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特　　集　：アジアにおける法研究、法教育及び法協力の促進～過去から学び、未来を見据える

Special Features　：　Promoting Legal Research, Education, and Cooperation in Asia, Learning from the Past, Looking to the Future

個 別 論 題 Thematic Papers

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研究ノート（Research Note）

資料（Documentation）

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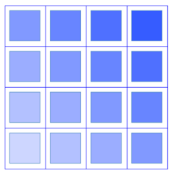

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特集

アジアにおける法研究、法教育及び法協力の促進～過去から学び、未来を見据える

本特集は、2022 年 9 月 20 日-21 日、名古屋大学にて開催した CALE 設立 20 周年記念シンポジウム「アジアにおける法研究、法教育及び法協力の促進～過去から学び、未来を見据える」（名古屋大学法政国際校育協力研究センター主催、名古屋大学大学院法学研究科共催）の報告者による寄稿論文である。

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Special Features

Promoting Legal Research, Education, and Cooperation in Asia, Learning from the Past, Looking to the Future

This special feature is composed of research articles which initially were presented in the form of reports at the CALE's 20th Anniversary Conference 'Promoting Legal Research, Education, and Cooperation in Asia, Learning from the Past, Looking to the Future', which was organized by the Center for Asian Legal Exchange of Nagoya University and co-organized by the Graduate School of Law of Nagoya University on September 20 and 21, 2022.

【Special Features】

Japanese Legal Technical Assistance: An Overview and the Case Study of Vietnam

CHINONE Koichi*

Abstract

For more than a quarter of a century, the Japanese government has been providing "legal technical assistance," a form of Official Development Assistance (ODA), to help mainly Asian countries develop their judicial and legal systems. This article presents the basic institutional framework of Japanese legal assistance, its formulation process, an overview of current projects, and refers to the underlying principles of such assistance stated in official documents such as the Development Cooperation Charter. It also presents a case study of Vietnam, which has the longest history of receiving legal assistance from Japan.

In Vietnam, four legal assistance projects have been implemented so far, resulting in numerous achievements in drafting and revising basic laws and improving the legal system. The current project, which started in 2021 and is expected to end in 2025, sets an unprecedented goal of equipping Vietnam with the capacity to compete globally, and aims to update its legal and judicial system to meet international standards. At the same time, the current project exemplifies the recent trend in Japan's legal assistance and hints at its prospects.

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* International Cooperation Department, Research and Training Institute, Ministry of Justice of Japan.

I. Introduction

This article presents an overview of the legal assistance provided by the Japanese government, including its brief history, implementation scheme, and underlying principles, and then presents a brief case study of legal assistance in Vietnam.[1]

Japan's legal assistance dates back to 1994 when the Ministry of Justice (hereinafter referred to as the "MOJ") invited officials from Vietnam's Ministry of Justice for a study trip to Japan in the first attempt of such assistance, and continues to date, expanding the number of recipient countries as well as the areas of support (from drafting and revising basic laws to strengthening the overall capacity of a judicial system).

Vietnam has remained a recipient country ever since the beginning of Japan's legal assistance, and over the course of time, the current project shows uniqueness that the previous projects in the country and projects in other countries have not achieved. The content of the current project in Vietnam may indicate the prospects for Japanese legal assistance.

II. Overview of Japan's Legal Assistance

1. Implementing Institutions and Schemes of Assistance

Legal assistance conducted by the Japanese government is officially called "legal technical assistance" ("*hou-seido-seibi-shien"*) and is an area of ODA (Official Development Assistance) which provides legislative assistance or support for improving legal institutions in developing countries.

Japan's legal assistance is mainly implemented by the Japan International Cooperation Agency (hereinafter referred to as the "JICA"), an incorporated administrative agency dealing with ODA[2], and the International Cooperation Department (hereinafter referred to as the "ICD"), a department of the Research and Training Institute of MOJ and the only governmental body specializing in such

[1] The views and opinions expressed in this article are those of the author and do not necessarily reflect the official policy or position of any agency of the Japanese government.

This article intends to provide basic information for non-Japanese readers on the current situation of Japanese legal assistance, centering on the assistance involving ICD the author belongs to. Therefore, the references here are in principle limited to materials and literature available in English.

[2] Established as an Incorporated Administrative Agency under the Act of the Incorporated Administrative Agency - Japan International Cooperation Agency (Act No. 136, 2002) and in principle under the jurisdiction of the Minister of Foreign Affairs (Article 43 of Act No. 136, 2002).

assistance, in cooperation with public sector actors (the Ministry of Foreign Affairs (hereinafter referred to as the "MOFA"), the Supreme Court, the Japan Patent Office, etc.) as well as private sector actors (the Japan Federation of Bar Associations, the International Civil and Commercial Law Centre (ICCLC)[3], universities, academics, practitioners, etc.).

JICA handles most of Japan's legal assistance[4] as it specializes in the planning and implementation of Japan's ODA.[5] JICA and ICD cooperate in the field of legal assistance within the framework of activities led by JICA such as projects and training courses with ICD providing the human resources of legal practitioners, especially judges and prosecutors. These legal practitioners are sometimes sent to a recipient country as long-term or short-term experts in JICA-led projects, mostly to provide legal expertise to local legal practitioners. Although JICA plans and carries out most of the activities related to legal assistance, some are planned and carried out independently by ICD, such as a joint study with a recipient country and a study trip to Japan, as explained later in this article.

As for the assistance involving ICD, there are three pillars of assistance[6]:

1. Drafting and revising basic laws and regulations
2. Creating systems needed for the implementation of laws[7]
3. Capacity building of legal professionals

according to which ICD currently provides support for 11 countries, as shown in Figure 1.

Legal assistance, typically embodied in the form of a project implemented by JICA, is commenced and conducted based on requests from a recipient country. In the process of formulating legal assistance, first, a request for assistance is made by a country in response to which the Japanese side examines the necessity and feasibility of the request through discussion between the relevant institutions such as MOFA, MOJ, embassies, JICA, external experts, etc. The Japanese side also conducts a detailed survey for plan-making, which usually entails several visits to the recipient country to observe the current situation in the area where assistance is requested, and to assess its actual needs through on-site research and interviews with the relevant local authorities. Upon

[3] ICCLC is a foundation established in April 1996 with cooperation from the business world, academia, and the legal community to assist the development of legal systems in the field of civil and commercial law. For further information on ICCLC, see (https://www.icclc.or.jp/english/) (accessed January 11, 2023).

[4] For the overview of legal assistance by JICA, see for example (https://www.jica.go.jp/english/publications/brochures/c8h0vm0000avs7w2-att/rule_of_law.pdf) (accessed January 11, 2023).

[5] The Act of the Incorporated Administrative Agency - Japan International Cooperation Agency (Act No. 136, 2002).

[6] https://www.moj.go.jp/EN/housouken/houso_lta_lta.html (accessed January 11, 2023)

[7] For example, ensuring consistency in laws and regulations, strengthening courts' capability in handling cases, creating manuals for practitioners, etc.

completion of such a survey, a JICA project is formulated and eventually implemented, typically with ICD providing the human resources of experts to be stationed in a recipient country.

Currently, ICD supports JICA projects on judicial and legal reform by sending long-term experts[8] to four countries: Vietnam, Cambodia, Laos, and Indonesia (note that the project in Myanmar is currently suspended due to political instability). Figure 2 provides an overview of the projects led by long-term experts as well as their numbers and affiliations.

Meanwhile, in addition to the JICA-led projects, ICD is providing various other forms of assistance. Figure 3 is an overview of such assistance, including, just to name just a few examples, a joint study in Timor-Leste on land ownership and registration, and seminars in Nepal on the newly enacted Civil Code involving local judges.[9] Regarding such assistance conducted uniquely by ICD, a specific request for assistance from a recipient country is required, after which the necessity and feasibility of such a request is examined by ICD and relevant institutions, such as the Research and Training Institute and MOJ.

2. Basic Characteristics of Japan's Legal Assistance from the Viewpoint of ICD

ICD, as a specialized institution for legal assistance, often lists the following as four main characteristics of Japan's legal assistance.

The first is "stand-by style" cooperation ("*yorisoi-gata-shien"*), which means that assistance, as mentioned earlier, is commenced and conducted based on requests from a recipient country. During the implementation of assistance, the initiative is attributed to the recipient country, and solutions are sought through dialogue with counterpart institutions and Japanese experts. Since the early stage of its history of legal assistance, Japan has consistently provided assistance while respecting the ownership of recipient countries.

Second, Japanese experts and relevant organizations value system building and human resource development, both of which take a long time to bear fruit; and long-term capacity building is valued more than short-term results. It is worth noting that a number of legal assistance efforts to various countries have dealt with human resource development in one way or another, such as the training of

[8] "long-term" means the term of dispatch lasts for at least a year (https://partner.jica.go.jp/resource/1669861352000/jicasJobView/jicas_job/pdf/specialist_treatment.pdf) (accessed January 12, 2023). Long-term experts consist of experienced judges, prosecutors, attorneys-at-law (dispatched from the Japan Federation of Bar Associations), and administrative officials (dispatched from each institution).

[9] For the details of the past activities by ICD, see "Chronology of Legal Technical Assistance" available on (https://www.moj.go.jp/content/001369284.pdf) (accessed January 11, 2023).

professionals.[10]

The third characteristic is that, in order to achieve long-term objectives, the Japanese government sends legal practitioners to a recipient country as long-term or short-term experts so that the counterpart institutions in that country can seek advice or opinions on hand. Moreover, resources are available in Japan to provide ongoing support for local activities. For recipient countries such as Vietnam and Cambodia, there is an "advisory group" composed mainly of academics and practitioners with a profound knowledge of the characteristics of the legal and judicial system of the said country and its history of receiving legal assistance from Japan. The members of an advisory group closely monitor the progress of a project and provide timely advice to experts stationed in the recipient country.

The last characteristic is the sharing of Japan's experience and knowledge. During the Meiji era, Japan stepped into modernization by importing legal systems from the West and adapting them to domestic needs and culture, eventually creating its own legal and judicial system.[11] When recipient countries draft basic laws, such as civil codes, they would experience similar circumstances that arise from receiving a set of legal norms foreign to their tradition. Therefore, it would be fair to say that Japan is in a position to advise recipient countries based on its own experience in adapting to foreign laws.

3. Basic Official Documents on Legal Assistance

Let us now turn to three official documents on legal assistance, which present the underlying principles of legal assistance conducted by the Japanese government.[12]

The first document is the Development Cooperation Charter (formerly known as "ODA Charter"), cabinet decision last revised in 2015, which provides basis for the overall ODA of Japan. It lays down three priority issues for ODA:

A. "Quality growth" and poverty eradication through such growth

B. Sharing universal values (freedom, democracy, respect for basic human rights, and the rule of law) and realizing a peaceful and secure society.

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[10] Ibid.

[11] For Japan's experience in adopting foreign laws and creating its own, see for example Uchida, Takashi, "Legal Technical Assistance and Juridical Science" (in Japanese) ICD NEWS No.93, December 2022, pp88-100.

[12] For the explanation of the other important documents referring to legal assistance, see for example Ito, Hiroyuki, "Current Trend of Japan's Basic Policies for Legal Technical Assistance," ICD NEWS (English) February 2017, pp108-114 available on (https://www.moj.go.jp/content/001321503.pdf) (accessed January 11, 2023).

C. Building a sustainable and resilient international community through efforts to address global challenges[13]

The Charter alludes to legal assistance in the context of the establishment of universal values such as the rule of law and good governance in recipient countries, stating that "(the establishment of the rule of law, the realization of good governance, the promotion and consolidation of democratization, and respect for basic human rights, including women's rights) hold the key to realizing an equitable and inclusive society including reducing disparities. Japan will thus provide the necessary assistance in such areas as: development of legal and judicial systems that involves the development of positive law and the training of legal and judicial experts including experts in the correction and rehabilitation of offenders."[14] The Charter does not make any further statements on legal assistance.

The second document is "Basic Policies on Legal Technical Assistance,"[15] last revised in 2013, formulated upon consultation among various ministries such as MOFA, MOJ, the Cabinet Office, the Ministry of Finance, etc. Unlike the Development Cooperation Charter, this document centers on legal assistance and defines its basic characteristics as follows: "Legal technical assistance, which provides legislative assistance or support for improving legal institutions in developing countries around the world, contributes to their self-help efforts toward good governance and building of integral foundations to attain sustainable growth. Japan has continuously emphasized the importance of the "rule of law" and appealed for the need to see it strengthened. Therefore, legal technical assistance is an effective tool for Japan to maintain its honorable position in the international community, and needs to be developed in a strategic manner."[16]

Upon such cognizance, the document sets five objectives of legal technical assistance:

1. Establishing the rule of law in developing countries through sharing universal values, including freedom, democracy, basic human rights, etc.

2. Improving the environment for sustainable growth and assuring compliance of global rules

3. Sharing Japan's experience and systems, strengthening economic ties with Japan, and establishing a platform for regional cooperation and integration

4. Improving the trade and investment environment, which is beneficial for Japanese enterprises in expanding their businesses overseas, and assisting in the introduction of environmental

[13] https://www.mofa.go.jp/policy/oda/page_000138.html (accessed January 11, 2023)
[14] Ibid.
[15] https://www.moj.go.jp/content/000115321.pdf (accessed January 11, 2023)
[16] Ibid.

and safety regulations.

5. Enhancing the effectiveness of Japanese economic cooperation and contributing to developing countries in achieving international development goals through the enhancement of governance.[17]

From these five perspectives, Japan is expected to proactively support recipient countries in the development of their legal systems as well as in the implementation of basic laws, economic laws, and related areas.

The "Basic Policies on Legal Technical Assistance" names eight countries, namely Indonesia, Vietnam, Myanmar, Mongolia, Cambodia, Laos, Uzbekistan, and Bangladesh, as "target countries for priority assistance." It also states that from the perspective of facilitating democratization, stabilizing the rule of law, supporting peace building, improving the investment environment, facilitating public–private partnerships, etc., Japan aims to meet future demand for assistance from other Asian countries, such as Nepal and Timor-Leste, and African countries according to the needs and demands of these countries.

The third document is the country assistance policy[18], which is formulated by MOFA and lays down country-specific aid policies for various areas of assistance, not limited to legal assistance. A unique country assistance policy exists for each recipient country along with a rolling plan, and includes the details and purposes of ongoing projects in that country. While the above "Basic Policies" enlists the priority issues of assistance for the above eight "target countries," the "country assistance policy" provides updated information and the vision for assistance in these and other countries.

III. Case Study of Vietnam

1. Achievements of the Past Projects

As mentioned above, Vietnam has the longest history of receiving legal assistance from Japan. Legal assistance in the form of a project in Vietnam began in 1996 and continues today, involving various counterpart institutions.[19] Figure 4 outlines the past projects, including the duration of each

[17] Objectives 4 and 5 were newly added in the 2013 revised version.

[18] https://www.mofa.go.jp/policy/oda/assistance/country2.html (accessed January 11, 2023)

[19] For a brief history of legal assistance of Japan to Vietnam, see for example ICD website (https://www.moj.go.jp/EN/housouken/houso_houkoku_vietnam.html) (accessed January 11, 2023).

project, the themes, and the counterpart institutions.

Figure 5 illustrates some of the major achievements of the past projects. It is noteworthy that the drafting and revision of basic laws such as the Civil Code, the Code of Civil Procedure, and the Code of Criminal Procedure have been accomplished in the course of the past projects.[20] Other achievements, such as the drafting of manuals for practitioners, are also noteworthy.

The country assistance policy of Vietnam, prioritizing the strengthening of good governance, states: "In order to strengthen governance required in the Vietnamese society in general, provide assistance such as human resource developments to streamline and improve efficiency of administrative agencies. It also provides assistance for efforts to improve the capacity of governance, such as strengthening capacities of the judiciary, legislation, and law enforcement."[21] It is evident that the past projects mentioned above, which focus on laying the foundation for the rule of law by establishing basic laws and contributing to human resource development, are aligned with the country assistance policy that focuses on building good governance in Vietnam.

2. Current Project in Vietnam

The appellation of the current project, which started in January 2021 and is expected to end in December 2025, is "Enhancing the quality and efficiency of developing and implementing laws in Vietnam." This project involves six counterpart institutions on the Vietnamese side: the Ministry of Justice (MOJ), the Office of Government (OOG), the Central Internal Affairs Committee (CIAC), the Supreme People's Court (SPC), the Supreme People's Procuracy (SPP), and the Vietnam Bar Federation (VBF).

While the current project follows its predecessors in focusing on the strengthening of good governance, one of its distinct characteristics is that it introduces a new method whereby each counterpart institution selects its own top priority issues and conducts research and discussion on them in a working group format.[22] Under this new method, problems that may hinder the

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[20] For the outline of the past projects, see for example ICD website (https://www.moj.go.jp/content/001369284.pdf).
For details of the project conducted from 2015 to 2020, see (https://www.jica.go.jp/project/english/vietnam/032/index.html) (accessed January 11, 2023), and for the current project, see Yokomaku, Kosuke, "Outline and Current Status of the 'Enhancing the quality and efficiency of developing and implementing laws in Vietnam' in Vietnam" scheduled to appear in ICD NEWS (English) March, 2023 (for its Japanese version, see ICD NEWS No.91, June 2022, pp11-19).

[21] Translated from the Japanese text of the latest version of assistance policy revised in 2017 available on (https://www.mofa.go.jp/mofaj/gaiko/oda/files/000072247.pdf). English version for the 2012 version is available on (https://www.vn.emb-japan.go.jp/document/pdf/vietnam-1%EF%BC%88En%EF%BC%89.pdf). (both websites accessed January 11, 2023).

[22] See for example Yokomaku (2022).

enhancement of the quality and efficiency of the development and implementation of laws are identified and solutions to them are implemented solely by the counterpart institutions, which could be described as an advanced form of the conventional "stand-by style."

Figure 6 lists the issues for each counterpart; some institutions have set two objectives, whereas others have set one. Currently, a working group has been formed for each theme and is in the process of discussing solutions for each issue.

When we look at the trajectory of past and present projects, we can see a transition in project purposes. The early projects dealt with drafting and revising basic laws, such as the Civil Code and Code of Civil Procedure, to support Vietnam's transition to a market economy. Then, the projects began to focus on improving the existing legal and judicial system, for example by creating manuals for practitioners to improve their skills and advising judges on how to write better judgments.

The current project sets even higher aims of strengthening Vietnam's global competitiveness by improving the quality of legal normative documents and their effective enforcement. The content of the current project follows those of the previous projects in some aspects; however, unlike its predecessors, the current project purports to bring the Vietnamese legal and judicial system up to international standards. This project is intended to reflect the resolution of the 13th National Party Congress in 2021, which sets various national objectives, including the development of laws and the improvement of the country's position in the international community.

IV. Conclusion

To date, Japan has provided legal assistance based on existing priority themes, such as establishing the rule of law, enhancing good governance, and building an investment environment for Japanese companies,[23] but the form and content of the assistance are changing over time. Conventional objectives of legal assistance have focused on the drafting and revision of basic laws, the establishment of systems necessary to implement laws, and the development of human resources. However, recent trends show that recipient countries are requesting assistance in areas beyond basic laws, with a focus on specialized, advanced laws such as intellectual property laws and competition laws, to name a few. Moreover, as we have seen in the case of Vietnam, recipient countries are

[23] MOFA recently announced its plans to revise the Development Cooperation Charter by the first half of 2023. (https://www.mofa.go.jp/press/release/press1e_000323.html) (accessed May 1, 2023)

increasingly aware of the need to improve their judicial systems to meet international standards. For donors such as Japan, formulating and implementing assistance in line with international standards—such as the SDGs and the UN Guiding Principles on Business and Human Rights, for example—is all the more important from the perspective of not only responding to the needs of recipient countries, but also achieving results with international recognition.

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Figure 1

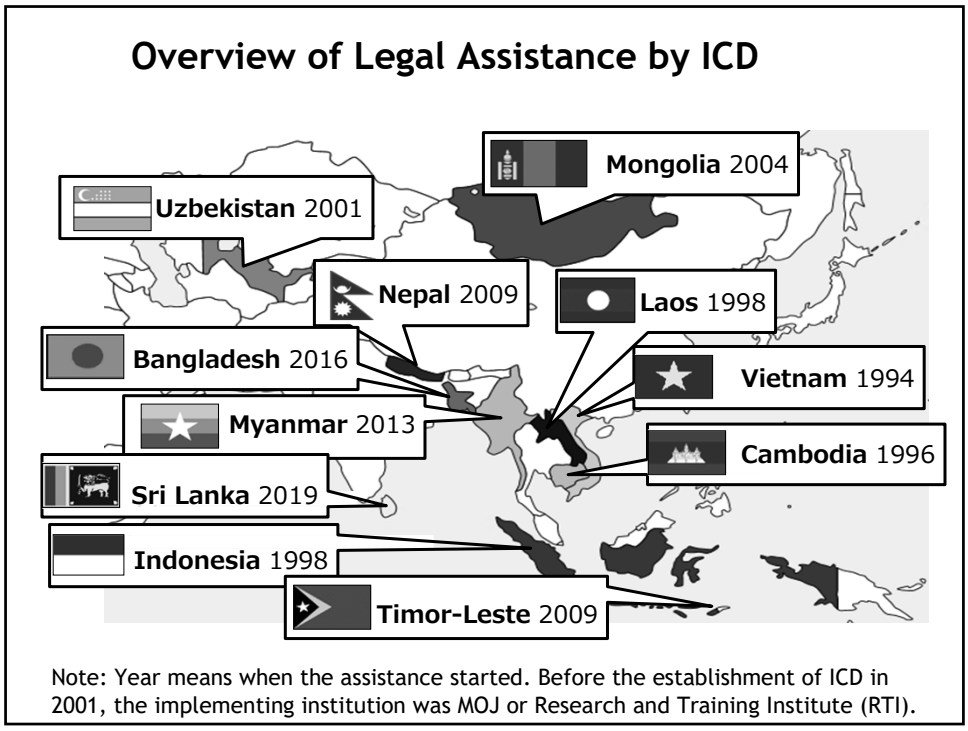

Figure 2

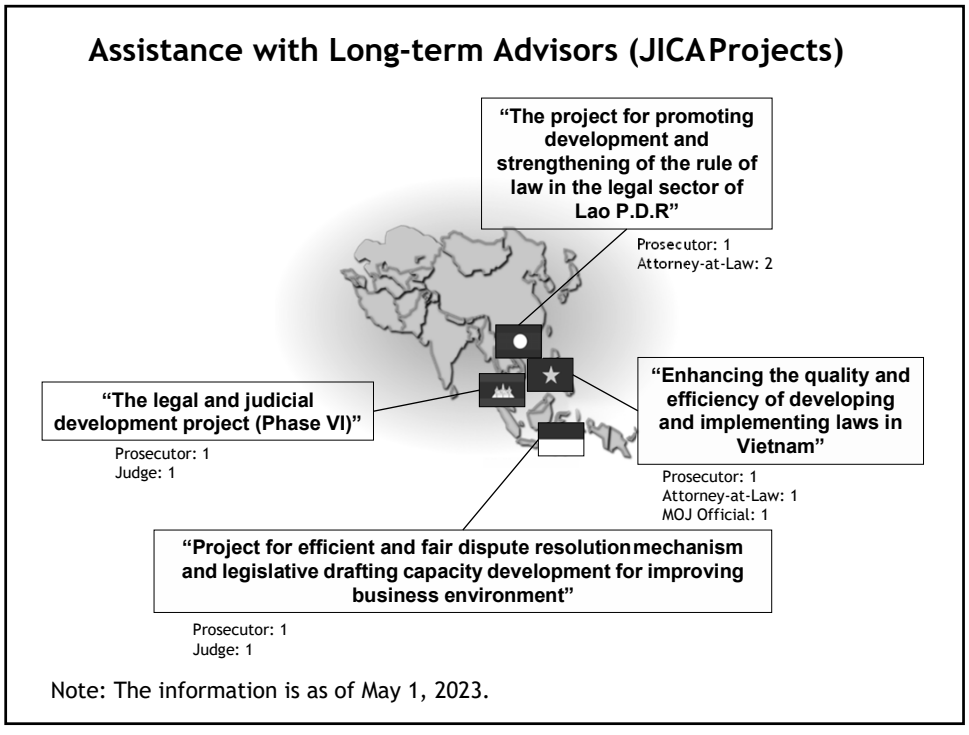

Figure 3

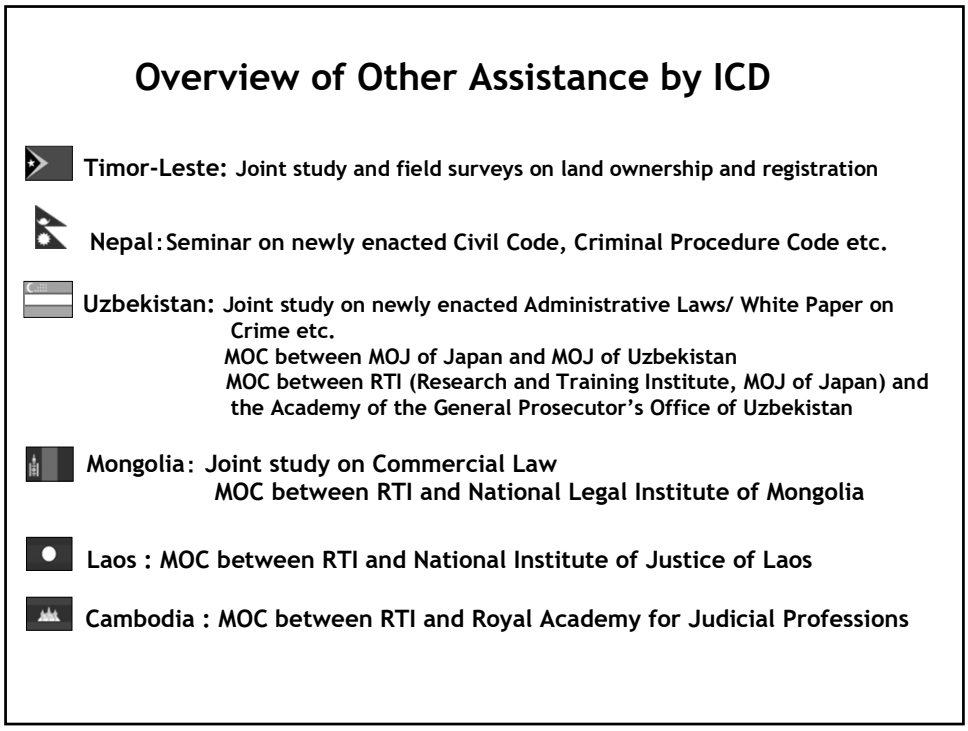

Figure 4

History of Legal Assistance Projects in Vietnam

	Period	Project Title	Counterpart(s)
1	Dec.1996～Nov.1999	Cooperation in the Legal and Judicial Field	MOJ
2	Dec.1999～Nov.2002	Cooperation in the Legal and Judicial Field (Phase 2)	MOJ、SPC、SPP
3	Jul.2003～Mar.2007	Cooperation in the Legal and Judicial Field (Phase 3)	MOJ、SPC、SPP、VNU
4	Apr.2007～Mar.2011	Technical Assistance for the Legal and Judicial System Reform	MOJ、SPC、SPP、VBF
5	Apr.2011～Mar.2015	Technical Assistance for the Legal and Judicial System Reform (Phase 2)	MOJ、SPC、SPP、VBF
6	Apr.2015～Dec.2020	The Project for Harmonized, Practical Legislation and Uniform Application of Law Targeting Year 2020	MOJ、OOG、SPC、SPP、VBF
7	Jan.2021～Dec.2025	Enhancing the Quality and Efficiency of Developing and Implementing Laws in Vietnam	MOJ、CIAC、OOG、SPC、SPP、VBF

MOJ: Ministry of Justice, SPC: Supreme People's Court, SPP: Supreme People's Procuracy, VNU: Vietnam National University, VBF: Vietnam Bar Federation, OOG: Office of Government, CIAC: Central Internal Affairs Committee
From Kono (2022)

Figure 5

Major Achievements of the Past Projects

【Drafting and Revising of Laws】
- Code of Civil Procedure (enacted in 2004, revised in 2011, 2015)
- Bankruptcy Law (enacted in 2004, revised in 2014)
- Civil Code (enacted in 2005, revised in 2015)
- Civil Judgement Implementation Law (enacted in 2008, revised in 2014)
- State Compensation Law (enacted in 2009, revised in 2017)
- Administrative Litigation Act (revised in 2015)
- Code of Criminal Procedure (revised in 2003, 2015)

【Others】
- Drafting of manuals for prosecutors
- Assistance for standardization of civil judgements and development of case law
- Assistance for improving capacity of judicial institutions (Courts, Procuracies, etc.)
- Assistance for examination of laws and regulations

Figure 6

Priority Issues for Each Counterpart

MOJ	1. Enhancement of quality and skill in legal system, ensuring uniformity, consistency and feasibility 2. Enhancement of efficiency and skill of laws implementation under the state management
CIAC	Making and perfecting laws on the prevention of corruption and negativity
OOG	Enhancement of quality and skill in verification of the draft of legal normative documents
SPC	1. Development of case laws 2. Enhancement of effectiveness and efficiency of the Law on Mediation and Dialogue at Court
SPP	1. Research on People's Procuracy (PP) in the Socialist Rule of Law State of Vietnam of 2021-2030, with a vision to 2045 2. Improving capacity of PP staff and prosecutors
VBF	1. Strengthening media agency communication 2. Developing profession with digital transformation

【Special Features】

Marriage Migration to East Asia: A Focus on Gender and Nationality

Susan KNEEBONE*

Contents

I. Introduction: Marriage Migration and Nationality in Historical Context

In this Note I summarise my research which focuses on the impact of gender discriminatory nationality laws (GDNL) in the context of marriage migration from Southeast to East Asia, specifically to South Korea ('the Republic of Korea' or 'Korea') and Taiwan ('the Republic of China' or 'ROC'). For this purpose, I adapt Knop and Chinkin's description of three 'generations' of discrimination under GDNL[1] as first: a married woman's right to independent nationality; second: inequality in the ability

* Professorial Fellow, Senior Associate Asian Law Centre, Research Affiliate Peter McMullin Centre on Statelessness, Melbourne Law School. This Note which is an outcome of an Australia Research Council (ARC) funded Discovery Project entitled, 'Development of a Legal Framework for Regulation of International Marriage Migration' was first presented at …. I thank the organisers for the opportunity to travel to Japan to present. I gratefully acknowledge the support of researchers Thomas Harré, Brandais York, Sarah Mercer, Subin Cho, Sayomi Ariyawansa, Hannah Gordon and Hansi Lim.

[1] Karen Knop and Christine Chinkin, 'Remembering Chrystal Macmillan: Women's Equality and Nationality in International Law' (2000-1) 22 *Michigan Jo Int L* 523, 546-550.

to pass nationality to children and third: gender inequality and discrimination in naturalisation procedures. For example, in the cases of both Korea and Taiwan, despite modifications to laws, GDNL persists in each of these three 'generations'.

Migration for marriage is not a recent practice as marriages between persons of different nationalities, which involve one migrating spouse, have occurred over time as Weil noted in his historical study of French nationality.[2] It is one of the issues which intersects with migration and citizenship \ nationality policies, in both destination and emigrant states globally. I argue that marriage migration from Southeast to East Asia falls between the gaps of related regimes which provide normative responses and state obligations for labour migration and human trafficking.[3]

Nationality, gender and the state are inherently connected[4] as I explain in the final section of this Note (III. Implications of the Research). Laws and policies are an integral part of the control of such migration. From 1907, when legislation in the United States and the United Kingdom deprived women citizens of their nationality upon marriage with a foreigner, until the end of World War I (1918), the principle that a wife's nationality depended on that of her husband was more generally recognised than in any other period.[5] One of the issues which the 1930 Hague Convention on Certain Questions Relating to The Conflict of Nationality Law (Hague Convention) dealt with was the nationality of women in the context of marriage migration. Ultimately, the 1930 Hague Convention in Chapter III (Nationality of Married Women) reaffirmed the principle of dependent or conditional nationality, by which a woman lost her nationality upon marriage to a 'foreigner' and took that of her husband. It was not until 1957 that the Convention on the Nationality of Married Women[6] abolished the principle of dependent nationality, in providing that neither celebration nor dissolution of marriage was to affect the nationality of a married woman (Article 1). It also provided that privileged arrangements for naturalisation should be available to alien wives at their request (Article 3(1)).

[2] Patrick Weil, *How to be French: Nationality in the Making since 1789* (Translated by Catherine Porter) Duke University Press 2008. Weil (12) describes how in the period of the 'Old Regime', whilst *jus soli* was the dominant principle, nationality could also be obtained by establishing 'qualité de français' (French identity). See also Candice Lewis Bredbenner, *A Nationality of Her Own: Women, Marriage, and the Law of Citizenship* (Uni of Calif Press, 1998) for a discussion of the link between migration, nationality and gender in the USA.

