



THE ROLE OF LAW IN DEVELOPMENT PAST, PRESENT AND FUTURE

Edited by Y. Matsuura

*Nagoya University
CALE Books*

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FOREWORD

The efforts to use law to assist social and economic development date back to the 1960s when the United States provided development assistance in South America and Africa. The American efforts identified difficulties and tasks of the legal reform assistance in the context of the economic development. As Professor Trubek reflects in his contribution to this volume, the American projects, though full of rich inspirations, were not so successful.

Since the 1990s leading countries of the world again have tried to use law to assist developing countries and post-socialist countries to shift to the market economy. We can not find any elaborate planning and preparation on the part of donors of legal reform assistance. Rather, it seems to be an emergency response to the desperate needs of these countries.

The symposium “The Role of Law in Development —Past, Present and Future—” is an attempt to “stop, listen and see”, after a decade of legal reform assistance, our past experience of legal reform projects. Approximately one hundred and fifty experts and academics participated in the symposium to share their experience and thoughts on the past projects.

The symposium reviewed the history of legal reform assistance and then discussed what sort of lawyer will be most effective in the recipient countries. It also examined how law is invoked and utilized in real social context of developing countries. The very strong assumption that law is essential to economic development, democracy and protection of human rights was subject to critical scrutiny. A translation project of Japanese law into English was reported as an effort to share the information about law globally.

All the participants agreed that we did our best efforts but there still remains much to be done. We also recognized that developed countries must reflect upon their own legal practice so that their experience should become truly relevant to the recipient countries.

This book is the first product of the consortium of those who are deeply concerned with the sound development of the recipient countries.

Yoshiharu Matsuura

Professor of Law, Nagoya University Law School

Table of Contents

<i>FOREWORD</i>	iii
<i>List of Authors</i>	vi
The “Rule of Law” in Development Assistance: Past, Present, and Future	
<i>David M. Trubek</i>	1
A) The Law and Development Movement of the 1960s	1
B) Crumbling Pillars: The Collapse of the L&D Paradigm	4
C) The “Rule of Law” Replaces Law and Development	6
D) Beyond Critique: What Future for the Rule of Law?	16
Selected Bibliography	17
Japanese Approach toward Legal Development Assistance (Law and Development)	
<i>Akio Morishima</i>	19
Legal Education for Developing Countries: A Personal Case Study from Indonesia	
<i>Cliff F. Thompson</i>	21
Introduction	21
Cautionary Comments	21
A Personal Case Study from Indonesia	22
Developing legal education in Vietnam	
<i>Lars-Göran Malmberg</i>	33
Introduction	33
The Project	33
Law and Legal Assistance in Uzbekistan	
<i>Katsuya Ichihashi</i>	41
Introduction	41
1. What is Uzbek Law?	41
2. Statutory “Legal Failure” and the Rule of Informal Laws	44
Conclusion	48
References	48
Removing Impediments to the Mobilization of Local Resources	
<i>Charles R. Irish</i>	51
1. Introduction	51
2. Legal obstacles to local resource mobilization: A sampling	52

3. Why the Benefits of Reform Are So Great	54
4. The Barriers to Reform Are Substantial	55
5. Conclusions: Implications for Legal Assistance Programs for Less Developed Countries	57

The Rule of Law and Economic Development: A Cause or a Result?

<i>Hiroshi Matsuo</i>	59
1. Introduction	59
2. The Rule of Law and Economic Performance	60
3. Good Government and the Rule of Law	64
4. Conclusion	66
References	68

Human Rights and Democracy in Vietnam: Some Thoughts on the Philosophy of Legal Assistance

<i>Masanori Aikyo</i>	71
1. Human Rights and Democracy in Vietnam	71
2. The Position of “Human Rights” and “Democracy” in Legal Assistance Activities	73
3. What Do “Human Rights” and “Democracy” Contribute to Legal Assistance Studies?	75
4. What is Legal Assistance? – Reviewing the Philosophy Behind It	77

Development and Democracy from a Viewpoint of International Law

<i>Maki Nishiumi</i>	81
Introduction	81
1. International law of development / droit international du développement	81
2. Right to development / droit au développement	83
3. Sustainable development / développement durable	84
Reference	84

Improving Legal Transparency: The Translation Project of Japanese Law and the Prospect of New Comparative Law

<i>Yoshiharu Matsuura</i>	87
Introduction: Seriously Imperfect Information	87
2. Real Challenges to the Translation Project	88
3. Good Translation and Information Technology	90
4. The Translation System and the Computer-aided Legislative Drafting	92
5. A New Approach to Comparative Law	94

Appendix

Programme of the Symposium	111
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List of Authors

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Over the course of his career, he has traveled to over 70 countries working with existing legal systems to improve practical results. He recently created a CD-Rom project on teaching An Introduction to Tax Law in Indonesia to be offered to Indonesian law schools. This project was originally proposed by the Economic Law, Institutional and Professional Strengthening Project (ELIPS II), and is awaiting final approval by U.S. AID. In addition, he has also focused on law in action, arranging exchanges with Chinese lawyers and judges, recently establishing a program for seminars and internships with Shanghai Xuhui District Municipal Workers.

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The “Rule of Law” in Development Assistance: Past, Present, and Future

David M. Trubek

This essay is dedicated to Judge Brun-Otto Bryde of the German Constitutional Court, a pioneer in the study of “law and development” and a champion of democracy and human rights. In preparation of this paper, I received invaluable comments, assistance and support from David Kennedy, Duncan Kennedy, Catherine Weaver and Alvaro Santos

The issue of the relationship between legal institutions and “development”, whether development is defined narrowly in economic terms, or more broadly, was originally mooted by Max Weber 100 years ago and has continued to fascinate scholars. In recent years, it has also come to interest policy makers as development institutions have placed increasing emphasis on the “rule of law” as a necessary ingredient in any development strategy. The result has been a proliferation of law reform projects and programs supported by development assistance institutions.

In the 1990s, there was a massive surge in development assistance for law reform projects in developing and transition countries. These projects involve investments of many billions of dollars. The World Bank alone reports it has supported 330 “rule of law” projects and spent \$2.9 billion dollars on this sector since 1990. At the beginning of this new surge of interest in law within the development community, there appeared to be a broad consensus on the reasons to create the “rule of law” in these transitional and developing economies, on what the “rule of law” meant, and on the best strategies to implement those objectives. But as more was learned about the challenges, and a burgeoning literature emerged, it has become apparent that the initial enthusiasm for the rule of law masked different, and potentially contradictory, visions and approaches. This paper seeks to trace the origins of the current wave of interest in the rule of law, identify the contradictions that have emerged, and specify issues now on the agenda.

A) The Law and Development Movement of the 1960s

Fully to understand the present, it is useful to go back to the first wave of interest in law in the international development assistance community. This was the law and development (L&D) movement that started in the 1960s and continued into the 1970s. This movement was led by a small band of liberal lawyers working in development agencies, foundations and universities in the US and Europe. They sought to interest development agencies in the importance of legal reform. Although the L&D movement was relatively small and short-lived, and had little impact on the development policies of its time, it did put the issue of how law related to “development” on the intellectual agenda.

The L&D movement was built around the dominant Western development paradigm of the

time which gave priority to the role of the state in the economy and the development of internal markets. This was the era of import-substitution industrialization, in which developing countries sought to build their own industrial capacity by limiting manufactured imports from advanced economies and providing subsidies for national firms. The basic economic model was one of a regulated market economy in which the state played an active role, not just through various forms of planning and industrial policy but also through state ownership of major industries and utilities.

Although the rhetoric of development stressed that the ultimate goals were freedom and democracy, not just growth, the projects focused on growth. Development policy stressed economic matters not because planners were uninterested in political democracy or social development, but because those who cared about such matters thought they would follow from economic growth. This meant that within this vision it was possible to accept – if not favor – various forms of bureaucratic authoritarian rule while professing allegiance to ideas of democracy and promotion of individual freedom. Authoritarianism could be portrayed as a temporary stage that would foster growth but automatically wither away once growth was achieved.

In this context, it is no surprise that the small band of liberal lawyers who focused on law reform as a development strategy placed great emphasis on the economic role of law and highlighted the importance of law as an instrument through which state actors could shape the economy. This meant more effective operation of state-owned economic enterprises and “modern” approaches to regulation of the private sector. The L&D movement cherished a vision of lawyers as pragmatic, instrumental problem-solvers who would facilitate state-led economic development. Depending on their role, such “modern” lawyers would help policy makers shape and enforce effective regulations; advise the managers of state enterprises how best to realize their goals; and counsel private clients in ways that would allow them to grow and profit while acting consistently with the policy objectives of the planners and law-givers.

According to the L&D planners, legal systems in Latin America and other developing nations were not producing the kind of modern law and lawyers that were needed. The planners saw many obstacles to legal modernity. Foremost among them was that the legal cultures of these nations were highly “formalist”. By this the L&D planners meant rules were developed, interpreted, and applied without careful attention to policy goals. They alleged that *formalist law teachers* taught that law was an abstract system to be applied by rigid internal rules without concern for policy relevance and impact; *formalist legislatures* copied foreign models or followed abstract principles instead of studying social context and shaping rules for instrumental ends; *formalist judges* applied rules in a rigid and mechanical fashion rather than first accepting the inevitable discretion adjudication entails and then looking to the policy goals behind the rules to guide them in the application of this discretion; and *formalist practitioners* stood aloof from both the goals of the law and the objectives of their clients, issuing interpretations based on some abstract logical system or rote application of formulae thus impeding rather than fostering progress.

Formalism, in this sense, engendered other weaknesses. These included weak enforcement, inappropriate rules, and low legitimacy. Enforcement was ineffective in part because the rules adopted were inappropriate to specific national contexts and thus were easily ignored, and in part because of administrative deficiencies and corruption. The rules passed were inapposite:

this was because they either had been copied from more advanced systems without real concern for national need and attention to specific national context, or because they were elaborated by some system of abstract logic equally insensitive to real policy concerns. The legitimacy of the legal system was low because the rules had little to do with the needs of the country and for that reason (among others) laws were frequently ignored.

This diagnosis led to the L&D programs that evolved in the 1960s. The primary goal of these programs was to transform legal culture and institutions through educational reform and selected transplant of “modern” institutions. If formalism was the source of bad laws, weak enforcement, and ineffective or counterproductive lawyering, then the most important thing to do was to create a new, more instrumental *legal culture*. This culturalist approach led to a heavy emphasis on reform of legal education. Legal education was seen as the source of the evils of formalism, and change of legal education as the way to transform a formalist culture into an instrumental one. Instrumentally-oriented law schools would not only turn out lawyers who would approach their tasks in an pragmatic, can-do fashion; they would also be venues from which a critique of formalism in law making and application could be mounted, as well as think-tanks that could produce the modern law that was so badly needed.

This culturalist approach meant that the L&D movement found itself working to a significant degree with law schools and with the legal elites that exercised substantial influence over major law schools in the developing world. Less attention was paid to the legislature, judiciary or practicing bar. This was not because they were thought to be less important, but because it was assumed that change in the education system was the most effective way to bring about change in all other legal institutions.

Looking back, it is not wholly clear why the idea took hold that legal education was the fulcrum on which all forms of change would occur. It seems as if the planners assumed – paradoxically – that legal education was both highly autonomous and yet very influential. That is, they assumed that it would be relatively easy to bring about change in the law schools because they were freer from the forces of “formalism” than the bench or bar while at the same time they thought that once change occurred in the schools it would immediately influence modes of adjudication and methods of lawyering. The focus on legal education also may have been influenced by the importance of law schools from advanced countries in the development effort. The pioneers of the law and development movement were drawn from elite law schools in the US and Europe and, early-on, called on the schools to assist in the effort. And in the US at least the law schools were actively involved in development assistance projects while the organized bar, bench, or attorneys general usually were not.

Legal education reform may have been an area of prime concern but it was not the sole focus of reform energies. It was also recognized that there was a need to create modern rules and legal institutions. This meant to some degree transplanting legal institutions from more advanced countries. But in accordance with the culturalist critique, this had to be done with careful attention to local needs and conditions to avoid the mimicry that seemed to have played such a major role in legal borrowing in the past.

Both in the reform of legal education and the development of modern law, the emphasis was on economic law and the training of business lawyers not just in the private sector but also in the public sector which played such a major role in many third world economies.. This emphasis on economic law was not because all L&D planners were indifferent to issues of

democracy, social justice, and human rights; rather it was because many thought that such values were best served by first getting growth going. Moreover, they believed that a more effective legal system would – by its very nature – insure protection of individual rights. Just as the development thinkers hoped (or pretended to hope) for spillover from economic growth to democracy, so the L&D movement believed there would be spillover from an effective and instrumental orientation in economic law to “democracy values” like access to justice and protection for civil rights.

What was the theory that lay behind the law and development movement of the 1960s? In a sense, there was none. Academics played a role, along with lawyers and others in development agencies, in creating the movement. But they really had no well developed theories to explain their choice of programs and projects. Beyond a general belief in the importance of law, the relevance of western models, and the importance of a modern legal culture, it was all *ad hoc* and pragmatic. This was a time everyone thought it urgent to get on with the job, not theorize. Theory could—and did—come later.

The Law and Development Movement had a brief and intense life. Of course, by today’s standards it was never a major enterprise. It was focused on a few countries in Latin America and Africa. Projects were small and short-lived, and funds limited. The bulk of the funding came from foundations, not bilateral or multi-lateral aid agencies. USAID did support some projects, but neither the World Bank nor regional banks like the Inter-American Bank for Development directly supported the reform of legal institutions. For a brief period there was a surge of energy and activity, engaging a small but dedicated group of reformers. However, by the middle of the 1970s there was disillusion in the academy, foundation interest declined, and the official aid agencies showed no interest in moving into legal reform. So, for the moment, the L&D movement seemed to have run out of steam.

B) *Crumbling Pillars: The Collapse of the L&D Paradigm*

The movement rested on four pillars; a cultural reform and transplantation strategy; an *ad hoc* approach to reform based on simplistic theoretical assumptions; faith in spillovers from the economy to democracy and human rights; and a development strategy that stressed state-led import substitution. In the course of the 1970s all four of these pillars crumbled.

As L&D actors gained more experience with Western-inspired reform projects, they began to see serious flaws in the approach initially taken. Questions arose about both the culturalist approach and its educational strategy, and the general effort to transplant Western legal institutions. The educational reform program failed to yield the results hoped for. The law schools proved more resistant to change than the reformers had imagined. And even if small gains were made in the educational sphere, and instrumental ideas accepted by some third world lawyers and legal scholars, the projects failed to have the system-wide impact hoped for. It seemed as if the structures of law making, law-applying, and practice were quite capable of resisting foreign-inspired cultural change. At the same time, many efforts at legal transplantation proved similarly disappointing. In some cases the transplants did not “take” at all: some of the new laws promoted by the reformers remained on the books but were ignored in action. In others laws were captured by local elites and put to uses different from those the reformers intended.

Finally, even when change did come about in the economic sphere, leading to more instrumental thinking, effective law making, purposive approaches to adjudication and pragmatic lawyering, the hoped-for spillover to democracy and protection of individual rights did not occur. This was a real shock to Western liberal legalists who had assumed that the legal system was a seamless whole and that reform in one sphere would necessarily lead to progressive change in other areas. These chastened reformers found themselves facing the frightening possibility that legalism, instrumentalism, and authoritarianism might form a stable amalgam so that their efforts to improve economic law and lawyering could strengthen authoritarian rule.

If these lessons from experience started to undermine several of the pillars on which the L&D movement rested, the edifice was further weakened by the effort to develop a theory of law and development. While the early L&D projects were put together in an *ad hoc* fashion and without any effort to develop a systematic theory, both the academics in the movement and some of the funding agencies sensed the need for such theory. As a result, substantial intellectual energy went into the search for a theory of law and development. Such a theory, it was hoped, would both explain and justify the earlier programmatic efforts and chart the way for future reform efforts. However, the project had effects opposite to those desired. Rather than providing a justification for what had been done, and a map for further reform, the theory-building project revealed serious flaws in the original approach without offering a robust alternative that could orient action and guide project development.

It is important to understand the context in which the theory-building effort was undertaken. The L&D movement was conceived and launched in the early days of the 1960s when liberal internationalism flourished and liberal legalism was a confident creed. The L&D projects were largely conceived by people from Western universities and aid agencies. By the end of the decade, when the project of theory-building really got underway, the context had changed dramatically. The failures of the initial reform projects were beginning to become apparent. The anti-Vietnam protests, the events of 1968 in Europe, and other developments had changed the political context and radicalized students in many of the universities in which the theory project was housed. At the same time, the initial reform efforts had brought scholars and activists from the developing world into the effort and they offered perspectives very different than those of the initial US and European reform groups. As chastened reformers met with sophisticated thinkers from the developing world and radicalized students, very different ideas about both law and development began to emerge.

In this new context, it is not surprising that the theory project brought to light some of the simplistic assumptions on which L&D reform projects had been based. Although no explicit and well-developed theories had been put forward in the original surge of L&D interest, further analysis suggested that behind *ad hoc* decision making lay a set of assumptions that constituted a theory of sorts. It became clear that many project designers had employed a linear model of development. In such a model, it was assumed that all nations went through similar stages to reach a common end, represented in this kind of thought by the legal, economic, and social structures of the US and Western Europe. This naive and ethnocentric neo-evolutionist thinking made it easy for L&D planners to believe that something called modern law, not surprisingly found in their own national legal institutions, was the end toward which all legal systems were moving. Because they could imagine that legal development followed evolutionary stages

linked to stages of economic growth, and that “Western law” was the higher evolutionary stage towards which all systems were moving, it was easy to believe that the process of transplanting Western legal culture and institutions would be relatively simple and straightforward. After all, weren’t the reform projects, modeled as they were on the legal institutions of more “advanced” societies, just modest efforts to accelerate the forces of history? With the winds of history at their back, how could the reformers fail?

Needless to say, the moment these simplistic ideas were held up to critical scrutiny, they collapsed. These ideas probably would have fallen of their own weight under any circumstance, but it helped that the critique emerged in a period in which, amid growing concerns about neo-imperialism, there was a great distrust of all forms of western intervention in the developing world. Thus as the 1970s rolled on, the L&D movement had to face the fact that the culturalist strategy was not working as they had hoped; transplantation often went awry; spillover was not happening, and critique had demolished the only theory they had. Things looked bad.

But if that were not enough, at the same time development policy was shifting, thus undermining the fourth pillar. While the L&D movement was going through this period of reflection, changes were afoot in the larger world of development policy. People began to question the effectiveness of ISI and of state-led growth. Attention focused on the inefficiencies of protectionism and the distortions of bureaucratic management of the economy. It was clear that a paradigm shift in development thought was on the way.

The L&D movement, as such, never recovered from these blows. Of course, some academics continued to work on these issues and development aid for law reform did not dry up completely. But the pace slackened. Foundations lost interest in the area and the bilateral aid agencies and international financial institutions did not take up the slack. Some academics became disillusioned. The networks of academics and policy makers that were created in the 1960s started to unravel, and the study of law and development in the academy declined. Some declared that the L&D movement was dead.

C) The “Rule of Law” Replaces Law and Development

The rumors of its death were greatly exaggerated. Today, the enterprise of law reform in developing and transition countries is big business, far eclipsing even the wildest dreams of the L&D pioneers. Aid agencies like the World Bank, which once focused primarily on building roads and dams and getting macro-economic variables right, now proclaim the importance of the “rule of law” (ROL) and spend billions to reform the legal systems of countries as different as Albania and Argentina, Bangladesh and Bolivia. How did we get from L&D to “ROL”? What forces impelled the move of law from the periphery of the development agenda to its very core? And what is the difference – other than sheer scale – between the projects of today and those of the L&D era?

To answer those questions, it is useful to divide the ROL era into two periods: an initial phase in which the new paradigm took shape and massive investments in law reform began, and a more recent period in which subtle changes can be glimpsed.

1) The global context is transformed

Although the L&D movement took institutional form in the 1960s, it could be seen as a

continuation of processes that dated to the end of WWII. The ROL era, in contrast, emerged during the latest wave of globalization and the post-Cold War era. This radical change of context helps account for the great differences between ROL and L&D.

The L&D movement emerged in a period in which international economic policy was supportive of state-led initiatives in partially closed economies. In the advanced countries of Europe and the US, this was the era of “embedded liberalism”. This regime, guaranteed by the Bretton Woods system, maintained a balance between openness, democracy, and economic fairness. Embedded liberalism was an *international regime* that operated to facilitate *domestic* politics and shield *domestic* systems of economic regulation and social protection in advanced capitalist countries from global shocks. It allowed individual nations leeway to regulate the economy, promote employment, insure against economic risks, and redistribute income. It supported democratic politics at the national level, ensuring that when governments exercised the powers safeguarded to them by the international regime they would act in the best interests of their citizens. This system combined efficiency with legitimacy: its great virtue was that once the international machinery was set in motion, the nation states had effective authority over their economies, major political choices could be made at the national level, and national governments could be held accountable through democratic processes.

Although the developing world was only marginally affected by embedded liberalism, one can see strong affinities between the broad intellectual framework the regime rested on and development policy of the 1950s and 1960s. Embedded liberalism was a compromise between those who wanted a completely open world economy and those who felt that it was important to limit the impact of exogenous economic forces and thus allow the state to play a major role in national economies. For people who accepted such a compromise for the developed world, it was easy to accept the idea of import substitution industrialization and state-led growth for the “Third World”.

If the thinking behind embedded liberalism affected the overall architecture of the post-WWII era, the emphasis on state-led growth and relatively closed markets was also a way for the managers of the world economy—or at least of that part of the world economy under Western hegemony—to cope with the pressures of nationalism and demands for decolonialization. National movements seized control of states in former colonies and sought to break ties with their respective metropolises that had been built up under colonialism: this meant placing more emphasis on national development strategies and endogenous growth, a change international development policy makers accepted and supported.

Finally, there was the Cold War, and the ideological struggle with the Soviet Bloc. This required that the West promise to be able to deliver economic growth, but do so while also claiming to promote liberal democracy. Law and development was part of the West’s answer to communism, part of the promise, often not fulfilled, that a Western-led economic system could deliver economic growth with freedom.

The contemporary “Rule of Law” enterprise took shape in a very different *conjuncture*. By the 1990s when ROL really became big business, major changes had occurred in the world economy and world politics. International trade had grown substantially. The spread of industry into the “third world” and the success of export-led growth in Asia, plus the globalization strategies of major transnational corporations and rapid deregulation of capital markets, significantly increased the degree of world economic integration. The collapse of the Soviet

Union helped legitimate the kinds of neo-liberal economic policies that gained credence in the West under the aegis of the Reagan and Thatcher administrations. The vision of a world of partially closed national economies and state-controlled national markets gave way to a vision of a fully open global economy with minimal state involvement and free flows of goods and capital across national boundaries. This vision affected thinking about development in very profound ways, creating a new development paradigm with important implications for the law reform agenda. It implied a triple shift, from state to market, from internal to export-led growth, and from official capital flows to private foreign investment.

These shifts create multiple pressures for the internationalization of legal fields. They provide opportunities for the more cosmopolitan sectors of the legal profession, valorizing knowledge of foreign legal systems and contacts with foreign firms. They put pressure of governments to make legal changes calculated to attract foreign investors. They created the need to strengthen the legal foundations of market institutions.

One of the more dramatic developments is the emergence of new actors into the legal scene. These include the growth of more internationally oriented corporate law firms in developing countries and the emergence of major multi-national law firms as global players. Local law firms with cosmopolitan connections were able to expand in size and influence. And truly global institutions were constructed. Through merger, acquisition, and opening of branch offices, major law firms, led by the US corporate bar and British solicitors, and joined by law subsidiaries of the Big 5 (now 4) accounting firms, created global legal practices with hundred if not thousands of lawyers operating in many countries. While the global practice of law was not a new phenomenon, the scale of such firms and the geographic range of their activities grew geometrically in the 1980s and 1990. The global firms often came to occupy important positions in national legal orders, thus deepening the contact between national legal systems and transnational legal ideas and actors and facilitating the spread of a new orthodoxy about law and economic development.

These forces intertwined with the growing interest of the official development agencies in legal reform so that the reform projects both found responsive supporters and helped create additional support elements. Although the remainder of the paper focuses on the development agencies and their discourse concerning law, it is important to bear in mind that they act in a broader context that is influenced by multiple actors and forces.

2) Discovering the “Rule of Law”: Human Rights, the Washington Consensus, and the emergence of law as a development assistance priority

This was the context for the re-discovery of law in the development community. One could see the ROL movement as arising from the confluence of two forces at work in this new era. These forces had different roots, were supported by different actors, and defined “development” in different ways. But they coalesced, at least at the more general level, on the importance of something called “the rule of law”.

a) The Project of Democracy and the need for domestic human rights protections

The first of these could be called “the project of democracy”, and came out of the human rights movement of the 1970s and 1980s. Remember that the L&D movement thought that growth and cultural transformation would lead to democracy and protection of human rights.

It soon became apparent that this “spillover” would not occur automatically: human rights had to be pursued as an independent goal. As a result, “human rights” went from an idea to an organized movement and institutionalized force. The international community made great progress in specifying human rights norms, creating machinery for international action to enforce them, and ensuring that internationally recognized human rights became a part of the discourse of domestic politics in many countries.

For our story, the most important move was the recognition that purely international approaches to human rights protection were insufficient without strong counterparts in domestic law. Events such as the Helsinki process drew attention to the lack of protection for human rights in domestic institutions. The human rights movement began to look at domestic institutions, championing the creation of constitutional guarantees, judicial review, greater judicial independence, and “access to justice”. This path naturally led to ideas about the construction of “the rule of law”. It was understood that that project would require substantial effort both to dismantle older systems that had buttressed authoritarian rule and to create the new culture and institutions needed to protect democratic freedoms.

b) The Project of Markets and the discovery of institutions

The second, and for the understanding of development assistance the more powerful, force might be called “the project of markets”. Following the decline of the 1960s statist-ISI paradigm, a new set of development policy prescriptions emerged from the Washington-based international financial institutions. This approach stressed export-led growth, free markets, privatization, and foreign investment as the keys to growth. To pursue these goals, it was necessary to create all the institutions of a market economy in former command economies and remove restrictions on markets in *dirigiste* economies such as those in many Latin American countries.

For many who promoted the project of markets, growth would be best achieved if the state stayed out of the economy except to the extent that—through law—it provided the institutions needed for the functioning of the market. These include guarantees for property rights, enforcement of contract, and protection against arbitrary use of government power and excessive regulation. All this was packaged as “good governance” and deemed important both to stimulate domestic growth and attract foreign investment.

In the very beginning, promoters of markets may have assumed that the main thing that needed to be done was to get the state out of the way, and somehow everything else would take care of itself. But it soon became apparent that markets do not create the conditions for their own operation, so that the move to markets would involve major institutional reform. As a recent World Bank Report notes:

Subsequent practical experience suggested that reform efforts could not stop with policies designed to shrink the state and liberalize and privatize the economies...It turned out that a lack of attention to institutions generally, especially legal ones, placed substantial limits on the reforms as a means to promote economic development and poverty reduction. (World Bank 2002, p. 17-18)

c) The Rule of Law as a common goal

Once the economic development agencies realized that the neo-liberal turn involved positive intervention to create the institutional conditions for markets, development agencies were

committed to investing in legal reform. They found their concerns overlapped with those of the proponents of human rights and democracy. For both, the rule of law was a common goal.

While the project of democracy and the project of markets seem very different, they both identified “the rule of law” as an essential step toward their objectives. Both thought it important to have constitutional guarantees for certain rights, even if they differed on the rights to be given primacy. Both thought that an independent judiciary, preferably armed with powers of judicial review, was desirable, even though they had different ideas about what the judges were to be independent of and what was the purpose of such independence. And they agreed that efficiently functioning courts providing cost-effective access to justice were needed, although they probably had different ideas about who should get such access and for what ends they would use it.

Ironically, both the market builders and the democracy promoters showed a faith in formalism, albeit a modernized neo-formalism, which was seen as an inherent part of a “rule of law”. For some of the promoters of democracy and freedom, it seemed self-evident that independent judges would possess a method of adjudication that would resolve all questions without resort to ideology, politics, or even policy-oriented balancing. However, at the same time that ROL proponents were championing formalism, they also were arguing that it was necessary to make legal systems more effective and efficient, and promoting instrumental thought and greater sensitivity to policy concerns.

The reform agenda that came from this curious amalgam of markets and democracy was wide-ranging, covering all aspects of the legal system from education and drafting of new rules to organization of the bar. This was especially true for programs in former command economies where, it was thought, the whole institutional structure of market society had to be built from scratch. Thus, unlike the L&D movement which focused on education, ROL projects sought to bring about change in all aspects of the legal system. This meant that there were projects to strengthen the bar and bench as well as the academy, and to reform legal rules in almost all areas. Practicing lawyers, prosecutors, judges, and court administrators from Western countries joined legal academics in this new phase of law reform and transplantation. However, special emphasis was placed on the administration of justice. This includes the efficient management of cases, increased access to justice through the construction of alternative dispute resolution mechanisms, enhanced means of enforcing judicial decisions, and the promotion of judicial independence. While there are many reasons why the administration of justice loomed so large in the ROL programs, it is worth noting that because of their shared faith in the role of judges, this is an area in which the project of markets and the project of democracy overlap.

Several distinctive features marked the first phase of the ROL era. In addition to neo-formalism and a focus on the administration of justice, there was great emphasis on contract and property, seen as core ingredients of a market economy, a strong belief in the possibility of legal transplantation, a willingness to conduct reforms at once in all parts and levels of the legal order, and a view that there was one model of “the rule of law” that made sense for all countries. Further, there was a faith that the needed reforms could be imposed from the top, and would be quickly and easily accepted.

