark / KNEPER, Rolf (eds): *Wege zum neuen Recht*, Berliner Wissenschaftsverlag, Berlin 1998.

<sup>71</sup> *Jahrbuch für Ostrecht (JOR)*: DEMIDOVA, Elena: *Reasons for the Adoption of the EU Legislation as Opposed to the US Regulation in the Russian Takeover Law*, JOR 49 (2008), 223-230; FALKE, Mike: *Die deutsche internationale Rechtsstaatsförderung zwischen Globalisierung und Nachhaltigkeit*, JOR 51 (2010), 55-70; KNEPER, Rolf: *Über die Notwendigkeit der Einführung von Gewaltenteilung und Gewaltmonopol in den Staaten des Übergangs*, JOR 45 (2004), 305-311; KODAMA (fn. 31), JOR 50 (2009), 491-506; TSAY, Igor: *International Assistance to State Governance Reforms in Uzbekistan: Lessons, Challenges and Prospects as Seen from a Recipient State*, JOR 51 (2010), 71-80. *Studien des Instituts für Ostrecht*: KÜPPER / BRENN (fn. 7).

The same is true for the monitoring by the Federal or state chamber of audit. An audit is always possible if state money is spent, as is usually the case in the projects that are the object of this paper. Yet, the audit can only control whether budget legislation was observed, e.g. whether means were administered in a careful way, and whether the money was spent within or outside the purpose of the budget title of the project. Chambers of audit have neither the mandate nor the knowledge to judge on objectives, methods, standards and contents of a project.

#### *4.1.2. German participation in EU-sponsored programmes*

Western Europe's legal co-operation with formerly socialist countries is conducted and financed to a large extent not by individual donor states, but by the European Union. This is especially true for countries aspiring at EU membership because they need to adapt their legal systems to the requirements of community law before being admitted to the EU. But also East European and ex-Soviet states that will not become EU members, at least not in the foreseeable future, such as Russia, Ukraine, Georgia, or Kyrgyzstan, receive considerable financial and technical assistance from the EU. This includes legal co-operation.

The EU, having only a central administration without the lower echelons of bureaucracy, cannot conduct these programmes with its own staff but depends on the member states. The usual procedure for the EU is to conclude an agreement with the recipient state that defines the scope of legal co-operation, the goals to be achieved and the measures to be taken in order to realise the goals. Then the project(s) is/are put to tender in a way that consortiums of agents from at least two member states may apply. The project is awarded to the consortium that appears to have the best qualifications or makes the best offer or seems most reliable. The relevant EU authority and the successful consortium conclude a contract which details very minutely every single measure and step to be taken. This detailed working programme is developed on the basis of the agreement between the EU and the recipient state.

In the framework of EU-sponsored programmes, there is quite a tight oversight. This, however, is strictly standardised and does little to help improve the quality of the project realisation. The consortium is obliged to report on every step, and in EU headquarters, project surveillance will control whether these steps correspond to the measures provided for in the contract. This control, however, is formal as well as limited to whether measures foreseen in

the contract are taken. The EU authorities do not and cannot control whether the quality of the realisation is good, whether the methods applied make sense, or whether the measure as such is useful within the project. EU monitoring services use the contract as a checklist and control whether planned measures were taken. Apart from that, they control whether budget rules are observed.

This sort of mechanical control is sometimes counter-productive. In the course of a project, a measure foreseen in the programme may turn out to be impossible or pointless or not helpful to the project aim. In such a case it is very difficult to leave the measure aside because it has a contractual basis: first, in the agreement between the EU and the recipient state (provided that this agreement covers these details), and second, in the contract between the EU agency and the consortium. The same is true if it becomes clear that a measure not foreseen in the project description is desirable or useful under the overall aim of the project. Since neither the working programme nor the project budget provide for that measure, the consortium is not allowed, strictly speaking, to take it even if its necessity is obvious. In practice, consortiums try to do what they think is appropriate and best for the project aims and seek the very fine line between seemingly keeping to the work programme foreseen in their contract and trying to make the project a success.

Like German projects, EU projects rely on a certain peer evaluation by outside experts. They share the basic problem of the domestic evaluations: Evaluators do not have any generally accepted standards for assessing goals and methods but only their subjective view.

#### *4.2. Japan*

The Japanese Ministry of Foreign Affairs concludes all treaties about official Japanese assistance programmes abroad and provides the funding for practically all of these programmes. However, this role is mostly administrative and limited to an ‘umbrella’. The ministry can and does control compliance with budget regulations on a global level, though not on project level. For lack of specialists and specialised knowledge, the ministry is not in a position to monitor and evaluate these programmes with view to their contents and to the validity of the methods applied.

The backbone of scientific self-reflection of the legal community active in legal assistance is the CALE in Nagoya<sup>72</sup>. This does not mean that CALE actively analyses other institutions' assistance work on a regular basis. CALE provides scientific infrastructure for a scientific discussion by disseminating publications and organising conferences and meetings. Self-reflection, questions of methods, contents and co-operation philosophy are an important part of CALE's work.

Certain scientific self-reflection is institutionalised at the specialised providers of co-operation activities, i.e. within JICA and the International Co-operation Department of the Research and Training Institute of the Ministry of Justice. They have publications that include articles and studies on these questions by both participants in co-operation programmes and outside scholars. The International Co-operation Department organises the annual 'Conference on Legal Technical Co-operation' (held usually in January). All agents of Japanese co-operation activities are invited to discuss their work; this has developed to be an important forum for self-reflection especially among the practitioners of assistance. JICA regularly evaluates their projects by mixed groups of JICA members and external specialists; however, the number of qualified external specialists is low so that these start, mid-term and final evaluations and assessments are in practice one form of self-reflection. The world-wide lack of universally accepted donor standards for goals, methods etc. of legal co-operation projects is felt by Japanese specialists as well.

There are several more initiatives that aim at enhancing the quality of Japanese international legal co-operation and that try to fill the lacuna caused by the weak infrastructure for comparative law, especially with view to the law of recipient countries, in one way or the other. One example is the International Civil and Commercial Law Centre Foundation<sup>73</sup>, an initiative of big companies in some co-operation with government offices, started in 1996. In collaboration with members of the scientific community, this foundation sponsors assistance projects in the fields of private and business law, but also provides some scientific backup such as seminars, research and publications.

## **5. Infrastructure of agents for the operative co-operation work**

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<sup>72</sup> On CALE, cf. *supra*, point 2.2.1.

<sup>73</sup> 国際民間商事法センター, website: <http://www.icclc.or.jp>; Kobayashi, Kiyonori: Status of Activities of the International Civil and Commercial Law Centre Foundation, ICD News, December 2010, 29-33.

The operative co-operation work with the recipient countries is in part conducted by state organs in the narrow sense (parts of the state administration). German administrative law calls these organs ‘direct state administration’. Official co-operation work involves also agencies that possess a separate legal personality, but are closely linked to the state, e.g. by budget ties. In terms of German administrative law, these agencies fall under the category of ‘decentralised’ or ‘indirect state administration’. Both in Germany and in Japan, the operative work of co-operating with recipient countries is performed by both forms of agents.

First, the level of direct state administration is examined. After that, an analysis of the organs of indirect state administration will follow.

### *5.1. Direct State Organs*

#### *5.1.1. Germany*

In Germany, there is more than one ‘state’. To be precise, there are seventeen: the *Bundesrepublik Deutschland* (Federal Republic of Germany, federal level) and sixteen federal states, the so called *Länder*. According to the classical theory of federalism, both the federal and the *Länder* levels possess the quality of statehood. This theory continues to be prevalent in Germany, and the German constitution of 1949, the *Grundgesetz*, is based on this assumption.

The German *Länder* may conduct certain foreign activities in their own responsibility. This includes, *inter alia*, the conclusion of international treaties, direct contacts with foreign countries, international organisations and their organs, as well as funding activities abroad. The *Grundgesetz* defines the powers of the *Länder* in this field only incompletely (predominantly art. 32 *Grundgesetz*). The influence of the federal level on foreign *Länder* activities is set out incompletely as well; art. 32 *Grundgesetz* only subjects the conclusion of international treaties by the *Länder* to the previous permission of the federal government. It is clear, however, that the federal level is responsible in international law for the observance of international rights and duties by all German public organs including the *Länder* and therefore must have an influence on international *Länder* activities that is stronger than the federal influence on the domestic affairs of the *Länder*. Still, this framework, the precise delimitations of which are an issue of debate among constitutional lawyers, leaves the *Länder*

a wide margin of discretion for their foreign activities, in the field of international legal co-operation and others. Thus, the *Länder* can be considered independent agents in this context.

#### *5.1.1.1. The level of ministries*

Due to federalism, there is not only one set of ministries, but one must differentiate between the federal and the *Länder* level.

