

## ABHANDLUNGEN / ARTICLES

### Why Legal Transformation Assistance from Germany and Japan to Former East-Bloc Countries ?

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- I. Low-Key Beginnings
- II. Interim Results, Institutional Competition, and Temporary Divisions of Labor
- III. Foreign Policy Reasons
- IV. Economic Reasons
- V. Reasons of Jurisprudence
- VI. Pragmatism as a Guide for Legal Transformation Advice

The legal side of the dramatic transformation of the former East-Bloc after the fall of the Berlin Wall has hardly been in the focus of the media or of high-political debate in the West. For the two leading thinkers of the 20<sup>th</sup> century on the concept of an open society, Karl Popper and Friedrich von Hayek, however, law had to play a crucial role in the transformation of any society from absolutism, authoritarianism, or totalitarianism to liberal democracy and free market economy. As a preface to the first Russian edition (1992) of his famous wartime treatise *The Open Society and its Enemies* (1945), Popper, the former Austrian philosopher of science living in Britain, wrote a letter to his Russian readers emphasizing that the rule of law was the most important issue for all new democracies and market economies.<sup>1</sup> Referring to the successful example of Japan's choice of Germany's draft civil code in the 1890s as a pattern for its legal framework for rapid modernization, he urged Russia to adopt the German or the French civil code for its legal transformation. And Hayek, the Austrian economist in Chicago, dedicated an entire book to the subject of law, legislation, and liberty in the 1970s,<sup>2</sup> at a time when development doctrine in the U.S. was oblivious to law, and lament about the lack of a theory on the role of law in economic development was widespread among American scholars.<sup>3</sup>

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1 Reproduced in its German original as part of the preface to the 7<sup>th</sup> German edition: KARL R. POPPER, *Die Offene Gesellschaft und ihre Feinde* (7. Aufl. 1992).

2 FRIEDRICH A. VON HAYEK, *Law, Legislation and Liberty* (1973).

3 DAVID TRUBEK / MARK GALANTER, Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States, in: *Wisconsin Law Review* 4 (1974) 1086.

But, strangely, below the levels of both philosophical thought and political discourse on the Western community of values, there was what the *Financial Times* called a “war of advice”<sup>4</sup> among Western consultants engaged in the former Eastern bloc. At first, it was mostly competition within the American consulting business for the attention of struggling Russian, Ukrainian, Eastern European, South Caucasian, and Central Asian policy-makers. But towards the mid-1990s, more or less subtle forms of competition also arose between American and European sources of advice.<sup>5</sup>

These frictions were compounded by the effects of wide swings in American scholarly sentiment on the relationship between law and development. Two waves of large U.S. resources committed to legal reforms in developing or transforming countries in four decades were each followed by deep troughs of self-doubt. The first wave took place in the “development decade” of the 1960s and was aimed at “modernizing” Third World countries. As described by David Trubek and Marc Galanter, it was based on the naïve assumption of the “goodness” and “potency” of the legal system of the U.S. for export to the Third World.<sup>6</sup> The trough followed in the 1970s when, after exposure to more sustained contact with lawyers and scholars in Third World countries, liberal American scholars began to feel that their paradigm was questionable in terms of foreign policy, economics, and jurisprudence.<sup>7</sup>

The second wave was carried by the surge of optimism after the fall of the Berlin Wall. Again, large American resources were mobilized, this time directed at rewriting the legal systems of Russia and other member states of the former Soviet Union so that they would serve as a framework for the transformation of former Communist countries into liberal democracies and free market economies. Many of the scholars involved had been able to regain confidence by reading Hayek’s *Law, Legislation and Liberty*<sup>8</sup> in the 1970s and 1980s. A further boost in morale came in 1991 and 1993 when two American representatives of institutional economics, Ronald Coase and Douglass North, received the Nobel Prize for their research on how legally binding contracts (Coase<sup>9</sup>) and, more generally, a reliable legal framework for markets (North<sup>10</sup>) can reduce economic transaction costs. Some scholars thus encouraged misread Hayek and argued that common law countries were better qualified than civil law countries of the Roman legal heritage

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4 “War of advice may break out in Russia”, *Financial Times*, 21 December 1992.

5 ROLF KNIEPER, *Judicial Cooperation, Universality and Context* (2004).

6 TRUBEK / GALANTER, *supra* note 3, 1080.

7 *Ibid.*

8 HAYEK, *supra* note 2; the original German manuscript of the book was later published as FRIEDRICH A. VON HAYEK, *Recht, Gesetzgebung und Freiheit: Eine neue Darstellung der liberalen Prinzipien der Gerechtigkeit und der politischen Ökonomie* (1980).

9 RONALD COASE, *The Firm, the Market, and the Law* (1988).

10 DOUGLASS NORTH, *Institutional Change and Economic Performance: The Political Economy of Institutions and Decisions* (1990).

to supply legal transplants to other countries.<sup>11</sup> Of civil law countries there were three groups or “legal families”, they suggested, the French, the Scandinavian and the German, the latter including Japan.<sup>12</sup> The trough, though, came when prominent American advisors who had gone into Russia and Eastern Europe with great faith in the early 1990s became appalled later in the decade by evidence of “kleptocracy” of prominent Russian entrepreneurs and of moral hazard of voucher privatization even in Czechoslovakia, led though it was by Prime Minister Vaclav Klaus, a prominent Hayekian.<sup>13</sup> Skepticism about “transplants”, be they from common law or civil law countries, by now seems to prevail among transformation scholars in the U.S.<sup>14</sup>

All the while, Germany and Japan have provided legal transformation assistance to former East-Bloc countries in a much more low-key style and on a much more modest financial scale but with sometimes remarkable results. Lest the German and Japanese officials, scholars, and lawyers involved in this effort be carried away by the American groundswell of skepticism just mentioned, it appears useful to survey what they have done, how they did it, and for what reasons. In view of the American debate, a recapitulation of the reasons for legal transformation assistance in terms of foreign policy, economics, and jurisprudence seems in order.

Although Germany and Japan have hardly been aware of each other’s efforts until recently,<sup>15</sup> their approaches have been in many ways similar in style and organization. However, there has been a rough geographical division of labor, with Japan focusing on South East Asia and Germany on Eastern Europe, the former Soviet Union, and China (I). They have achieved considerable results, especially with their advice on drafts of civil codes. But as legal transformation is inevitably a long-term process, these results cannot be considered as more than an interim progress. After a few years of mutual benign

11 RAFAEL LA PORTA / FLORENCIO LOPEZ-DE-SILANES / ANDREI SHLEIFER / ROBERT VISHNY, The Quality of Government, in: *Journal of Law, Economics & Organization* 15 (1999) 222 ff., 224 and DANIEL BERKOWITZ / KATHARINA PISTOR / JEAN FRANÇOIS RICHARD, The Transplant Effect, in: *American Journal of Comparative Law* 51 (2003) 163 ff., 171 quoting Hayek. In fact, Hayek stressed that Roman law has deeply influenced all Western law including English common law and that the Justinian code (on which both the French and the German code draw to different degrees) is the product of cognitive “findings” of lawyers in a process very similar to the later common law. He went out of his way to reject later interpretations of the Justinian code as the expression of the “will” of a ruler as false, *supra* note 8, 117 f.

12 LA PORTA ET AL., *supra* note 11, and, following them in this respect, BERKOWITZ ET AL., 180 ff., *supra* note 11.

13 BERNARD BLACK / REINIER H. KRAAKMAN / ANNA TARASSOVA, Russian Privatization and Corporate Governance: What went wrong?, in: *Stanford Law Review* 52 (2000) 1790; On Vaclav Klaus’ own “Hayekian” reform strategy, see VAČLAV KLAUS, “Main Obstacles to Rapid Economic Transformation of Eastern Europe”, in: H. Giersch (ed.), *Towards a Market Economy in Central and Eastern Europe* (1991) 77.

14 BERKOWITZ ET AL., *supra* note 11.

15 *I.e.* a conference on “Legal Assistance, a Dialogue between German and Japan” organized by the Center for Asian Legal Exchange at Nagoya University on Oct. 28, 2006.

neglect, unexpected institutional competition has arisen between sources of advice from common law countries and civil code countries. Initially, the U.S. tended to prevail with its templates for financial and economic regulations, while German and Japanese advice was more in demand for civil law legislation. But this seeming division of labor is far from implying an end to institutional competition in these two as well as all other areas of law (II). The foreign policy reasons for Germany and Japan, which share the experience of post-war transformation and reintegration into the Western value community, to engage in this field are of an equally remarkable similarity (III).

A closer review of Germany's and Japan's post-war economic histories suggests that the immediate availability of their civil and commercial codes, which had "survived" war and defeat intact, was a necessary condition for the "economic miracles" of their recovery. They offered easily accessible, safely enforceable legal instruments at low cost for the enormous surge of economic transactions after currency reforms and price liberalizations in both countries. Though necessary, the codes were clearly not a sufficient condition, however. Equally important were such factors as the removal of authoritarian planning, currency reforms, price liberalization, the imposition of anti-trust laws by the Allies, as well as banking structures, saving propensities, and the large reservoirs of technological know-how immune to physical destruction. Interestingly enough, while law plays a strong role as a framework for free competitive markets in both countries, economic policy styles differ markedly, with Japan's "strategic pragmatism" encompassing all economic theories competing with each other in the U.S. and Europe on a trial and error basis and thus offering a sometimes striking contrast to Germany's more dogmatically focused "ordo-liberalism". The border relations between law and competing economic theories are easily illustrated by the elementary matrix of goal attainment, adaptation, pattern maintenance, and integration in Talcott Parson's sociological functionalism (IV).

From the point of view of jurisprudence as well, the two countries are valuable sources for legal transformation advice. While both have a civil code, their laws keep evolving by a continuous stream of jurisprudence and court rulings used as precedents until legislation reacts by incorporating them in the codes by amendments. The recent debate about whether common law or civil law is a better source for transformation advice may lose some of its edge by recognizing the functional equivalence of the cognitive role of the courts in England, Germany, Japan, and the U.S. This too can easily be illustrated by locating sources and actors of legal transformation on the Parsonian matrix (V). In conclusion, I shall argue that pragmatism is not such a bad counsel for legal transformation assistance, since after all, pragmatism is a venerable American philosophy, a German reality in spite of lingering doctrinal disputes, and a strikingly successful Japanese strategy in the field of economic policy (VI).

## I. LOW-KEY BEGINNINGS

Compared to the din of the initially attempted “shock therapy” in Russia’s and Eastern Europe’s price and property reforms,<sup>16</sup> Germany’s and Japan’s legal transformation assistance was decidedly low-key in style, gradualist in method, and modest in financial allocations.