Looking at some of the ideas and projects of this period, L&D veterans could only sigh as they saw many of the errors of the past being repeated. For them, the emphasis on top-down, one size fits all reform, suggested that little had been learned from prior experiences. What

about all the experience with the limits of transplants, the need for adaptation to local contexts, the possibility of multiple paths to growth, the risk that reforms would be captured by elites for their own ends, the gap between law the books and law in action? And what could they make of the apparent return to formalism? After a personal encounter with the managers of the new ROL program in USAID in the early 1990s, I felt about that agency as Tallyrand felt about the Bourbons after the Restoration: they had forgot nothing and learned nothing!

3) *Critiques of the First Phase*

The first phase of the ROL enterprise had a narrow concept of the rule of law and a simplistic notion of how bring the rule of law into existence. There were three things that could be said in criticism. The first dealt with the implementation ideas. The others dealt with the institutional ideas themselves.

a) Questioning implementation methods

The first criticism has already been suggested. It focused on the method to implant the rule of law. For those who thought that there was a single model good for the whole world, attention had to be drawn to the fact that working legal institutions must be embedded in diverse contexts. Those who relied heavily on legal transplants had to be reminded of the complex and disappointing history of legal transplantation. And those who thought that reform ended with the passage on new laws needed to be lectured on the historic gap between the law on the books and the law in action.

b) Challenging the model itself

But doubts about the enterprise went beyond questions of timing and strategies for transplantation. There were real questions about the kind of “rule of law” that would result. Critics expressed concern about the results that would come from successful implantation of the initial rule of law model.

These more fundamental criticisms might be divided into two broad types. The first were those who agreed with the basic ideas behind the ROL enterprise, focused on the economy, but accepted a somewhat broader role for law and legal institutions than the strict, neo-liberal market vision that took center stage in the first phase. Early ROL ideas rested on a particular view of the role for the state in the economy. They presupposed severe restrictions on economic regulation. Private law was presented as a neutral framework with no distributional effect. The model did include protection for human rights, but these included rights to property as well as political and civil rights, and property was emphasized. The role of the judiciary was to police the boundaries between state and market, and it was thought they would do this through a mechanistic formalism.

Critics could note that such a model was at odds with the actual existing arrangements in all advanced capitalist states. They could point out that these countries used law to intervene in markets in myriad ways to correct market failures and allocate risk. They could also note that actually existing legal systems in established market economies vary in many dimensions, and that there was no single model or set of best practices that could be copied, even if, despite the prior experience with transplants, copying could be done effectively.

While this second criticism fell well within the mainstream of liberal thought about law and development, a more radical strand may also be discerned. The more radical position would embrace the first two critiques, but go beyond them to promote a version of the “rule of law” that promoted solidarity as well as efficiency and which operated more as an arena in which the struggles for various values and interests could go on than as a fixed entity rigidly cabined by formal rules and processes or a technocratic machine limited exclusively to correcting market failures.

c) revealing contradictions in the amalgam

If we look at the body of thought that arose in the first stage (ROL-1), we can see that it represented an uneasy amalgam of potentially contradictory strands. Emerging from an unstable alliance of the project of markets and the project of democracy, the amalgam had latent within it serious tensions. Initially, these were masked by the vagueness of the idea of the rule of law, a term sufficiently general so that different meanings might be and were read into it by partisans of differing visions.

Of course, there were areas of real overlap between the visions of the two projects: thus both believed in the idea of an independent judiciary that would serve as a shield against arbitrary state action. And it may be that both sides felt a need to play down differences in the interest of interesting policy makers in the part of the vision that they really shared. But as time has gone on, and critics have poured cynical acid on some of the initial ideas of the initial ROL effort, the contradictions always latent in ROL-1 and the neo-liberal development model have become clearer. These include contradictions between:

Formalism and pragmatism

ROL-1 stressed the importance of a neutral framework for growth, judicial autonomy, and adherence to the rule of law while simultaneously championing the need for an instrumental approach to law, pragmatic problem solving, and policy science. Thus it contained an unstable amalgam of legal formalism and a post-realist legal culture that not only rejected formalism, but *denied that formalism is a realizable goal*. According to the legal realist tenets embedded in post-realist pragmatist thinking about law, legal orders, private as well as public, are inherently indeterminate. As a result, any effort to revive formalism and pretend otherwise was mystification. As a result, pragmatists not only rejected the formalist option but claimed it was a myth behind which rules were being manipulated. As time goes on, the contradictions between these two inherently inconsistent strands of legal culture have become clearer.

Economic constitutionalism and democratic empowerment

The ROL-1 amalgam favored strong constitutional or quasi-constitutional protections for basic economic freedoms including property rights, freedom of contract, and protection against excessive and arbitrary regulation. At the same time, stress was placed on expanding access to justice, popular empowerment and more democratic forms of governance. At some point, these two approaches were bound to clash if democratically-elected governments choose to regulate their economies and intervene in market processes.

Market-oriented growth and direct poverty alleviation

The ROL-1 amalgam arose at a time when the faith in markets to spur growth and lift all boats was at its apogee. ROL accepted poverty alleviation as a goal, but in the robust version of this faith, there was no need for direct action for poverty alleviation as this would result from growth itself – yet another “spillover” idea in a field plagued by such notions. Needless to say, as time went on and the promised growth did not always materialize, or materialized but did not automatically lift all boats, this contradiction also has become more apparent.

Efficiency and distribution

In the ROL-1 amalgam, stress was placed on law’s role in making the economy more efficient, but little was said about distribution. There were two different reasons why distributional issues were down-played. First, according to formalist thinking, the rule of law simply creates a framework for efficient allocation of resources and does not itself have distributional consequences. Second, in robust neo-liberal economic thought, distributional issues are generally downplayed. But as some in the ROL enterprise have brought to light the inevitable distributional effects of all legal rules and institutions, and also seen the desirability of direct forms of intervention for distributional purposes, issues of distribution have reappeared in the debate.

Globalization and endogenous growth

Two cardinal aspects of robust neo-liberalism are that everyone will benefit from greater global economic integration, and foreign investment and export-led growth are the best development strategies. In this vision, a primary goal for the rule of law is to make national economies more attractive to foreign investors. To that end, property and other economic rights should be protected and government intervention limited. At the same time, this vision stresses the importance of measures of legal harmonization and elimination of any discrimination against foreigners so that national economies can be more easily linked to larger global or regional economic entities. But as evidence came in to show that liberalization can hurt some sectors of the population, and that some economies had grown successfully while placing limits on foreign investment and stress on internal market development, the tension between globalization and economic fairness has surfaced.

4) *ROL Stage II: Cracks in the Monolithic View of Development and Law*

As one looks at policy developments and at the burgeoning law and development literature, it looks as if we are entering a new stage in ROL era. To be sure, many of the elements of the first stage are still with us. But in recent years, critics have brought to light problems with the neo-liberal Washington Consensus approach to growth and raised doubts about some aspects the program of law reform initially associated with that approach. These changes and doubts, when coupled with other developments, show that the project is more complex – and more problematic – than initially thought. As the L&D veterans feared, the project of institution-building has proven more difficult than imagined. The idea that market development would by itself spur institutional reform has proven an illusion: it is one more “spill-over” idea refuted

by experience. As one observer noted, markets do not create the conditions for their own success. All the problems of transplantation discovered decades ago have belatedly been recognized. Finally, there is a growing recognition that the original compromise between the projects of markets and the project of democracy papered over contradictions now becoming more apparent.

a) Changes in development policy

The first big change has come about in the broader sphere of development policy. Doubt has arisen concerning the ease of implementing policies and institutional changes dictated by the Washington Consensus. This has led to much greater attention to issues of reform sequencing, and to a recognition that active planning and implementation are needed to implement even the most neo-liberal, free market order. But this questioning has gone beyond issues of timing and implementation: some more or less within the mainstream have also questioned some of the policies themselves. They have criticized the exclusive emphasis on export led growth; the strong bias against regulatory intervention; the idea that there is one and only one road to development that works for all economies; the idea that full and immediate capital market liberalization is highly desirable; the lack of concern for strong social safety nets.

As a result, a chastened neo-liberalism may be emerging. In this vision the “big bang” is to be discouraged and privatization and markets phased in gradually; export led growth policies will be tempered with concern for domestic markets; limits allowed on foreign investment; state intervention permitted but only when necessary to correct market failure; and targeted poverty reduction and limited safety nets allowed.

b) Official ideas about the “Rule of Law” become complexified

The second change has occurred in official thinking about law. One can see signs that development institutions have begun to question some of the ideas that were taken as holy writ in the first stage of ROL. Mainstream voices are heard questioning formalism; raising doubts about rigid constitutional constraints on state action; recognizing failures of transplants and top-down reform; stressing need for context-specific project development; accepting need for long time horizons; recognizing the need to add labor rights, women’s rights, and environmental protection to contract, property, bankruptcy, and economic regulation; acknowledging need for special efforts to ensure access to justice; and questioning the adequacy of the field’s knowledge base

Thus the World Bank has recently expressed doubts about the earlier commitment to formalism:

A new conventional wisdom about the rule of law and development seems to have taken root in development circles. It is asserted that formalist rule of law, which stresses institutionalized legal mechanisms and absolute autonomy from politics, is a necessity for economic development. But attempts to transplant formalist rule of law to developing and/or democratizing countries could actually be counterproductive for economic, institutional, and political development, especially when informal mechanisms would be more effective and efficient (World Bank n.d)

Similarly, in a recent note posted on the Bank’s legal institutions website, we see an emerging

recognition of the complexity of the relationship between formalism, judicial autonomy, and development:

[T]he economic impact of a particular set of institutions often depends on context. For example, certain institutions make it difficult for the government to institute policy changes. In some contexts, this is beneficial for economic development, since it makes government commitments more credible. On the other hand, in times of economic crisis or rapid change, these same institutions can hinder a government’s ability to respond effectively. An independent constitutional court may encourage foreign investment by ensuring the executive does not arbitrarily seize property, but if it were to prevent the rapid adoption of policies needed to counteract a financial crisis, it might also discourage investment (ibid.)

These cracks in the monolithic views of the first stage of ROL parallel changes in thinking about development policy in general. Even those who think that it is possible to create perfect markets now see that such a program involves time-consuming and arduous efforts at institutional reform. But as it becomes apparent that there will always be market failures of various forms, justifying some degree of regulatory intervention, emphasis is shifting towards various forms of regulatory and administrative law. These were far from central to the vision of the first stage of ROL. Finally, the recognition that there are different legitimate paths to growth casts doubt both on the “one size fits all” idea and the sure faith in legal transplants.

c) Expansion of the reform agenda and refinement of methods

The changes in official views have led to changes in the reform agenda and the nature of projects now being undertaken. A quick survey of recent developments at the World Bank indicates the following:

- explicit recognition of the failures of transplants and to top-down methods
- rejection of a one-size fits all approach and stress on the need for context-specific project development based on consultation of all “stakeholders”
- awareness that legal reform requires a long time horizon and cannot be carried out quickly
- recognition of the importance of the rule of law for poorer segments of the population
- support for rule of law projects that deal with labor rights, women’s rights, and environmental protection
- acceptance of the need to make access to justice an explicit dimension of judicial reform projects

d) Questioning the knowledge base

A final aspect of the current scene is that questions have begun to arise about the knowledge base on which the whole enterprise has been built. While the World Bank has acknowledged that it made mistakes in the past, its’ current publications stress that there is now a strong knowledge base and effective methodology to guide rule of law projects. However, even sympathetic outside observers have questioned this assurance. In a recent paper, Thomas

Carothers, heard of the Democracy and Rule of Law Project at the Carnegie Endowment for International Peace, challenged official thinking on a range of issues (Carothers, 2003). Where the World Bank is quite confident about its ROL credos, to the point of producing tables that quantify the amount of rule of law and show that the more ROL, the higher national per capital income (World Bank 2002), Carothers struck a more skeptical note. He questioned the validity of key aspects of conventional ROL wisdom such as whether:

- the rule of law is necessary to attract foreign investment
- technical improvements in the administration of justice are necessary for democracy
- the court system is the core of “the rule of law”.

Carothers made clear that, despite the expansion of the reform agenda and the refinement of methods, ROL projects remained tied to a Western model—one might add an *idealized* Western model—in which the core of the rule of law is thought to be an independent judiciary applying neutral rules in an objective manner and to the belief that the creation of such an institution will directly and unproblematically accomplish a wide range of goals from market development to poverty alleviation. Carothers suggested that despite rhetoric to the contrary, the development agencies have learned very little from their experiences and there are substantial obstacles to any systematic learning process in this field.

D) *Beyond Critique: What Future for the Rule of Law?*

Shifts in views about development and the cracks that have emerged in the original rule of law orthodoxy suggest that things are more open and fluid than they once seemed. Critics of the Washington Consensus and the legal orthodoxy it engendered have succeeded in opening up the discourse. The moment seems more open, the discourse more fluid.

But doubts remain. Are we dealing with a situation in which small concessions have been made to other ways of thinking about both law and development, but a hard orthodox core remains? Or is this a time when new ideas and new strategies might have a chance to be taken seriously? The World Bank has expanded its reform agenda and rejected the most blatant errors of implementation. It has added some “social concerns” to the economic rights core of its vision. But the Bank’s view of “ROL” is still grounded on strong assumptions about the nature of law, the relationship between law and development, and the relevance of Western models, however contextualized. So the question is: in this period of rethinking and partial doubt, is there a real chance for the recognition of alternative development strategies and of very different legal paths that can be followed on the road to economic growth and political freedom? Is it possible, for example, that acceptance of pragmatism could replace faith in formalism, however “neo” the formalism may be; democratic empowerment take precedence over economic constitutionalism; poverty alleviation be a goal in itself rather than a result of “trickle down” policies or token project additions; distributive concerns be highlighted in policy making and the construction of legal rules and institutions; and a better balance struck between economic integration and endogenous growth?

My view is that there is an opening for the introduction of new ideas. I see the present as a turning point, a moment in which it is possible to go beyond critique of orthodoxy to

reconstruction. Thus I think that progressive intellectuals should engage constructively with the ROL enterprise. I support such values as human dignity, equality, and fairness that are embedded in the idea of the rule of law. I recognize that actually existing legal systems do not necessarily embody these values, and to some degree can deny them while professing to uphold them. But we also know that these actually existing legal institutions are arenas in which the struggle for such values can go on in relatively bloodless ways.

That suggests that the struggle for progressive goals can be compatible with efforts to create something called “the rule of law”. And it raises the possibility that ROL development projects could be shaped to serve the whole population, not just an economic elite. There are groups in the developing world who seek to do just that. Intellectuals in the north have an opportunity—and an obligation—to work with them to identify the perils and open up the possibilities of this present moment.

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Japanese Approach toward Legal Development Assistance (Law and Development)

Akio Morishima

Japanese strategy of the official development assistance in the legal sector is fundamentally different from that of the law and development movement of the United States in the 1960s. The goal of the legal assistance project is to provide the countries in the process of transition from socialistic economy to market economy with necessary information and resource training to establish legal institutions appropriate enough to participate in the global market. Its methodology is as follows: to organize Japanese expert groups to draft laws or to advise drafting laws, to dispatch those experts to the partner country and to hold discussion meetings with lawyers of the partner country, and to conduct field studies if necessary. JICA (Japan International Cooperation Agency) sends long term experts to the partner country to coordinate project works. The Japanese experts do not make any final decision on the draft law but always seek for consensus with partner experts. For the purpose of capacity building, judges and government officials are invited to Japan to participate in a four-week seminar.

The philosophy of Japanese Legal Assistance is the partnership or equality between the two parties. Of course, the country of transition does not have the appropriate market legal institutions. The society itself is currently far behind the developed countries. However, the law of the country has to function in the society. Even when a country has an ideal legal system, it is not the law of the country if the system does not work in its society. Japan received European legal system in the 19th century and took long time to adjust to our own culture and society. That is the reason why we request our partners to take initiatives in making final decisions. Needless to say the countries of transition inevitably have to shift to market economy. In this sense we have to show our partners what are the merits and demerits of a legal institution and other alternatives of the market law. However, we refrain from imposing our preference on our partners.

Last few years the World Bank has been interested in the coordination of legal assistance projects of international organizations and governments under the name of Rule of Law. The idea could be to improve the governance and democracy of developing countries under judicial control. As an idea it is not bad, but each country has its own tradition of judiciary and the check and balance between the administration and judiciary varies from one country to another. If the assisting country imposing its own idea of judiciary, the transplanted system will not work in the society of assisted country.

Having described the experience of Japanese legal assistance, I would like to make my personal comment on the Law and Development in the United States. I learned it when I stayed at Yale Law School in 1971. When former colonies in Africa achieved independence in the 1960s, they needed assistance to establish their own new governments. I suspected that, taking that opportunity, the US tried to extend its political influence to Africa by exporting US

legal system to the countries of former European colonies and to strengthen the political power against the Soviet Union. However, since the legal institution is a part of the superstructure of the society, a mere transplantation of legal system may not root into the society. Despite the legal institutions the dictatorship has prevailed and the administration has lacked governance in many countries in Africa.

So far Japanese legal assistance project has covered only private laws (transaction laws) and extended to the countries in the process of transition from socialist economy. But some countries such as Indonesia are interested to receive assistance and the assistance to some public law areas such as the jail administration law is requested. We have to reexamine our assistance policy from the broader perspectives and formulate the long term strategy for the legal development assistance.

Legal Education for Developing Countries: A Personal Case Study from Indonesia

Cliff F. Thompson

Introduction

My own work in legal education has been about 20 years in developing countries and more than 20 years in the USA. The first phase outside the US was in three countries in Africa from 1961 to 1973, and the second was eight years in Indonesia between 1993 and 2004.

The current quest for principles of effective development is yielding results, but too late to guide me. My guiding principles, whether right or wrong, were consistent. The generalities are easy to state. Legal education must be responsive to the needs of the country, and the “effective lawyer” will not only know about modern law in the global age, but also will be able to apply it in drafting statutes and preparing teaching materials to educate the students, the new generation of lawyers. You must attract to the law school the students and teachers who are as excellent as possible. You must avoid one of the greatest barriers to effective legal skills, namely an education that is too rote, without sufficient opportunities to learn application. There are many ways to provide students with experience in applying the law, but that makes it important to note a limitation often overlooked by those who help plan education in developing countries: money. Faculty members are poorly paid and often needed to take outside jobs that interfere with other ambitions. Overall, law schools in developing countries often do not have the money for adequate libraries, or small-group programs like legal clinics. I have seen impoverished schools that had alleged clinics that were the equivalent of lecturing on “how to ride a bicycle” to 150 people who do not know how to ride a bike. They will learn something, but not how to ride a bike.

Cautionary Comments

1. Although many financial donors express the need for an effective legal system to support development, the perceptions over the past half century of the connection between law and development have changed as much as the waxing and waning of the moon. In 1986 there was a conference at Arden House, New York, called “After 20 Years” that brought together those who had served in Africa and Asia, mostly with the International Legal Center, a creation of the Ford Foundation. If David Trubek and Mark Gallanter had walked into the meeting, there were those who, I feel sure, would have tarred and feathered them. My own view of Trubek and Gallanter’s critical work on law development was not unfriendly. We would later become colleagues at Wisconsin, but I did not know that at the time. My equanimity had two sources. First, from what I had experienced, much of what they said seemed valid, and anyway not as apocalyptic as some believed. Second, if law was to have any role in the new countries of

Africa, there was an acute need for law-trained people, because they were in short supply or virtually non-existent. In Indonesia, in contrast, there were hundreds of law-trained people, but too few with requisite knowledge and skills in modern economic law. So development of legal education could go forward whatever the latest state of the theory of law and development. To the extent I needed reassurance, I got it from Willard Hurst's book, Law and Economic Development (1964), despite the differences between Wisconsin 1836–1915 and where I was serving.

2. One peculiar characteristic about legal education, unlike medical education, is that everyone is an expert. Or so everyone believes. Every law teacher, every lawyer, and a fair number of development experts without law training believe they know what is best. Fortunately, this makes for many good and interesting ideas. Unfortunately, the experts disagree. Once in a while, a good idea takes hold and comes generally to be accepted. In the USA, forceful advocates of clinics date from at least 1930, an idea that finally gained general support in the law schools in the late '60s and '70s. Much of the time in the US, however, the wheel is regularly re-assessed or re-invented, as new generations question their role and the role of the law school. Regrettably, disagreement among the experts about different methods can stall progress on any of the alternative paths of educational reform.

3. The final cautionary comment is that even when the experts are in general agreement, progress can be badly delayed by a conceptual difference. The problem is whether it is necessary to create the image of an outstanding or "ideal" legal education in order to proceed. (i) One view is that an overall conception of an "ideal" curriculum is necessary in order to make smaller changes meaningful. A common sense version of this might be, "A journey of a thousand miles must begin with a single step, but you better know which direction you are going." (ii) There is a trap, however, in the preceding view that must be noted and avoided. If agreement cannot be reached on the ideal curriculum, there may be failure to change what we would otherwise agree was bad, on the basis that an overall conception is needed to guide the smaller steps. Lon Fuller in The Morality of the Law (1964) called the difference the "morality of aspiration (the ideal)" as contrasted with the less ambitious "morality of duty." But the "morality of duty" can be quite practical – in a common sense image, we can get a hammer if we need to pound nails, and we can agree on this even if we disagree about what we should buy for an "ideal" complete set of tools. Likewise, where reformers in a law school agree about specific needed changes, my advice is to plunge ahead with those changes, and don't be embarrassed that there is still lack of agreement on the ideal legal education, because there may never be agreement about the ideal curriculum.

A Personal Case Study from Indonesia

The Suharto regime neglected the Indonesian legal system during three decades of authoritarian rule that ended in May, 1998, when public pressure pushed Suharto out of power. Before his fall, the government belatedly undertook patchwork legal projects. The original ELIPS Project was one of them. It began near the end of 1992, continued after the democratic and reform experiment began in 1998, and ended on October 7, 2004. During those 12 years, there was the original ELIPS Project (1992–1997) and the recent ELIPS II Project (2002–2004), with shorter versions in between, such as the "ELIPS Bridge." The ELIPS acronym

became a landmark in Indonesia, but it had shifting if similar titles, the final one being “Economic Law, Institutional & Professional Strengthening”. The Government of Indonesia and USAID sponsored the ELIPS Projects to help Indonesia to strengthen its legal system in regard to “economic laws.”

When the project began, the phrase “economic law” was in fact not much in use in the United States. In Indonesia, many law faculty members, if they had heard of “economic law”, equated it with a framework for a state’s planned economy. But the Project’s purpose was to oil the wheels of commerce and generate new wealth, especially in the private sector, and with an eye to a global market. An entrepreneurial emphasis was behind the GOI-USAID support for reform in the field of “economic law.”

There are other law reform projects in Indonesia that preceded or accompanied ELIPS, and such projects are likely to continue after ELIPS. Three decades of neglect of the legal system left much to reform. The Civil Codes, originally Dutch, lack official translation and are badly out of date. As reform began, there were virtually no versions in Indonesia of global economic laws, such as the International of Sales of Goods. Many judges were polishing their corrupt practices when not responding to political interference. In legal education, the 26 public law schools had an old guard of faculty (an able group), then a generation gap between it and the younger faculty being hired in the early 1990s. The schools’ curriculae had changed little from what was adopted in the years following Independence after World War II.

It is not the purpose of this paper to cover all of the reform projects, or even to cover all the activities of ELIPS, which had many components. Areas of concentrated effort included the following, noted with the name of the full-time Advisor who could provide a valuable account of the component: government contracts (Hal Sullivan), information technology applied to statutory material (Charles Shapiro); the new Competition (anti-trust) Commission (John Davis), and, most recently, legislation and regulations on anti-terrorism and control of money-laundering (Jon Eddy).

My emphasis is on legal education. The paper will note the many ELIPS activities in legal education, but the emphasis will be on its development of a Masters in Law program in the US for junior law faculty members. A theory about a legal education program is incomplete without realizing there are many unanticipated problems that can defeat the program. These are like the “transaction costs” that bedevil economic models. So I will provide a bit of the troublesome reality, an illustrative story with twists and cautionary tales. An underlying theme will be that the overseas law degree programs, including those in Australia, England, Germany, Japan, the Netherlands, and the USA and others, are the most effective form of faculty upgrading in developing countries that need to reform their legal education, and were essential in Indonesia to jump-start the engine of legal reform.

That the GOI-USAID law reform project contained a significant legal education component in 1992 was unusual. Since then, there has been worldwide no development project in legal education on the scale of the ELIPS Project. Law reform projects often assume that there are enough experts to carry out the new designs, but ELIPS recognized that the decades of neglect in the legal system required assistance to upgrade the legal experts and to create more of them. The Project had significant funding for legal education for much of the period 1993–2004.

ELIPS applied three guidelines for achieving effective legal training: 1) the use of knowledgeable and effective teachers, Indonesian or foreign, as “teachers of the teachers” for

“training the trainers” in USAID parlance; 2) the preparation of written materials for the trainees to reinforce their learning; 3) the provision of intensive and in-depth educational opportunities as well as shorter introductory training. The last guideline was opposed by those who thought it was only necessary to “train up” people in short courses. It surprised me to find so many who thought a one or two day workshop could transform someone into a negotiable instruments expert. One of my arguments for longer programs and not just short-courses was that the introduction in the USA of Articles 3 and 4 of the Uniform Commercial Code required years of educational effort, in the law schools and elsewhere.

You will notice that in the three guidelines that I named, there is no mention of interactive teaching. There was no requirement that the teaching be interactive, although we strongly favored it. Interactive teaching, in fact, has been a preferred goal by legal education leaders in Indonesia since the 1970s, but like other countries, it is easier to ask for it than to get it. ELIPS worked hard in support of interactive teaching, but we also felt we made progress if, for example, a course on the International Sale of Goods was added to the curriculum, where none had existed before, even if it was primarily taught by lecturing.

Also notice that while the assumption of the third guideline (the longer the training the better) proved generally valid, a study in 1997 indicated that a one or two-day workshop, if supported by good teaching and appropriate written materials, could bring about more curriculum reform than expected. The reason was that a newer law school, outside the major cities, with almost no modern economic law in its curriculum, would add introductory materials on new courses into the large blocks of hours that were assigned in a general way to commercial law. In contrast, the more established schools, with more entrenched senior teachers, often were unwilling to undertake the effort of change.

In addition to the three guidelines, namely, the use of good teachers, written materials for trainees, and the use of several levels of upgrading, we had two broad goals that help to characterize the ELIPS Project’s approach to legal education. The first was that we wanted to match the upgrading of people’s knowledge and skills with providing new tools for them to use. By new “tools” I mean new syllabi and new teaching materials for use by the teacher. The syllabi for Indonesian economic law courses were often non-existent or inadequate.

The second broad goal fits the saying of “killing two birds with one stone.” Thus, if there was a need for a workshop on “Commercial Paper,” we would insist on presenters who could prepare papers they were willing to see printed in a “Basic Book” on that subject. This goal of getting double value from activities was one of the many contributions to ELIPS by Professor Mardjono Reksodiputro, a former Dean at the University of Indonesia Law School, and sometime Executive Secretary of the Consortium of Law Schools.

The Need for the Legal Education Programs in Indonesia

The shocking shortage of economic law experts in Indonesia in the early 1990s was well understood by Professor Charles Himawan, the Dean 1986-1992 at the Faculty of Law of the University of Indonesia (FH-UI), and a major player in establishing the modern economic law program at FH-UI. He was also influential in lobbying for legal education to be included in ELIPS’s law reform program. He estimated in 1993 that the FH-UI had at most only 10 faculty who could be considered relatively knowledgeable in economic law, broadly defined, and that the other six “leading law schools” (those offering Masters and Doctoral programs) would, on

the average, each have fewer than five such experts. The situation in the remaining 19 public law schools was even weaker. The some 175 private law schools in 1993 reflected the inadequate state of the public law schools, since most of their faculty were those moonlighting from the public schools.

The shortage of economic law “experts” meant that there were too few people available to do the specialist tasks of initiating law reform, such as drafting the revisions and new laws needed, or designing and teaching the courses essential to educating the new generation of lawyers who are required for the long-term success of the program, and writing the scholarly articles that can help to guide the development of the law.

The basic shortage of legal experts in Indonesia was not, however, generally recognized by most of those who were actually or putatively the experts. They seemed to believe there were plenty of people available for the crucial tasks. Yet when asked for the names of those who were up to those jobs, people provided the same short-list of a few names, the “usual suspects.” It reminded me of a scene from the Beatles’ film “Help” in which a foreign official coming out of his airplane on a tropical isle is obviously impressed by the large number of people in the reception line. He shakes a hand, looks the fellow in the face, and then moves to meet the next person. But then the camera pulls back and you see there are only a handful of people in the line. The explanation is that after a person has greeted the official, that person runs ahead and rejoins the line, producing an endless line-up of greeters. Likewise, there was a wide-spread delusion in Jakarta about the number of economic law experts who were actually available. It may have been they actually believed there were many experts, for there were certainly a large number of faculty members and lawyers, both private and government. Or, their viewpoint may have been similar to an attitude I have seen in every one of the four states in the US where I have taught. Simply stated, many local lawyers assert that their jurisdiction already has too many lawyers and discourage law schools from adding any (who just might compete with them).

Indonesia did indeed have an abundance of law teachers, private and public lawyers, and law-trained people serving in the public and private sectors in a variety of roles in jobs with varying degrees of legal content. But they were not expert in the growing field of economic law, so ELIPS had many potential targets for its training programs.

Our primary emphasis was on the teachers, especially the younger teachers, in the law schools. Attention was also given to a more limited number of young lawyers in selected government offices, and to lawyers generally. The importance of teachers is that they are the ones needed to reform legal education and improve the quality of future law graduates. And in practice, government departments often relied more on law school faculty members than on their own staff in drafting of new or revised laws.

