ACCOMPANYING LEGAL TRANSFORMATION: JAPANESE INVOLVEMENT IN LEGAL AND JUDICIAL REFORMS IN ASIA

Yuka KANEKO*

I. INTRODUCTION

1. *Purpose and Method*

This paper purports to review the facts of, and comment on lessons from, the Japanese legal technical assistance (*houseibi-shien*) in Asia, which has been provided as a part of the official development assistance (ODA) since the mid-1990s.

Japanese legal technical assistance has often been described as introducing Japan's own experience of successful transplant of the modern Western legal system into its traditional socio-cultural condition.[1] This characterization often induces a negative image among foreign observers,[2] since it reminds us of Japan's exportation of its legal system, motivated by national self-interest during its pre-World War II colonial occupation of neighboring Asian countries.

---

* Professor, Kobe University, LL.D.

[1] See, e. g., Michiatsu Kainou, houseibi-shien to hikaku-hougaku no kadai (Legal Assistance for the Transplants of the Law And Some Problems Of Comparative Law), *Hikaku Ho Kenkyu* (*Comparative Law Journal*), n. 61, 2001, p. 70; Akio Morishima, Houseibi-shien to Nihon no Houritsugaku (Japan's Legal Technical Assistance and Legal Studies), in supra *Hikaku Ho Kenkyu* (*Comparative Law Journal*), 2001, p. 120.

[2] See, e. g., Taylor, Veronica L., "New Markets, New Commodity: Japanese Legal Technical Assistance", *Wisconsin Int'l L. J.*, n. 23, 2005, p. 2.

However, the Japanese legal assistance in the present days has never been intended as a "legal transplant" in a simple sense of exporting its own or any other particular formal legal model to another country. It has basically been provided in an adversarial mode, usually taking a style of commenting on each draft law already prepared in the recipient country.[3] Even in assistance in drafting the Cambodian civil code and civil procedure code, which was almost the only situation where the Japanese assistance team took responsibility for the entire process of drafting, the primary intention of the involved scholars was to encourage the recipient to think out their questions, to which the Japanese experts provided occasional suggestions, while referring to the advanced discussions in comparative legal studies in Japan, rather than copying any existing Japanese law.[4] This was, actually, a revival of the style of legal assistance taken by Professor Gustave E. Boissonade, who helped form the Japanese first civil code during his enthusiastic teaching in Japan during its Meiji modernization days. He has been beloved and seen as the father of Japanese civil law studies. Guided by this Professor Boissonade, the fundamental basis of Japanese assistance seems nothing more than a pure, even naïve, motivation for international cooperation, rather than the national self-interest. If any hint of self-interest has ever existed, it was the academic expectation of the scholars, who volunteered for the assistance projects, with a wish that they would obtain hints for Japan's own future legal reforms through the highly concentrated works of comparative legal studies in the process of assistance.[5]

Even when we assume that the Japanese legal assistance is nothing more than a self-model export, however, it is still difficult to consider it a simple attempt to transplant any particular Japanese formal law models to other countries. Although Japanese assistance gives a positivist impression with such material legal reform projects as the drafting of civil codes and civil procedure codes,[6] a closer look into the substance will show that such assistance has constantly stressed on judicial reforms, so as to enable judicial

---

[3] Among numbers of assistance in this mode, there are assistance to Vietnam's civil code, civil procedure code, civil enforcement law, immovable property registration law, bankruptcy law, and secured transaction law, as well as China's company law, competition law, and civil procedure law. See, for the details, Ministry of Justice of Japan (International Cooperation Department), ICD NEWS each issue (2002-present), *http://www.moj.go.jp/HOUSO/houkoku/index.html*.

[4] See Morishima, Akio, "Houseibi-shien womeguru Kokusaiteki Doukou to Houseibi-shien Katsudou no Kadai to Tenbou (International Trends of Legal Assistance and Issues and Prospects for Legal Assistance)", *Ministry of Justice of Japan, Icd News*, vol. 1, 2002.

[5] Morishima supra note 1, p. 135.

[6] See Zentaro Kitagawa, "Development of Comparative Law in East Asia", *The Oxford Handbook Of Comparative Law*, Mathias Reinmann & Reinhard Zimmermann (eds.), 2006, pp. 237, 255.

independence and qualified judgments.[7] It seems more accurate to consider its assistance to legal reforms, such as code drafting, as just the beginning of an interaction between Japan as a donor and each recipient country in the joint effort for improving institutions for incremental legal development. This paper attempts to approach the fact of Japanese assistance with this integrated view, covering both the formal lawmaking and the institution building enabling incremental development or transformation of initially imported formal law models.

As for the methodological approach to these facts, this paper follows the attempt of functionalists in the Japanese comparative law studies taking socio-economic and cultural factors into consideration in the interface with the legal sociology and legal historical studies.[8] Whether or not it is labeled as a "legal transplant," legal and judicial reform assistance involves mutual interaction of donor and recipient, which can bring about changes not only in the formal written law, but also of norms applied in the actual practice of dispute resolution as well as the institutional infrastructures that enables such normative dynamism. To comprehend such socio-cultural impacts of legal assistance beyond formal law, this paper attempts to incorporate observations about the socio-economic outcomes of the assistance projects, in addition to reviewing formal law changes.

Through this combined approach, the author expects to gain some distance from the complicated theoretical debates between the pessimistic and the optimistic sects toward the "law and development" or rule-of-law-oriented international projects (ROLs).[9] The academic field of "law and development," mostly led by a group of legal sociologists driven from legal critical studies in the 1970s, has leveled harsh criticism against the donors' drive for the "new law and development movement" since the 1990s, describing them as unvarnished attempts to export uniform (new) liberalist agendas without considering local socio-cultural and historical conditions.[10]

---

[7] See Kozo Kagawa and Yuka Kaneko eds., *Houseibi-shien ron* (*analyzing legal technical assistance*), chapter 4, 2007.

[8] Professor Kitagawa understands this stream of comparative law studies in Japan as a modified type of functional approach (see Zentaro Kitagawa, supra note 6, pp. 245-247). There is a group of Japanese legal comparativists, on the other hand, who have explicitly led the stream of hikaku-hou-bunka-ron (comparative legal culture) in an attempt to go beyond the inherent limitation of functional approach of finding common core among legal systems sharing basic cultural similarity: see Sanada, Yoshinori, "Kiso- Hougaku to Hikakuhou (Theoretical Legal Studies and the Comparative Studies)", *hikakuhou no houhou to konnnichi-teki kadai* (*methodology of cdomparative law and current issues*), 3, Nihon Hikakuhou Kenkyujyo, 1989.

[9] See, for the detailed description of each stance, Davis, Kevin E. and Trebelicock, Michael J., "The Relationship between Law and Development: Optimists versus Skeptics", *AM. J. COMP. L.*, num. 56, 2008, p. 895.

[10] Tamanaha, Brian, "The Lessons of Law and Development Studies", *American Journal Of International Law*, num. 89, 1995, p. 470; Tamanaha, Brian, On The Rule Of Law: History,

Legal anthropologists have joined in issuing this warning, based on empirical evidence of negative outcomes.[11] On the other hand, prominent works from the school of law and economics have continuously provided attractive theoretical justifications for ROLs, such as "governance",[12] "convergence",[13] "legal origin",[14] "legal transplants",[15] and "new comparative economics"[16] that have bolstered the legal globalization agenda led by influential international donors such as the World Bank, the European Bank for Reconstruction and Development (EBRD), the Inter-American Development Bank (IDB), and the Asian Development Bank (ADB). These cons and pros never seem to come across.[17]

Although scholars of comparative legal studies have been standing aloof from this academic mudslinging, the internal theoretical debates on the "legal culture" seem to have much in common with the criticism of the "new law and development movement," at least on the question of the capability of "legal transplants".[18] This article, however, does not purport to offer any direct answer to this theoretical question, but rather, will focus on the functional description of the process and outcomes of Japan's involvement in Asia. The answer on the possibility of "legal transplant" depends on the conclusion of complicated academic debates about what a "legal transplant" is. In Alan Watson's context of the pure history of legal development by

---

Politics, Theory, 2004; Rose, Carol, "The *New* Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study", *Law & Society Review*, num. 32(1), 1998, pp. 93-140; duncan kennedy, *law and development, law and development: facing complexity in the 21st century*, Amanda Perry-Kessaris and John Hatchard (eds.), 2003; Trubek, David, "The Rule of Law in Development Assistance: Past, Present and Future", *The new law and development: a critical appraisal*, David Trubek and Alvaro Santos eds., 2006).

[11]see e. g. franz von benda-beckmann, keebet von benda-beckmann & melanie g. wiber, changing properties in property (2006).

[12] Shihata, Ibrahim, "World Bank and 'Governance' Issues in Borrowing Members", *World Bank In A Changing World*, num. 53, 1991; Posner, Richard A., "Creating a Legal Framework for Economic Development", *World Bank Research Observer*, num. 13, 1998, pp. 1-11; Kaufmann, Daniel and Kraay, Aart, "Growth Without Governance", *World Bank Policy Research Working Paper*, num. 2928, 2002.

[13] See e. g., Pistor, Katharina and Wellons, Phillipe, *The Role Of Law And Legal Institutions In Asian Economic Development*, 1999; Hansmann, Henry and Kraakman, Reinier, "The End of History for Corporate Law, *Yale Law School Working Paper*, num. 235; *Harvard Law School Discussion Paper*, num. 280, 2000.

[14] La Porta, Rafael *et al.*, "Law and Finance", *NBER Working Papers*, num. 5661, 1996; La Porta, Rafael *et al.*, "The Economic Consequences of Legal Origins", *NBER Working Papers*, num. 13608, 2007.

[15] Berkowitz, Daniel *et al.*, The Transplant Effect, *AM. J. COMP. L.*, num 51, p. 163.

[16] Djankov, Simeon *et al.*, "New Comparative Economics", *NBER Working Papers*, num. 9608, 2003.

[17] See von Benda-Beckmann, Franz, "The Multiple Edges of Law: Dealing with Legal Pluralism in Development Practice", *World Bank Legal Review*, num. 2, 2006.

[18] See, Graziadei, Michele, "Transplants and Receptions", *The Oxford Handbook of Comparative Law*, *cit.*, p. 443.

uncovering the patterns of how the law responds to society as an independent tool for social changes, a "legal transplant" is an intentional work of legal elites that borrow foreign models for the purpose of formal law development, that cannot be reduced to economics and/or politics. When a "legal transplant" is defined in this Watson's context, it could be as "socially easy" as it was in the introduction of Roman law during the European Middle Ages, or in the formation of the modern European codes. [19] We would be able to find most of present day's legal reform projects simply successful, in this context, if a bill drafted by legal elites could safely pass through the legislative body.

However, when a "legal transplant" is understood in the context of Legrand's criticism,[20] as a senseless attempt by conservative scholars to export the law as a book from one society to another without considering the diversity of socio-cultural constructions, the majority of legal assistance projects must be doomed to fail. Perhaps, only when a rare similarity exists between the socio-cultural conditions of the origin country of the transplanted model and the recipient country,[21] can a legal reform project be seen as successful in this culturalist context.

A counter argument from the supporters of Watson's "legal transplant" contends that legal elites are entrusted with responding to social goals by means of legal changes, by which process they pay due consideration to the legal culture and even attain the cultural changes.[22] This kind of goal-means discussion necessitates objective evaluation so that it can stand against a passive understanding of the law as a mirror of socio-economic and political decisions.[23] Although econometrical approaches seemed to respond to this expectation for objective evaluation,[24] its technical limitations, especially on the attainment of large-scale social goals, have come to recognition.[25]

As if reflecting a mood of skepticism about the outcome of these debates, commentators in legal critical studies have featured new discourses

---

[19] Watson, Alan, Legal Transplants: An Approach To Comparative Law, 1974 and 1993; Ewald, William, "Comparative Jurisprudence II: The Logic of Legal Transplants", *AM. J. COM. L.*, num. 43, 1995, p. 489.

[20] See Legrand, Pierre, "Impossibility of Legal Transplants", *Maastricht Journal OF European and Comparative Law*, num. 4, 1997, p. 111; Legrand, Pierre, "What Legal Transplants?", Nelken, David and Feest, Johannes (eds.), *Adapting Legal Cultures*, 2001.