Because of differences in aid structures and approaches, a systematic comparison of American, German, and Japanese fiscal allocations is hard to come by. But the following series of data may offer a rough perspective of the order of magnitude involved in the American and the German cases: Whereas the U.S. in 1994 allocated fiscal resources of more than US\$ 2 billion in overall support to the countries of the former Soviet Union alone,<sup>17</sup> provided the prescriptions of the shock therapy were followed, the Kohl government in 1993 mustered DM 200 million for its first “Transform Program” for all countries of Eastern Europe and the former Soviet Union. Of this, not much more than DM 2 million went into projects of the newly established *Deutsche Stiftung für internationale rechtliche Zusammenarbeit* (IRZ) for legal transformation assistance to Eastern European and former Soviet countries.<sup>18</sup> Beginning in 1995, the *Gesellschaft für technische Zusammenarbeit* (GTZ) can be assumed to have earmarked roughly similar yearly amounts from the federal development budget to legal transformation assistance for developing countries in the former Eastern bloc. So probably not much more than DM 4 million of federal funds per year, or not much more than DM 50 million (EUR 25.5 million) in the decade since 1993 have gone into this crucial area of transformation.

The genesis of the German and the Japanese programs of legal transformation assistance was similar in several respects:

- They responded to demand-pull from the transforming countries rather than being driven into them as a supply-push.
- They were shaped by legal scholars, legal professionals and development experts.
- They were helped by a remarkably smooth interagency cooperation within their own government.

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<sup>16</sup> JEFFREY SACHS, Accelerating Privatization in Eastern Europe: The Case of Poland, in: New European Law Review 1 (1992) 71; PRADUMNA RANA / J. MALCOLM DOWLING, Big Bang’s Bust, The International Economy Sept./Oct. 1993; JEFFREY SACHS / WING WOO, Big Bang Smear Job, The International Economy, Nov./Dec. 1993. For a more penetrating analysis, see HERBERT GIERSCH, Some General Lessons from West Germany’s Post-War Experience, in: Giersch (1991), *supra* note 13, 1-21. On patterns which transforming countries might consider in Germany’s and Japan’s cases of post-war property reforms, HENRIK SCHMIEGELOW / MICHELE SCHMIEGELOW, How Strategic Pragmatism Can Reform Economies, The International Economy, July/Aug. 1991, 43.

<sup>17</sup> “Less Shock, more Therapy for Russians”, International Herald Tribune, 22 December 1993.

<sup>18</sup> Deutsche Stiftung für internationale rechtliche Zusammenarbeit (IRZ), Geschäftsbericht 1993.

- They were cost-effective because they did not employ expensive consulting firms but relied on a wide network of scholars, judges, research institutes, foundations, lawmakers, and diplomats contributing their expertise in the course of their regular functions without additional pay.
- Their working method was not the “tossing over” of the codes of their own countries to the transforming countries as “templates” for immediate legislation, but sustained dialogue on all legal issues involved and all alternatives available.<sup>19</sup>

“Old hands” of government with an acute sense of the importance of law in economic development helped steer the institutional set-up and the programming in both cases. In Germany, retired Undersecretary Kittel worked to hold the interagency approach of the first “Transform Program” of the federal government together, steering it to cabinet approval, helping to keep the distribution of funds to government and non-government agencies peaceful, and networking with partner agencies in the transforming countries. His capacity as Representative of the Federal Government for Transformation Assistance in Eastern Europe was a most useful vehicle for crossing institutional boundaries. But his competence did not extend to the developing countries of the former Soviet Union, namely those of the Central Asian and South Caucasian region. Here, another unconventional decision-maker played an important role, namely Minister Spranger, in charge of development cooperation in the Kohl cabinet. He was not afraid of stepping into the vacuum left by the Transform Program, allocating funds from his Ministry’s development assistance budget to legal transformation assistance in the former Soviet Union. The GTZ, which had long advocated this measure and had previous experience with helping in legal reforms in Africa,<sup>20</sup> was happy to implement such projects in Central Asia and the Caucasus region. Southeast European countries were added to both the GTZ and IRZ programs when funding was provided in 2000 in accordance with the G8 Stabilization Pact with Southeast European countries. Diverse forms of legal co-operation also emerged with China. Upon a direct Chinese request, the German Patent Office in Munich has been advising Chinese authorities in charge of preparing legislation for a patent law and the establishment of a patent office since 1992. The GTZ undertook several projects of development cooperation in the form of legal transformation advice. A broader dialogue on the rule of law ranging from human rights through civil law, penal law, administrative to economic laws was first envisaged during the state visit of President Herzog in China in 1996 and formally agreed during the visit of Chancellor Schröder in China in 1999.<sup>21</sup> It has been carried out under the

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19 IRZ, *supra* note 18, KNIEPER, *supra* note 5, for the German case, and Center for Asian Legal Exchange for the Japanese case.

20 KNIEPER, *supra* note 5.

21 NICOLE SCHULTE-KULKMANN, Rechtszusammenarbeit mit der Volksrepublik China (2005); KATJA LEVY, Der Deutsch-Chinesische Rechtsstaatsdialog (2006).

auspices of both the Minister of Justice, Brigitte Zypries, and the Minister of Economic Cooperation, Heidemarie Wieczorek-Zeul.

In Japan, Professor Akira Mikazuki, widely recognized as the Senior of Japanese jurisprudence, with a deep knowledge of Japan's own history of legal transformation both in the Meiji era and after the war, was luckily called to serve as Minister of Justice of the Hosokawa government in the decisive period of 1993-94. In this position he could help to set up the institutional and financial framework for Japan's program of transformation assistance to Southeast Asian countries. At the same time, he remained engaged in the substance of the legal issues involved and frequently participated in workshops and seminars for that purpose.

There are striking structural similarities between the German and Japanese cases as well. The funds are allocated by government ministries, in the German case the Ministries of the Economy, of Justice, and of Development Cooperation, and in the Japanese case the Ministry of Justice. The programming and project implementation is left to decentralized agencies, the IRZ and the GTZ in the German case, the JICA in the Japanese case. Finally, in each country there is one university that has emerged as the hub of legal transformation assistance, in Germany the University of Bremen and in Japan the University of Nagoya. In Bremen, Professor Knieper's Institute has worked with the GTZ for the past decade. In Nagoya, the Center for Asian Legal Exchange (CALE) was established under the leadership first of Professor Akio Morishima and subsequently of Professor Masanori Aikyo.

The small community of German and Japanese scholars, judges, lawyers, and development experts committed to legal transformation assistance is aware both of the modesty of their means and of the necessity of being ready for patient and sustained dialogue with their partners in transformation countries that have requested their cooperation. To Japanese lawyers, this method comes naturally. In their education and professional practice, they have internalized Japan's own experience of carefully considering foreign alternatives before embarking on its own legislation, always selecting those patterns that are functionally best adapted to its own societal or economic context or to its purposeful adaptation to social or economic change. They never have any doubt that the end result is always their own.<sup>22</sup> Prior to the legislation of the Japanese civil

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22 This method is perhaps best exemplified by the way in which the Foreign Ministry of the Meiji government engaged Hermann Roesler, Professor of Law and Economics at the University of Rostock in the 1880s, to come to Japan for several years as an advisor on Japan's commercial code as well as on the Meiji constitution. In the case of the Meiji constitution, he submitted his drafts and commentaries in incremental portions through his Japanese colleague Professor Inoue Kowashi to Prime Minister Ito Hirobumi, who previously had studied law in Germany with Lorenz von Stein. Roesler never knew in advance which parts of his drafts would find Ito's approval or what he would make of them in the end. A Bavarian social conservative converted to Catholicism, Roesler was adamantly opposed to the monarchical prerogatives of the Bismarckian constitution of 1871 of the Second German Reich. Arguments on this issue went back and forth between Ito and Roesler. In the

code in 1897, there were two decades of intensive discussions among Japanese scholars and lawmakers about the best choice among Western patterns to use. A first draft authored by the French advisor Gustave Emile Boissonade de Fontarabie almost became law in 1890. Deft opposition by Japanese scholars belonging to what was then called the “English School” of legal thought in Japan prevented its adoption, and a further period of reflection followed. The struggle between the “postponement faction” and the “immediate-enforcement faction” took on some aspects of the Thibault-Savigny controversy in Germany as well as of the struggle between natural law legal philosophy and the historical school, or between universalism and culturalism. Finally, a large number of Japanese scholars returning from Germany, where they had closely followed the debates about the 1887 and 1896 drafts of the *BGB*, prevailed with their advocacy of the German pattern. Their draft became law in 1897, three years before the *BGB* bill that had passed the Reichstag in 1886 entered into force in 1900.<sup>23</sup>

For the German experts involved in today’s legal transformation assistance, there was no tradition or precedent of pro-actively transplanting German laws like in the British or French cases of colonial diffusion of common law or the *code civil*. And quite evidently, such a method would not have been in keeping with the expectations of partners in transforming countries after the fall of the Berlin Wall.<sup>24</sup> Some of the partners, such as those of the former Soviet Union,<sup>25</sup> just hoped to resume the codification movement of the second half of the 19<sup>th</sup> century and the early 20<sup>th</sup> century, which Austria,<sup>26</sup> China, Greece, Japan, Russia,<sup>27</sup> Switzerland, and Turkey<sup>28</sup> shared with Germany.

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end, Ito – of course! – prevailed, and the Meiji constitution got its “Prussian” character later characterized as such by the American drafters of Japan’s post-war constitution, see JOHANNES SIEMES, Hermann Roesler and the Making of the Meiji State (1968); JUNKO ANDO, Die Entstehung der Meiji-Verfassung (2000) and ISHIKAWA-BARTELS, Hermann Roesler – Dokumente zu seinem Leben und Werk (forthcoming in 2007).

- 23 HIDEO TANAKA / MALCOLM SMITH, The Japanese Legal System (2000) 181; BERKOWITZ ET AL., *supra* note 11, 180, have the merit of pointing out this complete independence of the Japanese choice of the German patterns. This case seems to be their major empirical basis for distinguishing successful “transplants” of legal systems to “receptive” countries from the vast majority of less than successful “transplants” to non-receptive countries in many former French and British colonies.
- 24 See ROLF KNIEPER’s lecture “Rechtliche Zusammenarbeit aus der Sicht eines Beraters” at the 80<sup>th</sup> anniversary of the *Max-Planck-Institut für ausländisches und internationales Privatrecht* in Hamburg on June 17, 2006.
- 25 KNIEPER, *supra* note 24.
- 26 At the time including Hungary, and today’s Czech Republic, Slovakia, Slovenia, Croatia, and parts of Poland.
- 27 At the time including today’s Estonia, Latvia, Lithuania, Poland, Ukraine, Moldavia, the Central Asian countries, and those of the South Caucasus region.
- 28 Under the Ottoman empire, Turkey had adopted the French codes. Kemal Ataturk replaced the French civil code by the Swiss civil code, considered by LA PORTA ET AL., *supra* note 11, and BERKOWITZ ET AL., *supra* note 11, as part of the “German legal family” although they admit that the Swiss code can hardly be considered to be a “Roman law” code.