##### *5.1.1.1.1. Federal ministries*

German activities in the field of international legal co-operation in the sense of assisting foreign countries in improving their legislation and its implementation started in the 1970ies. At that time, international legal co-operation was developed out of, and considered to be a part of the overall technical assistance given to the at that time so called developing countries. This assistance is located in a specialised ministry, the *Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung* (Federal Ministry for Economic Co-operation and Development, abbreviation: BMZ). The *Bundesministerium der Justiz* (Federal Ministry of Justice, abbreviation: BMJ) embarked in systematic international legal co-operation only after the end of socialism and with a focus on Eastern Europe and the former Soviet republics, entering in a situation of competition with the BMZ.

Thus, the Federal Ministry of Justice (BMJ) is a comparatively new key player in international legal co-operation. It entered the scene after the demise of socialism in the early 1990ies. The formerly socialist countries subscribed to a total change of system: they wanted to radically alter their political, economic and social system. This required the re-writing of the entire law. It soon became obvious that this task was far beyond the traditional understanding of technical assistance given in legal questions; it was a new and unique task. This challenge caused the Federal Ministry of Justice to become active because it was felt that the experts of this ministry were better equipped to give comprehensive assistance of a purely legal nature than the agents of the classical development aid (technical assistance) were. The German Federal Ministry of Justice is well equipped for this task because – unlike the

Japanese Ministry of Justice – it has expertise on all fields of (federal<sup>74</sup>) law because it is responsible for reviewing all bills drafted by other federal ministries for their compatibility with the overall legal system<sup>75</sup>.

In the years after the end of communism, the BMJ was often addressed by East European ministries of justice for help because in many of the transitional systems of Eastern Europe, the ministries of justice were responsible for the oversight of the legal reforms. These East European ministries of justice addressed their German and other West European counterparts for help.

The Federal Ministry of Justice started and still conducts assistance programmes, usually of a bilateral nature. For this purpose, the Federal Republic of Germany concludes treaties with the appropriate organ of the recipient state on the contents and the financing of a co-operation measure. The programmes the Ministry of Justice sponsors are usually related to legislation and not so much to administration (implementation) because legislation is the core expertise of the ministry. Since the EU started to sponsor legal assistance programmes for prospective new member states – presently the largest programmes exist for what is called the Western Balkans, i.e. Albania and the successor states of Yugoslavia except Slovenia<sup>76</sup> – as well as for other formerly socialist countries (especially Russia, Belarus, Ukraine, Moldova, the South Caucasian and Central Asian republics)<sup>77</sup>, the Federal Ministry of Justice has taken a certain part in these programmes. In general, bilateral German activities and participation in EU-sponsored programmes are not linked, but run in a parallel way. Slowly, the Federal Ministry of Justice widens the territorial scope of its international legal co-operation. Until recently, it was more or less limited to formerly socialist countries (including the East Asian socialist states). Now, the ministry starts similar co-operations with countries where former or existing socialism is not at issue, i.e. in the Middle East, South America or Sub-Saharan Africa.

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<sup>74</sup> In the system of German federalism, most areas of legislation are federal. The *Länder* legislate predominantly in certain matters of special administrative law, especially in matters of education, culture, public security, police and local government.

<sup>75</sup> In Japan, this review is conducted by the Cabinet Legislation Bureau. As a consequence, the Japanese Ministry of Justice concentrates on the ‘core’ fields of the legal system: cf. *infra*, point 5.1.2.1.

<sup>76</sup> The EU website on its relationship with the Western Balkans can be found at [http://europa.eu/legislation\\_summaries/enlargement/western\\_balkans/index\\_en.htm](http://europa.eu/legislation_summaries/enlargement/western_balkans/index_en.htm).

<sup>77</sup> The EU presents information on its so called ‘European Neighbourhood Policy’ towards these countries on the website [http://europa.eu/legislation\\_summaries/external\\_relations/relations\\_with\\_third\\_countries/eastern\\_europe\\_and\\_central\\_asia/index\\_en.htm](http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/eastern_europe_and_central_asia/index_en.htm).

The Federal Ministry of Economic Co-operation follows a philosophy somewhat different from that of the Federal Ministry of Justice. The Ministry for Economic Co-operation continues to regard international legal co-operation to be one case of a more general technical assistance which is embedded in an overall concept of development. The Ministry of Justice, on the other hand, stresses the uniqueness of the assistance in the field of legislation and its implementation (“writing a law is different from digging a well”).

Apart from these fundamental differences in philosophy, originating from the different starting points of the two houses and kept up in a spirit of competition (which is not always helpful because it sometimes bars desirable co-operation between the ministries), the operative work of the Ministry of Economic Co-operation is very similar to that of the Ministry of Justice: international treaties with recipient countries on co-operation projects, conducting or sponsoring co-operation programmes, providing funds or acquiring them from other sources, participation in EU-sponsored programmes. In this spirit, the Ministry of Economic Co-operation conducts purely legal assistance programmes as well as programmes of a more general nature that include a legal side.

In addition to these two core agents in the field of international legal co-operation, other federal ministries are involved.

First, there is the *Auswärtiges Amt* (Ministry of Foreign Affairs, abbreviation: AA). International legal co-operation necessarily touches the competence of this ministry. Yet, in Germany federal ministries may conduct foreign contacts with their counterparts without the permission of the AA. If an international treaty for the Federal Republic of Germany is negotiated, the AA has to be involved and controls whether the future treaty is in accordance with international law and the other treaties of the Federal Republic.

In its own policy, the AA formulated the promotion of the *Rechtsstaat* (rule of law) worldwide as one of its priorities. This so called *Rechtsstaat* initiative is now embedded in an overall EU initiative to promote the *Rechtsstaat*/rule of law.

The Federal Ministry of Finance is involved as far as the costs of the programmes are concerned. Usually, the federal ministries finance programmes of international legal co-operation out of their own budget if no external financing exists (as is the case, e.g., in EU sponsored programmes). However, if they need extra resources the Ministry of Finance will have to get involved and will need to be convinced that the expenditure makes sense.

The Federal Ministry of the Interior plays a certain role in international legal co-operation, especially in the exchange of administrative staff as a form of providing practical training for public servants of the recipient countries. However, this participation in international legal co-operation is more typical for the *Länder* ministries of the interior because in the German system of federalism, the bulk of public administration is done by the *Länder* and their organs. The federal level maintains only a small number of administrative services and therefore has comparatively little potential for this sort of exchange. This is why the role of the ministries of the interior is described under the heading of the *Länder* ministries<sup>78</sup>.

#### 5.1.1.1.2. *Länder* ministries

Due to their limited foreign activities, the *Länder* have neither ministries for foreign affairs nor ministries for economic development. Foreign contacts are usually concentrated in the Prime Minister's Office. Apart from that, the ministries of justice are active in the field. Every individual Land<sup>79</sup> has its peculiarities and its own system which cannot be analysed here in detail. Nevertheless, some general traits can be described.

The Office of the Prime Minister concludes treaties for the *Land* with foreign countries. In the field of international legal co-operation, these often refer to the exchange of experts from among the judicial or administrative staff. Assistance in legislation is rarely a subject of *Länder* agreements because in the system of German federalism, the *Länder* have little jurisdiction and therefore comparatively little experience in legislative matters; only certain fields of administrative law, especially school and cultural affairs as well as police and public safety, underlie *Länder* legislation. The more detailed aspects of international legal co-operation are usually dealt with by the pertinent ministry, not so much by the Prime Minister's Office. As in most *Länder* the Prime Minister's Office has a 'mirror department' for each ministry there are established channels of communication between the Prime Minister's Office and the various ministries. Establishing and preserving the coherence of the overall policy is a prerogative of the Prime Minister's office.

The ministry of justice is a key player on the *Länder* level just as much as it is on the federal level. However, the tasks are somewhat different. Whereas the Federal Ministry of

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<sup>78</sup> Cf. *infra*, point 5.1.1.1.2.

<sup>79</sup> "*Land*" is the singular form of "*Länder*".

Justice is strongly involved in the federal legislative process and therefore possesses a rich expertise on legislation, the *Länder* ministries of justice administer the courts and the public prosecution services (with the exception of the six supreme federal courts which are administered by the Federal Ministry of Justice) and therefore have command over the vast majority of the judicial and procuratorial staff in Germany. This is where their importance in international legal co-operation lies.

Many co-operation programmes both on *Länder* and on federal level include the participation of German judges or public prosecutors as experts or advisers. It is the *Länder* ministries' decision to allow judges or public prosecutors to take part in such programmes. Without the permission of the ministry, they have to continue their judicial or procuratorial work in Germany. This competence may seem trivial but it is of a key importance because the *Länder* ministries of justice have the power to decide whether German assistance projects can be staffed with qualified experts or not. In this decision, many factors are important: on the one hand, Germany's obligation to present and, as the case may be, delegate experts, Germany's interest in the participation of German judges and prosecutors and thus the presence of German law and legal expertise in international projects, and on the other hand the functioning of the courts and prosecution services in the respective *Land*.