[3] Susan Kneebone, 'Gender, race, culture and identity at the internal border of marriage migration of Vietnamese women in South Korea' in Sriprapha Petcharamesree and Mark Capaldi eds, *Migration in Southeast Asia: The Interlocking of Vulnerabilities and Resilience* (Springer, 2023) Chapter 8.

[4] Susan Kneebone, 'Gender, Nationality and Statelessness: Marriage Migration to East Asia' to be published in the *NUS-MLS Statelessness in Asia Book Project* (accepted June 2022).

[5] Beroe Bicknell, 'The Nationality of Married Women' (1934) 20 *Transactions Grotius Soc* 106-122, 112.

[6] In force 11 August 1958.

The 1957 Convention was overtaken by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979, Article 9(1), which requires State Parties to grant women equal rights with men to acquire, change or retain their nationality. State Parties are to ensure that marriage to an alien shall not 'automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband'. Nevertheless, GDNL persist in many jurisdictions globally.[7] The regions with the largest concentration of countries with GDNL are Middle East-North Africa and Sub-Saharan Africa, followed by the Asia-Pacific.

First, I describe the persisting three 'generations' of discrimination under GDNL in Korea and Taiwan. I then briefly summarise the underlying norms of GDNL and the implications of my research for marriage migration to East Asia.

II. Three Generations of Discrimination

1. First generation discrimination: a married woman's right to independent nationality

In both Korea and Taiwan, marriage migration assumed the proportions of a 'phenomenon' in the 1980s in response to demographic changes and economic growth in the destination states. Despite the fact that Taiwan[8] (ROC) was a signatory to the 1957 Convention, automatic loss of nationality of foreign women marrying a Taiwanese national occurred until 2000 when the Nationality Act incorporated naturalisation procedures. Similarly, from the establishment of the state of South Korea in 1948 until 1997, marriage of a foreign woman to a Korean husband resulted in automatic 'spousal transfer of citizenship'.[9] Yet the Republic of Korea had ratified CEDAW in December 1984.[10] In 1997 the Korean Nationality Act was amended to provide a simplified process of naturalisation for a foreign wife on proof of two years of conjugal life in Korea. Whereas the Korean legislation required the foreign wife to relinquish her nationality of origin within 6 months of receiving Korean nationality (Article 3(1)), the Taiwanese Nationality Act of 2000 was distinctive in that it required an applicant for naturalisation to renounce their original nationality *before* the application would be approved.

[7] Global Campaign for Equal Nationality Rights: Global Overview https://equalnationalityrights.org/countries/global-overview.

[8] After the conclusion of World War II the Kuomintang took over control of Taiwan (formerly Formosa and a Japanese colony 1895-1945). At this point until 1971 the Republic of China (Taiwan) was a member of the UN.

[9] Younghee Cho and Dong Bun Im, 'Analysis of Social Issues and Legislation of International Marriages in Korea: Focusing on Establishment and Dissolution of Marriages' in Younghee Cho et al, *Legal Systems related to International Marriage in Asia: South Korea, Taiwan, Japan, Philippines, Vietnam and Cambodia* (IOM Migration Research and Training Centre 2013) 1-46 at 31; Nora Hui-Jung Kim, (2013) 18(1) The Journal of Korean Studies 7-28, 11; Chulwoo Lee, *Report on Citizenship Law: The Republic of Korea* (Country Report 2017\06, February 2017) EUI RSCAS 3.

[10] Note: Korea had entered a reservation on Art 9 at the time, which was withdrawn on 24 August 1999 to coincide with the change in the Nationality Law 1997.

Although the laws have been modified in each country in response to evidence of hardship including domestic violence, and as a result of strong advocacy on the part of the non-governmental sector, discriminatory factors which affect marriage migrants persist. For example, although since 2010 Korea's laws now allow dual nationality for a marriage migrant in a 'normal' marital relationship, or who is separated or divorced but has the care of a minor child born to the marriage, the divorced marriage migrant without a child is vulnerable if she has renounced her original nationality under the naturalisation process (see 3 'Third generation discrimination' below). By contrast, in Taiwan the marriage migrant is effectively excluded from acquiring dual nationality through the stringent requirements for this status, which favour 'high-skilled' migrants.[11] However her *immigration* status may change if she is caring for a minor child; she may be allowed to remain in Taiwan to care for the child until the child turns 20 years.

2. Second generation discrimination: the (in)ability to pass nationality to children

In Korea, as a result of the automatic conferment of Korean nationality on the 'foreign bride' until 1997, patrilineal *jus sanguinis* was ensured. Thus children of the 'mixed' marriage acquired Korean nationality. This discriminated against foreign wives on the basis of both nationality and ethnicity (generally, as from the 1990s most marriage migrants originated from Southeast Asia) and gender as from 1948 a foreign husband (married to a Korean woman) could apply for facilitated naturalization, from which any child of the marriage obtained the father's acquired Korean nationality.

In 1997 a second important change was made to the 1976 Nationality Law. This was to weaken the presumption of patrilineal *jus sanguinis* as an amendment provided that a Korean woman could pass on her nationality to her child.[12] Thus a Korean woman married to a foreign man could pass on her nationality to her child but a foreign wife married to a Korean man could pass on her nationality only though the laws of her original state.[13] As I explain below, this can lead to the vulnerability of the child if the marriage fails, and the child returns to the mother's country and the laws of that country do not cover this situation.

[11] Chen Yu-fu and Jonathan Chin, 'Some immigrants no longer need to give up citizenship', 24 March 2017, *Taipei Times* (online) - http://www.taipeitimes.com/News/front/archives/2017/03/24/2003667366.

[12] EA Chung and D Kim, 'Citizenship and Marriage in a Globalising World: Multicultural Families and Monocultural Nationality Laws in Korea and Japan' (2012) 19 Indiana Journal of Global Legal Studies 195, 214.

[13] Junmo Kim, Seung-Mum Yang, Ado Torneo, 'Marriage Immigration and Multicultural Families: Public Policies and their Implications for the Philippines and South Korea' (2014) 6(1) *Asian Politics and Policy* 97-119 at 120.

Like Korea, Taiwan inherited the patrilineal notion of *jus sanguinis*. A similar situation to Korea prevails in Taiwan, as a 2000 amendment to the Nationality Act 1929 permits both Taiwanese parents to pass on their nationality to their child, but the foreign bride cannot.

This situation can lead to vulnerability not only of the children of the marriage but also of the foreign wife. My research revealed that each year many Vietnamese women repatriate back home after divorce and/or separation from their Taiwanese or Korean husbands.[14] In recent years, the women have returned home increasingly accompanied by children born from these marriages. The children born in Taiwan, Korea and (more recently) China receive nationality through the *jus sanguinis* laws of their countries of birth. However, due to difficulties in formalising legal arrangements for divorce and custody,[15] many of these children travel to Vietnam without valid legal paperwork or documentation, and without parental understanding of the legal requirements for their migration. As a result, many of the children have precarious legal status and are in danger of facing a life on the fringes of society.[16]

A study that I conducted with others found that many of these children can considered to be *de facto* stateless (that is, 'in fact' as they hold a formal nationality, namely that of their father).[17] In the summary of our study, we described their lack of 'effective nationality' in Vietnam. While the children, ethnically, are 'half Vietnamese' their legal status is often precarious in Vietnam because of their foreign nationality. Through a close analysis of Vietnam's laws and policies, we found that they fell into gaps in the laws and policies. We recommended changes to the Vietnamese 2008 Nationality Law to specifically address the situation of children of returned marriage migrants, and which provides for a mother to unilaterally register her child as a Vietnamese citizen (as Vietnam has a more liberal policy on dual nationality).

3. Third generation discrimination: gender inequality and discrimination in naturalisation procedures

In both Korea and Taiwan, some laws and policies preclude marriage migrant women from accessing or completing naturalisation processes. In Korea, under the 1997 Nationality Law a

[14] In both Korea and Taiwan, the nationality and immigration laws have responded to problems caused by high divorce rates and 'domestic violence' in international marriages, which are well documented: Susan Kneebone, 'Transnational marriage migrants and nationality: the cases of South Korea and Taiwan' (International Academic Conference, Seoul, November 2017).

[15] Ibid. See also: Hyun Mee Kim, Shinhye Park and Ariun Shukhertei, 'Returning Home: Marriage Migrants' Legal Precarity and the Experience of Divorce' (2017) 49(1) *Critical Asian Studies* 38.

[16] Susan Kneebone, Brandais York and Sayomi Ariyawansa, 'Degrees of Statelessness: Children of Returned Marriage Migrants in Can Tho, Vietnam', (2019) 1(1) *Statelessness & Citizenship Review* 69-94, 71.

[17] Kneebone, York and Ariyawansa, (2019).

divorced woman lost her right to acquire nationality through naturalisation (Article 12(3)), and was deportable, often leaving children behind, or alternatively taking them illegally to her home country (see above). The 1997 Nationality Law also made a foreign wife vulnerable to statelessness in cases where she had relinquished her original nationality before completing the naturalisation procedure and her country of origin had not established a procedure for restoration of nationality (as was the case in Vietnam at this time).[18]

As noted above, in Taiwan until 2016, Article 9 of the Nationality Act required applicants for naturalisation to *first* renounce their previous nationality or allegiance before naturalisation would be approved. This requirement caused some marriage migrant women to become stateless, as there was no guarantee that after renouncing their original nationality, that they would gain Taiwanese nationality.[19] Although the 2016 amendment required foreign brides to present evidence of renunciation *within a year* of receiving Taiwanese citizenship, the grant of citizenship is conditional for 5 years during which time marriage migrants must have 'no bad conduct'. Some NGOs have reported that this leaves the marriage migrant vulnerable to false or exaggerated complaints by a disgruntled husband.

However, in both Korea and Taiwan the biggest obstacle that marriage migrants face to naturalisation is that they must establish an ongoing and stable marriage relationship. In Korea the 1997 naturalisation process requires the support of the husband and his family, which often means that a woman remains in an abusive relationship to secure naturalisation.[20] In Taiwan the husband controls the wife through the household registration system. In addition to onerous prerequisites for naturalization, must show that she is in a continuing marriage relationship, or has a 'citizen child'; that is, she must show a 'kin-dependency relationship'.[21]

In the case of Korea, the NGO Report to CEDAW July 2011 noted:

There are many cases where foreign spouses experience frustration as the Korean husband, who fears that they would run away after receiving citizenship, refuses visa extension or won't cooperate with the nationality application process. There are numerous complaints from women about how the husband controls the finances even when the women financially support the family. Some are even

[18] In 2011 the period of renunciation was increased from 6 months to one year and a pledge of renouncement replaced the process – see Chulwoo Lee, *Report on Citizenship Law: The Republic of Korea* (Country Report 2017\06, February 2017) EUI RSCAS, 4.

[19] Kitty McKinsey, *Divorce Leaves Some Vietnamese Women Broken-Hearted and Stateless* (14 February 2007) accessed at http://www.unhcr.org/45d324428.html.

[20] NGO Report to CEDAW July 2011 6; CEDAW, Concluding Observations of the Committee on the Elimination of Discrimination against Women: Republic of Korea UN Doc CEDAW/C/KOR/CO/7 (1 August 2011) para 26.

[21] Sara Friedman, 'Adjudicating the Intersection of Marital Immigration, Domestic Violence, and Spousal Murder: China-Taiwan Marriages and Competing Legal Domains' (2012) 19(1) *Indiana Journal of Global Legal Studies* 221.

terrified that they would be forced to leave the country if they divorce a violent spouse with no citizenship.

In response to the 2011 CEDAW Committee's[22] concerns and following a recommendation that Korea 'revise its legislation governing nationality with a view to removing all discriminatory provisions relating to the requirements for acquiring Korean nationality',[23] the requirement for the husband's support was changed. But in 2018, the CEDAW Committee found that in practice, immigration officers might still require migrant female applicants to furnish a sponsorship letter despite the enactment of a legal amendment in 2012 removing such a requirement.[24]

In 2004, in response to extensive reports of domestic violence and increasing numbers of divorces between marriage migrants and Korean men, the legislation was revised to provide that a foreign wife could apply for naturalisation in her own right if she could prove that she was a victim of domestic violence. This exceptional measure replicates those used in other countries such as Australia,[25] but for the foreign bride in Korea it is very hard to negotiate the legal system with limited language and technical skills.

The naturalisation procedure is thus fraught with many obstacles for marriage migrants in both Taiwan and Korea. In Taiwan many marriage migrants only ever obtain residency or 'partial citizenship'.[26] One study found that over a period of 15 years, only 18.3% of women obtained citizenship.[27] Unlike Korea there is no special naturalisation procedure for victims of domestic violence.

III. Implications of the Research

1. First generation discrimination on the basis of gender: independent nationality and intersecting 'constellations of power'[28]

[22] CEDAW (n 20) para 26.
[23] Ibid para 27.
[24] CEDAW, Concluding Observations on the Eighth Periodic Report of the Republic of Korea UN Doc CEDAW/C/KOR/CO/8 (14 March 2018) para 34(c).
[25] Susan Kneebone, 'Migration Marriage and Gender: A Site for Crimmigration? – An Australian Case Study' in Peter Billings ed *Crimmigration in Australia* (Springer 2019).
[26] Yea-Huey Sheu, 'Full Responsibility with Partial Citizenship: Immigrant Wives in Taiwan' (2007) 41(2) 179.
[27] Ibid. Cf Isabelle Cheng, 'Living with One China as a Migrant Wife in Taiwan' https://researchportal.port.ac.uk/portal/en/publications/living-with-one-china-as-a-migrant-wife-in-taiwan(9cb63bc5-0018-4aff-8b81-2333e9b33c3a).html – she says that from 1987-2016 more than 234,000 migrant wives have received ROC nationality.
[28] Patricia Hill Collins and Valerie Chepp *The Oxford Handbook of Gender and Politics* (2018).

Two gender stereotypes which link the notions of nation-state, national identity and national security have framed the treatment of a married woman's right to independent nationality. On the one hand a patriarchal notion of the state is applied to deny the right to married women. On the other, the 'biological role of women and their ability to contribute to the national well-being is valued as a reason to grant them the gift of their husband's nationality. Embedded in both stereotypes is an understanding that women are subservient to their husbands and to the nation; that women are incapable of allegiance or loyalty to the state.

Historically, the denial in international law in 1930 of the right to an independent nationality was a casualty of a successful campaign by Western-educated suffragettes for the right to vote. As I have shown,[29] it was assumed that the wife owed a 'subjective' allegiance to her husband as 'the state in miniature'.[30] Knop and Chinkin explain[31] that wives were viewed through a stereotype of devotion to 'preservation and care of life', and as 'incapable of love of country'. In the United States a national woman who married a foreigner lost her nationality under the Expatriation Act 1907 whilst a man did not; such marriage by a woman was seen as an act of disloyalty.

Bredbenner[32] argues that fluctuating policies in the United States on married women's nationality reflected shifting 'anxieties' over immigration policy and the credentials of foreign wives as the mothers of future citizens. Similar concerns dominate debates on immigration of foreign wives in many jurisdictions globally. In this context, women are perceived in cultural[33] terms, as both victims of deviant conduct[34] and as agents of change and upholders of cultural norms.[35]

In the context of East Asia, marriage migration is seen as a 'critical project for the nation-state'[36] which feeds anxiety about the motives and impacts of the 'foreign bride'. Similar concerns led from the migration of 'mail-order brides' to Australia in the 1980s[37] leading to restrictive responses which eventually had to be modified to recognize the individual agency of the women and their right to an independent status.

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[29] Kneebone 2022, 6.

[30] Helen Irving, *Citizenship, Alienage and the Modern Constitutional State: A Gendered History* (CUP UK 2016), 217.

[31] Knop and Chinkin 2000, 546 citing Enoch Powell's opinion that the ultimate test of nationality is a man's duty to fight for his nation in war.

[32] Bredbenner 1998, 195-96.

[33] Saskia Bonjour and Betty de Hart, 'A proper wife, a proper marriage: Constructions of 'us' and 'them' in Dutch family migration policy' (2013) 20(1) *European Jo of Women's Studies* 61-76.

[34] Susan Kneebone, 'Migration Marriage and Gender: A Site for Crimmigration? – An Australian Case Study' in Peter Billings ed *Crimmigration in Australia* (Springer 2019) 223-251.

[35] Kneebone, 2023.

[36] Mika Toyota, 'Editorial Introduction: International Marriage, Rights and the State in East and Southeast Asia' (2008) 12(1) Citizenship Studies 1, 3; Kneebone 2022.

[37] Kneebone 2019.

In the context of marriage migration to East Asia from developing countries in Southeast Asia, Korea and Taiwan need to exercise their structural power towards marriage migrants responsibly through migration policies that recognize the individual agency of the women and their need and desire to migrate. In the case of Korea I found that the vulnerability of marriage migrants was exacerbated by their exclusion from labour migration programs.[38] In Taiwan by contrast the government has created more visa pathways for women from Southeast Asia who can fill needs in the care sector.

2. Second generation discrimination: children as pawns of the state

In an early publication on this issue[39] I drew attention to a gap in discussion about marriage migration. As explained, the nationality policies of Korea (and Taiwan through its migration laws) favour the foreign wife who has produced a child for the nation. This is tantamount to regarding the child as a state asset (and nationality as a reward for the wife). However, the Convention on the Rights of the Child 1989 (CRC),[40] Articles 7 and 8, arguably contains provisions which collectively confer independent rights to nationality and identity upon a child born to an international marriage. Importantly the CRC has been uniformly ratified in Southeast Asia, except Taiwan, which has enacted the Enforcement Act of the CRC which effectively transposes the treaty into domestic law.

CRC Article 7.1 creates a right of a child to be registered and named from birth, and the right to acquire a nationality. The objective of this provision as Article 7.2 suggests, is to prevent statelessness, but Article 7.1 also refers to the 'right to know and be cared for by his or her parents' – 'as far as possible'. It has been noted that Article 7 is broader than the ICCPR, Article 24.2, to be registered 'immediately after birth' and to have a name.[41] It has been accepted that the CRC provision is designed to promote recognition of a child's legal personality and identity; that the child should be respected as a person in their own right.[42] This is consistent with other provisions in the CRC which provide that the child's views shall be respected (Articles 12 and 13).

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[38] Kneebone 2023.

[39] Susan Kneebone, 'Nationality and Identity in Regulation of International Marriage Migration in Southeast and East Asia: Children As Pawns of the State?' *U of Melbourne Legal Studies Research Paper No. 734* (2016) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2816750.

[40] Convention on the Rights of the Child, New York, 20 November 1989, in force 2 September 1990, UN Doc. A/44/49, 44 UN GAOR Supp. (No. 49) at 167 ('CRC').

[41] Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 1999), 145.

[42] Ineta Ziemele, *Article 7: The Right to Birth Registration Name and Nationality and the Right to Know and Be Cared for by Parents* (A Commentary on the United Nations Convention on the Rights of the Child, Martinus Nijhoff 2007), 1.

Additionally, CRC Article 8 provides for *preservation* of the child's identity.[43] This provision which was largely inspired by the disappeared children in Argentina is arguably applicable to marriage migration situations where families become split across states as a result of state policies. Article 8.2 imposes an obligation on states to provide assistance to re-establish the child's identity where the child has been deprived of it. It has been said this includes awareness of ancestors, family history, culture and religion, plus continuity with the past and a consistent biography.[44] Together with the strong emphasis on family unity in Articles 9 and 10, the CRC emphasises the need for a child to grow up with awareness of the culture of both parents.

Our research in Vietnam indeed showed that in some situations, children who returned to Vietnam from Korea after a failed 'mixed marriage' did maintain contact with their fathers in Korea and were encouraged by their mothers to maintain their Korean language skills with the possibility of higher education in Korea in the future, clearly within their sights.[45] But these situations were exceptional. They also require consistent policies and cooperation between states.

This discussion illustrates the need for states to consider the independent rights of children of international marriages to a nationality and an identity which recognises both parents. States need to implement child sensitive policies on nationality.

3. Third generation discrimination: naturalisation procedures

The naturalisation procedures, which implement policies on nationality, often reinforce the power of the husband over the foreign wife. Moreover, they demonstrate how administrative practices carried out by officials of the state can frustrate the intention of the policies and breach international law. It could be said that administrative practices reflect broader community attitudes to marriage migrants. In my work I have demonstrated that notions of gender, race, culture and national identity shape responses to marriage migration in Korea[46] and Taiwan[47] leading to negative perceptions of marriage migrants and their motives for migrating. Such perceptions are amplified by policies regulating marriage migration which 'commodify' and 'marketise' the migration.

[43] Defined as 'including nationality, name and family relations as recognised by law without unlawful interference' (Art 8.1).
[44] Alastair MacDonald, *The Rights of the Child: Law and Practice* (Jordan Publishing 2011) 397.
[45] Kneebone, York and Ariyawansa, (2019).
[46] Kneebone 2023.
[47] Kneebone 2022, 11.

IV. Conclusions

My Research Note shows that women who migrate for marriage from Southeast to East Asia, to Korea and Taiwan face gender discriminatory responses and risks of statelessness. Although these responses have been gradually modified over four decades, serious discrimination persists, and extends to the children of a 'mixed marriage'. As such discrimination links gender stereotypes to notions of nation-state, national identity and national security, the solution lies in state hands to remove it through laws and policies, including provision of migration pathways. As the Global Compact on Migration (2018) recognises, states need to provide safe and lawful pathways to reduce the vulnerabilities of international migration. Marriage migration is in large part a de facto labour migration strategy for women in Southeast Asia and East Asia is a region in need of immigrants.

As my research demonstrates, marriage migration occurs in a regional and transnational context. There is need for dialogue and discussion between states on this issue.

【Special Features】

Competition Law in ASEAN: Transplanting Legal Frameworks to Prohibit Abuse of Dominance from Europe to South East Asia

Burton ONG*

Abstract

National competition laws have been introduced in most of the ASEAN (Association of South East Asian Nations) Member States in the last two decades, many of which are based on the European competition law framework, even though many of these transplant jurisdictions have vastly different socio-economic and political landscapes. It should be noted that competition law in ASEAN only exists at the national level – in contrast with the legal model in Europe, where competition laws exist for at a regional as well as at a national level. This paper will provide an overview of the regional competition law framework in the ASEAN Economic Community and explain how the national competition law frameworks of each ASEAN Member State have implemented these non-binding regional guidelines in their national competition law frameworks, focusing on particular on the prohibition against conduct that amounts to an abuse of dominance. It will illustrate how a single European competition law concept has been enacted and adapted in different ways in individual ASEAN Member States despite the existence of regional guidelines which seek to achieve regional convergence in this field of economic law.

Contents

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I. Introduction: Competition Law in South East Asia

Competition law is a relative new field in the member states of ASEAN (Association of South East Asian Nations), with 9 out of 10 countries enacting competition law statutes between the last 5 and 20 years. The reasons for introducing competition law in each member state vary from jurisdiction to jurisdiction. For some countries, it was part of a broader effort to enhance economic development and liberalise their economies, which were previously dominated by state-owned enterprises, for others, it was to comply with their international commitments to free trade and to attract foreign investment. In many cases, it was a combination of some or all of the factors above. In this paper, I will explore the legal and economic context in which several ASEAN member states introduced their respective competition law and policy frameworks, focusing on legal prohibitions which were transplanted from the European competition law model.

At a regional level, competition policy has been given some prominence by the ASEAN member states (AMSs) because of its potential to contribute to the ASEAN Economic Community (AEC), a regional market initiative that aims to establish a common market for South East Asia.[1] Competition law is regarded as a means for facilitating regional market integration and spurring economic growth within the region. Competition law scholars support the view that regionalising Competition policy can advance economic development objectives, facilitating regional market integration between, in particular, developing countries.[2] AMSs have recognised the nexus between Competition policy and the establishment of a regional common market – the ASEAN Economic Community – and have chosen to adopt a regional Competition policy as an instrument to advance their collective economic interests.

Section 2 will introduce the ASEAN region, while Section 3 critically examines the original ASEAN Blueprint and the various implementing instruments that spawned from it, including the

[1] See Burton Ong (ed), *The Regionalisation of Competition Law and Policy within the ASEAN Economic Community*, Cambridge University Press (2018).

[2] See Drexl, J. "Economic integration and competition law in developing countries", chapter 11 in Drexl, Bakhoum, Fox, Gal and Gerber (eds), Competition Policy and Regional Integration in Developing Countries (Cheltenham: Edward Elgar, 2011).

regional competition policy guidelines developed to facilitate the introduction of national competition law frameworks in the ASEAN member states. Section 4 will look at examples from different AMSs to illustrate how competition law prohibitions have been imported from Europe into these jurisdictions, to establish national competition law frameworks, pursuant to the wider policy objectives of this regional economic grouping.

II. The Association of South East Asian Nations

Established in 1967, ASEAN has grown into an important regional economic grouping with ten countries in South East Asia – Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam – whose initial aims focused upon the acceleration of "economic growth… in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of Southeast Asian Nations".[3] The ASEAN Member States (AMSs) are organised around a series of cooperative principles which preserves each member state's freedom to independently pursue their own legislative and regulatory agendas. The "fundamental principles" that govern the relations between AMSs are set out in Article 2 of the *ASEAN Treaty of Amity and Cooperation*:[4]

(a) Mutual respect for the independence, sovereignty, equality and territorial integrity and national identity of all nations;
(b) The right of every State to lead its national existence free from external interference, subversion or coercion;
(c) Non-interference in the internal affairs of one another;
(d) Settlement of differences or disputes by peaceful means;
(e) Renunciation of the threat of use of force;
(f) Effective cooperation among themselves.

[3] The ASEAN Declaration (Bangkok Declaration), 8 August 1967. Available at http://asean.org/the-asean-declaration-bangkok-declaration-bangkok-8-august-1967.
[4] Treaty of Amity and Cooperation in Southeast Asia (Indonesia), 24 February 1976. Available at http://asean.org/treaty-amity-cooperation-southeast-asia-indonesia-24-february-1976.

The member states of ASEAN have incredibly diverse political, geographical and socio-economic landscapes. The spectrum of political systems within the ASEAN region include an Islamic monarchy, socialist states, a constitutional monarchy under military rule, transitional economies and several distinct parliamentary democracies with diverse political values. In 2015, the ASEAN Economic Community was formally established with the goal of drawing the economies of the AMSs closer together, though not going so far as integrating them into a single market as has been done in the European Union. The regional grouping merely aspires towards establishing a common market in which tariff and non-tariff barriers to trade are eliminated or at least substantially reduced. The table below captures the land and population size of these countries, as well as various indicators of their respective economic profiles.

Table 1: Comparison between key characteristics of ASEAN Member States

World Development Indicators (2021)	Surface Area (sq km)	Population Size (Million)	Gross Domestic Product ($US) – per capita	Agriculture (% GDP)	Income Level Categorisation
Brunei Darussalam	5770	0.441	31,722	1.3	High
Cambodia	181,040	16.9	1,591	22.8	Lower Middle
Indonesia	1,910,931	276.3	4,292	13.3	Lower Middle
Lao PDR	236,800	7.3	2,551	16.1	Lower Middle
Malaysia	330,800	32.7	11,371	9.6	Upper Middle
Myanmar	676,590	54.8	1,187	23.5	Lower Middle
Philippines	300,000	111.0	3,549	10.1	Lower Middle
Singapore	719	5.4	72,794	0.0	High
Thailand	513,120	69.9	7,233	8.5	Upper Middle
Vietnam	330,967	98.2	3,694	N.A.	Lower Middle

Source: The World Bank (World Development Indicators, data.worldbank.org)

Between 2007 and 2015, ASEAN has enjoyed an average of 5.3% GDP growth per annum, with the aggregation of the 10 AMSs' GDPs amounting to USD2.6 trillion by 2016. With a combined consumer base of 625 million people, with a majority under the age of 30, the ASEAN region attracted USD 120 billion of foreign direct investment (FDI) in 2015, or 7% of global FDI. [5] The regional market which ASEAN is working to establish would qualify as the world's seventh largest economy. [6] As a result of implementing the initiatives laid out in the ASEAN Free Trade Area and the ASEAN Economic Community Blueprint (2008-2015)(see below), extensive trade liberalisation measures[7]

[5] ASEAN Expert Group on Competition (AEGC) Inaugural Annual Report 2016, ASEAN Secretariat, May 2017, at p.2.

[6] Welcome Address by Mr Lim Hng Kiang, Minister for Trade and Industry (Singapore), at the International Competition Network Annual Conference 2016, 27 April 2016, at [7], available online at https://www.ccs.gov.sg/media-and-publications/speeches.

[7] Investment liberalization policies introduced by AMSs were introduced with the view of permitting market entry into previously state-controlled sectors and enhancing the contestability of such markets. Competition policy complements the removal of these internal barriers by preventing anti-competitive conduct from replacing these obstacles to market entry. See Lawan Thanadsillapakul, "The Harmonisation of ASEAN: Competition Laws and Policy from an Economic Integration Perspective" in Gugler and Chaisse (eds), *Competitiveness of the ASEAN Countries: Corporate and Regulatory Drivers* (Edward Elgar Publishing 2010) at p.130.

have been implemented by the AMSs to achieve duty-free internal tariffs for 96% of tariff lines, more liberal market access in more than 100 services sectors, improved customs clearance and other business-friendly regulatory frameworks. The overall economic strategy pursued by ASEAN towards economic integration has been described as an approach based on "open regionalism",[8] where both intra-regional and extra-regional liberalisation of trade and investment are simultaneously pursued by the AMSs, acting individually in some instances and acting collectively in others.

III. The ASEAN Economic Community Blueprint (2008-2015)

The proposal for establishing an ASEAN Economic Community (AEC) in dates back to 2007 when the AMSs conceptualised the AEC Blueprint, setting out the many reforms that the AMSs had to carry out to establish the AEC by 2015 in order to "transform ASEAN into a region with free movement of goods, services, investment, skilled labour and freer flow of capital".[9] Four key inter-related and mutually reinforcing characteristics for the AEC were articulated: (a) an ASEAN single market and production base; (b) a highly competitive economic region; (c) a region of equitable economic development; and (d) a region fully integrated into the global economy. Individual chapters in the Blueprint are dedicated to each of these goals, with each chapter setting out specific areas of policy-making and more detailed action plans for the AMSs to pursue.

In relation to (a), the Blueprint focuses on measures required to ensure the free flow of goods, services and investment between the AMSs. The goal was to "facilitate the development of production networks in the region and enhance ASEAN's capacity to serve as a global production centre or as part of the global supply chain", building upon the creation of the ASEAN Free Trade Area in order to eliminate non-tariff barriers to trade and attract sustained inflows of foreign direct investment.[10]

In relation to (b), a "competitive" ASEAN region was envisioned as one where every AMS had its own competition law and policy framework, consumer protection measures and intellectual property frameworks to "develop a culture of learning and innovation supported by a friendlier IP profile to businesses, investors and creators in ASEAN".[11] The Blueprint also exhorts cooperation between the AMSs in the areas of infrastructure development (multi-modal transportation, information

[8] See Lawan Thanadsillapakul, "The harmonization of ASEAN: Competition laws and policy from an economic integration perspective" in Drexl et al (eds) (n 1) above at p13-14.

[9] ASEAN Economic Community Blueprint, ASEAN Secretariat, Jakarta, January 2008, at [4]. http://asean.org/wp-content/uploads/archive/5187-10.pdf ("AEC Blueprint")

[10] AEC Blueprint, [10]-[23].

[11] AEC Blueprint, [41]-[45]

and communications technology, energy generation, mining and project finance), taxation reform and e-commerce.

In relation to (c), the Blueprint makes reference to The ASEAN Policy Blueprint for SME Development (APBSD) 2004-2014, calling upon AMSs to implement the APBSD's objectives of accelerating the development of small and medium enterprises, enhancing their competitiveness and dynamism, strengthening their resilience to better withstand the challenges of a more liberalised trading environment, as well as increasing the contribution of SMEs to the growth and development of the ASEAN region.[12]

In relation to (d), the Blueprint reaffirms the outward-looking nature of the AEC and the importance placed by the AMSs on making the region a more dynamic and stronger segment of the global supply chain, such that "it is crucial for ASEAN to look beyond the borders of AEC [and that] (e)xternal rules and regulations must increasingly be taken into account when developing policies related to AEC".[13] Furthermore, AMSs committed themselves towards maintaining "ASEAN Centrality" in ASEAN's external economic relations, particularly in relation to its free trade agreements and comprehensive economic partnership agreements.[14]

Competition laws were expected to be implemented by each individual AMS in accordance with their respect socio-economic needs and legal systems. As far as developing a regional Competition policy for the AEC is concerned, the AEC Blueprint advanced a "soft law" approach to give AMSs maximum flexibility to take into account their respective socio-economic and political landscapes in the process of introducing competition law frameworks to their respective jurisdictions, an approach entirely consistent with the "ASEAN Way".[15]

1. Competition policy within the AEC Blueprint (2008-2015)

It is noteworthy that the Competition policy section is located in the "Competitive Economic Region" chapter of the AEC Blueprint, bundled together with sections dealing with foreign-investment-linked issues such as Intellectual Property Rights and Infrastructure Development. Placing

[12] AEC Blueprint, [60].