The choice of patterns of the German codes by other countries at the time was always voluntary.<sup>29</sup> Of course, in that age, there was no “legal transformation assistance”. Foreign scholars, judges, and law-makers were not attracted by any “German” or “Roman” identity of the German codes (civil, commercial, penal, procedural, and organizational) legislated between 1862 and 1900, but simply observed how these codes had been the subject of decades of intense academic and legislative debate, first in the German Federation including Austria, then in the Northern German Federation around Prussia, and finally in the united Germany of 1871. These codes were considered by many European and East Asian lawyers of the time as more modern and more trans-cultural than either the somewhat idyllic law of medieval England where everybody knew everybody else<sup>30</sup> or the revolutionary, but unmistakably French, Napoleonic codes.

This may be part of the explanation of why, judging by interim progress, German and Japanese legal transformation assistance, in spite of its modest financial resources, has been remarkably successful, especially in the area of civil and commercial law codification. But these successes must be considered as interim results. After initial benign neglect of transformation assistance from civil law countries, U.S. advisors began to take notice. Since then, competition between U.S. sources and “civil code” sources of transformation advice has become increasingly vibrant in spite of recent American self-doubts on transplants. There has been some incidental division of labor between the U.S. and Western civil code countries, but it, too, must be considered temporary.

## II. INTERIM RESULTS, INSTITUTIONAL COMPETITION, AND TEMPORARY DIVISIONS OF LABOR

Even Black et al. acknowledge that Russia now does have some “decent” laws, including, by 1995, the first two books of the civil code,<sup>31</sup> which Russian experts drafted in a resumption of Russia’s old civil law movement and in consultation with Germany’s IRZ. While pointing to the substantial impact of the United States model on corporate and bankruptcy laws in the countries of the former Soviet Union, Berkowitz et al. concede that after ten years of competing legal advice from the U.S., the EU, Germany, and the Netherlands, countries in Central and Eastern Europe and in the Baltic region by and large follow European models at least in the area of commercial law.<sup>32</sup>

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29 “Foolishly” so, as some American critics of “Roman law” codes might say today, see BERKOWITZ ET AL., *supra* note 11, 166, paraphrasing LA PORTA ET AL, *supra* note 11.

30 FRITZ KERN, *Recht und Verfassung im Mittelalter*, *infra* note 94, 102.

31 *Supra* note 13, 1753.

32 *Supra* note 11,164.

Berkowitz et al. are skeptical about the effectiveness of laws on the books if there is no demand for law in transforming countries and if these countries are not “receptive” to the Western patterns adopted. But the equally skeptical Black et al. do concede that the writing of “good” laws can take years and the building of good institutions takes decades. To have understood that from the beginning, as explained above, is at least one advantage of Germany’s and Japan’s legal transformation advisors. But it is much too early to offer a definitive country-by-country survey of the relative success of transformation assistance from competing Western sources.

By and large, U.S. sources appear to be strong competitors on financial and economic regulations and German and Japanese sources are more in demand for the drafting of civil codes, which in a number of transforming countries are intended to integrate commercial laws. More particularly, Germany’s GTZ has accompanied the completion or the near completion of draft civil codes in most southern countries of the former Soviet Union from the Ukraine to Kazakhstan,<sup>33</sup> and Japan’s CALE has accompanied the completion of the civil codes of Vietnam and Cambodia. But what the *Financial Times* called a “War of Advice” is not over. It must be taken seriously as what I would prefer to call “institutional competition”, which is legitimate and beneficial as long as it is open and concerns substantive issues such as the functional difference or equivalence between the common law and the civil code traditions, or the balance between economic and social concerns, or yet the tension between universality and the cultural context.<sup>34</sup>

Needless to say, whenever asked, IRZ, GTZ, the *Max-Planck-Institut für ausländisches und internationales Privatrecht* in Hamburg, and other German institutions do provide advice on financial and corporate laws<sup>35</sup> widely considered to be a U.S. domain. Moreover, they continue to extend their efforts to all other legal areas as well as to the organization of courts, of legal professions, procedure and enforcement regulations, as well as training and public dissemination through media,<sup>36</sup> the importance of which was eloquently stressed by Popper in his letter to his Russian readers.<sup>37</sup> Conversely, in some strategically important countries such as Georgia and Azerbaijan which had gone far in drafting civil codes with German advice, there appears to be considerable U.S. pressure to reverse the process and opt for American templates. Curiously, American pressure in these cases seems to be compounded by pressure from Russia, which is concerned that German advice may have been too liberal and thus too “American” in substance.<sup>38</sup>

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33 KNIEPER, *supra* note 5, 35-48.

34 On the tension between universality and context, see, in particular, *ibid.*, 20.

35 *Ibid.*, 48-54, and recent yearly reports of the IRZ available on the Internet at <[www.irz.de](http://www.irz.de)>.

36 KNIEPER, *supra* note 5, 81-94.

37 POPPER, *supra* note 1.

38 KNIEPER, *supra* note 5, 37.

The GTZ and IRZ did host an international conference on “Legal Reform in the CIS” at Bremen in March 1997, in which 13 transition states and 12 bilateral, regional, and multilateral organizations,<sup>39</sup> including representatives from USAID, participated. It agreed unanimously on a “Bremen Declaration” on, among other issues, the importance of a legal framework guaranteed by the state as a prerequisite for free markets and democracy. If institutional competition between common law or civil code frameworks was already on the minds of participants, any “war of advice” was not declared at the conference. Competition “on the ground”, however, was felt already in countries such as Azerbaijan and Georgia, even though more often than not in undeclared ways, or in what Rolf Knieper called an “obscure mêlée”.

The merit of having made a first attempt in 1999 at elevating the issue of institutional competition between common law and civil code systems on an academic level goes to a group of scholars led by Rafael La Porta.<sup>40</sup> They take an interdisciplinary approach combining observations on political, cultural, and economic structures, which most political, cultural, and economic theories are used to consider separately. They begin with a number of bold conjectures drawn from such theories. One such conjecture is that civil law (as in the French and German codes) developed as an instrument by the sovereign for state building and controlling economic life, while common law developed as a defense of property owners against attempts by the sovereign to expropriate them. In an admirable *tour de force*, they marshal a large number of data sets from diverse available sources from different years on criteria such as degrees of political divergence, legal systems, and religious affiliations as determinants of good government and hence economic development in up to 152 countries. They obtained numbers for all data from these diverse sources and use either regressions to the least square or logarithms to integrate them. More particularly, they measure detrimental government intervention by an index of property rights protection and an index of the quality of business regulation published in 1997 by the Heritage Foundation, Washington. They test their conclusions on the quality of government of all the 152 countries by controlling them with the logarithm of per capita GNP data, geographical latitude (favoring countries of temperate zones), and ethno-linguistic fractionalization (detrimental to performance). At the end, they present the dazzling conclusion: the quality of government of common law countries is superior to that of civil code countries.<sup>41</sup>

In what should come as immediate relief to any German or Japanese jurist, however, their regression results on countries they count as of German legal origin, including Japan, are rather similar to those of common law origin, controlling for per capita GNP and latitude.<sup>42</sup> And yet, in spite of this remarkable refutation of their initial conjecture

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39 *Ibid.*, 17.

40 LA PORTA ET AL, *supra* note 11.

41 *Ibid.*, 224, 261.

42 *Ibid.*, 262.

by their own regression results, they don't yet quite admit defeat. For they find vindication in that the regression results on the countries of French legal origin strikingly confirm their negative conjectures about French civil law. Therefore, in order to cope with the evidence on German legal origin, they concede that their regression results point to important differences between civil law countries of different origins. But they close the argument by maintaining that their results on German legal origin are still "consistent with the (negative assumptions of their) political theory of institutions", on which they had based their conjectures. They do not seem to see that their regressions just might have shown that something was wrong with their assumptions.

The problem from the point of view of institutional competition is, however, that the La Porta study on the quality of government is considered to be influential in the U.S.<sup>43</sup> Lest scholars involved in legal transformation be carried away by this influence, some of its cognitive deficits and methodological problems should be discussed. Among the cognitive deficits are the following:

The German civil and commercial codes were not, as La Porta et al. assume, "introduced by Bismarck"<sup>44</sup>, but, as mentioned above, emerged from the German codification movement of the 19<sup>th</sup> century that began in Austria in 1811 long before Bismarck became German Chancellor, succeeded in the adoption of the Commercial Code by the Bundestag of the Deutscher Bund in 1862, and culminated in the passage of the Civil Code in the Reichstag in 1896, long after Bismarck was gone. The movement was inspired and pushed through by liberal political forces in Germany which had the overwhelming majority in the Reichstag and with whom the highly conservative Bismarck had to compromise on economic issues in order to obtain their consent on the foreign and military matters foremost on his mind.<sup>45</sup>

The French and German civil and commercial codes were not conceived as "instruments of the State in expanding its power", as La Porta et al. affirm.<sup>46</sup> They do not deal at all with the vertical relationship between the state and its citizens, which in most countries of the world is the subject matter of the constitutions, administrative laws, and penal codes, but are the main pillars of private law dealing with relations between citizens from contracts through torts to trust and estates (to express these subject matters in terms of American law school curricula). As common law since the Magna Carta deals with all kinds of rules both public and private, the strict distinction

43 BERKOWITZ ET AL., *supra* note 11, 166.

44 LA PORTA ET AL., *supra* note 11, 231.

45 On the political dynamics involved, see LOTHAR GALL, Bismarck: The White Revolutionary, 1985; on Bismarck as a "hat-in-hand chancellor" dependent on the liberals, see STEVEN OZMENT, The Mighty Fortress (2004); on the liberal drafters of the civil code such as Windscheidt, executive facilitators such as Delbrück and Leonhardt, and lawmakers such as Lascher, whom Bismarck hated even more than Windhorst, the leader of the Catholic Zentrum, see GEBHARD-GRUNDMANN, Handbuch der Deutschen Geschichte, Vol. 3, (1970) 256, 262.

46 LA PORTA ET AL, *supra* note 11, 231.

between public and private law may not be so obvious to Anglo-Saxons as to Continental Europeans.<sup>47</sup> But if conjectures such as La Porta et al.'s come near to influencing the debate on institutional competition in important processes such as legal transformation in former Communist countries, such confusions should be cleared. The answer to La Porta et al.'s important question whether property rights are well protected against the state in Germany or not, cannot be found in the civil or commercial codes, whose aim is that they should not be unjustly impaired by other citizens. The answer is Art. 14 of the German constitution, the *Grundgesetz*, which guarantees private property with Magna Carta-like solemnity while also mentioning its "social obligations", the most important of which is taxation just as in common law countries.