[21] See Kahn-Freund, Otto, "On Uses and Misuses of Comparative Law", *Modern L. R.*, num. 37, 1972.

[22] See Graziadei supra note 18, pp. 467-470.

[23] Friedman, Laurence, *A History of American Law*, 2nd. ed., 1985.

[24] See Mattei, Ugo, Efficiency of Legal Transplants: An Essay in Comparative Law and Economics, *Intrenational Review Of Law & Economics*, num. 14, 1994, p. 3.

[25] Kanda, Hideki and Milhaupt, Curtis J., Re-Examining Legal Transplants, *Am. J. Com. L.* num. 51, 2003, p. 887; Davis and Trebelicock, supra note 9.

such as "productive misunderstanding," "globalization," "translations," and so forth, while criticizing the basic concept of "legal transplant" as "pre-realist".[26] The author, sharing this skepticism, still sees the need to depend on the idiom of legal transplants as a starting point for observing the whole incremental process of legal development that goes beyond the original intention of legal elites.

2. *Donors and Academia*

Legal technical assistance, or legal transplants in the present day, has been mainly led by donors from common law countries. This was true of the law and development movement (LDM) in the 1960s,[27] the civil code reform projects in Central and South American countries during the 1980s,[28] the rule of law assistance to the transition economies since the early 1990s,[29] and the post Asian Crisis economic law reforms in the late 1990s,[30] all of which were products of collaboration among American aid sources (USAID, etcetera) and leading international donors such as the World Bank, the IMF, the IDB, the EBRD, and the ADB, as well as bilateral donors from other common law countries such as Canada (CIDA) and Australia (AusAID). Such a convoy fleet approach of common law donors has featured, in the public law sphere, judicial independence projects based on the American constitutional system of the balance of powers. In the private law sphere, they have concentrated their efforts on legal globalization based mainly on American models especially in the trend of deregulation.

This promotion of American law has been done in a particularly decisive way since the mid-1990s, when the international donors started to introduce varieties of "model laws",[31] while making full use of rigorous

---

[26] See Mattei, Ugo and Nader, Laura, *Plunder: When The Rule Of Law Is Illegal*, 2008, pp. 827 and 828.

[27] Trubek, David and Galanter, Mark, "Scholars in Self-Estrangement: Some Reflections on the Crisis of Law and Development Studies in the United States", *Wisconsin Law Review*, num. 4, 1974, p. 1062.

[28] See, e. g., Hammergren, Linn A., "International Assistance to Latin American Justice Program: Toward and Agenda for Reforming the Reformers", *Beyond Common Knowledge: Emperical Approaches to the Rule of Law*, 2003.

[29] Black, Bernard and Kraakman, Reinier, "A Self-Enforcing Model Of Corporate Law", *Harvard Law Review*, num. 109, 1996, p. 1911; Pistor, Katharina *et al.*, "Law and Finance in Transition Economies", *Economics of Transition*, num. 8, 2000, p. 325.

[30] See, e. g., Yuka, Kaneko, Outcomes of Conditionalities on Legal Reform in a Decade after the Asian Crisis (presentation paper at Law and Society Association Montreal Conference, 2008), *http://convention3.allacademic.com/one/lsa/lsa08*; Halliday, Terence and Kurrthers, Bruce, *Bankrupt: Global Lawmaking And Systemic Financial Crisis*, 2009.

[31] Influential model laws include EBRD's "Model Law on Secured Transaction" (1994), World Bank's "Principles and Guidelines for Effective Insolvency Systems" (1999/2004), World Bank/OECD "A Framework for the Design and Implementation of Competition Law and Policy"(1999), World Bank's "Template for Country Assessment of Corporate

compelling mechanisms such as loan conditionalities and performance ratings.[32] A quick review of these model laws will expose their basic new-liberal policy stance.[33] Conditionalities often set deadlines as short as three-months for the legislation based on these model laws, without allowing enough time for elaboration in conformity with the existing legal system, except for only occasional cases where consideration was given to integrating model laws with the recipient's civil law tradition, mostly based on the experience within a common law region such as the state of Louisiana in the US, and the state of Quebec in Canada.[34]

A stream of academic works has given plausible justifications for this globalization agenda based on American law models, such as "governance," "convergence," "legal origin," and "legal transplants." Even many of those scholarly works meant for human rights and poverty alleviations (or the "thick" version of the rule of law) were no different from these globalization promoters in the sense of admitting to a common law model.[35] Although constant criticisms from legal sociologists have been directed to this promotion of American law,[36] a visible influence over the donors' practice is rarely seen.[37]

Amid this trend of American law promotion, comparative legal studies as well took a meaningful role. During the late 1990s, leading American comparative legal scholars initiated a critical campaign against the traditional methodological approaches taken by mainstream comparative legal scholarship on the European continent, namely, too much dependence on formal law studies, too much focus on private law areas, and the

---

Governance" (2003), ADB's "Good Practice Standard" in Adb Law And Policy Reform 2000-Vol. II (ADB 2000); ADB's "Guide to Movables Registries" (2002).

[32] See, e. g., the World Bank/ IMF's Report on Observance of Standards and Codes (ROSC), and the EBRD's New Legal Indicator Surveys (New-LIS).

[33] Bankruptcy law models inherit rescue-oriented policy of the U.S. Federal Bankruptcy Code Chapter-11; corporate law models tend to copy Delaware-style deregulation of management liabilities; property law and secured transaction law models are based on absolute ownership at the expense of various preferential rights; competition law models provide for various rooms of exceptions based on efficiency evaluated by the total welfare test. See Kaneko supra note 30; Kaneko, Yuka, "A Review of Model Law in the Context of Financial Crisis: Implications for Procedural Legitimacy and Substantial Fairness of Soft Laws", *Journal of International Cooperation Studies*, num. 17, Kobe University, 2009, p. 3.

[34] As for post-Asian Crisis legal reforms, see, Kaneko, Yuka, *Ajia Kiki To Kinyu Housei Kaikaku (Asian Crisis And The Financial Law Reform)*, 2004.

[35] See, e. g., Jensen, Erik, "The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Pattern and Reformers' Response", *Beyond Common Knowledge: Emperical Approaches To The Rule Of Law*, 2003; Jayasuriya, Kanishka, *Law, Capitalism And Power In Asia: The Rule Of Law And Legal Institutions*, 1999.

[36] See supra note 10.

[37] See Alberto Santos, "The World Bank's Uses of the *Rule of Law* Premise in Economic Development", *The New Law And Development: A Critical Appraisal*, 2006, p. 253.

limitation of common law-civil law dualism.[38] Although this campaign broadcasted a reasonably strong message for change, at the same time, it obviously contained an equally strong bias toward promoting American law, explicitly calling for active participation by comparative legal scholars in the political agenda of "globalization of law" declared by the Association of American Law Schools (AALS) in January 1998.[39] Cautions have reasonably been raised against this agenda of legal integration that could risk self-denial of comparative legal studies,[40] and instead, more interdisciplinary interaction within social science, especially with economics, was suggested as an alternative means for methodological changes.[41] This alternative approach, however, seems to have carried its own risk of frequent manipulation by economists of such technical terms as "legal origin" and "legal transplants",[42] that have been only carefully developed by preceding scholarly works of comparative legal studies.

In response to such a drive for globalization of self-modeling in American academia, some corresponding movements arose among non-American countries. First, a group of scholars from other common law countries such as Canada and Australia are trying more empirical approaches for justifying a globalization agenda of common law models.[43] Second, more neutral works from some parts of Europe such as the Netherlands, Sweden, and the United Kingdom, mostly attempted to collect empirical data while remaining involved in actual assistance projects by politically neutral donors.[44] Third, legal scholars who have been involved in the assistance projects from major civil code countries have produced a series of reports based on their individual experiences other than the U.S. version.[45]

---

[38] Ewald, William, "Comparative Jurisprudence (I): What Was It Like to Try a Rat?" *U. of Pa. L. Rev.*, num. 143, 1995, p. 1889; Reimann, Mathias, "Stepping Out of the European Shadow: Why Comparative Law in the United States Must Develop Its Own Agenda", *Am. J. Com. L.*, num. 46, 1998, p. 637.

[39] Reimann, *ibidem*, p. 647.

[40] See, e. g., Mattei, Ugo, "An Opportunity Not to Be Missed: The Future of Comparative Law in the United States", *Am. J. Com. L.* num. 46, 1998, p. 709.

[41] Mattei, supra note 24, note 26.

[42] See supra note 14, note 15.

[43] See, e. g., Davis and Trebelicock, supra note 9; Timothy Linsey, *Law Reform in Developing and Transitional States*, 2006; Gillespie, John and Peerenboom, Daniel, *Regulation In Asia: Pushing Back on Globalization*, 2009.

[44] See, e. g., Bergling, Per, *Rule of Law on The International Agenda*, 2006; Jan Michiel Otto, "Rule of Law Promotion, Land Tenure and Poverty Alleviation: Questioning the Assumptions of Hernando de Soto", *Hague Journal on the Rule of Law*, num. 1, 2009, p. 173.

[45] See Center for Asian Legal Exchange, Nagoya University, Cale Series, each issue *http://cale.law.nagoya-u.ac.jp*, for the comparison of the modes of scholarly involvements in legal assistance of major bilateral donors. It is reported that, while French scholars have a strong bias on their own models, scholars from Germany and Japan are respectful of local formal law regime as well as socio-cultural contexts.

3. *Asian Context of Legal Reforms*

The question of "why Japan as a legal assistance donor in Asia?" has been asked not only by recipients but also by the very scholars involved in the assistance projects. Their answers have pointed to Japan's own experience as one of the Asian nations having international pressure to westernize its legal system.

One of the issues frequently referred to is self-reliance in legal development,[46] which Japan has managed to achieve despite perpetual foreign pressures. This is doubtlessly a relevant aspect for Asian countries, in which formal law systems had been mostly introduced through colonization. Even after political independence, in spite of each struggle for achieving "legal" independence, most of them have not yet been freed from the lingering influence from the respective suzerain state.[47] The globalization agenda has complicated lawmaking choices between different foreign models. This issue of self-reliance will be explored in Chapter III with particular focus on the Cambodian situation, where the Japanese assistance team has been involved in serious inter-donor conflicts due to the lack of self-reliance on local lawmaking.

Systemic consistency or integrity has been another crucial aspect for Asian legal reforms. In the case of Japan, the Meiji restoration government initially chose, based on a comprehensive study involving more than forty legal systems, to introduce a holistic set of codes as the most efficient way of legal transplant. Although this simple transplantation approach was destined to be modified in the interface with existing local customs, its basic deductive approach of maintaining an integrated legal system as a logically consistent holistic structure has become firmly rooted in the minds of legal practitioners and scholars throughout the Japanese legal development process. This could be a relevant lesson for Asian countries, having an equally strong desire for integrity in each historical context since the political development. At present, they are suffering even more from the systemic inconsistency of the legal system, as a result of the globalization pressure of donors who have brought in various individual legal models that can sometimes contradict each other, as well as the existing local system.[48] This issue of systemic

[46] See Morishima, supra note 4, p. 35.

[47] Indonesia still maintains the codes introduced by the Dutch colonial reign in 1848; Malaysia had continued the appeal system to the High Court of England by the mid-1980s; Myanmar maintains the Burma Code inherited from the Indian Code; Even the Indochina countries during the civil war period used to maintain the French-oriented codes especially valid for commercial areas. See, for details, Hooker, M. B., *A Concise Legal History Of South-East Asia*, 1978.

[48] See Kainou, supra note 1, p. 70.

consistency will be considered in Chapter IV with emphasis on the case of Vietnam struggling for the establishment of civil code system within the normative consistency under its socialist constitution.

Lastly, bridging formal and informal norms has been an indispensable part of the process of Asian legal reforms. The historical fact that formal law-making was the principle tool of colonial reign has made the local people extremely cautious and even hostile against application of formal law to this day.[49] An additional reason for the unpopularity of formal law could be the discretionary nature of administrative laws, and underdeveloped private law rules, especially those that resulted from authoritarian political regimes.[50] Contemporary pressure of globalization has further deepened the gap between formal and informal norms.[51] Scholars involved in Japanese assistance in Asia seem to have been responding to this gap in two ways:[52] first, by conducting careful customary surveys prior to each legal reform assistance effort, and second, by focusing on the independence of adjudication to let judges act as catalysts to bridge the normative gap, perhaps largely based on Japan's own historical experience of code application in which judges have taken a serious catalytic role. Chapter V will consider the meaning of Japanese judicial assistance in Indonesia especially in the context of promotion of court-annexed alternative dispute resolutions (ADRs) on their norm-catalytic roles.