[13] AEC Blueprint, [64].

[14] AEC Blueprint, [65]. Examples of these ASEAN-led trade agreements are the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA) and the Regional Comprehensive Economic Partnership (RCEP) between ASEAN, China and various other FTA partners. See http://www.asean-competition.org/about-aegc-free-trade-agreements.

[15] Luu Huong Ly, "Regional Harmonisation of Competition Law and Policy: An ASEAN Approach" (2012) Asian Journal of International Law 291. The "ASEAN Way", an approach that is centred on the principle of non-interference in the domestic affairs of each AMS, is analysed in depth in Rodolfo C. Severino, South East Asia in Search of an ASEAN Community (Institute of Southeast Asian Studies, 2008).

the Competition policy section alongside these other economic development priorities, rather than within the "Single Market and Production Base" chapter, is telling. Competition policy is probably regarded by the AMSs as something that will attract foreign direct investment to the ASEAN region,[16] as would have an effective system for protecting intellectual property or a mature intra-ASEAN transportation network.

Developing competition law frameworks within ASEAN would make the region more attractive to foreign investors concerned about the economic risk of entering markets occupied by state-owned enterprises, particularly if the AMSs adopt laws that are based upon competition policy foundations that are similar to the laws that these foreign investors are familiar with.

The Blueprint itself is silent on the extent of the role that competition law should play in facilitating the market integration goals set out in the "Single Market and Production Base" chapter. The common market which the AMSs envisage within the ASEAN region is fundamentally different from that found in the European Union, where a supranational competition law framework plays a central role to ensure that markets are not divided along national lines and that private conduct does not impede trade between Member States. The AEC Blueprint does not expect Competition Policy to perform such an onerous task because the AMSs have only committed themselves, to date, towards a much lower level of integration between their respective economies. In the absence of a supranational institutional and legal framework within the ASEAN region, the Competition Policy agenda articulated in the Blueprint must have been intended by the AMSs to focus primarily on their respective national jurisdictions.

The Competition Policy section of the AEC Blueprint states that the "main objective of competition policy is to foster a culture of fair competition"[17] and identifies the following actions to be pursued by the AMSs in this regard:

i. Endeavour to introduce competition policy in all ASEAN Member Countries by 2015;
ii. Establish a network of authorities or agencies responsible for competition policy to serve as a forum for discussing and coordinating competition policies;
iii. Encourage capacity building programmes/activities for ASEAN Member Countries in developing national competition policy; and

[16] On the supportive role that a regional Competition policy can have on the foreign direct investment regimes and regulations of the AMSs, ensuring that the liberalization of the ASEAN market is not "frustrated" by anti-competitive practices that produce market entry barriers, see Thanadsillapakul (n. 8) above at p.17-19. Intriguingly, Thanasillapakul goes further to argue that "[c]ompetition laws may replace the current restrictive investment laws and regulations, incorporating principles based on non-discrimination in the control of restrictive business practices among firms regardless of their origin or nationality."
[17] AEC Blueprint, [41].

iv. Develop a regional guideline on competition policy by 2010, based on country experiences and international best practices with the view to creating a fair competition[18] environment.

Action (i) has been achieved, with Cambodia being the last country to implement its national competition law framework in October 2021, with Cambodian Competition Commission established in February 2022. Action (ii) was achieved with the establishment of the ASEAN Experts Group on Competition (AEGC), a regional forum for discussing and coordinating competition policies within ASEAN that comprises representatives from the respective national competition authorities of the AMSs. Action (iii) is pursued through the capacity-building efforts of the AEGC, together with its economic development partners, while Action (iv) was achieved with the publication of the ASEAN Regional Guidelines on Competition Policy in 2010 ("Regional Guidelines"),[19] followed thereafter by the Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN in 2013 ("Regional Core Competencies – RCC – Guidelines").[20] Both these Guidelines articulate broad non-binding principles to assist the AMSs, particularly those with less experience with competition law, in developing their respective national legal frameworks. The Regional Guidelines provide AMSs with a framework guide to the core legal and economic principles underlying competition law regimes, while the RCC Guidelines introduce national competition authorities to useful international best-practices that are relevant to the development of their respective competition law agencies, enforcement systems and advocacy programmes. The production of both Guidelines was funded with technical and economic assistance from the German Federal Foreign Office, implemented through the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ).

2. The ASEAN Experts Group on Competition (AEGC)

Economic Ministers from the AMSs endorsed the establishment of the AEGC in 2007 as an official ASEAN body, comprising country representatives from national competition authorities and government departments responsible for their respective national competition policies. The AEGC is the central network through which the action plans relating to ASEAN Competition Policy are carried out, providing a focal point for undertaking the cooperative activities necessary to implement capacity building and institutional development goals set out in the Blueprint.

[18] The implications of the term "fair competition" will be explored below in the section dealing with the Regional Guidelines.

[19] http://www.asean-competition.org/read-publication-asean-regional-guidelines-on-competition-policy

[20] http://www.asean-competition.org/read-publication-guidelines-on-developing-core-competencies-in-competition-policy-and-law-for-asean

3. The ASEAN Regional Guidelines on Competition Policy

The 2010 Regional Guidelines serve as a non-binding reference guide for AMSs on the various policy and institutional options that may be used to shape their respective national competition law and policy frameworks. These Guidelines are based on country experiences and international best practices, with 10 chapters and 44 pages of proposals for how competition policy might be implemented by the AMSs in their respective jurisdictions.

Updates to these Regional Guidelines were subsequently made and published in 2020. The key features of these Regional Guidelines relating to the key competition law prohibitions will be summarised in the table below, along with the recommendations made to the national competition authorities of each AMS on how they can implement these guidelines in their respective national competition laws.

Table 2: Contents and Recommendations

Competition Law Prohibitions	Regional Guidelines (2020 edition)	Recommendations to AMSs
3.2 Prohibition of Anti-competitive agreements	Agreements to be evaluated by reference to their objects or effects. EU test for "by object" restrictions cited – "restrictions of competition by object are those that, by their very nature, are injurious to the proper functioning of normal competition"[21] and object should be "determined by reference to the provisions of the agreement between the parties, the objectives it seeks to achieve and its economic and legal context"[22] EU competition law concepts introduced: i) "hardcore restrictions" on competition (price-fixing, bid-rigging, market sharing, limits on production and investment); ii) Use of Counter-Factual in assessing the "effects" of an agreement; iii) "appreciability" threshold; iv) Safe harbour thresholds; v) Decisions of associations of undertakings; vi) Concerted Practices; vii) Vertical agreements as less restrictive of competition than horizontal agreements, especially where pro-competitive benefit outweighs the anti-competitive harm	AMS should clarify their position on the interpretation of the "object threshold" in their national guidelines to help business community determine when their agreements are anti-competitive. AMSs should introduced national competition law guidelines to clarify the application of competition to the activities of businesses and trade associations, as well as to "provide reassurance to businesses in the region" as to when their agreements "are unlikely to raise competition concerns"

[21] *Expedia Inc v Autorite de la Concurrence*, Case C-226/11 EU:C:2012:795, para 36

[22] 519/06 P GlaxoSmithKline [2009] ECR I-9291 [58].

3.3 Prohibition of Abuse of Dominant Position	Policy objective of abuse of dominance provisions "should be to protect competition in the market, not to protect individual competitors" EU competition law concepts introduced: i) exploitative vs exclusionary abuses of dominance[23]; ii) Price-based and non-price based abusive conduct; iii) Predatory pricing, Price discrimination, Margin squeeze, excessive pricing; iv) Bundling, Exclusive purchasing, Refusal to Supply; v) Effects-based test for market foreclosure (whether or not the conduct would result in "a competitor as-efficient as the dominant firm" being excluded from the market?)	(3.3.12) AMS may wish to consider whether certain types of abuses should be treated as abusive 'by object', with no obligation on the competition authority to establish an anti-competitive effect (as is the case with anti-competitive agreements). This could be the case, for example, with discrimination against suppliers from another AMS as such discrimination would oppose integration of the ASEAN Economic Community.
3.4 Prohibition of Anti-competitive Mergers	Mergers raise competition concerns when they lead to a substantial lessening of competition (SLC) or "significantly impede effective competitive in the relevant market". EU competition law concepts introduced: i) joint ventures that create independently functioning new entities; ii) substantive merger notification thresholds (e.g. merger = change in "control" or acquisition of decisive influence over activities of enterprise); iii) theories of harm – coordinated vs unilateral effects; iv) SLC test – use of counterfactual and relevant merger assessment factors	Recognises that there is great divergence between the merger notification systems of the AMSs – only a small number of AMSs have adopted simplified filing systems for cases that do not raise serious competition concerns. (3.4.11) "Given the likelihood of increased cross-border mergers in the ASEAN region, AMS may wish to consider taking steps to better understand each other's merger regimes and identify practical ways in which differences can be managed in practice. For example, AMS with mandatory regimes could inform AMS with voluntary regimes of a notified merger (of which the latter may be unaware) and a proforma merger waiver could be developed to allow confidential information to be shared among the competition authorities."

IV. Transplanting Competition Laws from the European framework into the ASEAN Member States

Of all the AMSs with national competition law frameworks, Singapore has implemented the three major prohibitions against anti-competitive market conduct in a way that comes closest to the European model. Sections 34, 47 and 54 of the Singapore Competition Act are very closely based on Articles 101 and 102 TFEU, and the EU Merger Regulation. Case law from the European Courts is

[23] European Commission: Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings

also frequently cited in the infringement decisions of the Competition and Consumer Commission of Singapore, as well as the appeal decisions of the Competition Appeal Board. Many of Singapore's commercial laws are based on corresponding English laws and the competition law framework is similarly based on the prohibitions found in the UK Competition Act which is, in turn, based on European competition law.

Malaysia has a similar colonial relationship with the UK as Singapore, and has also introduced a national competition law framework that is broadly similar to the Anglo-European model. However, it only currently has prohibitions against anti-competitive agreements (the Chapter 1 prohibition) and abuse of dominance (the Chapter 2 prohibition), though it is in the process of introducing its own legislative framework for merger control.

Vietnam first introduced its competition law in 2004, but has subsequently updated it with the Law on Competition in 2018, which came into effect on July 1 2019. New accompanying regulations were also passed to focus on agreements which restrain competition, abuses of market dominance, economic concentrations and unfair practices. The new law merged the pre-existing Vietnam Competition Authority and the Vietnam Competition Council into a National Competition Committee, a unit under the Ministry of Industry and Trade, which also has an investigation agency established within it. One of the main objectives of the new law is provide foreign investors with clearer guidelines on the regulations, using international standards as benchmarks for the national competition law.

Indonesia introduced its competition law, Law No.5/1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition Law, shortly after the Asian Financial Crisis as part of its economic restructuring efforts. Unlike other jurisdictions which use general language to describe the competition law prohibitions, the approach taken by this AMS is set out specific lists of prohibited practices. It covers prohibitions against cartels and anti-competitive horizontal agreements, anti-competitive vertical restraints, abuse of dominance, mergers that may result in monopolistic practices or unfair competition, as well as restrictions on "conglomerate power" (which prohibits interlocking directorates where the companies involved are in the same relevant market) and a prohibition against the formation of conglomerates with a single parent company holding the majority of shares in companies which collectively have high market shares. The stated goal of this legal framework is to promote "a fair, effective and efficient business environment" and "an atmosphere of fair and natural competition".

The Philippines introduced its competition statute in 2015, the Philippine Competition Act, after "languishing in Congress for 24 years" with its main goal of "creating more inclusive economic growth", improving consumer protection and accelerating investment and job creation. The Act

reflects the belief that competition "promotes entrepreneurial spirit", "encourages private investments", "facilitates technology development and transfer" and "enhances resource productivity". The law is a hybrid of US antitrust law and EU competition law, reflecting its historical links with the American legal tradition. For example, the prohibition against anti-competitive agreements includes both a list of "per se" US-style prohibitions as well as an EU-style "object or effect" based prohibition. The abuse of dominance and merger control provisions incorporate some of the legal language of the corresponding prohibitions from the EU competition law model, though the statutory provisions in the Act are drafted with much greater detail.

Cambodia was the tenth and final member of the ASEAN regional grouping to enact a comprehensive national competition law in September 2021, finally completing a long-drawn out process which began in 2006.[24] The Cambodian Law on Competition "governs any activities that prevent, restrict or distort Competition", while seeking to "encourage fair and honest business relations, increase economic efficiency, encourage new businesses and help consumers to access high-quality, low-cost, diverse and versatile products and services". It has specific prohibitions against anti-competitive horizontal agreements, vertical agreements, abuses of dominant market position and business combinations that have the effect of significantly restricting competition in the market.

1. Abuse of dominance – the "dominance" threshold

To illustrate the diversity of the ways in which the "abuse of dominance" prohibition has been implemented in the AMSs, consider the legal definitions given to the concept of "dominance" in these national competition law frameworks. In some jurisdictions like Singapore and Malaysia, the concept of dominance is not defined in the statute but is instead explained in non-binding guidelines issued by the national competition authority. Indicative thresholds, or starting points, for what sort of market share a firm should have before it is regarded as dominant are set out in the guidelines (see below).

Other jurisdictions are more prescriptive. Vietnam's law states that an enterprise with 30% or more market share is considered to have substantial market power. Indonesia's law states that states that a business with 50% of more market share shall be regarded as having a dominant position.

[24] The Competition Commission of Cambodia, which was established in 2022, explains on its website that "the law on competition is an economic and complex regulation that covers the national economy and are far different from other regulations. Due to the complexity and different methods of international experts from different countries with various jurisdictions, Cambodia has revised almost all of its draft law on competition whenever there was a change of global expertise who came to support the law drafting process."

The Philippines' law includes a rebuttable presumption of dominance if an entity has a market share of 50% or more. This places the burden of proof on a firm with a high market share to disprove that it lacks the market power to be considered a dominant undertaking.

Table 3: Abuse of Dominance in selected ASEAN Member states' competition law frameworks

AMS	Numerical thresholds (market share) for dominance	Nature of guidelines
Singapore	60%	[3.9] CCCS Guidelines on the Section 47 Prohibition "…as a starting point, CCCS will consider a market share above 60% as likely to indicate that an undertaking is dominant in the relevant market. However the starting point does not preclude dominance from being established at a lower market share."
Malaysia	60%	[2.14] Guidelines on Chapter 2 Prohibition "In general, the MyCC will consider a market share above 60% would be indicative that an enterprise is dominant. However, other factors will be taken into account in assessing dominance, such as whether there is easy entry into the market, etc"
Vietnam	30%	Article 24, Law No. 23/2018/QH14 Competition Law "An enterprise shall be considered to hold a dominant position on the market if it has substantial market power as specified in Article 26 of this Law or has market shares of 30% or more on the relevant market."
Indonesia	50%	Article 25(2) Law No.5/1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition Law "Business actors shall have a dominant position… [where] one business actor or a group of business actors controls more than 50% (fifty per cent) of the market share of a certain type of goods or services…"
Philippines	50%	Section 27 Philippine Competition Act (Republic Act 10667) (2015) "There shall be a rebuttable presumption of market dominant position if the market share of an entity in the relevant market is at least fifty percent (50%), unless a new market share threshold is determined by the Commission for that particular sector.□"
Cambodia	N/A	Article 3(6) Cambodia Law on Competition: "Dominant Market Position means a situation in which a Person has the power to act in a Market significantly without any effective constraint from other competitors."

2. Implications of divergent thresholds for establishing market "dominance"

The quick survey above of the abuse of dominance prohibitions from 6 of the 10 ASEAN member states reveals a significance divergence between them on the thresholds used to determine when a market player is regarded as "dominant" for the purposes of this pillar of the competition law framework. From non-binding guidelines, to rebuttable presumptions and "deeming" provisions, these jurisdictions appear to pursue very different approaches towards identifying the category of

undertakings who are subject to these additional restrictions on their market conduct. These differences between the way the European competition law concept of "abuse of dominance" has been implemented in these ASEAN member states has at least three important ramifications.

Firstly, this potentially creates uncertainty for the business community when a successful undertaking in one ASEAN member state expands its operations into neighbouring states – lawful competitive conduct in one jurisdiction might be regarded as unlawful abusive market conduct an adjacent jurisdiction if the status of that undertaking is reclassified from non-dominant to dominant under the national competition law framework of the latter state.

Secondly, it is unclear how these different national approaches towards the issue of "dominance" might be applied to undertakings that operate in regional markets across the ASEAN region – that is, in markets for goods or services that transcend national boundaries to include two or more countries. The possibility for conflicting assessments of the status of such transnational business undertakings is very real especially because many ASEAN member states have national competition law frameworks with extra-territorial reach.

Thirdly, these divergent approaches towards the definition of a "dominant" undertaking do not augur well for the convergence or harmonization objectives of the ASEAN Competition Action Plan 2025. If these jurisdictions are unable to reach a consensus on how to differentiate between "dominant" and non-dominant market players, then it seems even less likely for them to come up with a collective understanding of exactly what forms of market conduct should be regarded as "abusive" and therefore prohibited by competition law.

V. Conclusion

Competition law has only been in the ASEAN region for a relatively short period of time, with individual member states having between 2 and 20 years of experience in this field of economic law. The brief survey above has focused on the divergences that exist in just one aspect of the national competition law frameworks of these countries, illustrating just one of the many areas of competition law that these members of the AEC will encounter substantial challenges if they seek to advance the convergence and harmonization agenda of the AEC Blueprint.

個別論題

Thematic Papers

【Research Article】

Characteristics of the Identification and Protection of Personal Data and Privacy Rights in China

Mue I*

Contents

I. Introduction.

In recent years, with the accelerated informatisation and digitalisation of Chinese society, the Chinese Government has accelerated its legislation on the protection of personal information and privacy rights: the Civil Code has been in force since 1 January 2021, establishing the position of personal information and privacy rights protection in the highest codes in the civil law field. In addition, the Law on the Protection of Personal Data was adopted on 20 August 2021, which entered into force on 1 November. Having a closer look at such changes, it can be determined that China is also aiming to be one of the countries that is ruled by law. However, the content of personal data and privacy right protection reflected in these laws and the actual enforcement of the laws show that the individualistic[1] and democratic[2] nature of the original Western theories of personal data and privacy rights is disappearing, and that the personal information protection and privacy rights in China are also departing from Western theories and legal systems. It can be said that the personal information protection and privacy rights in China have become one that mainly aims to solve issues related to

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[1] Charles Fried, "Privacy", *77 YALE. L. J.*, pp. 475,482-484(1968); Alen Westin, *Privacy and Freedom*, Atheneum, p.7 (1967)

[2] Alen Westin, *Privacy and Freedom*, Atheneum, p.7 (1967).

civil law and that prioritise the societal and national benefits under the umbrella of a Chinese-style government, which has been adopted in Chinese society.

Indeed, the conflict within Chinese domestic academia on the extent to which this Western-style protection of personal information and privacy rights should be accepted has been raging for many years and has not resulted in a unified conclusion. The result is that even though the Civil Code and the Personal Data Protection Law have been legislated, the wording remains legally ambiguous and remains, and that personal information and privacy right protection is an unresolved issue that is still debated among academics in China. Through an analysis of China's Civil Code and Personal Data Protection Law, this paper takes a closer look at the definition and nature of personal data and privacy right protection as well as how it is actually expressed in Chinese law.

II. Various protections of the right to privacy and personal data

The concepts of personal data and the right to privacy are defined differently in different countries. Some countries interpret them as the same concept, while others define them separately. If they are defined separately, each country's society, culture, politics and laws also have their own views on how the boundary between the two should be drawn and what kind of protection they should be recognised as. For example, in the USA, the birthplace of the right to privacy, the scope of the concept of the right to privacy has gradually expanded over time to protect it as an individual right, while it has also changed to include information directly related to the individual, such as the individual's name and honour, in response to social needs. In particular, as information technology has progressed, the US has developed several privacy rights, such as the 'right to decisional privacy'[3], the 'right to physical privacy'[4] and the 'right to informational privacy'[5], to the point where the right to information privacy has become the core of personal information and privacy rights protection, in response to the information age.

The right to information privacy in the US is regarded as "the right of individuals to control the possession, disclosure and use of their personal information" (also referred to as the right to control

[3] Griswold v. Connecticut,381 U.S. 479(1965).
[4] Katz v. United States, 389 U.S. 347(1967).
[5] Whalen v. Roe,429 U.S. 589(1977).

personal information)[6], and the right to control when, to what extent and in what manner their personal information is disclosed to others, which is recognised as a right to be held by the individual[7]. The Information Infrastructure Task Force Principles for Providing and Using Personal Information, promulgated by the US Government, link identifiable personal information with the right to privacy[8].

On the other hand, unlike the US, Europe separates privacy rights and personal data and defines each separately. For example, the General Data Protection Regulation (GDPR) separates personal data protection from the right to privacy and establishes personal data as 'any information about an identified or identifiable natural person (data subject)' (Article 4). Article 8 of the European Convention on Human Rights and Article 7 of the Charter of Fundamental Rights also state that everyone has the right to have their private and family life, home and correspondence respected, and Article 8 of the Charter of Fundamental Rights says that everyone has the right to the protection of their personal data, with a specific and clear purpose of use and with their consent or the Charter regulates that personal data can only be processed impartially, with a specific and clear purpose of use and with the consent of the person or with a legitimate basis in law. It also stipulates that everyone has the right to know and the right to delete the content of their personal data and that these principles must be observed under the supervision of an independent supervisory authority.

In comparing the situation in Europe and the US, Juliane Kikitt & Christoph Sobotta note that 'given the existence of different regulations, Europe considers personal data and privacy rights as separate concepts, and merely It does not distinguish between the two as purely symbolic concepts"[9]. Of course, there is not a complete unanimity of opinion on this point of view in the academic field, as there are still various points of contention against it, especially given the intrinsic connection between the right to privacy and personal data, and the confusion between the two concepts in dealing with various actual cases. In many cases, for example, in the analysis of Paul De Hert & Serge Gutwirth, the European Court of Human Rights also adopted the European Court of Human Rights claim to protect personal data in 'private life', equating the protection of personal data with the right to privacy

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[6] Daniel J. Solove, Paul M. Schwartz, *Information Privacy Law*, Wolters Kluwer, (2017), p.36.

[7] Westin & Alan F, Privacy and Freedom, *Washington and lee law Review 25.1* (1968) p.166.

[8] Privacy Working Group, Information Infrastructure Task Force: Principled for Providing and Using Personal Information (1995); Xu Ke, Sun Mingxi, "The Re-clarification of Personal Information - From the Relationship between Privacy and Personal Information", *Chinese Applied Law, Vol. 1*, (2021), pp. 3-9.

[9] Juliane Kokott & Christoph Sobotta, "The Distinction Between Privacy and Data Protection in the Jurisprudence of the CJEU and the ECtHR", *International Data Privacy Law, Volume 3, Issue 4*, (November 2013), pp.222-228.

and equating the violation of the right to privacy with the violation of the right to personal data (data) protection Directive as unlawful processing[10].

Given this situation, it is challenging to distinguish between personal data and privacy rights protection, both in the USA, where personal data and privacy rights are unified and in Europe, where they are dualistic[11]. However, although both the US and Europe differ in the way they define the concepts of personal data and privacy rights, both are unified in protecting them as individual rights, i.e. they have evolved and continue to change from basic civil rights to constitutional rights, with democracy and individualism as their fundamental basis. In this sense, the protection of personal data and the right to privacy in Europe and the US are united in the protection of individual 'rights', which have been diversified by the development of modern information technology, and which arose to avoid conflicts between the public and the government, besides disputes in the private sector.

III. Personal Information and Privacy Rights in China

In light of this situation, the paper will delve into what personal data and privacy rights protection in China is like and what are the characteristics of the Chinese style. As already mentioned in the paper, *Personal Data Protection and Privacy Rights in China's COVID-19 Measures*[12], as a result of the influence of traditional Chinese cultural thought and morality, in the past, the individual right to The idea of privacy protection was almost non-existent and, as the Chinese jurist Wang Limin pointed out, due to the influence of thousands of years of Chinese culture, until around the 1980s, 'hidden private' was perceived as a word with negative connotations and considered disgraceful[13]. For Chinese society, personal information and the 'right to privacy' was an unknown concept, and there had been little

[10] Paul De Hert & Serge Gutwirth, "Privacy, Data Protection and Law Enforcement. Opacity of the Individual and Transparency of Power" in Erik Claes and others(eds), *Privacy and the Criminal Law*, Intersentia, (2006).

[11] Maria Tzanou, "Balancing Fundamental Rights: United in Diversity? Some Reflections on the Recent Case Law of the European Court of Justice on Data Protection", *6 Croatian Yearbook of European Law & Policy*, (2010) pp.53-59.

[12] Mue I, Personal Data Protection and Privacy Rights in China's COVID-19 Measures, The Hitotsubashi journal of law and international studies Vol.20, No.1, (March 2021), pp.561-567.

[13] Wang XiuZhe, *Study on the Public Law Protection of Individual Privacy in the Information Society*, China Democratic Legal System Press, (2017) pp.327-394; Wang XiuZhe, *A study on the constitutional protection of the right to privacy in China*, Legal Publishing, (2011) p.19; Yao-Huai lu, "Privacy and Data Privacy Issues in Contemporary China", *Ethics and Information Technology: Vol.7*, (2005) p.12; Mue I, Personal Data Protection and Privacy Rights in China's COVID-19 Measures, The Hitotsubashi journal of law and international studies Vol.20, No.1, (March 2021), pp.561-567; Daniel J. Solove, *Understanding Privacy*, Harvard University Press (2008).

thought of protecting it as an individual right[14]. Of course, amid this ideology and awareness, Chinese legal protections were also barely in place[15].

Only in 2010 the Liability Act explicitly protected the right to privacy (Article 2, paragraph 2)[16]. The initial definitions were similar to that of the USA, Taiwan and other countries and regions, which equated the definition of personal information with the definition of the right to privacy and adopted an ambiguous and centralised method of protecting personal information as part of the right to privacy[17]. However, with the development of the times and the information society and laws that have been developed, China began to express personal information and privacy rights as different concepts according to the community's needs[18]. Nevertheless, as there were no strict definitions of privacy rights and personal information at that time, the rationale for the division between the two definitions remained vague[19]. As a result, there was a heated debate among scholars in China over the right to the nature of the concept of privacy and personal information[20]. In particular, each debater argued his or her own view on whether the right to personal information and privacy is a protection of private or public rights, or a fundamental right. Therefore no unifying opinion can be reached even nowadays. Furthermore, there was considerable conflict among scholars as to whether personal data and privacy rights should be incorporated into the personality rights section of the Civil Code.

The Civil Code implemented on 1 January 2021 finally compiled the concepts of privacy rights and personal information into the Pact of Personality Rights and clearly defined each. However, it can be said that this concept has become quite Chinese in nature and has almost lost its original Western-style colours of personal information, democracy and individualism inherent to the right to privacy

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[14] Reference to the speech given by Wang Liming at the 2017 International Conference on Big Data and Privacy Protection in Hong Kong (written by Huang Yasheng, https://mp.weixin.qq.com/s/Jn9ec61iIPduj5SFdtfoQw, (2017)).

[15] Zhang Xinbao, “Limits to the application of the 'informed consent' principle to the collection of personal information”, *Comparative Law, Vol. 6*, (2019) p.7.

[16] The 2005 Law on the Protection of Women's Rights and Interests has provisions for the protection of the right to privacy (Article 42). Scholars have their own arguments and reasons for the breakthrough in the protection of personal data and privacy rights in China, and this paper, based on the opinions of many Chinese scholars, considers the 2010 Tort Liability Law to be a very important boundary.

[17] Ma Te, *Privacy Studies - Centered on Systemic Constructs*, Renmin University of China Press, (2014), pp. 66-78.

[18] For example, the Criminal Code was amended in 2015 to introduce the offence of infringement of personal data (Article 253-no.1), while the General Provisions of the Civil Code and the Cyber Security Act were legislated in 2017, thus clearly separating the concepts.

[19] Zhang Xinbao, “Limits to the application of the 'informed consent' principle to the collection of personal information”, *Comparative Law, Vol. 6*, (2019) p.1-20.

[20] Lv Bingbin, "The Protection of Personal Information: The Function of the System and its Relationship with Special Legislation", *Social Science Series, Vol. 1, No. 258*, (2022), pp. 93-102.

and personal information. Besides, looking at the relevant articles, the wording of the legal terms is also ambiguous, and even about the contents that have not been resolved in response to previous debates and conflicts between scholars, the legal articles did not answer the question head-on and avoided clear legal terminology.

For example, Articles 1032 and 1033 of the Civil Code define the concept of privacy and the specific forms of infringement of the right to privacy, stating that "Natural persons shall enjoy the right to privacy. No organisation or individual shall infringe the right to privacy of others using reconnaissance, invasion or harassment, leaking or disclosure. Privacy is defined as 'the tranquillity of the private life of a natural person and his private space, private activities and private, confidential information which he does not want others to know' (Article 1032). Article 1033 also states that, except as otherwise provided by law or with the express consent of the right-holder, no organisation or individual shall engage in any of the following acts. (1) Disturbing the tranquillity of another person's personal life using telephone calls, short messages, instant messaging tools, e-mails, leaflets, etc.; (2) Entering, photographing or peeping into the personal space of another person, such as a house or hotel room; (3) Filming, peeping into or photographing the personal activities of another person. (4) filming and peeping into the private parts of another person's body; (5) processing another person's personal information; and (6) violating another person's right to privacy by any other means. And Articles 1034 to 1038 also set out in detail the concept and protection of personal data. Namely, 'Personal data of natural persons shall be protected by law. Personal data are various types of information, recorded electronically or by other means, which alone or in combination with other information can identify a specific natural person. This includes a natural person's name, date of birth, ID number, biometric information, address, telephone number, email, health information and mobility information. Provisions relating to the right to privacy apply to private information in personal data. Where there are no provisions, the provisions relating to personal data shall apply' (Article 1034)[21]. Furthermore, it has been clearly stated that a data processor shall not divulge or falsify personal data collected and stored by him, nor shall he unlawfully provide such personal data to another person without the consent of the natural person. However, except where, through processing, a specific individual cannot be identified and cannot be restored..." (Article 1038).

[21] Misako Oda and Zhu Ye, "The Code of the People's Republic of China" (2, complete), Ritsumeikan Law Review 2020, no. 3 (391), p. 482 (1456).

However, at least the following four uncertainties clearly remain regarding these articles relating to personal data and the right to privacy. First, the issue of the 'right' to privacy right protection. Article 1032 of the Chinese Civil Code clearly stipulates that the right to privacy is a right enjoyed by natural persons and that no organisation or individual may infringe on this right. However, at this stage, the protection of the right to privacy in China is still only explicitly recognised in civil law, with the Chinese Constitution stating that 'personal freedom, civil dignity and civil housing are inviolable, and civil freedom of communication and confidentiality of communication is protected by law (Articles 38 - 40)'. The extension of the right to privacy from the civil to the constitutional level has been heavily debated among scholars in China, with no clear answer yet. In fact, opposition to the extension of the right to privacy from the civil to the constitutional level is mainstream among scholars[22]. The majority of scholars believe that extending the right to privacy from the civil to the constitutional sphere should not be allowed, as it would mean that opposition to public authority would be permissible. For China, where the traditional Chinese culture of patriarchy is deeply embedded in society, and the political system has been under the absolute leadership of the Communist Party government, it is an extremely difficult task to accept that private rights and public power are measured equally, even before the law[23]. In particular, the question of how to maintain the dynamic balance between individual interests, community interests, the public interest of society, government power and state interests, i.e. whether to prioritise individual interests or the public interest under government power, is one of China's most difficult balancing act. Of course, in recent years, some scholars have hoped that the Personal Data Protection Law legislation would solve this problem. Still, as related to the following fourth point, the discussion on the concept of 'personal data rights' in China, the nature of whether this privacy right protection is limited to civil law has not been clearly stipulated in law at present and remains one of the pending issues[24].

Furthermore, although the term 'any organisation' is mentioned, as in Article 1032 of the Civil Code, it is extremely unclear to what extent the scope of 'organisation' used here is covered. Chinese

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[22] Lv Bingbin, "The Protection of Personal Information: The Function of the System and its Relationship with Special Legislation", *Social Science Series, Vol. 1, No. 258*, (2022), pp. 93-102; Cheng Xiao, Personal information to the study of legal issues in the development of data interconnection, Politics and Law 2020 No. 8 Main Seminar; Wang Liming, "Redefining the Concept of Privacy", *The Jurist*, 2012, pp. 108-120.

[23] Mue I, Personal Data Protection and Privacy Rights in China's COVID-19 Measures, The Hitotsubashi journal of law and international studies Vol.20, No.1, (March 2021), pp.561-567; Feng Tianyu, "The historical and cultural origins of modern Chinese democracy", *China 21*, Society of Aichi University Modern Chinese Study, (2000, translated by Akiko Tanaka) pp.139-150.