This is a certain dilemma because the aspects in favour of the participation of judges and public prosecutors concern mostly the federal level whereas the aspects against it lie with the *Länder*: they have to bear the costs of the judges and prosecutors delegated abroad, and they have to pay the additional staff that may become necessary to fill the gaps caused by the absence of too many colleagues. The federal level cannot and will not recompense the *Länder* for their willingness to 'sacrifice' their judicial and procuratorial staff for the purposes of international legal co-operation.

A certain solution is delegating not active judicial and administrative staff, but retired experts. They possess a life-time of experience, and their delegation does not cause absences within the judicial and administrative service.

A similar role is played by the ministry of the interior for those projects that involve administrative personnel. The ministry of the interior has command over the largest part of the administrative apparatus of the *Land*, and it therefore can decide whether civil servants or employees of the *Land* can be delegated to a recipient country as experts, or whether foreign administrative staff can be trained in the authorities of the *Land*.

The latter model involves public servants of the recipient countries being invited to spend some time and observe the practical work and the routines in the equivalent organ of the donor *Land's* authority, i.e. an internship. Since exchange of staff as a form of legal international co-operation is very helpful in ensuring good implementation by a public administration of high professional standards, it becomes more and more important and widespread. As a consequence, the role of the *Länder* ministries of the interior increases.

The role of the *Länder* ministries of finance is similar to its federal counterpart<sup>80</sup>. Some other ministries may take part in international legal co-operation on a case-to-case basis if assistance projects within their jurisdiction involve legal questions as well. To give one example: several *Länder* agricultural ministries are involved in assistance projects that include, *inter alia*, agricultural legislation or its implementation.

#### 5.1.1.2. Other public organs

The participation of public organs others than ministries largely depends on their status.

Independent (autonomous) organs such as audit chambers can take part in co-operation programmes to the extent their budget allows them to do so. They may conclude agreements of co-operation with corresponding organs of recipient states. Their role in the international legal co-operation is limited to only a few projects.

Public organs without an independent status (administrative authorities) usually execute the commands of their superior ministry. This function may become crucial to the success of a co-operation project that involves the training of foreign judges, prosecutors or administrative staff in Germany. These foreign lawyers will not be trained in specialised training facilities or in the ministry but serve their internship in the courts and offices where the day-to-day work is done. This makes sure that they learn modern, *Rechtsstaat*-based administrative or judicial work on a practical level which allows them to select those elements that they think will work in their own country.

Local autonomies (communes, cities, and districts) play a similar role although they are not subordinate to a ministry. They may delegate part of their staff as experts to go abroad, and they may receive foreign administrative staff for training on the spot. Sometimes,

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<sup>80</sup> Cf. *supra*, point 5.1.1.1.1.

administrative support programmes are agreed upon between a German commune and its partner commune in the recipient country.

### *5.1.2. Japan*

Unlike Germany, Japan is a centralised state. ‘The state’ is the central state (Nippon-koku, 日本国) with its central, regional and local organs.

#### *5.1.2.1. The level of ministries*

Japan, being a central state, only has one set of ministries, not seventeen like Germany has. The Japanese ministries dealing with international legal assistance are the Ministry of Foreign Affairs and the Ministry of Justice.

Japan does not have a separate ministry for economic development or aid. These questions fall mostly into the jurisdiction of the Ministry of Foreign Affairs. One of the more important fields of activities of that ministry is the so called ‘Official Development Assistance’ (ODA)<sup>81</sup>, i.e. technical assistance given from one state to another state or some other public body. In Japan, international legal co-operation in the sense of technical legal assistance is felt to be an integral part of the overall technical assistance, i.e. one possible case of ODA<sup>82</sup>. Foreign technical assistance is seen as one means to realise the goals of Japanese foreign policy. For this reason, the Ministry of Foreign Affairs is involved more than its German counterpart.

Japan entered the field of international legal assistance later than Germany. The first request of this kind was received in 1992 by Vietnam. Just like the East European reform states, Vietnam too charged its ministry of justice with the task of legislative reform, and the request for help was presented by the Vietnamese Ministry of Justice to the Japanese Ministry of Justice as well as to JICA. Since then, the geographical focus of law-related ODA has always been Asia: first East and South East Asia, now extending to Central Asia as well. The background is similar to the ‘boost’ in German legal assistance programmes since 1990: States give up socialism or radically reform their system under the heading of ‘socialism’ and

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<sup>81</sup> 政府開発援助.

<sup>82</sup> JICA, Capacity Development (fn. 8), ii-iii.

want to incorporate elements of market economy, rule of law and/or democracy in their legal systems. In Asia, Japan is one ‘natural’ model state<sup>83</sup>.

The Ministry of Foreign Affairs deals with international legal co-operation in many ways and acts as the umbrella institution in this field.

First, if Japan concludes a treaty with a recipient state about a co-operation programme or a project, Japan is represented by the Ministry of Foreign Affairs. In some cases, this role of the Ministry of Foreign Affairs is material, e.g. if contacts are established through diplomatic channels. JICA, being the executing agency of the ministry in questions of technical assistance, maintains field offices and close ties to many recipient countries and therefore often is addressed with requests for Japanese technical assistance which JICA hands over to the ministry. In other cases, another ministry – e.g. the Ministry of Justice – may have the contact with its foreign counterpart and will include the Ministry of Foreign Affairs only when a co-operation treaty is to be concluded. Japanese ministries other than the Ministry of Foreign Affairs do not enter into contractual relationships with foreign organs, even if the subject-matter of an agreement falls within their scope of activities. In this respect, law-related programmes are treated the same way as any other development programme.

Second, the Foreign Ministry may give grants and other financial support to foreign countries in the framework of Japanese foreign policy. In individual cases, this may include activities that may be defined as belonging to international legal co-operation.

Third, the Ministry of Foreign Affairs holds the Japanese ODA funds in its budget; large parts of these funds are handed over to JICA<sup>84</sup> because JICA administers these funds for the ministry. This includes the institutional financing of JICA as the general ODA implementation agency mandated by the ministry. JICA uses these funds to finance and conduct the programmes and projects that have been agreed upon between Japan and the recipient state and which JICA is commissioned to administer.

If JICA cannot or does not wish to execute certain programmes with their own staff, they can address other official bodies (including autonomous bodies such as the Federation of Bar Associations) for help, which they are legally required to give as far as they can. Or JICA can buy equipment or knowledge on the market. If goods or services are bought on the market, JICA have to put them to tender.

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<sup>83</sup> MORINAGA (fn. 6).

<sup>84</sup> On JICA, cf. *infra* point 5.2.2.

Specifically, in law-related projects of international co-operation it is sometimes felt that JICA lacks the necessary expertise. In these cases, JICA may address the Ministry of Justice for assistance. The inclusion of the Ministry of Justice or any other ministry leaves the primary responsibilities of JICA and the Ministry of Foreign Affairs unaffected. This is true for finance as well. Project costs are borne by JICA and thus indirectly by the Ministry of Foreign Affairs, even if the Ministry of Justice is involved.

International legal co-operation and technical legal assistance do not play a prominent role in the Foreign Ministry's ODA agenda. Among the so called 'specific issues' of ODA only 'democratization' is at least somewhat close to international legal co-operation and may to a certain extent be compared to the *Rechtsstaat* initiative of the German Ministry of Foreign Affairs. All other specific issues are rather remote from law<sup>85</sup>. This definition of core issues reflects the global perspective of foreign policy pursued by a ministry of foreign affairs; law-related questions will find more attention in a ministry of justice rather than in a ministry of foreign affairs.

The Ministry of Justice is the other important institution on government level in the field of international legal co-operation. It maintains contacts to the ministries of justice and, as the case may be, to other law-related institutions of recipient countries, though in a more informal manner outside diplomatic channels. If these contacts result in the wish to enter into a formal agreement on legal assistance, the Ministry of Justice will address the Ministry of Foreign Affairs which will conclude the treaty and provide the means for the implementation of the assistance programme. The Ministry of Justice does not have a special department for foreign relations other than judicial co-operation. Foreign contacts are handled by the Minister's Secretariat, Office of International Affairs, and sometimes also by the department responsible for the field of law in question.

The Ministry of Justice does not conduct programmes of international legal co-operation in its own responsibility because these programmes are part of the ODA which falls within the competence of the Ministry of Foreign Affairs. The Ministry of Justice is addressed by the agency managing a project of international legal co-operation, i.e. by JICA, if procuratorial staff or members of other legal professions related to the Ministry of Justice are

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<sup>85</sup> Cf. <http://www.mofa.go.jp/policy/oda/index.html> by 2010 Oct. 23.

sought for participation in an assistance programme<sup>86</sup>. The Ministry of Justice will then make sure that adequate staff is recruited, *inter alia* by offering promotion to those willing to be delegated for some time to a recipient country. Unlike Germany, Japan relies nearly exclusively on active staff because these are still rooted in their professional ministerial, judicial, procuratorial etc. networks, and it is felt that it is important for the experts to have this backing of their mother institution. Furthermore, active staff can be motivated by career advantages – an incentive which will not work with retired experts. If other legal professions need to be addressed, the Ministry of Justice offers help to establish contacts where this help is needed.