II. JAPANESE EXPERIENCE IN ASIAN CONTEXT

1. *Japanese Law in the Mainstream Comparative Law*

Before examining the individual cases of Japanese legal technical assistance in Asia, this chapter attempts to sketch the lessons of Japanese legal history since the Meiji modernization period, which have influenced its assistance projects in Asia, whether or not understood as a legal transplant.

Japanese law has not always been very accurately categorized in the mainstream comparative legal studies. While a well-known categorization by René David put the Japanese law into the Far East legal system,[53] Zweigert and Köts understood the Japanese law as being a transition from the Asian

---

[49] For empirical studies revealing this fact, see, e. g., Undp, Access To Justice In Aceh Making The Transition To Sustainable Peace And Development In Aceh (2006).
[50] See *The Role of Law and Legal Institutions in Asian Economic Development*, supra note 13.
[51] See Benda-Beckmann, supra note 17, p. 77.
[52] See Morishima, supra note 4, p. 35; also see Mikazuki, Akira, *Houritsu-Gaku Heno Shoutai (Invitation To The Legal Studies)*, 1982, pp. 89-98.
[53] David, René and Brierley, John E. C., *Majoy Legal Systems in the World Today*, 3rd ed., 1985.

law to the Western law.[54] However, considering the fact that Japan had endured vigorous efforts of westernization of its legal system since the 1870s, and had established the whole set of the basic code system before the year of 1900 when the epoch-making first World Conference of Comparative Law was held in Paris and the German Bürgerliches Gesetzbuch was adopted, it is much better to categorize Japanese law in the civil law group as Merryman, Clark and Haley have done.[55]

Perhaps, these mainstream categorizations tend to center too much on the Western Europe, and hence cannot be entirely satisfactory to scholars from other regions.[56] From the viewpoint of non-Western countries, the same cautiousness, at least, is required for categorizing each historical result of individual legal development as equaled to the categorization among Western countries of their respective results of historical transformation of originally transplanted legal models.

Apart from the problem of categorization, however, a more fundamental question is the very characteristics of Japanese law. Although several interesting hypothetical questions continue to appear in Japanese law studies by foreign academics,[57] no clear self-portrait has yet been posted by Japanese scholars. Actually, not a few scholars have been volunteered for the legal assistance in Asian legal reforms for the very purpose of rethinking this fundamental question of self-identification of Japanese law, amid the interaction with different legal systems and socio-cultures.[58] Unfortunately, however, not a lot of academic feedback has moved from the frontlines of these assistance projects to the mainstream of Japanese law, apart from the occasional technical or factual reports written by practitioners. Accordingly, the author has no choice than to depend on these reports to explore some visions Japanese scholars have obtained in the process of assistance. The focus will be on each aspect of self-reliance in successful legal transplants, the

---

[54] Zweidert, Konrad and Köts, Hein, *Einführung In Die Rechitsvergleichung Auf Dem Gebiete Des Privatrechts*, 1971; English translation of its 3rd ed. by Tony Weir, An Introduction to Competition Law, 1998.

[55] Merryman, John H. *et al*., *The Civil Law Tradition: Europe, Latin America, and East Asia*, 1994.

[56] See e. g., Noda, Yasuyuki, "The Far Eastern Conception of Law", *International Encycropedia Of Comparative Law*, t. 2, 1975. More recently, by a group of Japanese scholars who initiated Hikaku-Hou-Bunka-Ron (comparative legal culture), "western law" has been put merely as one category in the legal cultural comparison with regard to "Melanesian," "Indian," "Northasian," and "Islamic" legal cultures (see Kinoshita, Tsuyoshi *et al*., "Hou-Kannen wo chushin tosuru Sekai-Hou-Bunka no Hikaku (Legal Culture in the World: Focusing on Legal Conceptions)", *Hikakuhou-Kenkyu* (*Comparative Law Journal*), num. 60, 1998.

[57] Haley, John, *The Spirit Of Japanese Law*, 1998; Upham, Frank, *Law and Social Changes in Post War Japan*, 1987; Ramseyer, J. Mark and Rasmusen, Eric B., *Measuring Judicial Independence: the Political Economy of Judging in Japan*, 2003.

[58] See Morishima supra note 1, p. 135.

systemic consistency of code drafting, and the consideration for formal and informal norms.

2. *Self-Reliance in Legal Transplants*

It is ironic that the Japanese legal experience has been understood as a typical example of "receptive" legal transplant by a group of law and economics scholars who have been promoting the globalization of common law models. Following their successful campaign for the general superiority of common law against civil law,[59] their further attempt to indentify necessary factors for expediting the "convergence" to common law models has emphasized "receptiveness" or willingness in transplanting foreign legal models as one of the core preconditions for a successful legal transplant.[60] Japan has been considered a typical case of this "receptiveness".[61]

It is true that the modernization of Japanese law since the early Meiji restoration era was willingly started, despite foreign pressures such as diplomatic conditions set for amending unequal bilateral trade agreements. The strategy of the Meiji restoration government was to introduce the Western legal system for both the political purpose of philosophically justifying the new regime, and for achieving capitalist economic development.[62] This willingness is never shared by contemporary legal reformers in Asia, whether forced by conditionalities for financial rescue packages, set in the negotiations for the WTO entry, or compelled under the provisions of Free Trade Agreements (FTAs).

It is apparently inaccurate, however, to understand this willingness of the Japanese legal transplant as a simple example of "receptiveness." Even if it were the definite intention of the Meiji restoration government to transplant Western models, Japanese society was far from "receptive" to such transplantations. The most renowned evidence of this was the failure of Japan's first civil code, the preparation for which the Meiji government began as early as 1871. The code was adopted in the Diet in 1890, but the formal implementation of which was suspended due to a national outcry against the adoption of a foreign-made basic law. Over a nine-year period, the code was entirely rewritten by Japanese professors, based on a series of customary law research projects, and was finalized in 1899. The deliberation in the Diet on this second version was not simple, with fundamental debates directed toward the basic pro-capitalist policy stance of the new draft, which

---

[59] See supra note 14.
[60] See Berkowitz *et al.*, supra note 15.
[61] *Ibidem*, Table-3.
[62] Fukushima, Masanori, *Nihon Shihon-Syugi No Hattatsu To Shihou* (*Development of Capitalism and Private Law In Japan*), 1953.

was largely influenced by the 1st draft of German codification.[63] By the time this revised civil code was adapted at the Diet in 1898, it had endured several modifications meant for protections for the socially weaker parties, such as the introduction of upper limits for interest rates, and the extended length of long-term leaseholds.[64] The whole socio-political process of adoption of the Japanese civil code adoption should hardly be understood as simple "reception."

This, however, was just the beginning of the code's difficult history. Further review of its implementation process tells of drastic transformations of its provisions through supplementary legislation as well as judicial interpretations, which started almost as soon as it was adopted. Particularly in the judicial scene, the Supreme Court (Daishin-in) initiated the famous judge-made principle of "prohibition of the abuse of rights" the very next year after the code was adopted, to set limits on the absolute nature of ownership provided in the code, while formally recognizing the customary communal rights instead.[65] This activist culture in judicial interpretation of the code has continued throughout the rapid socio-economic changes in Japan, departing from the feudal agriculture-based economy to an emerging capitalist economy, and has played an important role in modifying the inherent inflexibility of the code provisions.[66] Even conservative legal academia that was first controlled by the French-style commentaries, and then by German legal doctrines, gradually opened to the studies of such case law practices by the 1920s, under the influence of legal sociology.[67]

In a sum, Japan's historical lesson should never be characterized as simple "receptiveness" to legal transplants, but instead, as a dramatic transformation process of the once transplanted models. Guided by this self-learned hard lesson, Japanese involvement in Asian legal reforms has reason to pay due respect to local initiative and self-reliance.

3. *Civil Code in the Systemic Consistency*

---

[63] Tsuneo Ikeda, Nihon Minpou no Tenkai (1) Minpouten no Kaisei- Zen-3-pen (Dynamism of Japanese Civil Code (1) Civil Code Amendment on Its First Three Parts), In Minpouten No Hyakunen (One Hundred Years of Civil Code) (Toshio Hironaka & Eiichi Hoshino 1998), p. 48.

[64] For the detail, see Toshio Hironaka ed., *Dai-9-Kai Teikoku-Gikai No Minpou-Shingi (Deliberations on Civil Code at The Ninth Diet)*, 1986.

[65] This was done despite the adoption of Law on Legal Sources (Hourei) in conjunction with the Civil Code in 1898, narrowing the applicability of traditional customs by providing that they were only effective as long as consistent with laws and regulations (Art. 2), implying the intention of the Code drafters to limit the freedom of judicial law-making since the pre-Code period.

[66] See Fukushima, *Nihon Shihon-Shugi No Hattatsu To Shihou* (*Development Of Capitalism And Private Law In Japan*), supra note 62.

[67] Kitagawa, supra note 6, pp. 240-242.

Taking advantage of the centennial anniversary of the adoption of the Japanese civil code in 1998, civil law scholars have made enthusiastic arguments for rethinking the superior position of the civil code in the nation's holistic normative system. One of the issues is the meaning of civil code as the general law in the private law sphere.[68] Under the influence of German codification, the Japanese civil code follows the logical system of Pandectist, and therefore, its general provisions (part 1) have been considered as the very basic principles that were put in the supreme place of the fundamental normative structure in the whole private law sphere. Because of the political difficulties that arose in the process of the code's adoption, the draft makers had intentionally simplified its contents until the total number of provisions became less than half than those of German and French codes, which intensified the basic nature of the civil code as a general law. The abstract nature of the code has, however, allowed the intrusion of special laws, especially in the area of commercial law under the 1890 commercial code, causing the so-called commercialization or "hollowing out" of civil law. Although judicial interpretation have been filling the gap between the commercializing law and the interests of civil life, no more can be expected under the contemporary pressure of new liberalism against the judicial role. It is argued, therefore, that a wholesale review of the general principles of the civil code is necessary to re-establish its superior normative position.

This rethinking of the civil code has also encouraged the recognition of the position of code within the whole national legal system under the constitution. The public law-private law separation used to be the basic stance among civil law scholars, who were cautious about replicating of the same authoritarian public intervention into the private law sphere as occurring during the World War II.[69] Recent arguments, however, have been more positive about integrating constitutional norms into the general principles of the civil code in an attempt to re-strengthen the normative structure of civil society against the increased pressure of deregulation and new liberalism since the 1990s.[70] It seems that the Japanese civil code is moving into a new life after its first one hundred year journey.[71]

Although this new life seems to be a product of theoretical talks in academia, it is actually a result of incremental developments of the code interpretations that have accumulated through case law. While the fundamental principles in the general provisions of the code such as "public

---

[68] See Hoshino, Eiich, *Minpou No Susume* (*Recommendation Of Civil Code*), 1998.
[69] See e. g., Hoshihno, Eiichi and Higuchi, Youichi, "Shakai no Kihon-Hou to Kokka no Kihon-Hou (Basic Law for the Society and Basic Law for the State)", *Jurist*, num.1192, 2001.
[70] Oomura, Atsushi, *Houten Kyouiku Mnpou-Gaku* (*Code, Teaching, Civil La Studies*), 1999; Yamamoto, Keizou, "Kenpou System niokeru Shihou no Yakuwari (Role of Private Law under the Constitutional System)", *Houritsujihou*, vol.76, num. 2, 2004.
[71] Ikeda, supra note 63, pp. 112-115.

welfare," "good faith," "prohibition of abuse of rights" (art. 1) and "public order and good morals" (art. 90) have all constituted indispensable normative bases in interpretation of the code by the court, we should also recall that these principles themselves are the very products of judicial lawmaking. Since the Meiji restoration government apparently leaned toward promoting capitalist interests when it drafted the code, it has been the judiciary that has taken the role of interpreting the code to achieve better normative outcomes. These principles have been formed through the accumulation of actual cases, and finally incorporated into the post-World War II revision of the civil code in 1947 following adoption of the 1947 constitution. Although criticisms were expressed about the risk of conservative usage of these fundamental principles in anticipation of authoritarian state's intervention into capitalist freedom, recent studies have identified rather progressive uses of the principles by the courts, especially since the 1990s, for the sake of reconfirming the normative basis of the code in the interests of civil life and the competitive market order.[72] There is also a persuasive argument for observing court practices for balancing the systematic approach and the problem-based functional approach.[73]