[24] Zhang Hong, "Exploring Japanese Personal Information Protection Law in the Era of Big Data", *Financial Law No.3*, (2020), pp.150-160.

legal experts have analysed that the term 'organisation' in social phenomena is not originally a technical term for legal concepts. However, in recent years, the word has been used as a general concept in at least 65 laws and about 165 places in Chinese law, where it is said to be an 'organisation' in legal relations, abstracted from the results of judgments based on the values of the legislator[25]. Some scholars have pointed out that the scope of the term is supposedly analysed to include all legal entities, unincorporated organisations, or related entities beyond civil law. However, the term still has a shadow of the former Soviet-era civil law behind it, and, in fact, it is unclear whether the scope of 'organisation' here includes legal entities or the government[26].

Second, in terms of the concept of the right to privacy in the Civil Code, the Chinese right to privacy is recognised as a kind of individual right, and it is clearly stipulated that it may not be infringed by any organisation or other person. In practice, however, mainstream Chinese legal scholars view the right to privacy as a mental personality right, a kind of passive, passive and defensive right. Their perspective is that such a passive right to privacy cannot be exercised proactively and actively by the person in question before others violate it and that the only time it is possible to exercise the right is when it is violated and only when there is an exclusion to the interference of others and compensation for the loss[27]. Such a concept is very different from the Western-style, individualism-centred, individual freedom and ideas developed from a proactive and active conception of the protection of dignity, and is completely out of step with the Western-style individual 'right to control one's own information', at least in the early stages of the US, and even more so in the civil law field. It can be recognised as remaining a reduced version of privacy rights protection.

This is because the theory of personal data control must meet at least two a priori conditions: one, the person concerned and the personal data processor must be on equal footing; the other, the person concerned must be informed of all information in advance. However, it is also argued that ‘it is unlikely that these conditions are currently ensured, although Chinese law currently contains only formalities'[28]. Therefore, even if the text of Chinese law states that the person has the right to control his or her personal information, it can be attributed to the fact that this right to control is simply a kind of passive

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[25] Gu Zhuxuan, *A Conceptual History of Civil Law - General Provisions*, Law Press, (2014), p. 97

[26] Zhang Xinbao, "Analysis of the meaning of "any organization or individual" in China's Civil Code", *Chinese Law Review, Vol. 4, No. 46*, (2022), pp. 37-51.

[27] Wang Liming, "Redefining the Concept of Privacy", *The Jurist*, (2012), pp. 108-120.

[28] Zhang Jihong "Research on the designed personal information protection mechanism", *Journal of Northwest University of Political Science and Law of Legal Science, Vol. 3*, (2022), pp. 31-43.

and passive protection of personal information and privacy rights that is effective against the private sector to some extent and is powerless against government power.

It should be noted that, in fact, these characteristics are clearly reflected in various policies in China, for example, in the case of the Chinese social credit system, which is currently being introduced with a view to implementation and are also manifested in the ongoing measures against new coronavirus infections. A typical feature is that even if the government collects excessive personal data unless there is a clear violation of personal interests or an incident of information leakage, it is not regarded as an infringement of personal data or privacy rights, and the public either tolerates the government's collection of personal data or does not regard it as a major problem. The public generally tacitly accepts or does not regard government collection of personal data as a major problem. Appropriately, the protection of privacy rights in China does not lie on the axis of 'individual rights' or 'individual control' but rather the protection of personal information and privacy rights under government control and with government protection.

On the other hand, some researchers within China have a different perception. For example, some scholars argue that if all individuals feel that their privacy rights are at risk of being violated, even before they are violated, and if there is solid evidence that their privacy space is being shown on surveillance cameras or other equipment, individuals have the report states that individuals should have the right to submit a request to have the device removed, and should say so regardless of whether it is against an organisation or against an individual[29]. However, the number of researchers making such claims is still limited in China, with many scholars viewing the Chinese right to privacy as passive and only as a right of self-preservation. This point that the right is only allowed to be exercised as an exclusion to interference when it is violated is also linked to the possibility and justification of collecting, utilising and disclosing personal data from the government. As is evident from this point of view, Chinese-style protection of the right to privacy loses much of its democratic content.

Third, the overlap between personal information and the right to privacy is discussed. First, although China's right to privacy and personal information adopt a dualistic conceptual structure, in practice, there is some overlap between the two concepts[30]. Mainly, this is the 'private, confidential

[29] Li Jia Ni, "A Study of Privacy Issues under Surveillance Cameras", *Knowledge Power*, Issue 46, (November 2019).

[30] Wang Liming and "And the Appropriateness of Different Rules for Delineating Privacy and Personal Information", *Law Review (bimonthly), Vol. 2, No. 226*, (2021), pp. 15-24.

information' part of Article 1032 of the Civil Code and the concept of 'sensitive information' as stipulated in the 'Information Technology Personal Information Security Code', which corresponds to the previous Chinese Personal Data Protection Law, and the Personal Data Protection Law newly in force since 1 November 2021. In other words, sensitive information, as defined in the Personal Data Protection Act, is "information that, once leaked, illegally provided or abused, is extremely likely to violate the dignity of the personality of a natural person and threaten the security of person and property, including biometric identification, religious belief, specific status, medical health, financial accounts, movement information and personal information of minors under 14 years of age' (Law on the Protection of Personal Data, Article 28), and regulates the use of such information. On the other hand, the fact that the content of the right to privacy in Article 1032 of the Civil Code, 'private information', and the content of Article 1304, 'biometric information, health information, movement information', overlap with the content of 'sensitive information' of personal information, suggests that, conceptually, there is no clear distinction between the right to privacy and personal information in part. It has been argued that there may be a distinction between the right to privacy and the right to personal information in some cases[31].

For example, "Sensitive information is central to protecting the right to privacy and is highly private. If such content is disclosed or utilised, individuals may be severely affected. Therefore, private and sensitive information have the same content" and therefore conceptually overlap, leading some experts to argue that they are protections of the same nature about the content of personal data and the right to privacy[32]. On the other hand, however, 'while acknowledging that sensitive and private information have the same content, sensitive and non-private information cannot easily be judged to be the same because the difference between private and non-private information is the civil right and the method of protection'. The right to privacy in the safety of private life and private and confidential spaces such as residences and hotels is clearly different from the concept of private information, and therefore 'the right to privacy and the concept of private information do not overlap, although they do overlap' in the Civil Code[33]. Some scholars have therefore argued that personal data and the right to privacy are separate concepts and have different meanings for protect. The focus of this debate is not

[31] Xu Ke, Sun Mingxi, "The Re-clarification of Personal Information - From the Relationship between Privacy and Personal Information", *Chinese Applied Law, Vol. 1*, (2021), pp. 3-9.

[32] Zhang Xinbao, "From Privacy to the Theory and Institutional Arrangement of Re-Equalization of Personal Information Interests", *Chinese Jurisprudence, No. 3*, (2015).

[33] Cheng Xiao, "Sensitive and Private Information in Personal Information Protection," *People's Court Daily, Vol.5*, (November 19, 2020).

so much a dispute over the right to privacy and the concept of personal data but rather a dispute over whether the meaning of their protection is the same. The reason for being so concerned with the two concepts is closely related to the nature of personal data and the methods of protection that follow.

Fourth is the lack of clarity regarding the nature of personal data protection. In the Chinese Civil Code, the term 'right to privacy' was clearly written, but the term 'right to personal data' was not. Indeed, the Civil Code clearly stipulates that the personal information of natural persons is protected by law. However, it does not clearly state what kind of protection this protection is, i.e. whether it is a personal right. In the opinion of some scholars, personal data should be protected as an individual right, just like the right to privacy. In addition, "personal data protection law is a kind of public law rights protection and should be considered as a new type of public law rights protection for information subjects to counteract information processing acts on the part of information controllers. Such rights protection belongs to the statutory rights category. ...and since the main object of infringement of the right to personal data is public law liability, it is argued that personal data protection law also has a public law character and is irrelevant to private law in the Civil Code"[34]. On the other hand, in response to this point of view, China's 'Civil Code plays an important role in clarifying the definition of personal information. It clearly stipulates that natural persons are not protected against personal information as an individual right, but as a civil right (interest), and also that it is not a right under public law". Indeed, some scholars argue that although "the Civil Code does not use the term 'right to personal data'", it does not change the fact that "the protection of the rights (interests) of personal data is a civil right (interest protection), and a private right (interest) protection"[35].

IV. Analysis on reasons why there are differences between protections

The underlying cause for scholars' adherence to their own views to this extent is the concern that recognising the protection of personal data and the right to privacy in the same way would expand the individual's right to domination and control over his or her personal data and make the right absolute. There is concern that this will have an adverse impact on the future free flow of personal information

[34] Zhou Hanhua "The Legal Positioning of Personal Information Protection", *Legal and Business Studies, No. 3*, (2020), p. 52.

[35] Cheng Xiao "Innovation and Development of the Personal Information Protection System in China's Civil Code", *Financial Law No.4,* (2020), pp.32-53.

and the development of the information and digital society of Chinese society[36]. It is also for this reason that the articles themselves are ambiguously worded in China's Civil Code and Personal Data Protection Law, which has resulted in an ongoing debate among scholars on the issue[37]. Indeed, there is a lively debate among foreign scholars that in this day and age, it is no longer possible to regard personal data as completely owned by individuals[38]. However, this is precisely why countries are cautious about the use of this personal data when enforcing their laws and policies. For example, the attitude of governments towards the use of personal information is expressed, for instance, in the infected person detection apps introduced by various countries in response to new coronavirus infections, and the collection and processing of information is also largely divided between anonymous and real-name systems. However, in the case of China, the public ownership of personal information is clearly expressed in policies and laws, so that laws, and the effectiveness of policies, take precedence over the protection of personal information and personal interests.

According to an analysis by Chinese jurist Wang Liming, "In the Western view of the right to privacy, the right to privacy is recognised as the dignity of one's personality and personal information is reflected as the person's right to control his or her personal information", but in the Chinese Civil Code, the articles on the right to privacy and personal information shows a clear difference in these definition. Whether the Civil Code should have the word right after both privacy and personal information has been the focus of significant debate within China for many years. In Wang's argument, "the core of the right to privacy is to avoid disturbance from others and to protect the rights of individuals, and protection by law is absolute. However, personal information is not the protection of rights, as it is the personal rights and interests (gains) of the subject of the information, a kind of civil rights and interests (gains) protection. Some personal data rights (interests) belong to individuals, while others are responsible for the public interest. It is, therefore, important that protection against personal data is based on the principle of balance of interests. Moreover, while the protection of the right to privacy is an absolute protection of the right for the individual, protection against personal data does not reach an absolute level". This is because personal data also includes the protection of rights (interests) belonging to the public interest, and "even in the Civil Code, the right to privacy is

[36] Cheng Xiao " Innovation and Development of the Personal Information Protection System in China's Civil Code ", *Financial Law No. 4*, (2020), pp. 33-34.

[37] Wang Xixin, Peng Chun, “Constitutional Foundations of the Legal System for the Protection of Personal Information”, *Tsinghua Law vol. 15, No. 3* (2021), pp. 6-24.

[38] Jerry Kang, “Information Privacy in Cyberspace Transaction”, *50 Stanford Law Review* pp.1193,1202,1246 (1998).

recognised as an independent personality right, but personal data does not constitute an independent right, but merely the protection of one personality right (interest). The analysis states that 'protection to legal rights is higher because it exceeds the level of protection to interests (profits)'[39].

And according to Wang's analysis, although there is no clear distinction in the Chinese Civil Code regarding the protection of rights and interests (profits) as in other laws, there is a clear distinction between the protection of the right to privacy and the protection of personal data. For example, Article 1033 on immunity from infringement of the right to confidentiality regulates that 'the explicit consent of the person must always be obtained'. On the other hand, Article 1038's exemption for processing personal data states that 'the consent of the natural person or the guardian shall always be obtained', but the word 'explicit' is absent from Article 1038. This is a careful conclusion of the legislator and not an accidental omission. The reason for the absence of the word 'explicitly' is that if the word 'explicitly' is added to personal information, the method of using the person's 'implicit consent' cannot be used when collecting personal information, and the 'explicit 'consent' of the person must be obtained. Currently, in China, the government's "collection of personal data (although the law states that the person's consent is required) can, in fact, be processed without the person's explicit consent, as long as there is tacit consent. Wang analyses that the reason this is not illegal is that it does not protect personal data as a right but as a right (benefit) for both the individual and society[40]. Furthermore, the logic in China is that the public interest as a society stands above the private interest.

In other words, Chinese law defines the right to privacy and personal information as separate concepts and clearly distinguishes between the protection of both as well as their realities. The reasons for this division of the two according to their substance are analysed by Chinese experts in the following five ways.

The first is the difference in the nature of the two rights. The right to privacy is a kind of spiritual personality right, and its value as property is unclear. The right to privacy is one of comprehensive rights (interests) and includes both spiritual and property interests. On the other hand, the right to privacy is a personality right and is regarded as an absolute individual right in its nature. However, the

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[39] Wang Liming "And the Appropriateness of Different Rules for Delineating Privacy and Personal Information", *Law Review (bimonthly), Vol. 2, No. 226*, (2021), p. 19.

[40] Wang Liming "And the Appropriateness of Different Rules for Delineating Privacy and Personal Information", *Law Review (bimonthly), Vol. 2, No. 226*, (2021), p. 18.

Civil Code does not define the interest (benefit) of personal data as an absolute right. The reason for this is that the protection of personal data must be coordinated between the safety of the interests of natural persons, freedom of information and reasonable use. For example, the Civil Code stipulates that the reasonable use of personal data for 'acts such as newspaper reporting and public opinion supervision to implement public interests' (Article 999) is possible, and the personal data infringement exemption (Article 1037) also clearly defines the details. On the other hand, the difference between the two is evident in the absence of rules against the right to privacy, such as cooperation and reasonable use of personal data.

Second, personal data is aggregated, whereas the right to privacy is less characterised by aggregation. Personal information can be processed as aggregate data, whereas the right to privacy cannot be processed this way.

Third, personal information is available, and the law plays a role in protecting and promoting its use. The emphasis here is on the consent of the individual at the time of collection and use, as personal information, in general, is allowed to be known by others. However, as the right to privacy is, in principle, non-useable, the degree of protection is overwhelmingly superior.

Fourth, the person has the right to self-disposal of the right to privacy but does not allow others to use it without permission or for business purposes. However, personal information, other than private and confidential information, can be used under the Civil Code, provided that the rules are observed, such as the collection of personal information under lawful and legitimate reasons, not excessive, and that the data is not processed (Article 1035). And it is legal for it to be used by others to develop the internet and other information industries and the digital economy.

Fifth, there are many types of violations of the right to privacy. For example, the Civil Code lists six types of infringements of the right to privacy and stipulates that they apply to the business activities of companies and the official activities of government departments, as well as to the scope of activities of individuals[41]. On the one hand, the protection of personal data rights and interests (interests) mainly

[41] (i) Disturbing the peace and quiet of another person's private life by means of telephone calls, short messages, instant messages, e-mails, leaflets, etc. (ii) Entering, photographing or peeping into the private space of another person's residence, hotel room, etc. (iii) Photographing, peeping into, eavesdropping on or disclosing the private activities of another person. (iv) filming or peeping on the private parts of another person's body (v) processing another person's private information (vi) Violating another person's right to

covers personal data processing, and the rule scope includes activities such as the collection, storage, use, processing provision and disclosure of personal data. Conversely, it is stipulated that the protection of personal data does not apply to communications between family members and friends or to the provision of personal data in social activities[42].

As this analysis shows, Chinese law and mainstream experts see the concepts of privacy rights and personal data as distinct and different. Some scholars hold opposing views to this notion. For example, in the interpretation of some scholars, personal data protection is the core content of fundamental rights and reflects human dignity and independence of personality. However, as the Chinese Constitution does not incorporate the content of personal data protection, they argue that it should be written into the Constitution through constitutional precedents[43]. On the other hand, requiring personal data to be protected from the Constitution is not compatible with China's (culture, ideology, political system, etc.) national circumstances. There are also notable dissenting voices that argue that protecting personal data as a fundamental right is an overemphasis on personal data and clashes with the free circulation of information and the development of the information industry[44].

At the heart of the debate on whether personal data protection should be protected as an individual right is the dispute over the absolute right of ownership and control of information by the subject of personal data. That is, it is generally recognised in China that personal information contains individual rights (interests) as well as social rights (interests). It is true that the law takes the form of requiring the consent of the individual when collecting personal information. Still, in Chinese society, where the public interest prevails over the rights (interests) of the individual, when the government collects personal information in response to social needs (such as policy enforcement), it is based on implied consent. These issues are at the heart of the debate. It is efficient and convenient for governments to collect personal data through the introduction of various policies if they can freely collect personal data at any time in the form of implied consent. Conversely, if the protection of personal data is legally defined as a right, various legal restrictions will be imposed on the use of personal data. This may lead

privacy by any other means (Civil Code, Article 1033) (see Soga Law Office, Japanese translation, https://www.sogalaw.com/archive/200528%20Minfadian_JP_ver201222.pdf).

[42] Cheng Xiao, "Sensitive and Private Information in the Protection of Personal Information", People's Court Daily, p. 5, 19 November 2020; Wang Liming "And the Appropriateness of Different Rules for Delineating Privacy and Personal Information", *Law Review (bimonthly), Vol. 2, No. 226*, (2021), p. 18.

[43] Sun Ping, "Protection of Citizens' Privacy in the Era of Government Mega-Databases", *Jurisprudence, No. 7*, (2007), p.41.

[44] Xu Mei, "Re-discussing the Path of Personal Information Protection - Taking Article 111 of the General Principles of Civil Law as a Starting Point", *Journal of China University of Political Science and Law, Vol. 5*, (2018), p. 89.

to various disadvantages when enforcing policies, so both in the legal system and in the academic field, the definition and protection of personal data protection are very carefully debated, which is one of the main characteristics of personal data protection and privacy rights protection in China. This is also one of the main characteristics of the protection of personal data and the right to privacy in China that reflects the essence of the community interest and public interest priorities of Chinese society.

However, I argue here that consent is a kind of declaration of intent. For example, under Article 140 of the Civil Code, manifestations of intention, including consent, can be indicated by express and implied means. However, a legal provision stipulates that an implication can only be recognised as a declaration of intent if it conforms to a promise or a trade custom between the parties concerned. Reasoned statements of intent, which can be considered implied consent, involve strong interference with personal autonomy and may be intended to remove legal ambiguity and forcefully pursue the achievement of a goal[45]. Therefore, silence regarding personal data and privacy rights cannot be taken as consent, as it is not generic as a typical normal case. The perception that the attitude of silence on the subject of personal data is an acceptance is mere speculation. It is unlikely to be considered real consent to personal data processing. Otherwise, the person is regarded as consenting, even though he or she has done nothing, and the collection and processing of personal data are made voluntary, which can easily lead to a state of lawlessness in society. As a result, legislation to protect various types of personal data becomes meaningless. Therefore, some Chinese experts have expressed alarm in this regard, and therefore the idea of tacit consent is also out of step with the fundamentals of democracy[46].

Moreover, such an approach is clearly contrary to the principle of the rule of law, which states that all individuals, organisations and governments are equal before the law. Article 1035 of the Civil Code originally stipulates that the consent of the individual or his/her guardian is the principle for processing personal information, and the Personal Data Protection Law, which will come into force on 1 November 2021, specifically states that, with regard to sensitive information, "the individual has the right to know and control the processing of personal information and others have the right to restrict or refuse the processing of personal information. The principle of requiring the person's consent is clearly emphasised: 'The person has the right to restriction or refusal of the processing of personal

[45] Shi Yifeng "The Meaning of Silence in Civil and Commercial Interactions - A Multi-Level Balance of Private Autonomy", *The Jurist, Vol. 6*, (2017).

[46] Lv Bingbin, "The "Consent" Dilemma of Personal Information Protection and Its Way Out", *Legal and Business Studies, Vol. 38, No. 28*, (2021).

information' (Article 44). However, the convenient interpretation of the concept of personal data in the name of national digitisation and the development of informatisation, as well as the ambiguity of the scope of the law's reference to 'organisations' in 'any organisation', makes it unclear whether the government is included, and indeed, when implementing the law, the government is above the law, etc., this is clearly at variance with the principle of legal impartiality and contrary to democratic principles.

Of course, under such a leading policy, China, in the process of implementing various procedures, frequently has cases that violate personal information and privacy rights without obeying the law. For example, health codes are being introduced in many parts of China to combat new coronavirus infections. However, all kinds of personal information are being collected, not only information on those infected with the epidemic but also personal health examination information and life management information of the general public. The scope of personal information collected far exceeds that required for epidemic control, but local governments are single-handedly expanding the scope of personal information collected under the guise of controlling epidemics[47]. CCTV cameras on the streets are also constantly checking people's behaviour, checking for traffic rule-breakers and criminals. The moment a problem is detected, without confirmation, the person's face image and personal details are shown on the monitor screen, sometimes without the person even knowing if they have done anything wrong, and in some cases, their personal details are exposed. While this kind of overarching approach is very effective in creating a social environment, it is difficult to say that the protection of an individual's personal data and privacy rights is reliably ensured[48].

China's Personal Data Protection Law emphasises, among other things, the principle of the person's consent to the handling of sensitive information, stipulating that "the person has the right to know and control personal information processing and others have the right to restrict or refuse to process personal information" (Article 44). However, although it states that the person has the right to control his or her personal data, in reality, this right to control is protection of personal data under government power and against the private sector, and what is being protected is the overriding protection of the interests of the private sector as a whole. On the other hand, the public is certainly 'powerless' against exercising government power. This is because, as there is a latent and continuing

[47] Wang Xixin, Peng Chun, “Constitutional Foundations of the Legal System for the Protection of Personal Information”, *Tsinghua Law vol. 15, No. 3*, (2021), pp. 6-24.

[48] Shi Jiayou, “Protection of personal information in public video equipment applications”, *Jiangsu Social Sciences Vol. 3*, (2022).

recognition in traditional Chinese culture, the government is the representative of the 'public', the 'public' stands above the 'private', and government action is for the benefit of society as a whole, and personal information is not an absolute right of the individual. Therefore, when considering individual rights and interests, the individual, first of all, as a member of society, is increasingly aware that all citizens are obliged to serve society under the principle that the 'community interest' takes precedence, and this tendency is expressed prominently in law and the enforcement of policy.

Through the analysis of the concepts of personal data and privacy rights, of the nature of protection in both, and the claims of scholars in China, it has become clear that some of the typical features of this Chinese-style protection of personal data and privacy rights are as follows. It aims to solve various social problems under the Chinese government's governance. This means that the protection of privacy rights in China prioritises the protection of the public interest, the community and society as a whole rather than the individual's personal data and privacy rights, with a clear "hierarchical distinction" and "protecting the public interest" - in short, ensuring the successful development of China's information society as a top priority. As China continues to be influenced by traditional Confucian moral ethics and is under the political system of Communist Party leadership, with a strong sense of community, clear hierarchical relations and a political structure of concentration of power, the Chinese-style protection of personal information and privacy rights that is being nurtured and developed are consistent with these aforementioned characteristics. Hence, the Chinese-style protection of personal information and privacy rights is not coloured by democracy and individualism but is used by the government as a tool for the governance of one society[49].

However, two questions remain about the way personal data protection is shaped by this political system and values: first, with regard to legal personal data and privacy rights in China, in a context where all personal data is collected and processed by the government, what is still left as a right to privacy; and second, what is left as a right to privacy in a context where all personal data is collected and processed by the government. The second question is what is still left as a right to privacy in a situation where all personal data is collected and processed by the government. Another question is that personal information contains both private and public interests, but how can the boundary between the two be demarcated, and how can the balance point be reached? In short, even under the guise of prioritising the public interest, the answer to the question of how much private interest is ultimately

[49] Regarding Confucianism, please refer to: Kei Amago, *Chinese Logic and Western Thinking*, (Seitousha, 2021).

left to the private interest is extremely unclear.

V. Summary

This chapter has identified four characteristics of the right to privacy and personal information in China, based on the Chinese Civil Code and Personal Data Protection Law and the discussions of scholars in China, including the conceptual similarities and differences between the two and the nature of their protection. Personal data and the right to privacy in China are regarded as two separate things, and the types of protection are quite different. In recent years, Western-style theories of personal information and privacy rights have been introduced and accepted in China by the needs of Chinese society and have been strongly influenced by China's unique culture, ideology, morality, values and political system, etc. As a result, the original colours of democracy, individualism, liberalism, etc., have been shed, and China's own form of personal information and privacy rights protection has been formed. These characteristics of personal data and privacy rights protection are expressed prominently in laws such as the Civil Code and policy enforcement. In effect, this Chinese-style protection of personal information and privacy rights is a passive right protection under the Chinese government, with the aim of resolving frictions and conflicts between the private sectors to protect the stability of Chinese society and the people's living environment. Through an analysis of Chinese law, this paper took a closer look at the nature of personal data and privacy rights protection and the attitudes of scholars in China towards personal data and privacy rights protection.

e【Research Article】

Vietnam's Effective Enforcement of Handing Over of a Child in International Parental Child Abduction Cases: Acceding to the 1980 Hague Convention (1)

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Abstract

Vietnam is researching to accede to the 1980 Hague *Convention on Civil Aspects of International Child Abduction* to handle the increasing international parental child abduction (IPCA) cases. Through implementing the Convention, enforcement of handing over a child is a significant task for the abducted child's prompt return to their home country. Thus, contracting states, including Japan, have improved their rules to execute the return order. This article focuses on solutions for effectively enforcing handing over a child when a dispute arises in IPCA based on the Convention and Japan's experience, which does not presently exist in Vietnam.

Currently, Vietnam's enforcement of the handover of a child is prolonged and sometimes unenforceable due to legal and practical problems. This research analyses the compatibility of such enforcement in IPCA cases in Vietnam with international standards. By introducing the Guide to good practices under the Convention on enforcement issues, this research points out the gaps that Vietnam needs to improve in enforcing return orders.

This article finds from Japan's experience that Japan struggled with the enforcement issue after acceding to the Convention in 2014. Although it has amended some regulations of compulsory execution measures to address such difficulties, the enforcement is still challenging because of deficient execution measures and several obstacles in the return order procedure. As Vietnam prepares to accede to the Convention, Vietnam legislators should focus on the strengths of Japanese law and, simultaneously, consider how to avoid some of the problems Japan still faces in dealing with enforcement. Establishing an effective enforcement procedure with adequate coercive measures and ensuring efficiency in central authority and judicial stages are the essential solutions that the government of Vietnam should endeavor to enforce the child's handover in IPCA cases effectively.

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Contents

I. Introduction

International parental child abduction (IPCA) occurs when a parent (taking parent — TP) wrongfully removes a child from the child's home country (habitual residence) or retains a child in

another nation or state. Such action violates the rights of custody and access of the left-behind parent (LBP) and, more importantly, infringes on the child's best interests. If both related countries are members of the *Convention on the Civil Aspects of International Child Abduction* (the Convention),[1] the LBP can ask for help to return the child. According to the Convention and the *Guide to Good Practice under the 1980 Hague Convention, Part IV — Enforcement* (the Guide),[2] the return procedure has to be child-friendly and prompt because it directly affects the emotions, psychology, and physical health of the child. Although enforcement of the return order is essential and complicated,[3] Article 2 of the Convention gives each state member the competence to stipulate its procedure.

As a state member of the Hague Conference on Private International Law (HCCH), Vietnam is researching to accede to the Convention because IPCA cases have happened more frequently.[4] Yet Vietnam has no regulations to handle such issues. For example, in a case in 2016, administrative authorities received a judicial assistant request on the abducted children's return from the Australian Federal Police. However, they needed several months to define that Vietnam has no regulation for this request.[5] In another case in 2011, the court in Vietnam confirmed its jurisdiction and granted custody to the Vietnamese mother. Despite the Vietnamese court's judgment, when the mother returned to the USA, she was caught and charged with three years imprisonment because of abducting her child and contempt of the American court.[6] Remarkably, in a case in 2018, the problem went further to the execution stage. The French father abducted his daughter to France. The Vietnamese mother strived to win child custody in a French court in June 2016. The father then brought the girl back to Vietnam but kept hindering the mother from meeting the child. The enforcement agency executed the case based on the Ho Chi Minh city court's decision to recognize and enforce the French custody judgment. However, it lasted for five months due to the father's noncompliance. The father finally handed over the child in January 2019 but failed to surrender her passport.[7] These recent cases reveal several critical legal problems that, if not addressed, could be problematic after Vietnam's signing on to the

[1] HCCH, *Convention of October 25, 1980*, entry into force on December 1, 1983, accessed October 10, 2019, https://www.hcch.net/en/instruments/conventions/full-text/?cid=24

[2] Permanent Bureau of HCCH, "Guide to Good Practice under the 1980 Hague Convention, Part IV – Enforcement," accessed April 15, 2020, https://assets.hcch.net/docs/49dc30cf-79cb-42ae-af36-dd2fc20bb11e.pdf (hereinafter "The Guide").

[3] The "enforcement" used in this article means "implementation by coercive measure," as same as "execution." The implementation of handing over the child "through voluntary compliance is therefore not considered as 'enforcement.'" (The Guide, para 11).

[4] Until now the government of Vietnam has no official statistic.

[5] Vietnam's Ministry of Justice (MoJ), *Ministerial Research: The 1980 Hague Convention: International Experience on Accession, Implementation, and Suggestions for Vietnam*," [Đề tài khoa học cấp Bộ: Công ước La Hay 1980: Kinh nghiệm quốc tế về gia nhập, thực thi và các đề xuất đối với Việt Nam], 2019: 122-123 (hereinafter "The Ministerial Research").

[6] Ibid, 120-121.

[7] Ibid, 121-122.

Convention. Therefore, completing Vietnam's laws on handing over a child is essential to implement the Convention effectively.

Japan provides a recent typical case of a country struggling to establish the enforcement mechanism, thereby offering scrutiny for Vietnam. Japan acceded to the Convention and enacted the *Act on Implementation of Convention on the Civil Aspects of International Child Abduction* (the Implementation Act) in 2014.[8] This Act aims for the operation of the Convention in Japan, particularly establishing a new compulsory execution of the child's return. However, the practice of implementing the Act faced unexpected difficulties and new challenges in the enforcement procedures.[9] In 2019, Japan partially amended the *Implementation Act* to overcome those obstacles and international criticism.[10] This amendment illustrates the importance of the execution phase in implementing the Convention. Despite the improvement of the Act, compared with the Convention and the Guide, Japan still has many obstacles to overcome.

This article outlines Vietnam's background on enforcement of handing over of a child, considers what the Vietnamese legal system needs to improve to meet the requirements of the Convention and the Guide, and what Vietnam can learn from Japan's experience.

II. Vietnam's Background

1. Overview of case proceedings on handing over a child in Vietnam

Enforcement of handing over a child is the final step in resolving child custody disputes. This section briefly introduces the child custody case process. Next, it discusses the details of the execution procedure.

(1) Hearing on custody rights

[8] Japan's Ministry of Foreign Affairs (MoFA), "Overview of the Hague Convention and related Japanese Legal Systems," last updated April 2, 2020, accessed May 1, 2021, https://www.mofa.go.jp/fp/hr_ha/page22e_000250.html.

[9] Shuji Zushi, "Japan's 5-year Experience in Implementing the 1980 Hague Abduction Convention," *International Family Law Journal*, Issue 2 (2019): 82, accessed March 10, 2021, https://www.mofa.go.jp/files/100059988.pdf (hereinafter "Japan's Experience").

[10] Japan's MoFA, "Overview of the Hague Convention;" Jiji and Kyodo, "U.S. Removes Japan from Blacklist of Countries not Complying with Hague Convention on Child Abduction, but 'Remains Highly Concerned,'" *The Japan Times*, May 13, 2019, accessed November 1, 2019, https://www.japantimes.co.jp/news/2019/05/13/national/politics-diplomacy/u-s-removes-japan-list-countries-showing-noncompliance-hague-convention-child-abduction/.

Under Vietnam's 2014 *Law on Marriage and Family (LMF)*,[11] the court will decide on custody based on the parents' condition. In principle, if the child is under 36 months, the mother will have custody rights unless she cannot afford to rear the child or otherwise agreed by the parents in the child's best interest (Art.81(3)). The non-custodial parent still has rights and obligations to care for, raise and educate the children, particularly visitation rights and giving alimony (Arts. 81(1), 82). For the child's best interest, if they are full seven years old or older, the court will listen to and consider their wish (Art.81(2)). A custody decree often simply awards custody to a parent and visitation to the other parent. The parties can appeal against the first instance judgment within 15 days from the decision being granted; the appellate court's determination is final and binding from the date of pronouncement (*Civil Procedure Code — CPC*, Arts. 273, 313(6)).[12] After divorce, the court can modify the custody decree in three situations: both parents agreed to petition for modification; either parent can petition if the custodial parent no longer has a good condition to take care of the child; and state authorities request to designate a guardian if both parents cannot rear the child (rule of *parens patriae*) (*LMF,* Art.84).