Thus, the involvement of the Ministry of Justice in international legal assistance is comparatively limited. The ministry will deal with the political questions of legal assistance, unless these are dealt with in the Ministry of Foreign Affairs, and it will help finding qualified experts from the legal professions. It is not involved in the operative co-operation work as such and does not compete with the Ministry of Foreign Affairs in the way that the German Federal Ministries of Justice and for Economic Co-operation do.

The operative legal co-operation with transitional and developing countries is performed by the Ministry of Justice's Research and Training Institute, seated in Tokyo<sup>87</sup>. The institute with a staff of 85 persons on the ministry's payroll is part of the ministry. Due to its special tasks the institute does not form a part of the regular hierarchy within the ministry but is an external organ with a status somewhat different from an ordinary department.

International legal co-operation, however, is not the only task of this Institute. On the contrary, its core functions consist in research within Japan to provide a scientific basis for future legislation especially in the field of criminal justice as well as in training for Japanese justice officials. In the mid-1990ies, the scope of these activities was extended to foreign countries, and the Research and Training Institute became the ministry's chief executive agency for assistance to developing and transitional countries, including the formerly and actual socialist countries in East and South East Asia. Recently, Central Asia including Mongolia has become a new target region of Japanese international legal co-operation.

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<sup>86</sup> The Ministry of Justice is also involved in the recruitment of judicial staff but in a different way: The Supreme Court as the head of the court administration has to agree, and the judges in question are formally made public prosecutors, thus leaving the jurisdiction of the Supreme Court and coming under the administration of the Ministry of Justice.

<sup>87</sup> 法務省法務総合研究所 ; websites: [http://www.moj.go.jp/housouken/housou\\_index.html](http://www.moj.go.jp/housouken/housou_index.html), <http://www.moj.go.jp/ENGLISH/MEOM/meom-01.html>.

The Research and Training Institute does not do any research on the law of the recipient countries as such. However, its training is open to foreign lawyers in the framework of legal co-operation programmes. If such a programme includes training of lawyers from the recipient state in Japan, they receive special training in the Research and Training Institute, in CALE or other educational institutions. Practical internships as in Germany do not normally form part of Japanese co-operation programmes.

In order to conduct this international co-operation work on a professional level, a specialised International Co-operation Department<sup>88</sup> was established in 2001. Its seat is Osaka, and its legal staff consists of one director, *Terutoshi Yamashita*, a public prosecutor and ministry official of long standing and involved in the establishment of the department in 2001, and some 8-10 lecturers. Lecturers are recruited from the ranks of judges, prosecutors and ministerial lawyers working in the Ministry of Justice. Being experienced practitioners of Japanese law, they usually have no previous knowledge of the law of the recipient county or countries they work with. Since the Department staff takes part in the usual rotation within the ministry, its director as well as the lecturers usually serve a two or three years' term in the department before being transferred to other parts of the ministry or before going back into the judicial or procuratorial practice<sup>89</sup>. There are no mechanisms to institutionalise the knowledge these lecturers have acquired in the course of their projects for the benefit of their successors or the Department at large.

The International Co-operation Department is usually involved in co-operation projects on invitation by JICA<sup>90</sup>. If JICA is commissioned by the Ministry of Foreign Affairs with the execution of an assistance programme that requires legal expertise, JICA may address the International Co-operation Department either by direct invitation from government agency to government agency or – so far a theoretical alternative – by putting the project to tender. Since there are few institutions in Japan with expertise in international legal co-operation, the International Co-operation Department would stand good chances to acquire projects opened to tender. In execution of the programme, the Department either sends its own lecturers e.g. to conduct seminars in the recipient countries or, especially in the case of long term experts, seeks appropriate Japanese lawyers – usually practitioners, sometimes

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<sup>88</sup> 法務省法務総合研究所国際協力部; website: [http://www.moj.go.jp/housouken/houso\\_icd.html](http://www.moj.go.jp/housouken/houso_icd.html).

<sup>89</sup> On the staff of the International Co-operation Department by the second half of 2010, cf. MORINAGA (fn. 6).

<sup>90</sup> In one case so far, the request came from the Asian Development Bank immediately.

scholars – to be sent to the recipient countries in order to provide assistance, e.g. in the drafting of laws or in more comprehensive reform projects. This assistance may require a longer or shorter presence in the recipient country, depending on its form (advisory opinion, training in seminars etc). Long-term experts sent to the recipient countries, including those employed by the International Co-operation Department, act as JICA advisors<sup>91</sup>.

The second tier of international legal assistance work is the organisation of special training courses for lawyers from recipient countries, especially lawyers from the public sphere (courts, public prosecution services, public administration). These lawyers are invited to the Department in Osaka where they receive training of a more theoretical nature; practical internships in Japanese courts or public authorities are not part of Japanese assistance programmes. The format of these courses is usually adapted from the courses for Japanese legal practitioners that the Research and Training Institute organises for domestic purposes.

Beyond the strategic and operative work of international legal co-operation, the International Co-operation Department also provides some scientific backing by publishing articles on the law of recipient countries as well as on theoretical and practical questions of the co-operation work. *ICD News* containing reports and articles on international co-operation activities as well as material on the law of recipient countries is regularly published in Japanese; in 2009, the first English *ICD News* edition was published, and publication in English language is to continue in one volume per year. A certain focus of the discussion in *ICD News* is put on questions of language and qualified legal translation<sup>92</sup> because this has turned out to be a major obstacle to success in the operative assistance work. The Department has a library that contains works on Japanese and Western law (representing the donors' side) as well as on the law of the recipient countries. However, the latter collections are not systematic and do not cover the entire legal systems of these countries and thus do not provide a comprehensive knowledge base on the recipient states' legal system.

The involvement of experts from ministries other than the Ministry of Justice and its specialised units is somewhat stronger than in Germany because the Japanese Ministry of Justice – unlike its German counterpart – does not deal with all fields of law but only with the

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<sup>91</sup> On JICA and their employment of long term experts resident in the recipient country cf. JICA, Capacity Development (fn. 8), 11.

<sup>92</sup> SUGIYAMA (fn. 35).

traditional core subjects such as civil and criminal law and the judicial system<sup>93</sup>. Specialised legal expertise is concentrated in the pertinent ministry.

The Ministry of Education often participates if projects encompass questions of legal education. Co-operation projects developed out of contacts between a Japanese university and a university in the recipient country usually involve the Ministry of Education because it has the oversight over universities. This ministry is also responsible for the financing and the administrative overview of the institutional teaching of Japanese law in the recipient countries, i.e. for the Centres of Japanese Law<sup>94</sup> and their organising bodies: Nagoya University Graduate School of Law and CALE.

The role of the Ministry of Finance is minimal because the funds for foreign co-operation are covered by the budget of the Ministry of Foreign Affairs.

The Ministry of Finance, as well as other ministries, sometimes takes part in legal co-operation programmes, especially if the object of co-operation falls within their specialisation. In this context, the Ministry of Finance did already take part in assistance projects on tax or customs law.

On Cabinet level, the Council of Overseas Economic Co-operation<sup>95</sup> started to take some interest in international legal co-operation quite recently and organised a conference in 2008. As a result, the relevant ministries held a co-ordination meeting in April 2009 where they identified seven important target countries of Japanese international legal co-operation: Cambodia, China, Indonesia, Laos, Mongolia, Uzbekistan and Vietnam. This list is not exhaustive, i.e. initiatives elsewhere are possible and do take place. Questions of method or an institutionalised flow of information between the various Japanese key players were not addressed in the meeting<sup>96</sup>.

Due to changes in government, however, this protocol is outdated. The Council stopped dealing with international legal co-operation for the time being, and the fact that legal technical assistance gained the attention of a cabinet office did not result in better funding.

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<sup>93</sup> Cf. *supra* fn. 68.

<sup>94</sup> On the Centres of Japanese Law, cf. *supra*, point 3.2.

<sup>95</sup> Website: [http://www.kantei.go.jp/foreign/policy/index/kaigai/21kekka\\_e.html](http://www.kantei.go.jp/foreign/policy/index/kaigai/21kekka_e.html).

<sup>96</sup> The protocol of the co-ordination meeting bears the heading 法制度整備支援に関する基本方針 (Basic guideline with respect to giving technical legal assistance). JICA's position on this protocol is highlighted in JICA, Capacity Development (fn. 8), foreword, xi.

*5.1.2.2. Other public organs*

Unlike Germany, in Japanese international legal co-operation the Supreme Court needs to be mentioned. The Supreme Court is the head of the court administration, a role shared by the federal and the *Länder* ministries of justice in Germany. Therefore, the Supreme Court has to agree if judges are to be set free in order to participate in international co-operation activities (or any other official function outside the courts).