Given the importance of case law in the history of the Japanese civil code, it is necessary to discuss the institutional conditions that made this judicial activism possible. It is often said that there are several thousands of case laws developed by judges for the application of roughly 1,000 provisions under the civil code. These are the results of individual but logically integrated efforts by Japanese judges, who have been evaluated in many ways by foreign scholars: sometimes as successors of centuries-long tradition of case law culture,[74] and often as "nameless and faceless" formalists.[75] Perhaps, more detailed investigation into the procedural aspects of Japanese court practices would provide concrete lessons for foreign observers. Such investigation may include the techniques of fact-finding and ultimate facts (*Youken-jijitsuron*) that have been developed by the judicial training practice;[76] the method of judgment writings developed through the court practices, particularly featuring the logical description of reasons not only for the law but also for fact-finding;[77] and the sophisticated tradition of academic

---

[72] Hironaka, Toshio, *Minpou Kouyou* (*Essence Of Civil Code*), vol. I, 1989, 2006.
[73] Kitagawa, *Zentaro, Minpou No Riron To Taikei (Theory and System of Civil Code)*, 1987.
[74] See Wigmore, Jonh H., *A Paramaount of the World's Legal Systems*, vol. 3, 1928; Wigmore, Jonh H., *Law and Justice in Tokugawa Japan*, vol. 1, Tokyo University Press, 1969.
[75] See Foote, Daniel H., *Na Monai Kao Monai Shihou: Nihon No Saiban Wa Kawarunoka* (*Nameless And Faceless Judiciary: Whether Japanese Litigation Can Change?*), 2007.
[76] See e. g., Ito, Shigeo, *Youkenjijitsu No Kiso* (*Basics Of The Ultimate Facts*), 2000.
[77] See Tsuguo Nakano eds., Hanrei to Sono Yomikata (Case Laws and Methods of Reading Thereof) (1986).

critiques of judgments, constantly encouraging the formation of Japanese case laws.[78]

In sum, a civil code can develop through judicial interpretation in holistic normative consistency under the constitution. Therefore, a legal transplant of the code in a positivist sense is not the goal, but just the beginning of normative development. In this sense, any assistance project meant to be a legal transplant has to have considerable judicial assistance for strengthening institutional conditions for the succeeding code development. This might be the more relevant lesson for the Asian counterparts whose code systems, if any, have long been suffering from formalist inflexibility. Even though the Japanese civil code does not in itself look like an attractive model for a legal transplant, it does cast more important historical lessons on this normative development process.

4. *Procedural Basis for Formal-Informal Law Interaction*

The pressure of globalization seems to have increased the risk of "legal pluralism," causing gaps among donor-oriented global models, local formal law regime, and local customary orders, while reminding us of the colonial past.[79] As a result, it has been increasingly clear phenomenon that local people go for vicious forum-shopping actually meant for norm-shopping, which distorts the predictability in dispute settlements.

Although efforts have been made in insightful post-modern studies to encourage overcoming this pluralism in the name of "vernacular communitarianism",[80] the critical liberal circle remains in favor of Western leadership while casting suspicion on the "pre-democratic" nature of Asian communities in contrast to Western "post-democratic" communitarianism.[81] While the goal of these normative debates has never been seen, either in the West or the East, some donors have started to focus on creating procedural channels for local people, or the "secondary rules" in the Hartian philosophical sense, to let them search out their own integrated normative solutions. The question here is whether we can induce any lesson from the Japanese experience for this context of secondary rules' promotion.

One unique dimension of Japanese legal experience is the modification of the formal law towards the harmonization with customary norms, mostly through the accumulation of judicial precedents that pave way

---

[78] See e. g., ibidem, pp. 109-115.
[79] See Benda-Beckmann, supra note 17, p. 58.
[80] See Beng-Huat Chua, "Asian Values' Discourse and the Reconstruction of the Social Positions", *East Asia Cultures Critique*, num. 7, 1999, p. 573. (1999).
[81] Kymricka, Will and He, Baogang, *Multiculturalism in Asia*, 2005.

for legislative responses.[82] As aforementioned, the Meiji restoration government's efforts for the westernization of law were severely contested by Japanese people, who stressed the lack of conformity of such models with domestic norms. A typical example of this conflict was the aforementioned suspension of the country's first ever civil code that French professor Boissonarde had drafted, but this was merely one of the numerous contests against the formal law regime, in which the court played an actively conciliatory or catalytic role by incorporating local social justice into the formal law regime. Such judicial catalytic role has often been helped by academic researches on customary norms which has been particularly popular in Japan since the Taisho period when scholars, facing enormous difficulties in their attempts to narrow the widening gap between formal law and socio-economic needs, were greatly influenced by Eugen Ehrlich's ideas about the catalytic role of judicial norms operating between the formal law and social norms. Contemporary scholars have inherited this academic tradition, in their works further identifying the institutional conditions for both protecting and controlling judicial activism.[83]

Actually, a respectful stance on local customary norms has been a long tradition of Japanese involvement in Asian lawmaking since the colonial period before World War II, when government-sponsored scholars head by Izutaro Suehiro, a renowned legal sociologist, devoted energies to the *Kankou-Chousa* (survey of customary laws) in the Korean peninsula and the northeastern part of China.[84] Though such a respectful stance on the part of the colonialist might sound ironic, the Japanese had learned the hard way that formal law cannot be accepted by society unless it goes through a process to pay attention to the local order. This has been remembered even in Japan's present day's legal assistance in Asia.[85]

---

[82] For the case-law development in the hundred year's Japanese Civil Code application, see, e. g., Hironaka, Toshio and Hoahino, Eiichi, *Minpouten No Hyakunen* (*One Hundred Years Of Civil Code*), 1998.

[83] On the role of legal interpretations, see Hironaka, Toshio, *Minpou Kaisyaku Houhou Ni Kansuru 12 Kou* (*Twelve Lectures on the Methods of Civil Code Interpretation*), 1997. For procedural approaches, see Tanaka, Shigeaki, "Saiban niyoru Hou Keisei (Judicial Law-making)", *Shin Minji-Sosho-Hou Kouza* (*New Practical Lectures on the Civil Procedure Law*), vol. 1, 1981; Ohta, Katsuzo, "Legal Evolution and Social Justice", *Minji-Hunsou Tetsuzuki-Ron* (*Analyzing the Procedures on Civil Dispute Resolution*), Katsuzo Ohta, 1990, p. 109; Shozaburou, Yoshino, *Saiban niyoru Hou-Keisei to Saibankan no Yakuwari* (*Law-making in Litigation and the Role of Judges*), Ritsumeikan Hougaku, 1988, pp. 5 y 6; Hara, *Takehiko, Saiban Niyoru Housouzou to Jijitsu-Shinri* (*Law-making in Litigation and Fact-finding*), 2000. From legal sociology, see Hirowatari, Seigo, "Shihou Handan to Seisaku Keisei (Judicial Decision and Policy Making)", *Hou-Shakaigaku* (*The Sociology of Law*) 2005, p. 63.

[84] See, e. g., Masao, Fukushima, *Fukushima Masao Chosaku-Shu Vi: Hikakuhou* (*Collection of Works by Fukushima Masao VI: Comparative Law*), Fukushima Masao, 1996.

[85] *Houritsu-Gaku Heno Shoutai* (*Invitation To Legal Studies*), supra note 52, pp. 89-98.

In this same context, attentions should be paid to the role of judge-involved ADR, including settlements in the course of litigation as well as the court-annexed mediations. As a means of settling accumulating social disputes, especially in the areas of land tenant, housing, and labor, arising amid the country's rapid capitalist development, these judge-oriented ADRs have played a major role in Japanese society. Although there is a famous academic debate over the nature of this popularity,[86] perhaps, as Japanese scholar–practitioners often explain, Japanese people have recourse to ADRs in different situations.[87] It seems that "judgment-predicting ADR," as an efficient alternative to litigation, has gained popularity in modern-day Japan where laws and judicial precedents have been firmly developed to guarantee predictability. The "judgment-challenging ADR," however, is supposed to have played a much more active role during the drastic socio-economic changes in which capitalist-oriented norms of the formal law regime were challenged in every sphere of society. Judges were supposed to act as catalysts in interpreting social justice, particularly because of an institutional custom in Japanese courts in which the same judge appears both in litigation and in ADR for the same dispute. This facilitates procedural continuity between the litigation and the ADR, and thus exposes judges more to the assertions of social justice. Arguably, this experience of "judgment-challenging ADR" is more relevant for a changing Asia than the now-popular "judgment-predicting ADR."

III. ASSISTANCE TO CAMBODIA—RECEPTIVENESS *VS.* SELF-RELIANCE

1. *Issues of Inter-Donor Conflicts*

Japanese assistance to Cambodian lawmaking has been a typical case that we should consider the importance of self-reliance in legal transplants. The modern formal lawmaking process in the civil law area in Cambodia started under the French protectorate after 1863, which saw the adoption of the 1915 civil and civil procedural code (revised in 1920). This code remained in force throughout political independence from France in 1953, and during the period of Khmer Republic (1970-1975), but was explicitly abolished by the Democratic Kampuchea (Khmer Rouge) in 1975. Although the last years of the People's Republic of Kampuchea (1979-1993) under the 1989 constitution saw some rulemaking relating to private law areas such as contract and properties, they were by nature administrative laws. In this near vacuum in the private law, upon the promulgation of the 1993 constitution of Cambodian monarchy declaring the rights for freedom, countless

[86] See e. g., Ramseyer, J. Mark and Nakazato, M., "The Relational Litigant: Settlement Amount and Verdict Rates in Japan", *J. Leg. Stud.*, num. 18, 1989, p. 263.
[87] See e. g., Kusano, Yoshiro, *Wakai-Gijyutsuron* (*Techniques of Settlement*), 1995, pp. 10-14.

assistance projects of Western donors flowed in, each waving the flag for its own version of legal reform.

This vicious competition among donors started without mutual coordination for consistency. Each donor has its own counterpart institution in certain section of the government, but since these institutions often lacked coordination, an inevitable outcome was a series of confused law emerging from the legislature. It seemed, in the initial phase, that bilateral assistance from France would take care of holistic legislative consistency under its code-drafting assistance. France later concentrated more on criminal law, and gave little consideration to civil law sphere. Several initiatives attempted by the UNDP were in this vein because of the indifference of the most influential donors, including the World Bank and the ADB.

In this confused environment, the Cambodian government approached Japan for help drafting its civil code and civil procedure code. The project began in 1999; its first phase was completed when relevant drafts were handed over to the Cambodian Ministry of Justice in 2003. Still, drafting laws was just the beginning of lingering inter-donor conflicts. Since the Japanese team, as the code drafter, had natural concerns about the logical consistency of the holistic private law regime, it had to tackle with various systemic discrepancies mostly resulting from the introduction of individual commercial laws by common law donors.[88]

Among all, land law was the most controversial area in which a couple of donors concentrated their efforts at legal transplant. Upon the declaration of private ownership as the centerpiece of the 1993 constitution's full capitalist lineup of rights to freedom (art.44), the limited reach of private ownership in the former land law enacted in 1992 (art.19) had to be superseded by a new law giving full recognition to private ownership. The ADB's conditionality to the Agricultural Policy Reform Loan TA2591-CAM forced this lawmaking, together with the World Bank and the Gesellschaft für Technische Zusammenarbeit (GTZ), which brought about the 2001 land law. At the same time, however, Japan had been assisting the Cambodian government in drafting the civil code, and tried to coordinate efforts with the team from the World Bank and the ADB that was assisting the land law. These donor agencies often neglected this coordination, moving on instead to the final adaptation of the land law, while insisting that the Japanese team

[88] For the details of Japanese assistance and its conflicts with donors, see Morishima, Akio, "Donor-kan niokeru Shien no Soukoku to Nihon no Shien no Seibi (Inter-Donor Conflicts and Rethinking of Japanese Assistance)", *Ministry of Justice of Japan*, *Icd News*, num.14, 2004, p. 19; Misawa, Atsumi, "Outlook of the Japan's Legal and Judicial Assistance in Cambodia", *Ministry of Justice of Japan*, *Icd News*, num. 16, 2004; Sakano, Issei, "Cambodia Minpoutenn to Tochi-hou (Cambodian Civil Code and the Land Law)", *Houseibi Shien Ron* (*Studies on Legal Assistance*), *op. cit.*

should amend the contents of the draft civil code so as to conform to the land law. The Japanese team members did not easily surrender, emphasizing that the draft civil code was the product of local customary survey.