The methodological problems of La Porta et al. are more astonishing for such a methodologically ambitious approach. They are the following:

Their cultural assumptions repeat Max Weber's mistake of basing his theory that Protestantism was the cultural basis of capitalism on severely narrow historical circumstances of English and Northern German history.<sup>48</sup> They deduce from a charming but certainly more normative than real<sup>49</sup> proposition about Protestants having more trust in foreigners than Catholics and Muslims, that economic performance of Catholic and Muslim countries must be inferior to Protestant countries,<sup>50</sup> which – somehow implied – should be common law countries. Their conjecture is exposed to refutation by cases both of past history and of the most topical present. Among the historical cases are, of course, Cromwell's Protestant dictatorship;<sup>51</sup> Prussia's both Calvinist and absolutist monarchy,<sup>52</sup> which also happened to be the first European monarchy to introduce a

47 On the lack of distinction between private and public law in the Middle Ages, see KERN, *infra* note 94, 67.

48 For a survey of other than Protestant cases of capitalism from early Catholic capitalists in Scotland and England, through the great family empires in Italy from the Medici to the Agnelli, in Germany from the Fuggers and Welsers to the Bleichröders and Rathenau and more particularly, of Japan's case of outstanding capitalism from the medieval Osaka merchants such as Mitsui to the modern Toyodas, see HENRIK SCHMIEGELOW / MICHELE SCHMIEGELOW, Strategic Pragmatism: Japanese Lessons in the Use of Economic Theory (1989) 157 f.

49 Robert Putnam, the author of this proposition, is now treating it as a statement about the idyllic past, at least when talking about conditions in the U.S. whose collapse of community spirit he laments, just for the period of the 1980s and 1990s from which La Porta et al. have taken most of their measures of comparative economic performance, see PUTNAM, *Bowling Alone: The Collapse and Revival of American Community* (2001).

50 LA PORTA ET AL., *supra* note 11, 233.

51 On Cromwell's overriding the provisions of the Magna Carta and his use of scatological invectives for it, when he admonished judges he had appointed not to apply it to him to control his actions, see DANNY DANZIGER / JOHN GILLINGHAM, 1215: The Year of Magna Carta (2003) 281.

52 HANS-JOACHIM SCHOEPS, Preussen, Geschichte eines Staates (1966) 31; CHRISTIAN GRAF VON KROCKKOW, Friedrich der Große (2000) 123, on the Grand Elector Frederic William's imposition of "Calvinism from above" on the majority of Lutherans in Brandenburg.

general law code, the *Preussisches Allgemeines Landrecht*; and finally, the fact that Bismarck, who according to La Porta et al. was the “state builder” who “introduced the German civil code” was also a Protestant, and moreover waged an embittered *Kulturkampf* against the “ultramontane” influence of the Roman Catholic *curia* in Germany.<sup>53</sup> Among today’s frequently referred-to examples are the Catholic common law country Ireland and the Muslim common law country Malaysia, which both have higher economic growth rates than the UK, not to mention the common law country India, whose Hindu majority of 800 million is simply ignored by the authors. Of course, these small items get easily lost in the overwhelming cascade of regressions from a great number of eclectic data for 152 countries.

But they illustrate the severest methodological pitfall of the study, which is the treatment of legal origins as a constant while all other determinants of government performance are counted as variables. France and Côte d’Ivoire are counted as “French civil code countries” irrespective of their wildly diverging degree of societal internalization and legal enforcement of the code. In fairness, the authors apply the same method to England and Zimbabwe, counting them as common law countries. But the fairness ends when the number of economically, politically, and hence legally struggling former colonies counted by La Porta et al. as French, English, and German in origin is compared. The number of such countries in the “French” group is by far the largest because former Spanish and Portuguese colonies in Latin America are counted as French legal origin. The number of former colonies in the British group is considerable, but much smaller. The number in the German group is 0. With this methodology, the otherwise impressive regressions as well as the control by per capita GNP logarithm lose any of the value they might have had with a more rigorous input.

Berkowitz et al. have identified the same methodological pitfall in La Porta’s approach after using the same sample of countries, the same regressions (for a more limited number of categories of quality of government), and the same control by per capita GNP logarithm as La Porta.<sup>54</sup> With that sobering discovery, they seem to throw out the baby with the bathtub, however. They conclude that “legal families”, such as the English, the French, and the German, and effectiveness of legal institutions are not correlated, which in this unqualified brevity may turn out to be an overstatement. They make one important contribution, however, by recognizing that the quality of the process of legal transplantation and reception does count. They emphasize that a voluntary transplant to what they call a receptive country, such as Japan’s adopting the pattern of the German code, correlates with a high degree of effectiveness of legal institutions.<sup>55</sup>

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53 GALL, *supra* note 45; OZMENT, *supra* note 45, 214.

54 BERKOWITZ ET AL., *supra* note 11, 166.

55 *Ibid.*, 180.

In the end, a pattern of events just as in the case of Japan's 19<sup>th</sup>-century civil code debate described above may arise in any of the transformation countries. Some legal scholars and professionals in these countries who lean towards common law countries may advocate for a pause of reflection in the codification process or for abandoning it altogether in order to give time for judges to develop a body of case law. Although their number in most transforming countries still appears to be much smaller than those with affinities to the civil code movement, they can count on strong U.S. support. As explained above, in the case of Meiji Japan, a large stream of law scholars and students returning from Germany and impressed by the intense German debate on codification prevailed against both the French draft code and against the smaller school of thought on English law. Which direction the legal process in the transforming countries will take in the end, will be decided, one may reasonably assume, by the answer to two questions, one quantitative, one qualitative:

- Which Western country engaged in legal transformation assistance will attract the greatest number of scholars and students from transforming countries?<sup>56</sup>
- Which Western country, having attracted such scholars and students, will win their legal affinities by convincing them that its legal system has a comparative advantage from the point of view of institutional competition?

Western countries will have to bear these questions in mind when they reflect upon the reasons for continuing their efforts in legal transformation assistance and for facing the institutional competition involved in that process.

### III. FOREIGN POLICY REASONS

Any discussion of institutional competition between American, European, and Japanese sources of legal transformation advice can gain an added value of clarity, if it recognizes at the outset that these competing sources are equally committed to liberal democracy, free markets, and the rule of law by which the Western community of values defines itself. In the fog of transatlantic and intra-European quarrel on joining, or not joining, the 2003 war in Iraq, this recognition may have dimmed temporarily. Since then, however, the transatlantic community has been repaired and the U.S.-Japan alliance deepened more than ever, not the least thanks to a conscious effort of the second Bush administration to soften the edges of the neo-conservative revolution and to focus on preserving past achievements and building trust among allies. Interestingly enough, this effort has been compared by American scholars with the shift of the "White Revolutionary" Bismarck from waging a series of wars between 1863 and 1871

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56 See BLACK ET AL., *supra* note 13, 1801, ending their article with the plea to set up a fund of US\$ 20 million to offer 500 top Russian law students Western legal training.

to maintaining peace by building trust of as many allies as possible in Europe and Asia.<sup>57</sup>

This has been helped by an American realization that while the U.S. might not need its allies to win wars such as the Cold War or hot wars such as those in Bosnia, Kosovo, Afghanistan, and Iraq, it does need them to “win the peace”. And since according to Immanuel Kant’s well-tested theory that democracies do not fight each other,<sup>58</sup> the building of democratic institutions is the best long-term strategy of winning peace after a war, postwar U.S. administrations have regularly looked for contributions from their allies in this area, including Germany and Japan. Often, U.S. administrations, including the Bush administration, have felt that while there was no alternative to the U.S. for assuring the security of the free world, “nation-building” was not their “job” but could as well be assumed by allies as a matter of burden-sharing or by the United Nations.

The question is often asked why, of all countries, the two losers of World War II should play prominent roles in this area. The answer is rather obvious. While Germany’s and Japan’s histories of the 1930s and 1940s cannot be compared without terrible simplifications<sup>59</sup> in spite of the alliance between Germany’s Nazi regime and Japan’s military regime, their post-war history of reconstruction and the renewal of their democracies is full of striking similarities. They have acquired vast experience in building institutions from scratch after total defeat and destruction. This new start from a clean slate but within a surviving civil and commercial law framework, allowed their economies to grow rapidly into the second and the third largest of the world after the U.S. and to retain that status for the past four decades.<sup>60</sup> They are continuously reforming their generous balance of social and economic concerns. Most importantly for their former neighbors, they have learned to approach international problems with “soft power.” Germany’s political foundations have played crucial roles in what Samuel Huntington has termed the “Third Wave” of democratization in Europe, Latin America, and Asia since the 1970s, most particularly in the peaceful democratic revolutions in Portugal, Spain, and Greece.<sup>61</sup> Japan has led the “flying geese” pattern of rapid economic development of the newly industrialized countries of East and Southeast Asia.

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57 PAUL KENNEDY, Like Bismarck, Bush May Become Stabilizer, *The Daily Yomiuri*, December 5, 2004; JOHN LEWIS GADDIS, After Shattering the Status Quo, Bush Hopes for the Best, *Foreign Affairs* 83 (2005) 1.

58 MICHÈLE SCHMIEGELOW, The Meaning of Democracy in Asia, in: Michèle Schmiegelow (ed.), *Democracy in Asia*, 1997, 4, and ID., Cultures, Power, Economics and Civilization, in: *ibid.*, 544, with further references.

59 When lectured by Westerners that Japan should address the crimes of the 1930s and 1940s as Germany has done, some Japanese point out that Japan at least did not commit a Holocaust.

60 See MANCUR OLSON, *The Rise and Fall of Nations*, Economic Growth, Stagflation and Social Rigidities (1982) 75.

61 SAMUEL HUNTINGTON, *The Third Wave* (1989).

Germany has been a motor of functional integration in Europe, Japan in East and Southeast Asia.<sup>62</sup> The concept of soft power was drawn by Joseph Nye from the literature on municipal politics to the field of international relations.<sup>63</sup> The concept and its implementation by democratic governments and non-governmental organizations worldwide has contributed to the accelerating trend of functional spectralization of foreign policy beyond the classical areas of war and diplomacy into economic, social, cultural, technological, and legal fields.

Success or failure of legal transformation advice could easily become a test case for Western soft power. An open and patient dialogue tends to increase the soft power of good arguments, too massive and impatient approaches tend to decrease it. All parties involved in institutional competition between different Western legal systems would benefit from recognizing these tendencies.