The Supreme Court tends to be reluctant to get involved in international co-operation because the court considers this to be a matter for the executive branch, not for the judiciary. In their understanding of the separation of powers, tasks should not be mixed. However, there are a few judges at the International Co-operation Department because the Supreme Court's reluctance is somewhat less pronounced vis-à-vis the Ministry of Justice. Formally, these judges are made public prosecutors for their time outside the judicial service; this technique is always employed when judges are sent to work in state offices other than courts.

Some other state organs take part in co-operation programmes that concern their respective field of law. The Fair Trade Commission is quite active in assistance projects including competition law, as is the Patent Agency if intellectual property law forms part of a project.

Apart from organs of the central state administration, regional and municipal authorities (prefectures; cities and villages) sometimes have their own programmes for recipients in countries outside Japan within the framework of city or regional twinning. The content of these programmes rarely touches the content of international legal co-operation. However, law implementation and law enforcement on a regional or local level may be included in these programmes since prefecture and city administrations have expertise in this field. Prefectures and cities sometimes delegate staff into assistance programmes, especially if they expect some feedback that helps their local enterprises expand into recipient countries.

Autonomous organs such as the Japan Federation of Bar Associations (JFBA) play a certain role in the recruitment of attorneys-at-law for co-operation projects. Official project organisers such as JICA do not search attorneys on the 'free market' but by addressing the bar associations via their umbrella organisation. Both JICA and the International Co-operation Department of the Research and Training Institute of the Ministry of Justice entertain close direct co-operation contacts with the JFBA. This involvement has led to the JFBA planning

an assistance project of its own in Cambodia; if this test case turns out to be successful, the JFBA may become another important donor agent.

## 5.2. Co-operation Agencies

The bulk of the operative work is not done by the ministries but by specialised organs that have a separate legal entity but are closely linked to the state. In Germany, two such institutions compete, reflecting the competition between the two core federal ministries. In Japan, there is only one such agency, but here, too, a certain competition exists because a second operative agent, the Research and Training Institute and its International Co-operation Department, is part of the Ministry of Justice and therefore was dealt with above<sup>97</sup>.

### 5.2.1. Germany: GTZ and IRZ

In Germany, the dualism of the Federal Ministry of Economic Co-operation and the Federal Ministry of Justice is reflected by a dualism of operative agencies: the *Deutsche Gesellschaft für Technische Zusammenarbeit* (GTZ, German Company for Technical Co-operation<sup>98</sup>) and the *Deutsche Stiftung für Internationale Rechtliche Zusammenarbeit* (IRZ, German Foundation for International Legal Co-operation<sup>99</sup>).

Both are legal entities of private law. The GTZ is a limited company (GmbH) owned by the Federal Republic of Germany, whereas the IRZ – despite its name – is not a foundation but an association (e.V.) with representatives of the state, of the judiciary, of the legal professions, of legal science and of some enterprises as members. Both are non-profit organisations sponsored from the federal budget: the GTZ by the Ministry of Economic Co-operation, the IRZ by the Ministry of Justice. For both agencies, this sponsoring from the federal budget covers only part of their expenditure; a considerable proportion of their funds come from projects. This form of financing requires both institutions to constantly look for, and acquire new projects.

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<sup>97</sup> Cf. *supra*, point 5.1.2.1.

<sup>98</sup> Website: [www.gtz.de](http://www.gtz.de).

<sup>99</sup> Website: [www.irz.de](http://www.irz.de).

GTZ was founded in 1975 and is seated in Eschborn, a suburb of Frankfurt/Main. Its overall task is technical co-operation with foreign countries, especially, but not exclusively with developing countries. Most commissions and projects originate from the Ministry of Economic Co-operation, but GTZ acquires projects also from other federal ministries, foreign governments, the European Union, international organisations such as the UN or the World Bank as well as from private enterprises. More than 15.000 persons work in GTZ projects; from these, some 4.000 are Germans, the rest are local staff<sup>100</sup>.

True to its name, the GTZ started in the field of technical assistance, e.g. in infrastructure and industrialisation projects. Since its beginning, it has defined ‘development’ in a wide, comprehensive sense including, *inter alia*, legal co-operation. Therefore, there were first sporadic law-related projects during the first decades of the existence of the GTZ, e.g. in the late 1970ies in Chad where Prof. *Knieper* helped to write a new mining act.

GTZ defined ‘core areas’ (*Schwerpunkthemen*). Law-related international co-operation does not form a core area. Yet, one of GTZ’s core areas, good governance, is rather close to legal co-operation because it involves questions such as rule of law, democracy, decentralisation, corruption, and public finance<sup>101</sup>. All these questions arise also in international legal co-operation in projects in the field of public law. Insofar, there is an overlap with the focus of the other institution, the IRZ.

IRZ is much younger and also smaller than GTZ and has a more specialised and therefore narrower focus. It was founded in 1992 by the Federal Ministry of Justice as a reaction to the special needs that the formerly socialist countries east of Germany had in the field of legal co-operation<sup>102</sup>. At that time, the Federal Ministry of Justice became more active in international legal co-operation, and in order to serve the special needs of its law-related co-operation with Eastern Europe and the former Soviet Union, the ministry created a special institution. Until recently, the regional focus of the IRZ corresponded to its genesis and was limited to formerly and present socialist countries. This geographical self-limitation is being given up although the majority of co-operation projects continue to concern the formerly or present socialist world.

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<sup>100</sup> <http://www.gtz.de/de/689.htm> by 2010 Oct. 17.

<sup>101</sup> Other core areas are rural development, sustainable infrastructure, social development, environment and climate, and economy and employment. All these areas may touch legal questions but are essentially outside the scope of legal co-operation.

<sup>102</sup> On these special needs, cf. point 1.

The concentration on *legal* co-operation (as opposed to a wider technical co-operation), however, is continued and can hardly be changed by an institution affiliated to the Ministry of Justice. So, the IRZ is developing from a legal co-operation agency specialised on post-socialist transformation countries to a more global legal co-operation agency.

The staff of the IRZ headquarters consists of some two dozen employees, some of them delegated from the Ministry of Justice. They are responsible for managing existing and for acquiring new projects. The operative co-operation work in the projects is largely done by outside experts that the IRZ draws from the ranks of judicial, prosecutorial and public administrative staff, from among university professors and qualified researchers and sometimes from other professions, e.g. from among computer experts if a project includes the computerisation of certain legal activities or from legal publishers if the creation of a legal literary infrastructure is part of a project.

Both GTZ and IRZ share the philosophy now prevalent among Western donor countries: International legal co-operation that merely aims at transplanting the donor country's legislation to the recipient country is bound to fail. Co-operation with sustainable results requires the analysis of the recipient's needs as defined primarily by the recipient state itself and to develop solutions tailored to the recipient's special situation. The donor's role is to provide an up-to-date methodology of how to achieve the defined goals in legislation and its implementation and to give information about practical experiences gained in the donor country and perhaps elsewhere, i.e. a support for the recipient's own efforts<sup>103</sup>. Furthermore, there is another, more practical reason to loosen the donor's focus on their own law: many co-operation projects with formerly socialist countries are sponsored by the EU. These projects cannot be conducted by an agency or agencies from one member state alone but necessarily need to comprise agencies from several EU members. This in itself creates a greater distance towards individual national legal systems and strengthens comparative aspects. Nevertheless, the involvement of German experts and advisors who know their law best leads to a certain preference for German solutions in projects sponsored by Germany or conducted with the

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<sup>103</sup> This philosophy prevails despite a change from demand-driven to offer-driven co-operation programmes that can be experienced among the professional legal co-operation agents of the donor countries. This must not be confused, however, with the principle that the recipient's stakeholders must be included and endorse the aim of the assistance project, i.e. that support cannot be imposed on an unwilling or a disinterested recipient.

participation of German experts. This ‘export’ of German law is considered politically desirable for the reasons pointed out above<sup>104</sup>.

Preferential credits from the federal budget to transitional and developing countries are handed out *inter alia* by the *KfW Entwicklungsbank* (KfW Development Bank), a member of the state-owned banking group *Bankengruppe KfW (Kreditanstalt für Wiederaufbau, Reconstruction Credit Agency)*. This business has little impact on co-operation of a legal nature but sometimes credits are linked to certain development goals which may require legal reform in the recipient country. In these exceptional cases, the *KfW Entwicklungsbank* may take part in law-related international co-operation.

### 5.2.2. Japan: JICA<sup>105</sup>

By its outlook and its profile, the Japanese International Co-operation Agency (JICA<sup>106</sup>) resembles GTZ more than IRZ. Its geographical focus is global, and it deals with technical assistance in a broader sense, i.e. in the sense of a comprehensive development strategy. Like GTZ (and IRZ to a smaller extent), they maintain field offices in all important recipient countries.