The equally serious friction between donors was observed with regard to the draft civil procedure code, which began with Japan's assistance in 1999 and handed over to the Ministry of Justice in 2003. While Japanese assistance aimed to create judicial access for ordinary Cambodian people in achieving their civil rights,[89] the Canadian- World Bank assistance to the Cambodian Ministry of Commerce in drafting the law on establishing commercial court emphasized promoting foreign investment, and insisted on an extremely wide exclusive jurisdiction to cover almost all market side disputes regardless of the involvement of non-merchants in weaker contractual positions (art.26), as well as the exclusion of the application of the civil procedure code to such cases (art.31).[90] The intentions of this exclusion were understood, for one thing, to secure the freedom of choosing internationally popular procedural rules that would offer the quickest way of enforcing contracts, and also to enlarge the chances of direct application of any foreign law chosen as the governing law in the contracts. The Japanese team insisted that local people were vested with the constitutional right to sue under the civil procedure code, rather than being involved in the quickest enforcement mechanism of contracts which could contain unlawful provisions. This conflict among donors has continued without progress even after the adoption of the civil procedure code in July 2006.

It was strange that, throughout these inter-donor conflicts, the stance of the Cambodian government remained unclear. This silence has made the conflicts look as if the issue was the donors, who represented either the common law or the civil law models. The true question, however, must be whether Cambodia should simply transplant global models or build its own consistent private law regime. Regardless of the devotion by the Japanese team on behalf of Cambodian interests, the Cambodian government remained noncommittal, seemingly because of diplomatic considerations in favor of the WTO entry and promoting foreign investment. Perhaps, this lesson illustrates the typical dilemma that many recipients of legal assistance projects have been trapped in. They are often forced by donors to choose a short-sighted globalization strategy at the expense of building institution for their long-term sustainable socio-economy. The lack of self-reliance in determining the fate of national legal reform is one of the most serious problems in legal transplants in Asia.

---

[89] See Takeshita, Morio, Issues for Donor Coordination in Cambodia, *Ministry of Justice of Japan*, *Icd News*, num.14, 2004, p. 24.

[90] See Yasuda, Yoshiko, "Cambodian Civil Procedure Code *vs.* the Commercial Court", in Kozo Kagawa and Yuka Kaneko (eds.), *Houseibi Shien Ron (Studies on Legal Assistance*), 2007.

2. *Outcomes of Cambodian Land-Titling Promotion*

For the sake of considering this self-reliance issue, it is worthwhile to look more closely at the details of Cambodian land law. Land law has been one of the areas where international donors have focused most heavily, rigorously promoting Torrens-style land-titling system as a global standard, while causing serious friction with local social orders.[91] In Cambodia, international donors promoted a nationwide land titling project under the policy slogan of "Land of Their Own." The 2001 Cambodian land law, however, has had something of an opposite effect on re-distributing state lands for poverty alleviation. One economic result is a huge growth in national confiscations of farming lands accompanied by the granting of concessions for speculation. As a result, land disputes involving farmers asserting unfair loss of their land rights have frequently risen.[92] One NGO survey reports that 80 percent of land disputes involve farmers' claims.[93] This section will explore the detailed legal designs of the 2001 land law that has created this disastrous outcome.

A. *Hurdles for Ownership Registration*

If the purpose of land titling was truly to promote the interests of landed farmers, the first question would be how their rights can be secured as private ownership. The 2001 land law (art. 29, art. 30, art. 38) lays down alternative requirements of either five years continuous, peaceful, dispute-free, and explicit possession of the land, or purchase with consideration, as the conditions for registration of land ownership. In other words, farmers who want to secure their land have to prove either of these conditions to the satisfaction of the land administration office.

However, a question arises with regard to this short period of required possession, given the fact that land holding by Cambodian farmers is mostly long and continuous, especially in the case of settled agriculture, which amounts to 80 percent of the total number of farmers. Since the burden of proof is on them, with most of them lacking documentary evidence, the most probable consequence is that commercial land developers, who can somehow show documents on a purchase with consideration and/or a possession for merely five years, will prevail against the farmers making living on the very land for generations.

---

[91] See Benda-Beckmann, supra note 17, p. 58.
[92] See Oxfam, Land Dispute In Cambodia (2005); Ngo Forum In Cambodia, Statistic Survey on Land Disputes Occuring In Cambodia (2008a); Ngo Forum On Cambodia, Land Disputes Database –Pilot Study Report (2008b).
[93] Statistic Survey On Land Disputes Occuring In Cambodia, *ibidem*, p. 7.

B. *Presumed State Land and Concessions*

Despite the active campaigns, the land-titling project is progressing very slowly; only 5 percent of all national land has been registered as of March 2008.[94] A serious negative side effect of this delay is that farmers have been unfairly deprived of land by state offices and the military. The 2001 land law (art. 12) has one presumption that land belongs to the state unless ownership registration is completed as for private land. The separated categories of lands, "state public land" and "state private land," have made the situation more complicated. Since "state private land" is transferable to the private sector (art. 16), the distinction has often been misused, particularly with regard to provisions that allow great concentrations of land for concessions with a nominal limitation of up to 10,000 hectares (art. 59) for ninety-nine years (art. 61).

C. *The Nature of Collective Ownership*

To protect traditional communal rights, the 2001 land law has specifically provided for the "redistribution of state land" for the "collective ownership of the traditional community" which is exempted from the application of provisions for private ownership (art. 23–28). This separate policy for communal orders, however, contains serious problems.

First, what the 2001 land law delineates as "state land" is the very land being used by the ethnic minorities, and accordingly, the true nature of "state land redistribution" is nothing other than the prohibition of ethnic communities from enjoying the land usage as before unless special registration is obtained. Second, this special registration is purposely quite difficult to obtain, since each such community has to establish the socio-cultural "unity," the existence of a traditional way of living, the existence of a collective-style agricultural method, and the actual continuation of this communal existence and land usage (art. 23). Third, even a successfully registered communal right is doomed to be easily eroded by the freedom of individual members of the community to separate his or her share and to freely dispose of it (art. 27). Thus, "collective ownership" is designed as narrowly as possible, in the expectation of its ultimate fate of merger into the formal private ownership regime as a matter of fact.

3. *Implications: Assistance to Restore Self-Reliance*

---

[94] Data obtained from the interview conducted in March 2008 with Mr. Nheam So Hurim, a senior project officer at the Ewmi (East West Management Institute) Phnom Penh Office, a consultation office working for the ADB/ World Bank land reform project in Cambodia.

The case of Cambodian land law makes us reconsider the serious need for self-reliance in legal transplants. Throughout drafting and implementation, the most influential international donors led the charge for legal reform, while the recipient continued to be simply "receptive." Even after the most vicious socio-economic outcomes of its new-liberalist legal design were revealed, it seems no initiative was taken by local legal elites to carry out their own legal reform to ensure the chances of local people to duly assert their traditional land tenures as well as communal rights against the intrusions of commercial land owners or presumed state lands. Even the desperate endeavors of NGO-based lawyers to help local people bring cases before the court have been met with unreasonable reluctance by judges.[95]

This need for legal reform of their own could have been met, at least partly, by the work of the Japanese assistance team which repeatedly advised the Cambodian government that the 2001 land law should be amended to ensure consistency with the general policy set out in the draft civil code. The core issue was the legal effect of ownership registration.[96] The Japanese team has held the view that the legal effect of ownership registration under the 2001 land law should be weakened to the level of the draft civil code (art.133) which gave only a notice and priority effect against third parties, as opposed to the design that gives a Torrens-style absolute titling effect which cannot be tested once registration is completed. The Japanese design would have preserved the lawfulness of customary land transactions among ordinary farmers, based on the style of transfer of relevant documentary evidence but without formal registration. Japan's historical experience indicates that nationwide land registration takes at least a decade; hence, there is a strong need to permit continued customary transactions during the transition period while also preventing the abuse of registration and corruption.[97]

The other issue for modification was re-strengthening the legal effects of land use rights which do not amount to the ownership. The 2001 land law (art. 106; 108) provides for a long-term lease as a right *in rem*, without mentioning its detailed legal effects. This was contrary to the stance of draft civil code (art. 243) which attempted to establish "perpetual leasehold" as a right *in rem* for fifty years (with the option to extend the period up to one hundred years), and capable of asserting the priority against third parties upon registration (art. 245). Even in the absence of written agreement, under the draft civil code, the same right was supposed to be

---

[95] Information obtained in the author's interview with Mr. Yeng Virak, the head of the Community Legal Education Center (CLEC) in Phnom Penh as of March 2008.

[96] For the detail, see Issei Sakano, Drafting fundamental laws in Cambodia: Japan's experience in supporting legislation of the Civil Code and the Code of Civil Procedure, (presentation paper, Law & Society Association Denver Conference, 2009).

[97] See Morishima, supra note 88; Sakano, supra note 88.

valid as a "lease for infinite period of time" (art. 244 & art. 612) which could only be unilaterally terminated after one year's grace period, while an unwritten lease under the 2001 land law (art. 109) can be terminated by the owner upon the lapse of one payment term. In addition, though "usufruct" is considered another chance for unregistered land users, the 2001 land law (art.120, sec.3) necessitates a written agreement for this, while the draft civil code (art. 257) admitted unwritten agreements, provided that a unilateral termination could be made by the owner upon the lapse of one year's grace period (art. 258, sec. 2). The draft civil code (art. 258, sec.1) also explicitly mentioned to the legal effect of registration for securing the priority of usufruct against third parties, while the 2001 land law did not discuss such chances.

These issues seemed to be recognized when the agreement between the World Bank, the ADB and the Japanese team was concluded in August 2004,[98] with admission that the 2001 land law should be amended in conformity with the basic stance of the draft civil code protective of the local customary land use rights. Nevertheless, neither the donor agencies nor the Cambodian government has taken action to modify the land law. Such inaction underscores the difficulty of restoring the once lost self-reliance in legal transplants. The future task of assistance is to continue persistent efforts for the incubation of local legal elites who will be able to take responsibility for restoring self-reliance in their own lawmaking.

IV. VIETNAM—IMPLEMENTING CIVIL CODE AS GENERAL LAW

1. *Socialist Constitution and Market Reform*

Japanese assistance in establishing the code system in Vietnam provides a good case for reconsidering the systemic consistency in legal transplants. Since Doi Moi introduced an economic reformation policy in1986 that was ratified by the 1992 constitution's concept of "multi-sector commodity economy" (art.15), Vietnam has been carrying out vigorous legal and judicial reform to materialize its market economy. The constitutional regime, however, maintains socialism, which has been controlling the nature of codes.

In fact, the 1995 civil code explicitly declared in its preamble that the code should provide for civil matters according to the 1992 constitution. The 2005 civil code similarly alluded to the 1992 constitution as amended in 2001. Besides, the 2005 civil code has added an explicit mention to its holistic coverage over both civil and commercial relations (art. 1), which strengthened its self-identification as general basic law in the whole private

[98] See Sakano, supra note 96.

law sphere. A further look into the structure reveals the Pandects-like normative stories, including the general principles put in the beginning of Part I (general provisions), additional general principles set in each beginning section of individual parts of the code.[99] It is also worth noting that the provision on the applicability of customs and analogies of law within the general principles (art. 3) has been transferred to the beginning section of this Part I. These outlooks of the civil code must show how concerned Vietnamese lawmakers have been about ensuring systemic consistency in the private law sphere (both civil and commercial, and including customary norms) under the holistic normative regime head by the constitution. Vietnamese lawyers seem to inherit this inclination to vertical logical consistency from socialist codifications in Russia and China, which stemmed from German influence,[100] instead of historical experience during French colonialism.[101] It seemed appropriate that Japan, which also has been influenced by the German school, responded to the Vietnamese call for assistance in its codification works.