#### IV. ECONOMIC REASONS

Comparative economic performance as measured by current or recent per capita GNP is certainly one of several sources of legitimacy for Western countries offering legal transformation assistance to former East-Bloc countries. As attested even by La Porta et al., Germany and Japan do not score so badly on this account. After Germany's reunification, its per capita GNP slumped dramatically from its customary level of above US\$ 30,000, similar to that of the U.S. and Japan, to a comparatively poor level of mid-\$20,000 by the statistical effect of integrating the East German population and its former COMECON economy. But most transforming countries will intuitively look at the rich former West Germany as a source of transformation experience.

If the functional value of competing Western legal systems is to be compared, however, other levels of analysis have to be added. Most certainly, the long-term path of economic development since the introduction of the competing legal systems needs to be considered to attain some degree of confidence about whether or not legal systems may have had an impact on economic performance. Most certainly, too, in order to somehow control such confidence, the capacity of such legal systems to survive fundamental economic shocks or political changes, such as those the transforming countries are facing, is an important test. Finally, economic policies and structures beyond civil

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62 HENRIK SCHMIEGELOW, How "Asian" will Asia be in the 21<sup>st</sup> Century?, in: *Asien* 100, 56.

63 JOSEPH NYE, Soft Power, in: *Foreign Policy* 80 (Fall 1990) 1; and ID. Soft Power, The Means to Success in World Politics (2004). On Germany's and Japan's emergence as "Civilian Powers" after the end of the Cold War, see HANNS MAULL, Germany and Japan: The New Civilian Powers, in: *Foreign Affairs* 69 (1990) 5, 91, and YOICHI FUNABASHI, in: "Japan and the New World Order", in: *Foreign Affairs* 70 (1991). On Germany's and Japan's soft power contribution to international peace since Sept. 11, 2001, see HENRIK SCHMIEGELOW, Germany Committed to Reforming the UN, in: *Asahi Shimbun*, 30 June 2005.

and commercial law, which have been identified by economic analysis as having had an impact on economic development, must be included in arguments about institutional competition in order to invest them with at least some “soft power”.

Germany and Japan share sequences of legal, political, and economic development since the late 19<sup>th</sup> century like no other pair of major Western countries. They share histories of first-wave democratization in the 19<sup>th</sup> century (by Samuel Huntington's standards Germany earlier than the UK)<sup>64</sup> accompanied by civil law modernization and industrial development exceeding the UK's long-term growth rates from the 1880s to 1945 and again from the 1950s to the 1980s.<sup>65</sup> They share reversals to pre-modern ideologies accompanied by authoritarian manipulation of markets after the great depression of the early 1930s. And finally, they share the post-war revival of democracy, the liberalization of markets, and “economic miracles” on the basis of their surviving 19<sup>th</sup>-century civil and commercial laws that only had to be cleared from the overgrowth of authoritarian central planning from the mid-1930s to the end of the Second World War.<sup>66</sup>

Most remarkably, however, they also share the post-war history of a reordering of some of their corporate structures and economic institutions by the Allies. Markets shaped by pre-war and wartime concentration were “re-atomized”. Giant industrial conglomerates such as the German *IG Farben* and the Japanese *Zaibatsu* were broken up, antitrust legislation introduced, significant categories of private landowners and shareholders (those involved in industrial-military collusion in both countries as well as refugees from former East German provinces and the Soviet zone in the German case) expropriated, government bonds devalued or wiped out. Currency reforms were enacted, exchange rates fixed, a balanced budget rule prescribed by the three military

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64 HUNTINGTON, *supra* note 61.

65 On comparative long-term growth rates from the 1880s to the 1950s, see ASA BRIGGS, The World Economy, in: The New Cambridge Modern History, Vol. XII, The Shifting Balance of World Forces, 83. On Germany, see CHARLES KINDLEBERGER, Economic Response, Comparative Studies in Trade, Finance and Growth, (1975) 175; CHARLES WILSON, Economic Conditions, in: New Cambridge Modern History, Vol. XI, Material Progress and World-Wide Problems: 1870-1898 (1970) 58; on Japan, see W.W. LOCKWOOD, The Economic Development of Japan: Growth and Structural Change 1868-1938 (1968); W.G. BEASLEY, The Rise of Modern Japan: Political, Economic and Social Change since 1850 (1995); TATSURO UCHINO, Japan's Postwar Economy (1983); HUGH PATRICK / HENRY ROSOVSKY (eds.), Asia's New Giant: How the Japanese Economy Works (1976) 3-65, SCHMIEGELOW / SCHMIEGELOW, *supra* note 48.

66 On Germany's postwar renewal of economic philosophy and policy, see REINHARD BLUM, Soziale Marktwirtschaft, Wirtschaftspolitik zwischen Neoliberalismus und Ordoliberalismus (1969); ANDREW SHONFIELD, Modern Capitalism: The Changing Balance of Public and Private Power (1965); HOLGER SCHMIEDING, West Germany's Economic Reforms of 1948: The Lessons for Central and Eastern Europe Today, in: Giersch, *supra* note 13, 23; On Japan's case: SCHMIEGELOW / SCHMIEGELOW, *supra* note 48, 50.

governments in the three Western zones of Germany on June 20, 1948,<sup>67</sup> and by the Japanese government acting under the guidance of Detroit banker Joseph Dodge sent by President Truman in 1949 to both occupied countries in order to “reeducate” the economic policies of the former enemies.<sup>68</sup> While pro-active Keynesian demand management with fiscal and monetary means prevailed in the U.S. and the UK, the fiscal policy abstinence imposed by the balanced budget rule remained one of the most important guiding principles of both Japan’s and Germany’s economic policy until the late 1960s.<sup>69</sup> This, as well as the limited influence of special interest groups in post-war Germany and Japan, are the main factors to which influential economic writers such as Mancur Olsen attribute the fact that the two losers of the Second World War outgrew the victors in the 1950s and 1960s.<sup>70</sup>

On the other hand, in addition to the continuity of their commercial and civil law system, Germany and Japan were allowed by the Allies to keep their banking systems intact, which had served to finance the industrial development of both countries since the 19<sup>th</sup> century. Until quite recently, Germany and Japan remained “back-ward” countries by British standards in the sense of relying more on indirect finance through the banking system than on equity finance for their industrial development.<sup>71</sup> Yet this “backwardness” from the point of view of classical economics had not prevented the two countries from growing into the “power-houses” of Europe and Asia respectively. It evidently had proven so functional by the 1920s that even the Allies in 1948 and 1949 did not see any need to change them. Japan’s main bank system and the industrial portfolios of Germany’s banks not only secured a stable supply of finance to industry but also involved important functions of management performance control of industrial enterprises by banks from the creditors’ point of view. This was one of a number of crucial advantages of the two losers of the Second World War after 1949 as compared to the transforming countries of the former East Bloc after 1990.<sup>72</sup>

Other structural factors that are considered by economic analysis as crucial for Japan’s and West Germany’s rapid post-war recovery include the high savings rate of their households<sup>73</sup> and the high level of technological know-how of their scientific

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67 SCHMIEDING, *supra* note 66, n. 30.

68 UCHINO, *supra* note 65, 49.

69 *Ibid.*

70 OLSON, *supra* note 60, 75, 184.

71 ALEXANDER GERSCHENKRON, Typology of Industrial Development as a Tool of Analysis, in: Second International Conference on Economic History (1965) 449; F.T.M. ADAMS / IWAO HOSHII, A Financial History of Japan (1972) 53.

72 SCHMIEDING, *supra* note 66, 44, on the German case; YOSHIO SUZUKI, Money and Banking in Contemporary Japan: The Theoretical Setting and Its Applications, 1980 on the Japanese case. As to the significance of this pattern for transforming countries in the 1990s, see SCHMIEGELOW / SCHMIEGELOW *supra* note 16 (1991).

73 GIERSCH, *supra* note 16, 5.

institutions and industrial enterprises.<sup>74</sup> These factors are not in the focus of general equilibrium theories in the tradition of classical economics. But they are the subject of recent influential research paradigms on the borderlines between general equilibrium theory, behavioral economics or cultural explanations of capitalism, institutional economics, and the theory of economic policy.

Herbert Giersch, the widely respected economist who led the change from Keynesian to Schumpeterian economics in the 1980s, points to the high saving rates in Germany and East Asia as a comparative advantage over the low rates in North and South America. He considers it plausible in today's non-Keynesian world that a high propensity to save is almost a guarantee of fast long-term growth. He admits being tempted to interpret it as a sign of the capitalist spirit, i.e., the very spirit associated by Max Weber with Protestantism. Of course, a high saving propensity also distinguishes the popular syncretism of Shintoism, Buddhism, and Confucianism of Japan's traditional farming and samurai classes as well as of its present political and business elite.<sup>75</sup> The only problem with this interpretation, as Giersch remarks, is that it implies that overspending and undersaving consumers in today's U.S. are a sign of declining capitalist spirit.<sup>76</sup>

The highly suggestive empirical evidence of technological know-how as a ferment of Germany's rapid industrial development between the mid-19<sup>th</sup> century and the mid-20<sup>th</sup> century and Japan's extraordinary technological supply-push since the 1970s, particularly stunning for a mature economy,<sup>77</sup> has recently found serious theoretical grounding in Paul Romer's "New Growth Theory".<sup>78</sup> It endogenizes technological innovation traditionally treated as a residual or as a constant incremental input in general equilibrium theory. In this model, growth is driven by technological change that arises from investment decisions for which the classical law of diminishing returns does not apply. The stock of human capital determines the rate of growth.

To sum up, Japan and West Germany benefited from an accumulation of structural advantages, from surviving civil and commercial codes through the leveling of the playing field by antitrust rules and monetary reform, "Protestant" saving propensities of households, intact banking systems channeling household savings to industrial enterprises, and technological know-how just waiting to ferment supply-push growth. With such a structural environment in place, the price liberalization by the Yoshida government in Japan since 1947 and by Ludwig Erhard in West Germany's American and British "Bizone" in 1948 turned out to be striking successes. A few days after the Allied currency reform in the three Western zones, Erhard, then head of the Bizonal economic administration, was authorized by guidelines on the decontrol of the economy

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74 SCHMIEDING, *supra* note 66, 43.