In its present form, JICA was created in 2008 by incorporating the administration of Japan’s development loans and grants into the until then rather technical JICA<sup>107</sup>. JICA’s legal status is an independent administrative institution<sup>108</sup>, i.e. a legal person in public law. Its separate legal personality gives it a similar freedom to act as the German way of organising its co-operation agencies in forms of private law. Its staff is some 1.600 employees in Japan and abroad<sup>109</sup>, the number of (usually local) project staff amounts to round 10.000.

JICA is the official executing agency of the Ministry of Foreign Affairs for all fields of technical assistance, i.e. practical development aid (ODA). The Ministry of Foreign Affairs

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<sup>104</sup> Cf. *supra*, point 1.

<sup>105</sup> A detailed survey is given by JICA’s annual reports 2008 and 2009, the first reports of the new JICA: <http://www.jica.go.jp/english/publications/reports/annual/2008/index.html>, <http://www.jica.go.jp/english/publications/reports/annual/2009>.

<sup>106</sup> 国際協力機構, website: <http://www.jica.go.jp>.

<sup>107</sup> Until then, they had been administered largely by the Japan Bank for International Co-operation (JBIC) and the Ministry of Foreign Affairs.

<sup>108</sup> 独立行政法人.

<sup>109</sup> <http://www.jica.go.jp/english/about/organization/> by 2010 Oct. 17.

provides JICA's basic funding and exercises the global legal and administrative control over JICA.

One important function of JICA is to administer the funds benchmarked for Japanese ODA credits to foreign countries (concessional and similar credits). Before 2008, these funds were in the hands of the Japan Bank for International Co-operation (JBIC) and the Ministry of Foreign Affairs. Since then, they have been concentrated with JICA, except for some minor funds that the Ministry of Foreign Affairs may administer according to its political preferences. JICA receives 99 % of these funds from the government budget, usually through the Ministry of Finance, sometimes through other ministries such as the Ministry of Economy, Trade and Industry. Because of this function, which corresponds to Germany's *KfW Entwicklungsbank*, JICA handles a much larger financial volume than GTZ.

JICA defines certain fields of activities as its 'missions', similar to the core areas of the GTZ. Not only the concept, but also the fields of activity thus defined resemble each other. JICA's mission no. 3 is 'improving governance'. The formulation of this mission, however, stresses economic aspects. This is why JICA's mission no. 3 does not concentrate on the state and on public law to the extent GTZ's core area of improving governance does. Nevertheless, assistance in the field of law is defined as one aspect of governance<sup>110</sup>.

This formulation of priorities shows that assistance of a legal nature is not the core activity of JICA. Nor has JICA had the opportunity to gather experience to the extent it has in other fields of assistance because the first projects of legal co-operation date back only to 1996, i.e. not more than one and a half decades<sup>111</sup>. Nevertheless, the importance of legal assistance is growing, be it in the form of projects that concentrate on law or as one aspect of larger projects. Therefore, within JICA, a special 'Law and Justice Division of the Governance Group, Public Policy Department' was established to ensure the specialisation necessary for high professional standards. The number of staff in this group, however, is small and comprises some 5 qualified lawyers.

JICA pursues a 'holistic' or 'integral' attitude towards technical legal assistance which might be compared to the point of view of Germany's Ministry of Economic Development

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<sup>110</sup> JICA, Capacity Development (fn. 8), 1-5; Torii, Kayo: JICA's Cooperation in Capacity Development for the Legal and Judicial Sectors in Developing Countries, ICD News, December 2010, 23-28.

<sup>111</sup> JICA, Capacity Development (fn. 8), xi; Matsubara, Sadao: My Contact With Vietnam Through Legal Technical Assistance, ICD News, December 2010, 73-86 (75-80).

and of GTZ. JICA considers international legal co-operation as one field of the more general technical assistance having only few differences from other fields of co-operation.

JICA's official philosophy in development co-operation – including legal co-operation – is very much the same as described for GTZ and IRZ<sup>112</sup>. Law cannot be simply transplanted from the donor to the recipient, but every recipient country needs tailor-made solutions that take into account local conditions. A certain difference between JICA's official philosophy on the one hand and the attitude of GTZ and IRZ on the other can be experienced in Japan's stronger stress on the involvement of investors and their interests<sup>113</sup>.

Next to JICA, the Japanese state entrusts another organisation with international co-operation programmes: the Japan International Co-operation Centre (JICE<sup>114</sup>), a foundation in private law. Its function is rather auxiliary as compared to JICA. JICE administers training and exchange programmes such as, *inter alia*, the Japanese Development Scholarship. JICE very often acts for other institutions that transfer their more technical and organisational work to JICE. Providing for qualified translators is also a task of JICE. This sometimes presents certain difficulties because translators qualified to translate law-related texts directly between Japanese and the languages of the recipient countries are difficult to find<sup>115</sup>.

Major clients of JICE are JICA and the International Co-operation Department of the Research and Training Institute of the Ministry of Justice. JICE maintains offices in Central, East and South Asia<sup>116</sup>. JICE's budget is composed of a basic financing by the Japanese state and of project funds.

## **6. Political, financial and other co-ordination of the various activities and agents**

The previous descriptions show that both Germany and Japan conduct their donor activities in international legal co-operation by a wide range of agents. This makes an efficient co-ordination and exchange of information between these agents desirable. Practical

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<sup>112</sup> Cf. *supra* point 5.2.1. towards the end.

<sup>113</sup> JICA, Capacity Development (fn. 8), iv-viii, 39.

<sup>114</sup> 日本国際協力センター, websites: <http://jice.org>, <http://sv2.jice.org/e/index.htm>.

<sup>115</sup> The practical experiences in Japanese legal co-operation activities show that the 'detour' via English does not produce satisfying results: SUGIYAMA (fn. 35).

<sup>116</sup> Central Asia: Kyrgyz, Tajikistan, Uzbekistan; East Asia: China, Mongolia; South and South East Asia: Bangla Desh, Cambodia, Laos, Myanmar, Philippines, Sri Langka, Viet Nam.

experience shows that the lack of information about the other agents' activities leads to negative results which may be illustrated by one example: In the late 1990ies, two German experts were working in the same Polish ministry, on more or less the same questions of law, in offices practically on the same corridor in the ministry's building, without knowing about each other. They had been delegated on different *Länder*-sponsored bilateral programmes; each programme was based on an agreement between the *Land* and the Polish government. *Länder* are not legally required to – and do not – exchange information on their foreign activities, so there was no channel how these two German experts could have known about each other. The Polish ministry, however, had tacitly assumed an exchange of information between the delegating *Länder* ministries, and its lack made a very bad impression on the Polish project partners because they interpreted it as a lack of professionalism on the German (donor's) side.

Today it is common knowledge that the “lack of co-ordination among the donors is one of the most serious problems in international legal co-operation”<sup>117</sup>. Germany and Japan deal with this problem with different mechanisms.

## 6.1. Germany

### 6.1.1. The EU as a co-ordinating level

A large number of German co-operation projects with formerly socialist countries are nowadays sponsored by the EU. The reason is that the East European countries joined the EU<sup>118</sup> or want to join<sup>119</sup>. One prerequisite of accession is the compatibility of the candidate country's legal system with EU law; this prerequisite is monitored regularly by the EU in the course of the highly structured pre-accession process. This need to comply with EU law leads

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<sup>117</sup> GAUL (fn. 11), 116-124. A similar comment was made by Nicholas BOOTH, policy advisor for the UN Development Programme in Vietnam, on the ‘10<sup>th</sup> Annual Conference on Technical Assistance in the Legal Field’ organised by the ICD of the RTI (MoJ) in January 2009: HARADA, Akio: Roles of and Future Challenges for the International Civil and Commercial Law Centre Foundation, ICD News, December 2009, 11-15 (13).

<sup>118</sup> Until now: Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia.

<sup>119</sup> Croatia nearly finished the accession negotiations so that membership may be close. Albania, Macedonia, Montenegro and Serbia expressed their will to accede, and the preparations of formal accession negotiations have progressed to various degrees. So far, only Macedonia has the formal status of a candidate country (together with Iceland and Turkey), whereas the other countries are defined as ‘potential candidate countries’. In the case of the factual international protectorates Bosnia-Herzegovina and Kosovo, very basic questions concerning, *inter alia*, status and sovereignty need to be resolved before formal steps towards accession negotiations can be started.

to a ‘natural’ preponderance of the EU in the question of legal co-operation. But also formerly socialist countries without the wish or the perspective to join are in the special focus of the EU because there are special neighbourhood programmes which aim also at assistance to legal reforms that the neighbouring East European countries may want to realise<sup>120</sup>

The EU conducts very few co-operation programmes with own staff. The usual way is that the EU and the candidate country (recipient) agree upon certain programmes, the execution of which the EU puts to tender for consortia of agents from at least two EU member states. The successful agent concludes a contract with the EU and undertakes to conduct and administer the co-operation project.