Articles 52 and 54 of the *LMF* encourage the parties to find an amicable solution. They can mediate at a grassroots mediation at the commune level. Mediators have prestige in the local community, are elected by households, and are recognized by the commune People's Committee president.[13] They also can conciliate at judicial conciliation led by a judge before the trial. However, this conciliation is not mandatory because one party can request the court not to conciliate (*CPC*, Art.207(4)). In addition, from 2021, the parties can mediate at court-annexed mediation, which the *Law on Court-Annexed Mediation and Dialogue* regulates.[14] Suppose the parties can reach an agreement in all dispute matters, including child custody, through either mediation or conciliation above-mentioned. In that case, the court will grant a decision on recognizing that agreement, which shall have the same effect as a final and binding judgment (*CPC*, Art.397).

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[11] National Assembly of Vietnam (VNA), *Law No.52/2014/QH13*, June 19, 2014, accessed June 4, 2021, https://thuvienphapluat.vn/van-ban/Quyen-dan-su/Luat-Hon-nhan-va-gia-dinh-2014-238640.aspx.
Vietnam's People's Court system includes the Supreme People's Court, High People's Courts, Provincial People's Courts, District People's Courts, and military courts. See *Law on Organization of People's Courts* (No.62/2014/QH13), November 24, 2014, Article 3, accessed April 9, 2021, https://thuvienphapluat.vn/van-ban/Bo-may-hanh-chinh/Luat-to-chuc-Toa-an-nhan-dan-2014-259724.aspx

[12] VNA, *Law No.92/2015/QH13*, November 25, 2015, accessed May 28, 2021, https://thuvienphapluat.vn/van-ban/Thu-tuc-To-tung/Bo-luat-to-tung-dan-su-2015-296861.aspx.

[13] VNA, *Law on Grassroots Mediation* (No.35/2013/QH13), June 20, 2013, Arts. 7, 8, accessed May 28, 2021, https://thuvienphapluat.vn/van-ban/Thu-tuc-To-tung/Luat-hoa-giai-o-co-so-nam-2013-197282.aspx.

[14] VNA, *Law No.58/2020/QH14*, June 16, 2020, accessed May 28, 2021, https://thuvienphapluat.vn/van-ban/Thu-tuc-To-tung/Luat-Hoa-giai-doi-thoai-tai-Toa-an-so-58-2020-QH14-395767.aspx.

The custody decree is also a result of other proceedings. Upon request from a plaintiff or *ex officio,* the court can apply a provisional measure of handing over a child if the case's resolution involves the child with no guardian (*CPC*, Arts. 114(1), 115, 133-135).

(2) Enforcement of handing over a child

The General Department of Civil Judgment Enforcement (GDCJE), which belongs to the MoJ, is responsible for enforcing the civil judgments and decisions of the courts (*LCJE*, Art.54; *Decree No.62/2015/NĐ-CP*, Art.52).[15] This department has CJE agencies (CJEAs) at provincial and district levels. A CJEA enforces judgments of the same level court located in the same administrative territory, appellate judgments, and retrial or reviews decisions of the judgments of that court. In addition, a provincial-level CJEA executes decisions of recognition and enforcement of foreign judgments, judgments involving overseas parties or assets, or requests for international judicial assistance for enforcement (*LCJE*, Art.35).

Enforcement of handing over a child follows the general CJE procedure prescribed in the *LCJE*. Article 120 of this law, for the first time in Vietnam, regulates compulsory measures in such cases.[16] The *LCJE* encourages voluntary compliance; otherwise, the CJEA enforces the judgment by coercive measures (Art.9). The CJEA executes a handover of a child case upon the petition of a parent or *ex officio* (Art.36).

In the enforcement procedure, upon request, the custodial parent can file a petition to the CJEA (Art.31). The district courts deal with most divorce cases, so the district-level CJEAs are usually the main actors. The statute of limitations for requesting judgment execution is five years from the date the judgment takes effect. Within five days of receiving the petition, the director of the CJEA issues a decision on judgment enforcement upon a request and assigns an executor to implement this case (Arts. 31, 36). The non-custodial parent (the obligor) has ten days of voluntary compliance after receiving the decision (Art.45). If the obligor fails to hand over the child, the executor examines the child's situation to enforce (Art.44; *Decree 62/2015/NĐ-CP*, Art.9(1)). The executor must coordinate with local government and socio-political organizations to persuade the parent of compliance (Art.120(1)). The local people can be the president or judicial officer of the communal People's Committee, the

[15] VNA, *Law No.26/2008/QH12*, November 11, 2008; amended and supplemented some articles by *Law No.64/2014/QH13*, November 25, 2014, accessed April 2, 2019, https://thuvienphapluat.vn/van-ban/Thu-tuc-To-tung/Van-ban-hop-nhat-12-VBHN-VPQH-2014-hop-nhat-Luat-thi-hanh-an-dan-su-264499.aspx.
The Government of Vietnam, *Decree No.62/2015/ND-CP*, July 18, 2015; amended and supplemented some articles by *Decree No.33/2020/NĐ-CP*, March 17, 2020, accessed April 9, 2021, https://thuvienphapluat.vn/van-ban/Trach-nhiem-hinh-su/Van-ban-hop-nhat-1357-VBHN-BTP-2020-Nghi-dinh-huong-dan-Luat-Thi-hanh-an-dan-su-443228.aspx.

[16] The Standing Committee of VNA enacted three *Ordinances on CJE* in 1989, 1993, and 2004. These ordinances just briefly provided for the enforcement of the judgments on obligation for action or inaction.

staff in the communal Women's Union and Communist Youth Union whose jobs are related to child care and protection, the village leader, and even the teacher of the child.[17] If the persuasion is successful, the executor takes the minutes of the voluntary handover of the child and closes the case. The CJEA would apply coercive measures if the persuasions failed. Article 120(2) of the *LCJE* provides three measures: pecuniary sanctions, physical removal of the child, and criminal charges.

Enforcement *ex officio* is a procedure when the CJEA executes a provisional measure of a handover of a child. The court immediately transfers the decision, and the CJEA instantly enacts the decision on judgment enforcement *ex officio* when receiving this decision (Arts. 28(3), 36(2)). The obligor does not have ten days to implement the handover voluntarily. Instead, the executor promptly examines the child's situation and applies the execution measures as prescribed in Article 120 of the *LCJE* within 24 hours from the time of receiving the enforcement decision (Arts. 44(1), 130(1)(a)). However, Article 120 emphasizes encouraging and persuading voluntary compliance; thus, enforcement *ex officio* essentially curtails the time to apply the execution measures.

The obligor and the child may move to another locality while the enforcement procedure is pending or happening. Then, the director of the executing CJEA will entrust the case to the CJEA where the child is staying within five working days from the date of getting ground of their new address, or immediately in case of executing the provisional measure (Arts. 55(1)(3), 130(2)).

2. Current problems of enforcement of handing over a child and their causes

With current regulations, the enforcement of handing over the child in Vietnam has some achievements. Several executors have successfully persuaded non-custodial parents to implement custody judgments voluntarily.[18] On the contrary, several cases are unenforceable, prolonged, and cumbersome for four main reasons. They are failure to locate the child, impotent compulsory execution measures, judicial phase imperfection, and practical issues of the CJEA.

(1) The ineffectiveness of locating the child

The executor cannot locate the child if the non-custodial parent temporarily takes the child into hiding. Since Articles 38, 39(1) of the *LCJE* provide that the executor serves all decisions and notifications on enforcement to the parties, related people, and local government, the non-custodial

[17] Vietnam's Judicial Academy, *Manual on CJE Professional Knowledge* [Giáo trình Nghiệp vụ Thi hành án dân sự], vol. 2 (Judicial Publishing House, 2016): 207.

[18] Thi Mai Huong Nguyen, "Effectiveness of the Persuasion through an Enforcement of Handing over a Child Case in the CJEA of Quang Xuong District" [Hiệu quả công tác vận động, thuyết phục qua vụ việc cưỡng chế giao người chưa thành niên cho người được giao nuôi dưỡng ở THADS huyện Quảng Xương], July 19, 2019, accessed May 20, 2020, https://thads.moj.gov.vn/thanhhoa/noidung/tintuc/lists/nghiencuutraodoi/view_detail.aspx?itemid=20.

parent can simply be absent with the child at the appointed time and place. On the other hand, Article 39(2) of the *LCJE* regulates that the executor may not need to serve the notification of enforcement to prevent such evading. Nevertheless, in some cases, when the executor surprisingly came, the parent reacted aggressively to keep the child or ran away.[19] Although the executor could apply administrative sanction against these violations, some non-custodial parents accepted to pay the fine rather than comply with the custody decrees.[20]

Furthermore, the non-custodial parents may flee with the child when they predicted the result of court proceedings or understood that their partner would never let the child live with them. In such case, under Articles 44, 44a of the *LCJE* and Articles 9, 11 of the *Decree No.62/2015/NĐ-CP,* the CJEA issues a decision on unfeasible execution, publishes it on the CJEA's website and sends it to the communal People's Council where the parent lived before fleeing. The executor keeps seeking the parent and child at least once per year within two years before stopping tracking. When the executor, the custodial parent, or any third party can locate the parent and the child, the CJEA will restart the case. However, without the police's support, it is very difficult to find them. Unfortunately, the police restrain from intervening in the family matter except the cases involving criminal signs.

(2) The deficiency and ineffectiveness of compulsory execution measures

Even though Article 120 of the *LCJE* provides three coercive measures to enforce the handover of a child, they are inadequate and deficient. Besides, the order of priority for the physical removal of the child and criminal charges is not explicit.

First, the monetary sanction is not effective enough. It is an indirect enforcement measure to put the non-custodial parent under pressure to hand over the child. Practically, the executor is reluctant to apply it because of two reasons. One reason is the procedure to enact the sanction decision is demanding. The executor needs to enact a decision on the coercive execution of handing over a child and sends a notice of execution to the parents.[21] These documents inform the time and place of the handover and warn the obligor about further coercive measures if they fail to comply.[22] The executor may keep coordinating with local staff to persuade the parent of compliance. Suppose the obligor fails to hand over the child at the enforcement scene. In that case, the executor records the violation and

[19] "Abducted the Child after Divorce" ['Bắt con' hậu ly hôn], November 17, 2014, accessed May 20, 2020, https://zingnews.vn/bat-con-hau-ly-hon-post480379.html.

[20] Hong Minh, "Concealing the Child after Divorce" [Hậu chia tay, mang con đi giấu], January 24, 2018, accessed May 20, 2020, https://plo.vn/xa-hoi/hau-chia-tay-dem-con-di-giau-752436.html.

[21] Vietnam's MoJ, *Circular No.01/2016/TT-BTP,* February 1, 2016, Forms C39, D19, accessed March 1, 2020, https://thuvienphapluat.vn/van-ban/Thu-tuc-To-tung/Thong-tu-01-2016-TT-BTP-huong-dan-thuc-hien-thu-tuc-ve-quan-ly-hanh-chinh-bieu-mau-nghiep-vu-trong-thi-hanh-an-dan-su-302329.aspx.

[22] Ibid.

prepares a dossier of enforcement proceedings until the time of the violation.[23] Most handovers of child cases are at district-level CJEAs, but the director of provincial-level CJEA has the competence to enact the sanction decision.[24] Consequently, the executor and district-level CJEA must promptly prepare and send the dossier since the time frame to issue the decision is just seven days from the date of making the record. Another reason is that the CJEA enforces *ex officio* the fine, so in some cases, it is a burden to execute if the non-custodial parent is not willing or cannot afford to pay, even if it is just from 3–5 million Vietnamese dongs (VND) (about $130–$215).[25] In other instances, some obligors accepted to pay monetary sanctions but did not hand over the child. Thus, this penalty is relatively powerless because of very detailed requirements, different authorities to enact the decision, difficulty in execution, and not very punitive.

Second, though the physical removal affects the child psychologically and physically, the *LCJE* does not provide how to execute this measure except for the following rules. The compulsory execution cannot happen during the night, from 10:00 p.m. to 6 a.m., on weekends, public holidays, and special occasions (Art.46(2)). The executor can request protection from the police, supervision from the procuracy, and coordination from the local government (Art.72). In practice, because of no particular regulation of physical removal of a child, the CJEA implemented it under their discretion in very few cases.

Third, Article 380 of the *Penal Code* provides that a person may be sentenced to three months to two years in prison and may additionally be fined from 5–50 million VND (about $215–$2,157) for noncompliance with the judgment.[26] However, the application of criminal sanction against noncompliance with a custody decree has been rare and did not lead to the handover of the child in some cases. The reasons are that administrative sanction is a ground of the crime institution. Still, the CJEA is reluctant to apply it, and the tendency not to criminalize civil relations, especially when a parent takes the child away. This hard measure may be strong enough to make some obligors hand

[23] Ibid, Form D49.

[24] *Decree No.82/2020/ND-CP,* Articles 64(3), 85(3).

[25] VNA, *Law on Handling Administrative Violations* (No.15/2012/QH13), June 20, 2012, Article 66(1); The Government of Vietnam, *Decree No.82/2020/ND-CP*, July 15, 2020, Articles 64(3), 85(3), accessed May 28, 2021, https://thuvienphapluat.vn/van-ban/Vi-pham-hanh-chinh/Luat-xu-ly-vi-pham-hanh-chinh-2012-142766.aspx, https://thuvienphapluat.vn/van-ban/Doanh-nghiep/Nghi-dinh-82-2020-ND-CP-xu-phat-hanh-chinh-linh-vuc-hon-nhan-thi-hanh-an-pha-san-doanh-nghiep-392611.aspx.

[26] VNA, *Law No.100/2015/QH13*, November 27, 2015, amended and supplemented by *Law No.12/2017/QH14,* June 20, 2017, accessed July 2, 2020, https://thuvienphapluat.vn/van-ban/Bo-may-hanh-chinh/Van-ban-hop-nhat-01-VBHN-VPQH-2017-Bo-luat-Hinh-su-363655.aspx.

over the child. However, this crime is not so severe, and when the violated parents have a good record, the courts typically charge them with a suspended sentence.[27]

Finally, Article 120 of the *LCJE* does not explicitly prioritize the physical removal of the child and the institution of criminal proceedings against noncompliance with a court judgment. Instead, the regulation simply puts an "or" between two coercive measures, giving the executor more discretion but somewhat creating controversy. The executor may request criminal charges first to punish the non-custodial parents for making them hand over the child. Practically, this option has three risks. First, the probability that the procuracy accepts prosecution is usually not high for two reasons mentioned in the preceding paragraph. Then, the child has integrated into the new environment with the non-custodial parent as the criminal proceedings often extend from the first to the appellate instances.

Most importantly, if the obligor is found guilty with a suspended sentence, the CJEA still has to enforce the handover of the child. Another choice for the executor is to apply physical removal of the child first. This option may quickly resolve the handover of the child. If it succeeded, the criminal proceedings might not be necessary anymore because such enforcement's principal goal is handing over the child, not the punishment on the parent. Nevertheless, due to vague regulation, this choice may lead to criticism that such coercion is rough or the executor should apply deterrent measures against the violated parent rather than directly release the child.

(3) The causes originated from the judicial stage

The qualities in judicial decision-making directly affect the effectiveness of enforcement of handing over a child, precisely the rationality of assessing children's opinions. Moreover, the court can modify a custody order in some circumstances, which may impact the enforcement of the original judgment.

In child custody cases, difficult enforcement may arise due to children's objections because the court proceedings and enforcement procedures are lengthy. Furthermore, the non-custodial parent brainwashed the child's mind about the other parent, or the period without contact between the child and the custodial parent was too long. However, the most crucial reason is that the court did not hear the child's voice adequately. The judge may directly hear the child's wishes if they are fully seven years old, but the decision must be based on the child's interests to assign the primary parent (the *CPC*, Art.208(3)). Collecting the child's intention must be child-friendly, suitable for their psychology, age,

[27] As of December 15, 2022, the Supreme People's Court has published 1,044,687 judgments and decisions of all level Courts on its website https://congbobanan.toaan.gov.vn/. Nevertheless, just 14 sentences are on the crime of noncompliance with the judgment; of 14 cases, five cases are about the handover of a child.

and maturity level, and ensure minors' rights, legitimate interests, and personal secrets.[28] A proper way is that the judge can invite the child to a waiting room in the family and juvenile court office and talk with them in person.[29] However, not every child is ready to reveal his or her true thoughts, and not every judge has the skills to make the children speak their minds. Consequently, there were cases even the children said that they wanted to live with this parent, and the other parent agreed to let them go, however, the children refused to go in the enforcement stage.[30] The children were under pressure from their parents' disputes; thus, their actions contradicted their testimony. The court failed to investigate all aspects of the child's situation. If the judge has more support from a psychologist, the children may share their thoughts with the court, then resolving child custody disputes may be more reasonable and enforceable.

Moreover, the law does not require the court to investigate the child's intention if they are too small. Instead, the court may refer to the opinions of the local government and consult with the teacher in kindergarten or the family's neighbors about each parent's care for the child. Then the court examines the child's best interests and decides on custody. Nevertheless, the decision may not be what the children wanted, and they strongly rejected or pushed the custodial parent away.[31] Therefore, even if the children are under seven years old, the court should have an adequate method to understand their intention rather than just based on other people's arguments.

Another significant aspect of the judicial stage is the misuse of the modification of the original custody decrees, which may lead to a stay of execution. The modification petition is an extraordinary legal challenge against the final and binding judgment in a custody case. Generally, modifying the custody order is necessary when the custodial parent and the child's lives change. Until the child is 18 years old, the court can decide this matter in line with the child's best interests. However, the non-custodial parent may exploit the regulation of modification to impede the enforcement of the original judgment. In the enforcement proceedings, the non-custodial parent, who has not complied with the

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[28] The *CPC*, Art.208(3); *LMF*, Arts. 55, 81(2); Supreme People's Court, *Official Dispatch No.01/2017/GĐ-TANDTC*, April 7, 2017, Section IV(26), accessed May 2, 2020, https://thuvienphapluat.vn/van-ban/Trach-nhiem-hinh-su/Van-ban-01-2017-GD-TANDTC-giai-dap-van-de-nghiep-vu-345378.aspx.

29 The 2014 *Law on Organization of People's Courts* introduces the family and juvenile court as a specialized court to better protect the child's rights in civil and criminal proceedings.

The Supreme People's Court, *Official Dispatch No.13/TANDTC-PC*, February 24, 2020, accessed May 25, 2021, https://www.toaan.gov.vn/webcenter/portal/tatc/chi-tiet-chi-dao-dieu-hanh?dDocName=TAND103857.

[30] "Mother Tired of Child Custody Because of Unsuccessful Execution: The Procuracy Spoke out" [Vụ mẹ mòn mỏi đòi con vì thi hành án không thành: Viện kiểm sát lên tiếng], June 20, 2018, accessed January 15, 2021, https://phunuvietnam.vn/vu-me-mon-moi-doi-con-vi-thi-hanh-an-khong-thanh-vien-kiem-sat-len-tieng-44243.htm.

[31] Trung Dang, "Abandoned the Child then Suddenly Returned to Gain the Custody" [Bỏ con rồi bất ngờ trở về giành quyền nuôi con], January 1, 2018, accessed January 15, 2021, https://plo.vn/xa-hoi/bo-con-roi-bat-ngo-tro-ve-gianh-quyen-nuoi-con-748339.html

custody order and still retained the child, may request the court to change the primary carer. Because the *CPC* and the *LMF* do not have any particular regulation to restrict this situation, some courts accepted the obligor's request and tried the case to change the primary carer. However, some other courts suspended the case because the original judgment had not been implemented.

Regarding the *LCJE*, it does not have any regulation of stay of execution based on the ground that the court accepts the petition to modify a custody decree. In practice, the CJEAs have different decisions, which lead to controversial situations. Some CJEAs continuously tried to enforce the handing over of the child and applied compulsory execution measures; then, the plaintiff complained that the court was considering modifying the custody. Other CJEAs usually postpone the enforcement to wait for the result of the court's work, so the custodial parent insisted that the original decree was final and binding and needed to be enforced. If the CJEA tries hard to execute, but later the court reverses the original judgment, the enforcement is in vain and harmful to the child. Therefore, the GDCJE favors a stay of execution, considering the child's best interest.[32]

Whether the court heard or terminated the modification case was correct or incorrect, and the fact that the CJEA postponed or kept enforcing the handover of the child was reasonable or unreasonable, a petition of modification will affect the ongoing enforcement procedures of the original custody decrees. Accordingly, the relevant laws lack strict grounds for modifying the custody decree and the impact of the court's work on enforcing the original decision if the case is enforced.

(4) Little incentive for the enforcement agencies

With the belief that the coercion execution badly affects the child, the executors usually refrain from using compulsory measures and persuade the non-custodial parent to hand over the child. Therefore, some cases have lasted years or become unenforceable because the child has integrated with the new life and refused to live with the custodial parent, or some obligors even took the child somewhere else that nobody knows.

Additionally, several reasons led to the little incentive to keep executing the handover cases. First, although executors spend much effort to examine, coordinate, persuade, and implement these cases, a finished case is counted as a small result, which reduces their motivation. Concretely, a successful handover of the child case is calculated as one case and just 1,000 VND, and this work has no single statistic. However, if the executor finished one monetary case and recovered one million VND for the

[32] GDCJE, *Official Dispatch No.3982/TCTHADS-GQKNTC*, November 2, 2017, accessed November 20, 2020, https://dichvucong.gov.vn/pfiles/10701/24157/3982_Bo_Tu_phap_PAKN_cua_ba_Vu_Thi_Nhi_2644081117132351.pdf

judgment owner, the statistical report calculates it as one case and one million VND.[33] Next, because the pressure on fulfilling the goals of monetary cases is enormous, the executors have to pay more attention to executing the judgment debt. On average, an executor has to enforce more than 200 cases each year, and the values ranged from 35 billion VND in 2016 to 64 billion VND in 2020.[34] Furthermore, enforcement of the handover of the children has no execution fee, while in judgment debt cases, the fee usually is accounted for 3% of the recovered value.[35]

3. The international standard under the Convention's goals

The previous sections have attempted to analyze the obstacles in enforcing the handing over of a child. To accede to the Convention, the government of Vietnam inherently needs to improve legislation under the Convention and the Guide's requirements to address those limitations. Article 11 of *the Convention* stipulates that the judicial and administrative authorities of the member state in which the child is brought or is retained shall act expeditiously in proceedings for the child's return. The Special Commission on the Practical Operation of the Convention has frequently updated the recommendations for efficient enforcement,[36] which cover three stages in return procedures: the central authority (CA), the judicial, and the enforcement phases.[37]

First, at the CA phase, the contracting state will designate an organ as its CA to cooperate with and promote cooperation amongst the competent authorities in the State to secure the child's prompt return (*the Convention*, Art.7). The CA should have the capacity to rapidly act upon the return request, such as promptly locate the child, prevent taking the child into hiding or removing to another country. Then, it can encourage the parties to have a mediation or other form of voluntary settlement. However, at the same time, it can initiate court proceedings, or if the amicable resolution fails, it will instantly start court proceedings.[38]

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[33] Vietnam's MoJ, *Circular No.06/2019/TT-BTP*, November 12, 2019, Form 05/TK-THA, Explanatory, item 5, accessed May 28, 2021, https://thuvienphapluat.vn/van-ban/Thu-tuc-To-tung/Thong-tu-06-2019-TT-BTP-Che-do-bao-cao-thong-ke-thi-hanh-an-dan-su-thi-hanh-an-hanh-chinh-429213.aspx.

[34] For example, the average number of cases and value in 2022 that each executor has to solve was: in Ben Tre: 382 cases, 43 billion VND; in Binh Duong: 345 cases, 114 billion VND; in Long An: 341 cases, 106 billion VND; in Ho Chi Minh City: 335 jobs, 436 billion VND; in Can Tho: 334 cases, 118 billion VND. Etc (Vietnam's Government, *Report on Judgment Enforcement 2022*)

[35] Vietnam's Ministry of Finance, *Circular No.216/2016/TT-BTC*, November 10, 2016, Articles 2, 4, accessed May 28, 2021, https://thuvienphapluat.vn/van-ban/Thue-Phi-Le-Phi/Thong-tu-216-2016-TT-BTC-muc-thu-che-do-thu-nop-quan-ly-su-dung-phi-thi-hanh-an-dan-su-295121.aspx

[36] HCCH, The Convention, Special Commission Meetings, accessed April 1, 2021, https://www.hcch.net/en/instruments/conventions/publications1/?dtid=57&cid=24.

[37] The Special Commission of the 1980 Hague Convention, "Premilinary Document No 10 A of August 2017," The Seventh Meeting, accessed April 12, 2021, https://assets.hcch.net/docs/7c88af92-e59b-4787-9e48-1823434e6201.pdf.

[38] Ibid; HCCH, "The Guide," principles 1.1-1.4, 5.1.

Second, at the judicial phase, the court must promptly grant a final and binding return order and ensure its enforceability. The concentration of jurisdiction with specialized judges is a feature of "speedy proceedings and more coherent case law."[39] The contracting party should have legislation or procedural rules to ensure expeditious return proceedings from the first to final instances with limited legal challenges against the return order.[40] The court should consider the age and maturity of children to listen to them at the beginning of the proceedings.[41] In all but exceptional circumstances, the return order should require the child's immediate return.[42] The order should be detailed and specific and include cascading options as a prediction of the enforcement phase to avoid losing time when the TP fails to follow the return order.[43]

Third, at the enforcement phase, the state member should have a range of coercive measures to apply appropriately in the individual case. In most contracting parties' jurisdictions, three types exist: contempt of court or coercive enforcement measures. They are pecuniary fines, imprisonment of the TP, and physical removal of the child from the TP by executors.[44] These measures are applied to the TP whenever the order is final and binding and the TP fails to comply voluntarily.[45] The Guide emphasized the ruling of the European Court of Human Rights that:

> "[I]t is not sufficient to provide for what the court called "indirect and exceptional" means of coercion, e.g., a fine imposed upon the abducting parent, his or her imprisonment, or the institution of criminal proceedings – in particular where these measures require steps to be taken by the applicant. Instead, the law should also provide for the direct implementation of the return order (i.e., the physical return of the child to the applicant or the State of habitual residence) by State organs."[46]

The executor needs to care whether the LBP has not contacted the child for a long time; they need to psychologically prepare for both the LBP and the child before the handover.[47] The Guide also noted the avoidance or limitation of additional conditions, requirements, and administrative burdens

[39] Ibid, para 20; HCCH, "The Guide," principle 2.1
[40] Ibid; HCCH, "The Guide," principle 2.2-2.8.
[41] HCCH, "The Guide," para 100.
[42] Ibid, principle 4.1.
[43] Ibid, paras 78, 86-87.
[44] Ibid, paras 23-24.
[45] Ibid, paras 25-26, 28, 58.
[46] Ibid, para 25.
[47] Ibid, para 25.

for enforcing a return order through coercive measures.[48] The executor should serve the orders or decisions upon the respondent when beginning the enforcement procedure to prevent absconding.[49]

(To be continued)

[48] Ibid, principles 1.6, 1.7.

[49] Ibid, principle 1.8.

【Research Article】

A Comparison of Labor Contract Conversion Rules in Cambodia and Japan

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Abstract

This paper firstly discusses the rules on contract conversion in Cambodia, secondly examines the rules on contract conversion in Japan, thirdly compares Cambodian's and Japan's contract conversion rules, and finally recommends proposals for improvement of the rules regarding contract conversion in Cambodia. In Cambodia, the contract conversion rules are compulsory, while the conversion rules in Japan respect the worker's will to convert the contract. In Cambodia, if a fixed-duration contract fulfills certain conditions for automatic conversion, the contract will be transformed into an undetermined duration labor contract. Any agreement of the parties contrary to these rules is void. In Japan, if the worker has been working longer than five years and requests the employer to conclude the labor contract of an undetermined duration, the employer must accept such a request. In conclusion, this paper suggests that the compulsory conversion rules in Cambodia should be maintained and that Japan's rule on the guarantee for the continuation of employment (by prohibiting the employer from unjustly rejecting the worker's request for renewal or concluding new fixed duration upon expiry of the existing contract) should be adopted in Cambodia through an amendment to the Labor Law.

Contents

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I. Introduction

There is a tendency in laws and employment practice in which the labor contract of fixed duration is used for short-term relations while the labor contract of undermined duration is used for a long-term relations. Under the conversion rules, a fixed-duration contract can be converted to an undetermined-duration contract. One of the main purposes behind the rules is to provide workers with employment security and income stability by transforming a fixed-duration contract into an undetermined-duration contract that cannot be unjustly terminated at the employer's initiative.[1] In particular, the conversion rules prohibit the parties from excessively using a fixed-duration contract for continuous or long-term employment. Compared with an undetermined-duration contract, the fixed-duration contract provides workers with limited protection of employment security. In principle, a fixed-duration contract ends at expiry, and premature termination must fulfill strict legal requirements.[2] However, the excessive use of a short-term contract for continuous employment relations may lead to a deprivation of the worker's rights to enjoy the benefits he or she would have received under the rules of an undetermined duration contract of the long-term employment relationship. Based on the consideration above, Cambodia and Japan have adopted the conversion rules.

The currently effective Labor Law of Cambodia (the "Labor Law"), enforced since 1997, adopts the compulsory rules that automatically convert a fixed-duration contract to an undetermined-duration contract if any certain legal condition of the conversion rules has been fulfilled. Unless otherwise stated clearly in the Labor Law, any aspect of the parties' agreement that contrasts with the conversion rules is void.[3] The conversion rules, in particular the rule limiting the total length of the fixed-duration contract, had been long a controversial topic among scholars, practitioners, employers, and employees until the Ministry of Labor and Vocational Training, which is currently the ministry in charge of labor sector, issued an Instruction No. 050/19 dated 17 May 2019 on Determination of the Types of

[1] Labor Law, Royal Code No. CHORSOR/RORKORMOR/0397/01, (1997) (Cambodia) [herein after called "Labor Law"], art. 74, para. 2. Termination of the undetermined duration contract at the initiative of employer cannot be taken without a valid reason relating to the worker's aptitude or behavior, based on the requirement of the operation of the enterprise, establishment or group. Similar protection has been found in Article 16 of the Labor Contract Act of Japan which stipulates that "If a dismissal lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, it is treated as abuse of rights and is invalid." This English translation of Labor Contract Act can be found at website named Japanese Law Translation via https://www.japaneselawtranslation.go.jp/en/laws/view/3744, visited on 13 July 2022. The unofficial translation of the Labor Law of Cambodia of 1997 is available at ILO's website (https://www.ilo.org/dyn/travail/docs/701/labour).

[2] Article 73 of the Labor Law and Article 17 (1) of the Labor Contract Act of Japan.

[3] Article 13 of the Labor Law provides that "The provisions of this law are of the nature of public order, excepting derogations provided expressly…"

Employment Contract (the "Instruction No. 050/19").[4] The said Instruction has clarified the maximum duration of a fixed-duration contract and required that a fixed-duration contract whose total length exceeds this maximum duration must be converted to an undetermined duration contract.

In Japan, no legislative text converted the fixed-duration contract to the undetermined duration contract upon the worker's request to the employer for contract conversion.[5] It was until the amendment of the Labor Contract Act in 2012, which took effect on 01 April 2013. Before the amendment, an employee who worked under a fixed-duration contract would never have a chance to convert their contract to an undetermined-duration contract if an employer did not agree with the request for the conversion. The amendment of the Labor Contract Act of Japan in 2012 has adopted contract conversion rules based on the worker's will, under which the contract conversion is made possible upon the request of the worker who has been continuously working with the same employer for more than five years.[6] Since the amendment or adoption of conversion rules became effective on 01 April 2013, the worker who had been continuously working with the same employer under a fixed-duration contract until 01 April 2018 were eligible to apply for the conversion or conclusion of an undetermined-duration contract and the law requires the employer to accept such request. More importantly, the said amendment also incorporates the judicial rules (on the guarantee for continued employment after the expiry of the contract) into the legislative text, and such rules are very related to the conversion rule.

Since Cambodia does not have the rules on the guarantee for continued employment as Japan does, the conversion of contract in Cambodia is avoidable if there is proper management or arrangement on the use of fixed-duration contract, which might affect the job security attached to the undetermined duration contract. In consideration of the facts that the Civil Code of Japan has remarkably influenced the Civil Code of Cambodia and that both countries have adopted the contract conversion rules in employment relation, this paper aims to suggest a proposal for the improvement

[4] There is an unofficial debate whether or not the Instruction No. 050/019 prevails over the interpretations on the total period of the fixed-duration contract by the Arbitration Council. The details on different rules on contract conversion rule will be discussed in this next section of this paper.

[5] In Japan, tacit renewal of employment relation after the expiry of the contract (Article 629 of the Civil Code) or the continuation of employment relation within the period which exceeds the period limited by the law (Article 14 of the Labor Standard Act) causes the employment relation to be under the contract of indefinite duration. However, if the contract was properly administered or managed to comply with the form and period of the contract, the fixed-duration contract could not be converted to undetermined duration although the contract had been subsequently renewed.