75 On Japan's "Protestant" capitalism, see also SCHMIEGELOW / SCHMIEGELOW, *supra* note 48, 157.

76 GIERSCH, *supra* note 16, 5.

77 SCHMIEGELOW / SCHMIEGELOW, *supra* note 48, 62.

78 PAUL ROMER, Endogenous Technological Change, in: *JPoliticalEconomy* 98 (1990) 71.

passed by the (German) Bizonal parliament to lift price controls for almost all manufactured goods and some food stuffs. He did so within a week, although the Bizonal U.S./UK Allied control office had not yet approved the guidelines of the Bizonal parliament.<sup>79</sup> The “shock therapy” of currency reform and price liberalization within a week was a success that became legendary. In the six months following the reform, industrial output grew by an annualized 137%, the 1936 based index of industrial production jumping from 5% in June to 77% in December.<sup>80</sup>

In Japan, instead of a shock therapy, the Yoshida government chose a somewhat more gradual approach to price liberalization, beginning in 1947, accelerating in 1949 after Joseph Dodge arrived in February 1949 and could point to the example of the West German Bizone, and carried on until 1951. The success took a little longer than in West Germany, but was even more dramatic. Down to around 20 to 25% of the 1936-44 based indexes, various sectors of industrial and agricultural production in 1946 reached an average of around 70% by 1951.<sup>81</sup> Inflation repressed by war-time price administration was allowed to soar between 1946 and 1949, but abated in 1951 with recovering industrial production letting supply come back to the level of demand.<sup>82</sup>

These two parallel histories of dramatic economic recovery of civil code countries suggest *prima facie* that civil codes such as the German and the Japanese do correlate with high levels of economic performance even after severe external shocks. The fact that the external shocks in these two cases included massive loss of property, and more particularly the devaluation or complete wiping out of financial assets through currency reforms or expropriation, also somewhat mitigates the persuasiveness of the use of the criteria of shareholder and creditor protection as principal proxies for the quality of legal systems as in the La Porta and Berkowitz studies. Standardized contract patterns (sale, work, service, lease, etc.) provided by civil and commercial codes to parties not able to afford the time and money for multi-page contract drafting exercises, easily accessible real estate registries, reasonable court costs and lawyers fees, as well as the rule that the losing party of a dispute pays court costs and lawyer's costs of the winning party, could well be among the features of a legal system scoring in institutional competition by lowering transaction costs and thus helping economic recovery even after severe economic shocks.

On the other hand, the two post-war histories also indicate that commercial and civil codes are not the only legal sources influencing economic performance, just as common law is not in the U.S. old and new legislation such as anti-trust laws, banking laws, securities laws, currency laws, foreign trade laws, etc., do shape the structure of markets

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79 SCHMIEDING, *supra* note 66, 32.

80 SCHMIEDING, *supra* note 66, 34.

81 KAZUSHI OHKAWA / HENRY ROSOVSKY, Japanese Economic Growth: Trend Acceleration in the Twentieth Century (1973).

82 EDWARD DENNISON / WILLIAM CHUNG, Economic Growth and Its Source, in: Patrick / Rosovsky (eds.), *Asia's New Giant* (1976) 72.

in American, Asian, and European economies alike. Germany's *Außenwirtschaftsgesetz* of 1961 and Japan's Foreign Trade and Foreign Exchange Control Law of 1979, for example, go further than the U.S. foreign trade administration in liberalizing cross-border flows of goods, capital, and services. Both laws contain general clauses making the freedom of transactions the rule and the prohibition of transactions (contained in a "negative list" of restrictions) the exception, whereas the U.S. until today maintains the principle of prohibition, enumerating transactions approved by executive order in a positive list.<sup>83</sup>

In West Germany, the striking success of the 1948 reforms encouraged a group of economists led by Walter Eucken, Franz Böhm, and Friedrich von Hayek to elaborate a body of economic thought emphasizing the necessity of safeguarding the freedom of markets by a strong legal framework. They were by no means a monolithic group. Some, such as Eucken and Böhm, stressed the importance of a strong state able to impose anti-trust rules as a departure from the rule of cartels in pre-war Germany's economy<sup>84</sup>; others such as Hayek showed more "*laissez faire*" leniency for cartels but still maintained that a legal "order" was an essential component of liberty. The journal *ORDO*, founded in 1948 and edited by Böhm, F.W. Meyer, and Hayek, gave the group its name: "Ordo-liberals". "Ordo-liberalism" immediately became, and always remained, West Germany's and united Germany's reigning economic doctrine.<sup>85</sup> Scholars quoting Hayek as a reference for assumptions of differences in economic philosophy between the U.S. and Continental Europe might be interested in knowing that he is one of the important philosophical links between Germany and the U.S.

All the while, from the 1940s to the early 1990s, mainstream economics in the U.S. and the UK was absorbed by the sequence of great debates about Keynesian macroeconomics, the neo-classical synthesis, the rise of monetarism, and supply side economics. Some of these debates influenced German economic policies, such as Karl Schiller's short period of Keynesian demand management from the end of 1969 to the mid-1970s and the lasting reception of monetarism by the Bundesbank. But the last resort of political debate about economic policy in Germany always was, and still remains, "*Ordnungspolitik*" of the *ordo-liberal* tradition. Conversely, the notion *Ordnungspolitik* as a category of economic policy never made it to the American economic policy discourse, in spite of the deep and continuing impact of Hayek's, von Mises', and Schumpeter's "Austrian economics" as a methodological challenge to the limitations of neo-classical model-building and as a political theory of liberty. The light-hearted reason was that the term was untranslatable into English; the real reason

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83 For a comparison, see HENRIK SCHMIEGELOW, Japans Außenwirtschaftspolitik: merkantilistisch, liberal oder funktionell? (1981).

84 FRANZ BÖHM, Das Reichsgericht und die Kartelle, in: *Ordo* 1 (1948) 157; WALTER EUCKEN, Die Wettbewerbsordnung und ihre Verwirklichung, in: *Ordo* 2 (1949) 1.

85 BLUM, *supra* note 66, 143 ff.

was that mainstream economics was oblivious to the role of law in the economy. In a way, it was left to Ronald Coase and Douglass North to find a good translation for *Ordnungspolitik*. Their institutional economics made law interesting to economists by showing that legal structures are not only essential on the level of analysis of political theory as a safeguard of liberty, but that they can actually be useful to market participants by reducing transaction costs.

Japanese policy-makers in government and business followed the debates of these five decades with intense interest. They developed a pragmatic strategy of trying out all economic doctrines competing in the U.S. and Europe instead of incurring the cost of prolonged doctrinal stalemate.<sup>86</sup> They relied on a strong state to set rules for free markets as advocated by many of Germany's ordo-liberals. Loose Western talk about the Japanese "superstate" in the 1970s was refuted by the simple fact that, while Britain had nationalized the telecommunications, post, electricity, gas, oil, coal, railway, steel, and shipbuilding sectors, Japan's state ownership was limited to the post and part of the railway system just as in the U.S.<sup>87</sup> Government-brokered agreements between leading electronic firms on pre-competitive research cooperation in such areas as mainframe computers and memory chips that had the quality of Coaseian contracts, were perfectly legitimate in terms of antitrust law and crowned with such success that they triggered what was later called the micro-electronic revolution.<sup>88</sup> In that way, while remaining inscrutable to many American and European observers, the Japanese economy became "more Western than the West."<sup>89</sup>

Obviously there is more to the relationship between law and economics than has been recognized so far by the debate about what are the best sources for legal transformation advice to former East Bloc countries. In order to connect with La Porta et al.'s interdisciplinary attempt with its broad sociological references, I propose using Talcott Parsons' categories of sociological functionalism as rough orientation. They are no substitute for rigorous political theory, economic analysis, or jurisprudence. Parsons' self-confessed eclecticism is evident in his combining economic equilibrium theory based on Pareto and Marshall utility with Max Weber's sociological explanation of culture, economy, and society.<sup>90</sup> But just that combination may help in responding to La Porta et al. To be sure, in the 1960s and 1970s, it became fashionable to regard Parsons' sociology as an outmoded conceptual collection. But for the present debate on

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86 MICHÈLE SCHMIEGELOW, Cutting Across Doctrines: Positive Adjustment in Japan, in: International Organization 39 (Spring 1985) 261.

87 SCHMIEGELOW / SCHMIEGELOW, *supra* note 48, 4.

88 *Ibid.*, 69.

89 HENRIK SCHMIEGELOW / MICHÈLE SCHMIEGELOW, *Ôbei ijô ni ôbeiteki na nihon keizai* [Japan's Economy – More Western than the West], in: Chûô kôron 108 (1993) 72; HENRIK SCHMIEGELOW, Japans Strategischer Pragmatismus: Bedrohung oder Modell? in: Maull (Hrsg.), *Japan und Europa: Getrennte Welten?* (1993).

90 TALCOTT PARSONS, *The Structure of Social Action* (1968) vol. 1, 11.

the relationship between law and economics, they have a *prima facie* relevance. Parsons' categories constitute an elementary matrix of necessary components of any viable society and can serve as early warning against all too reductionist assumptions. Parsons proposes that any social system or action has four functional requirements, namely, goal attainment, adaptation, pattern maintenance, and integration. In modern societies, these requirements are fulfilled by the political system ("polity"), the economy, culture, and law.<sup>91</sup> In *Figures 1* and *2* these functions and social subsystems are represented by a simple matrix of four squares.

*Figure 1:* Four Functional Requirements of a Social System or Social Action

1. <i>Goal Attainment</i>	2. <i>Adaptation</i>
3. <i>Pattern Maintenance</i>	4. <i>Integration</i>

*Figure 2:* Four Functional Requirements of a Society

1. <i>Polity</i>	2. <i>Economy</i>
3. <i>Culture</i>	4. <i>Law</i>

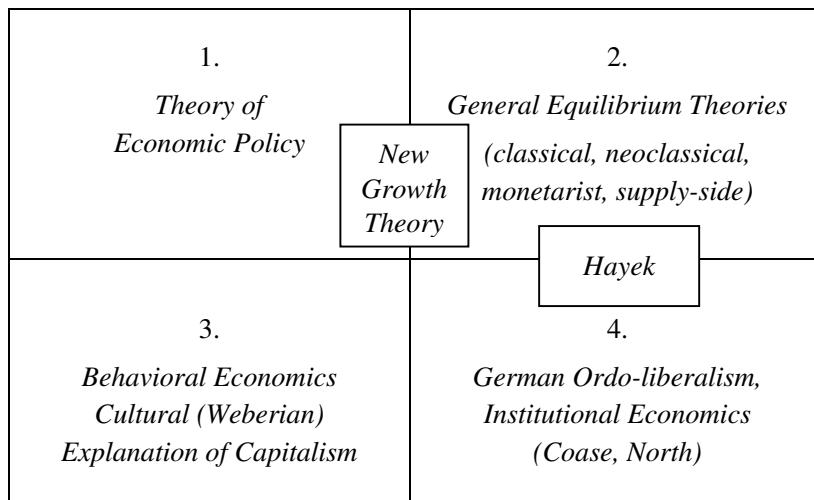
Of course, in each of these subsystems, and more particularly in the economy and the legal system, different functions are assumed by different actors. *Figure 3* (see next page) illustrates the division of labor taking place in economics between the theory of

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91 TALCOTT PARSONS / NEIL SMELSER, *Economy and Society* (1956) 197.

economic policy with its focus on the attainment of specific goals such as keeping inflation in check or encouraging investment, general equilibrium theories analyzing how markets adapt to impulses such as price changes, behavioral economics or cultural explanations of economic patterns such as Max Weber's "Protestant" explanation of capitalism, and finally ordo-liberalism and institutional economics with their interest in legal frameworks helping markets to function at the lowest possible transaction costs.