Given this structure of legal co-operation between the EU and the candidate countries, it is obvious that an oversight over the various programmes and thus an exchange of information and co-ordination can take place only at EU level, not at a national level. For the EU, ‘enlargement’ is a special field of politics, led by a special member of the Commission, the Commissioner for Enlargement and European Neighbourhood Policy. Other EU organs such as the Council and the Parliament have special committees for questions of enlargement.

Programmes of legal co-operation with formerly socialist countries – candidates and potential candidates (they fall under the heading ‘Enlargement’) as well as the other successor states to the Soviet Union (they fall under the heading ‘European Neighbourhood Policy’) – usually fall within the scope of the Commissioner for Enlargement and European Neighbourhood Policy. Nevertheless, other EU agencies take part in this co-operation work as well. This requires an exchange of information inside the EU between the various agents.

For this task, a special ‘Technical Assistance and Information Exchange’ (TAIEX) service was created. TAIEX is managed by the Directorate-General Enlargement of the Commission. TAIEX both provides a certain amount of assistance as well as collects information on assistance activities in recipient countries. The latter task, however, does not function well in practice. The EU continues to start numerous programmes with overlapping scope and with little or no opportunity for the administrators and experts working in one programme to know about the other relevant programmes, especially not beforehand.

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<sup>120</sup> This concerns the successor states to the Soviet Union. On European territory: Belarus, Moldova, Russia and Ukraine, beyond Europe in a territorial sense the South Caucasian and the Central Asian republics. The geographical factor has legal relevance as well because art. 49 Treaty on European Union (EU Treaty, in the version established by the Lisbon Treaty) invites the accession of ‘any European State’. For the former Soviet Union and the Mediterranean countries, art. 8 EU Treaty establishes the possibility of special relations to neighbouring countries.

This can be seen most clearly in Kosovo because it is a small country which receives an enormous amount of technical, legal and other kind of assistance. Therefore, the ratio between donor representatives and officials of the recipient state is higher in Kosovo than in any other recipient country<sup>121</sup>. Many assistance programmes for Kosovo concern the creation of a modern legal system responding to the needs of democracy and the rule of law. Many of these programmes overlap. There are, to give only one example, at least two EU sponsored programmes that, despite of somewhat different overall aims, include the compilation and consolidated codification of the laws in force in Kosovo. No co-ordination mechanism within the EU prevented this doubling.

However, the situation is even more complicated because many donor institutions are active in Kosovo. Apart from the EU, assistance programmes – including legal assistance programmes – are sponsored by individual foreign states (both EU members and others), international organisations such as Council of Europe, OECD, United Nations, World Bank etc. Some of these institutions, too, have felt the need to assist Kosovo in putting down in writing the law in force. Preventing an overlap and a clash of goals, contents and methods of assistance programmes would require some co-ordination or at least a joint information basis between these agents. As was explained before, exchange of information and co-ordination do not work within one agent such as the EU, let alone between several.

A solution would be a co-ordination by the recipient. The recipient knows – or should know – about all assistance programmes because on the recipient's side there is only the state (one state) whereas on the donors' side a multitude of actors can be found. Assistance is not given as a one-sided act by the donor (this would violate the recipient's sovereignty) but on the basis of an agreement between donor and recipient which means that all programmes have a written contractual basis which is available on both the donor's and the recipient's side. This knowledge, if properly administered, would put the recipient into the position to co-ordinate agreed and offered assistance programmes. However, this does not take place because experience shows that recipients do not consider themselves responsible for this sort of co-ordination. In the example cited above, the Polish ministry could have mentioned in the negotiations on a second assistance agreement with a German *Land* that assistance on similar matters had already been agreed upon with another *Land*; yet, this did not happen and the recipient did not consider this to be his responsibility. The same is true for Kosovo.

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<sup>121</sup> A similar ratio may only be found in Timor Leste.

In practice, delegated project staff in Kosovo meet to exchange details on their programmes and to agree upon some sort of co-ordination on the spot. It has become usual practice for many project administrators and experts in Kosovo to start the work with their Kosovar partner with the question “Which other assistance programmes are being or have been conducted in your house?”. This creates an unofficial exchange of information which makes an unofficial co-ordination and co-operation among donors possible. However, the success of this co-ordination depends on the experience and alertness of the delegated programme staff on the spot as well as on the knowledge of the individual person responsible on the Kosovar side.

#### 6.1.2. The ‘*Bündnis für das deutsche Recht*’

The lack of co-ordination and mutual information has been felt strongly for some years now by all German agents active in the field of legal co-operation. Yet, for constitutional and legal reasons, such a co-ordination and an exchange of information cannot be made compulsory, but can only be based on voluntary participation. The main reason is federalism: both the federation and the *Länder* possess statehood independent from each other. Therefore the federation can oblige the *Länder* to do something – e.g. to provide information or to accept co-ordination – only if the federal constitution gives the federation an express authority to do so. International legal co-operation is part of foreign policy which is, according to art. 32 *Grundgesetz*, in principle a federal competence. Nevertheless, the *Grundgesetz* does not forbid the *Länder* to have foreign relations of their own. In constitutional law, it is very doubtful whether the overall responsibility of the federal level for contacts with the outside world as enshrined in art. 32 *Grundgesetz* (and the general principles of international law<sup>122</sup>) give the federal level the authority to establish a system of co-ordination and information compulsory for the *Länder*. Probably the federation does not have such an authority. Thus, all endeavours to co-ordinate German international legal co-operation with third countries and to exchange information about German activities are necessarily of a voluntary nature.

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<sup>122</sup> In international law there is a general rule that in federal systems the federal level bears on overall responsibility for the observance of the country’s international obligations, including the conduct of the federal units. Therefore, the federal level bears full responsibility to the outside. One might argue that this requires the federal level to possess the necessary authority to enforce the observation of international obligations against the federal units.

A first step to create voluntary structures of an exchange of information was taken in 2008 when the ‘*Bündnis für das deutsche Recht*’ (Alliance for German Law<sup>123</sup>) was established by and under the ægis of the Federal Ministry of Justice. Membership in the Alliance is voluntary. So far, the Alliance has among its members the associations of the legal professions (of judges, of attorneys-at-law, of notaries public, the German Lawyers Association), some of the scientific and executive institutions concerned with international legal co-operation (IRZ, Institute for East European Law Munich) as well as the German Institution for Arbitration. Representatives of other relevant federal and *Länder* ministries, of the GTZ, of legal science and of NGOs take part in the sessions and conferences of the Alliance.

The purpose of the Alliance is to strengthen the position of the German law in the world. This rests on two pillars one of which is relevant in this context. First, the Alliance promotes German law abroad by issuing information on German law in German and English<sup>124</sup>. The Alliance hopes that this information may convince international companies to choose German law and/or German courts for their disputes with other international companies. A second hope is that foreign legislators may be convinced that German law may be a model for their reforms which would create a recipient-side demand for legal co-operation with Germany.

The second aspect is a stronger co-ordination of international legal co-operation. For this purpose, the partners of the Alliance agreed upon creating a data base and upon feeding this data base with all the information on their own activities of international legal co-operation. This data base is operated by the IRZ. Ideally, every agent reports their activities, and this flow of information makes a decentralised self-coordination of the various agents possible. However, in the first years of the existence of the data base the influx of information was not satisfying so that the data base cannot yet fulfil its role as a forum for self-coordination. For the reasons explained above, participation and providing information is fully voluntary which explains the low participation: every agent shuns the extra work of presenting their projects on the data base.

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<sup>123</sup> For details, cf. the website of the Federal Ministry of Justice: [http://www.bmj.bund.de/enid/15e7cc9c0cc43c0d4086708f0f762808,0/Rechtsstaatsentwicklung/Buendnis\\_fuer\\_das\\_deutsche\\_Recht\\_1j4.html](http://www.bmj.bund.de/enid/15e7cc9c0cc43c0d4086708f0f762808,0/Rechtsstaatsentwicklung/Buendnis_fuer_das_deutsche_Recht_1j4.html). Information is available both in German and in English.

<sup>124</sup> The brochure ‘Law – Made in Germany’ can be found on the website <http://www.bmj.bund.de/files/-/3426/Broschuere-Rechtsexport.pdf>.

## 6.2. Japan

In Japan, there are fewer agents in the field of international legal co-operation. Most important, there is no doubling of state activities because the state is unitary and not divided in two levels of statehood. Therefore, there is only one ministry in each field, not seventeen as in Germany. Furthermore, the competition between the German Federal Ministries of Justice and for Economic Co-operation cannot be found between the Japanese ministries because the Ministry of Foreign Affairs is the uncontested umbrella institution for foreign legal co-operation. However, Japanese experts active in this field report of certain rivalries between various ministries, too, as well as between JICA and the International Co-operation Department of the Research and Training Institute of the Ministry of Justice. The Ministry of Education, although being a key player in all projects involving legal education, often is not included when the Ministry of Foreign Affairs, JICA and others meet in order to discuss their co-operation in international assistance. On the whole, agents in Japan are less numerous and are led and guided at least on a symbolical level by the Ministry of Foreign Affairs. Nevertheless, Japanese practitioners report of a quite fragmented practice because the various institutions and within one institution the various departments sometimes find it difficult to establish a true co-operation; often, there seems to be a spirit of competition that makes the various players guard their information instead of sharing it. Therefore, the need for a better exchange of information and for an improved co-ordination and co-operation is felt and voiced in Japan as well.