[6] Article 18, paragraph 1 of the Labor Contract Act of Japan.

of the rules regarding the contract conversion in Cambodia through the comparison between the rules relating to contract conversion of Cambodia and the those of Japan. Accordingly, the paper firstly discusses the rules on contract conversion in Cambodia, secondly examines the rules on contract conversion in Japan, thirdly compares Cambodian's and Japan's contract conversion rules, and finally recommends proposals for improvement of the rules regarding contract conversion in Cambodia.

II. Labor contract conversion rules in Cambodia

In Cambodia, the conversion rules were first found in Article 64 of the Labor Code of Cambodia, which was promulgated in 1972.[7] The first Labor Code required that most labor contracts be concluded in the form of undetermined-duration contracts, except in the case where the type of work to be performed could be fixed. The fixed-duration contract had to be in writing and could not exceed a period of three years. However, for any occupation that did not need to travel far and did not cost much money, the maximum period was 12 months for a single worker without a family and two years for a worker with a family. If the worker needed to travel far and spend much money, the maximum period was two years for a single worker without a family and three years for workers with families. Whenever an employment contract with a fixed term of less than or equal to three years was silently renewed at the end, the contract had to be deemed an indefinite labor contract.

The conversion rules with the same content were again incorporated into the Labor Law of Cambodia, which was adopted in 1992.[8] Article 64 of the Labor Law of 1992 replicates Article 64 of the first Labor Code of 1972. Both required the fixed-duration contract to be written and limited the total duration to three years. The tacit continuation of employment relation after the end of the term would still cause the fixed-duration contract to become an undetermined-duration contract. Although the two laws did not mention clearly whether or not the fixed-duration contract could be renewed once or more times from the commencement date until the three-year term, it is understood from the texts of the two laws that the fixed-duration contract was only concluded when it is necessary while the two

[7] The Labor Code of Cambodia was firstly promulgated on 14 January 1972 under the Khmer Republic regime which was running the government from 1970 to 1975 before the arrival of Kampuchea Democracy (Pol Pot regime) which came to power in 14 April 1975 until 07 January 1979. Although the Code was no longer valid; there are several provisions of the current Labor Law of Cambodia, which has been promulgated in 1997, have been heavily influenced by those provisions of that Code. The reference to that Code is important to understand the current Labor Law as well.

[8] The Labor Law of Cambodia which was adopted by the National Assembly of the State of Cambodia on 11 August 1992. The Labor Law of 1992 was superseded by the Labor Law of 1997.

laws encouraged the parties to conclude an undetermined-duration contract. Hence, a fixed-duration contract could not be renewed even if the initial contract did not reach the total duration limited by the laws.

The conversion rules continued to be enshrined in the current Labor Law of Cambodia.[9] Until now, the Labor Law has been amended three times; however, the rules on contract conversion therein have remained unchanged. The conversion rules have been stipulated in Article 67 and Article 73 of the Labor Law. Article 67, paragraph 1, reads, "A labor contract signed with consent for a specific duration must contain a precise finishing date." Paragraph 2 of the same reads, "The labor contract signed with consent for a specific duration cannot be for a period longer than two years. It can be renewed one or more times as long as the renewal does not surpass the maximum duration of two years…Any violation of this rule becomes a labor contract of undetermined duration." Paragraph 7 of Article 67 reads, "A contract of a fixed duration must be in writing. If not, it becomes a labor contract of undetermined duration." Last but not least, Paragraph 8 of the same reads, "When a contract is signed for a fixed period of or less than two years, but the work tacitly and quietly continues after the end of the fixed period, the contract becomes a labor contract of undetermined duration." Furthermore, Article 73, paragraph 5 of the Labor Law stipulates that "If the contract has a duration of more than six months, the worker must be informed of the contract's expiration or of its non-renewal ten days in advance. This notice period is extended to fifteen days for contracts that have a duration of more than one year. If there is no prior notice, the contract shall be extended for a length of time equal to its initial duration or deemed as a contract of unspecified duration if its total duration exceeds the time limit specified in Article 67."

According to the above provisions of the Labor Law, labor contract conversion is possible if (i) a contract fails to state the specific expiry date; (ii) the contract is not made in a written form; (iii) the total duration of the contract exceeds the limit period; (iv) the renewal of contract due to employer's failure to serve notice of the expiration or non-renewal of the fixed-duration contract exceeds the limited period; or (v) the employment relation tacitly continues after the end of the fixed period. Consequently, it can be summarized that contract conversion rules are embedded in the contract

[9] The Labor Law of Cambodia which has been promulgated on 13 March 1997. The Labor Law of 1997 is the law which has been in force with amendments in 2007, 2018 and 2021. The unofficial translation of the Labor Law of Cambodia of 1997 which is available at ILO's website (https://www.ilo.org/dyn/travail/docs/701/labour) and the original text in Khmer language have discrepancy on numbering the paragraph. This text follows the numbering of paragraph in Khmer text while the content in English is based on the unofficial English translation version.

formation process, total duration of the contract, renewal of the contract, and tacit continuation of employment relations.[10] In the past, the contract conversion rules (i), (ii), and (v) were comparatively less problematic than rules (iii) and (iv). As briefly mentioned in the Introduction herein, the rule on contract conversion based on the total duration of the contract had been controversial interpretation and implementation until the issuance of Instruction No. 050/19.

In the following section, this report explains the different interpretations and practices before issuing the said ministerial rules. The Labor Law, in particular, Article 67, paragraph 2 reads "The labor contract signed with consent for a specific duration cannot be for a period longer than two years. It can be renewed one or more times, as long as the renewal does not surpass the maximum duration of two years..." This seems understandable and undisputed; however, it has led to different interpretations and implementations. The first interpretation is that the fixed-duration contract could be renewed one or more times as long as the total period of the contract, which included the initial period and extended period, did not exceed two years. The second interpretation is that the fixed-duration contract could be renewed one or more times, and the total period of the contract, which included the initial and extended periods, can be up to four years. The third interpretation is that the fixed-duration contract could be renewed one or more times as long as each period did not exceed two years, and the fixed-duration contract would not be converted to a labor contract of an undetermined duration.

The Labor Arbitration Council supported the first interpretation.[11] Pursuant to the arbitral award for case No. 10/03 in 2003, the Arbitration Council limited the total period of a fixed-duration contract to two years, and this interpretation of Article 67, paragraph 2 and Article 73, paragraph 5 of the Labor

[10] See Kanharith Nop, Employment Contract in Cambodia: A Focus on Rules Transforming Fixed-duration to Undetermined Duration Contract, Japan Labor Issues, vol. 2, no. 8, August-September 2018 available at https://www.jil.go.jp/english/jli/documents/2018/008-05.pdf. That article was written before the issuance of notice of the Ministry of Labor and Vocational Training in 2019 which resolve the issues of the uses of fixed-duration contract in Cambodia. Consequently, certain parts of that article, in particular section III (Renewal of fixed-duration contract) are out-of-date and will be supplemented by this study.

[11] The Labor Arbitration Council was established pursuant to the Labor Law of 1997. See also Prakas No. 099 on Arbitration Council dated 21 April 2004 issued by the Ministry of Social Affairs, Labor, Vocational Training and Youth Rehabilitation which was the Ministry in charge of labor sector at the time. The Arbitration Council only had jurisdiction over collective labor dispute until the 3rd amendment of the Labor Law in 2021 through which the Arbitration Council has jurisdiction over individual and collective labor disputes. The references to the awards of the Arbitration Council are important for research of the labor laws and employment relations in Cambodia as the Arbitration Council has been consistently and transparently interpreting previsions of labor laws and such practices have formed arbitration-made rules in Cambodia. The awards of the Arbitration Council are accessible via its website: https://www.arbitrationcouncil.org.

Law had been an arbitrator-made rule governing the total duration of the fixed-duration contract for years.[12] In that case, the contract was concluded for six months and was subsequently renewed four times. The workers requested to convert the fixed-duration contract to an undetermined-duration contract, while the employer objected. The Arbitration Council viewed that the term "renewal" in Article 67 (paragraph 2) meant the total length of a labor contract of fixed duration, including the initial contract and all subsequent extensions; and the Arbitration Council further viewed that the total length of 2 years was the time limit which was referred by Article 73, paragraph 5. Paragraph 5 of Article 73 reads, "…If there is no prior notice, the contract shall be extended for a length of time equal to its initial duration or deemed as a contract of unspecified duration if its total length exceeds the time limit specified in Article 67."

Instruction No. 050/19 adopted the second interpretation regarding the total duration of the labor contract of fixed duration. The Ministry has instructed that "Pursuant to Article 67 point 2 of the Labor Law, the labor contract signed with consent for a specific duration cannot be for a period longer than two years. It can be renewed one or more times as long as the renewal does not surpass the maximum duration of two years. If once or more renewals of the contract exceed two years, the fixed-term labor contract will become an indefinite labor contract."[13] According to this Instruction No. 050/19, the initial duration of a fixed-duration contract cannot be more than two years, and one or subsequent contract renewals cannot be more than two years. Consequently, the maximum period of the fixed-duration contract can be up to four years, depending upon the initial period. If the labor contract's duration exceeds the time limit, this contract is automatically converted to a labor contract of an undetermined duration. Instruction No. 050/19 provides three examples in order to explain the above interpretation. First, if the first term of the labor contract is six months, then the total duration of the contract is limited to a maximum period of two years and six months. Second, if the first term of the labor contract is one year, then the total duration of the contract is limited to a maximum of three years. Third, if the first term of the labor contract is two years, then the total duration of the labor contract of fixed duration is limited to a maximum of four years.

Instruction No. 050/19 further explains how to calculate the total duration of a labor contract of fixed duration. The duration of the contract is not counted if there is a cut-off relationship or gap

[12] Arbitration Council, Arbitration Award Case No. 10/03 dated 23 July 2003.

[13] The Instruction No. 050/19 dated 17 May 2019 of the Ministry of Labor and Vocational Training on Determination on Types of Employment Contracts, page 2. The Instruction is written in Khmer language.

between a fixed-duration contract that has just ended and the new fixed-duration contract that the parties will begin. If the duration of the labor contract exceeds the maximum period allowed by law, the employer may re-enter into a fixed-duration contract with the same worker for the same or similar work as long as there is a gap of at least one month between an old fixed-duration contract that has just been terminated and a new fixed-duration contract that has been agreed upon by both parties. If the gap between the old and new labor contract of fixed duration is less than one month, the new labor contract will be considered as a continuation of the previous labor contract, which will be a labor contract of undetermined duration if its total length exceeds the time limit.

Instruction No. 050/19 is in line with the decision of the Arbitration Council that a labor contract of fixed duration will not be converted to a labor contract of an undetermined duration if there is no continuous employment relation due to a gap or break of relationship which cannot cause the total duration of the labor contract to exceed the limit period. However, the gap or break period is not defined but should be reasonable to prove that the employment relation is not continuous. For example, in case No. 177/16, every time the duration of the labor contract reached two years, the employer allowed the worker to take leave for two days and changed the worker's identity number and new staff card when they came to work. The Arbitration Council ruled that employment relation was continuous since there was no break.[14] Instruction No.050/19 has clarified that the gap or break of the employment relationship should be at least one month.

However, to some extent, the conversion rules do not apply to fixed duration with an unspecified date which will be discussed as follow. Pursuant to Article 67, paragraph 3, of the Labor Law, there are cases where a fixed-duration contract may have an unspecified date when it is drawn up for (i) replacing a worker who is temporarily absent; (ii) work carried out during a season; or (iii) occasional periods of extra work or a non-customary activity of the enterprise. This duration is then finished by (a) the return to work of the worker who was temporarily absent or the termination of his labor contract; (b) the end of the season; (c) the end of the occasional period of extra work or the non-customary activity of the enterprise. Moreover, under the Labor law of Cambodia, contracts of daily or hourly workers who are hired for a short-term job and who are paid at the end of the day, the week, or the fortnight, are considered to be contracts of fixed duration with an unspecified date. Contracts without a precise date can be renewed at will as often as possible without losing their validity. Based

[14] Arbitration Council, Arbitration Award No. 177/16 dated 18 August 2016.

on these rules, Instruction No. 050/19 instructed that the rule regarding the gap or break of a relationship, as mentioned in the preceding paragraph, does not apply to the conclusion of a new fixed-duration contract for (i) replacing a worker who is temporarily absent; (ii) work carried out during a season; or (iii) occasional periods of extra work or a non-customary activity of the enterprise as stated in Article 66, paragraph 3 of the Labor Law. However, since the labor contract without a specified date is also a labor contract of a fixed duration, it must be made in writing and must not tacitly continue after the termination of such contract. For example, Mr. A is employed to replace Mr. B, who is temporarily sick. After Mr. B returns to work, the employer continues to employ Mr. A tacitly without signing any new contract. Consequently, the labor contract of Mr. A is a contract of undetermined duration.

The conversion rules under the Labor Law of Cambodia have the nature of public order according to which parties' agreement, which is contrary to these rules, is void. Article 13 of the Labor Law reads: "The provisions of the Labor Law are of the nature of public order, excepting derogation provided expressly. Consequently, all rules resulted from a unilateral decision, a contract, or a convention that do not comply with the provisions of this law or any legal text for its enforcement are null and void…Except for the provisions of this law that cannot be derogated in any way, the nature of public order of this law is not obstructive to the granting of benefits or the rights superior to the benefits and the rights defined in this law, granted to the workers by a unilateral decision of an employer or a group of employers, by an employment contract, by a collective convention or agreement, or by an arbitral decision." In case No. 023/17, when the labor contract reached two years, the employer asked the workers to choose either a fixed or undermined-duration contract. The Arbitration Council ruled that the agreement between the employer and workers to conclude a fixed-duration contract after the duration of the employment relationship exceeded the limit period (2 years) was a violation of Article 67 (2) and Article 73 (5), and such agreement was void according to Article 13 of the Labor law.[15]

Although case No. 023/17 was based on the rule made by the Arbitration Council, which adopted the first interpretation under which the total duration of the fixed-duration contract was limited to two years, this case proves that the conversion rules in Cambodia are compulsorily enforced and prevail over the parties' agreement. However, it is worth noting that the public order nature of Article 13 of

[15] Arbitration Council, Arbitration Award No. 023/17 dated 07 June 2017.

the Labor Law does not invalidate the private agreement that provides benefits or advantages better than those provided to the workers by the laws. Since the labor contract of undetermined duration is considered a type of labor contract that provides job security and stable income to the worker rather than a labor contract of fixed duration, any agreement between the employer and worker to continue using the labor contract of fixed duration is in contrary to the conversion rules and such agreement is void.

To sum up, Cambodia's labor contract conversion rules can apply to contract formation, total duration of the contract, renewal of the contract, and tacit continuation of employment relations. If the labor contract fulfills any conditions that cause the contract conversion, the fixed-duration contract will automatically be transformed into an undetermined-duration labor contract. The employer must settle all the benefits eligible under the labor contract of a fixed-duration contract to the worker. Therefore, the employer must pay the severance pay, which is provided to the worker at the termination of the fixed-duration contract.[16] Upon conversion, the employment duration under the fixed-duration labor contract will be included with the duration under the undetermined-duration labor contract to calculate the worker's seniority.[17]

III. Labor contract conversion rules in Japan

The conversion rules in Japan are available in the Civil Code of Japan, the Labor Standard Act, and the Labor Contract Act of Japan. The Civil Code of Japan, in particular, paragraph 1 of Article 629 reads, "If an employee continues to engage in that employee's work after the expiration of a term of employment and the employer knows of this and raises no objection, it is presumed that the further employment is entered into under conditions identical to those of the previous employment. In such cases, each party may give a notice of termination pursuant to the provisions of Article 627."[18] Accordingly, if the fixed-term contract continues after the expiry of the term, it continues with the

[16] Article 73, paragraph 6 of the Labor Law provides that "*At the expiration of the contract, the employer shall provide the worker with the severance pay proportional to both the wages and the length of the contract. The exact amount of the severance pay is set by a collective agreement. If nothing set in such agreement, the severance pay is at least equal to five percent of the wages paid during the length of the contract.*" See also Clause 1, paragraph 3, of Prakas No. 443 dated 21 September 2018 on Payment of Seniority Indemnity issued by the Ministry of Labor and Vocational Training.

[17] Article 73, paragraph 7, of the Labor Law reads "*If a contract of unspecified duration replaces a contract of specified duration upon the latter's expiration, the employment seniority of the worker is calculated by including periods of the both contracts*."

[18] The Civil Cod of Japan of Civil Code was adopted on 27 April 1896 pursuant to Act No. 89 of 1896. The English translation of the Civil Code of Japan is available at https://www.japaneselawtranslation.go.jp/en/laws/view/3494 .

same conditions of the previous contract, except the termination must be made based on the rule of contract of undetermined duration. Article 627, paragraph 1 of the Civil Code reads, "If the parties have not specified a term of employment, either party may give notice of termination at any time. In such cases, employment terminates on the expiration of two weeks from the day of the notice of termination." Hence, employment through a tacit renewal of employment after the expiry of the term will be under the indefinite term.[19] The above rule is one of the contract conversion rules under the Civil Code.

Another contract conversion rule can be found in the Labor Standard Act concerning continuing employment relations after the period limited by the law. Article 14 of the Labor Standard Act reads:

> "(1) Excluding labor contracts without fixed terms and excepting those in which it is provided that the contract period is the period necessary for the completion of a specific undertaking business, it is prohibited to enter into a labor contract for a period exceeding three years (or five years, for a labor contract falling under one of the following items):
>
> (i)a labor contract entered into with a worker who has expert knowledge, skills, or experience (hereinafter referred to as "expertise" in this item and Article 41-2, paragraph (1), item (i)) falling under the standards prescribed by the Minister of Health, Labour and Welfare as being of an advanced level (limited to a worker who is appointed to work activities requiring the specified advanced level of expertise).
>
> (ii)a labor contract entered into with a worker aged 60 years or older (other than a labor contract as outlined in the preceding item)."
>
> "(2) In order to preemptively prevent disputes from arising between workers and employers when they enter into fixed-term labor contracts and when those labor contracts expire, the Minister of Health, Labour, and Welfare may prescribe standards for particulars regarding the notice that employers are to give in connection with the expiration of the period of labor contracts and other necessary details."

[19] Hisashi Takeuchi-Okuno, The Regulation of Fixed-term Employment in Japan, available at https://www.jil.go.jp/english/reports/documents/jilpt-reports/no.9_japan.pdf, in foot note 37, visited on 14 July 2022.

"(3) The relevant government agency may give the necessary advice and guidance concerning the standards referred to in the preceding paragraph to employers entering into fixed-term labor contracts."

Article 14 of the Labor Standard Act limits the period of the fixed-duration contract. The interpretation of this Article 14 by the courts and common views have ruled that if the parties to the contract continue their employment relation beyond the legally limited period, the contract will become one with an indefinite term, in accordance with Article 629, paragraph 1 of the Civil Code.[20]

The contract conversion under the Civil Code (tacit renewal) and the Labor Standard Act (continued relation within the period longer than the legally allowed term) can be avoided through clear management or arrangement of the contract.[21] Hence, the workers having a fixed-duration contract with periods as required by Article 14 of the Labor Standard Act would have little chance of having their fixed-duration contract converted to an undetermined duration contract. Consequently, although the workers had been working under a fixed-duration labor contract with the same employer for years, his or her contract would not be transformed into a labor contract of undetermined duration if the employer did not agree. However, in order to provide job protection to workers under the labor contract of fixed-duration, Japanese judges have applied the "abuse of the right to dismissal" principle in analogy to prohibit an employer from unjustly rejecting the worker's request for renewal or conclusion of labor contract of fixed-duration upon the expiry date of the existing labor contract.[22]

The Supreme Court, in the Toshiba Yanagi-cho Factory case where the workers, with two-month employment contracts which were renewed from 5 times to 23 times, were denied renewal of the contract, ruled that "where there was a desire for continued employment on the part of both contracting parties, and where the fixed-term contracts were repeatedly renewed so that they were de facto indistinguishable from indefinite-term contracts, the refusal to renew is tantamount to a dismissal."[23] After this case, even though the employers properly administered the use of the contract to avoid the fixed-term contract being considered indistinguishable from an indefinite-term contract, the Supreme

[20] *Id*. p. 77.

[21] For example, the parties can manage to have written contract to be signed by the parties for renewed employment relation and to ensure that the period of the contract does not exceed the period limited by Article 14 of the Labor Standard Act.

[22] Hisashi Takeuchi-Okuno, The Regulation of Fixed-term Employment in Japan, available at https://www.jil.go.jp/english/reports/documents/jilpt-reports/no.9_japan.pdf, p. 77-79, visited on 14 July 2022.

[23] Takashi Araki, Labor and Employment Law in Japan, 2002, p. 34-35.

Court in the Hitachi Medico case ruled that "even where the fixed-term contract was not indistinguishable from an indefinite-term contract, the theory concerning dismissal shall apply by analogy when there was an expectation of continued employment and the contract was renewed five times."[24] There was a decision of a lower court that expanded the scope of employment security for a worker under fixed-duration contracts, by ruling that "even if a fixed-term contract was not renewed repeatedly, a justifiable reason is necessary for not renewing it if there was a reasonable expectation of continued employment."[25]

The labor contract conversion rules in Japan were newly adopted rules when there was an amendment to the Labor Contract Act of Japan in 2012.[26] At the time, the amendment, which was mainly related to the labor contract of fixed-duration, derived from the need to protect workers under fixed-duration contracts by limiting abusive use of fixed-duration contracts by adopting the conversion rules rather than the rules limiting the entering into the fixed-duration contract.[27] In parallel with the conversion rules, there are other rules in relation to the fixed-duration contract. The conversion rules were adopted in Article 18, the rule on guaranteeing continued employment in Article 19, and the rule of equal treatment in working conditions regardless of the type of contract in Article 20 of the Labor Contract Act. The three articles (18, 19, and 20) were very important for promoting labor contract conversion in Japan. Article 19 came into force on 10 August 2012, while Articles 18 and 20 took effect on 1 April 2013.[28] However, Article 20 was deleted when there was an amendment to the Labor Contract Act in 2018. It is worth noticing that rule of Article 20 of the Labor Contract Act was incorporated into Article 8 of the Act on Improvement of Personnel Management and Conversion of Employment Status for Part-Time Workers and Fixed-Term Workers.[29]

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[24] *Id.* p. 35

[25] *Id.*

[26] The Labor Contract Act of Japan was firstly adopted in 2007 regulating rights and obligations under the employment contract. The English translation of this law can be found at https://www.japaneselawtranslation.
go.jp/en/laws/view/3744. The enactment of law in addition to the Labor Standard Act was necessary in consideration to the roles of individual contract, increase of individual labor dispute and absence of civil law dealing with employment contract. Please also read Ryuichi Yamakawa, The Enactment of the Labor Contract Act: Its Significance and Future Issues, Japan Labor Review, vol. 6, no. 2, spring 2009, available at https://www.jil.go.jp/english/JLR/documents/2009/JLR22_yamakawa.pdf , last visited 10 February 2023.

[27] Yuko Watanabe, New Rules of Conversion from Fixed-term to Open-ended Contracts: Companies' Approaches to Compliance and the Subsequent Policy Developments, Japan Labor Issues, vol.2, no.7, June-July 2018, p. 13-14, available at https://www.jil.go.jp/english/jli/documents/2018/007-03.pdf.

[28] *Id*, p. 13.

[29] Article 8 of the Act on Improvement of Personnel Management and Conversion of Employment Status for Part-Time Workers and Fixed-Term Workers (Act No. 71 of 2018) reads: "An employer must not create differences between the base pay, bonuses, and other treatment of the part-time/fixed term workers it employs and its corresponding treatment of its workers with standard employment statuses that are found to be unreasonable in consideration of the circumstances, including the substance of the duties

Article 18 of the Labor Contract Act of Japan reads:

"(1) If a Worker whose total contract term of two or more fixed-term labor contracts (excluding any contract term which has not started yet; the same applies hereinafter in this Article) concluded with the same Employer (referred to as the "total contract term" in the next paragraph) exceeds five years applies for the conclusion of a labor contract without a fixed term before the date of expiration of the currently effective fixed-term labor contract, to begin on the day after the said date of expiration, it is deemed that the said Employer accepts the said application. In this case, the labor conditions that are the contents of said labor contract without a fixed term are to be the same as the labor conditions (excluding the contract term) of the currently effective fixed-term labor contract (excluding parts separately provided for with regard to the said labor conditions (excluding the contract term)).

(2) In between the expiration date of the preceding fixed-term labor contract and the start date of the following one with the same Employer, if there is a period of time outside of these two contract terms (excluding a period outside of either of the said contract terms which falls under the standards provided by Ordinance of the Ministry of Health, Labour and Welfare, provided that these contract terms be regarded as continuous; hereinafter referred to as a "vacant term" in this paragraph) and the said vacant term is six months or longer (if the contract term of one fixed-term labor contract which expired just before the said vacant term (if there is no vacant term between the contract terms of two or more fixed-term labor contracts including the said first one, the aggregate term of the said two or more contracts; the same applies hereinafter in this paragraph) is less than one year, the length of a term given by Ordinance of the Ministry of Health, Labour and Welfare, based on the length of a term determined as being one half of the said first contract term), the contract term of the fixed-term that expired before the said vacant term is not included in the total contract term."

Pursuant to paragraph 1 of Article 18 above, a worker who has been working under a fixed-duration contract with the same employer for more than five years can request for the conclusion of

of those part-time/fixed term workers and workers with standard employment statuses and the level of responsibility associated with those duties (hereinafter referred to as the "job description") and the scope of changes in their job descriptions and assignment, that are found to be appropriate in light of the nature of the treatment and the purpose of treating workers in that way."

the labor contract of an undetermined duration to his or her employer before the expiry date of the currently effective contract of fixed-duration and the employer is obliged to accept the said request and to begin the labor contract of undetermined duration on the day after the expiry date of the current contract. Upon conversion, the labor conditions, which are the contents of the labor contract of undetermined duration, are the same as those (excluding the contract term) of the previous fixed-duration contract. According to paragraph 2 of the same article, the duration of the old contract and new contract will not be aggregated if there is a break or vacant period between the old and new fixed-duration contracts. The said vacant period is six months or longer term.

In Japan, there is an encouragement, but not a compulsory requirement, that fixed-duration contracts must be in writing. A worker and employer must confirm the content of the labor contract (including matters concerning a fixed-duration contract), whenever possible, in writing.[30] Furthermore, except for undetermined-duration contract and contract which is made for a period necessary for the completion of a specific undertaking business, the Labor Standard Act prohibits the parties from entering into a labor contract for a period exceeding three years or five years (for contracts with expertise, 60-year-old or older worker as specified in Article 14 paragraph 1).[31] With regard to the fixed-duration labor contract, the employer must consider not renewing the contract repeatedly as a result of prescribing a term that is shorter than necessary in light of the purpose of employing the worker based on such a labor contract.[32] However, a fixed-duration labor contract will not be converted to undermined duration contract if the contract violates the rules mentioned in this paragraph.

Regarding renewal of the labor contract of fixed duration, the Labor Contract Act of Japan has protected the worker-whose contract has been repeatedly renewed in the past or who has reasonable ground to expect for renewal-from unjustified rejection by the employer to the worker's request for renewal or conclusion of labor contract of fixed-duration upon expiry of the existing contract. If the employer's refusal to accept the worker's request lacks objectively reasonable ground and is not appropriate in a general social term, it is deemed that the employer accepts the worker's said request. Article 19 of the Labor Contract Act reads:

[30] Article 4, paragraph 2, Labor Contract Act of Japan.
[31] Article 14, Labor Standard Act of Japan.
[32] Article 17, paragraph, Labor Contract Act of Japan.

> "If, by the expiration date of the contract term of a fixed-term labor contract which falls under any of the following items, a Worker applies for a renewal of the said fixed-term labor contract, or if a Worker applies for the conclusion of another fixed-term labor contract without delay after the said contract term expires, and the Employer's refusal to accept the said application lacks objectively reasonable grounds and is not found to be appropriate in general societal terms, it is deemed that the Employer accepts the said application with the same labor conditions as the contents of the prior fixed-term labor contract:
>
> (i) the said fixed-term labor contract has been repeatedly renewed in the past, and it is found that terminating the said fixed-term labor contract by not renewing it when the contract term expires is, in general, social terms, equivalent to terminating a labor contract without a fixed term by expressing the intention to fire a Worker who has concluded the said labor contract without a fixed term;
>
> (ii) it is found that there are reasonable grounds upon which the said Worker expects the said fixed-term labor contract to be renewed when the said fixed-term labor contract expires."

To sum up, the labor contract renewal or conversion in Japan is initiated by the worker who has been qualified to request for contract renewal or conversion to his or her employer.

IV. Comparison between labor contract conversion rules in Cambodia and Japan

1. Compulsory conversion rules versus at-will conversion rules

As discussed above, one of the remarkable differences between Cambodia's and Japan's labor contract conversion rules rests upon the worker's will or intention. In Cambodia, as long as the labor contract fulfills certain conditions enabling automatic conversion, the fixed-duration contract will be transformed into a labor contract of an undetermined duration. The conversion rules in Cambodia are compulsory; consequently, any agreement of the parties contrary to these rules is void. The conversion rules of Japan respect the worker's will to convert the contract and make it compulsory for the employer to accept the worker's request. After the five-year period of continuous employment relation has passed, if the worker wishes to continue working with the same employer and requests for the conclusion of the labor contract of an undetermined duration, the employer must accept the said request.

2. Content of conversion rules

Comparatively, the conversion rules of the two countries have the same purpose in promoting and protecting the employment security of the workers from the abusive use of a fixed-duration contract for long-term employment relations. However, the contents of the rules of the two legal systems are different in terms of scope and level of protection, to be discussed in this section. The labor contract conversion rules in Cambodia cover the process of contract formation, total duration of the contract, renewal of contract, and tacit renewal, while the contract conversion rules in Japan cover the total duration of the fixed-term contract and tacit renewal of the contract. The guarantee for continued employment in Article 19 is very connected with the contract conversion in Article 18 of the Labor Contract Act of Japan because the continued employment causes the fixed-duration contract to become an undetermined duration contract if the above requirements are fulfilled. However, in Cambodia, there is no rule specifically requiring a justifiable reason for not renewing the fixed-duration contract after the expiry of the previous contract.

In Cambodia, the fixed-duration labor contract must be written in writing and have a specified expiry date. The duration of the initial contract cannot exceed two years, and the total duration of contract renewal cannot be more than two years. Hence, the duration of the fixed duration can be up to 4 years, depending upon the duration of the initial contract of fixed duration. If the parties violate the rules on the formation or those of duration of the contract, the contract is automatically transformed into a labor contract of an undermined duration. Moreover, if the labor contract is made for more than six months, the employer must notify the worker ten days before the expiry or non-renewal of the labor contract. This notice period is 15 days if the labor contract is made for more than one year. Failing to serve such notice, the contract will be automatically renewed for the same period as the previous contract and will become a labor contract of an undetermined duration if the total duration of renewed contracts exceeds two years. The implicit continuation of the employment contract after the end of the fixed-duration contract will convert the contract to the undermined duration contract. Based on the summary of the conversion of Cambodia in the preceding sentences, parties need to carefully administer the formation and implementation of their contracts to avoid contract conversions. Since no rule requires an employer to justify his or her refusal to accept a worker’s request for renewal or conclusion of the fixed-duration contract, the employer can freely terminate the fixed-duration contract upon the expiry date.

In Japan, in addition to the case of tacit renewal of employment relations and of continuing employment relations for a period longer than the period required for the fixed-term, conversion of a contract is also possible when the worker who has been working with the same worker for more than five years requests for the conclusion of the undetermined duration. The worker must make such a request before the expiry date of his or her existing fixed-duration contract, and the labor contract of an undetermined duration will start after the expiry date of the existing contract. Regarding the guarantee for continued employment, to avoid the employer from unjustly rejecting the renewal of the fixed-duration contract, the Labor Contract Act ruled that if the rejection of the employer worker's request for continuation of the fixed-duration or to conclude a new fixed-duration upon the expiry of the existing fixed-duration contract lacks objectively reasonable grounds and is not found to be appropriate in general societal terms, it is deemed that the employer accepts the said request with the same labor conditions as the contents of the prior fixed-term labor contract. This rule applies to the case of repeated renewals of fixed-duration contracts, and non-renewal of fixed-duration is not appropriate in general social terms or where there is reasonable ground on which the worker expects the renewal of his or her existing fixed-duration contract.

Regarding the calculation of the continuous relations, Article 18, paragraph 2 of the Labor Contract Act of Japan has defined continuous relations if there is a break or vacant period between the previous contract and the new contract, which is less than six months. Comparatively, the vacant period is longer than the vacant period defined in Instruction No. 050/19 of Cambodia. The gap between the previous fixed-duration contract and the next fixed-duration in Cambodia is one month.