Before turning to the overseas Masters’ programs, I will briefly outline some of the other kinds of training that ELIPS made available.

- One to two day workshops in a variety of topics, involving upwards of 2,000 faculty members, government officials and other professionals;
- Month-long, full-time programs for over 125 candidates;
- Semester-length (3 to five months) full-time training for over 100 junior faculty or government officials;
- Advanced research work of two to four week in US law libraries for five senior faculty

who helped train junior faculty;

- Research fellowships in Indonesia for 24 Masters or Doctoral candidates in economic law subjects;
- 40 new model syllabi in economic law subjects
- 18 sets of teaching materials;
- 12 “Basic Books“ that were not textbooks, but introductions to subjects that emphasized “law in action” as well as the “law on the books;”
- assisted with Continuing Legal Education programs every semester at FH-UI;
- arranged for two US law professors on sabbatical to be in residence at Indonesia law schools to share their economic law expertise: one at USU in north Sumatra (for one semester), and one at UGM in central Java (for two semesters);
- core library collections of 200 economic law textbooks for all seven of the “leading law schools” and 500 additional textbooks for FH-UI;
- legislative drafting training, in a wide variety of formats, most usually a two-week workshop, under the leadership and methodology of the Professors Ann and Robert Seidman of Boston University, and with major assistance to the FH-UI in the revision of its basic training course methods. The participants in the training were legislators, legislative staff, faculty members, and members of NGOs;
- distance learning courses involving CD-ROM technology and some synchronous on-line faculty-student exchange, in conjunction with several of the leading law schools in Indonesia, and with the law schools of the University of San Francisco, the University of Southern California, and the University of Wisconsin. The main courses were an Introduction to US Constitutional Law, International Transactions, and Basic Tax Law.

James L. Agee III, the Chief of Party for ELIPS II 2002-2004, was the principal implementer of the last two noted activities, as well as being involved in other ELIPS programs since ELIPS began in the early 1990s.

Masters in Law Programs in the USA

Between 1993 and 1997, ELIPS sent 10 candidates for a Masters program (hereafter LL.M, although specific titles may differ) to law schools in the USA, and nine were successful. From 2000 to 2003, we sent 13 candidates to the US who successfully returned to Indonesia with their degrees. There were 17 more candidates in the US in 2004, aiming to graduate in May/June, or by September 2004 at the latest. Fifteen did graduate, and two, while remaining in good academic standing, had not completed all of the required credits when ELIPS ended.

The striking increase in the number of LL.M candidates between the original ELIPS Project and the current ELIPS II was, for me, a wonderful development. That is because I am one of the supporters of the view that overseas LL.M training is a crucial step in getting Indonesia into a self-sustaining orbit in its effort to undertake law reform. But there were detractors and opponents as well as supporters of the LL.M program. There is little by way of research to sustain either side. Detractors include those who are sure that they hold an alternative magic key, such as a pedagogical methodology for designing courses, or a new technology that will sweep away the problems of the past. They may be envious of the useful prestige of a LL.M as a credential and the networking among the recipients, but neither the formal prestige nor the network would long survive if the substance of a foreign LL.M were not there.

Local training can be sufficient to excellent, once it is established, and in many areas that level has been reached in Indonesia. But at a time when there are too few people with the advanced qualifications to do all of tasks of law reform , including legal education, it is vital to bring up a new cadre to a high level as fast as possible.

Let me give you three of my reasons for thinking the foreign LL.M could do this. 1) The candidates are associated with teachers and fellow students engaged in advanced legal education on an intense, full-time, and competitive basis, while at the same time largely freed of the time-consuming obligations of their home institutions and the calls of an extended family. 2) I saw the LL.M program work in Africa in the early days of independence of many countries in 1960 and afterwards. I helped in legal education in Sudan, Zambia, and Ethiopia, from 1961 to 1973, often not directly involved with the foreign LL.M programs, but I saw the LL.M produce an overwhelming number of the national legal leaders. 3) But you did not need to look to countries outside of Indonesia, whether in Africa or SE Asia (and Singapore would jump to mind) to make the case for a foreign LL.M. In Indonesia in 1993, those who already could undertake with expertise the revision and drafting of economic laws , and the building of this subject into the university curriculum, were, with few exceptions, those Indonesians who had done a foreign Masters in Law (and occasionally a doctorate), most of them in Australia, the Netherlands, Great Britain, Japan, and the USA.

Oversees Masters Program under the original ELIPS Project (1993–97)

Whatever the merits of the arguments for and against the overseas Masters program, you might imagine that given my views, that the LL.M programs would proceed smoothly in the original ELIPS Project. This was not to be. There were two obstacles. First, although there was money in the contract for overseas training, nothing was tied to a Masters program. There were plenty of rival claimants, especially those few who already had foreign LL.Ms and wanted to begin foreign doctorates. Second, a much greater obstacle was that virtually none of the otherwise qualified candidates from the Indonesian law schools had sufficient ability at English to be admitted to a US law school. This was stunning bad news. I had never met such a weak standard of English It was not the Indonesians fault, the fault was in the wholly inadequate system of language training in the government schools. A telling contrast for me was Ethiopia, which was not a British colony, but it had a high standard of English in the university because of the leadership of Emperor Haile Sellassie.

ELIPS tested large numbers of law faculty candidates, often in the hundreds, at the University of Indonesia and the six other “leading law schools,” and at some of the other 19 public law schools. The ones who were qualified were the few who had already done overseas Masters programs in English. Otherwise, the scene was bleak. At Law Faculty of the University of North Sumatra (FH-USU), for example, we found that out of more than two hundred test-takers only one person had a Toefl score near 550 (213 new scale), still well short of the minimum 580 (237) to 600 (250) required by US law schools, with scores in 640 (273) range being preferred.

In addition to the language requirement, the person was to be a junior faculty member whose career was, or increasingly would be, in economic law. A candidate needed the support of the Dean and key colleagues, as part of assuring later service within the law school, and there was a final vetting by ELIPS. We found an encouraging number of candidates who, other

than the English requirement, met the ELIPS criteria for a LL.M. So the obvious need was to support English language training for the otherwise qualified candidates. That need led to the next shock. The original ELIPS Project contract said that it was “not expected” that funding would be used for English language training, and USAID’s Project Officer for ELIPS used that non-binding indication to make ELIPS support for such training unavailable.

We found indirect ways around that problem, but the main rescue of the Masters program was by UI Law Dean R.M. Girindro Pringgogidgo (“Dean Bipi”). Elected as Dean in 1993, and determined that his junior faculty would benefit by the LL.Ms potentially available from ELIPS, he quickly decided to send some 17 of them to a large house he rented in Cisarua, a small town in the mountain area well away from Jakarta. With an Indonesian language instructor, they studied English full-time for a semester, with permission to return home only on Sundays. This episode is worth telling at greater length, but for this paper I will only emphasize that he had no sure idea of how he would pay the cost, which was about US\$26,000. His bravery and risk paid off, since he found the money for the bill in an evening degree program he introduced, and the majority of the first ELIPS’ LL.Ms came through his Cisarua program.

Otherwise, ELIPS’ indirect assistance to get around the ban on language training was principally through four or five week summer programs for foreign lawyers in the US that were taught in geared-down English, and which had lower Toefl requirements. Some 40 Indonesian junior law faculty and GOI officials went to these programs at the law schools at the University of California (Davis), the University of Wisconsin, and the Southwest Legal Foundation. Later, a more elaborate program for 16 candidates was held for five months at a specially designed program at Harvard Law School.

Eventually we had three faculty candidates from the University of Indonesia who were clearly strong in their analytical skills and motivation, and who were up to the minimum of 550 (213) required by USAID for long-term training. Since we were convinced the three had the character and academic ability to get an LLM, we needed to convince one or more US schools to trust our judgment about the ability of our nominees. In effect, ELIPS asked from a US law school not one but two favors: 1) to lower the 580 (237) or higher Toefl requirement for admission down to 550 (213); 2) to provide, in addition to student advisors, a faculty member who would meet weekly with an ELIPS candidate to make sure the person was on track. The schools that cooperated were the University of Washington (Seattle), the University of Florida, and the University of Wisconsin, which took one candidate each. The initial group of three Indonesians performed from well to sensationally well. American University (D.C.) and Louisiana State University joined the original three US law schools in welcoming the later rounds of LLM candidates under the first ELIPS. The achievements of the first three candidates made it much easier to place later candidates in the US schools, including the original three schools. But there was also some increased risk, since the first selection was of only three candidates observed closely over a relatively long period, circumstances that were less favorable in later selections.

On the original ELIPS Project we had a total of 10 law faculty candidates for the LL.M, seven women and three men, with an average age in the late 20s. Six were from UI, and one each from UNPAD (Bandung, West Java), USU (Medan, Sumatra), and UNDIP (Semarang, Central Java). Nine completed the work for their Masters’ degrees. All but one of the successful candidates have since moved into the middle-level, or even above, in national legal reform.

Overseas Masters Programs under the ELIPS Bridge (2000–2001) and ELIPS II (2002–2004)

The support for the overseas Masters programs under ELIPS took two important steps forward during 2000–2004. First, the competitively-awarded contract to ELIPS II allowed financial support to Indonesian law schools for English language training. Since the level of English among potential candidates had already improved in many of the law schools from 1993 to 2000, the authorization to intensify English training increased the chances of getting good candidates for the LL.M. Second, and more dramatically, the goal of overseas LL.Ms was not only explicit in the contract, it was also posited that approximately 30 new LLM candidates would go to the US. Given that at the time of the contract to ELIPS II there were about five new candidates who had adequate Toefl's scores, the goal was refreshingly optimistic as well as daunting. We were able to prepare 13 who were in the first batch that began LL.Ms in the Fall of 2002.

But the number of otherwise qualified candidates who would reach adequate Toefl scores for the second group to begin in the Fall 2003 was seriously in doubt until the receipt of the official scores in April 2003. We were pleased and relieved that the success allowed the final selection of 17 candidates. They aimed to complete their degrees by September 2004.

That progress was greatly helped by the various programs that ELIPS II could provide in language as well as law training. Similar to the original ELIPS, some workshops, such as the two-week programs in legislative drafting, while mostly in Indonesian also had English presentations as well. More substantively and directly, a new program was that ELIPS provided funding for law schools to put selected faculty into established English programs in their areas, and ELIPS helped to monitor their progress. Some law schools, especially the University of Indonesia, used the ELIPS grant to expand programs they were supporting from their own funds.

Perhaps most importantly, ELIPS II developed three centralized pre-LLM programs that combined introductions to the common law with some of the best English language training available in Indonesia, competitively selected. Both the law component and the language section provided interactive teaching, exams, and individual assessments based on class performance. The first program was with the University of San Francisco and the Indonesian-Australian Language Institute for 13 weeks; the second was with Professor Brietzke of Valparaiso University (and former full-time Legal Advisor to a USAID economic development project in Indonesia) for five weeks; and the third was with the University of San Francisco Law School and The British Institute (Jakarta) for 10 weeks. The USF's law portion was a distance learning course with both an original CD-ROM and synchronous on-line internet feedback between the candidates and the instructor.

The above summary suppresses the substantial new difficulties we faced during ELIPS II. I will not dwell on them since there are no clear lessons that might be passed along. The main message, however, which will not be new to those of you who have managed projects, is that unexpected threats jump into your face, just like they do in a horror film. So it is better not to holler (too loud or long) but rather to do your best to handle the threat.

The two main jolts were a budget crisis early in 2003, and an escalating difficulty in the attempt to get USA entry visas for the LL.M candidates.

The budget crisis came at the start of 2003, when we were trying to identify 17 new

candidates to follow the first 13. It suddenly appeared, for reasons never clear to me, that we would have funds for only seven more LL.M candidates. Since at that time we were doubtful about finding even seven candidates who would qualify, an easy response would have been to accept seven rather than 17 as the goal. I did not do that. Setting aside months of varying suspense and complicated explanations, the bottom line is that ELIPS II was not limited to seven candidates. I was especially grateful to Professor Erman Radjagukguk, the guiding spirit of ELIPS II from both the UI and his senior post in the government, and to the Leader of the USAID (Jakarta) Economic Growth Team, Paul Deuster, for their help.

The resolution of the budget crisis did, however, cut away the flexibility that we previously had in regard to the LL.M funding. In the US, a LL.M takes a minimum of an academic year, that is, nine or ten months, and many people complete it in that time. But some foreign students, up to 50% of them in many law schools, take more than the nine or ten months. There are at least two situations, in my view, as to why a longer period than a minimal academic year may be essential or desirable. 1) Since ELIPS II was still sending some candidates with Toefl scores well under 580 (237), it might be essential to allow a lighter course load and stretch the program to at least one calendar year to avoid an undeserved failure. 2) After a semester or two of studying at a foreign law school, a candidate, in addition to getting settled generally, may have made a substantial improvement in English, and will have moved up to a higher level of expertise in economic law. The more challenging courses are then within the ability of such a candidate. Thus, stretching the LL.M beyond the minimum time can bring dividends far in excess of the extra time invested.

We had used that flexibility in the original ELIPS and for the first group of 13 candidates in ELIPS II. But for the remaining 17 the new policy required strict adherence to a goal to graduate within an academic year, that is, nine or ten months. For example, a person with a weak Toefl had to take a full course load which could in theory achieve that goal. Any exceptions required the approval of USAID, and no exception could go beyond a total of one calendar year. Monitoring who might be a candidate for an extended stay in the summer was extremely difficult.

The other new problem for ELIPS II arose from the tightened requirements for a visa to enter the US. This was a result, of course, of the heightened security concerns in the US after 9/11 (2001). This was not a surprise, but our difficulty was caused by a combination of a mandatory "waiting period" that kept increasing (up to six months for the last group), the lack of clarity in many rules, and the changing rules. The problem was not the lack of help from the responsible officials, who were in fact helpful, but primarily because it was all new, with many glitches. A computerized data base operating out of Washington was one new feature. To give you some sense of the process, ELIPS took the precaution of asking if the (many) Indonesians with one name should add a name, since one name is hard to handle on US data forms. The answer was the candidate's name must match the person's passport. Nevertheless, the processing later came to a long halt when a person listed only one name.

Likely you have read about the legions of applicants who in the past two or more years did not get a study visa to the US, or got it too late to begin an academic program.

For ELIPS II, the amazing result is that all of our candidates got visas in time for them to begin their LL.M programs. How we did this is not clear, and I don't rule out those who attributed the result to prayer. We tried a great deal, including a variety of end runs, which

worked for the 13 candidates who went to the US in 2002, but not thereafter. The most important elements in the success were, I think, two. The cooperating schools in the USA were gratefully responsive to our endless requests for flexibility, such as how many candidates we would try to send, and whether they could take people at times other than those prescribed in their timetables. The second element was the untiring and unstopping efforts of the Indonesian secretaries at ELIPS and the Indonesian staff at the US Embassy who daily fed data into the computer until we got what we needed.

The first group of 13 Masters candidates who began in 2002 and who all returned successfully in 2003 had eight men and five women, average age in the early 30s, 10 of them from five law school faculties, and three from government ministries. The cooperating law schools in the US were the University of Washington (Seattle), the University of San Francisco, American University (DC), and the University of Wisconsin. In addition, ELIPS provided support for a faculty member who won a Fulbright Scholarship, in order to cover the difference between the Fulbright and the actual current costs. He also returned successfully in 2003.

Under ELIPS II, the new Dean of the leading public law school (at the University of Airlanga) in Surabaya, Indonesia's second largest city, did not allow his young faculty to go on ELIPS foreign programs. Fortunately, one of the private law schools that had developed a strong reputation was at the University of Surabaya, which enthusiastically and effectively coordinated with ELIPS II.

The group of 17 who aimed to complete studying in the US in 2004 had 10 men and seven women, average age about 29, 12 of them from four law schools, and five representing four government institutions. The cooperating US law schools were the University of Washington (Seattle), American University (DC), and the University of Wisconsin. Fifteen of the candidates succeeded by June or by the end of the summer 2004. The two who did not were short of academic credits that they may complete later on funds other than those of USAID.

USAID is in 2005 undertaking support of education in elementary schools in Indonesia, and I am not in a position to predict the long-term value of this, in part because the level of support is unsettled. But I do feel confident about the future of the 40 LLM candidates from the ELIPS Project in the past decade. Overall, they will be in the vanguard, along with the existing legal experts, of the law reform movement in Indonesia, if it is allowed to proceed. With them will be the Masters graduates of the programs in Australia, the Netherlands, Japan, England, Germany, and elsewhere. Of course, not every candidate will be a leader. We have already seen one of our promising graduates drift out of sight and out of Indonesia, one or two are not living up to their potential, and, tragically, one died young of cancer. My prediction for the LL.Ms is the kind of prediction that one can make for a team, not for any particular individual, and I feel optimistic about betting on this team.

Developing legal education in Vietnam

Lars-Göran Malmberg

Introduction

This article is written as a narrative part of the presentation I delivered in the seminar in Nagoya University CALE in October 2004. The focus of the session was to clarify the desired legal education for developing countries. Currently developed countries accept many students from developing countries and offer legal education and further more embark on different activities supported by state aid organizations or financing institutions like the World Bank or Asia Development Bank. The question that this article will discuss is whether it is clear to the supporting universities what sort of lawyer is most effective and most needed in developing countries? In this context I will elaborate on the legal education the Lund University currently offer and the program that the Law Faculty is supporting the Law Universities in Vietnam. An interesting point would be to examine the strategy in developing a legal education in Vietnam. This could be described as a clarification of “the theory of legal education” and an identification what sort of assumptions we have as to the “effective lawyer” in developing countries.

The following is based on the experience of and lessons learnt by the Swedish partners the Law Faculty Lund University in the Swedish Sida¹ funded project “Strengthening Legal Education in Vietnam”.

The Project

Developing legal education in Vietnam

Introduction

Around 1992 the Swedish government became more and more interested in the relation between legal developments and strives for poverty reduction and governmental reforms. As one of the cornerstones in developing a governmental structure to establish a rule of law concept in countries like Vietnam and Laos, and later on in some African countries, the Swedish government started to realize that legal education has to be reformed to facilitate the future development of the countries in this direction. The Vietnamese government was already from the beginning ready to embark on this idea and requested support from Sweden to develop the Law University in Hanoi. It should be noted that Hanoi Law University had been supported in earlier projects funded among others by the ADB and that there was good international connections in the university already at the start of the Swedish funded project.

When the request came to the Swedish government on supporting Hanoi Law University the first task was to find the Swedish partners to a project like this. From this point it should be noted that none of the Swedish universities with law faculties had any prior experience of

¹ Sida is the abbreviation of Swedish International Development Agency Cooperation

academic development projects in the “third world”.² The second task was to define the duration of such a project. To the universities such projects has to be put on top of the other tasks set by the government to be carried out, education and training of lawyers in Sweden and legal research. A development project like this would also compete with other interesting tasks our colleagues like to take on as legal consultations outside of the university. From these points it was not easy to strike a balance between the planned project activities and the capacity of the proposed Swedish partner university.

This early planning stage of the project, “Strengthening Legal Education in Vietnam” started already in 1994 but it took until 1998 to the inauguration of the project. The Law Faculty Lund University was after years of discussion between Vietnamese Universities and the Swedish agency selected as the Swedish partner. In the discussions between the Vietnamese side and the Swedish it also became clear that both the Hanoi Law University and the Law University of Ho Chi Minh City, at that time the Law College of Ho Chi Minh City, would be the Vietnamese beneficiaries of the project.

Structure of the Project

In the early discussion between the Sida and Lund University it became clear that this project was to be a long-term project. Sida foresaw the need of a strategy that would take time and it should be given time to create sustainability. The Project was to be carried out over different phases and each phase would last for approximately three and a half year. Each phase would be given a specific budget frame and an plan of operations, to be approved by both Sida and the MPI³ in Vietnam, had to be established prior the start of each phase. In the early days the Swedish partner was referred to as the consultant.

The phases of the project has so far been two and the third is about to begin in 2005. The first phase begun in 1998 and ended after three six months prolongations in July 2001. The second phase was opened in September 2001 and will last until the 28th of February 2005. The projected and soon to be approved third phase will according to the plan last until July 2009. The partners to the project aim for an additional phase of two and a half year until 2011 to phase out the project. Since the start of the project in 1998 the phases has gradually been extended so that the first was originally planned to last for three years, but after prolongation it lasted three and a half. The third phase is planned to last for four and a half year. As the phases grows so does the budget. This was for the first phase limited to 1.4 million US dollar and in the second phase it had grown to 3.2 million US dollar. In the third phase the budget is almost 10 millions US dollar. Of course the content of the plan of operations has also been developed, but at this time it could be said that the planned operations finally are in harmony with the budget.

To the structure of the project should be added that it is headed by a Steering Committee in Lund and by a Board of Directors in Vietnam. During the second phase a Swedish resident coordinator to the project has been posted in Vietnam and an extended organization for coordination is to be formed to meet the needs in the third phase. In Vietnam there are two

² The Umeå University had been supporting Ministry of Justice in Vietnam since a number of years but this is hardly an academic development project.

³ Ministry of Planning and Investment

project offices, one at each of the universities and with the major office in Hanoi.

The three universities are all a bit different from each other. Hanoi Law University was opened in 1979 and has today a staff of about 500 members: teachers, librarians and faculty administrative members. The Law University of Ho Chi Minh City established around 1995 has a staff of 200+. The yearly intake of students at the two Vietnamese Universities is at a level of 900–1.500 freshmen. The gender situation in the lecture force is divided 50/50 in both Hanoi and Ho Chi Minh City. The management teams are mainly male dominated. The Law Faculty Lund University is one of the original four faculties at the University founded in 1666. Today the Faculty has around 2.000 students and approximately 30 students on legal research to become doctor. The staff is about 100 persons and the academic staff is about 35 professors and lecturers.

The Project:

When it was started in 1998 the Ministry of Justice formulated an overall objective. This was later amended and is today

To achieve an accomplished curriculum development and teaching methodology for bachelor, master and doctor degrees, which fit the principles of a state based on rule of law and the needs of the “Doi Moi” policy, strengthening legal education capability by improving gender equal lecturers qualification, strengthening libraries information system and widening international cooperation.

This gives an overall view of what the project aims at lecturers, library and international cooperation. This overall objective is divided into three sub-objectives that are;

1. To develop gender equal lecture force, applying modern teaching methods based on modern literature and a modern curriculum
2. To developing law libraries to modern standard and define their role in modern legal teaching
3. To enhance legal education and project management and widening international cooperation

Over the years those three sub-objectives have been the same but the content has been developed over the years and especially the development of teaching methodologies and the libraries has been very successful.

The activities and aims under the three different sub-objectives could easily be described since the focus is very clear. The main components in teachers training is based on capacity building by introducing (1) modern teaching methodology, (2) enhanced English training and (3) subject orientated seminars. The first phase saw a limited number of activities, since the budget also was rather limited, such as a couple of workshops and a twice yearly teaching methodology training in Lund over a three week period for a limited number of teachers. Since the start of the project two junior teachers one from each of the two universities have participated in a one-year master course in Lund. During the second phase the funds were increased and more activities was to be carried out. Among them the most ambitious was an introduction of a joint master training program in International and Comparative Law and a first doctorate candidate was selected to take his courses in Lund.

Concerning the second of the three cornerstones, library development, the main activity

has been to train the librarians. As one of the most important factors for the development the Board of Directors approved a strategic plan for the future of the libraries. This plan concerned more than just book procurement to specific legal areas, it also set the strategy for developing the librarian staff and how to equip the libraries with computer based search motors and access to international legal databases like Westlaw, HeinOnline and the Swedish ELIN.

The third element in the project is management support and widening international cooperation and the first real activity carried out was the development of the LL.B curricula. This started by an extensive survey on different curricula in universities all over the world. It was completed and supplemented by an international conference in September 2002 which resulted in a new curricula developed by Hanoi Law University and the Law University in Ho Chi Minh City. The second main activity has been to widening international cooperation and a number of study tours have been conducted both within Europe and Asia and to the American Continent. As a result we have made a lot of useful contacts that has participated in different activities over the years.

The three cornerstones of the project proved to be the perfect choice already from the beginning and all the planning that preceded the inauguration of the project in 1998 was worth all efforts and of course the waiting time to let it start. The first phase of the project until 2001 has been describe as a “trying-out-phase” when the partners got the time to learn to know each other and the steering of the project got the necessary time to develop. Most other projects in this field would have been terminated after a four-year period but this was to be given another phase for three and a half year and then a further for four and a half year. The second phase, which now has come to an end, has proved to be successful in the way that more or less all targets for the development of legal teaching has been defined and the training institutions that will carry out different types of training has been found. The third phase will see the effective development of the two Vietnamese universities to meet the same standards as in other modern universities in the region such as you find it in Singapore, Malaysia and Thailand.

The Outcome of the Project – Training a Lecture Force and Modernize the Legal Training
What kind of lawyers does Vietnam need for the future?

Some introductory notes

First of all, this is Vietnam: The area of the country is 329.560 sq Km, the population is almost 80 million people, the country comprises of 61 provinces. There are two major laws teaching institutions designated Law Universities; Hanoi Law University and the Law University of Ho Chi Minh City, added to these two major there are four Faculties of Law, at the Universities of Can Tho, Dalat, and Hue and in the National University in Hanoi. There is at the moment approximately 11.000 law students in Vietnam. This could be compared to Sweden with an area of 449.964 sq km, a population of about 9 million people and 22 provinces. Legal education is carried out at six different faculties of law and the number of students is about 11.000. With about one tenth of the Vietnamese population Sweden has the same number of law students in the education process per year.

The Governmental Order No.10/CT-TTg from 2002 puts more stress to further enhance quality rising activities concerning both the LL.B. and the LL.M. training as well as the Doctorate training. The education strategy of Vietnam puts the goal to reach the ratio of 24 BA graduates per 1000 persons. At the present time, ratio of bachelors of law per 1000 persons is

6/1000. This ration is very low compared to other countries in the region. That is why legal training is seen as one of most important tasks in the education strategy of Vietnam at the present time.

The needs for lawyers are great in the whole of Vietnam. In one of the poorest provinces in the south of Vietnam there are 202 legal officers at provincial level, out of which 120 has an LL.B exam, 2 has a LL.B, 32 has a university degree other than law and 17 has just a college degree. At the district level there are 440 legal officers; out of which 189 has a LL.B degree, 0 LL.M, 39 has a university degree other than law and 29 has just a college degree. At the commune level there are 181 legal officers with a LL.B status 0, College level 42, degree from a university other than law 0 and 141 passed different short professional training courses. The yearly demand in this province is about 70 new lawyers on provincial level only, not to mention what is needed on district and commune level. It could be estimated that a number of provinces throughout of Vietnam has more or less the same demand.

To the Vietnamese partners of the project it has become more and more important to define the development process of curriculum that serves the needs of the education of the future Vietnamese lawyers. The project has further on to support every such strive towards a curriculum that will serve the purpose of the development of a state based on rule of law. In the new curriculum one of the most important changes are the introduction of comparative law as subject. Also the international aspect of law has been increased. But this is not really enough. A major part that lacks and is of vital interest in the development of a rule-of-law based country is legal training in the protection of human rights. Presently no such courses are available even though there is no lacking of written material in the libraries on the subject. Newly educated lawyers should therefore in the future have a LL.B degree with a solid understanding of the concept of rule of law and a good understanding of “Good Governance” in administrative law. The third criterion to meet is an ability to critically analyze legal texts and court cases.

The problem is; how do we get there? The problems starts with the teachers approach to teaching, continues with the status of the present textbooks, further on to the design of the lecture halls and ends with lacking resources in the library. The students could be said to be a problem of its own in the sense of a background in a school system that does not foster a critical mind and with the lack of school material haven't really improved in critical reading. In other words: There are a lot of things to turn around.

Solutions to the problem

The strategy to move the education towards a modernization and the target area of rule-of-law influenced teaching was taken after continuing discussion among the partners of the project. Those discussions are taken each annual meeting and among the Vietnamese Board of Directors and the coordinator of the project. The first target group that was identified was the teachers. It became clear at an early stage that teaching methods used was hardly up-to-date and the material used was also outdated and lacking in volume. The library was also in such a state that it was of limited use in modern teaching where the demand on data based searching of material form the cornerstones in esp. problem based learning. The factors that catered for a limited success in the education could be described as follows:

1. Most teachers are bound to use simple teaching methods like ordinary lecturing.
2. Most teachers have to rely on limited information sources

3. Most teachers are not subjected to training in teaching methodology
4. Most teachers does not have access to a well equipped library

This has as an effect that the students have never been subjected to any other methods of teaching than what is called the simple form of lecturing, namely the transfer theory. This is when the teacher more or less is transferring his knowledge to the students. Another back draw is the low level of English knowledge that the students possess which limits their possibilities to use English material and the legal databases that will be put to their use.

The second problem to tackle is the size of the classes and the design of the lecture halls. Lecture halls are in general of the size of two hundred students and the shape of a giant shoebox. To the students in the rear the activity in the front is just a rumor. It is virtually impossible to see what's on the black or white board in the front end of the lecture halls and most teachers are by those means just using the microphone and loudspeakers to distribute their knowledge. A look into the lecture halls with two hundred students could was at the start of the project a depressing sight. With the lack of communication between teacher and students most students in the rear of the lecture hall is asleep or doing other things than paying attention. But it should be noted that this is really not any big difference to legal teaching in Sweden some 25 years ago. With all due respect, under circumstances like this providing active learning is a difficult task. After two phases of the project this is already about to change.

There are unfortunately no easy solutions to this. The key issue in such a project as ours is to have patience and to be able to convince the donors that this will take time. In our case this was understood by the donor organization already from the beginning. The other key issue is to remind yourself that this has to take time and to be able to see the small changes as important steps forward. Secondly the partners to the project have to agree on a common platform to operate this change of teaching structure. Which in terms means that the partners walk in the same direction, if not necessary at the same pace but with the same road map.