Towards the international level, JICA holds contact with the World Bank and similar organisations that finance assistance projects. Through these channels, Japan knows about the activities financed or otherwise tutored by the given international organisation in the target country of a Japanese assistance programme. These requests are usually started at an early stage, before the agreement with the target country is concluded. This permits a certain co-ordination but only carries as far as the requested international organisations possess information on programmes, i.e. in practice as far as the requested organisation finances or oversees programmes in the given recipient countries. These requests will not help discover programmes of foreign countries or other international organisations in the target country. The solution would again be a certain co-ordination by the recipient but Japanese agents

experienced the same reluctance of recipient countries to undertake a co-ordinating role as was described for Germany.

Inside Japan, there are no formal structures for an exchange of information or co-ordination of activities in the field of international legal co-operation. The agreement between the relevant ministries on international legal co-operation, concluded in 2009, did not establish a formal co-ordination body or procedure. It is expected that the Ministry of Foreign Affairs, the Ministry of Justice, its Research and Training Institute and JICA have an overview of their respective activities. However, none of these agents is involved in all details of all programmes and possesses all pertinent information. There is no institution that collects and registers information on Japanese legal assistance programmes, nor are the agents required to give this sort of information about their activities to some central data base. Japanese experts active in international legal co-operation programmes state that a better flow of information is necessary but so far no initiative has been taken to create the infrastructure necessary for such an exchange<sup>125</sup>.

## **7. Conclusion**

A comparison between the German and the Japanese donor structures show many parallels but also some major differences.

### *7.1. Parallels*

The first and perhaps most important parallel is that the state takes a political interest in international legal co-operation, especially with the formerly and present socialist countries in the region, and assumes ultimate responsibility for this form of co-operation. Neither the German nor the Japanese state leaves these activities to the market and to private agents such as major law firms or specialised assistance companies. Therefore, state institutions on the ministerial level and their implementation agencies play an important role. Germany and Japan do not limit themselves to a mere assistance but are active in spreading knowledge of their respective legal system in the recipient countries. Acquainting young lawyers with

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<sup>125</sup> JICA, Capacity Development (fn. 8), ix.

German and Japanese law, it is hoped, will make them more open to German and Japanese co-operation offers once they are in positions to decide about these questions.

Not only the basic political interest is similar in both countries. Both donors also share some basic problems. The most important ones are co-ordination and quality control. In the field of co-ordination, both countries suffer from a lack of flow of information between the various agents. Even Japan with its more concentrated and centralised structures experiences the need to better co-ordinate its activities and to improve the flow of information between the institutions and persons involved. So far, in both countries experts have developed informal networks to fill this gap but an institutionalisation is necessary. Experts from both countries feel that an efficient co-ordination requires activities by the recipient, but both sides have made the experience that recipients are very unwilling to assume this role and that they prefer to remain passive receivers of the assistance offered.

All quality control so far suffers from the basic deficit that there are no standards for legal co-operation programmes. There is a vivid international discussion which includes German and Japanese experts. However, this discussion so far has produced fashions but no universally accepted and reliable standards of conduct for donors and recipients. Therefore, especially donors shape their activities, their procedures, goals, methods, techniques, contents and exit strategies for a sustainable assistance success according to instinct, personal experience and the results of a more or less formalised self-reflection within the donor community. Publications and conferences as well as evaluation procedures are important forms of self-reflection but can only carry as far as reliable experiences are formulated into acceptable general standards.

## *7.2. Differences*

In science, one can usually learn more from the differences than from the parallels. This is true for the object of this paper as well. There are some quite remarkable differences between the German and the Japanese systems of international legal co-operation.

The first difference is that Germany has extensive knowledge about the law and the legal system and legal culture of the recipient countries as far as formerly socialist countries are concerned. Several institutes inside and outside universities specialise in research on the law of Eastern Europe including the successor states of the Soviet Union. Although the

primary task of all these institutions is research and, if they are university institutes, teaching, their experts are involved in international legal co-operation as well. They can help shape German assistance programmes to the needs of the recipient country and the German advisers understand the law and the legal thinking of the recipient lawyers. In Japan, such an institutionalisation and thus professionalization of the research on the law of recipient countries does not exist. Deeper knowledge on the legal situation in the recipient countries often is acquired only in the course of the project, and there are so far few institutionalised ways to make this knowledge available to others.

The second difference concerns the state as donor. Japan is for the time being a centralised state with one set of institutions, whereas Germany is a federal state with two levels of statehood. Both levels are active in the field of legal co-operation especially with the neighbouring countries in the East. For Germany, this means that the peculiarities of federalism need to be explained to recipients unfamiliar with this doubling of statehood levels, but also that the need for co-ordination among domestic agents is stronger and more acute than in a centralised system. For constitutional reasons, all solutions need to be voluntary. On the other hand, federalism allows Germany to offer more diverse forms of international legal co-operation. The different governments on the federal level and in the 16 *Länder* entertain different opinions on who should be given assistance to what extent, in which fields and with which methods and goals. This leads to a wide diversity in the outlook and consequently in the offers that are made.

The third difference is a stronger coherence between the Japanese agents and a distinct dichotomy between the German agents. In Germany, one can identify two different sets of agents with a different philosophy or at least a different starting point in their respective philosophies. The Federal Ministry of Economic Co-operation and its implementing agency GTZ have a development aid background and see legal assistance as one form of development aid, a technical question embedded in a more global development strategy that encompasses other parts of the recipient system as well. For them, “writing a law is not different from digging a well”. On the other hand, the Federal Ministry of Justice and its implementing agency IRZ concentrate on law as the object of co-operation and stress the uniqueness of the assistance required in the field of law; for them, “writing a law is different from digging a well”. This is especially true for the formerly socialist states that did not and do not need so much development aid in the classical sense but much rather assistance in a radical political,

societal and economic change and in adapting their legal systems accordingly. In practice, these opposite starting points do not cause insurmountable differences, but a distinct competition between the Ministry of Justice and IRZ on the one side and the Ministry of Economic Co-operation and the GTZ on the other can be stated.

In Japan, the agents are more intertwined. First, the preponderance of the Ministry of Foreign Affairs and JICA is not questioned, at least not formally. They represent a philosophy comparable to that of the German Ministry of Economic Co-operation and the GTZ, perhaps with a somewhat stronger stress on investor interests than in Germany. The Ministry of Justice and its International Co-operation Department play a role which, on a formal level, is clearly secondary to the Ministry of Foreign Affairs and JICA. It is true that the lawyers of Ministry of Justice and the International Co-operation Department with their specific professional background sometimes have an outlook on international legal co-operation that is somewhat different from JICA's, and it is also true that this may result in a feeling of competition. Nevertheless, a competition as in Germany has not evolved within the Japanese government apparatus. Therefore, the Japanese legal co-operation policy is more coherent and more uniform than the German policy – with all the advantages and disadvantages that a lack of competition causes.

The fourth and last difference concerns the international framework. Japan stands alone whereas German co-operation activities are strongly embedded in EU programmes. The EU takes a special interest in membership candidates (after the accessions in 2004 and 2007, this means mainly the Western Balkans) and in the regions adjacent to the EU: Eastern Europe (Russia, Ukraine, and former Soviet Union) and the Southern Mediterranean, i.e. the target regions of the European Neighbourhood Policy. Numerous EU programmes finance assistance to and co-operation with these regions. In the field of law, membership candidates will naturally orientate towards the EU rather than individual member states because an EU compatible legal system is one of the requirements for accession. Therefore European law is more attractive as an object of advice than the members' national law is. Germany is the most active member state in the execution of European programmes with Eastern Europe and somewhat less active in regard to the Mediterranean. The strong presence of European programmes is a chance for Germany because they allow for more money, but they also require from Germany – both from the Federation and the *Länder* – a certain harmonisation with EU policies, programmes and initiatives. Germany cannot formulate her national interest

contrary to what the European Union has formulated in any given field of politics, including legal co-operation with and assistance to third parties.

Japan, on the other hand, is fully sovereign and can and does shape assistance initiatives and expenditures according to the autonomously defined Japanese national interest. On the other hand, Japan lacks the rich funds a supranational organisation can provide, and it lacks the attractiveness of a larger community and the alluring power of an accession perspective that the European Union can offer.

### *7.3. Conclusion*

Japan and Germany possess donor structures for the co-operation with third party countries that are in part parallel and in part different from each other. However, the differences are not so strong that co-operation is impossible. Structures on both sides are well equipped to carry out a closer donor-side co-operation.





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