What, then, was the substance such a normative regime in Vietnam envisaged for controlling the whole private law sphere? General principles set at the beginning of Part I (general provisions) of the 2005 civil code contain some different concepts: modern capitalist tradition, socialist

---

[99] The structure of the 2005 Civil Code is as follows: Part-I "General Provisions" includes Chapter-1: Task and Effect of the Code, Chapter-2: Basic Principles, Chapter-3: Individuals, Chapter-4: Legal Person; Chapter 5: Family Households and Cooperatives, 6: Civil Transactions, Chater-7: Agent, Chapter-8: Time Periods, Chapter-9: Prescriptions. Part-II "Property and Ownership Rights" includes Chapter-10: general Provisions, Chapter-11: Types of Properties, Chapter-12: Contents of Ownership Rights, Chapter-13: Forms of Ownership, Chapter-14: Establishment and Termination of Ownership, Chapter-15: Protection of Ownership, Chapter-16: Other Provisions regarding Ownership. Part-III "Civil Obligation and Civil Contracts includes Chapter-17: General Provisions, Chapter-18: Common Civil Contracts, Chapter-19: Management without Mandate, Chapter-20: Obligation for Restitution of Property Possessed, Used or Enjoyed without Legal Basis, Chapter-21: Liabilities for Damages Outside Contracts. Part-IV "Inheritance" includes Chapter-22: General Provisions, Chapter-23: Testamentary Inheritance, Chapter-24: Inheritance at Law, Chapter-25: Payment and Distribution of Estate. Part-V "Provisions on the Transfer of Land Use Rights" includes Chapter-26: General Provisions, Chapter-27: Contracts for Exchange of Land Use Rights, Chapter-28: Contracts for Assignments of Land Use Rights, Chapter-29: Contracts for Lease of Land Use Rights, Chapter-30: Contracts for Mortgage of Land Use Rights, Chapter-31: Contracts for Donation of Land Use Rights, Chapter-32: Contracts for Capital Contribution of Land Use Right Value, Chapter-33: Inheritance of Land Use Rights. Part-VI "Intellectual Property and Technology Transfer" includes Chapter-34: Copy Rights and Related Rights, Chapter-35: Industrial Property Rights and Rights to Plant Varieties, Chapter-36: Technology Transfer. Part-VII is "Civil Relations Involving Foreign Elements."

[100] The 1995 Civil Code was prepared under the direct influence from the Russian 1994 Civil Code Part I, as well as the 1986 Chinese Civil General Principles.

[101] There were the 1883 Civil Code for Cochinchina (south), the 1931 Civil Code for Tonkin protectorate (north), and the 1936 Civil Code for Annam (central) protectorate.

considerations, and socio-cultural considerations of their own. For example, the declaration of freedom of transaction (art. 4), restrictions by the law and social ethics (art. 4, 11), good faith (art. 6), and public order and good morals (art. 8) all refer to the established capitalist tradition, whereas socialist-oriented principles also are mention, including equality in terms of ethnicity, gender, wealth, thoughts, beliefs, etc.(art. 5), the principle of actual enforcement (art. 7), several administrative remedies in addition to ordinary civil compensation for damages (art. 9),and the emphasis on restrictions based on national and public interests (art. 10). On the other hand, in an interesting identification of the code as an Asian civil code, socio-cultural aspects such as the emphasis on national culture, neighborly love, cooperation, and ethnical ethics are mentioned, in paraphrasing the public order and good morals (art. 8), as well as the promotion of conciliating culture (art. 12).

Although there is no much change between the contents of general provisions in the 1995 and the 2005 Codes,[102] one prominent part is the explicit mention to the civil code's applicability to commercial law areas (art. 1), which in fact implies a fundamental change in the holistic structure of Vietnamese legal system.

Truly, the 1992 constitution contains room for interpretation in regard of private law, which never seemed clarified in the 2001 amendment that focused mainly on the public sphere. Above all, the meaning of a multi-sector commodity economy (art. 15) has been unclear as to what extent it differs from the capitalist economy. Actually, as a result of extraordinarily rapid socio-economic changes after the adoption of 1992 constitution, its substance seems to have been transformed into something far different from what was first envisaged as an equal competition among state, collective, private, and foreign sectors. Namely, the scope of the "private sector" in this multi-sector commodity economy seems to have been grossly developed, from the typical image of consumer goods transactions led by small and medium-sized enterprises, to the highly sophisticated commercial transactions led by large limited liability companies. This drastic shift of the private sector from "civil" to "commercial" must have awakened national lawmakers' concerns about maintaining certain control, which led to the widening reach of general provisions under the civil code to this evolving commercial sphere.

Even prior to the 2005 civil code, such a concern for integrated control over both civil and commercial relations has been reflected in the procedural law reform. The 2004 civil procedure code had introduced an integrated procedure for both civil and commercial disputes (art.1). Since it

[102] One can notice that the order of general provisions was streamlined so as to appeal the capitalist-oriented principles first, and then put socialistic principles to follow.

was a socialist tradition to maintain separate jurisdictions for economic disputes and civil disputes,[103] based on the socialist philosophy of separated categorization of ownership into public ownership on production means, on one hand, and private ownership on consumption means, on the other, these consolidated jurisdictions and procedures for both civil and commercial disputes signaled a serious philosophical change closer to capitalism.[104] This seems only made possible, apart from foreign pressures for changes, by increasing social needs to incorporate intra-market control over commercial transactions which have grown beyond the reach of traditional administrative controls. The 2005 civil code seemed a natural result of the policy decision that had already been made through the procedural law reforms.

2. *Japanese Assistance for Normative Development*

It seems clear that the Vietnamese political leaders intend to establish and implement a logically consistent normative regime under the civil code, reminding us of the commentarist period succeeding each code introduction in the legal history of many code countries, including Japan. The Communist Party has been vigorously campaigning for an integrated application of law at the court, while criticizing the existing judicial culture of overly flexible solutions.[105]

Indeed, the integrity of judicial function is a constitutional requirement. The preamble of the1992 constitution upholds socialism as the fundamental political base, whereas "democratic centralism" has been maintained as the core constitutional principle. Hence, it is the legislature (namely the National Assembly as well as the People's Council at each local level) that concentrates national decision-making power (art.6), including the authority to supervise the activities of the judiciary (art. 84, No.2; art.122).[106] This vertical control has been further strengthened within the judicial system by the constitutional amendment in 2001, followed by the court law reform in 2002 introducing the system of vertical personnel control by the Supreme People's Court (SPC). Another serious institutional pressure on judges is the

---

[103] Before the consolidation of jurisdictions and procedures, a dualistic system existed, consisting of the 1989 ordinance on procedures for civil dispute resolution (applied in the people's courts) and the 1994 ordinance on procedures for commercial dispute resolution (applied in the economic arbitration tribunals).

[104] In the area of substantive law, there was the 1989 Ordinance on Economic Contracts maintained even after the adoption of the 1995 civil code.

[105] See the Communist Party Politburo Decisions in 2005 num. 48 on the Strategies of Legal Reform, as well as num. 49 on the Strategies of Judicial Reform.

[106] Though the 2001 constitutional amendment incorporate a new clause referring to a "balance of powers" style interaction among state bodies (art.2, second paragraph), no change was made about the supremacy of the legislature.

traditional system of judgment supervision under the French-style "cassation" system, in which the upper courts and the prosecutors' office take responsibility for checking all judgments written by lower court judges.

Nevertheless, provisions in the law are subject to change according to social needs. Actually, there are growing calls for flexible judicial interpretations of the law to fill frequently occurring discrepancies or lacks in the present formal law system.[107] The civil code (art.3) seems to admit such flexible roles of judicial interpretation based on local customs and analogies of law within the limit of the general principles of the code. Accordingly, there is always tension between these two requisites, integrity and flexibility, in the judicial application of law.

Japanese assistance seems to have provided reasonable strategies for tackling with these complex judicial tasks. The assistance was initiated by Professor Emeritus Akio Morishima for its phase-1 project (1996–1999), and proceeded in a trial-and-error manner,[108] until three targeted areas for legal reform (namely, civil code, civil procedure code, and bankruptcy law) were identified in phase-2 (1999–2002), which was succeeded by a bundle of judicial training programs in phase-3 (2003–2006) and maintained in phase-4 (2007–2011).[109] What deserves notice is the increasing stress put on judicial reform especially for improving the quality of judgments through such technical training as fact-finding, law-application, and reference systems of judicial precedents.[110] The logic behind this approach has been that improved quality of individual judgments is the best defense for adjudicative independence against not only external but also internal pressures in the judiciary,[111] which ultimately helps achieve both integrity and flexibility in the application of law. Judicial training for law-application, development of a judgment manual, and the introduction of reference system for judicial precedents are among central menus in this context.

---

[107] Duc Manh, Ngo, *Legal Interpretation and the Supremacy of the Constitution*, Vietnam, Law and Legal Forum, 2008, p. 166; Gillespie, John, Perspectives on Legal Interpretation, Vietnam, Law and Legal Forum, 2008.

[108] Morishima, Akio, "Vietnam Minpouten no Kaisei to Nihon no Houseibi-Shien (Revision of Civil Code of Vietnam and Japanese Assistance)", *Icd News*, Ministry of Justice of Japan, num. 27, 2006, p. 17.

[109] For details of the assistance process, see Ministry Of Justice Of Japan, Icd News, num.16 and num. 34.

[110] Although similar micro approaches to adjudicative practice are taken by some other bilateral assistance such as the Cida's Judge project and the Danida/EU Judicial Access Project, in parallel with the UNDP's Access to Justice Project, their scope tends to be concentrated to important but limited areas such as ethical training and pro bono activities.

[111] See, e. g., Iseki, Masanori, "Vietnam Minji-Soshouhou no Shourai no Kadai (Issues for the Future of Civil Procedure of Vietnam)", *Icd News*, Ministry of Justice of Japan, num. 26, 2006, p. 18.

A. *Judicial Training on Interpretation Techniques*

As for improving of judicial training at the Judicial Academy in Vietnam, experts from the Japanese counterpart institution (*Shihou-shushu-jyo*) were dispatched to introduce their own training methods for applying and interpreting the law, namely, the method for fact-finding and ultimate facts (*Youken-jijitsu-ron*). The basic dialectic concept of *Youken-jijitsu-ron* seems a normal technique for applying the actual facts of individual cases in hand to the legal factors deducted from each statutory provision. Since the Japanese judicial training relies strongly on judicial precedents, however, the training cannot end with paraphrasing statutory provisions but must go on to refer to the array of legal factors added by judicial precedents[112], including the modified rules of burden of proof beyond the literal meaning of the relevant provisions.[113] Following exposure to this Japanese-style code application technique, the trainees must be made aware of the dynamism of legal development wherein judges can take an active role in modifying the meaning of each statutory provision and/or distributing burden of proof within the holistic normative framework under the general provisions of the code.[114] Judicial training could be an efficient channel for training future judges' flexible law application within the integrity of the normative regime.

B. *Judgment Manual*

Although its completion has been postponed for several technical reasons, the judgment manual project is another area Japanese assistance focused on. Its original intention is ascertained from the report on a judgment manual prepared by the same Japanese experts for Laos.[115] The independence of adjudication can be increased by learning from the hybrid nature of Japanese judgment writing custom, which includes the same lengthy reasoning culture as common law judgments, while inheriting the continental judgment culture of referring not only to legal decisions but also to detailed fact-finding in the reasoning part.[116] The report emphasizes that such a Japanese-style judgment has been the most straightforward manner

---

[112] For example, although the Japanese Civil Code contains about 1,000 provisions, it is said that Japanese judges have to know several thousands of precedents in applying the Civil Code properly.

[113] See Youkenjijitsu, No Kiso (Basics Of The Ultimate Facts), supra note76.

[114] In the author's interviews with several local judge-trainers at the Judicial Academy in December 2008, it was emphasized that Youken-jijitsu-ron was operating in a Vietnamese style. They often hold meetings to reach a common understanding on legal factors in any questionable statutory provision or judgment. The results of such meetings are often reported to the SPC, which will disclose the essence of such reports in official legal journals.

[115] Iseki, Masanori, Laos Hanketdugaki Mannual Sakusei Shien (Assistance to the Judgment Manual in Laos), *Icd News*, Ministry of Justice of Japan, num. 33, 2007, pp. 9-15.

[116] Iseki, *ibidem*, p. 9.

for a Japanese judge to prove the validity of his/her conclusion while avoiding undue influence.