In the project we have trained the professors and lecturers new way of lecturing in big classes, we have been giving them new ideas about how to move from the idea of lecturing to learning and we have more and more been introducing cases as a mean of analytic discussions. In the third phase of the project the partners⁴ have decided on more activities to create sustainable structures for a continuing development of curricula, teaching methodology and forms of examination. We are providing more courses on intermediate English and advanced English for teachers. The project is further to set up more computers for students to access legal databases and encourage teachers to use foreign material in their teaching. To achieve an analytic and critical we will introduce more case material to the students and teachers in the form of a casebook series. To train teachers in using cases seminars with American and Swedish professors have been held and this will be continuing in the future parts of the project.

Some final words

There are a number of things that has to be done for the future to create a modern teaching environment using a modern way of teaching. The perhaps most important item to stress for

⁴ We are no longer considering us as consultant and beneficiaries but partners. The process in the project has developed a twinning effect in the group and consultant activities have been altered to discussions among scholars.

the future is to introduce an analytical way of lecturing which means that the teachers turn away from the old fashion way of lecturing to establish a learning process among the students. To be able to convert to learning mode the teaching has to integrate with the library and the possibilities to find information in the library. This in turns mean that the idea of a library has to be changed from a simple book provider to an information centre. This is normally visible through the different course curricula were some of the assignments are carried out in cooperation with the library.

It is our firm believes that from now on there will be a rather fast change in the teaching methodology on both bachelor and master level in the universities in Vietnam. Our long time participation has and will go on to support this development. But the most important part is not just a rapid change of things, it is the continuing work on curricula development, teaching methodology and examination development through assessments. To make sure that there will be sustainability in this area an academic quality assurance center (AQAC) will be established in the both universities. This is the most demanding object from the projects point of view and this calls for a strong support from the two universities Board of Directors. These centers will in the future decide on pedagogical courses, curricula development and make course assessments to change examination processes and teaching methodology. With the support from these AQAC a new generation of teachers will form a new generation of students. Prepared to carry the task of the lawyers to fulfill the goal of a socialist state built on the foundation of rule of law.

Law and Legal Assistance in Uzbekistan¹

Katsuya Ichihashi

Introduction

I worked as a short-term Japan International Cooperation Agency (JICA) expert in the field of legal assistance to the Tashkent State Institute of Law in Tashkent, Uzbekistan for seven months from March to early October 2002.

My main task was to conceptualize the amendment of the Civil Code and enactment of a Commercial Code in the Republic of Uzbekistan, both of which are important subjects of ongoing legal reform in Uzbekistan. Meanwhile, I also translated into Russian the Japanese Civil and Commercial Codes which will likely be used as reference during the process.

In this paper, based on my former experiences with JICA, I am going to raise some issues which deserve attention while conducting legal reform or legal assistance projects.

1. What is Uzbek Law?

In order to assist Uzbekistan in its legal reform, one must learn first of all about the target of the reforms, Uzbek law. When asking what Uzbek law is, one needs first to clarify which law the question is actually directed to. As an answer to this question, I was told that one should base his/her knowledge of Uzbek law on two main features.

First, Uzbekistan was part of the former Soviet Union. Even though changes have taken place as a result of its independence and marketization, Uzbek law is basically considered Soviet law. The second line of thinking suggests that since Uzbekistan is a country made up of a majority of Uzbeks, who are primarily Muslim, Uzbek law is Islamic (Shariat) in nature.

Although one can claim that these two ways of understanding Uzbek law result in different interpretation of its contents, both of them are based on what can be called a “common sense” view approach. Both of them are half “truths”. However, it will be a mistake if either view is employed exclusively on its own premises when approaching Uzbek law. For the people of Uzbekistan, especially the majority Uzbek ethnic group, this way of approaching Uzbek law would not be considered as based on “common sense” (Saidov 1999: p.438).

(1) Parallel Existence of Statutory and Traditional Laws – Legal Pluralism

Let’s now look into the first “common sense” view that Uzbek law is Soviet law. Uzbekistan was under Soviet rule for 70 years until it became independent just over ten years ago. If we include the time when this country was under the rule of the Russian Empire, we see that it was a part of Russia and the Soviet Union for a total period of 150 years. In this region, known

¹ This paper is translated from the Japanese by Teilee Kuong (Associate Professor, Center for Asian Legal Exchange), with the assistance of Matthew Linley (Researcher, Center for Asian Legal Exchange)

by the Russians as “Turkistan”, a history in which countries and empires develop, flourish and are destroyed continuously repeats itself. The one-and-a-half century of Russian and Soviet rule is the longest of such episode in the history of Turkistan. Therefore, from the perspective of law – including basic and other statutory laws, the judicial system to operate these laws and the legal consciousness of legal professionals – the country is obviously heavily influenced by the Soviet and post-Soviet Russian laws (Saidov 1999: pp.449–454).

However, to understand the law of Uzbekistan only at the level of Soviet laws as the statutory laws of a nation state is one-sided.

L. Levitan, a constitutional lawyer from Kyrgyzstan, has said that the people of Uzbekistan conduct their life not only based on norms set by the former Soviet Union, but also norms formed throughout the long history of many centuries. According to Z. Kh. Arifkhanova, an ethnologist in Uzbekistan, the former Soviet system sought to implement a concentrated policy towards dismantling traditional systems. However, the local communities (*sosedskaja obshchina*; *makhallja*) showed their firmness and prevented alienation of the traditional norms. The Soviet regime had to consider the interests of these local communities so as to hold them under control. The regime used these communities for its own interests (Arifkhanova 1998: p.25). This is the other aspect which one should not neglect when trying to understand the law of Uzbekistan (Brusina 2000: pp.148–149).

For example, let’s look at the citizen’s general assembly (*skhod grazhdan*), its chair (*aksakal*) and the *makhallja* committee (*kengashi*) of the local community/*makhallja*². These organizations hold the authority to approve urbanization plans, sales and purchases of houses, development and construction activities. They can also reject or prevent the establishment of places which are not approved by the local people (such as the establishment of nightclubs, for instance). In addition, the conciliation committee of *makhallja* handles almost all local cases of conciliation related to family disputes such as divorce or succession, and other disputes among residents of the local community. It seeks to settle disputes by means of compromise before they are brought to the court. These regulatory and dispute settlement functions of *makhallja* are not based on written family or civil codes. Conduct is not based on the law of the State but on local traditional law known as *shariat* or *adat*. Any party dissatisfied by or unwilling to accept the regulatory or dispute settlement work of the *makhallja* may seek adjudication at the court according to the statutory law of the State. However, the reality is that the number of such adjudication cases is very small (Tashkentskii gosudarstvennyi iuridicheskii institut 2003: Chast’2 Interv’uirovaniye Predsedatelia I predstavitelei makhalli po opredelennym napravleniim).

On the one hand, Uzbek society maintains a system of State law formulated under strong Soviet influence and a parallel system of unwritten traditional law called *shariat* or *adat* on the other. The traditional system co-exists with the statutory law and continues to play a practical and, in fact, more important role (Dzhabbarov 1996: pp.49–65). In this context, a phenomenon of so-called “legal pluralism” (*puravovoj pururalizm*) or “acceptation” or “convergence” (*retseptsijal konvergentsija*) between the systems has emerged (Bobrovnikov, V.O. 2002: pp.98–110).

² This acquired an official local entity status after independence and the trend is that the former autonomous organizations of local residents or *makhallja* are now changed to administrative entities (Sievers 2002: pp.118–123).

(2) Secular Islamist Law

In Uzbekistan, in the conditions of “legal pluralism”, traditional law, which includes Shariat and Adat, is still practically operational in many parts of the country. However, can we classify the Shariat and Adat of this society as “Islamic Law” following the second category of the “common sense” view?

After the collapse of the Soviet Union, we can see the development of what has been called an “Islamic Boom” in newly independent states of the Islamic regions of the former Soviet Union (Bobrovnikov 2002: p.264). In countries like Uzbekistan, the nationalist authority adopted policies of “reviving and strengthening Shariat and Adat” and “strengthening makhallja” (brushina 2000b: pp.72–73). Further, for Muslims in this region, economic hardships accompanying the transition to a market economy have become very serious, and the number of people who are convinced that “only Shariat and Adat can suppress the increase in crime and social instability” is on the increase (Tsipko 1997).

However, the Russian Legal Ethnologist V.O. Bobrovnikov correctly points out the following:

“In the second half of the 19th Century, and especially in the 20th Century, due to the massive movements of people and the resulting changes, the customary law and the other elements of pluralistic legal conditions suffered irreversible changes. ‘The revival of Islamic Law and Adat’ means formation of an absolutely new post-Soviet tradition in the region” (Bobrovnikov 2002: p.107).

This revival and strengthening of traditional law is not retrogression to the Islamic law which once existed in the society. Although the law can be called traditional due to its deep-rooted existence in Uzbek national history, it is better to look into it as an attempt to form a new and indigenous informal legal system for the contemporary Uzbek people.

Namely, in order to understand the Shariat and Adat of Uzbekistan, we cannot overlook the secularization (*sekljarizatsija*) of Shariat and Adat as a result of the massive changes that occurred in the Soviet era. In the case of Uzbekistan, the neighbourhood communities ruled by the traditional law of Shariat and Adat are no longer communities (*mechetnaja obshchina*) centering on the institution of the mosque. While in the past, the mosque was the essential center of the community, it has been replaced by the secularized tea drinking places known as *chajkhana*. Further, regarding the person administering traditional law, now, it is not the imam (Muslim religious leader), nor is it the *kadi* (Islamic judge). It is the elder (*starejshina*) of the neighborhood community, including the person known as the *aksakal*, who administers the traditional law.

Revival of the traditional legal system in Uzbekistan is based on the Uzbek comparative law specialist A Kh. Saidov’s “secular islamism” motif (Saidov 1995: p.43). We must note the distinction between a revival of Islamic law and the so-called “traditional system” in which fundamentalist Wahabbism refers to the reinstatement of Islamic courts (*shariatskij sud*), religious police (*politsija nraovov*), and a theocratic Islamic state (Bobrovnikov 2002: p.266).

(3) What is Uzbek Law?

As we can see up to this point, Uzbek law thus goes beyond our “common sense” or “comprehension”, and should not be considered as merely Soviet law or Islamic law.

When we view the history of Uzbek law, we see that the peculiar conditions of “legal

pluralism” have existed for a long period.

First, when Islam was introduced, the Adat of the various ethnic groups living in Turkistan accepted Shariat and the two co-existed, resulting in Islamization (Geiss 2001: pp.100–103).

Next, with the creation of the Soviet Union, Adat and Shariat survived the acceptance of Soviet law and secularization. The accepted Soviet law acknowledged the existence of, and coexisted with, the traditional law and was therefore able to remain functional in this region.

Currently, we are witnessing the beginning of the third wave of formation and acceptance of law.

These days, a new “legal pluralism” is making an appearance. First, the secularized Adat and Shariat that we saw in the Soviet era are retaining their secularized characteristics and beginning to develop into the current informal legal system. Second, for the development of a framework to secure the establishment of a market economy, at the level of statutory law, the legal system built on the former Soviet law is now beginning to accept the European and Anglo-American legal systems (Saidov 1999: p.473).

In the future, how will these newly introduced European and Anglo-American legal systems react to a diversified legal system of Shariat, Adat and Soviet law, etc, which have coexisted in mutual interactions, influences and acceptance throughout the history of the region? Are they intended to be another new legal system derived from the European and Anglo-American law, to coexist with the other systems in the existing “legal pluralism”? Or, are they unwilling to tolerate and instead abolish the state of legal pluralism existing so far, just to lead the country towards formation of a unified legal system based on the European and Anglo-American law model? A long journey of legal reforms has just begun, but its direction is yet to be decided.

2. Statutory “Legal Failure” and the Rule of Informal Laws

Currently, in Uzbekistan, legal reforms are occurring in a new condition of legal pluralism in which the informal legal system of the secularized Adat and Shariat traditional law developed and, at the level of statutory law, the European and Anglo-American legal systems are being accepted.

The statutory law system based on Soviet law, the traditional legal system, and the new Western legal system will surely influence, accept and coexist with one another. However, this does not mean a non-contradictory harmonious “intricacy”. If we want to promote a stable process of legal reforms in Uzbekistan, in which the different legal systems grasp with their respective major problems while remaining strongly and closely intertwined, we must pursue a gradually progressive path towards legal reforms in the long run, aiming at “symbiosis” of these systems while remaining alert to its “pathology”.

(1) Trust in Informal Law and Distrust of the State Law – Legal Nihilism

As already point out, in Uzbekistan where most daily disputes among local residents are settled by resorting to traditional law, the main areas of social life are not regulated by statutory laws of the State but practically by the traditional or informal law. In this sense, informal laws are becoming strong “social norms”, faithfully reflecting the public interests and belief devoted to by makhallja or local communities (North 1990: p.36). It is therefore discernible that local residents being members of the community respect and put their faith in the informal law

(Sievers 2003: pp.109–115).

This does not merely indicate that the informal law dominates or rules. It is also said that because people consider that statutory laws enacted by the State do not identify public interests, they have no faith in and do not respect these laws (Galligan 2003: p.6). Legal experts in Uzbekistan call this the pathological “legal nihilism” (*pravovoj nigilizm*) phenomenon.

This is becoming excessive in Uzbekistan. People feel alienated by and unfamiliar with statutory laws of the State as a barely acceptable imposition. Resistance and opposition to statutory laws are a frequent occurrence. Although ordinary people cannot ignore the existence of statutory laws, they do what they can to get away from it, to respond to it by means of evasion or to cheat their way out of the influence of these laws. Further, statutory laws are also used arbitrarily for the sake of private interests. They are considered a “tool” for private interests, utilized as a bargaining chip in pursuit of a favorable deal (Galligan 2003: pp.7-8). Unfortunately, this is the typical behavioral pattern of a great number of civil servants who are given power and authority under the provisions of statutory laws.

(2) Pathological Informal Law Resulting from “Legal Nihilism”

In Uzbek society, “legal nihilism” has become a hotbed of pathological informal law different from the traditional one.

From the legal consciousness of “legal nihilists”, informal law is created as a kind of social norm to regulate the network of informal distribution and acquisition of “wealth”, namely personality (qualifications and status), goods, money, service and information, etc. Since such informal law becomes a guide for people’s daily life, it constitutes a kind of “social norm”. However, it is not like *makhallja* or other traditional law which mainly reflects the public interests of the local community. Rather, it does just the opposite, perhaps by distorting the public interest.

By exploiting people’s strong tendency towards “legal nihilism”, those (the hitherto group of civil servants) who are in a position to manage distribution and acquisition of wealth create “social norms” for “wealth” management in their own interests, through a common “social practice” among themselves. One typical case of pathological informal law is represented by the “social norms” in regulation of the universal and structural “corruption network” in Uzbekistan. At any level of the bureaucracy, one can find some kind of “bribery” demanded by civil servants whenever and wherever any “wealth” distribution takes place.

Without mentioning the case of pathological informal laws, public administration in general is not receptive to influence by any statutory law beyond the field. Its relationship with statutory laws of other fields may in some cases be competitive. Public administration embraces a wide range of closed self-regulatory administrative norms and operates on that basis (free discretion) (Galligan 2001: pp.88–89). Just like any ordinary individuals, administrative institutions and public servants certainly cannot ignore statutory laws. They take into consideration the existence of these laws. However, this does not lead to “administration in compliance with law”. Due to its characteristic of being “closed administration”, it mostly ends up in a situation of “administration in management of law” which allows laws to be distorted by means of informal administrative norms that fulfill only selected legal requirements and seek to redefine them (Galligan 2001: pp.92–93). Therefore, one must take heed of the existence of a closed administrative world which is governed by informal administrative norms and encourages the

growth of “legal nihilism”, in parallel with local communities which are ruled by non-state informal laws called the traditional law (Galligan, polianskii, starilov 2002: pp.54–55). This is also the issues of inconsistency and formalism which F. W. Riggs mentions in his “Prism Theory” arguing that “(A) dministrators called upon to carry out the law then resort to literalism, sometimes to deliberate nullification. This is advantageous to the legal adepts and the bureaucrats, for they can fabricate interpretations which permit them to do what they wish or what their clients and protégés find profitable” (Riggs 1964: pp.183).

(3) “The Pathological Triangle” and the Vicious Circle

The pathological informal law as “social norms” is also making statutory law pathological.

At places where “legal nihilism” and the resulting pathological informal law rules, neither the citizens nor the civil servants would give legitimacy to the statutory law, nor would they respect it and handle it seriously, even if the statutory law existed with appropriate objectives and contents, and an implementation system were already established. At the end of the day, no matter how healthy the statutory law or its general framework can be in form and in substance, it still suffers the influence of informal law born out of “legal nihilism”. There are many cases of statutory law heading towards failure as a result of this.

Statutory law has to compete with the conflicting informal law and finally loses in the struggle. It fails in its attempt to regulate social relations and to settle disputes emerged thereupon. In other words, statutory law malfunctions in what is known as “legal failure” (Galligan 2003: pp. 2–5). Following the malfunction of statutory law, “legal nihilism” becomes even stronger among the citizens and the civil servants. This results in further development of the pathological informal law of which “legal nihilism” works to replace the statutory law. In this way, “legal nihilism”, pathological informal law and the malfunctioning statutory law together form a “pathological triangle”. A vicious circle emerges.

(4) The Way to “Rule of Law” and “Overlapping Challenges”

When considering legal reforms in countries where a strong “pathological triangle” and the vicious circle exist, one must do something to sever this triangle, overcome “legal nihilism”, dispose of the pathological informal law, make statutory law functional and realize the “rule of law”. One must identify the necessary conditions for statutory law to run parallel with traditional and other healthy informal law, as “social norms” acceptable to the society.

Legal reform has to progress towards realization of the “rule of law”, after changes have been introduced to reverse the rule of pathological informal law and the statutory law becomes well accepted. In order for this to happen, the precondition is to have a system that enables the making and functioning of statutory laws which incorporate appropriate objectives, contents and due process, reflecting the interests of the public (Hendley 2001).

However, as already mentioned earlier, another indispensable precondition for statutory laws to function is to ensure that those who were influenced by and who observed the pathological informal law, by utilizing it and being under its rule, will opt for changes and turn themselves into people who respect and accept the rule of statutory laws (Hendley 2002: p. 137, pp. 144–145). Therefore, if legal assistance activities, offered in building up a system to make and to promote the functioning of statutory law, and in training of human resources to handle and to facilitate acceptance of the statutory law, are intended for severing the

“pathological triangle” and give rise to the “rule of law”, we are then facing “overlapping challenges” in legal reform which requires that these two activities be handled in parallel.

In the “overlapping challenges”, we need to deal with not only “system building” but also “human development” which will surely take a long time. However, after some progress has been made, we will see that the citizens and civil servants will acknowledge and have confidence in some, if not all, of the statutory laws as “social norms” to follow, and they will take these laws more seriously. Once the citizens and civil servants start the step by step process of assimilating and internalizing the statutory law, the society will be moving towards “acceptation of statutory law” in its genuine sense (Galligan 2001: pp. 95–96).

(5) Making of an Appropriate “Life-sized Statutory Law” *(zakon v natural’nuju velichinu)*

Unfortunately, if we look at the present situation of law in Uzbekistan, we find that it is yet to reach this step of “acceptation of statutory law”. If the direction is already aimed at future completion of that step, the current situation may be referred to as a long “transitional period” towards acceptance of the statutory law. In this transitional period, we must also start legal assistance activities and the training of legal professionals by preparing the appropriate conditions which take into consideration the special feature of this “transitional period”.

First, in making statutory law, for instance, if European and Anglo-American statutory law, with its developed content and structural framework, has been imported as a tool for realization of radical social objectives, no matter how excellent the superficial “transplant” is, the new statutory law will be caught in the “pathological triangle”. It will not be able to function in the triangle, but treated as “irrelevant” and will therefore become dysfunctional (Hendley 1996: pp. 239–240). If one takes into consideration the special characteristics of this “transitional period”, the statutory law to be prepared in this phase should not be the kind of tool for social change which is aimed at achieving objectives of a future society. Rather, it is important to start first of all with the preparation of a “life-sized statutory law” appropriate for Uzbekistan. This statutory law should first be accepted by the current society, albeit with pathology, become familiar with the social environment, be supported by society and be able to present itself as a means of social coordination.

In this regard, assertions made by Denis J. Galligan, the British sociologist of law and administrative law expert, are worth mentioning. According to him, for statutory law to exercise its social coordination function in practice, it needs to possess “certain qualities” that ensure interaction and reciprocity (Fuller 1969: p. 27) among individuals and between individuals and the state (Galligan 2003: p. 19).

This is because we believe that only when the statutory law possesses such “certain qualities” will it be possible to predict how people behave and how the behaviors will be responded to. Only then will statutory law be observed by the society. The society will find more fairness with better certainty, benefits and resorts to remedy, in this “life-sized statutory law” which ensures interaction and reciprocity, than it could find in the hitherto pathological informal law. This will lead to the beginning of trust.

What is important here is that the newly introduced “life-sized statutory law” does not destroy and replace the framework created by the old statutory and informal laws. The old framework remains. By means of filling this framework with basic substance of the new “life-

sized statutory law” or designing new “life-sized statutory law” on the periphery of the old framework, assistance to legal reforms will increase the importance of the statutory law as time gradually passes by. Such legal reform will bear some special characteristics. That is to say, by developing the new “life-sized statutory law” and by obtaining people’s trust in it, the reform will gradually pose influences on, and bring changes to, the existing framework, and will thus create an environment favorable to the ultimate reform of the framework itself.

(6) Reform of Legal Education

Second, legal education for the sake of training legal professionals must also take into consideration the special characteristics of this transitional period. In Uzbekistan today, the Soviet legacy of legal education continues. Most of the education on contemporary statutory law is either fully marked with commentary notes and illustrated as harmonious and equitable, or identified as a tool for achieving social goals complete with an introduction to the most advanced European and Anglo-American laws. The legal education which pays no attention to the contradictions actually taking place in the transitional society or which constitutes of only “imported disciplines” having no root in the real society will not be able to grasp the pathology particular to the society, nor will it be able to show the way to recovery. Therefore, not only will such legal education fail to gain people’s confidence, but it may even contribute to strengthening “legal nihilism” against statutory law.

Legal studies in the transitional society should not end up with commentaries and introductions only. It needs to adopt a “sociology of law approach” to expand its vision, and to discover the social environment which seriously impacts upon the function of statutory law and the different social conditions necessary to ensure this function.

Conclusion

To engage in assistance in law making and training of human resources by taking into consideration the characteristics of a “transitional period” towards acceptance of statutory law will likely take much time until the country really reaches the phase of “accepting statutory law”. The first job to do is to consider keeping appropriate balance between the statutory law which needs to be made and the informal law which has been saved from pathology, while considerations have to be made of the social environment during the transitional period. It has to start from preparation of statutory laws which promote social coordination in limited areas. It should not be the kind of statutory law that seeks to pursue responsibilities by threats of force and sanctions or to promote radical social reform. Albeit time-consuming, the assistance must start with the help to make statutory laws which ensure interaction and reciprocity between individuals and to train legal professionals whose support is needed for the making of these statutory laws.

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Removing Impediments to the Mobilization of Local Resources

Charles R. Irish

1. Introduction

People are poor because they have no money. Countries are less developed because they have no capital. These truisms have a profound impact on the development assistance provided by rich countries to the poor countries, as evidenced by the tendency to measure development assistance by the amount of resources transferred from the rich to the poor and the emphasis on the creation of an environment friendly for foreign direct investment, with such investment widely viewed as an important addition to the capital starved economies of the less developed countries.

These common misconceptions, however, may obscure an important point and steer development assistance away from programs that would provide real stimulants to economic growth. The point is that in many cases the major impediments to growth may not be a lack of capital, but an inability to mobilize the capital that does exist. To be sure, it is rare that people sit in poverty surrounded by abundant resources; but oftentimes what makes the poor desperately poor are legal obstacles to the use of the few resources they do have. The legal obstacles generally are in the form of excessive business regulation and inadequate recognition of property rights and they result in *dead capital* – assets that are physically sound, but unusable.¹ The existence of dead capital is most apparent to people who have worked in the poorest parts of the world. In addition, recent studies by the World Bank have found that the inability to make use of local physical and human capital may be a more severe obstacle to economic growth than destructive macroeconomic and education policies. In **Doing Business in 2005**, the World Bank concluded that for countries in the bottom three quartiles in business regulation a hypothetical improvement in all of the business regulations sufficient to move into the top quartile would boost growth by an additional 1.4 to 2.2 percent per year, while improving to the top quartile in macroeconomic and education indicators would boost growth by only 0.4 percent to 1.0 percent.²

This paper briefly considers the legal impediments to the mobilization of local resources. The next section lists some examples of legal obstacles to local resource mobilization. The third section explains why the removal of obstacles to more productive use of local resources is likely to lead to such significant improvements in economic growth and human development indicators. The fourth section examines the major factors inhibiting the efforts to simplify and rationalize business regulations and improve property rights. The final section concludes with suggestions for legal assistance programs in less developed countries.

¹ World Bank, **DOING BUSINESS IN 2005**, at 3 (quoting from Hernando de Soto's *The Mystery of Capital*).

² *Id.* at 4.

2. Legal obstacles to local resource mobilization: A sampling

The legal obstacles to local resource mobilization fall into two broad categories. In one category are laws and institutions that provide inadequate protection of property rights. In this case, the deficiencies of the legal system result in weak or non-existent property rights. In the other category are burdensome regulations that limit the ability to start and carry on businesses. This category is somewhat the opposite of the first in that here the legal system is too aggressive and overbearing. The effect of both categories is largely the same, however: in both instances, the result is that potentially productive physical and human capital sits idle, or alternatively is driven into the informal economy beyond the reach of the government.

A. Deficiencies in the Legal System

The inadequate protection of property rights can result in significant under-utilization of capital. Consider three examples:

- *Example 1:* In 2003, Grace Roseau bought undeveloped land from John Hamilton. The land sits on a hill overlooking the harbor, is on the outskirts of a major city, and has easy access to a sandy beach. Because of very substantial stamp duties and corruption in the land registration office, the cost of formally registering the change in land ownership would equal about 25 percent of the total purchase price so Grace and John did what is common in the community – they informally transferred the land and did not register the transfer with the government. In 2004, when Grace tries to build a tourist hotel on the land, however, she discovers that she cannot use the land as collateral for a loan because she is not formally acknowledged as the owner.
- *Example 2:* Luke Mwanakatwe wants to expand his profitable equipment leasing business, but to do so, he needs additional financing. Luke’s only tangible assets are the business equipment and his accounts receivable, but because there is no reliable credit registry in the country and national law does not recognize accounts receivable as collateral, Luke cannot obtain the financing necessary to expand his business.
- *Example 3:* In 2003, Wang Microsystems sold stock to a small group of investors, including Mao Shih Ming. In assessing the risk of the investment, Mao considered the financial statements of Wang Microsystems and gave special weight to the certification by the outside auditors, Chen and Partners. In 2004, after Wang Microsystems declared bankruptcy, it appeared that the certified financial statements were very misleading and may have been fraudulent. When Mao filed a law suit against Chen and Partners for knowingly or negligently certifying the false financial statements, the case was dismissed because Mao had no formal relationship with Chen and Partners. Privity was lacking, the judge said. The judge also concluded (i) that only Wang Microsystems had standing to bring a suit against Chen and Partners for the improper certification and (ii) that Wang Microsystems’ recovery might be limited to the professional fee paid to Chen and Partners.

B. Burdensome Regulations

Excessive and overbearing government regulations result in under-utilization of physical resources, but they also stifle entrepreneurial talent. Two examples illustrate the effects of

such regulations:³

- *Example 4:* Suharnoko wants to start his own business services company. Suharnoko's education and his previous work experience make him a good candidate for success in this venture. He also has done marketing research that indicates his business will fill a gap in the business services industry. The problem is that the government imposes very significant costs and long time delays to start-up a new business. In order to satisfy the government regulators, Suharnoko must go through 19 different procedures which will take on average about 150 days and the total official cost of getting the business started is expected to be over US\$1,000, which is many times Suharnoko's annual earnings. In addition, it is widely understood that the time delays and large number of different procedures give rise to pressures to bribe government officials to speed up the process, so the actual cost often is much greater than the official costs. In frustration, Suharnoko gives up the plan to start the new business and continues in his job as a relatively low level employee.
- *Example 5:* Chartran, Inc. is a company engaged in manufacturing oil and natural gas pipeline equipment. The company's sales and profits are growing and Chartran want to expand its operations. Doing so, however, would require hiring new staff. The government mandates a minimum wage of US\$200 per month, night and weekend work are prohibited, women can only work a maximum of 8 hours per day, and firing workers requires the approval of the Minister of Labor and payment of 12 months salary as severance pay. To avoid the rigidity of the labor regulations, Chartran enters into informal employment contracts with five new workers. The informal contracts provide no health care, educational or pension benefits, they are not subject to any of the safeguards in the labor regulations, and in the case of employer abuses the contracts cannot be reviewed by the courts since the labor is not documented. Chartran also bribes key personnel in the Labor Ministry to look the other way with regard to the contracts.

Each of these examples illustrates how laws or the absence of law can limit the utility of otherwise productive property and stifle entrepreneurial talent. Of course, these examples are not limited to the poor countries – many of the failings illustrated in these examples also can be found in the richest countries. One of the most significant contributions of the World Bank's **Doing Business in 2005**, however, is to demonstrate the unfortunate relationship between economic under development, poor protection of property rights and excessive regulation of business activities. Based on an analysis of 7 areas of business regulation in 135 countries, **Doing Business in 2005** concluded that the 20 countries with the most burdensome business regulations and the least protection of property rights are all poor and many are among the poorest in the world. Among the 20 countries with the best records, only two could be characterized as less developed – Thailand and Botswana. The report lists the business regulations in the following countries as the least burdensome:

³ Examples 4 and 5 are inspired by the World Bank's, **DOING BUSINESS IN 2005**, at 17–32.