*Figure 3: Functional Divisions of Labor in Economic Theory*



From the two histories of dynamic economic response to post-war legal renewal in Germany and Japan I draw the following tentative conclusions:

1. The civil and commercial codes offered legal instruments for economic transactions, which were immediately available, easily accessible to everyone, safely enforceable, and, given the extremely low amounts of currency distributed equally among all citizens by the currency reforms, obviously at such low transaction costs that they were enthusiastically used by market participants.
2. Civil and commercial codes were necessary, but not sufficient conditions for economic performance. A wide array of old and new economic laws governing competition, the financial system, and foreign transactions were equally necessary conditions for functioning markets.
3. Germany's and Japan's codes and economic laws have proven their functional worth in two culturally different countries.

4. The “capitalist spirit” as expressed in saving and investment propensities is strikingly similar in Catholic and Protestant segments of German society as well as Buddhist, Confucian, and Shinto elements of Japanese society.
5. Given their well-documented experience, Germany and Japan seem legitimate sources for legal transformation advice.

## V. REASONS OF JURISPRUDENCE

On jurisprudence, Germany and Japan have been conducting an intensive dialogue since the late 19<sup>th</sup> century, perhaps more intensive than any other pair of countries so far away from each other in terms of geography and culture. Their scholars have gone through all the agonies of doctrinal battles of the past 140 years, from natural law, through positivism to *Interessenjurisprudenz* and sociological jurisprudence. The latest comprehensive debate of this kind took place in September 2005 in Tokyo at a conference of leading scholars, judges, and lawyers on the subject of “Globalization and Law”, featuring Gunther Teubner’s and Jun’ichi Murakami’s deconstructivist sociology of law.<sup>92</sup>

Of course, the design and language of the German civil code of 1896 reflected Bernhardt Windtscheidt’s *Begriffsjurisprudenz* and in the first years of its application tended to be applied with the inexorable mechanism of the positivist school reigning at the time. Scholars pleading today in favor of judge-made law as a source of legal transformation tend to think in terms of the soft principle of “equity” in the early history of common law as an expression of natural justice and fairness in evaluating conflicting claims. Their perception of civil law codes, conversely, seems to be the one left by the initial positivist use of the codes a century ago. But, as we all know today, that positivist use misapplied the German civil code, since it neglected the principle of *Treu und Glauben* contained in § 242 *BGB* and today understood as an injunction to all participants in legal life to apply all laws, not only the civil code, *ex aequo et bono*, with “equity”. Legal history mostly interprets § 242 *BGB* as a concession by the leading Romanist drafters of the code to Germanic traditions. But, of course, the Justinian codex already contained many of the most important principles that are now understood to be concretizations of § 242.

In the century since the entry into force of the *BGB*, all German codes have been subject to a vast array of amendments induced by a continuous stream, interrupted only by the 12 years of the Nazi regime, of court rulings interpreting the codes, filling their gaps, or correcting their economic or social inadequacies or obsolescence in a process of *richterliche Rechtsfindung*. This has been precisely the cognitive process that

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92 Cf. GUNTHER TEUBNER, ‘Global Bukowina’: Legal Pluralism in the World Society, in: Teubner (ed.), *Global Law without a State* (1997); JUN’ICHI MURAKAMI, System and Self-Observation (2000). The conference results will be published by Professors Murakami and Marutschke at the end of 2006.

Hayek<sup>93</sup> and, before him, Fritz Kern in his celebrated Article of 1919 on *Kingship and Law in the Middle Ages*,<sup>94</sup> have so eloquently explained. Over time, after such court rulings became constant jurisdiction, legislation tended to integrate them into the codes. The last major legislation of this type has been the reform of the second book of the *BGB* on obligations, incorporating recent developments such as product liability as well as jurisdiction on *culpa in contrahendo* constantly recognized by the courts “beyond the code” since the early 20<sup>th</sup> century. In this way, German codes have continued to reflect both “old law” of the Roman or Germanic type grown in millennia and adjustments to contemporary functional requirements. A similar process has taken place in Japan. The famous court cases of the Minamata disease in the 1970s have been a landmark of judge-made law forcing the hand of the Japanese Diet to enact reforms in the area of torts and environmental protection. Another example is the recent tendency of Supreme Court judges to affirm the powers of the Supreme Court vis-à-vis the legislative branch by examining the constitutionality of existing laws such as the rules for the election of the Upper House of the Diet.<sup>95</sup>

I therefore submit as a first tentative conclusion of this section that, with positivism fortunately behind us, the cognitive role of the courts in England, Germany, Japan, and the U.S. is functionally equivalent however used we may be to the (mistaken<sup>96</sup>) notion of a fundamental ethical or cognitive difference between common law and codified law in the Roman law tradition.

Conversely, common law countries are no longer governed by judge-made law alone but also by an increasing array of written constitutions and statutes. While English common law remained the source of law in the North American colonies, legal development there has sharply diverged since their independence. Not only has the United States adopted a written constitution, but statutory law has played an ever-increasing role since then.<sup>97</sup> In the mid-19<sup>th</sup> century, even English common law was codified for the purpose of transplanting it to other parts of the British Empire. Most remarkably for the present discussion on judge-made law or codified law as sources of advice to transforming countries, Berkowitz et al. do recognize that this codification greatly accelerated the transplantation of the common law to India and other parts of the empire. As mentioned at the beginning, such an acceleration of legal transformation by

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93 HAYEK, *supra* note 8, 118.

94 FRITZ KERN, *Gottesgnadentum und Widerstandsrecht im Mittelalter*, Historische Zeitschrift 1 (1919), reprinted in: *Kingship and Law in the Middle Ages* (Oxford 1939), and *Recht und Verfassung im Mittelalter* (Darmstadt 1952) 14.

95 See the ruling of the Supreme Court of January 14, 2004, with the dissenting opinion of Judge Hiroshi Fukuda and the supplementary opinion of Judge Tokiyasu Fujita, *Saikinno Saikōsai Kettei*, 1 January, 2004, which had broad public impact, see “Balance Vote Disparity: Diet Must Act to Remedy Unfair Seat Distribution,” *Asahi Shimbun*, January 16, 2004.

96 HAYEK, *supra* note 8, 117 f.

97 BERKOWITZ ET AL., *supra* note 11, 51.

using codified law as a pattern was precisely the reason for Karl Popper to recommend the German or French code to his Russian readers. And, needless to explain at length, the German and the Japanese instant recoveries after the post-war currency reforms and price liberalizations would not have been possible had households and enterprises been left to wait for judge-made law to grow for a few centuries, instead of using the instantly available legal instruments of their codes as well as the general clause of *Treu und Glauben*, for their sales and purchases, works, services and leases energizing the economy.

Also, English common law is no less “abstract” than the German or the Japanese civil law code. One of the greatest English judges in the 18<sup>th</sup> century, Lord Mansfield, famously stated that the common law was not constituted by particular cases, but by general principles, which are illustrated and explained by those cases.<sup>98</sup> Also, lesser English legal philosophers and judges have not been immune to constructivist or positivist tendencies. Hayek mentions Francis Bacon, Thomas Hobbes, Jeremy Bentham, and John Austin in one breath with the German positivists Paul Laband and Hans Kelsen.<sup>99</sup> And he is fully aware that common law precedents, if set and continuously followed by positivist judges or judges belonging to a particular interest group, may end up constructing a “one-way street”. As the most “palaeo-liberal” representative of “ordo-liberalism”, and with the experience of Nazi Germany’s statism still a target of his writing, Hayek had a basic preference for the gradual process of judge-made law. But writing his *Law, Legislation and Liberty* in 1973, he did concede that such one-way streets of common law needed to be corrected by legislation.<sup>100</sup>

My second tentative conclusion from this section is therefore that the relationship between judge-made law and legislation is a two-way street. They complement each other and correct each other, both in common law countries such as the U.S. and in civil code countries such as Germany and Japan. This functional equivalence is easily illustrated by Parsons’ matrix in *Figure 4* on the actors moving the legal process and *Figure 5* on the sources of law available to them.

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98 As quoted by HAYEK, *supra* note 8, 121.

99 *Ibid.*, 107.

100 *Ibid.*, 124.

*Figure 4: The Functional Equivalence of Actors Involved in the Legal Process of Common Law and Civil Code Countries*

1. <i>enlightened judges “finding” the law in a cognitive process guided by equity</i>	2. <i>claimants socially or economically aggrieved by existing laws or precedents</i>
3. <i>defendants asserting the sanctity of existing laws or precedents</i>	4. <i>legislators amending codes in line with new jurisdiction or judges considering new court rulings as precedents</i>

*Figure 5: Functional Sources of the Legal Process of Common Law and Civil Code Countries*

1. <i>“Rechtspolitik”, legislative projects</i>	2. <i>social and economic change</i>
3. <i>existing laws or precedents</i>	4. <i>new legislation or jurisdiction</i>

My only definite conclusion from this section is that whatever the functional advantages of common law or civil codes as sources for legal transformation advice may be, civil codes have the one advantage of their instant availability as a source and as a legislative technique. Just as Karl Popper has emphasized, that does not mean that foreign codes should be adopted wholesale as the final law of the land. The right balance between adaptation and pattern maintenance, or in Rolf Knieper's words, universality and context, will have to be found by the sovereign legislators and judges of the transforming

country itself. *Figure 6* illustrates the actors, *Figure 7* the sources of legal transformation assisted by advice from common law or civil law countries in the matrix of socio-logical functionalism.

*Figure 6:* Functional Cooperation of Actors Involved in the Transformation Process

1. <i>representatives of the reform movement in the transforming countries</i>	2. <i>external advisors offering legal transformation assistance</i>
3. <i>representatives of the existing judiciary of the transforming countries</i>	4. <i>lawmakers or judges of the transforming countries</i>

*Figure 7:* Functional Sources of Transformed Laws

1. <i>reform constitution</i>	2. <i>foreign laws or precedents as “templates”</i>
3. <i>existing laws, cultural contexts to be preserved or considered</i>	4. <i>new codes adopted by reformed legislators or new court rulings by reform-minded judges</i>

One aspect to which both foreign advisors and legal reformers in the transformation countries will have to pay attention to is legal transaction costs. As demonstrated by institutional economics and evidenced by Japan's and West Germany's post-war

recovery, good laws lower transaction costs and thus improve economic performance. As argued by Gilson, good lawyers are “transaction cost engineers” in Western legal systems.<sup>101</sup> So are *ordo-liberal* legislators. However, one of the most important parts of a legal system influencing both the access to law and the demand for law, are the rules on legal costs, both court costs and lawyers’ fees. If allowed to rise too high, such legal transaction costs may cancel out too great a part of the reduction of economic transaction costs produced by good laws.