C. *Reference System of Precedents*

Another pillar of Japanese assistance is the development of a reference system for cassation precedents, to create a judgment culture based not only on the general rules given by written laws, but also on the judicial precedents that further clarify the statutory provisions.

This is in fact another example of the Japanese stance that aims to respond to needs for both integrity and flexibility. The Japanese team asserts that, to achieve the uniform application of law, the current top-down mode of cassation system has limited effectiveness, as it merely constitutes an *ex post facto* check made on a case-by-case basis, which can never prevent the repetition of similar mistakes.[117] Instead, the team argued that the new precedent reference system would encourage a bottom-up mode of uniform law-application on the initiative of lower court judges. This practical proposal was received positively by the SPC which had initiated a campaign of *phat trine an le* (development of precedents) in response to Japanese inputs,[118] which are expected to influence the revision of the civil procedure code planned for 2010.

Japanese assistance is thus an attempt to support the building of an institutional basis for normative development through the judicial application of the code, beyond a short-term goal of legal transplant.

3. *Precedent Reference System in Real Practice*

What about the results of such assistance? A functional approach would review the process of applying the code, beyond a mere reading of its contents. Fortunately, as a result of U.S. pressure for judgment disclosure, the cassation cases given by the Supreme Judges Council at the SPC during 2003–2006 are now available for study purposes.[119] Though the coverage of disclosure as well as the reach of distribution was something far from the

---

[117] See Iseki, supra note 111.

[118] JICA(Japan International Cooperation Agency), Japan-Vietnam Joint Research on the Development Of The Judicial Precedents/ Nghien Cuu Chung Viet-Nhat Ve Viec Phat Trien An Le Tai Viet Nam, 2007; See, also, the Proceedings of The Seminar on the Precedent System jointly held by the SPC and the JICA Hanoi Office, December 25-26, 2008.

[119] Toa an Nhan Dan Toi Cao, Quyet Dinh Giam Doc Tham Cua Hoi Dong Tham Phan Toan an Nhan Dan Toi Cao, Nam 2003-2004, 2005; Toa An Nhan Dan Toi Cao, Quyet Dinh Giam Doc Tham Cua Hoi Dong Tham Phan Toan An Nhan Dan Toi Cao, Nam 2005 (2008a); Toa An Nhan Dan Toi Cao, Quyet Dinh Giam Doc Tham Cua Hoi Dong Tham Phan Toan An Nhan Dan Toi Cao, Nam 2006, (2008b).

U.S. assistance team's initial intention,[120] its indirect impact on the development of Vietnamese judgment culture could be enormous, especially when the Japanese assistance on the "precedent reference system" is taken into consideration. Although they are still too short to make useful reference material, given the lack of any index or commentaries indicating the essence of precedents, they must at least influence over local judges to write better judgments.

An obvious tendency of recent cassation decisions is that the highest cassation level seems more evasive about legal interpretation, while adhering to procedural requirements such as the participation of related parties and the scope of inquisitorial investigation of evidence. This procedural orientation seems to have been intensified by the introduction of the 2004 civil procedure code, although the cassation court is also expected to review on the law (C.P.C. art. 283). Particularly in land disputes which constitute the overwhelming majority of civil disputes, there are extremely complex normative situations due to the historical changes of land regime,[121] and to the impact of hasty legal reforms under the market economy reform including the land code (first adopted in 1993 and revised in 2003) as well as the civil code, involving numerous problems such as unregistered traditional land rights being denied by newly registered rights under the land law, and/or unwritten contracts being disregarded by third parties that have written contracts. This complexity seems all the more serious because of the basic stance of Vietnamese lawmakers to favor compulsory provisions in their formal law making.[122] Despite numerous substantive issues raised in the lower courts, however, highest cassation court has been almost silent about these legal questions.

---

[120] See Virginia Wise, Several proposals to Vietnam on the judgment disclosure practices in the world's leading systems, in the preface of Toa An Nhan Dan Toi CAO (2005) supra note 119. Initially, the cassation casebooks were only distributed among courts. In December 2008, the SPC created a connection with the USAID/STAR project's website where everyone can search cassation decisions (*http://www.toaan.gov.vn/portal/page/portal/tandtc/545500/cbba/dtba*).

[121] Land re-distribution to the poor class was the feature in the early socialist policy in 1950s, which was then taken over by a drastic land concentration policy, and finally turned to a land return project under the Doi-Moi economic reform. Accordingly, typical land disputes involve conflicts of claims between the original landowner and the land users during the socialist period, as well as disputes among heirs of an original landowner in the pre-socialization period once confiscated but recently regaining ownership.

[122] Civil agreements prior to the civil code are invalid if they conflict with the compulsory provisions of the Code (see National Assembly's decision on the implementation of civil code dated October 28, 1995 and its replicate by the National Assembly Decision num. 45, 2005). All formalities for land rights and transactions laid down in the 2001 land law are considered to be compulsory (art. 88), and should be extended to the rights and transactions that occurred prior to the enactment of the land law at the earliest convenience (see, for example, art. 50).

While the highest level has thus hesitated, lower courts are being compelled to respond to social needs amid rapid socio-economic change. They have traditionally brought about conciliating-type judgments, and never seemed to automatically apply the logic prescribed by formal law. Moreover, we also note some new approaches among them in response to the current institutional changes and tightened procedural requirements under the 2004 civil procedure code. One is the stronger recommendation for conciliation to avoid increasing pressures for the evidence-based procedural requirements of the upper courts.[123] The other is a positive stance for explicit legal reasoning, including challenges for flexible interpretation of legal provisions, mostly directed to the justification of conciliatory conclusions. Even a quick review of the lower court judgments that appear in the cassation casebooks shows signs of dynamic legal interpretations, including, the admission of retroactive completion of land transactions that lack the formalities prescribed by the formal law;[124] respect for peaceful long-term land usage;[125] different treatment for *bona fide* third parties despite the adverse principle of formal law;[126] recognition of validity of a compensation contract beyond the limit of formal law as a private special agreement;[127] orders to return the balance between debts and collateral in a foreclosure-type security contract;[128] and analogical application of the formal law to informal marriages.[129]

An interesting tendency is the willingness among the SPC's cassation court judges not only to supervise but also to learn from such a bottom-up mode of lower court judgments in drafting their cassation judgments.[130]

---

[123] This strengthened recommendation for "conciliation" seems a result of the introduction of "adversary system" in the 2004 civil procedure code under the US pressure. Given the prevalence of self-represented litigations in Vietnam, conciliation can be a tentative solution to avoid the increased burdens of the weaker parties. It deserves notice, however, that the nature of "adversary system" under the 2004 code is different from the capitalist standards, with such uniquely socialistic features as the paternalistic involvement of social institutions as "parties" (C.P.C. art. 56) as well as the social effect of judgment (C.P.C. art. 19).

[124] See e. g., the trial judgment at Tu Liem District Court referred to in the cassation num. 4/2006HDTP-DS, Toa An Nhan Dan Toi Cao (2008b) supra note 119, p.180.

[125] See e. g., the trial judgment at Tien Giang Provincial Court referred to in the cassation num. 42/2006KDTM-Gdt, Toa An Nhan Dan Toi Cao (2008b) supra note 119, p.423.

[126] See e. g., the trial judgment at O Mong District Court referred to in the cassation num. 26/2005HDTP-DS, Toa An Nhan Dan Toi Cao (2008a) supra note 119, 245.

[127] See e. g., the trial judgment at the People's Court of Ho Chi Minh City referred to in the cassation num. 8/2005HDTP-DS, Toa An Nhan Dan Toi Cao (2008a) supra note 119, .

[128] See e. g., the trial judgment at Dak Mil District Court referred to in the cassation num. 19/2005HDTP-DS, Toa An Nhan Dan Toi Cao (2008a) supra note 119.

[129] See e. g., the retrial judgment at Kien Dang District Court referred to in the cassation num. 06/2006HDTP-DS, Toa An Nhan Dan Toi Cao (2008b) supra note 119, 197.

[130] See Nguyen Van Cuong, Nhat Thuc Chung Ve An Le, Tam Quan Tong Cua An Le Trong Cong Tac Xet Xu, Kai Quat Cac Trong Phai An Le Tren The Gioi (presentation paper at the SPC-JICA Joint Seminar, December 25, 2008).

These facts seem to imply the possibility that lower court judges are motivated to take up the challenge of drafting an excellent judgments to contribute to the development of case law.

4. *Implications: Secondary Rule Assistance*

This chapter reviewed the process of Japanese involvement in the Vietnamese codification, which never simply ended with drafting and adoption, but meant a long-term involvement in the whole process of trial-and-errors of the Vietnamese in seeking an integrated normative structure. It is obvious that the civil code is integrated in a normative hierarchy headed by the constitution, but the substance of this holistic hierarchy is still developing amid socio-economic changes. This must be the very task to be sought out in the incremental process of code application, through the techniques of legal interpretation based on the general principles of the code, which include complex norms of capitalist freedom, socialist concerns, and ethnic morals.

By implication, code assistance can never be a simple legal transplant finished by the legal elites. The code can develop according to the changes of social choice of norms. The donors in code assistance must accompany technical assistance to institution building that enables such development of the code. Although this type of assistance may look plain and limited, it is actually all the more attractive, at least in the technical sense of designing the details of workable institutional mechanisms for dynamic normative development than a plain exportation of foreign models.

V. INDONESIA— BEYOND LEGAL PLURALISM

1. *Legal Pluralism Caused by Donors*

In contrast to Vietnam seeking normative integration through codification, post-Suharto Indonesia seems to be moving toward normative diffusion. First, the structure of the public law sphere is disturbing especially since the national principle of unity (*Persatuan Indonesia*), one of the five fundamental philosophical principles (*Pancasila*) of the 1945 constitution, has been weakened through drastic decentralization pursued after the 1999 local autonomy law. This law (art. 7) boldly transferred the whole legislative and administrative functions other than five exceptional areas (defense, diplomacy, finance, judiciary, and religion) mainly to the municipal level,[131] the political system of which was also fundamentally restructured with regard to the balance of powers between the local assembly and the mayor, the

[131] Succeeding special laws adopted in 2001 gave special autonomous status to the provinces of Aceh and Irian Jaya.

selection of which was changed from the original centrally dispatched style to election at the local assembly (art. 40). This Westminster-style power balance was meant to enhance autonomy in the local administration by reducing vertical control from the central ministries and strengthening the integrity of the local assembly that directly represented local people, followed by the 2003 election law. The local legislative power was also materialized by the provision of the 1999 law which admitted the local claim to the Supreme Court when the president at the central level repealed local ordinances on the reason of violation of national laws and regulations (art. 113-114). While consecutive amendments to the 1945 constitution ratified these radical post-Suharto legislations toward autonomy, some counter-reform regulations have been occasionally issued by the central ministries. These counterattacks paved way for the fundamental revision of the local autonomy law in 2004, which introduced the confronting form of balance of powers between the local assembly and the governors/mayors by changing the selection system for the latter from indirect to direct election by local voters, while accompanying a semi-centralization attempt to increase the control by provincial administrations over municipal level administration. These consecutive reforms seem to have resulted in awful confusions in the normative hierarchy among central laws, administrative regulations, and ordinances of different levels of local autonomy.

Second, disturbance of the normative structure has been a serious problem in the private law sphere. Indonesia has a code system, including the 1848 civil code and the commercial code, inherited from Dutch colonialism, but its applicability historically has been limited. During the colonial days, the codes were basically applicable only to transactions involving colonialists, while local private relations were continually ruled under the customary orders *(adat)*.[132] The codes remained valid as of political independence, but only as a tentative means of avoiding lawlessness in a transition period, and they were considered laws that should be replaced by succeeding lawmaking efforts of the independent government sooner or later. The problem was, however, the delay in this independent lawmaking work. It was only in 1961 that the Basic Agrarian Law was enacted to supersede the provisions on property law (except mortgages) under the civil code, which was never followed by succeeding revision of the other parts of the old code system. As a result, up until now, traditional *adat* orders have remained in effect in large spheres of private law, although they have been eroded occasionally by administrative regulations during the Suharto reign, as well as by commercial laws and regulations increasingly introduced during the liberalization policy of the late-Suharto era since the 1980s under the auspices of foreign donors such as the World Bank and the USAID. It is extremely difficult, as a consequence, to precisely tell which among *adat*, the

[132] See A Concise Legal History Of South-East Asia, supra note 47.

codes, administrative laws, or transplanted commercial laws is applicable to a private dispute under what kind of hierarchy.