- | | |
|-------------------|---------------------------|
| 1. New Zealand | 11. Swizerland |
| 2. United States | 12. Denmark |
| 3. Singapore | 13. Netherlands |
| 4. Hong Kong | 14. Finland |
| 5. Australia | 15. Ireland |
| 6. Norway | 16. Belgium |
| 7. United Kingdom | 17. Lithuania |
| 8. Canada | 18. Slovakia |
| 9. Sweden | 19. Botswana |
| 10. Japan | 20. Thailand ⁴ |

The report also stresses that the lack of burdensome regulations should not be taken as evidence of zero regulation:

Being in the top 20 on the ease of doing business does not mean zero regulation. Few would argue it's every business for itself in New Zealand, that workers are abused in Norway or that creditors seize a debtor's assets without a fair process in the Netherlands. Indeed, for protecting property rights, more regulation is needed to make the top 20 list.

All of the top countries regulate, but they do so in less costly and burdensome ways. And they focus their efforts more on protecting property rights than governments in other countries.⁵

The conclusions of the report are:

- Businesses in poor countries face much greater regulatory burdens than those in rich countries. They face 3 times the administrative costs, and nearly twice as many bureaucratic procedures and delays associated with them. And they have fewer than half the protections of property rights of rich countries.
- Heavy regulation and weak property rights exclude the poor from doing business. In poor countries, 40% of the economy is informal. Women, young and low-skilled workers are hurt the most.
- The payoffs from reform appear large. A hypothetical improvement to the top quartile of countries on the ease of doing business is associated with up to 2 percentage points more annual economic growth.⁶

3. Why the Benefits of Reform Are So Great

Removing the obstacles to the mobilization of local resources is so promising because it produces several different consequences, all of which come together to support greater economic development and the more efficient use of human capital.

- Simpler and more rational business regulations require less time and expense on both sides of the regulatory process. The government bureaucracy overseeing the regulation

⁴ *Id.* at 2.

⁵ *Id.*

⁶ *Id.* at 3.

of business will require less of the government's resources, which will enable the government to divert personnel to the delivery of essential services, such as health, education, and infrastructure development.

- On the business side, more efficient regulations will require less time and resources for compliance, which will allow the businesses to spend more time on their productive activities. They will produce more goods and services and spend less time on government compliance matters.
- The simpler and more rational business regulations will stimulate new business development as people previously deterred by the high costs of business start-ups move to establish their businesses. In addition, businesses operating in the informal economy because of the excessive and unrealistic legal burdens in the formal economy will be encouraged to shift to the formal sector.
- The growth of the formal economy through the establishment of new businesses and shrinkage of the informal economy will expand the government's tax base. This will allow the government to further escalate the delivery of essential services. Note the important implication here – that rationalization of business regulation includes tax reform, with tax rates reduced to international norms and tax compliance penalties stepped up to increase the risks associated with operating in the informal economy.
- As the formal economic grows both in absolute terms and relative to the informal sector, the government's business regulations will become more relevant to business. Simplifying and rationalizing the regulatory process thus will actually lead to the regulations having a broader impact. This will have its greatest effect on those groups most at risk in the labor markets. Women and children now will be protected by the government regulatory process rather than being left unprotected in the informal economy.
- At the same time, the simpler and more rational business regulations aimed at mobilizing local resources will also be attractive to foreign investors. As local barriers to doing business fall and respect for property rights grows, not only will local capital be drawn into the economy, but also foreign direct and portfolio investment will be drawn to the market.
- Greater protections for property rights will bring dormant capital into productive use. The entire financial system will be on sounder footing as credit arrangements tend to follow economic opportunities rather than personal relationships.
- The emergence of local resources to finance economic activities will reduce the reliance on foreign assistance and build up national self-sufficiency. Economic growth beginning from within the economy is much more sustainable and is more likely to produce local linkages that further enhance the growth prospects.

4. The Barriers to Reform Are Substantial

It seems relatively easy to identify the regulatory obstacles to making more productive use of local resources. In addition, since examples of best or better practices are readily accessible, the critical question is “Why aren't reforms proceeding at a rapid pace? What is holding back the reform process?”

In fact, regulatory reforms aimed at improving the business climate and enhancing property rights are occurring, but according to **Doing Business in 2005** they are taking place more in the high and middle income countries and in recent years the reform process has been driven principally by the need to compete within the newly expanded European Union.⁷ Unfortunately, the lowest level of reform is occurring in the poorest countries, which are most in need of reform and have the most to gain from such reform. So, the question becomes Why aren't the poorest countries more active in reforming business regulations and investor protections? The answers lie in the reasons for government regulations.

There are three principal theories supporting government regulations. The first, and most sanguine, is the public interest theory of regulation. This theory assumes that unregulated markets experience frequent failures and that governments regulate to counter those failures and to make the markets safer and more efficient.⁸ The second is one variant of the public choice theory and suggests that the regulated industries capture the regulators and are able to turn the regulatory process to the advantage of the regulated.⁹ Under this theory, stricter regulations are in the interest of the existing operators because the regulations limit entry into the marketplace and enable the existing operators to earn monopoly rents. The third theory is a second variant of public choice theory and is referred to as the *tollbooth view*.¹⁰ Under this theory, government regulations exist to give politicians and bureaucrats the opportunity to create artificial scarcities and then extract the rents from such scarcities through bribes, campaign contributions, and employment opportunities for friends and family members.

In the case of less developed countries, there sometimes is a fourth reason for government regulations – legal inheritance or legal transplantation. The less developed countries may have inherited obsolete or counterproductive regulations from their former colonial masters and inertia or a lack of skilled personnel may have insulated the regulations from reform. In the alternative, naïve legal transplantation may have resulted in the introduction of unhelpful regulations and inertia, lack of skilled personnel, or the daunting influence of the imprimatur of a foreign assistance program may keep the regulations from the review process.

The public interest theory of government regulations suggests that regulations are designed to serve the broader public good. The two variations of public choice theory, however, proclaim the winners to be either the existing operators in the regulated industry or the politicians and bureaucrats who administer the regulations. Under either public choice theory, the general public is not well served. In the case of inherited or transplanted regulations, economic productivity may suffer, but the regulations themselves may not have a powerful constituency supporting them.

The regulations that are the most injurious to the public and have the greatest adverse impact on local resource mobilization are precisely the ones with the most powerful constituencies supporting them – either the regulated industries or the government implementing the regulations. Further, the World Bank's **Doing Business in 2005** has found extensive evidence

⁷ *Id.* at 1.

⁸ Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, *The Regulation of Entry*, 117 *QUARTERLY JOURNAL OF ECONOMICS* 1–2, 2001.

⁹ *Id.* at 2.

¹⁰ *Id.* at 2–3.

that the most injurious regulations, especially regulations under the tollgate theory, are much more common in the more autocratic and less developed countries than in the more democratic and developed countries. This explains why reforms are so difficult to achieve in the less developed countries – they must be done in the face of formidable, local opposition.¹¹

Lest the rich countries get overly smug about the slow pace of reform in the poor countries, it should be recognized that their governments also stymie reforms that clearly are in the national interest in order to protect a few powerful vested interests. The clearest examples are the Japanese government's intransigent position on rice imports to protect local rice farmers or the U.S. government's cotton subsidies to guarantee the market for a few rich, but politically powerful cotton farmers. The governments in the poor countries are doing much the same thing as they oppose the reform process, it is just that they may be doing it to a greater degree and with more damage to the local economies than in the rich countries.

5. Conclusions: Implications for Legal Assistance Programs for Less Developed Countries

Apart from human rights and criminal law reform projects, it would appear that legal assistance programs for less developed countries should be concentrated in improving the regulatory environment affecting businesses and investors. The benefits from regulatory reform seem so great that there is a compelling case for directing all legal assistance for private sector development into the simplification and rationalization of business regulations. If the host countries are not willing to accept that emphasis, it may be that the technical assistance would be more effective if it were redirected to other host countries where the governments are more receptive to reforming business regulations.

Three concluding thoughts on the structure of legal assistance programs for private sector development:

- First, the initial phase of legal assistance program should be a catalogue of the business regulations. The World Bank's **Doing Business in 2005** and subsequent editions should help immensely with this process as they already have collected extensive information on 8 areas of business regulation in about 140 countries. As part of the cataloging process, however, business regulations should be defined according to the constituencies supporting them. In the case of unhelpful regulations lacking clear constituencies, the reform process may be expected to proceed quickly. On other hand, a regulatory program that enriches the prime minister's family may not be a good prospect for the first efforts at reform.
- Second, who are the most suitable technical advisors – local professionals or foreign experts? In developing its **Doing Business ...** series, The World Bank is depending on input from different local sources and the results seem impressive.¹² On the other hand, local professionals are more likely to be co-opted by powerful constituencies supporting particular regulatory programs, so the use of foreign experts may promote greater objectivity. A review of government regulations applicable to legal services

¹¹ World Bank, *DOING BUSINESS IN 2005*, at 3–4.

¹² *Id.* at 11–14.

may be skewed, for example, through reliance on highly regarded professionals within the regulated industry – especially since bar associations around the world are the best examples of regulatory capture under the public choice theory.

- Finally, the reforms must be implemented and then sustained to be effective. Just passing new and more enlightened regulations does not guarantee a change in the regulatory environment. As demonstrated by the U.S. experiences in pressuring East Asian countries to adopt greater protections for intellectual property rights, the passage of laws is only the first step towards actual change in the legal environment. Law reform programs thus should include multiple stages, including the formulation of reform proposals, passage of the proposals, implementation of the new proposals, and ongoing reviews of the proposals to insure that the reforms remain as positive forces for economic development and the mobilization of local resources.

The Rule of Law and Economic Development: A Cause or a Result?

Hiroshi Matsuo

1. Introduction

The legal reform has become the major category of international aid, as it has been recognized that the institutional reform matters in development (World Bank 2002). Now the development can be restated as the comprehensive reform of institutional structure in the developing societies. The rule of law has become the symbol of the institutional reform and the rule-of-law projects have been undertaken all over the world.

However, the outcome of those projects is now questioned: what has been brought about through the rule-of-law projects? If we focus on the relevant problem of the relationship between the rule of law and economic development, discussions continue between the opposite views. On the one hand, there is a belief that the rule of law facilitates the economic activities and it is a necessary precondition for economic growth (see 2 (1) below). On the other side of the view, it is criticized that the rule of law is not “a path to development” but “a highly desirable result of development” (Upham 2001).

This chicken-or-egg like question seems to depend ultimately on the definition of the rule of law. According to the *formal definition*¹, the rule of law is measured by some objective criteria such as the existence of a set of legislations, the fair execution of law by the executive, the independent and impartial judiciary, etc., and it can be an instrument to be *made* and *used* for the promotion of economic transactions and other activities of the people. On the other hand, if we rely on the *substantive definition*, the rule of law is regarded as the rule of *good* law which is normatively just and fair (Dworkin 1985). In this sense the rule of law is postulated as the objective to be sought rather than the mere instrument and is valued as such rather than is measured by incidental outcomes. The *functional definition* of the rule of law focuses on “how well the law and legal system perform some function” such as constraining the government discretion, making legal decisions predictable, etc. (Stephenson 2001b). It seems to be the instrument, but may be the objective depending on the contents and degree of the function to be required.

Whatever the definition we will use and whatever the contents we will require of the rule of law, however, it is worthwhile to make clear the causal relationship between the rule of law and economic development. For we must be certain whether and how the rule of law would lead to development before we embark on the rule-of-law project.

In this paper various views on the causal interaction between the rule of law and economic

¹ The rule of law is formally defined as the rule of laws which are made by the legislature in accordance with the constitutional rules on law-making, made public, applied precisely and not retroactively, executed certainly by the executive, judged openly and fairly by the independent judiciary, etc.

performance will be reviewed. We will analyze some variables and conditions which relate to economic growth together with or independent of the rule of law. If the rule of law is not merely the derivative or epiphenomenal result but can be a possible cause under certain circumstances, then it will be considered how the rule of law may be implemented together with some additional conditions. Then the rule of law will be faced with the question of how it relates to good government, for a certain aspect of the good government seems difficult to be compatible with the rule of law. Finally we will come back to the question of what at all the rule of law is and how it will contribute to economic development.

2. The Rule of Law and Economic Performance

(1) Positive Views

The rule of law especially defined as the existence of a set of formal rules and an enforcement mechanism has been regarded as the basic condition for economic development. For it protects the rights of individuals, execute contracts, and thus provides the people with *predictability* of the actions of contractual parties as well as those of government. For instance, the property rights protection by creating the formal transferable title system reduced *transaction cost* to constantly test the title of the transferor and removed obstacles to rapid transaction, increased *certainty* of the property and facilitated the mortgage system, provided the financial transactions with *calculability* and attracted investments, and thus fostered economic development (Mehren and Sawers 1992). Mehren and Sawers presented the thesis that “the development of legalism in general, and the specific conceptual innovation of title in particular, has had an important impact on the economic development of Thailand’s agricultural sector” (Mehren and Sawers 1992: p. 68).

There is also a report according to which the land law reform in Arab countries liberalized the land ownership, defeated the stranglehold by the comparatively few notables and military classes over agricultural land, weakened or abolished institutions which imposed restrictions on the freedom of contract, allowed non-possessory or deferred mortgages to obtain credit, instituted programs of agrarian reform and thus removed some obstacles to the economic development (Ziadeh 1985).

Another study analyzed a positive correlation between the security of property rights by removing the risk of expropriation, security of contractual rights through contract enforceability, and the efficiency of provision of public goods and creation of policies by the governments on the one hand, and the amount of investments and the speed of growth on the other (Knack and Keefer 1995).

A survey which focuses on the judicial independence as “a crucial aspect of the rule of law” testifies that “[w]hile *de iure* judicial independence does not have an impact on economic growth, *de facto* judicial independence positively influences real GDP growth per capita” (Feld and Voigt 2002).

It seems to be recognized with evidence that the predictability on the part of judiciary, the less likelihood of government repudiation of contracts, the lower level of corruption, the reduction of risk of government expropriation, the quality of bureaucracy, and overall maintenance of the rule of law significantly influence and positively associated with the levels of income, rates of growth and amounts of investment (Davis and Trebilcock 2001: pp. 26, 28).

(2) Objections

However, there are also evidences which indicated that reforms of the formal legal system had little effects on economic and social conditions in developing countries (Trubek & Galanter 1974). Recently empirical studies have been accumulated which attempt to show the causal relation between a reform of particular field of law and a specific effect².

With respect to land reforms designed to facilitate the privatization of land, for example, the evidences concerning the impact on productivity is regarded as mixed. With regard to the economic effects of the formalization of title to land, its impact on incentives to invest in the acquisition or improvement of real property is also seen as mixed.

Rather the feasibility and effectiveness of land redistribution programs to enhance agricultural productivity and reduce inequalities were significantly undermined by the interests of dominant groups in a society. Some relatively successful land redistributions such as those in South Korea, Taiwan, Japan, etc. were mostly undertaken during the period of radical reform just after the World War II under the strong pressure or supervision from outside (Davis and Trebilcock 2001: p. 28).

Also the land titling programs faced difficulty to change the customary patterns of land holdings and land dealings which were “stubbornly persistent”, because the introduction of land title system not only affected the interests of the privileged class but simultaneously created new uncertainties for other groups who had traditionally enjoyed usufructuary rights and feared a risk of being denied their customary rights to land during the registration process (Platteau, 1996).

We have also data which indicate that the economic growth does not always positively correlate with the rule of law. For instance, the rule-of-law indicator adopted by the UNDP does not seem to show the correlation with economic growth, especially in Asian countries (see [Table 1]). Here the rule-of-law indicator is measured by the aggregate of a variety of individual factors such as (a) black markets, (b) enforceability of private and government contracts, (c) corruption in banking, (d) crime and theft as obstacles to business, (e) losses from and costs of crime, and (f) unpredictability of the judiciary (UNDP 2002: p. 37)³. More than five percent GDP growth rate may be accomplished not only under the higher score of the rule-of-law as is the case of Singapore, but also under the lower score of the rule of law as observed in China, Vietnam, Thailand, Myanmar, Korea, etc.

Of course it cannot be neglected that the Asian financial crisis which occurred during this period highlighted the failure of the rule-of-law reforms such as the lack of transparency and accountability and it affected the economic growth. This implied that the Asian miracle economies are unstable without the rule of law (Carothers 1998: pp. 105–106), and the rule of law becomes significant in the second stage of development. Besides, the data cover only a limited period and it is too short to identify the real effects of the rule of law on the long-term economic growth that matters in development. Anyway we need much more data including those of the change in the rule-of-law indicator to analyze the correlation more accurately.

² Those empirical studies are collected and summarized in Davis and Trebilcock 2001: pp. 27–30.

³ Government effectiveness is measured by the factors such as (a) bureaucratic quality, (b) transactions costs, (c) quality of public health care, and (d) government stability (UNDP 2002: p. 37).

[Table 1] The Rule of Law and Economic Growth

	Rule of Law 2000-2001	Government Effectiveness 2000-2001	GDP per capita annual growth rate (%)	
			1975-2002	1990-2002
U. K.	1.61	1.77	2.1	-2.4
France	1.22	1.24	1.7	-1.6
Germany	1.57	1.67	2.0	-1.3
Kenya	-1.21	-0.76	0.3	-0.6
U. S. A.	1.58	1.58	2.0	-2.0
Brazil	-0.26	-0.27	0.8	-1.3
China	-0.10	0.14	8.2	-8.6
Vietnam	-0.57	-0.30	5.0*	-5.9
Thailand	0.44	0.10	5.2	-2.9
Myanmar	-1.02	-1.25	1.8*	-5.7*
Indonesia	-0.87	0.50	4.2	-2.1
Singapore	1.85	2.16	5.0	-3.8
Korea	0.55	0.44	6.1	-4.7
Japan	1.59	0.93	2.6	-1.0

Source: UNDP 2002 (for Rule of Law Indicator); UNDP 2004 (for GDP per capita).

*: Data refer to a period shorter than that specified.

(3) Focusing on Factors Other than the Rule of Law

One of the possible answers to these different views may be that the rule of law is not an independent or autonomous variable in the process of socio-economic change. Rather its effectiveness must be contingent on that of other factors including the political stability, government effectiveness, informal system of dispute resolution or trade networks, domestic and international socio-economic circumstances, religious attitude, etc. As a result, it is not surprising that if two countries recorded the same rule-of-law score, they may differ in the economic growth. The rule of law would reinforce as well as retard the economic development depending on other variables. For instance, the land title system introduced in Thailand reinforced the economic growth under the specific conditions of the Thailand's entry into the world market through the Bowring Treaty, the increasing demand for rice and the concomitant increase in the price of rice and land and the rise of commercialized agriculture. In this context legal reform played "a more modest, though important reinforcing role" (Mehren and Sewers 1992: p. 93).

The effectiveness of a legal reform may also differ depending on the cultural factors developed in each country or region. Perry attempts to present a culture-based approach toward the relationship between legal reform and economic development. Relying on Geert Hofstede's study of variance of cultural values, he focuses on the general character of the people such as the (i) uncertainty avoidance, (ii) collectivism or individualism, (iii) power distance (differences in the power distribution between citizens and the state), (iv) femininity or masculinity, and (v) long-term orientation or short-term orientation. Perry analyzes their significance, for

instance, as follows:

People from countries with a high UAI [uncertainty avoidance index] score tend to have an ‘emotional’ need for rules ... more precise laws than those with low UAI scores. ... By contrast, low UAI countries have ‘an emotional horror of formal rules’ and resort to them only ‘in case of absolute necessity’. Paradoxically, ‘although rules in countries with weak uncertainty avoidance are less sacred, they are generally more respected’ (Perry 2002: pp. 296–297).

... economic actors in East Asian collectivist cultures tend to rely on more on networks of personal relationships and negotiation than on legalism and written contracts. Such flexible relationships require a good deal of state discretion (Perry 2002: p. 304).

In small power distance countries (... , for example, Great Britain), ‘a feeling dominates that the use of power should be legitimate and subject to the judgement between good and evil’; that inequality is ‘basically undesirable’ ...; and that the ‘law should guarantee that everybody, regardless of status, has equal rights’. ... small power distance countries are characterized by rule-based (less discretionary) state.

In large power distance countries (... , for example, the Philippines), ‘power is seen as a basic fact of society which precedes the choice between good and evil’, and ‘[i]ts legitimacy is irrelevant’ because ‘[m]ight prevails over right’ (Perry 2002: pp. 301–302).

Countries that combine strong uncertainty avoidance with individualism (for example, France) tend to favour rules that are ‘explicit and written’; while countries which combine strong uncertainty avoidance with collectivism (for example, Japan) tend to favour rules which are ‘implicit and rooted in tradition’ (Perry 2002: p. 300).

Based on this approach, Perry criticizes the “contemporary prescription for legal reform” which emphasizes the “market-allocative” and “rule-based” and thus “private-sector-led development policy held by the international financial institutions. Those variables may influence the function of legal reform and economic development, and will guide to make more flexible development policies depending on the cultural variance.

Upham pays attention to the role of *informal rules* in the economic development. He notes that the rule of law is not a necessary condition for development and sometimes even counterproductive when the “informal mechanisms” which foster economic growth are more effective and efficient than the formal rules (Upham 2001). For instance, in the case of Japan, Upham states, formal legal rules have very little to do with the economic growth and instead other causes have been functioning. He indicates: (a) the Japanese allowed interaction between bureaucrats in the powerful Ministry of International Trade and Industry, politicians, and private business to guide economic policy; (b) the Japanese also rely on a system of informal mechanisms to handle disputes including the Big Four Pollution Cases in the 1970s. Upham concludes that in its extensive reliance on informal mechanisms, the Japanese legal system would serve as a better model for developing countries than the United States (Upham 2001).

It is true that the existing informal rules may give the predictability, while the newly introduced formal rules may increase the transaction costs. In this context the costs of replacing well-functioning informal institutions with formal ones should not be overlooked in the process of legal reform. However, at the same time, the role of informal rules should not be overemphasized and they must be valued in total including their negative effects. Anyway we must be very before concluding that the rule of law is not a necessary condition for economic development.

Although the rule of law is *not* a panacea, its significance for economic development must be measured in the long-run process of the comprehensive institutional change of the society. Because formal institutions such as the rights-based legal system supported by the government's enforcement mechanism and the people's rights consciousness need fairly long time to be transplanted. But once they begin to take root, they gradually supplant the informal system and become more cost-effective as the economic activities extend and the impersonal transactions become popular around the country. Japanese style of economic development, I believe, may be a typical sample of such a long-run institutional change rather than that of the informal rules.

Another reason for the necessity of the long-term evaluation is that the impact of the rule of law may appear more significantly in "the second phase" of development, for instance, in the stage of building institutions such as tax agencies, customs services, antitrust agencies, etc. which need the governance reform by realizing the stability, transparency and accountability and thus to deepen and consolidate the institutional reform after the first phase of economic liberalization initiated by the introduction or reform of market system (Carothers 1998: p. 98).

3. Good Government and the Rule of Law

If the rule of law can be an effective instrument under additional conditions for economic growth, the next question is how to implement it in a particular situation of each country. However, we have learned that this is a quite difficult problem, because the rule of law includes not only (a) the legislation of formal rules, but also (b) the establishment of enforcement mechanism and (c) the change of attitude of the people as well as of the government to respect for the formal rules⁴. In this context the rule-of-law reform must be placed within a part of the comprehensive institutional reform seeking for good government.

If we rely on the substantive definition of the rule of law as the rule of good legal system, the rule of law can be abstractly and easily regarded as an "equivalent to good government" (Thomas 2001). However, if we are actually engaged in the legal reform project bearing in mind the formal or functional definition of the rule of law, "there is no *a priori* reason to believe that the rule of law ... is necessarily always a good thing." Stephenson puts it:

Consider the example of official discretion. Official discretion is often a bad thing – when seen as such, the behavior is often called "arbitrary." On the other hand, sometimes official discretion is a good thing – in these cases, we tend to think of the behavior as "flexible." But flexibility and arbitrariness may be two sides of the same coin. Whether official discretion is used for good or ill depends on a host of other factors. The rule of law, while often a good thing, can in some cases create problems (Stephenson 2001b).

⁴ Carothers classifies the rule-of-law reform into three types: the first type concentrates on the law themselves such as commercial law, criminal law, etc.; the second type is focusing on the strengthening of law-related institutions to make them more competent, efficient and accountable; and the third type legal reform aims at increasing government's compliance with law. He notes that the rule-of-law projects assisted by the foreign aid have been concentrated on the first and second type which are more easily attained than the third that is concerned with the real change in the government obedience to law and is "the hardest, slowest kind of assistance." As a result the rule-of-law aid "affected the most important elements of the problem least" (Carothers 1998: pp. 99–100, 105).

This implies that one of the virtues of the good government as *predictability* or *credibility* of government decision, that is also a primary factor of the rule of law, is sometimes difficult to be compatible with another virtue of the good government as *flexibility* of the government decision, especially “in times of economic crisis or rapid change.” Stephenson also puts it:

[T]he economic impact of a particular set of institutions often depends on context. For example, certain institutions make it difficult for the government to institute policy changes. In some contexts, this is beneficial for economic development, since it makes government commitments more credible (Brunetti and Weder 1994; Henisz 2000).

On the other hand, in times of economic crisis or rapid change, these same institutions can hinder a government’s ability to respond effectively (Tsebelis 1995). An independent constitutional court may encourage foreign investment by ensuring the executive does not arbitrarily seize property, but if it were to prevent the rapid adoption of policies needed to counteract a financial crisis, it might also discourage investment. The consensus seems to be that, in developing countries, maintaining credibility tends to be more economically important than retaining flexibility, but the example illustrates the complexity involved in assessing the net economic impact of institutions (Stephenson 2001a).

The “good” government includes various elements which can be divided, I believe, into three aspects: (a) the “efficiency” of the government’s function, (b) the “righteousness” in the exercise of governmental power and (c) the “benevolence” of the government toward the people⁵. We can not escape from the latent contradiction between the “efficient” government on the one hand, and the “righteous” and “benevolent” government on the other. This means that, for instance, the rule of law which guides the righteous government to provide the people with calculability, predictability, credibility sometimes fall into contradiction with the demand on the efficient government to require a flexible decision making in the context of development. As it is difficult to meet these different aspects of the good government at a time, the only possible way would be that we promote the rule-of-law project as a part of the good-government project step by step, avoiding the “vicious circle” by balancing those aspects toward the “goals of development” (Huntington 1987)⁶. This may be characterized, I believe, as the ***incremental and balanced approach*** to the rule-of-law reform.

In this context the relationship between the rule of law and economic development is a part of the whole story. We have to take into consideration, at least, the relationship between the rule of law, economic growth and democracy. There are various views on this relationship to the effect that (a) the democracy promotes economic development; (b) it reduces economic growth; or (c) it has no statistically significant impact on economic outcomes (Davis and Trebilcock 2001: p. 26). Anyway the structural obstacle to harmonize the marketization and

⁵ The efficiency is concerned, for instance, with the policy making and enforcement by the government to support the market system. The righteousness relates to the formal decision making of the government including legislation, judgment of the court and administrative decision in accordance with the rule of law, legality and administrative justice such as accountability, transparency and probity. The benevolence means the government’s consideration for the people to open its information, to promote democratic participation and to foster the civil society.

⁶ Huntington enumerates as the goals of development (a) economic growth, (b) equality, (c) democracy, (d) stability and (e) autonomy, and analyzes the views on the conflict, compatibility and harmonization between them (Huntington 1987).

democratization can not be ignored. By taking the significance of ethnic problem into consideration Chua puts it:

[T]he combined pursuit of marketization and democratization in the developing world is likely to catalyze ethnic tensions, with potentially catastrophic effects, including the subversion of both markets and democracy (Chua 1998: p. 6).

The market will not lift the great majority of citizens out of poverty. Rather, it will aggravate, at least in appearance and probably in reality, the existing ethnic maldistribution of wealth. Democracy will not make all voters imagine themselves as coparticipants in the fraternal national community. Rather, the competition for votes will more likely foster the emergence of ethnic political entrepreneurs (particularly among the impoverished majority) and active ethnonationalist movements. Markets and democracy cannot be regarded unproblematically as solutions to the dangers of ethnic strife in deeply divided societies. ... marketizing and democratizing lawyers who continue to ignore the developing world's historic distributional problems, especially its ethnodistributional problems, are engaging in "romanticism or worse" (Chua 1998: pp. 106-107).

To solve this puzzle, Chua indicates as "the best of the 'second best' solutions," that is, the "carefully tailored, ethnically conscious market interventions" including affirmative action made by the government on the one hand, and the "ethnically conscious tailoring of the democratic process" led by the government to control the democratization process on the other, depending on the particular situation of individual case (Chua 1998: pp. 62, 77, 91). In this coordinating effort, however, "the second best solutions" should not be perpetuated and they must not be used merely as an excuse for market intervention and democratization control by the government. In this context it is worthwhile, I believe, to reconfirm the basic implication of the rule of law to restrict the government discretion, which will also enable us to avoid the "romanticism or worse," though such an effort must be full of tensions and far from "romanticism."

4. Conclusion

It is not easy to describe clearly and accurately the causal relationship between the rule of law and economic development. There are various factors which disturb the function of the rule-of-law reform. However, these negative factors do not mean to deny the possible correlation between the legal reform and economic development. Further, in the light of the accumulated studies, it seems difficult to conclude that the rule of law is not a necessary condition for economic growth but merely an incidental result contingent on a particular pattern of development. We can not expect the rule of law too much, but never make little of it. For the moment, the agenda for the future discussion may be summarized as follows.