V. Recommendation for conversion rules of Cambodia

Based on the comparison between Cambodia's and Japan's labor contract conversion rules, the report discusses the similarities, differences, and effectiveness in limiting the abusive use of a fixed-duration contract. This paper suggests that compulsory conversion rules should be maintained considering the social and economic inferiority of workers in Cambodia. Based on the rule on the guarantee of employment in Japan, the report proposes that Cambodia adopts the rule on the guarantee for the continuation of employment by prohibiting the employer from unjustly rejecting the worker's request for renewal or concluding new fixed-duration upon expiry of the existing contract. Based on the current conversion rules of Cambodia, if the employer precisely administers the use of the fixed-

duration contract, the conversion from a fixed-duration contract to an undetermined-duration contract can be avoided. However, if there is a requirement that the employer presents a valid reason for denying the worker’s request for continuing employment, it can cause the continuation of employment under a fixed-duration contract to exceed the period limited by the law for the fixed-duration contract. This suggestion can come into existence if there is an amendment to the Labor law of Cambodia.

【Research Article】

Strict Liability Concept Applicable to Vehicle Owners: Comparative Analysis

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Abstract

This paper discusses vehicle owner's liability as a strict liability concept for interpreting and improving existing legal norms in emerging civil law jurisdictions. Focusing on application style, the scope of damage compensated under the strict liability rule, the determination of transport vehicle, and grounds for exemption from liability, this research provides a comparative analysis of vehicle owners' liability. The comparative study of the strict liability for transport vehicle proposes a more purpose-oriented interpretation of the relevant norms of the Civil Code of Mongolia[1] (hereinafter "CCM") and improvement at the legislative level.

Keywords: Transport vehicle, danger, hazard, strict liability, owner, possessor, *res ipsa loquitur*, negligence, absence of fault, exemption from liability, the scope of damage

Contents

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[1] Civil Code of Mongolia, 2002 https://legalinfo.mn/en/translate.

I. Preliminary introduction

The main goal of the general principle of fault-based liability is to prevent harm to others by the potential tortfeasor, who is more likely to foresee the risks and prevent damages[2]. However, due to the increased use of machines, mechanisms, equipment, and vehicles, the concept of fault-based liability cannot solely fulfill tort law's function in the modern world. Technical and technological development has brought not only benefits but also tremendous risks and dangers to society. Although there have been attempts to solve this problem with the insurance system, proper legal means are necessary to diminish the risk to all members of society by transferring the consequences to those who profit from it[3].

Liability for a vehicle as the strict liability concept, which does not require proof of fault, emerged in the 19th century in the European legal system and has been developing under broad discussions with controversy and uncertainty since the second half of the 20th century[4]. The concept of strict liability has emerged from the rules on compensation for damages in industrial accidents. It is used for many types, such as liability for animals and buildings, product liability, which calls for broad debates. But this study focuses only on strict liability for vehicle owners.

Although the emergence and development path of Mongolian civil law has some specifics compared to that of developed countries in Europe, Asia, and America, the concepts of the Western legal system have been firmly constituted at the structural level. Due to the relatively late economic liberalization process, the practical application of the civil law concepts was insufficient and consequently lacked academic and judicial interpretation of the norms of the CCM.

Article 499 of CCM presumably provides strict liability for transport vehicle owners without fault. This article, as a rule for vehicle owners' liability, has four sections covering grounds for liability and exemption clauses, which will be presented in more detail later in this paper.

However, the above-mentioned legislative norms still challenge the Mongolian judiciary requiring proper interpretation of the ambiguous terms, and the case study identifies that not only the identification of the owner and the transport vehicle but also the application as strict liability is

[2] M. Stuart Madden, *Tort Law Through Time and Culture: Themes of Economic Efficiency* in Stuart Madden (ed), Exploring Tort Law (Cambridge University Press, 2005) 12.

[3] Kenneth S. Abraham, *Twenty-First-Century Insurance and Loss Distribution in Tort Law* in Stuart Madden (ed), Exploring Tort Law (Cambridge University Press, 2005) 82.

[4] Franz. W etc., *Strict Liability in European Tort Law: and Introduction* in Franz.W&Vernon.V.P (ed), The Boundaries of Strict Liability in European Torts Law (Carolina Academic Press, 2004) 3.

questioned[5]. Therefore, this paper will provide a summary of comparative study of transport owners' liability in other jurisdictions having some similarities.

II. Application of the strict liability concept to vehicle owners

Explaining the grounds for imposing strict liability was always difficult for civil law jurists, and it wasn't included in both German and French civil codes representing civil law jurisdiction.[6] A study of tort law rules on transport owner's liability in civil law countries demonstrates two prevailing approaches: imposing liability through an expansive interpretation of the civil code provisions for holders of dangerous objects or providing strict liability for a motor vehicle by passing special legislation.

1. Interpretative application of general regulations

General fault-based liability requires the causal connection between the wrongful act or omission of the person who caused the damage. It is clearly stated in articles 1382 and 1383 of the Civil Code of France, while in article 1384, any person, in addition to the damage caused by himself, is liable for the damage caused to others from objects or by the person under his control[7]. This article was considered a mere precondition of articles 1385 and 1386, which provide responsibility for the owner of things such as animals and houses.

Thus, strict liability for things was conventionally limited to "animals" and "houses". While due to the increased number of industrial accidents, it became the general principle of strict liability through judicial interpretation[8]. Particularly, the Cassation Court of France has established that application of provisions of article 1384 (1) of the French Civil Code is not limited to animals and houses. In this way, this concept is explained not as the liability based on the presumption of fault but as the strict custodial liability. Therefore, this provision applies to the liability of the owners of railways, trams, transport vehicles, and persons engaged in the production, storage, and transfer of electricity, gas, and other dangerous substances responsible[9].

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[5] Shuuhiin shiidveryn dun shinjilgee Serial No4, (Ulaanbaatar, Open Society Forum, 2022) [Analysis over judicial decisions] 219-247 https://cdn.greensoft.mn/uploads/users/3092/files/Court%20Series%204_Web.pdf.

[6] J. Gordley, Foundations of Private Law (Oxford University Press, 2006) 160, 182-183.

[7] https://www.legifrance.gouv.fr/content/download/1950/.../Code_22.pdf Civil Code, art.1382-1386.

[8] Franz.W etc., *Synthesis and Survey of the Cases and Results* in Franz.W&Vernon.V. P (ed), The Boundaries of Strict Liability in European Torts Law (Carolina Academic Press, 2004) 419-420.

[9] K.Zweigert&H.Koetz, Comparative law: Volume II, The Institutions of Private Law (North-Holland Publishing Co.,1977)322.

Interpretative application of Article 1384 of the French Civil Code significantly impacts other civil law jurisdictions such as Italy, Portugal, and the Netherlands, accepting the concept with both strict and general fault-based liability elements. For instance, the Italian Civil Code contains similar general strict liability provisions, whereas vehicle owners' liability is contained in special provisions[10], which imply a presumption of fault[11].

Article 1064 of the Civil Code of the Russian Federation defines the general provision on fault-based compensation for harm and states the possibility of strict and vicarious liability in case of specific legal stipulations[12]. Section 1 of Article 1079 stipulates that the owner of the source shall be responsible for compensation for the damage caused by the "extra dangerous source", whereas the legal determination uses the words "source", which can express both an activity and a thing and this provision applies to delict from the transport vehicle[13].

The French model of interpretation of liability for the thing as a strict liability principle is widely receipted by civil law jurisdictions, legislative and interpretative styles differ from country to country, whereas having some elements of presumption of fault if otherwise is not proven. There is a similar concept of "*res ipsa loquitur,*" or strict liability is accepted in the common law[14].

In American law, the defendant is liable without any evidence under this concept, which explains that the defendant is presumed to be negligent in the absence of any sound explanation of innocence.[15] Although there is a difference of opinion about the principle that requires sufficient explanation and puts the burden of proof on the defendant's part, in many cases, the defendant was exempted from liability by proving the absence of his negligence in the accident.

2. Specific legal norms providing vehicle owners' liability.

German courts don't apply the general strict liability principle since conditions for imposing liability without fault are specifically established by legislative acts[16]. Particularly, in addition to the strict liability of owners of luxury animals[17], which is stipulated in the Civil Code, several types of

[10] Art.2051, art.2054, Civil Code of Italy http://italiantortlaw.altervista.org/civilcode.html.

[11] Franz.W etc., *Synthesis and Survey of the Cases and Results* in Franz.W&Vernon.V. P (ed), The Boundaries of Strict Liability in European Torts Law (Carolina Academic Press, 2004) 421.

[12] Grajdanskii Kodeks RF [Civil Code of Russian Federation], art. 1064, 1079 http://www.zakonrf.info/gk/1079/.

[13] Grajdanskoye pravo [Civil Law] M.B.Karpichyeva, A.M. Hujina ed., (Moscow, Prospekt, 2010) 613.

[14] K.Zweigert&H.Koetz, Comparative law: Volume II, The Institutions of Private Law (North-Holland Publishing Co., 1977) 314.

[15] J. Gordley, Foundations of Private Law (Oxford University Press, 2006) 205.

[16] J. Gordley, Foundations of Private Law (Oxford University Press, 2006) 209.

[17] Article 833.1 establishes that the owner of the animal is liable for its harm, while the section 3 of this article exemption clause for owner of the animals for enterprise purpose as if he proves due performance of control over the animal. Article 834 of the Civil code establishes that the accident was inevitable occurrence.

strict liability have been established within the framework of special laws. For instance, the Law on Strict Liability of 1871 established strict liability for damage to human life and health caused by railway operations and later expanded its scope.

In 1978, the Law on Strict Liability was revised to include damages caused by liquids, smoke, and gases passing through pipelines, except for force majeure[18]. Currently, within the framework of the Air Traffic Law and the Nuclear Energy Law, strict liability has been imposed on persons engaged in aviation and nuclear energy operations. It is stipulated that liability should be imposed even if there is an influence of force majeure. In addition, the Water Management Act of 1957 and the Medicines Act of 1976 regulated the liability for damages related to water pollution, including economic loss, without limitation, and companies supplying drugs to the market are fully liable for damages related to drugs.

There is a similar system of strict liability in Austria and Switzerland. The Swiss Pipeline Act of 1963 extended its scope beyond Germany and Austria to include natural oil, gas, other liquids, volatile materials, and fuels as specified by parliament.[19] In Germany, the Motor Vehicle Insurance Act and the Motor Vehicle Act, which were later issued under the pressure of lawyers, regulate that the liability for damage caused by the driver and the passengers traveling without payment was exempted. The law was amended several times, and in 1952 the Traffic Law was approved and is still in force. According to Article 7, Section 1 of the law, the registered owner or custodian of the vehicle shall be responsible for the damage caused to persons or property during the vehicle's operation[20].

Since the last half of the 20th century, there has been an increase in cases related to damage caused by vehicle accidents, and it is believed that there has been considerable development in the Japanese civil law theory of damage compensation. Apart from the Civil Code liability provisions for the things, several types of special delicts are established by special legislations. One of them is the Act on Securing Compensation for Automobile Accidents,[21] adopted in 1955. The vehicle owner's liability under this law is explained as not “exact”, but “close to” strict liability since the owners hold and benefit from the things dangerous to human life and body.[22] Therefore, article 3 of this special law has established the special prerequisites for imposing liability on vehicle owners. The law not

[18] Franz.W etc., *Strict Liability in European Tort Law: and Introduction* in T Franz.W&Vernon.V. P (ed), The Boundaries of Strict Liability in European Torts Law (Carolina Academic Press, 2004) 26.

[19] K Zweigert&H.Koetz, Comparative law: Volume II, The Institutions of Private Law (North-Holland Publishing Co.,1977) 321-322.

[20] N. Foster&S.Sule, German Legal System and Laws (Oxford University Press, 2002) 437.

[21] Act on Securing Compensation for Automobile Accidents, 1955 https://www.japaneselawtranslation.go.jp/en/laws/view/3135/en.

[22] Wagatusma Sakae etc., Minpou 2 Saikenhou [Civil Law 2 Law on Obligation] (Keisoshobo, 2003) 477-478.

only strengthens the person's responsibility for a car accident but also sharpens the liability insurance system through a distribution scheme of the damage cost that can provide real compensation to the victim[23].

English law does accept the concept that imposes liability on the defendant whose negligence is not proven. The system relies on special legislation for strict liability, such as the Aircraft Owners Liability Act and the Nuclear Energy Liability Act. There are a few types of strict liability that have been created by judicial precedents[24].

III. Ambiguous terms

1. Vehicle as a dangerous thing

In jurisdictions with special laws, there is a tendency to include the dangerous nature of a vehicle in a certain measurement[25]. For example, according to Article 1, Section 2 of the Traffic Act of Germany, vehicles are defined as all land vehicles driven by mechanical force except for railways, and slow-moving vehicles that cannot exceed 20 km/h are exempt from the application of the law. We can find similar logic in Japanese law[26].

But when the law does not specifically regulate strict liability for vehicle operation, determining the dangerous nature of sources and objects creates ambiguity. In countries such as Russia and France, which do not regulate the damage caused by vehicles by special laws, a vehicle is considered dangerous. For example, in the Russian Federation, "highly hazardous sources" are defined as the activities of using, transporting, storing, and consuming commercial purposes that cannot be fully controlled by humans and are likely to threaten surroundings[27].

There are two diverse ways to explain the term “source”: operation-oriented and object-oriented. From the perspective of operation-oriented theory, "source" is any activity that may cause extraordinary danger to the surroundings and cannot be fully controlled by an individual, while from the perspective of object-oriented theory, it is interpreted as objects of the material world with dangerous nature to its surroundings. In other words, whether extraordinary danger arises from the

[23] Kato Masanobu, Shin Minpou Taikei V Jimukanri, futoritoku, fuhoukoi [Civil Law V: Management of affairs, unjust enrichment, tort] (Yuhikaku, 2002) 414.

[24] Franz.W etc., *Synthesis and Survey of the Cases and Results* in Franz.W&Vernon.V.P (ed), The Boundaries of Strict Liability in European Torts Law (Carolina Academic Press, 2004) 400.

[25] B.S.Markesinis, The German Law of Obligations: Volume II: The Law of Torts: A Comparative Introduction (3rd ed., Clarendon Press, Oxford 1997) 715.

[26] Art.1-2, Act on Securing Compensation for Automobile Accidents, 1955 https://www.japaneselawtranslation.go.jp/en/laws/view/3135/en.

[27] Grajdanskoye pravo ch.III [Civil Law part 3] A.P.Sergeev, Yu.K Tolstoye ed., (Moscow, Prospekt, 2004) 48.

activity or the object's nature is controversial among Russian scholars. However, it is believed that both explain the dangerous character of sources in connection with activities or objects, do not completely contradict each other but indicate a mutual relationship between activities and objects[28].

In Germany, there are a lot of cases in which the damage must have occurred during the vehicle's operation. Generally, the condition of "during the operation" is understood as a collision with some objects. Still, it can also be related to the case where the damage occurred, even if the vehicle did not come into contact with it. For example, if the motorcyclist behind the car loses balance due to sudden braking or sudden turn of the vehicle, the latter's driver is liable according to the law. In addition, the parking of a car is considered the same except for a police car or motorcycle, which is placed in the middle of the road for the purpose of giving a signal[29].

At the same time, in England, there was a dispute over how to define "dangerous activity," and the *Fletcher v. Rylands* case was important for explaining the responsibility for the consequences of a dangerous activity, where the court stated that a person should be responsible for the consequences of the activities he owns or conducts as well as unusual usage of things would be a reason for liability.

The United States indirectly recognizes the concept established by the case as mentioned above in an indirect way. In 1938, it issued Restatement on torts, which establishes the general rule of strict liability of the person who engages in extremely dangerous activities and defined the "ultra-dangerous activity" as a non-routine application where there is a risk of serious damage to property and the risk cannot be completely avoided with the usual level of care.[30]

Even though the main justification for strict liability is based on the general idea that a person benefiting from extraordinarily dangerous activity or thing should bear its risk, in most jurisdictions, the term "ultra-dangerous" is still vague. Consequently, some countries do not consider keeping a car so dangerous.[31]

2. Determining the "owner"

The Road Traffic Law of Germany uses the formula "custodian" who keeps the vehicle under control, management, and use for own benefit. More clearly, the owner of a car is defined as a person who uses the car at his own expense and has the authority to dispose of it in connection with such

[28] Grajdanskoye pravo ch.II [Civil Law part 2] A.P.Sergeev, Yu.K Tolstoye ed., (Moscow, Prospekt, 1998) 733.

[29] B.S.Markesinis, The German Law of Obligations: Volume II: The Law of Torts: A Comparative Introduction (3rd ed., Clarendon Press, Oxford 1997) 716.

[30] K.Zweigert&H.Koetz, Comparative law: Volume II, The Institutions of Private Law (North-Holland Publishing Co,1977) 335-337.

[31] Jan M.Smits (ed.) Elgar Encyclopedia of Comparative Law (2nd ed., Cheltenham: Edward Elgar Publishing.,2012) 880.

use[32]. Usually, the custodian of the vehicle is the owner, but in some cases, when the owner has transferred it to another person, for example, through a lease agreement or other reasons, would not be considered a custodian.

While the person using the car under a short-term rental contract is not considered the custodian. In the case of a long-term rental contract, the person using the vehicle is considered a custodian if he is responsible for all related expenses. If the vehicle is used with the owner's permission or stolen because of the owner's carelessness, the owner remains responsible according to the law.[33]

Even if the owner transfers the vehicle to others, he remains as the custodian, but if his employee takes the vehicle without permission, it is considered that the maintenance and custody of the vehicle have been transferred to the employee, which shows that it is considered in the context of "factual possession". However, for damage caused by the vehicle driven by the owner's employee, according to Article 831 of the Civil Code, the vehicle's owner is liable because the employee was wrongly selected and supervised.

The person responsible for automobile damage, defined by Article 3 of the Act on Securing Compensation for Automobile Accidents of Japan defined as the person who has authority over and uses the automobile for their own benefit. Therefore, this provision is almost identical to the German regulation and is interpreted similarly[34].

The owner of a dangerous source can be determined either by the factual holding or the legal nature of the person who has the authority to hold the items based on certain rights in Russia, and this way of interpretation is important in the judicial application of the law. An example is given that a person who drives a certain vehicle due to an employment relationship is not considered the "owner".[35]

In addition, if several persons jointly own a certain object or if ownership and possession belong to different persons, the criterion of real domination is applied. For example, in the case of a car belonging to the joint ownership of family members, the defendant is the one whose name appears on the car registry. Also, if the vehicle is rented alone without a driver, the person who rented it is considered the owner. However, in case the owner of the vehicle is guilty of the act causing damage, the general rule for fault-based tort applies[36].

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[32] B.S.Markesinis, The German Law of Obligations: Volume II: The Law of Torts: A Comparative Introduction (3rd ed., Clarendon Press, Oxford 1997) 715.

[33] B.S.Markesinis, The German Law of Obligations: Volume II: The Law of Torts: A Comparative Introduction (3rd ed., Clarendon Press, Oxford 1997) 716.

[34] Uchida Takashi, Minpou II, SaikenKakuron, /Special provisions of “Obligation”/ (Tokyo University Press, 2011) 509-510.

[35] Grajdanskoye pravo ch.II [Civil Law part 2] /ed., A.P.Sergeev, Yu.K Tolstoye/ (Moscow, Prospekt, 1998) 736.

[36] Grajdanskoye pravo ch.II [Civil Law part 2] /ed., A.P.Sergeev, Yu.K Tolstoye/ (Moscow, Prospekt, 1998) 738.

3. Liability cap

Due to economic reasoning, there is a tendency to establish liability caps for strict liability, especially vehicle operations in civil law jurisdictions. In other words, the scope of liability is limited either to a certain amount of liability or to interests protected, which varies from country to country.

In the Traffic Law of Germany, the vehicle owner's liability is limited to human health and life damage. For example, if a person is deceased, the cost of medical treatment is carried out to save that life, an economic loss equivalent to the amount of income the deceased or injured person would have earned, and funeral expenses are compensated, but there is an upper limit in terms of amount[37]. In this respect, Germany's strict liability for traffic accidents is like that in Austria, Greece, the Netherlands, Switzerland, and Scandinavian countries and is different from the French system, where all damages caused by dangerous activities and objects are held as a general fault-based delict.

This approach to defining the scope and limits of damages can be seen in the provisions of Japanese special laws. For example, damage caused to the life and health of other persons will be held within the scope of the law, and since the law is aimed at eliminating personal damage, it is believed that other types of property damage should be dealt with within the scope of the general regulation of damages of the Civil Code[38].

In terms of compensation for damages caused to passengers when using a vehicle for commercial purposes, the owner of the vehicle is responsible if the passenger was transported for a fee and if the negligence of the victim contributed to the increase in the amount of damage, the amount of damage is determined by applying Article 254 of the Civil Code of Germany[39].

There are not any special rules establishing ceilings or limiting the scope of damages in jurisdictions having general strict liability concepts, such as France and Russia since the owner is liable for any damages[40].

4. Grounds for exemption from liability

[37] H.B.Shaefer&A.Shoenenberger, *Strict Liability versus negligence: an economic analysis* in Franz.W&Vernon.V.P (ed), The Boundaries of Strict Liability in European Torts Law (Carolina Academic Press, 2004) 59.

[38] Uchida Takashi, Minpou II, SaikenKakuron, /Special provisions of "Obligation"/ (Tokyo University Press, 2011) 509-510.

[39] B.S.Markesinis, The German Law of Obligations: Volume II: The Law of Torts: A Comparative Introduction (3rd ed., Clarendon Press, Oxford 1997) 716.

[40] Franz.W&Vernon.V.P (ed), The Boundaries of Strict Liability in European Torts Law (Carolina Academic Press, 2004) 351.

Strict liability does mean liability under all circumstances because of exemption rules. Mostly accepted grounds to deny liability for a vehicle are force majeure, an unrelated third party's action, and the victim's action.[41] The defendant must prove such grounds.

In Germany, the vehicle's owner is released from liability in cases of unavoidable events, such as force majeure, actions of a third party, or when the owner proves that he was careful and took all necessary measures to prevent the accident. Unavoidable events include the actions of the victim, the actions of persons not involved in driving the vehicle, and the actions of animals, in addition to the fact that both the owner and the driver of the vehicle must prove that they have taken appropriate precautions[42]. Moreover, since the cause of damage by the vehicle can be connected to external or internal reasons, defect in the vehicle is considered an internal factor, and the owner is not exempted from liability, and the behavior of a third party is understood as a third party that doesn't not have any interest in the operation of the vehicle.

A similar regulation exists in Japan. For example, as opposed to the logic of the general fault-based tort, which is described in Article 709 of the Japanese Civil Code, according to the special law, the owner of the vehicle and the driver should prove that the latter was not negligent while using the vehicle, there was an intentional or negligent act of a third party other than the victim and the driver and absence of the structural level defects and wrongs in parts of the vehicle. So, if all these three conditions have been met simultaneously and proven by the defendant, the liability is exempted[43].

As for the countries that do not have special laws, the general liability provision provides a rule to exempt from liability in the event of force majeure or proof of intentional or gross negligence of the victim[44]. Particularly, in Russia and France, the defendant is not released from the obligation to compensate for damage caused by dangerous objects or activities unless he proves circumstances that deny his fault, such as force majeure, the victim's gross negligence, or the fault of a third party.

From the exemption mentioned above rules, it can be concluded that defense grounds, such as force major and victim negligence, are widely recognized in most modern jurisdictions. While there are still considerable differences among Western systems in the interpretation of defense rules, the gap between strict liability and negligent-based liability is getting less important[45].

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[41] Jan M.Smits (ed.) Elgar Encyclopedia of Comparative Law (2nd ed., Cheltenham: Edward Elgar Publishing, 2012) 881.

[42] B.S.Markesinis, The German Law of Obligations: Volume II: The Law of Torts: A Comparative Introduction (3rd ed., Clarendon Press, Oxford 1997) 716.

[43] Uchida Takashi, Minpou II, SaikenKakuron, /Special provisions of "Obligation"/ (Tokyo University Press, 2011) 509-510.

[44] Grajdanskii Kodeks RF [Civil Code of Russian Federation] art.1079 http://www.zakonrf.info/gk/1079/.

[45] Franz.W&Vernon.V. P (ed), The Boundaries of Strict Liability in European Torts Law (Carolina Academic Press, 2004) 353.

IV. Strict liability of vehicle owners in Mongolia

1. General background

Mongolian civil codes have contained general strict liability provisions for dangerous activities and objects. For example, article 254 of the Civil Code of 1952, article 320 of the Civil Code of 1963, and Article 379 of the Civil Code of 1994 have established the liability of the person for possession or carrying out an activity dangerous to surroundings except for the circumstances of force major, or fault of the victim[46].

These regulations are the same as those of the Soviet Civil Code of that time, which has analogous rules to France. Therefore, until the new Civil Code was adopted in 2002, vehicle owners' liability was imposed by interpreting the general strict liability rule. In other words, special delict for vehicle owners' liability has comparatively new to Mongolian jurisdiction. Article 499 of CCM contains four sections containing vehicle owners' liability rules.

Section 499.1 of CCM stipulates that the possessor of a vehicle shall compensate all damages caused by the vehicle's operation, and the rest of the sections are vested in exemption rules. Section 499.2 establishes force majeure as a ground to exempt from liability except for an aircraft. Section 499.3 establishes a rule that the owner or the possessor shall be in *solido* with the operator unless he proves no opportunity is given to the operator. Moreover, section 499.4 states that "The owner or possessor of the vehicle shall be liable for the damage if he has assigned or transferred the vehicle to the operator."

As described above, section 499.1 provides grounds for strict liability for vehicle owners with defense rules. While this regulation provides a specific norm of vehicle owner's liability, like in Germany and Japan, it has generalizations in defining custodian, scope, and forms of compensation. Moreover, the clauses establishing defense rules have complications requiring proper interpretation. These issues will be discussed in the following pieces of this paper.

2. Main definitions: "transport vehicle" and "possessor/owner"

Determining the "transport vehicle" is not a problem in Mongolia since Article 3.1.1 of the Law on Road Traffic Safety describes it as a "device for transporting people, cargo, and installed equipment on the road" and Article 3.1.2 describes "mechanized vehicles" as a vehicle equipped with an engine, except for a moped, while the law also defines "moped" as "a two- or three-wheeled vehicle with an

[46] Mongol Ulsyn Irgenii Huuliin Huuli Togtoomj (tuuhen emhtgel) [Incorporation of Mongolian Civil Codes (historical collection) 1926-2002 (Ulaanbaatar, 2012).

engine capacity of no more than 50 cm3 and a technical speed of no more than 50 km per hour." This demonstrates that the determining vehicle is indirectly described depending on its dangerous nature, such as speed, which is counted in countries like Germany and Japan. In other words, the word “vehicle” in the Civil Code of Mongolia is determined by other specific legislation, while its Japanese and German terms are contained in the legislation itself.

The liable person under this regulation is described by the term “possessor” and “owner” in an interchangeable manner. Since the regulation itself does not have a clear definition of a liable person like in other jurisdictions having special regulations on liability for a vehicle, these terms require systematic interpretation within the general framework "ownership and possession” provisions of the Civil Code. Under Mongolian ownership rule, for moveable assets, “possessor” is meant to be “owner” for a third person[47]. If this is interpreted, every car driver must be considered as owner. Consequently, there would not be a difference between the operator and the possessor in a liability sense.

Therefore, the word “possessor” needs a more purpose-oriented interpretation. The article is purposed to establish strict liability for vehicle owners, not for the drivers who are meant to be negligent in a car accident. Both sections 499.3 and 499.4 of the Civil Code identify that the driver is a "user" rather than a "possessor". Therefore, it is considered that every person who temporarily takes possession of a car cannot be understood as the possessor, who is to hold strict liability.

Then the definition of "owner” of a vehicle includes both the direct one, who holds the vehicle for own purpose, and the indirect one, who has transferred or allowed the operation of the car. In the case of a long-term rental agreement, there is also a need to determine who will be the liable person.

According to Mongolian law[48], the possessors are divided into “direct” and “indirect,” depending on the purpose of possession. Particularly, the person who acquired possession of the thing for a certain period for their own benefit is a direct possessor. In contrast, the person transferring the items shall be an indirect possessor. In this case, a teleological or at least systematical interpretation of the law is needed to determine whether the renter (direct possessor) is using the vehicle for his own benefit or the rent holder (indirect possessor).

[47]Art. 91 of CCM “Article 91. Recognition of possessor as an owner 91.1. As for the third person, possessor is considered as an owner of the property. 91.2. Article 91.1 of this Law shall not be applied for the following cases: 91.2.1.if ownership right is based on State registration; 91.2.2.for the previous owner, if property, except for money and non-bearer's securities, was out of possession due to reasons not depending on the previous possessor's will (such as loss or theft, etc.)” https://legalinfo.mn/en/edtl/16532510240071.

[48] Art. 89 of CCM “89.3.Person acquired the right or obligation to possess assets for certain period of time according to one's own rights and legitimate interests, based on law or transaction, shall be direct possessor. The person delegating the authority shall be indirect possessor” https://legalinfo.mn/en/edtl/16532510240071.

3. Exemption from liability and scope of liability

As established in many other jurisdictions, force majeure is a basic defense of vehicle owners except for aircraft, according to section 499.2 of CCM. There is another defense implicitly expressed in section 499.3, stating, "A person who caused damage using a vehicle without the consent of its owner or possessor shall be liable for such damage. However, the owner or possessor of the vehicle shall not be released from liabilities if there was an opportunity to use the vehicle due to his/her default." According to this rule, the owner shall be exempted from liability if he proves there was no opportunity to use the car by the driver.

The other popular exemption grounds, such as the victim's fault or influence of a third party, are not stipulated in special vehicle owners' liability provisions. In this regard, the problem of a causal connection between the driver's fault of the vehicle and the damage caused would be raised according to general fault-based rules of delict.

There are no limits on the scope and amount of damages, such as in Germany and Japan, which have specific vehicle owner liability rules. Even though the article establishing vehicle owners' liability ground itself clearly states the damage to life, health, and material asset is to be compensated by the owner[49] , excluding moral damage, while judicial application broadens the scope of the damage, including moral damage referring to norms establishing the ground for general fault-based tort.[50]

V. Conclusive summary

The above-described analysis demonstrates that the strict liability for vehicle owners is widely accepted in most modern jurisdictions, while there are still differences in determining the scope of compensation, grounds for exemption from liability, and methods of interpretation and application of legal regulations.

There is a tendency to establish special legislations, at least special provisions in the Civil Code, for imposing liability to the vehicle owner since applying general strict liability norms into the case of vehicle owner requires broad judicial interpretation and sound explanation for liability without any fault. In this respect, special legal norms for liability facilitate legal certainty.

[49] Art. 499 of CCM "499.1. An owner of a passenger or freight forwarding transportation mean shall bear responsibility of the harm to others life, health and damage, loss or destruction of their property caused in course of using the transportation mean." https://legalinfo.mn/en/edtl/16532510240071.

[50] Supreme court decision No 001/HT2022/01152, dated November 23, 2022, http://shuuh.mn/single_case.

Though the liability is named “strict” due to the absence of fault on tortfeasor’s side, its “strict” character is diminished by introducing broad defenses that include force majeure, victim negligence, and third-party influence.

Mongolian vehicle owners’ liability rule is like German and Japanese, although it requires more judicial interpretation. As contained in the Civil Code, the regulation is formulated briefly and generally, while special legislative acts contain clearer, detailed regulations applicable to car accidents. Consequently, the terms used in Article 499 of CCM are interpreted in connection with traffic acts and general civil norms. On the other hand, such an active judicial interpretation would diminish the certainty of law and the purpose of strict liability.

From the analysis of the scope of compensation, liability caps, and exemption from liability, strict liability for a car accident is utilized to balance social and private interests, risk, and benefit of technological development. In this respect, Mongolia needs to develop the related legal norms at the legislative level, otherwise, judicial activism would be increased. Particularly, ceiling caps of compensation, the scope of the damage, and defense clauses, such as victim negligence, require further detailed analysis of Mongolian social and economic situations in this respect and good foreign practice.

【Research Article】

The 2013 Constitution of Vietnam: Improvement toward Constitutionalism and Challenges

TO Van Hoa*

THAI Thị Thu Trang**

Abstract

This paper examines the 2013 Constitution of Vietnam through the lens of constitutionalism. It focuses on two important aspects of constitutionalism, i.e. constitutional protection and human rights protection.[1] The paper first discusses the constitutional provisions on the constitutional supremacy, constitutional protection, followed by a critique on the challenges to the realization of constitutional supremacy and implementation of the human rights limitation clause in Vietnam. The paper shows that the 2013 Constitution of Vietnam does reflect, from its words, values of constitutionalism such as enhanced provisions on constitutional supremacy and human rights. However, the paper argues that Vietnam is facing significant challenges in bringing the supreme value to the constitution in practice.