Theoretically, legal costs of judge-made law and codified law should be identical for the law-seeking economic agent. Anecdotal evidence from the “legal business” that sprang up around Westminster in medieval England<sup>102</sup> and from take-over practices of British and American law firms of Wall Street or of the City of London resulting, in the end, in higher fees for clients,<sup>103</sup> is just a mere suggestion that legal costs in common law countries tend to be higher. Reliable evidence is hard to come by, leaving this question to be a worthwhile subject for future empirical research.

One advice to reformers in transformation countries would be to emulate the German Law on Court Costs with its rule that the losing party pays all court costs as well as both its own and the winning party’s costs. This rule makes justice much more accessible and demand for law much higher than in the large majority of other countries where each party to a dispute has to cover the fees of its own lawyer irrespective of the outcome of the dispute. In this way, a small or medium firm newly founded in a transforming country has a fair chance to ask a top law firm to sue a global behemoth, to win the case and, moreover, keep its sometimes over-borrowed balance sheet unaffected by the litigation. The confidence of Germany’s small and medium-sized enterprises to have that chance was certainly one of the many little secrets of the *Wirtschaftswunder* of 1948 and their “hidden championship” in global manufacturing since then.<sup>104</sup>

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101 GILSON, Value Creation by Business Lawyers: Legal Skills and Asset Pricing, in: Yale L.J. 94 (1985) 239.

102 DANZIGER / GILLINGHAM, *supra* note 51, 193.

103 REENA SENGUPTA, The Case of the Expanding Brief: A Global Elite Is Emerging Among Top Legal Practices, but Not All Clients Are Convinced of the Benefits, in: Financial Times, 22 November 2004.

104 HERMANN SIMON, Hidden Champions: Lessons from the 500 Best Unknown Companies (1996).

## VI. PRAGMATISM AS A GUIDE FOR LEGAL TRANSFORMATION ADVICE

The reasons of foreign policy, economics, and jurisprudence surveyed and the two country cases summarized suggest pragmatism as a guide for legal transformation advice. This does not mean an unprincipled approach nor a tactic of muddling through. On the contrary, the foreign policy reasons discussed in section III amount to nothing less than a political imperative to stay engaged in this effort of the Western world to let the transforming countries share the benefits of democracy, liberty, and free markets guaranteed by the rule of law. The experience even of the relatively modest but remarkably successful and highly cost-effective German and Japanese programs shows that budgets set aside for this purpose have been and will continue to be for at least another decade among the best-spent fiscal resources of the West for this goal.

The very urgency of this imperative means, however, that the West should avoid as much as possible the frictional losses of its own doctrinal battles. The pragmatism I suggest as a guide for legal transformation advice is American philosophical pragmatism in Charles Peirce's and John Dewey's tradition. They were aware of scientific uncertainty even before Karl Popper published his *Logik der Forschung*,<sup>105</sup> today's universally accepted epistemology, in 1935. Pragmatism means eschewing dogmatism, realizing that all knowledge is temporary, that action may be required even under conditions of uncertainty and across the cleavages of dogmatic contention, and above all, that adjustment and correction is imperative as soon as failure is recognized. Germany's and Japan's economic success stories reported in Section IV are stories of economic pragmatism in full awareness of what competing economic theories had to offer. In Germany's case of post-war recovery, it was a confluence of *ordo-liberal* conviction and pragmatic acceptance of structural advantages, such as the civil and commercial codes, a functioning banking system, and a wealth of technological know-how. In Japan's case, pragmatism evolved, moreover, into a sustained strategy encompassing all competing economic theories in their changing balance of persuasive power over the following decades.<sup>106</sup> With these cases as a background, the risk of legal dogmatism referred to in Section V appears particularly salient. This risk is evident in the legal communities of both common law and civil law. Fortunately, as also surveyed in

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105 KARL R. POPPER, *Logik der Forschung* (1935); further developed in ID., *Conjectures and Refutations: The Growth of Scientific Knowledge* (1965).

106 On the sequence of different phases of strategic pragmatism in Japan's economic policy since the 1980s up to today, from the bursting of the bubble of the late 1980s through the following deflationary period and the Asian crisis of the second half of the 1990s to the striking recovery since 2003, see HENRIK SCHMIEGELOW / MICHÈLE SCHMIEGELOW, *Nihon no kyōkun: senryakuteki puragumatizumu no seikō* [Japan's Lesson: The Success of Strategic Pragmatism] (Tokyo 1992); MICHÈLE SCHMIEGELOW, 'Asian' Capitalism: Explanation for both Success and Failure?, in: *Asien* 70 (January 1999) 54; ID., *Senryakuteki puragumatizumu ni tachikaere: nihon keizai e no sho-hōsen* [A Comeback of Strategic Pragmatism: Prescriptions for the Japanese Economy], in: *Nihon keizai sentā kaihō* 895 (2002) 4; and ID., Which Recipe for the Japanese Economy?, in: *Asien* 87 (April 2003) 78.

Section V, there is a growing convergence between the two systems, as legislation increasingly corrects and complements the common law, and as court rulings have been correcting and complementing the German and Japanese codes over the past century and are continuing to do so.

The one functional advantage of the codes as a pattern for transforming countries is, as Karl Popper wrote to his Russian readers, that they are readily available. It is as safe for transforming countries to use the legal instruments offered by the codes for their economic transactions as it was for Germany and Japan in their post-war recoveries. It is up to the courts of the transforming country to immediately begin the process of the adjustment of the codes to the changing context of the transforming society.

There are thus good reasons for Germany and Japan to continue responding to requests for legal transformation assistance. Their low-key approach is in keeping with an American philosophy, a German reality, and a Japanese strategy of pragmatism.

## ZUSAMMENFASSUNG

*Die beiden führenden Denker der Offenen Gesellschaft, Karl Popper und Friedrich von Hayek, maßen dem Recht eine entscheidende Rolle bei der Transformation jeder Gesellschaft zu Demokratie und Marktwirtschaft bei. Popper verwies im Jahre 1992 auf das Beispiel Japans, das 1887 den deutschen BGB-Entwurf als Muster des Rechtsrahmens für seine schnelle Modernisierung gewählt hatte, und empfahl Rußland, sich für seine Transformation ebenfalls am kodifizierten deutschen oder französischen Zivilrecht zu orientieren. Hayek veröffentlichte sein „Recht, Gesetzgebung und Freiheit“ im Jahre 1973 in den USA, zu einer Zeit, als das Recht jenseits des Horizonts amerikanischer Entwicklungsökonomik und die Klage amerikanischer Rechtswissenschaftler über das Fehlen einer Theorie der Rolle des Rechts in wirtschaftlicher Entwicklung weit verbreitet waren. In den neunziger Jahren trat die Institutionenökonomik mit der Erkenntnis hervor, daß verbindliche Verträge (Coase) und verlässliche Rechtsrahmen für Märkte (North) wirtschaftliche Transaktionskosten reduzieren.*

*Unterhalb des Niveaus philosophischen Diskurses über die westliche Wertegemeinschaft entbrannte jedoch ein „war of advice“ unter westlichen Transformationsberatern. Aus den USA flossen massive Ressourcen, um die Rechtssysteme der früheren Ostblockstaaten umzuschreiben. Einige amerikanische Autoren mißdeuteten Hayek, verwandten eindrucksvolle quantitative Darstellungsmittel und präsentierten die aufsehenerregende Schlußfolgerung, daß Common Law-Länder besser für Transformationshilfe qualifiziert seien als Länder mit kodifiziertem Zivilrecht römischer Tradition. Die eigenen quantitativen Mittel widerlegten jedoch die Schlußfolgerung, indem sie unerwartet positive Ergebnisse für die Qualität der Rechtssysteme der Länder des sog. deutschen Rechtskreises zu Tage brachten.*

*Währenddessen leisteten Deutschland und Japan unbeirrt Transformationshilfe in behutsamer, dem Nachfragesog folgender anstatt Angebotschub ausübender Weise, und mit sehr viel geringerem finanziellen Aufwand. Japan konzentrierte sich auf Südostasien, Deutschland auf Osteuropa, die frühere Sowjetunion und China. Anfänglich setzten sich amerikanische Vorlagen zumeist in Finanz- und Wirtschaftsregulierungen durch, während bei Zivil- und Handelsgesetzbüchern vorwiegend deutsche bzw. japanische Beratung nachgefragt wurde. Intensiver institutioneller Wettbewerb zwischen Geberländern westlicher Transformationshilfe hält jedoch auf allen Rechtsgebieten unvermindert an.*

*Mit ihrer gemeinsamen Erfahrung der eigenen Nachkriegstransformation und Reintegration in die westliche Wertegemeinschaft haben Deutschland und Japan bemerkenswert ähnliche außenpolitische Gründe, sich auf diesem Feld zu engagieren. Ein Rückblick auf die Wirtschaftsgeschichte der Nachkriegszeit macht deutlich, daß die sofortige Möglichkeit, mit den fortgeltenden, von planwirtschaftlichem Wildwuchs befreiten Zivil- und Handelsgesetzbüchern zu arbeiten, eine notwendige Bedingung für die „Wirtschaftswunder“ beider Länder war. Neue Verfassungen, Währungs- und Preisreformen, funktionierende Banksysteme, eine hohe Sparneigung der Haushalte und vorhandene Technologien waren weitere Faktoren. Auch aus rechtspolitischer Sicht können beide Länder als wertvolle Quellen rechtlicher Transformationsberatung gelten. Seit Überwindung des positivistischen Dogmatismus wirken Gesetzesrecht und richterliche Rechtsfindung in beiden Ländern so aufeinander ein, daß wirtschaftliche und soziale Anliegen immer wieder auf besonders hohem Niveau austariert werden. Richterliche Rechtsfindung in England, Deutschland, Japan und den USA ist funktional äquivalent. In Common Law-Ländern wächst die Bedeutung des Gesetzesrechts, in Kodexländern die der Rechtsprechung. Die Konvergenz ist offensichtlich. Eine ehrwürdige amerikanische Philosophie, eine immer wieder überraschend fruchtbare deutsche Realität und eine herausragend erfolgreiche japanische Wirtschaftsstrategie legen die Schlußfolgerung nahe, daß Pragmatismus keine schlechte Leitlinie für rechtliche Transformationshilfe ist.*