(a) The rule of law is not a single, autonomous and independent cause of economic development. It can be a facilitating factor for economic growth *only if* some basic and additional conditions are satisfied. Those conditions vary depending on the history, culture and initial situation in each country. However, they may be concerned with (i) the domestic and international economic situation such as the degree of commercialization and the extension of impersonal exchange, (ii) the cultural attitude of the people toward law, for example, the reliance on formal rules, (iii) the strength (or weakness), efficiency and rationality of the existing informal rules.

Both the factors which will prevent the legal system to function and the possible conditions which will facilitate the economic development together with the rule-of-law must be investigated in the specific situation and historical context of a particular country or region. Among those factors cultural elements may be interpreted into informal rules⁷, and they might include what is called “social capital” (Putnam 1993) which facilitates the co-operative activities among the citizens that influence the performance of institutions.

(b) In the process of the rule-of-law reform, it is not surprising that the legal reform is more costly or even counterproductive when the informal rules have been more effectively and less costly applied to transactions and other activities. However, before it is decided which informal rules should be kept and which should be replaced, the investigation must be made on the *total* effects of the informal rules concerned and the possible effects of a series of legal reforms must be measured not in the light of impact on rapid economic growth but in the long-term process of the comprehensive institutional reform.

(c) To reduce the costs of legal reform as possible as we can informal rules should not be replaced by formal rules *at a time*. It must be taken into consideration that every legal system consists of the combination of formal rules and informal rules. All the legal reforms must be undertaken by paying enough attention to the existing rules and, if it is possible, by using them. Those existing rules can not be ignored only because their contents are bad. Institutional reform can be performed by starting from the scaffolding of a set of present institutions, and institutional change could only be realized through the existing institution concerning the rule of change. As a result all the legal reform is necessarily incremental in its nature and thus all the possible development is path-dependent (North 1990) and there is no standard pattern.

(d) Any law can not exist as a single and isolated rule, rather every law is a part of a comprehensive legal system. In the process of the rule-of-law project, comprehensive and long-term planning must be indispensable. Legal reforms performed by the ad hoc-basis or fragmented legal reforms would have little effect, or even counterproductive when they produce contradictions with other legal reform projects. It would affect seriously the consciousness of the people to respect for law, which is in the heart of the rule of law (see (f) below). Although there would be no fixed and standard pattern, the order of legal reform should be investigated and each legal reform project must be placed into the comprehensive and long-term planning of institutional reform.

(e) In the rule-of-law reform the marketization for economic growth must be coordinated with the democratization. Also in such a coordination process the government’s decision must be basically predictable and credible. However, especially in the time of rapid change or economic crisis more flexible policies may be required of the government. However, particularly in this context the special significance of the rule of law must be remembered and reconsidered to identify the flexible decision making by the government which is allowed within the rule of law and arbitrary discretion in the name of flexibility.

(f) The rule of law in a sense may exist in most societies if we take into account not only formal rules but also informal rules. For the people in every society must be bound by any

⁷ The interpretation of culture into a set of informal rules may be possible, because a particular element of a particular culture can be regarded as a set of traditional and conventional rules which guide the patterns of conduct of the people in each society.

rules which are actually applied so as to avoid *uncertainties*, though they may be individual, unstable, irrational or inefficient. However, rule of law in its proper sense exists in societies where the formalization system of rules is established, by which law is conceived as a “union” of the *primary rules* to give rights to and impose duties on the people and the *secondary rules* to recognize, adjudicate and change the primary rules (Hart 1961: pp. 79-99). Then, after that step, we can ask whether those rules are actually enforced or not, and whether their contents are normatively valued as good or not.

Thus the rule of law contains (i) the basic attitude of the people as well as the government to obey the rules, (ii) the existence of formalization process of the rules, (iii) the actual implementation mechanism of the laws, and (iv) the normative value of the laws. If all these requirements are satisfied in a society, then it can be said to have the rule of law in the most strict sense.

In the rule-of-law project we must be very careful not to neglect the basic elements such as the basic attitude to obey the rules (above (i)) by emphasizing the importance of other elements such as the normative value of the law (above (iv)). For instance, if the donors overlook the people’s original attitude to obey the existing rules (whether informal or formal) and attempt to introduce new legal system rapidly only by paying attention to its contents, it would seriously, however unconsciously, undermine the establishment of the rule of law.

The basic implication of the rule of law which is rooted in the very nature of law and legal system is that once a set of rules are recognized as law in a legal system, they must be obeyed by the people as well as by the government (Raz 1977; Raz 1990) until they are changed in accordance with the rule of change that is included in the legal system. All the legal reforms can be performed only as an extension of the existing rules by using some of them. This basic implication should always be kept in mind in the process of legal reform project.

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Human Rights and Democracy in Vietnam: Some Thoughts on the Philosophy of Legal Assistance¹

Masanori Aikyo

1. Human Rights and Democracy in Vietnam

The current Constitution of Vietnam (enacted in 1992 and amended in 2001) states in Arts.50 and 51 on “Human Rights” and “The Rights of Citizens” as follows:

“Article 50: In the Socialist Republic of Vietnam human rights in the political, civic, economic, cultural and social fields are respected. They are embodied in the citizen’s rights and are determined by the Constitution and the law.”

“Article 51: The citizen’s rights are inseparable from his duties.

The State guarantees the rights of citizens; the citizen must fulfill his duties to the State and society.

The citizen’s rights and duties are determined by the Constitution and the law.”

Spiritual freedom in the forms of physical liberty and freedom of expression have been guaranteed under the provisions of the current constitution of 1992. However, under the present denial of multi-party rule, the exercise of citizen’s rights, with political freedom in particular, has been restricted. The 1992 Constitution erased the concept of a “State of proletarian dictatorship” and changes it into the “State of the people, from the people and for the people”. Furthermore, the word “human rights” (*quyen con nguoi*), which had been rejected before, was provided for in the Constitution. The following questions emerge with regard to the introduction of the category of “human rights” in the Constitution:

The first question is why “human rights” was introduced into the 1992 Constitution. The reason for Vietnam to adopt a “human rights” category in the early 1990s has not been clear. However, one may mention that at that time Vietnam had already ratified the two International Covenants. Another reason may have been the rise of radical reformists who advocated pluralism on the occasion of the collapse of socialist countries in 1989, and another group of reformists who received influence from the first group. They may have demanded that the draft constitution include provisions on a “human rights” category. In fact, during the last phase of the drafting process, the conservatives attacked the attempt to introduce a “human rights” category into the Constitution. As a result, the provisions on “human rights” were adopted in a way quite different from the earlier drafts. The conservatives managed to remove any trace of “human rights” as “natural rights” from the provisions by integrating “human rights” into “citizen’s rights”. They

¹ Translated from the Japanese by Teilee Kuong (Associate Professor, Center for Asian Legal Exchange, Nagoya University). Further assistance was provided by Matthew Linley (Researcher, Center for Asian Legal Exchange, Nagoya University).

succeeded in inserting the category of “human rights” into the chapter on the conventional socialist fundamental citizen’s rights under the title of “citizen’s rights”.

The second question is why general provisions on “human rights” and “citizen’s rights” were provided for separately in Art.50 and Art.51. The previous Vietnamese constitutions only contained provisions on “citizen’s rights”. There was only one single article on this issue. In contrast, the first three drafts of the new Constitution separately mentioned “human rights” and “citizen’s rights” in different provisions, resulting in the final separation of the two articles. However, since the 1992 Constitution considers “human rights” as being included in the chapter on “citizen’s rights”, there is logically little significance in separating the two articles. Yet, based on requests by the reformists, the word “human rights” remains and two articles were left separate as before. Therefore, the position of “human rights” provisions in Art.50 of the current Vietnamese Constitution of 1992 is extremely unclear.

As we have observed so far, when the Constitution was adopted in 1992, the contents of the “human rights” provision were a major retreat from what had been in the earlier drafts. However, new theories about “human rights” in Vietnam took shape within the subsequent environment surrounding the country.

When one considers human rights theory in Vietnam, one needs to pay attention to the trends and views of the Human Rights Center of the Ho Chi Minh National Political Academy. As one can tell from its name, the Ho Chi Minh National Political Academy has been serving as a school of the political party. But based on a proposal by the Deputy Prime Minister, a “Human Rights Center” was established in 1995 inside this traditionally Marxist- Leninist institution.

The Human Rights Center has the following mandate:

- (1) To conduct studies on human rights theories and history of the world;
- (2) To conduct studies on how to implement human rights provisions;
- (3) To cooperate with national and international research centers on human rights;
- (4) To organize seminars and conferences on human rights research and education;
- (5) To develop books and materials for human rights awareness; &
- (6) To conduct post-graduate education.

As a result of the establishment of this Center, there has been stronger engagement in human rights research. One of the examples is that the Institute of State and Law, which is the largest law research institute in Vietnam, also followed suit and established a new human rights department.

Human rights theories in contemporary Vietnam are generally explained in the following way. I will introduce these arguments based on a publication issued by the Human Rights Center. According to that publication, Ho Chi Minh emphasized the close conceptual linkage between “the sacred national right (quyen dan toc)” and the “fundamental human rights (quyen co ban cua con nguoi)”. It is pointed out that this view was later developed into the “fundamental national rights (quyen dan toc co ban)”. The publication also puts emphasis on “the right to life”, and introduces the viewpoints expressed by Singaporean politicians that “the right to development is a fundamental right” given the condition of poverty in Asia. In addition, it states that while “human rights” is a universal term for all human beings, it is at the same time a term for the whole of Vietnamese nationals in their long struggle for independence, freedom and happiness”.

Characteristics of human rights terminology in Vietnam today imply the following:

- (1) Revival of the concept of “fundamental national rights” used during their wars of national liberation against the United States, placing it in the center of human rights theory;
- (2) Emphasis on the argument that “human rights is an internal matter”;
- (3) Reference to the “right to development” of the “nation”.

Furthermore, with regard to democracy, there emerged controversies concerning the concept of the “State based on law”. At around the time of the 7th Party Congress in Vietnam in 1991, Do Muoi, then Secretary-General of the Communist Party, and people around him started using the concept of “State based on law” as a slogan in parallel with the notion of “socialist legality”. Although the phrase “socialist State based on law” (nha nuoc phap quyen xa hoi chu nghia) had already been used together with the concept of “State based on law” in Vietnamese legal literature for a while, its official use only started to emerge in the papers of the 8th Party Congress in 1996. It was used to emphasize the “socialist” factor. Together with “socialist democracy” (dan chu xa hoi chu nghia) and “socialist legality” (phap che xa hoi chu nghia), it helps stress the way of a “unified” State authority based on the socialist theory of State-building.

2. The Position of “Human Rights” and “Democracy” in Legal Assistance Activities

(1) Debates About “Asian Democracy” and “Asian Human Rights”

This report looks into human rights as “norms” and seeks to understand them as something having “objective characteristics”.

Discussions about the issue of “Asian human rights” have close theoretical links with the way one understands “the third generation of human rights”, in particular the “right to development”. Research on these questions finally takes on a serious dimension in Japan. Okada Nobuhiro’s work on the third generation of human rights is significant as a review of the “third generation of human rights” from the constitutional law perspective.

In his essay, Okada reviews both critical theories (by Donnelly, Sudre, Rivero) against the “third generation of human rights” and complimentary theories (by Vasak, Rousseau). He emphasizes the importance of clarifying the subject of rights, the targets and the bearer of responsibilities, stating that since human rights are “rights of the human being” as an individual, the existence of groups or communities must be considered a tool to ensure fulfillment of these human rights, as pointed out in these critical theories. This argument is closely relevant to the themes of constitutional studies, which focus on reviews of concrete cases of infringement on individual’s rights as may in fact occur under the name of “the right to development”.

Aoki Tamotsu questions the persuasiveness of a kind of comparative study which pitches Japanese “communitarianism” and a “culture of shame” against the Western “individualism” and “culture of punishment”. He reviews the work of Ruth Benedict, Kato Shuichi, Umesao Tadao, and states that, for instance, “individualism” is also detectable in Thai society, as a country in Asia. He thus points out the problematic nature of this formula.

The claim of “Asian human rights” is conditioned by the concept of “Asian values”. However, Aoki also points out that “Asian human rights” in this context includes the “Japanese way of business management”, its “family-oriented social system”, the “Asian system of decision-

making based on consensus without votes”, “the Japanese spirit”, and “communitarianism”. In other words, this line of thinking attempts to draw an active interpretation of something called “the Asian way”, and it seeks to approach “human rights” on this basis. In concrete terms, it maintains the stance that, for the sake of development, the imposition of restrictions on “human rights”, particularly spiritual and political freedoms, is inevitable. The special feature of this approach is to explicitly advocate the concept of “overall national interests” or “national polity” embodied in the “Achievements of the Revolution” (in the case of Vietnam) and “*Panchasila*” (in the case of Indonesia). This principle for restricting the exercise of human rights is mainly for the purpose of realizing a policy of “development first”. In addition, this theory on democracy is based on the understanding that governance by an outstanding leader is itself important, and anything that ends up with good results is in and of itself good. In terms of relations with the outside world, human rights issues are claimed to be internal matters of the “State” concerned, featuring the tendency to protest against “interference in domestic matters” for the cause of human rights. This argument also embraces the understanding that the guarantee of the right to life is the first priority whereas respect for civil and political freedoms is only guaranteed after this a priori right has been protected. In general, by conceptualizing “Asian human rights” based on contents which are in contrast to “Western human rights”, this argument even leads to cases of attacks and complaints against the Universal Declaration on Human Rights and other international human rights instruments. However, apart from some leaders like Lee Kuan Yew and Mahathir Mohammad, not many leaders of Asian countries resort to the use of phrases like “Asian human rights”, “Chinese human rights”, “Vietnamese human rights”, etc.

Behind the claims of “Asian human rights” lies the need to move towards modernization and to overcome poverty in the process of fighting for decolonization and independence. For some Asian countries, there exists also a history of serving as the counter-revolutionary “front” during the “Cold War”.

However, things really began to change with the advent of China and Vietnam calling for “reforms and openness” and their adoption of the policy of “developmentalism” after 1989. At this time, the need to maintain socialism and the occurrence of various problems thereof became obvious in Asian socialist countries. Worries were exacerbated by the beginning of the process that eventually led to the collapse of socialist countries in East Europe and the Soviet Union. Further, mainly after the 1990s, assistance received from the West had complicated influences, for instance, upon the way human rights arguments were formed in Vietnam. These facts are linked to the controversial questions of why Vietnam introduced a “human rights” category into the Constitution of 1992, and, notwithstanding this, why it then tried to theoretically play down the significance of this “human right” category.

The theory on “a Confucianist cultural area” arose after the 1980s as an argument to “seek a suitable explanation” for the phenomenon of rapid economic development in the Asian NIES and to respond to the “age of Japamerica²”. This suggested an approach to the theory of Asia within the framework of civilization. Through the use of such keywords as “communitarianism” and “learning-based society”, and as alternatives to “Western individualism”, emphases were made on Asian “communitarianism” and on responsibility rather than rights in the “rights vs

² The thinking that Japan is economically catching up and overtaking the US hegemony.

responsibility” dichotomy. It was even claimed that this very type of society itself is most suitable for capitalist development. However, after the “Asian crisis”, such views lost their practical grounds. In their place were arguments that “these theories stood on their own head” or that “Asia is diverse”. Yet, there remain a number of theorists who support the theory of “a Confucianist cultural area”. Nevertheless, the important thing which we should pay attention to is that, more than anything else, the theory of “Confucianist cultural area” was brought up just to re-focus “Japan” studies and the study of the “Japanese Constitution”. Therefore, one can also say that the Japanese theory of a contemporary Asia is a miniature of the theory on contemporary Japan.

(2) Governance

Realization of “good governance” is an objective condition for moving towards realizing the “rule of law” premises in Asian countries in transition. Legal assistance projects in the field of governance, such as reform of the civil service institutions and administrative reform, etc, are to take place in some Central Asian countries like the Kyrgyz Republic. In Vietnam, in cooperation with the National Academy of Public Administration, we are planning to organize an international symposium on “Administrative Reform and Law” at the end of December 2004. These and other instances show that engagement in this field is increasing.

3. What Do “Human Rights” and “Democracy” Contribute to Legal Assistance Studies?

In an international symposium on “International Cooperation in the Field of Legal Studies and an Agenda for Comparative Law Studies - Experiences of Legal Assistance to Countries in Transition” held in Japan in May 2004, some issues related to legal assistance and comparative law studies were identified in the reports presented by foreign speakers. The topics presented at the Symposium were as follows:

- (1) Robert K. Goldman (American University, USA), “Some Reflections on Lessons learned from U.S. and International Financial Institutions’ Efforts Promoting Legal Reform in Countries in Transition”;
- (2) Martin Lau (London University, UK), “The Role of Islam in the Reconstruction of Afghanistan’s Legal System”;
- (3) Penelope Nicholson (University of Melbourne, Australia), “Distinguishing Law and Development: Legal Assistance in Asia and the Vietnamese Courts”;
- (4) Herwig Roggemann (Free University of Berlin), “Differences in Legal Tradition and Legal Culture in Post Socialist Eastern and Western Europe as a Problem of Comparative Law”;
- (5) Gábor HAMZA (Eötvös Loránd University), “New Trends of Codification of Civil (Private) Law in Central and Eastern Europe”.

The objective of holding the International Symposium in May was to clarify the following questions, based on the Japanese experience of theorization and practice with regard to the legal assistance studies:

- (1) What are the implications of building a legal system, training legal professionals and developing legal education, etc?

- (2) Are there any new implications in the debates about “traditional law”, “reception of law” and “transplantation of law” in the present context of globalization and regionalization?
- (3) What do legal assistance activities have to contribute to comparative law studies in general?

Foreign guest speakers reported on the situation of the following countries: Latin American countries, Russia, Germany, Hungary, Bulgaria, Croatia, Italy, Afghanistan, Cambodia and Vietnam, etc. Subjects targeted in these reports included legal assistance, and legal harmonization, etc. Speakers from Europe and the United States were deeply involved in researching and practicing legal assistance activities in these diversified regions.

Many issues were brought up for discussions at the Symposium. It is not possible to mention all the details here, but I would like to touch upon some important points as follows:

First, as stated by Professor Goldman from the United States, one should learn from the “past” of legal assistance activities, including the past track record of the “law and development movement” in the United States. This is also related to the issues pointed out by Professor Nicholson from Australia, posing the question of whether legal assistance projects developed at present by different bilateral and multilateral aid organizations at the global level are different, to any significant extent, from the nature of the “law and development movement” from the 1960s to the 1970s. Although I hold a different view from that of Nicholson, her critical view on the possibility of implementing legal reforms without following political reforms poses an important question to the agenda of legal assistance studies.

Second, Professor Lau from the United Kingdom presented his report based on his practical experiences in conducting legal assistance activities in Afghanistan. He pointed out the gap and differences between urban and rural areas and the existence of informal law. Furthermore, the question of whether it is good to launch legal reform only to satisfy international society, or the suggestion that what is longed for now in Afghanistan is not human rights but security, brings up the core issue in legal assistance studies. In other words, it involves the argument that donors must familiarize themselves well in the local realities of the recipient countries before making judgment on what should be assisted.

Third, based on the historical experience of German unification, Professor Roggemann from Germany pointed out the question of how to consider the law of the former East Germany which used to exist as socialist law. Touching on the issue of legal tradition in Eastern and Central Europe, the tradition of democracy and the role of the Constitutional Courts, etc, he also emphasized the importance of comparative law studies to be applied in reviewing the unification of law in Germany. Professor Hamza from Hungary reviewed the phenomenon of the “reception of law” from an empirical and comparative approach, focusing on the field of private law. He discussed the mutual influences which different countries have on each other through law and pointed out that law has a significant impact upon the political and economic spheres. This view is extremely interesting, given its relevance to that of Professor Nicholson mentioned above posing the issue of whether or not legal reforms are possible without political reforms.

Then from the floor, a number of issues were raised which led to rich discussions.

- (1) A question was asked about Nicholson’s report on whether or not one may conceive of an Asian version of “judicial independence” in Vietnam where an “independent judiciary” does not in fact exist.

- (2) From the view of legal assistance and the resulting phenomenon of legal inflation, what is the legitimacy of legal assistance activities? Will the US-styled “rule of law” survive?
- (3) The need to study the Islamic system of dispute settlement.
- (4) How does one consider legal assistance in environmental protection, given the present reality of land problems of developing countries in Asia?

Discussion on problems of “human rights” and “democracy” should start from their relevance to those concrete questions of legal assistance activities mentioned above.

4. What is Legal Assistance? – Reviewing the Philosophy Behind It

The Japanese government started its legal assistance to countries in Asia in December 1996. The first country to receive this assistance was Vietnam, where Japanese legal assistance was focused on the field of civil and commercial laws. Legal assistance then started in Cambodia in March 1999. As will be discussed later, the initial activities there were to draft the Civil and Civil Procedural Codes. Legal assistance was formally launched in Laos in 2003. In addition, assistance has recently been provided to Uzbekistan in the field of legal education and Mongolia in the field of land law.

I am going to examine how these legal assistance activities have been conducted so far, by focusing on a comparative study of the assistance provided by three donor countries - Sweden, Korea and Japan.

Sweden started providing legal assistance to Vietnam in the late 1980s and has become vigorously engaged since 1992. The most systematic presentation of the essence of this assistance can be found in a book edited by Par Sevastik in 1997 entitled “Legal Assistance to Developing Countries – Swedish Perspectives on the Rule of Law”, Kluwer Law International. However, since it was published 7 years ago in 1997, we may need to contact the Sida field office or researchers from Lund University for more updated information. The Swedish aid agency has been developing a consistent project to promote the “rule of law” in Vietnam for the last 10 years. It was stated in the project that the idea of the assistance was to promote “democracy”, “human rights”, “rule of law”, and “due process”. Swedish Sida has been engaged in this project since 1992 and Omeo University, and later Lund University, has been the key agency in implementing this project. The project puts tremendous emphasis on strengthening legal education. Assistance is provided to legal education based on the philosophy mentioned above, focusing in particular on the revision of the curriculum and teaching methodology. Statements made by persons involved in Swedish aid activities, as cited by the book above, is very suggestive. “(M)arket economy is a necessary albeit not sufficient condition for the development of democracy and the formation of a *Rule of Law/Due Process*”³, i.e., it is important to acknowledge that democracy, rule of law and due process need be set as separate subjects of their own right. Furthermore, it is also stated that “Sweden does not have any interest in exporting its own legal system to Vietnam or in writing the laws of the country”⁴.

³ Par Sevastik ed., *Legal Assistance to Developing Countries – Swedish Perspectives on the Rule of Law*, KLUWER LAW INTERNATIONAL, 1997, at 6.

⁴ *Id.* at 10.

I think that the Swedish way of providing assistance is a typical one in the field of legal assistance.

The second case to present here is that of the Korea International Cooperation Agency (KOICA). KOICA explicitly locates legal assistance activities in the framework of “national strategic projects”. KOICA started its legal assistance program in 2002. An International Conference on Reconstruction Assistance to Afghanistan was held in Tokyo in January 2002. Korea took that opportunity to commit assistance to the judicial sector of Afghanistan, when the agenda was presented to the Conference. What I am going to present here was first brought to my attention by Professor Suh Won Woo, Professor Emeritus of Seoul National University. According to the Korean law newspaper (dated December 16, 2002), export of legal culture is a national strategic project which costs little but is highly efficient. In addition, legal assistance to countries in Asia is said to be an accumulation of experiences in preparation for effective transformation of the legal system of North Korea after unification. Its target countries are those in the former Soviet Union and in Asia. It intends to provide assistance to all legal target areas, ranging from the Constitution to the Criminal Law.

The third case is related to Japanese assistance. Japan also has had experiences in providing legal assistance to Vietnam or other regions. However, here I wish to briefly mention the Japanese assistance to Cambodia in drafting the Cambodian Civil Procedural Code. In a round table talk on the “Current Situation and Future Challenges of Legal Assistance – Assistance in Drafting the Cambodian Civil Procedural Law” reported in the *Jurist (in Japanese)* no.1243, 2003), moderated by Uehara Toshio, participants convey an extremely interesting message for legal assistance studies. The question posed in this round table talk was how we should evaluate the experience of Japan providing concrete drafting assistance to a Civil Procedural Code, one of the specific fields belonging to the legal system of another country, while keeping good cooperation with local judicial officers. Since the talk was extremely long, I will only raise some points which are relevant to my matter of interest. First, concerns the question concerning the relationship between legal assistance on the one hand, and a “democratic and law-based State” and the “rule of law” on the other. Views were expressed at the talk that we should not approach *legal assistance* only from a narrow view of economic transition⁵, but should also approach it in the context of pursuing for a higher achievement aimed at promoting a democratic State based on law⁶. My understanding is that the talk reveals the need for a clearer philosophy of legal assistance.

The second issue relates to the background of legal assistance. This focuses on the belated development of the social infrastructure which is needed to back up the legal system. It was stated that assistance should be for the building of this infrastructure.

The third issue discussed at the talk concerned the question of legal transplantation, i.e., what country the drafting of Cambodia’s new Civil Procedural Code should be modeled on. Since Japan implements this project, participants at the talk agreed that there was no other choice than using Japanese law as the basis for the assistance. However, emphasis was put on the need to conduct the assistance by taking into consideration the local legal situation. Japan

⁵ Emphasis by the author.

⁶ See *JURIST, id.* summary by Professor Uehara after listening to the statement made by Professor Takeshita Morio.

should disseminate the information from Japan in conformity with the reality of the recipient country. For example, a jury system was proposed for the draft but was later dropped. Another example is the introduction of a provision to retain the existing incidental civil litigation attached to the criminal procedure⁷.

To sum up, I want to make the two following points:

First, after finishing a comparison of the three countries, we may say that different countries or international aid agencies base their assistance on different philosophies and measures of gravity.

Second, I think that a new trend of thought is emerging inside Japan. So far, Japanese legal assistance has been directed towards promoting a market economy in the recipient countries, focusing mainly on the civil and commercial areas of law. But as we have seen above, some researchers who led the project on drafting the Civil Procedural Code in Cambodia are now talking about the need to further clarify the purpose of the assistance by including the topics of “democratic State based on law” and the “rule of law”. It is within such a context that I characterize this as a new trend of thought. However, we need to observe more carefully and in more details before we can judge whether the new trend will lead Japanese assistance to becoming comparatively similar to that of Sweden. Undoubtedly, the Swedish approach is a full presentation of the issues of “human rights”, “democracy”, or “gender”. This is exactly what makes the two cases so different.

This in fact begs the question of what information Japan can really disseminate when it chooses to provide legal assistance to a foreign country, and what area of law Japan can target for this information dissemination work.

⁷ *Id.* at 74.

Development and Democracy from a Viewpoint of International Law

Maki Nishiumi

Introduction

The main objectives of this International Symposium entitled “the role of law in development” seems to consider what was, and what should be, the role of law in the promotion of development and the realization of democracy in various countries (especially developing countries), in terms of straightening out their legal system. By contrast to this, in this report, the role of law in development and democracy will be considered in terms of international law. In the following, will be introduced successively “international law of development”, “right to development” and “sustainable development”, which all constitute an important contribution to contemporary international law concerning development and democracy.

1. International law of development / droit international du développement

History of international law of development

International Law of Development is a theory of international law which tries to reduce disparity of development between developed and developing countries, or to realize economic independence of developing countries. It is an approach of international law to the North-South problem. André Philip, French representative to the first UNCTAD in 1964 used for the first time this term and insisted that developed countries should cooperate with developing countries for the purpose of modernization of their economies. After that, mainly francophone scholars such as Michel Virally, Maurice Flory, Alain Pellet, Guy Feuer and Hervé Cassan made respectively great effort to systemize this new branch of international law.

The characteristics of this law can be summarized as follows. First, *objective-oriented law* (droit orienté) in the sense that this law intends to transform actual international economic system which is not in favor of developing countries, or to promote effective realization of each development program. Second, *composite law* (droit composite) in the sense that this law consists of international law, municipal law and transnational law. Third, *contested law* (droit contesté) because having a tendency to intervene in favor of developing countries, this law is susceptible of objection on the part of developed countries which persist in liberal model of economic relations.

Three principles support international law of development : Sovereignty, Equality and Solidarity. Economic aspect of sovereignty is emphasized for the purpose of establishing autonomous economy of developing countries (for example, permanent sovereignty for natural resources and economic activities). As to equality, not only traditional equality (equal participation to economic decision-making for example), but especially substantive equality which gives differential favorable treatments to developing countries has a great importance.

And solidarity means cooperation of all countries but particularly of developed countries, indispensable to assure such sovereignty and equality for developing countries. We can easily note that the idea to establish law and institutions favorable to developing countries exists coherently throughout these principles.

As examples of implementation of international law of development, we can enumerate Part IV of GATT, Generalized System of Preference, Regime of deep sea-bed elaborated in the United Nations Convention of Law of the Sea. But in general, we cannot say that objectives of this law, such as reduction of North-South disparity or establishing autonomous economy of developing countries have been achieved. With the end of the Cold War, market economy or free trade tendency has been à la mode, and in consequence vivacity of this law has weakened. Not a little of norms of this law remained in fact *lex ferenda*, not becoming *lex lata*, positive rules of international law.

However, the signification of international law of development is not small. By breaking away formalistic and abstractive character of traditional international law, recognizing realities often contradictory to this formality and orienting protection of weaker countries, international law of development introduced certainly new approach to contemporary international law. The idea of this law is succeeded in the “special and differential treatment” of the WTO agreements, and “Common but differential responsibility” principle of the international law of environment.

Key concept of international law of development : substantive equality

We said that substantive equality which gives differentiated favorable treatments to developing countries has a great importance. This is a concept to ensure the equal result in the law-application level, by taking into consideration the inequality of development which exists between developed and developing countries and, consequently, by admitting a favorable treatment for developing countries.