Third, because of the structural weaknesses of the judicial system, there is limited expectation that this normative disturbance can be sorted out through case law development. The judicial system has perpetuated the pluralistic structure extant since the Dutch colonial days, wherein the normal court only has jurisdiction over disputes under the formal law system, whereas disputes under *adat* come under the jurisdiction of the religious court and/or traditional ADRs. Even after the recently achieved concentration of administrative controls over all relevant courts by the Supreme Court, under a so-called "one roof system" introduced in 2004, the tradition of parallel jurisdictions among different courts has remained unchanged. This pluralism in the dispute resolution system seems to reduce the chance of normative development through interactions among the formal and informal norms.

The negative outcome of legal pluralism seems even increasing, as a result of recent rule of law projects led by various Western donors. The leading international donors such as the World Bank have been encouraging the drastic promotion of decentralization such as the 1999 local autonomy law.[133] Especially in private law areas, introduction of individual commercial laws under the pressure of donor agencies,[134] without considering the need of code reform, seems to have added the complexity. An attempt among civil law donors to persuade the government to re-establish consistency through a drastic bailout of the code system has been neglected by the ministries in charge,[135] and as a result, the reform of fundamental codes appears merely in the last part of the lengthy legal reform agenda.[136]

2. *Formal Law's Modification*

Legal pluralism has been, indeed, a long tradition in Indonesia since the Dutch colonial reign, when local people, for common disputes resolution, used to resort to the customary mediation within the community with the

---

[133] World Bank, Indonesia Meaintaining Stability: Deepening Reforms (2003); World Bank, East Aisa Decentralizing: Making Local Government Work (2005).

[134] E. g., bankruptcy law reform and introduction of the commercial court in 1997-8, company law and security law reform in 1995/ 2007, law on mortgages in 1996, secured transaction law in 1999.

[135] Netherlands for example, has been suggesting the revision of the civil code in vein. Japanese assistance team also suggested the revision of the civil procedure code, but ended up with the revision of relevant Supreme Court Regulation.

[136] See the priority list appeared in the 2007 law num. 17 on the long term national development plan of 2005-2025.

expectation of that local customs, unless they intentionally sought the application of formal law at the formal judicial court. As economic growth is sought, however, traditional types of dispute resolution have increasingly revealed limitations in solving complicated norm-conflicts.

A typical area of such norm-conflicts is land law. Although *hak milik adat*, or the land tenure obtained through traditional ways of land transaction without going through with ownership registration, has been legally admitted and prevailing throughout the country, its assertion against the registered rights of industrial/commercial land developers has turned extremely difficult because of recent legal reforms.[137] The other example is the traditional communal land orders, known as *hak ulayat*,[138] which face difficulties in asserting their rights against national development and/or increasing privatization projects. Although these are the problems apparently beyond traditional types of dispute resolution, formal judicial forums have provided limited solution, given their formalistic tradition of application of law.[139]

Perhaps, serious endeavors are needed to mitigate norm-conflicts. If the legal elites at the central government are so occupied with responding to the conditionalities set by donor agencies, this could be achieved from the bottom up. There are at least two new attempts by some legal assistance donors to help local initiative for normative integration: one is the creation of institutional links between traditional types of dispute resolution and the formal judicial system to enhance the interaction of formal and informal norms. The other is the creation of new types of ADR within the formal judicial system to institutionalize the chances for local people to assert their informal justice inside the formal system. The former is mostly led by the United Nations Development Plan (UNDP), while the latter is being pursued by the Japanese assistance team.

Namely, a new mode of legal assistance led by the UNDP together with the EU and the International Development Law Organization (IDLO) aims to create of links between the formal and informal dispute resolution forums. Especially in the context of assistance relating to socio-economic recovery and peace-building in post-tsunami Aceh, the donors focuses on rebuilding dispute resolution mechanisms, together with the customary law

---

[137] See the 1996 law num. 4 on land mortgages, and the government regulation No. 40 on hak guna-usaha, hak guna-bangunan, and hak pakai in 1996, which largely extended the length of enjoyment and collateral uses of these commercial rights.

[138] Hak ulayat is given only limited protections under the Basic Agrarian Law (art. 3), and extremely weak under the principle of social function (art. 6).

[139] The normal court judges tend to be positivists in application of formal law, while more active religious courts have limited jurisdiction. Although the administrative court is relatively activist, the stance of Supreme Court in balancing the conflicting conclusions of normal and administrative courts seems unclear.

surveys of land law and family law, since a vast increase in disputes was expected following the end of the traditional one-year mourning period after the tsunami.[140] A unique trial has been initiated to create institutional linkages between the formal dispute resolution mechanisms (including normal courts and religious courts) and traditional communal dispute resolution.[141] The donors have been assisting by drafting procedural guidelines for general use by village-level conciliators,[142] while collecting local oral traditions to supplement lost documentary evidence of customary rules.[143] Although this approach of assistance has only just commenced, its implications are not small as a new attempt to bridge the gap between formal and informal orders, which is beyond the traditional and often unsuccessful approach of legal anthropologists to simply attempt to preserve the informal orders separate from the formal orders.

3. *Japanese Assistance to Court-Linked ADRs*

On the other hand, an approach by the Japanese assistance team increased the chances of interaction within the formal judicial mechanism. Its essence is the promotion of judge-oriented ADRs, such as the conciliation in the course of litigation as well as the court-annexed mediation.

This approach seems uniquely different from the previous ADR promotion projects that were led by other donors. According to the classification by legal sociologists and philosophers, at least three different types of policy implications can be identified in ADR promotion:[144] (i) supplementing the efficiency of judicial function with less formal procedures for applying the same substantive basis as formal litigation employs; (ii) enhancing the judicial access by introducing less formalistic procedures which enable extended reach of normative basis; or (iii) substituting for the judicial function in terms of both procedures and norms. Common law donors such as the World Bank and the USAID are promoting type (i), often explaining their intentions in the context of investment promotion by supplementing inefficient local judiciary.[145] On the other hand, human

---

[140] See UNDP project titled "Access to Justice in Aceh" since 2005, the IDLO project titled "Post-Tsunami Legal Assistance Initiative" during 2006–2007 (in which some Japanese assistance was given), and the EU project titled "Aceh Justice Project" since 2008.

[141] Access To Justice in Aceh Making the Transition to Sustainable Peace and Development in Aceh, supra note 49.

[142] Aceh Adat Assembly, Guidline for Adat Justice in Aceh (2008).

[143] Undp, Broadening and Backing Local Justice in Aceh (2008); Idlo, Guardianship, Inheritance and Land: Law In Post-Tsunami Aceh (2006).

[144] Wada, Yoshitaka, *Minji-Hunsou-Shori-Ron* (*Arguing Civil Disputes Resolution*), 1994, pp. 130-135; Tanaka, Shigeaki, *Tenkanki No Nihonhou* (*Turning Point of Japanese Law*), 2000, p. 285.

[145] See e. g., World Bank, *Legal and Judicial Assessment Manual*, 2002; Usaid, *Alternative Dispute Resolution Guide*, 2000, p. 49.

rights-oriented assistance donors such as the UNDP and the EU promote (iii) by way of stimulating community-based approaches.[146]

Between these two extremes, Japanese bilateral assistance often takes a unique stance to promote ADRs within the formal judicial system, which may fall into category (ii). Namely, the Japanese assistance team head by Professor Yoshiro Kusano, an ex-judge, in response to a local request, helped revised Supreme Court Regulation No. 2 in 2003 for the court-annexed mediation *(mediasi*), which was adopted under Australian aid based on the models taken from common law countries. Although this Australian assistance featured the introduction of pre-trial compulsory mediation by specially trained professional mediators (including but not limited to lawyers specially trained for this purpose), this idea was far from accepted among the court practitioners. Against this popularity of an imported model, the Japanese prescription re-strengthened existing institutions within the judiciary, namely, the role of judges. Above all, the re-encouragement of conciliation in the course of litigation (*perdamaian*) provided in the century-old civil procedure rules[147] is considered a more reasonable choice than newly transplanting common law practice.[148] Accordingly, the revision of Supreme Court Regulation in 2008 under Japanese assistance resulted in a series of provisions for the increased role of judges in *perdamaian*, which was a repercussion against the original Australian idea of expert mediation.[149] In addition to this revision, court-annexed mediation led by judges has been suggested; this has been an extremely popular system in Japan since the 1920s (*minji.choutei*).

Such a concerted way of Japanese assistance looks, at first glance, like an export of a self-model driven by an authoritarian image of judges' control over the private autonomy. When the context of Indonesian legal pluralism is remembered, as well as the historically successful Japanese experience with these judge-oriented ADRs, however, the prescription given by the Japanese team might provide a more relevant solution at least in comparison to the Western models that are applicable to sophisticated commercial practices. Perhaps, the most attractive part of this Japanese

---

146 Access to Justice in Aceh Making the Transition to Sustainable Peace and Development in AceH, Supra Note 49; Broadening and Backing Local Justice in Aceh, Supra Note 143; Eu Task Force In Land Tenure, Eu Land Policy Guidelines, 2004.

147 There are provisions on conciliation in the course of litigation in the 1984 procedure code, revised in 1941, known as "HIR" (art. 130) as well as in the equivalent version for other regions than Java and Madera adopted in 1927 (art. 154).

148 See Yoshirou Kusano & Souzaburou Kawata "A Case in Indonesia: Project for Strengthening Reconciliation and Mediation System" (presentation paper at Law & Society Association 2009 Denver Conference, May 28, 2009).

149 The revision included provisions to encourage conciliation throughout the course of litigation; to extend the time-limit for conciliation; to enable the same judge to sit for both litigation and mediation of a case.

suggestion must lie in its inherently contradictory nature: the judge as the very guard of the formal law regime takes the flexible role of conciliator who decides beyond the formal law. Such a system exposes judges to social norms out of the formal law regime. This experience may be influential to rewrite the normative order within a judge's individual mind, which may change his/her interpretation of formal law back in formal litigation, which may ultimately produce a new active judicial culture.

Indeed, the essence of Japanese assistance on the system and the techniques of judge-oriented ADR have been eagerly accepted by local judges, especially at the local religious courts.[150] This is a positive sign of active roles to be taken by local judges in future legal developments.

4. *Implications: Post-modern Context of Legal Assistance*

The focus on legal pluralism in Indonesia should be considered in the same context as numerous other cases in Asian and African societies that suffer from the increasing gap between formal and informal norms. Although formal law modification by the local legal elites is needed for successful incorporation of informal norms, it is often implausible mostly because of the scarcity of human capacity. The mostly short-sighted legal transplant projects can hardly improve the situation.

In this deadlock, probably, we may still respect the local bottom-up initiative for incremental attempts to integrate the dispersed normative situation. Donors are expected to assist institutional mechanisms which enable such gradual legal development through the accumulation of legal interpretations which may ultimately pave the way for formal law amendments.

VI. SUMMARY OF FINDINGS

This paper reviewed three cases of Japanese legal technical assistance to Asian countries to consider general lessons about legal transplants in the Asian perspective. Although foreign observers tend to describe Japanese assistance as the Japanese version of "legal transplant" driven by national interests, the author drew on different conclusion. What has been attempted is not a transplant of Japan's own code system or any other particular set of written laws, but rather, an introduction of a set of institutional mechanisms through which Japan has had its own experience of perpetually transforming once transplanted Western models into its own.

---

[150] See Kusano and Kawata, supra note 149.

If this can be called a "legal transplant," then the leading actor in this transplantation process must be, instead of donors or a handful of local legal elites who draft written laws, ordinary people whose assertions of social norms through legal disputes will continually make their institutional mechanisms move toward legal development. Donors can only be expected to go along with this process of legal transformation in which local institutions take the initiative in enabling interaction between imported formal law and existing social norms, which will ultimately produce their own integrated law as a living system. It doesn't matter whether or not the draft codes assisted by the donor team safely pass at the local legislative process, since the legislation is just the beginning point of more substantial task of donor assistance in accompanying local legal transformation. What benefits this long-term involvement is more comprehensive and detailed comparative legal knowledge on micro aspects of civil procedural law and practice, for which more accumulation of comparative legal studies is expected.