The real movement requiring substantive equality began in 1960s, when developing countries born after decolonization sought their economic independence and reduction of North-South disparity. Traditional, formal equality principle ignores *de facto* difference between countries and treats them the same, which works more or less to protect the sovereignty of smaller and weaker countries. But this principle does not consider realization of equal result of law-application. Therefore, if this principle is applied directly to the relation between developed and developing countries, it will not at all assure equal result but paradoxically enlarge existing inequality between them. That is why developing countries require with perseverance this substantive equality in their relationship with developed countries.

According to the theory of international law of development, substantive equality realizes itself by differential treatment in favor of relatively weak countries which can be regarded as a kind of compensation of inequal development. First, countries are classified into two categories, developed/developing countries and rights and obligations in favor of developing countries as relatively weak ones are created and applied (for example non-reciprocity instead of reciprocity, preferential treatment instead of most-favor-nation treatment). This is the « duality of norms ». Second, within the category of developing countries, various sub-categories are established (least developed country, land-locked country, island country, regime-changing country, for example), and rights and obligations are created and applied in favor of

relatively weak countries belonging to these sub-categories. This is the « plurality of norms ».

The approach of this « plurality of norms » are introduced in generalized system of preference, special and differential principles in WTO agreements, common but differential responsibility of the international law of environment, and is now an indispensable method to regulate the North-South legal relationship.

2. Right to development / droit au développement

Insufficiency of international law of development

We can point out two insufficiency of international law of development. First, it lacks consideration of linkage between national inequality and international inequality. Indeed, there is a linkage between democratization of international order and democratization of national regime. But the declaration of the New International Economic Order, which reflects profoundly the idea of international law of development, did not have a clear-cut mention about importance of democratization of internal order or equitable distribution of national resources. The reason is probably that the Third-world political leaders, who require the new international economic order, avoided intentionally reference to internal power structure, because saying this problem would have destabilized their own foundation of powers. This situation can be justified in the level of international law by respect of state sovereignty and non-intervention in internal affairs of other state. So in international law of development, the power structure of developing countries is almost neglected or analysed very optimistically. Its world power image relies on simply dichotomous Center/Periphery model, It does not look at internal situation of periphery where exists also center/periphery and consequently domination/subordination phenomenon.

Second insufficiency concerns the function of « plurality of norms ». It attenuates various obligations of relatively weak parties on the one hand, and strengthens at the same time obligations of relatively strong parties in the sphere of financing or technical cooperations on the other hand. The attenuation of obligation would favor certainly developing countries in a short term, but it damages the objectives of each treaty such as protection of global environment or protection of worker's rights. So, from a view-point of objectives of treaties, the elimination of this type of « plurality of norms » (= attenuation of obligations of relatively weaker parties) through financing or technological cooperation is desirable. « Plurality of norms » is not all mighty. There is limits derived from the difference between individual as beneficiary and states as actor of implementation of treaties.

Characteristics of right to development

Right to development is an attempt to surmount these insufficiency. The term « development » in this right does not mean only economic aspect such as economic growth. It contains political, social, cultural aspects. Therefore it is a comprehensive concept and concerns the total process of realization of human potentiality. Right to development is a new right. It was adopted in resolution by General Assembly of the United Nations in 1986. This adoption signifies that request to this process was authorized as an objective of international community as a whole.

There are three characteristics of this right. First, right to development is an ensemble of human rights. It reconstitutes various human rights from the view-point of human development

and aims to assure effectively these human rights. Second, this right should be implemented not only by individual states but also through the cooperation of international community as a whole. So we can call this right « right of solidarity ». Third, in the center of this right, there exists participation of individuals and people to the decision-making. By this participation, all human rights are harmonized, development policies ameliorated and democratizations of internal/international social/economic/political regimes promoted.

However, this right to development is a right in formation. Actors and contents of this right and those of corresponding obligations are not yet sufficiently clear. Nevertheless, this right suggests a possibility to surmount the insufficiency of international law of development derived from its character of inter-state agreement. In this sense, this right is very important potential future.

3. Sustainable development / développement durable

The attempt to coordinate development and protection of environment leads to the concept of sustainable development. This concept is also very comprehensive one. Among components of this concept, there are : sustainable use and preservation of natural resources, equity inter/intra generations, common but differential responsibility, good governance, precautionary principle etc. These components are incorporated in various international documents such as Rio Declaration, Agenda 21, Convention of Biodiversity, Framework Convention of Climate Change etc. But about contents of these components and their legal characters, consents of countries are not yet precisely established. We can say that the concept of sustainable development became a legal principle, but its range and effectiveness are largely unknown. So we must await accumulation of international/internal practices in this regard. Nevertheless, the concept of sustainable development is used frequently in various international documents and adopted as criteria of judgment or opinion, in international dispute-settlement organizations (ICJ, WTO, ITLOS etc).

In another aspect, this concept is very ethical one, in the sense that : (1) it takes into consideration the quality of life of not only existing human being, but also human being in future. (2) on the one hand, it insists the necessity of development and good governance for poor people in South who are deprived of main means of subsistence ; (3) on the other hand, it demands the change of life-style for rich people of North not yet abandoning their wasteful way of life. Sustainable development is a comprehensive concept which synthesizes environmental protection, development and democracy. Contemporary international law is expected to enrich this important concept through collaboration with other disciplines, and make it gradually positive rules.

International lawyer is required to collaborate with other lawyers in the important work of straightening out the legal system in developing countries. In this work, I hope above-mentioned international aspects of development and democracy should be taken into consideration.

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Improving Legal Transparency: The Translation Project of Japanese Law and the Prospect of New Comparative Law

Yoshiharu Matsuura

Introduction: Seriously Imperfect Information

Since the 1990s Japan has been engaged in the legal reform assistance to the developing countries and countries in transition to market economy. The legal reform assistance includes such projects as codification of basic laws, re-structuring of the court system, reform of administration of justice, land law reform and so forth. Further, education and enlightenment of the elites of these countries who will take the initiative in legal reform projects are one of the most important ways of assistance. All these projects strive for good governance and economic growth of these countries.

The elites of the recipient countries in fact showed remarkable enthusiasm to learn from Japan and expressed high expectation to share the experience and lessons of modernization and economic success of Japan. In case of Nagoya University Law Faculty, the faculty hosted diverse opportunities for judges, attorneys, prosecutors, public officials, law professors and law students of these countries. Currently one hundred overseas students are enrolled in the graduate programs of law at Nagoya.

As soon as the technical assistance projects began, everybody quickly noticed one major problem. It is the fact that laws and related legal documents of Japan are not readily accessible to visitors from overseas who are eager to learn from the Japanese experience. Almost all the legal documents are there but they are available mostly in the Japanese language. Translated documents, such as laws, law review articles, cases and government papers, are often outdated and fragmental and thus do not describe the current Japanese law. In this sense Japan is not prepared for effective dissemination of her “unique” experience about law.

Though visitors from countries in transition usually have good command of English or other foreign languages, only a few can read the Japanese legal text which is often written with archaic terms and phrases. As a result, those who wish to learn from the Japanese experience are obliged to rely heavily on the oral communication such as interview. Interviews often provide the public officials and practitioners of countries in transition with some important and current information about Japanese law. But the situation is very serious for degree candidates, for they have very limited primary and secondary sources they could use in their academic works.

In addition, the information about the laws of a recipient country is often imperfect. Laws of Asian countries are mostly written in their native languages such as in Vietnamese, Laotian or Khmer. Like Japanese law, translation of their legal documents is very limited and fragmental. This fact has profound implication for legal reform assistance. Projects of legal reform assistance

are usually conducted through some sort of comparative law method. In order to make meaningful comparison we need accurate information of two different legal systems. Feasible and relevant assistance becomes possible only when both the donor and the recipient countries understand the mechanism and function of respective legal system to a fair degree.

This is the reason for growing awareness of the importance to translate laws and statutes in Asian countries, including Japan. In fact there has been strong demand for more information about Japanese law in English. Demand came from various sources, such as the legal reform assistance projects, business world, government, and institutions for advanced education. In 2004 the Japanese government at long last made decision to promote the translation project¹.

The focus of the translation project of Japan is set upon the codes and statutes. Because the black letter law is always, at least in the Continental legal tradition, the starting point and the core of serious legal research and legal thinking.

In the following, the author will describe the overall plan of the translation project and argue that the translated black letter law could become a platform to develop a comparative study of law where both donor and recipient countries can contribute and share the fruits of the research.

2. Real Challenges to the Translation Project

The demand for translation of laws and statutes of Japan is not new. In the past many people and institutions attempted to produce decent translation of the Japanese law. In fact we can find some good translations of laws and statutes. The real challenge to the translation project is, however, to keep the pace with amendments and changes continually added to the original text of law. Many past attempts of translation were short-lived mainly because they were not prepared for the fact that laws are always amended, repealed and newly enacted. The work of updating the translation has no end and demands the tremendous commitment on the part of the project promoters. There is no functioning system that can timely meet this challenge.

Therefore, it is essential for the success of the translation project to design the system which has a built-in mechanism to reflect any change in current law without delay. The system must tell whether the translation available is the translation of current and valid law or not. This is easy to say. In order to implement the translation system with this function, however, it is necessary to introduce the elaborate data-management system to monitor the whole body of law of one country.

The translation framework under development by a Nagoya University team consists of two parts. The first part is a comprehensive statutory management system which supports the drafting process of new laws and stores the past records of laws and statutes. It also provides the current information about Japanese law in the Japanese language. The second part is the system that generates the English translation of the Japanese law. Two parts are to be integrated so that they could keep pace with any change in the original text of Japanese law. The figure 1 is a rough illustration of the translation project.

Currently the Japanese government offers via internet free information of current laws and

¹ See the Feb. 15, 2005 issue of *JURISUTO (JURIST)* which featured the articles on the translation project of Japanese law by the government initiative.

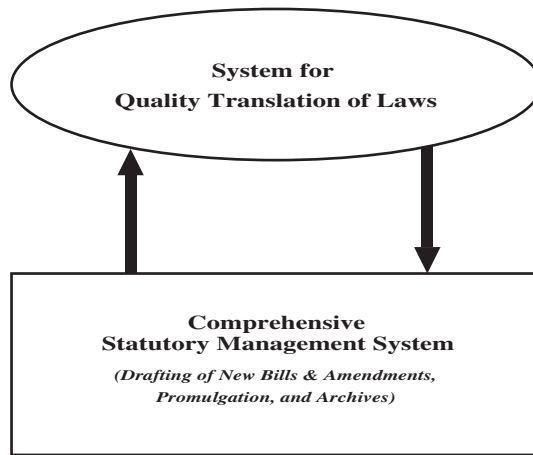


Figure 1. Core concept of the whole project

statutes in Japanese². It is a fairly accurate approximation to the current Japanese law and frequently used to identify the current black letter law. It is also used by drafters of new bills. But it is not easy to identify what part of the law was recently modified and what words were replaced, deleted or added. Nor is it easy to know which provisions are brand-new.

In order to use the current government service as the foundation of the translation project, it is necessary to modify or re-design the government system so that it should provide authentic text of current law as well as specific information as to the changes in laws and statutes. The translation system is to be erected upon this firm foundation. If the government system does not offer this service, it will become necessary to develop a statutes data-base which can provide information essential to the translation project.

Creating a human network to produce translation continuously is another challenge. Translation projects of the European Union and the French government operate on the established policy to employ professional translators who are native speakers of the target language (for example, a native speaker of English, in case of translation of French text into English). In addition they require translators to have a college degree and fair understanding of legal science. This policy sounds quite reasonable, if the required human resources are actually available.

In case of Japan, we do not have sufficient number of native speakers of English who can read and understand the Japanese legal documents. The European approach does not seem to be feasible in Japan. Many countries in Asia may face the same difficulty when they try to translate their laws into English.

One possibility to clear this hurdle is to utilize information technology. Since the Nagoya project plans to use information technology extensively, the author shall discuss, in the next section, how information technology will be utilized.

² <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi>

3. Good Translation and Information Technology

Translation of statutory provisions is not an easy task. When we review the work of translation already done, we can easily find some weaknesses of past efforts. For example, the same legal term is translated in various ways mainly because many translators involved did their work without any consideration of long term consistency. There was no official mechanism to maintain consistent use of a legal term. The sentence style of translation varied depending on the taste of each translator. The result was the unrefined accumulation of translated text of law.

The notion of version management of translation was simply missing. Since law is amended from time to time, it is important to identify the original text of law which was actually used by the translator. Curiously many translations did not include this information in their work and it often became necessary to identify the year of the original text used by them. Without this check, we feel very uneasy because we might be reading the translation of law which was repealed long before.

Some translations are good and some are bad. But the problem is that there was no easy way to know the quality of translation, because there was no reliable procedure to test the quality of translation.

Even when the translation of current law is fortunately available, the information may not be sufficient. A provision of a statute may delegate the power to issue guidelines to regulations or ordinances. In this case the translation of major statutes must be supplemented with the translation of other relevant regulations and ordinances. If the translation is to be socially useful, it must include all provisions related to one particular provision. This has been done very imperfectly.

In order to overcome the past weakness of many translation projects the Nagoya project proposed to utilize information technology. It set off its work from construction of a reliable translation dictionary, because the reliable dictionary is the key to good and consistent translation of statutory text.

The project uses a tool called “Bilingual KWIC” to create the dictionary. The tool called KWIC (Key Word In Context) has been in use for years. It can list all the relevant sentences which include a keyword or a key expression so that we can see how a keyword is used in these sentences. It provides the contextual information how a word is used in real sentences. The Bilingual KWIC does this in two different languages. Suppose the Japanese Civil Code and its English translation is available. The bilingual KWIC can show a comparative table of the Japanese text and its English translation with a keyword high-lighted. The following figure illustrates this function.

The above table shows how a Japanese legal term (*Torikeshi*) has been translated into English. We can see from the table that the same Japanese term was translated in two English words, “annulment” and “revocation.” A group of legal experts on the Japanese Civil Code could use this result as a starting point to develop a reliable dictionary for translating laws and statutes. They could decide the proper choice of English words for a particular Japanese legal term. For example, they might maintain the use of two English words by assigning each English word to a particular legal domain. They could decide that the word “annulment” should be used in the context of making the marriage null and void and the word “revocation” to make

<p>九条の規定は、婚姻の取消につきこれを準用する。箇月間は、その婚姻の取消を請求することができる者は、その婚姻の取消を裁判所に請求すること</p> <p>四 設立許可の取消</p> <p>の規定は、設立許可の取消による解散の際に就職し、破産及び設立許可の取消の場合を除くほか、解散清算人の責任の免除の取消。但し、特別清算の開始監督役の責任の免除の取消。但し、整理の開始から六条の規定は、縁組の取消これを準用する。した者は、その縁組の取消しを裁判所に請求すること</p> <p>女が前婚の再婚又は再婚の前から懐胎していた場</p> <p>二款 婚姻の無効及び取消</p> <p>二款 縁組の無効及び取消</p> <p>第五節 遺言の取消</p> <p>がないときは、遺言の取消を家庭裁判所に請求する</p> <p>○1 申込の取消の通知が承諾の通知を発</p> <p>前条の規定は、廃除の取消これを準用する。</p> <p>、推定相続人の廃除の取消を家庭裁判所に請求する</p>	<p>ations to the annulment of a marriage.</p> <p>apply for the annulment of the marriage during a</p> <p>Court for the annulment of such marriage.</p> <p>4. The annulment of the permission for or</p> <p>solution upon annulment of permission for creati</p> <p>bankruptcy or annulment of permission for creati</p> <p>4. Annulment of any release from liab</p> <p>7. Annulment of any release from liab</p> <p>court for the annulment of adoption. However, th</p> <p>ations to the annulment of adoption.</p> <p>issolutio or annulment of her previous marriage</p> <p>. Nullity and Annulment of Marriage</p> <p>. Nullity and Annulment of Adoption</p> <p>Section V. Revocation of Will</p> <p>Court for the revocation of the will, if no perf</p> <p>notice of the revocation of an offer has arrived</p> <p>ations to the revocation of the disinheritance o</p> <p>Court for the revocation of the disinheritance o</p>
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Figure 2. A sample view of the Bilingual KWIC

the testator’s will invalid. Or they might decide that only “annulment” should be used in all the legal domains. In this way they could construct the dictionary for translation of statutes.

The Bilingual KWIC can provide not only the usage samples of words but also the samples of idiomatic expressions. Thus, it can show how conventional expressions in legal documents were translated. This means that we can list up English translation of all the technical terms and conventional expressions, which in turn can be used to generate a comprehensive dictionary and assist the work of translators.

The next step is to select more appropriate terms and expressions for the dictionary. It may become necessary to add or coin English terms when the Bilingual KWIC does not list candidates from the past translation. If we could organize the substantial number of legal experts in a particular field such as the law of contract and provide the data generated by the Bilingual KWIC, legal experts can go over the list of technical terms and expressions and actually choose the best candidates for the dictionary. In the similar way the translation dictionary for major legal subjects will be developed.

It is to be noted that the translation dictionary will emerge not in a conventional form of a book. Rather, it will emerge as an evolving dictionary on the web. The following figure will be useful to understand how a translation dictionary grows continuously.

When new laws or amendments pass the parliament, the text of the law is transmitted to the translation system. The system check the current law data-base so that it could show what part is added or new in the Japanese text. Since the system includes the data-base of statutes with reference function, it can offer the information of what other provisions and subordinate regulations are relevant to a particular provision newly added. It also tells whether the English translation is available or not. If available, the outdated part of the English translation will be identified.

The Japanese text of new laws or amendments is sent to translators. The translator knows the provisions to be translated, including the ones relevant to the new laws. The translators now use the translation dictionary which provides English expressions for particular Japanese terms and expressions. In Fig. 2 the dictionary is described as “Knowledge for Translation,” for it will provide far more diverse information than the conventional dictionary. The dictionary also offers the Bilingual KWIC service so that the translators utilize the past translations (“Available Translation of Law” in Fig.2). At this stage the translator works somewhat like a lawyer researching the past cases and precedents.

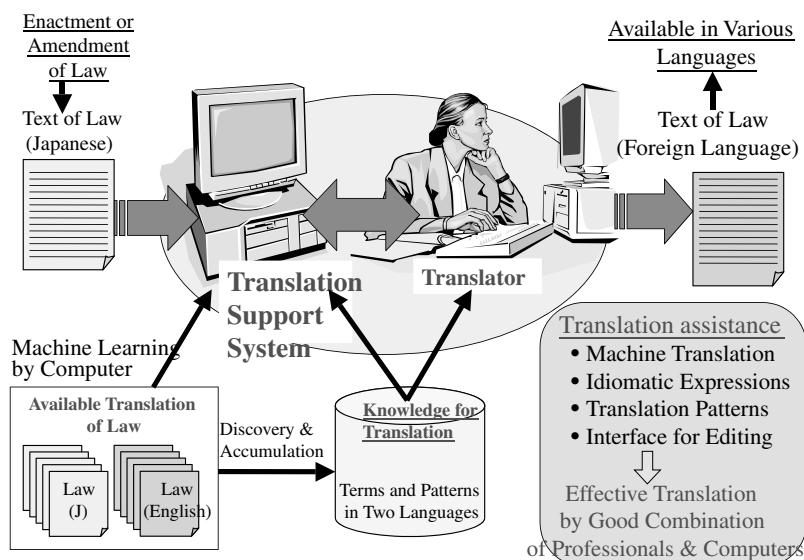


Figure 3. Framework of the translation project

As soon as the translation work finishes, it will be sent to the translation system. The system checks to what extent the translator’s work complies with the translation dictionary. When the work satisfies the quality check by the computer system, it will be submitted to the experts committee which tests accuracy of the translation and quality of English.

The translation endorsed by the experts committee will be published through the internet or printed for distribution. At the same time the terms and idiomatic expressions used in the endorsed translation are automatically added to the translation dictionary. The dictionary will keep the past record such as what term was used in what period and replaced with what term.

After the publication of new translations, anybody can “challenge” the current translation by submitting his or her alternative translation to the experts committee. If the committee agrees, the current translation will be replaced by the proposed translation. In this way the translation dictionary grows continuously.

4. The Translation System and the Computer-aided Legislative Drafting

It is necessary to describe the Japanese approach to legislative drafting briefly, since it inspired the translation project of Nagoya University. The Japanese approach strives for the national law without contradiction, inconsistency and overlap. For example, when drafters of new legislation use a particular legal concept in their draft, they list up all the provisions of the past legislation which used this particular concept to avoid any deviation from the conventional usage. For this purpose the current statutory data-base of the government is used and some drafters characterized it as “indispensable to the drafting.” This concern with consistency is observed in the stylistic structure of the law, numbering of provisions, punctuation and so forth. Consistency and coherence are valued most in the drafting process for many years. The Figure 4 illustrates some critical tasks in the legislative drafting.

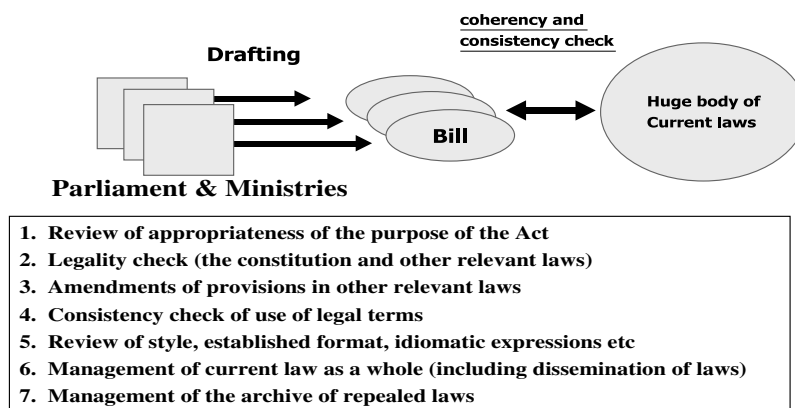


Figure 4. Complex tasks involved in the legislative drafting

From the perspective of the translation project the Japanese commitment to the stylistic completeness and long range consistency is a great advantage. The project members thought it easier to develop a translation dictionary, given the rigid rules for drafting. For computer is fit for rigid rules.

The drafters also work hard to identify all the provisions to be amended. In many cases a particular provision refers to other provisions and subordinate rules explicitly or implicitly. Amending a provision makes it necessary to amend other relevant rules at the same time. The information of explicit as well as implicit references has been kept manually. The more complex the cross-reference of rules becomes, the harder it becomes to maintain this information complete.

An incidence in 2004 was symptomatic. After the time-pressed preparation of rather complex amendments of pension laws, a set of amendment laws successfully passed the Japanese Parliament and was duly promulgated. Soon after, more than forty mistakes, including typographic errors, were discovered. This came as a total embarrassment to the government and some officers were disciplined for this irregularity. The government announced that it will introduce the double-checking system at the earliest occasion.

This incident suggests the significance of introducing a computer-aided legislative drafting (it might be called as “e-legislation”). It should maintain the style of writing and coherence in the whole body of law. It should provide comprehensive information of cross-reference among laws. In addition, it should offer the current information about Japanese law. This is what we mean by “Comprehensive Statutory Management System.” The current government site of statutory data-base does not fit for this purpose³.

Needless to say, commitment to consistency and coherence varies, depending on the legal culture of each country. Centrally controlled system for legislative drafting may appear as a great threat to regional autonomy and democracy. It may work against the more flexible growth of law.

³ There is one commercial product for e-legislation developed by CRESTEC Company. It was developed for use by regional governments. The translation project regards this product as a prototype of e-legislation which could be used, with some improvements, for the translation project.

Still, there is much to say for a computer-aided legislative drafting. If it is important to grasp comprehensive information about a particular provision, the cross-reference function of the system will be far better than the manual research. If it is socially valuable to integrate national and regional rules without too much inconsistency, both computer-aided legislative drafting and a statutory data-base with inconsistency screening function will be very important.

Though the degree of consistency and coherence should be chosen by each country, developing countries and countries in transition seem to need this kind of assistance. A country like Cambodia does not have many skilled drafters of new legislation. Vietnam and Uzbekistan appear to work hard to strike out incoherence between national laws and regional rules. So long as the legislative drafting is done by different hands, a mechanism is necessary to achieve coherence and consistency in law.

For this reason the translation project of Nagoya University promotes a separate project to convert the Japanese e-legislation system for other countries.

5. A New Approach to Comparative Law

The translation project has an interesting implication for comparative study of law. Translation of the black letter law does not provide extensive information about one legal system, rather it only scratches the surface. For example, it is easy to translate the Japanese word “*Fudohsan*” into the English word “Real Property.” But this translation does not tell much about the Japanese real property system unless one knows that the house and the land are treated differently under the Japanese law and thus partly subject to different rules. One might wish to know further why the Japanese law treats the house and the land separately and what rules apply to the land.

It is the common sense of the legal profession that the black letter law makes sense only when we understand the legal institution, the function of a particular provision, the socio-economic context where the rule was created, the function of law socially expected and so forth. In one sense the black letter law is a leaf floating on the stream.

At the early stage of the legal reform assistance, projects tended to focus upon the code or major statutes. But if it is true that the black letter law makes sense when it is integrated into the background context, relevant information must be linked to the black letter law. It is critically important how we relate the background context to the code and statutes.

It seems to be a sound policy that the donor and the recipient countries respectively provide the background information of their own legal system. This is simply because we can most comfortably talk about our own legal system. For example, Japanese experts assisting the reform of the Business Law of Lao PDR can describe and explain the Japanese company law and its background context. In return Lao experts can offer to the Japanese experts the explanation of their Business Law and its contextual information.

One of the purposes of the legal reform assistance is to help the recipient countries make better choice. Legal experts of the donor countries can contribute more by talking extensively about their own legal system.

Where can we store and share the information so provided by experts of the donor and the recipient countries? The data-base of the translated laws and statutes might be a good storage. The translation project of Nagoya University focuses upon statutory provisions of Japanese

law. Japan will be able to disseminate the English translations of her important laws and statutes. There is no technical difficulty to add the background information to each translated provision in the form of “link.” Legal experts of Japan can provide the contextual information voluntarily. But it is far more important for them to respond to the request of legal experts of foreign countries, particularly recipient countries. To talk about the common sense is not easy, for we take it granted and often fail to notice the critical importance of the common sense of our own law and society. A simple question of a foreign lawyer such as “Why does your rule work?” might open an eye of a native lawyer as to an open question of effective law.

If each country and its experts of various disciplines can provide the similar service, we will be able to create, in substance, an extensive information service by expanding the database of the translated laws. The following illustration shows a conceptual image of the global sharing of statutory information.

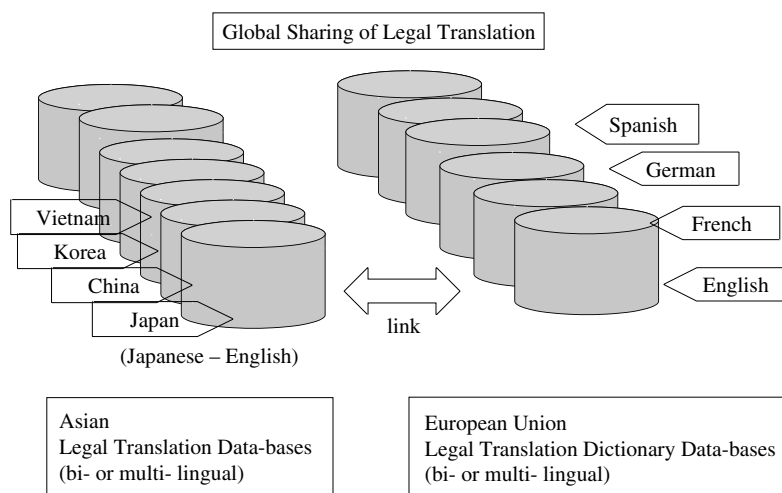


Figure 5. Sharing of translated laws and background information

As already mentioned, the first step of the translation project is to generate the “translation dictionary” or “translation memory” which works as the yardstick of translation. If Japan produces a translation dictionary of Japanese-English and Laos does one dictionary of Lao-English, it is technically possible to create an integrated translation dictionary of Japanese-Lao-English laws. In this way we can grow the integrated translation dictionary for laws of various countries. Actually the European Union has already developed the translation dictionary for more than twenty languages. If we can establish a network of translation dictionaries developed in Asia and relate it to the dictionaries of the European Union, an extensive translation dictionary with global coverage will emerge on the web.

Even if we can create the network of translation dictionaries and share the huge body of translated laws of various countries, we still need to supplement it with extensive contextual information. This will be the real forum for the comparative study which is pursued by global collaboration. Relevant contextual information will include socio-economic environment, history, legal culture, political context, culture and so forth.

Figure 6 shows a slightly structured view of the contextual information. A legal expert by the name of “prosecutor” may make an interesting example. Prosecutor seems to carry quite different social significance. In socialist countries a prosecutor performs the role of the guardian of the social justice. In some cases he appears more like the conventional Lord Chancellor of England who embodied equity. In contrast the Japanese prosecutor (*kensatsu-kan*) is regarded as a public officer of the state who works in the public domain and is seen very different from an attorney working in a private domain. In the US and UK prosecutor is simply an attorney with a different mask. It is useful to discriminate the levels of description to characterize what the prosecutor is.

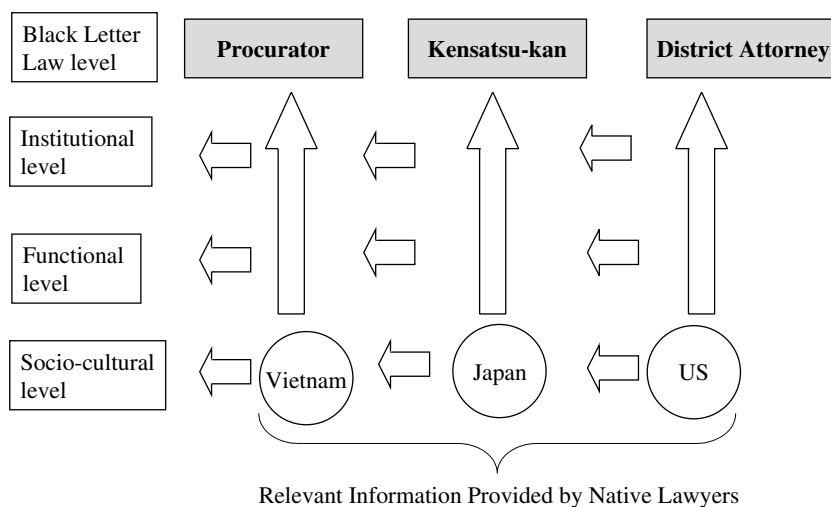


Figure 6. Layers of contextual information

The suggested global sharing of the statutory information will function somewhat like a menu from which the recipient countries choose for their legal transplant. For successful legal transplant diverse information is essential. Public officials, practicing lawyers, and academic lawyers of both donor and recipient countries can contribute to this process by contributing their unique experience and wisdom. In addition non-lawyer experts can contribute to clarification of the contextual information. Long term fruit of this process will be, it is expected, emergence of a new comparative study of law.

Appendix

CALE



“Law and Development”
Past, Present and Future
by
David M. Trubek

1

Law and Development as applied knowledge

- Law and Development (L&D) doctrine is designed to guide practical activities
- Orients assistance for legal reform in developing and “transition” countries
- Serves as a handmaiden to the overall development aid process

2

Emergence of L&D

- Initial alliance: foreign aid lawyers, foundations, and law school academics
- Lawyers thought law was important to development
- Foundations thought the rule of law was essential to freedom and modernity
- Academics saw possibility for a new field

3

Sources of L&D doctrine

- Theories were related to prevailing ideas about economic development
- Filtered through the legal consciousness of the period
- Based on idealized notions of the US legal system
- Influenced by practices of development agencies

4

Role of US universities

- 1960s: universities were main site for production of L&D doctrine
- 1970s: university activity declined
- 1980s: specialized units in development agencies appeared
- 1990s: consulting firms and think-tanks entered the field
- Today: universities no longer the primary source for L&D doctrine

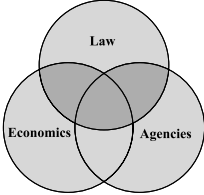
5

Ideas are drawn from three primary sources

- Development Economics
- Legal Theory
- Practices of Agencies

6

L&D doctrine as the intersection of three spheres



The diagram consists of three overlapping circles. The top circle is labeled 'Law', the bottom-left circle is labeled 'Economics', and the bottom-right circle is labeled 'Agencies'. The circles overlap in the center and at the intersections between pairs of circles.

7

Co-rotation of the spheres

- Each of the spheres has changed over time
- These changes unsettle prevailing L&D doctrine
- In time, a new doctrine or mainstream orthodoxy develops

8

Three “moments” of L&D

- First Moment: Law and the Developmental State
- Second Moment: Law and The Neo-Liberal Market
- Third Moment: An Emerging Paradigm

9

The Developmental State

- Import substitution in internal market is the engine of growth
- Scarce savings must be directed to key investment areas
- “Traditional sectors” will resist change
- Private sector too weak to provide “take-off” to self-sustaining growth
- Foreign capital scarce and possibly exploitative
- The national state creates plans, reallocates surplus, combats resistance, invests and manages key sectors, controls foreign capital

10

Law in the Developmental State

Vision: law as a tool to remove “traditional” barriers and change economic behavior

- Create legal structure for macro-economic control
- Translate policy goals into laws that channel economic behavior in accordance with national plans
- Create legal framework for state bureaucracy and public sector corporations
- Manage complex exchange controls and import regulations

11

First Moment assistance: modernize regulation and the legal profession

- Emphasize public law
- Transplant regulatory laws from advanced states
- Strengthen legal capacity of state agencies & state corporations
- Modernize the legal profession by encouraging pragmatic, policy-oriented lawyering
- Reform legal education

12

Two: The Neo-Liberal Market

- Focus on developing markets
- Get prices right
- Remove distortions created by state intervention
- Encourage foreign investment
- Foster export-led growth

13

Law in the Neo-Liberal Market

Vision: law as a way to foster private transactions

- Put emphasis on private law
- Protect property and facilitate contractual exchange
- Place strict limits on state intervention
- Ensure equal treatment for foreign capital
- Rely on judiciary as the primary actor to restrain state and facilitate markets

14

Second Moment assistance: reform private law and the judiciary

- Strengthen property rights
- Modernize contract law
- Create independent judiciary
- Encourage formalism
- One-size fits all—markets are markets, laws are laws

15

Shifting spheres: reactions to the Second Moment

- Markets do not create themselves
- Unrestricted markets do not solve all problems
- Transplanted laws may not take
- Formalism may lead to the wrong results
- Development involves more than economic growth

16

Three: An emerging paradigm?

- Development as freedom
- Comprehensive Development Framework
- Incorporation of the “social”
- Transaction costs and market failures justify limited intervention
- Sensitivity to diversity

17

Law in the Third Moment

- Continue the private law project
- Allow limited use of regulatory law
- Continue strengthening judiciaries
- Encourage consequentialist thought
- Pay attention to access to justice
- Emphasize human rights
- Adapt to local contexts

18

Conclusion: Three Questions

- Will the Third Moment lead to chastened neo-liberalism or to a new departure?
- Will we see a re-engagement of the universities?
- Will the intellectual project become an international endeavor?

19

Developing Legal Education in Vietnam

The Project:
Strengthening Legal Education in Vietnam

Funded by the Swedish Government
-
Sida

1

Developing Legal Education in Vietnam

Introduction

- ❖ Started in 1998
- ❖ Encompasses the Two Major Law Universities in Vietnam
 - ❖ Hanoi Law University
 - ❖ The Law University in Ho Chi Minh City
- ❖ Swedish Partner The Law Faculty Lund University

2

Developing Legal Education in Vietnam

Project phases

- ❖ First phase 1998 – 2001
 - ❖ Budget: 14 million SEK (1.4 Million US\$)
- ❖ Second phase 2001 – 2005
 - ❖ Budget: 24 million SEK (app. 3.2 million US\$)
- ❖ Third phase 2005 – 2009
 - ❖ Budget: 72 million SEK (app. 10 million \$ US)
- ❖ Fourth phase 2009 – 2011 (?)

3

Developing Legal Education in Vietnam

Hanoi Law University

- ❖ 240 Academic teachers
 - ❖ 47 PhD; 131 LL.M
- ❖ 240 Staff members
- ❖ 5000 full time students (7000 part time)
- ❖ Yearly intake of students full time 900 – 1.500 (2004: 1.300 students)

4

Developing Legal Education in Vietnam

The Law University of Ho Chi Minh City

- ❖ Academic Teachers 148:
 - ❖ 22 PhD; 66 LL.M
- ❖ 62 Staff members
- ❖ 5000 full time students (3500 part time)
- ❖ Yearly intake of students full time 900 – 1.500 (2004: 1.000 students)

5

Developing Legal Education in Vietnam

The Over-all Objective

- To achieve an accomplished curriculum development and teaching methodology for bachelor, master and doctor degrees, which fit the principles of a state based on rule of law and the needs of the "Doi Moi" policy, strengthening legal education capability by improving gender equal lecturers qualification, strengthening libraries information system and widening international cooperation.

6

Developing Legal Education in Vietnam

Three Main Sub-Objectives

- Developing Gender Equal Lecturers Force
- Developing and Modernizing the Law Libraries
- Strengthening the Education and Project Management Competence and Widening the International Cooperation

7

Developing Legal Education in Vietnam

Developing Gender Equal Lecturers Force

- ❖ Teaching Methodology Training
- ❖ English for Lawyers
- ❖ Seminars and International Conferences
- ❖ Master and Doctorate Training

8

Developing Legal Education in Vietnam

- Developing and Modernizing the Law Libraries
- ❖ Training Librarians
- ❖ Access to International Database
- ❖ Literature on International and Comparative Law

9

Developing Legal Education in Vietnam

- What kind of lawyers does Vietnam need for the future?
- How do we train the next generation of lawyers to reach this goal?
- How do we develop modern teaching methods to reach this goal?

10

Developing Legal Education in Vietnam

- Available University Training for Lawyers
- ❖ Hanoi Law University
- ❖ The Law University of Ho Chi Minh City
- ❖ National University in Hanoi (Faculty of Law)
- ❖ University of Da Lat (Faculty of Law)
- ❖ University of Can Tho (Faculty of Law)
- ❖ University of Hue (Faculty of Law)

11

Developing Legal Education in Vietnam

- Present situation in some of the poorest provinces
- ❖ Provincial Level 202 legal officers
 - ❖ 120 LLB, 2 LLM, 32 university degree other than law and 17 college degree
- ❖ District Level 440 legal officers
 - ❖ 189 LLB, 0 LLM, 39 university degree other than law and 29 college degree
- ❖ Commune Level 181 legal officers
 - ❖ 0 LLB, 42 College level and 141 passed different short professional training courses

12

Developing Legal Education in Vietnam

- Basic qualifications of a new generation of lawyers
- ❖ understand the concept of rule of law
- ❖ perspective of human rights
- ❖ understand "Good Governance" in administrative law
- ❖ ability to analyze legal texts and court cases

13

Developing Legal Education in Vietnam

- Obstacles to a modern way of teaching
- ❖ Teachers
- ❖ Students
- ❖ Text books
- ❖ Libraries
- ❖ Teaching facilities

14

Developing Legal Education in Vietnam

The way to the development of legal education

Patience

15

Developing Legal Education in Vietnam

- Change the lecturers attitude to the learning process
- Develop lecture material to support active learning
- Support the constant development of courses, material and examination by introducing an AQAC

16

Developing Legal Education in Vietnam

Effective Lectures

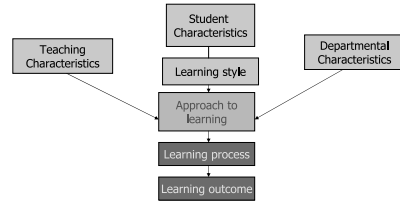
Student lecture reception

- ❖ The students have distinctive approaches to learning
- ❖ The approach determines the learning process and affects the quality of the learning outcome
- ❖ Three phases of approaches are visible: the surface approach, the deep approach and the strategic approach

17

Developing Legal Education in Vietnam

Student lecture reception



18

Developing Legal Education in Vietnam

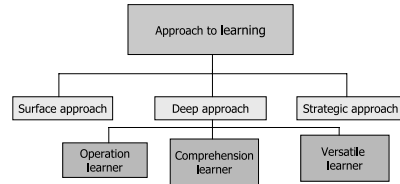
Students Characteristics

- ❖ Teaching methods used by teachers in Secondary School, Gymnasium or College
- ❖ Teaching methods used by teachers in earlier courses at the University

19

Developing Legal Education in Vietnam

Student lecture reception



20

Developing Legal Education in Vietnam

Teaching (Teacher) Characteristics

- ❖ Teachers Own Background
- ❖ Subject Orientated Teaching
- ❖ Student Orientated Teaching

21

Developing Legal Education in Vietnam

Relation Teach and Learn

	Simple	Developed
Subject Orientation	The Transfer Theory Knowledge as commodity to be transferred as from a ship to another	The Travelling Theory The subject is treated as a terrain to be explored, with the teacher as traveling expert guide
Student Orientation	The Shaping Theory Teaching treated as a process of shaping or moulding students to a predetermined pattern	The Growing Theory Focus in this theory is more on the attention on the intellectual and emotional development of the learner

22

Developing Legal Education in Vietnam

Departmental Characteristics

- ❖ Administration
- ❖ Library
 - ❖ Library Development Strategy
 - ❖ Sources of Information
 - ❖ Student Union
- ❖ Student Facilities

23

Developing Legal Education in Vietnam

Key word is Active Learning

- Active Learning means:
 - Participation in the learning process
 - Individual or group activity in solving problems
- Be aware of:
 - Ways of Starting the Discussion
 - Barriers to Discussion
 - Student Problem – non participation

24

Developing Legal Education in Vietnam

The Seven Steps in PBL

1. Clarify terms and concepts not readily comprehensible
2. Define the problem
3. Analyze the problem
4. Do a systematic inventory of explanations
5. Formulate learning goals
6. Collect additional information outside of the group
7. Synthesize and test the acquired information

25

Developing Legal Education in Vietnam

PBL - Teachers Role

- Different approach to traditional teaching
- The role is to listen without interrupting
- Prepared to catch mistakes made by students presentation
- Correct and summarize at the end of the each presentation

26

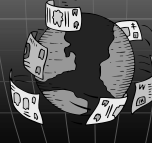
Removing Impediments to the Mobilization of Local Resources

Symposium on the Role of Law in Development --
Past, Present and Future
October 22 - 23, 2004
Nagoya, Japan
By Charles R. Irish, Director
East Asian Legal Studies Center
Volkman-Bascom Professor of Law
University of Wisconsin
Madison, USA

1

Introduction

- Who has the money?
- Who has the capital?
- Legal impediments to the mobilization of local Resources



2

Legal Obstacles to Local Resource Mobilization

- Laws and institutions that provide inadequate protection of property rights
- Burdensome regulations that limit the ability to start and carry on businesses
- The RESULT: potentially productive physical and human capital sits idle, or alternatively is driven into the informal economy beyond the reach of the government

3

Deficiencies in Legal System Example One

In 2003, Grace Roseau bought undeveloped land from John Hamilton. The land sits on a hill overlooking the harbor, is on the outskirts of a major city, and has easy access to a sandy beach. Because of very substantial stamp duties and corruption in the land registration office, the cost of formally registering the change in land ownership would equal about 25 percent of the total purchase price so Grace and John did what is common in the community - they informally transferred the land and did not register the transfer with the government.

In 2004, when Grace tries to build a tourist hotel on the land, however, she discovers that she cannot use the land as collateral for a loan because she is not formally acknowledged as the owner.

4

Deficiencies in Legal System Example Two

Luke Mwanakatwe wants to expand his profitable equipment leasing business, but to do so, he needs additional financing.

Luke's only tangible assets are the business equipment and his accounts receivable, but because there is no reliable credit registry in the country and national law does not recognize accounts receivable as collateral, Luke cannot obtain the financing necessary to expand his business.

5

Deficiencies in Legal System Example Three

In 2003, Wang Microsystems sold stock to a small group of investors, including Mao Shih Ming. In assessing the risk of the investment, Mao considered the financial statements of Wang Microsystems and gave special weight to the certification by the outside auditors, Chen and Partners.

In 2004, after Wang Microsystems declared bankruptcy, it appeared that the certified financial statements were very misleading and may have been fraudulent. When Mao filed a law suit against Chen and Partners for knowingly or negligently certifying the false financial statements, the case was dismissed because Mao had no formal relationship with Chen and Partners. Privily was lacking, the judge said. The judge also concluded (i) that only Wang Microsystems had standing to bring a suit against Chen and Partners for the improper certification and (ii) that Wang Microsystems' recovery might be limited to the professional fee paid to Chen and Partners.

6

Burdensome Regulation Example Four

Suharnoko wants to start his own business services company. Suharnoko's education and his previous work experience make him a good candidate for success in this venture. He also has done marketing research that indicates his business will fill a gap in the business services industry.

The problem is that the government imposes very significant costs and long time delays to start-up a new business. In order to satisfy the government regulators, Suharnoko must go through 19 different procedures which will take on average about 150 days and the total official cost of getting the business started is expected to be over US\$1,000, which is many times Suharnoko's annual earnings. In addition, it is widely understood that the time delays and large number of different procedures give rise to pressures to bribe government officials to speed up the process, so the actual cost often is much greater than the official costs. In frustration, Suharnoko gives up the plan to start the new business and continues in his job as a relatively low level employee.

7

Burdensome Regulation Example Five

Chartran, Inc, is a company engaged in manufacturing oil and natural gas pipeline equipment. The company's sales and profits are growing and Chartran want to expand its operations. Doing so, however, would require hiring new staff. The government mandates a minimum wage of US\$200 per month, night and weekend work are prohibited, women can only work a maximum of 8 hours per day, and firing workers requires the approval of the Minister of Labor and payment of 12 months salary as severance pay.

To avoid the rigidity of the labor regulations, Chartran enters into informal employment contracts with five new workers. The informal contracts provide no health care, educational or pension benefits, they are not subject to any of the safeguards in the labor regulations, and in the case of employer abuses the contracts cannot be reviewed by the courts since the labor is not documented. Chartran also pays bribes to key personnel in the Labor Ministry to look the other way with regard to the contracts.

8

World Bank's Doing Business in 2005 Analysis of Burdensome Regulations

- The 20 countries with the most burdensome business regulations and the least protection of property rights are all poor and many are among the poorest in the world.
- The 20 countries with the least burdensome business regulations:

1. New Zealand	11. Switzerland
2. United States	12. Denmark
3. Singapore	13. Netherlands
4. Hong Kong	14. Finland
5. Australia	15. Ireland
6. Norway	16. Belgium
7. United Kingdom	17. Lithuania
8. Canada	18. Slovakia
9. Sweden	19. Botswana
10. Japan	20. Thailand

9

Analysis of Burdensome Regulation

- Being in the top 20 on the ease of doing business does not mean zero regulation.
- All of the top countries regulate, but they do so in less costly and burdensome ways.
- And they focus their efforts more on protecting property rights than governments in other countries.

10

Conclusions of World Bank's Analysis of Burdensome Regulation

- Businesses in poor countries face much greater regulatory burdens than those in rich countries.
- Heavy regulation and weak property rights exclude the poor from doing business.
- The payoffs from reform appear large. A hypothetical improvement to the top quartile of countries on the ease of doing business is associated with up to 2 percentage points more annual economic growth.

11

Why the Benefits of Reform Are So Great?

- The government bureaucracy overseeing the regulation of business will require less of the government's resources.
- On the business side, more efficient regulations will require less time and resources for compliance, which will allow the businesses to spend more time on their productive activities.

12

Benefits (Continued)

- Stimulate new business development
- Businesses operating in the informal economy will be encouraged to shift to the formal sector.
- The growth of the formal economy through the establishment of new businesses and shrinkage of the informal economy will expand the government's tax base.
 - Note the important implication here -- that rationalization of business regulation includes tax reform, with tax rates reduced to international norms and tax compliance penalties stepped up to increase the risks associated with operating in the informal economy.

13

Benefits (Continued)

- Regulations will have a broader impact. This will have its greatest effect on those groups most at risk in the labor markets. Women and children now will be protected by the government regulatory process rather than being left unprotected in the informal economy.
- More attractive to foreign investors. As local barriers to doing business fall and respect for property rights grows, not only will local capital be drawn into the economy, but also foreign direct and portfolio investment will be drawn to the market.

14

Benefits (Continued)

- Greater protections for property rights will bring dormant capital into productive use.
- The emergence of local resources to finance economic activities will reduce the reliance on foreign assistance and build up national self-sufficiency.

15

Barriers to Reform are Substantial

- Regulatory reforms are taking place more in the high and middle income countries and in recent years the reform process has been driven principally by the need to compete within the newly expanded European Union.
- Unfortunately, the lowest level of reform is occurring in the poorest countries, which are most in need of reform and have the most to gain from such reform.

16

Theories of Government Regulation

- **Public interest theory of regulation:** assumes that unregulated markets experience frequent failures and that governments regulate to counter those failures and to make the markets safer and more efficient.
- **Public choice theory of regulation:** regulated industries capture the regulators and are able to turn the regulatory process to the advantage of the regulated. Under this theory, stricter regulations are in the interest of the existing operators because the regulations limit entry into the marketplace and enable the existing operators to earn monopoly rents.

17

Theories of Government Regulation (Continued)

- **Tollbooth theory of regulation:** government regulations exist to give politicians and bureaucrats the opportunity to create artificial scarcities and then extract the rents from such scarcities through bribes, campaign contributions, and employment opportunities for friends and family members.
- **Legal inheritance or legal transplantation theory of regulation:** The less developed countries may have inherited obsolete or counterproductive regulations from their former colonial masters and inertia or a lack of skilled personnel may have insulated the regulations from reform.

18

Implications for Legal Assistance Programs for Less Developed Countries

- The initial phase of legal assistances program should be a catalogue of the business regulations.
- Who are the most suitable technical advisors -- local professionals or foreign experts?
- The reforms must be implemented and then sustained to be effective.

19

Improving Legal Transparency

Integrating Statutory Translation and Statutory Drafting Tools

Yoshiharu MATSUURA,
School of Law, Nagoya University

1

Demand of the Day: Continuing Translation of Japanese Laws into Foreign Languages

- Education of Overseas Students
- Need for global sharing of information of laws of various nations
- Globalization of Economic Activity
 - Availability of critical information for those who do business in Japan
 - Transparency of Japanese society
- Protection of Rights of Foreign Residents in Japan
 - Easy access to information on rights and duties under the Japanese law

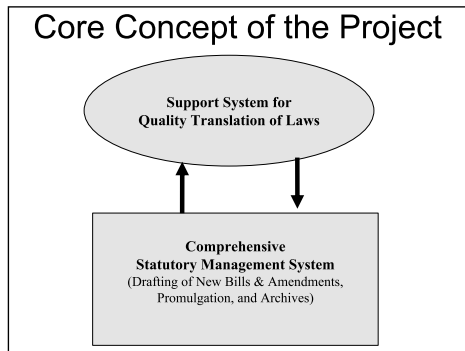
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Project Outline

Two Essential Sub-projects

- Development of a Support Environment for Computer Aided Translation of Laws
 - a system to produce a continuous, quality flow of translated statutory text
- Development of a Comprehensive Statutory Drafting and Archiving Environment
 - a system for drafting, amending, and disseminating statutory law

3

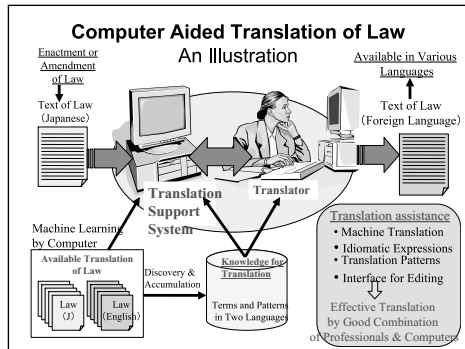


4

How the translation will be shared? An Image

The image shows a screenshot of a legal translation software interface. The top part displays Japanese text in a list format, with corresponding English translations visible on the right side. The bottom part shows a detailed view of a specific regulation, with the Japanese text on the left and its English translation on the right. The interface includes various toolbars and navigation elements typical of a legal research or drafting application.

5



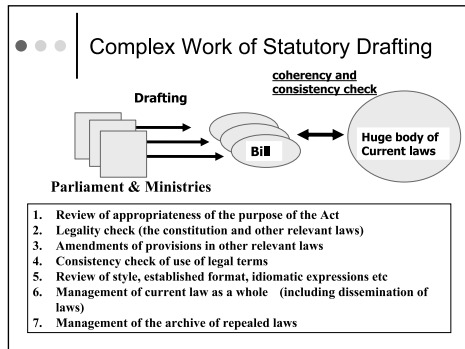
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Development of the Comprehensive Management of Statutory Information

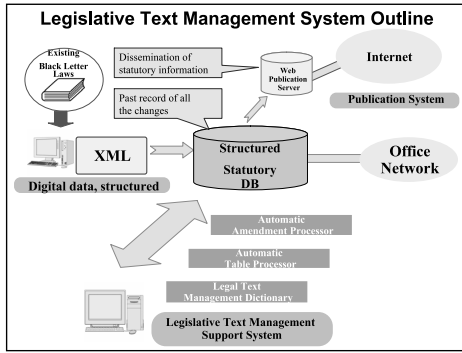
Essential Base for Continuing Translation of Law

- Need for information management of many laws continuously drafted & amended
- Need to add meta-data to legal texts for effective translation
- Professional drafters of law are in short supply

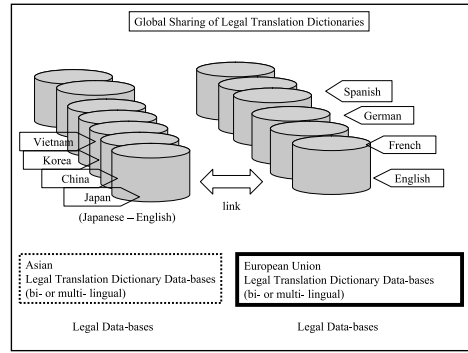
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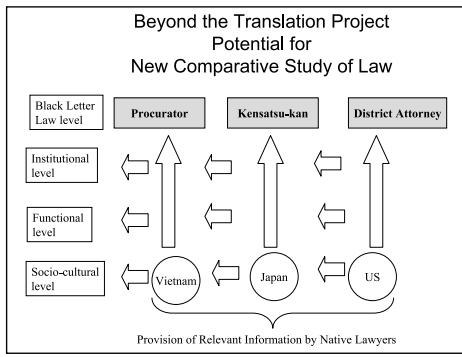
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9



10



11

ANNOUNCEMENT OF AN INTERNATIONAL SYMPOSIUM

The Theme of the Symposium: The Role of Law in Development – Past, Present and Future

Date: October 22-23, 2004

Venue: KKR Hotel Nagoya

(1-5-1 Sannomaru, Naka-ku, 460-0001, Nagoya, Japan)

Speakers:

- Session 1** **Prof. David Trubek**, University of Wisconsin Law School
 Prof. Emeritus Akio Morishima, School of Law, Nagoya University
- Session 2** **Prof. Cliff Thompson**, University of Wisconsin Law School
 Prof. Lars-Göran Malmberg, Faculty of Law, Lund University
- Session 3** **Prof. Katsuya Ichihashi**, Graduate School of Law, Nagoya University
- Session 4** **Prof. Charles Irish**, University of Wisconsin Law School
 Prof. Hiroshi Matsuo, Keio University Law School
- Session 5** **Prof. Masanori Aikyo**, Center for Asian Legal Exchange, Nagoya University
 Prof. Maki Nishiumi, School of Law, Chuo University
- Extra Session** **Prof. Yoshiharu Matsuura**, Graduate School of Law, Nagoya University
 Prof. Thomas Bruce (*Commentator*), Cornell Law School

PROGRAMME

October 22

8:15– **Registration**

9:00 **Opening Session**

Opening Address: **Saburi Haruo**, *Dean of Graduate School of Law, Nagoya University*

Addresses: **Shinichi Hirano**, *President, Nagoya University*

Masayuki Inoue, *Ministry of Education, Culture, Sports, Science
and Technology*

Keiichi Aizawa, *Ministry of Justice, Research and Training Institute*

9:30–12:00 **Session 1: Overview of the Past Efforts and Observations for the Future**

9:30–10:00 **Prof. David Trubek:** The “Rule of Law” in Development Assistance:

Past, Present, and Future

10:00–10:30 **Prof. Akio Morishima:** The Japanese Approach Toward Legal Development
Assistance (Law and Development)

10:30–10:50 *Coffee Break*

10:50–12:00 **Discussion**

12:00–13:00 *Lunch*

13:00–15:20 **Session 2: What Sort of Lawyer will be most effective in the Context of Legal
Reform of Developing Countries?**

13:00–13:30 **Prof. Cliff Thompson** (*ex Dean of UW Law School*):

Legal Education for Developing Countries: A Personal Case Study from
Indonesia

13:30–14:00 **Prof. Lars-Göran Malmberg** (*Faculty of Law, Lund University*)

The Project: Developing legal education in Vietnam

14:00–15:10 **Discussion**

15:10–15:30 *Coffee Break*

15:30–18:30 **Session 3: The Role of Law in the Developing Countries**

15:30–16:00 **Prof. Katsuya Ichihashi** (*Graduate School of Law, Nagoya University*)

Law and Legal Assistance in Uzbekistan

16:00–17:00 **Discussion**

17:00– **Steering Committee**

Members: Charles Irish, David Trubek, Christian Hathen, Lars-Göran
Mamlberg, Thomas Bruce, Masanori Aikyo, Yoshiharu Matsuura,
Haruo Saburi, Masanori Kawano

18:30–20:30 **Reception**

October 23

9:00–12:00 *Session 4: The Rule of Law and Economic Development*

9:00– 9:30 **Prof. Charles Irish** (*UW Law School*)

Removing Impediments to the Mobilization of Local Resources A Paper for the Symposium on the Role of Law in Development – Past, Present and Future

9:30–10:00 **Prof. Hiroshi Matsuo** (*Keio University Law School*)

The Rule of Law and Economic Development: a Cause or a Result?

10:00–10:20 *Coffee Break*

10:20–11:30 **Discussion**

11:30–13:00 *Lunch*

13:00–16:00 *Session 5: The Rule of Law and “Democracy”*

13:00–13:30 **Prof. Masanori Aikyo** (*Center for Asian Legal Exchange, Nagoya University*)

Human Rights and Democracy in Vietnam — Some thoughts on the philosophy of Legal Assistance

13:30–14:00 **Prof. Maki Nishiumi** (*School of Law, Chuo University*)

Development and Democracy — from a Viewpoint of International Law

14:00–14:20 *Break*

14:20–15:40 **Discussion**

15:40–16:00 *Coffee Break*

16:00–16:45 *Extra Session*

16:00–16:30 **Presentation: Prof. Yoshiharu Matsuura** (*Graduate School of Law, Nagoya University*)

A Nagoya Project: Translation Project of the Japanese Law — Its Implication for Statutory Drafting and Management of the Statute Data Base

16:30–16:45 **Comment: Prof. Thomas Bruce** (*Cornell Law School*)

Comments on Nagoya project

16:45–17:00 **Closing Remarks**

C A L E