Contents

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[1] Constitutionalism is recently accounted on in the Vietnamese legal research. It is proposed that the concept is composed of some essential elements, such as a constitution having the effect of limiting the exercise of power, people's sovereignty, human rights protection, constitutional protection and separation of powers. (See Son, Bui Ngoc, "The Constitutionalism in Vietnam", Journal of the State and Law, no. 11 (2009): 12 – 24; Dung, Nguyen Dang, "From Constitutionalism to the Constitution", Journal of Political Theories, no. 2 (2012): 81 – 84; Giao, Vu Cong and Tam, Nguyen Minh, "Some Theoretical Accounts on Constitutionalism", Jurisprudence Journal, no. 8 (August 2019): 24-28).

I. The 2013 Constitution and its supremacy

"The supremacy of the Constitution" can be understood as the accrediattion of the Constitution's ultimate value within the legal system in a theoretical sense, and the absolute adherence to the Constitution in the political landscape, state operations and social life. The "supremacy" in question means that as far as the political system is concerned, no institutions shall be prioritized over the Constitution, whether expressly or impliedly.

Compared to the previous versions of the Constitution, the 2013 Constitution has included provisions that reflected the maturity in common preconceptions about the supremacy of the constitution. That is expressed through provisions on the effect of the constitution, protection of the constitution and the due process for amendment and supplement of the constitution.

1. On the supremacy of the Constitution

The first two constitutions of Vietnam – the 1946 Constitution and the 1959 Constitution – have no assertions for the highest-priority status of the constitution. It was only until 1980 that the Constitution first claimed its supremacy in effect in the following terms:

> "The Constitution of the Socialist Republic of Vietnam is the fundamental law of the state, bearing in it effect of the highest order.
>
> All other legal provisions must adhere itself to the Constitution." [2]

This provision was carried over to the 1992 Constitution (amended in 2001).[3] Within the Vietnamese legal system, only the Constitution may be referred as the fundamental law, which

[2] Article 146, the 1980 Constitution.

[3] Article 146, the 1992 Constitution (as amended in 2001).

intends to emphasize that Constitution shall provide the foundation for the entire legal system and also serve as the highest law. Consequently, all legal documents must be in adherence to the Constitution.

The 2013 Constitution has carried on this sentiment that began in 1980 and 1992. However, its development has surpassed the precursors. Article 119 of the 2013 Constitution stipulates:

> "1. The Constitution is the fundamental law of the Socialist Republic of Vietnam, bearing in its effect of the highest order.
>
> All other legal provisions must adhere itself to the Constitution".

While the 1980 and 1992 Constitutions still regarded themselves as the fundamental law of the **State**, the 2013 Constitution has now assigned itself the fundamental law of the Country – the Socialist Republic of Vietnam. This is a minor difference in the wording, but it expresses a significant leap in perception. "Country" is an entity that consists of three components: borders, populations, and a state with a legal system to rule over the its land and populations. Meanwhile, "State" refers only to the governmental system as part of "Country". When something asserts its representation of "the Socialist Republic of Vietnam", it represents the highest regarded virtues to the entire country. In other words, the constitution has now been transformed from the law that establishes state structure to the law that protect the society by prescribing the highest values of the country by which state organs must abide. Vietnam The constitution certainly bears values more supreme than the will of state organs.

2. On the protection of the constitution

Protection of the Constitution is an essential issue to its supremacy in effect. If all unconstitutional violations are not defined and not applied and countered with appropriate measures, the offender will be free from all sanctions. As a result, there would be no meaning for the existence of the constitution. No matter how the constitution asserts its fundamentality and supreme legal status, all contents do not have any substance. Theories on constitutionalism always hold in highly developed countries with strong constitution protection mechanisms. For example, Germany has "Bundesverfassungsgericht", which means "the Federal Constitutional Court", and France has "Conseil Constitutionnel" – "the Constitutional Council" - which has recently obtained similar capacities to the German Bundesverfassungsgericht. It is obvious that without a proper constitution protection mechanism, the supremacy of the Constitution cannot be truly upheld.

In the constitutional history of Vietnam, the emergence of the Constitution did not coincide with the requirement to preserve it. The 1946 Constitution did not have a rule for constitutional protection. The 1959 Constitution did not mention constitutional protection either, though there was a rule that stipulated the capacity to indict for unconstitutional laws. Accordingly, the National Assembly Standing Committee reserved the power to "amend or annul all decrees, resolutions, and directives that are not adherent to the Constitution as well as laws and ordinances"[4]. There were only restrictions on unconstitutional documents ratified by the Governmental Council, and nothing on unconstitutional documents ratified by higher institutions like the National Assembly Standing Committee, the President, and the National Assembly itself. The 1980 Constitution made no substantive changes to the 1959 Constitution in this regard. Therefore, it was the State Council[5] that had the power to "suspend, amend or annul all resolutions, decrees, decisions of the Minister Council that are not adherent to the Constitution as well as laws and ordinances"[6]. Eventually, in the 1992 Constitution (amended in 2001), the power to contend with unconstitutional documents was considerably expanded. Except for documents ratified by the National Assembly, all unconstitutional documents from all government institutions may be subject to suspension or annulment. The power to annul unconstitutional documents adopted by the President, the National Assembly Standing Committee, the Government, the People's Supreme Court, and the People's Supreme Procuracy belonged to the National Assembly.[7] The National Assembly Standing Committee reserved the power to suspend such documents and recommend them to the National Assembly for annulment. On the other hand, the power to annul unconstitutional documents of the provincial People's Committee was reserved by the National Assembly Standing Committee. The power to suspend or annul documents ratified by a Minister, other members of the government, decisions and directives of the provincial People's Committee and its Chairman was reserved by the Government.[8] Even though the scope of subject documents was expanded, the 1992 Constitution (amended in 2001) did not address constitutional protection directly.

In the 2013 Constitution, all provisions regarding the annulment authority and the range of institutions subject to document annulment have been inherited entirely from the 1992 Constitution (amended in 2001).[9] Additionally, the 2013 Constitution has also provided new stipulations for the

[4] Clause 7, Article 53, the 1959 Constitution.

[5] This body is an equivalent of the National Assembly Standing Committee which emerges in the 2013 Constitution of Vietnam.

[6] Clause 8, Article 100, the 1980 Constitution.

[7] Clause 9, Article 84, the 1992 Constitution (amended in 2001).

[8] Clause 4 and Clause 5, Article 114, the 1992 Constitution (amended in 2001).

[9] Clause 10, Article 70; Clause 4 and Clause 7, Article 74; Clause 4, Article 98, the 2013 Constitution.

protection of the supremacy of the Constitution.

First, the 2013 Constitution was drafted with meticulous emphasis on legislative technique. All articles have been presented in precise legal writing. Therefore, their legality is more pronounced compared to the previous constitutions. Provisions on human rights, fundamental citizen rights are a few of the most notable examples. Whereas the 1992 Constitution (amended in 2001) only states in general that "rights and duties of citizens are determined by the Constitution and laws", the 2013 Constitution stipulates that "human rights, citizen rights shall only be restricted under the provisions of legislations in cases of national security, social order, social ethics and welfare of the community."[10] Whereas the 1992 Constitution (amended in 2001) only states in general that "all citizens are equal in the application of the law", the 2013 Constitution supplements it by stipulating "no one shall be discriminated by their political, civil, economic, cultural and social positions"[11]. Furthermore, whereas the 1992 Constitution (amended in 2001) stipulates: "Citizens are free to conduct business in accordance with the law", the 2013 Constitution supplements by stipulating: "Everyone is free to conduct businesses that were not expressly prohibited by the law".[12]

The above provisions of the 2013 Constitution clearly present significant improvements in legality compared to the 1992 Constitution (amended in 2001). The entire structure and legal wording of the 2013 Constitution underscore its gradual emancipation from its preconceived form of a political/legal manifestation, as was seen in the 1980 and 1992 Constitutions. It gradually becomes a zeitgeist legal document. It is clear how relevant parties in legal interactions established by the Constitution shall calibrate their behavior. Under constitutional rules of such pronounced legislative characteristics, unconstitutional behaviors can now be identified more easily, which results in a greater need for the constitutional protection.

Second, the establishment of the 2013 Constitution marks the first time in the constitutional history of Vietnam to explicitly monitor the problem of the constitutional protection and supporting mechanisms. According to the definition, constitutional protection means to contend and apply sanctions to all unconstitutional actions, regardless of the offender being any governmental institution. This is a key definition to preserve the supremacy of the constitution. In accordance with this sentiment, Clause 2 of Article 119 stipulates: "The National Assembly and its subordinate institutions, the President, the Government, the People's Supreme Court, the People's Supreme Procuracy, other institutions of the State, and the entire People bear the duty to protect the

[10] Article 51, the 1992 Constitution (amended in 2001); Clause 2, Article 14, the 2013 Constitution.
[11] Article 52, the 1992 Constitution (amended in 2001); Clause 2, Article 16, the 2013 Constitution.
[12] Article 57, the 1992 Constitution (amended in 2001); Article 33, the 2013 Constitution.

Constitution. Constitutional protection mechanisms shall be determined by the legislation."

This provision in Clause 2 of Article 119 is still considerably vague in clarifying the responsibilities of the constitutional protection. However, this provision has expressed three essential increments in the common perception of the constitutional protection in Vietnam. First, it presents the explicit imperative to protect the constitution. The term "constitutional protection" being first mentioned in this Constitution shows the comprehensive sentiment toward this problem. Second, the responsibility to protect the constitution is now pronounced. Even though this responsibility has not yet been assigned to a specific body, the need for a protection mechanism is determined. Third, a protection mechanism has been mentioned. Although Article 119 does not clearly stipulate it, there must be dedicated institutions for constitutional protection, and there needs to be a proper process for the prosecution of unconstitutional actions to be reviewed and determined publicly. The second sentence of Clause 2, Article 119 can be considered as a vivid call upon the National Assembly to legislate for constitutional protection. This is clearly a new and significant improvement on the conceptions and general thought on the supreme status of the constitution and the need to construct a constitutional protection mechanism in Vietnam.

3. On the procedures of amendment and supplement of the constitution

"The process of Constitution drafting has significant importance in legislation activity. A constitution that is constructed by a certain procedure with democratic technology and science, when all steps are carried out perfectly and subprocesses are logical and airtight, must be of high value." [13] However, the process to create or amend a constitution does not only ensure the quality of the constitution, but it also reflects the opinions on the power of constitutions in general. Because a constitution is a fundamental law with an absolute effect of a country, it requires a procedure to create, amend, and supplement that fully emphasizes such importance. Conversely, through the steps and procedures in the legislative process, one can also assume the conceptions and opinions based on the respect a society of any country pays to its constitution. The more airtight the constitution drafting process and the broader the public participation are, the higher the political credibility to the resulting constitution is, and by association, the more pronounced the effort to uphold the supreme effect of that constitution shall be.

In the constitutional history of Vietnam, the first constitution enacted in 1946 stipulated the procedure to amend the constitution. Firstly, the constitution amendment process shall only initiate

[13] Lien, Hoang The, *2013 Constitution: New breakthroughs*, Hanoi: Judicial Publishing House, 2015, page 285.

when a single-majority of votes within the Parliament is in favor of the amendment; then the Parliament shall vote to appoint a Constitutional amendment drafting committee. Finally, the changes ratified by Parliament shall be affirmed by the general public[14] through a referendum. In practice, due to the emergent situation regarding wars after the Constitution was ratified, this affirmation process was never implemented.

The 1959 Constitution did not inherit the procedure of its predecessor. This constitution stipulates in simplistic terms about the constitutional amendment with only two matters. First, only the National Assembly may amend the Constitution; second, the amendment shall only be initiated upon a single-majority of the vote among delegates of the National Assembly. [15] In the 1959 Constitution, there is neither stipulation on the procedure of the constitutional amendment, nor steps nor designations to take. The 1980 Constitution and the 1992 Constitution (amended in 2001) inherit both elements of the 1959 Constitution regarding the amendment.[16]

Unlike the three previous constitutions, the 2013 Constitution stipulates in considerable detail the process to enact and revise a constitution. The process shall be suggested only by either the President, the National Assembly Standing Committee, the Government, or at least one-thirds of all the National Assembly delegates. A two-thirds majority of the National Assembly is required to endorse the suggestion. Then, the revision process can begin officially by the National Assembly establishing a Constitutional Drafting Committee. This committee shall be established based on the recommendations of the National Assembly Standing Committee. In the drafting process, the drafting committee must organize polls for the People to express their opinions. Constitutional changes shall be adopted by at least two-third majority of the National Assembly. Constitutional referenda may be held should the National Assembly deem it necessary.[17]

The participation of the people in the process of creating and amending the Constitution under the 2013 Constitution is significant. This process requires the poll and the opinion review of the People as a prerequisite before a draft is presented to the National Assembly. [18] There are no specific requirements for the level of participation. However, in the resolution of the Constitution, each Vietnamese individual and household must be afforded an opportunity to participate in the opinion polling. The 2013 Constitution also stipulates the extent to which the People assert their role in deciding whether or not a Constitution draft would be ratified through a referendum. This is similar

[14] Article 70, the 1946 Constitution.
[15] Article 112, the 1959 Constitution.
[16] Article 147, 1980 Constitution; Article 147, the 1992 Constitution (amended in 2001).
[17] Article 120, the 2013 Constitution.
[18] Clause 3, Article 120, the 2013 Constitution.

to the affirmation vote as stated in the 1946 Constitution. However, the difference lies in this process being optional and may only be initiated upon resolution of the National Assembly.[19]

Therefore, in general, the process to create and amend the Constitution stipulated in the 2013 Constitution is thorough and airtight with detailed procedures. This reflects the consistency and the priority of the Constitution. The participation of the population is mandatory, and in certain circumstances, it provides the definitive impact upon the creation and amendment of such constitution. Along with the removal of the exclusive power to enact a constitution of the National Assembly by the 2013 Constitution as its precursor, the 2013 Constitution has attached itself more firmly and fundamentally to the base power vested in the people. This element reinforces the political credibility and priority status of the Constitution in a Constitutional Socialist Vietnam, especially regarding the dynamics between the institutions of the same political system.

II. The 2013 Constitution and the protection of human rights

Compared to the 1992 Constitution (amended in 2001), the 2013 Constitution has expressed more clearly on the perception in Vietnam regarding the natural human rights. The 2013 Constitution emphasizes the comprehensive approach to human rights as seen in Article 3 and Clause 1 of Article 14 of the 2013 Constitution which state that the Socialist Republic of Vietnam recognizes, enshrines, and protects human rights. This shows that the State fully understands the dynamics between itself and human rights as a principle. This sentiment was not clear enough in Article 50 of the 1992 Constitution (amended in 2001). In Chapter II of the 2013 Constitution, civil and political rights are firstly mentioned instead of economical, cultural, and social rights as seen in the 1980 Constitution and the 1992 Constitution.

For the respect for natural, comprehensive, and universal human rights, the 2013 Constitution has also expressed a development in its conception of the dynamic between state agencies and human rights in comparison with the 1992 Constitution (amended in 2001). Rather than being bodies that "grant" or "protect" human rights, state agencies are responsible for recognizing, respecting, and ensuring the practice of human rights. The bound of state agencies to human rights is now highly legislative. In other words, the 2013 Constitution now bars state agencies from being "arbitrary" in matters concerning human rights. This is reflected by the following aspects.

First, Clause 2, Article 14 of the 2013 Constitution clearly stipulates a condition to limit rights,

[19] Clause 4, Article 120, the 2013 Constitution.

stating that "human rights and citizens' rights can only be restricted according to the provisions of legislative acts". Though this regulation only places conditions on formality, it is highly normative. In the current legal system of Vietnam, almost any state agency has the right to issue legal documents. Previously, there was no provision in the Constitution that is similar to Clause 2, Article 14 of the 2013 Constitution, which means that any legal document and accordingly almost every agency could restrict human rights. The state, whether it is a central or local state administrative agency, can arbitrarily restrict human rights in a constitutional and legal manner. In accordance with the provisions of Clause 2, Article 14 of the 2013 Constitution, all restrictions on human rights must comply with the law adopted by the Legislature, which means only in cases where the National Assembly has foreseen in the law. Any legal document with a restrictive effect against human right that has not been specified or contemplated in a legislative act is considered unconstitutional. Any restrictions on human rights, therefore, must be authorized or contemplated by the National Assembly. Government agencies are no longer allowed to arbitrarily restrict human rights.

Second, many provisions in the 2013 Constitution on specific human rights, especially civil and political rights, clearly state that any restrictions, including procedures for implementation or assurance of implementation must comply with the provisions of the legislation. In the 1992 Constitution (amended and supplemented in 2001), common phrases are found in the provisions on specific human rights that “citizens have rights… as prescribed by law” or “[infringement of rights of citizens] must comply with the provisions of law”. For example, Article 71 of the 1992 Constitution (amended and supplemented in 2001) stipulates that “No one shall be arrested without a decision of the People's Court, a decision or approval of the People's Procuracy, except for when they are caught red-handed. The arrest and detention of people must be in accordance with the law”; Article 73 states that “No one may enter another person's residence without his consent, except in cases permitted by law; the search of residences, the opening, controlling and seizure of citizens' correspondence and telegrams must be conducted by competent persons in accordance with the law". If the above provisions are exercised by promulgating legal documents, state agencies could infringe on human rights and that would still be considered completely constitutional. It would only take a written decision or a normative document adopted by an administrative agency to conduct an infringement of human rights which is still considered "lawful” or” permitted by law” or “as required by law”.

In the 2013 Constitution, such arbitrary terms have been eliminated by the provision that “human rights, citizen rights may only be restricted by the legislation”. Arrests are redefined as follows: “No one shall be arrested without a decision of the People's Court, or a decision or an

approval of the People's Procuracy, except in the case of a criminal being caught red-handed. The arrest, detention and imprisonment of people are prescribed by legislation."[20] Intentional entry into another's residence is regulated as follows: "The search of a residence is prescribed by legislation."[21] The opening and seizure of letters and telephones are regulated as follows: "No one may open, control or seize correspondence, telephones, telegrams, and other forms of private information exchanges of other people, unless it is allowed by legislation."[22] This adjustment in the way of regulating human rights in the 2013 Constitution adds constitutional value to human rights and significantly limits the arbitrariness of state agencies when dealing with issues of human rights. As affirmed by key members of the 1992 Constitutional Amendment Committee, "this represents progressive thinking in acknowledging the possibility of the direct application of constitutional norms, and, at the same time, noting the binding force on the State to take responsibility for the protection and the assurance of human rights."[23] This remark is reasonable because if a government's decree has limiting effect over a fundamental right without a manifest permission in a legislative act, such decree shall be in direct violation to the Constitution and Article 14, Clause 1 of the 2013 Constitution can be applied to annul the decree. On the other hand, if a legislative act bears provisions that have limiting effect over a fundamental right and the limitation is not based on the interest of national security nor public morality, health, order or safety, the same constitutional provision may be applied to hold such legislative act unconstitutional.

Third, even though the phrase "according to the law" is still used in some provisions on human rights in the 2013 Constitution, the discretion of state agencies regarding human rights is limited compared to the 1992 Constitution (amended in 2001). For instance, Article 23 of the 2013 Constitution stipulates the right to freedom of movement as follows: "Citizens have the right to freely move and reside in the country, have the right to go abroad and return home from abroad. *The exercise of these rights is prescribed by the law*." [24] Similarly Article 25 regulates that citizens have the right to freedoms of speech, the press, access to information, assembly, association and demonstration. *The exercise of these rights is prescribed by law*." [25] On the other hand, the 1992 Constitution (amended and supplemented in 2001) stipulated the right to freedom of movement as

[20] Clause 2, Article 20, the 2013 Constitution.
[21] Clause 3, Article 22, the 2013 Constitution.
[22] Clause 2, Article 21, the 2013 Constitution.
[23] Hung, Sinh Nguyen et al., Constitution of the Socialist Republic of Vietnam in 2013 and legislative achievements during the 13th National Assembly term. pg.102.
[24] Author extra in italics.
[25] Author extra in italics.

follows: “Citizens have the right to freely move and reside in the country, have the right to go abroad and return from abroad *in accordance with the provisions of the law*” [26]. The freedom of speech, the press, assembly, etc. were defined as follows: “Citizens have the right to freedom of speech and freedom of the press; have the right to be informed; have the right to hold meetings, to form associations, and to demonstrate *in accordance with the provisions of the law*.”[27]

Thus, if it is stipulated that citizens have certain rights (freedom of movement, freedom of speech, freedom of the press, etc.) "in accordance with the provisions of the law" as the 1992 Constitution (amended and supplemented in 2001) means, it implies that the entire scope as well as procedures and limitations are decided by state authorities, including the National Assembly as well as the government and the governmental agencies, when promulgating legal normative documents. In the 2013 Constitution, it is recognized that people have those rights first and then specifically states that "the exercise of these rights is prescribed by law", which means that the law, including administrative regulations, only provides on procedures for people to exercise the human rights recognized by the Constitution. Combined with the provisions on restriction of rights in Clause 2, Article 14 makes it clear once more that all restrictions on rights must be stipulated or envisaged by legislation, which means, authorized by the National Assembly. Other state agencies, by their own promulgated legal documents, may prescribe only the manner and procedures for exercising their rights and must not violate the limitations set forth by the legislation.

The provisions on human rights of the 2013 Constitution not only bring about truly progressive and universal values of mankind, but also serve as a tool to restrict the arbitrariness of state agencies for the purpose of ensuring human rights. This clearly demonstrates the improvements in the spirit and ideology of the socialist rule of law that Article 2 of the 2013 Constitution has recognized.

III. Challenges against the supremacy of the 2013 Constitution

1. Preserving the supremacy of the Constitution and challenges in establishing a constitutional protection mechanism in Vietnam.

Constitutional protection is difficult because the constitution, as the fundamental law, regulates the organization and sets the standard for the operation of the nation's highest state organs from the National Assembly as the highest state power, to the President as the Head of State, to the

[26] Article 68, the 1992 Constitution (amended in 2001). (Author extra in italics)

[27] Article 69, the 1992 Constitution (amended in 2001).

Government as the highest state administrative agency and to the Supreme People's Court as the highest judicial body. The actors who violate the constitution can be powerful authorities at both central or local levels, making constitutional protection even more difficult to be done. Yet, the issue is important for the guarantee of constitutional supremacy in practice.

To protect the constitution, countries must build a strong constitutional protection mechanism. Without a constitutional protection mechanism, there will be no way to prevent or deal with unconstitutional activities conducted by powerful state agencies. In the course of making the 2013 Constitution, the drafters were already aware of the need for a specialized constitutional protection agency. In fact, the 2013 Draft of the New Constitution, which was published for public consultation in January 2013, included the Constitutional Council as the constitutional protection institution, along with two other constitutional bodies, the National Election Council and the State Audit.[28] However, at the final stage of the National Assembly session for approval, the Constitutional Council was removed from the draft. Instead, the 2013 Constitution stipulates that there should be a constitutional protection mechanism specified by legislation. This shows that the construction of a constitutional protection mechanism in Vietnam still faces many obstacles, and it is still not ready for the 2013 Constitution to recognize the presence of a constitutional protection agency as an independent constitutional body. Until now, 10 years after the 2013 Constitution took effect, the National Assembly has still not been able to make a law specifically providing for an independent, effective and efficient constitutional protection mechanism.

Based on the criteria for building a constitutional protection mechanism, we can see that the difficulty of establishing a constitutional protection agency in Vietnam comes from the particularity of the principle for the allocation of state power. According to the Party's principle, the model for protecting the constitution must be "suitable to the political system and specific situation of our country".[29] Regarding the organizational and operational characteristics of the Vietnamese state apparatus, the socialist state apparatus model attaches great importance to two fundamental principles: the people's sovereignty and the unity of power. Accordingly, the National Assembly, as the highest representative body, is determined to be the agency with the highest position of power in the state apparatus. There is no intention or vision of any other agency more powerful than the National Assembly. Even when the 2013 Constitution was adopted with an emphasis on the necessity

[28] Chapter X, the Draft of the New Constitution published for public consultation in January 2013. The Constitutional Council is stipulated in Article 120.

[29] According to the conclusion of the 5th plenum of the XI Central Committee (quoted in Report No. 287/BC-UBDTSĐHP on the explanation, reception and revision of the 1992 Constitution Draft on the basis of the people's opinions of the Drafting Committee for Amendments).

of controlling state powers,[30] yet no mechanism has been foreseen for the control over legislative power. This is the main reason leading to the difficulties in building the constitutional protection mechanism in Vietnam. Because while the National Assembly is certainly a potential subject of constitutional control, no willingness or intention of such constitutional control institution has been made available.

2. On the implementation of the principle of limiting human rights under Clause 2, Article 14 of the 2013 Constitution.

The advantages of setting the principle of restriction of rights in the 2013 Constitution have been mentioned above. However, the implementation of this principle is also a big challenge. The first difficulty comes from the vague interpretation of the principle's content, which leads to confusion in the implementation process.

Clause 2, Article 14 of the 2013 Constitution reads as follows:

> "Human rights and citizens' rights can only be restricted according to the provisions of legislation in cases of necessity due to reasons concerning national defense, national security, public safety, public morality, public health."

Currently, the common interpretation of the provision is that any restriction of rights can only be made when such restrictions have been contemplated by a legislative act of the National Assembly. This means that the National Assembly must "foreshadow" or "pre-approve" such restrictions. For instance, the law that the National Assembly prescribes on the limitation of rights will set the framework for the restriction. In other words, the establishment of a law will establish the principle of restriction; it is to limit the content of the restriction; it is to identify the subject with limited authority. The Government, ministries, or local authorities rely on the issuance of regulatory documents. A criminal offense under the law may restrict a right [mostly stipulating how the restriction of a right is to be exercised] but must "follow" the framework provided by the law. However, authorities and researchers hold different views on the explanation of this principle in practice.

The first group of views proposes that the phrase "restriction as prescribed by legislation" means "restriction as prescribed by law", which can be understood as any form of restriction of rights could

[30] Clause 3, Article 2, the 2013 Constitution.

be provided by and specified in legislative acts or governmental regulations. In other words, human rights can be effectively restricted by any form of law.[31]

The second group of views deems that any restriction of rights must be prescribed clearly in statutory laws adopted by the National Assembly. In other words, the National Assembly, must not only allow for any restriction of human rights but also determine, via its legislation, the scope and details of such restriction. Government and governmental agencies can issues legal regulations but their regulations must not include provisions that have the effect of limiting rights.[32]

The third group of views holds that "restriction as prescribed by legislation" means the restriction of the rights specified in the law or legal documents of state agencies authorized by the National Assembly.[33] Based on this view, apart from the National Assembly, state agencies authorized by the National Assembly to legislate in specific fields will be able to proactively regulate the issue of limitation of rights in the fields of their mandate. However, this understanding partially does not meet the spirit of the 2013 Constitution for setting out the principle of limiting rights to control the restriction of the rights of state agencies, because Vietnam still lacks legal provisions to ensure the control over legislative authorization activities. For example, there is no regulation on the responsibility of the National Assembly for the inspection and supervision of documents. Though regulations are promulgated on the basis of legislative mandate, there is no clear regulation on the time limit for legislative authorization.

Although the application of this principle in the understanding of the third point of view is prominent, it has not really eliminated the other two views. The ambiguity in the understanding and application of the principle of limitation of rights in Clause 2, Article 14 of the 2013 Constitution above shows an urgent need for an official explanation from the body competent to interpret the constitution. Otherwise, it will lead to arbitrary application of this principle.

The next difficulty posed in the implementation of the principle of restriction of rights is the determination of conditions for restricting rights: "in case of necessity for reasons of national defense, national security, social order and safety, social ethics, and public health". How to ensure that the

[31] Dat, Bui Tien, “The Principle on Limitation of Human Rights: Meaning, the Need for Interpretation and Application”, Legislative Research Journal, no 19 (August 2017): 13-20.

[32] Tuan, Dang Minh, “Issues That are Untouched by the Draft Amended Constitution”, Legislative Research Journal, no 5 (March 2013): 54-63; Nghi, Pham Huu, “The Issue Concerning Restriction of Human Rights in International Law, National Constitutions and the 2013 Constitution of Vietnam”, Vietnam Journal of Human Rights Law, no. 1, 2018: 39-28.

[33] Quang, Truong Hong, “The Need to Explain the 2013 Constitution's Restrictions on Human Rights and Civil Rights", *Journal of the State and Law*, no. 3 (March 2018): 3 – 13; Hoa, To Van, "The Thought of Limiting Human Rights and the Principle of Limiting Constitutional Fundamental Rights under the 2013 Constitution the 2013 Constitution", Jurisprudence Journal, no. 8 (August 2018): 28-42.

provisions restricting that right have met the conditions set forth by the Constitution? How to assess the "necessity" to restrict rights in those five areas? Practices show that the determination of meeting constitutional conditions is completely based on the subjective will of legislators, in case there are individuals and organizations that think that the regulation on limiting certain rights is unnecessary. Is it extremely difficult to solve? In many countries, the role of the Court in the control of limited rights is very important. Through its adjudication function, the Court can assess whether the provisions restricting rights are really necessary, appropriate, and proportionate to the purpose of the restriction. But in Vietnam, the Court has not yet fully promoted its position in the matter of considering the constitutionality of a law in general and the issue of limited rights in particular. On the other hand, according to current legal regulations, the scope of lawsuits to court does not include suing legal documents, even if the Court during the adjudication process detects legal documents showing signs of contravention of the law. Based on the Constitution, the Court can only recommend competent state agencies to consider amending and supplementing such legal documents and request agencies to respond to the Court on the results of handling of such legal documents. The Court settle the case on the basis of giving recommendations in accordance with law"[34]. Those provisions are not enough for the Court to control whether the restriction of the rights of state agencies is really in accordance with the necessary conditions in one of the five cases set out by the Constitution. On the other hand, the lack of a constitutional protection mechanism as mentioned in the first challenge is also the reason why it is difficult for Vietnam to assess whether the process of implementing the principle for limiting the rights of state agencies has been consistent with the spirit of the 2013 Constitution or not.

3. On the dynamics between the Constitution, the law and Party leadership

A society under the rule of law is a society in which all organizations and individuals, in any respect, must respect and comply with the common standards of society, which are usually defined in the constitution. Political parties, the state, social organizations and the people need to be deeply aware of the supremacy of the constitution and law to ensure the appropriateness in the process of exercising their power. The rule of law creates a principled order in the arrangement of power positions of the political party, the state and the people, expressed through the relationship between the constitution, the law, and the leading role of the political party.

The rule of law society derives from the ideal that social power within a country belongs to the

[34] Clause 7, Article 2, the Law on Organization of People's Courts 2014.

people. The people are the subject with the highest power in deciding the issues of society. The instrument for the people to protect their supreme power is the constitution. Next, the political party, especially the ruling party, is the subject that has the role of leading the country's development. In the rule of law state, the ruling party can only do this through holding state power [a legitimate state established on the basis of a constitution and empowered by the people]. Thus, the relationship between the state, the ruling party and the people in the exercise of power is quite complicated and it is difficult to distinguish whether the domination of the party or the people is decisive for the exercise of power of the state.

We can see this issue more clearly in the practice of exercising the legislative power - "a particularly important power of a society"[35]. In this regard, the state is the official subject with legislative power, but the ruling party governs legislative activities through party members who are members of the parliament and the government. They will be expressed and supported by MPs for adoption. On the other hand, the legislative power will be controlled by the people to ensure that the enacted laws protect people's lives because the people are the subjects of establishing the state by voting and the functions of the state government. Fundamentally, the state is for the people. So, who will have the ultimate decision on the content of a law? In a society under the rule of law, the ruling party can dominate and direct the parliamentary and parliamentary activities through the role of politicians holding state positions. The quality of a law is assessed based on its ability to meet the needs of the people. Ensuring this is first and foremost that laws must be constitutional. Even if a law is supported by politicians, if it is contrary to the constitution, i.e. it goes against the general spirit of the social contract, it must be amended or repealed. Thus, constitutional control in legislative activities is very important and must be ensured.

As analyzed in terms of the 2013 Constitution and the rule of law, in the spirit of upholding the rule of law, the 2013 Constitution partly identified the role of the ruling party, the state, and the people in the exercise of power. However, Vietnam's legal and political tradition has not entirely ensured that principled order. The influence of the Party during the struggle for national liberation and in the period of national construction and development has built up the people's deep trust in the Party's leadership, creating the concept of the supremacy of the Party to decide on state and social issues. This is clearly reflected in the Constitution of Vietnam. Both the 1980 Constitution and the 2013 Constitution affirm the leadership of the Communist Party in state and society by a specific

[35] Giang, To and Cuong Nguyen Van, "The Ruling Party Through Legislative, Executive and Judicial Power in Vietnam", Vietnam Lawyers Association, Dec 13, 2022, http://hoiluatgiavn.org.vn:8080/dang-cam-quyen-thong-qua-quyen--lap-phap-hanh-phap-va-tu-phap-o-viet-nam-d2552.html.

provision in the constitution. Since then, the activities of the state and society are practically under the leadership of the Party. In view of the implementation of the 2013 Constitution, the concept of the Party's ultimate decision is a challenge for ensuring constitutional supremacy.

Returning to the exercise of the legislative power to prove this statement. Just like in other modern countries, the ruling party governs the activities of the state, especially the legislative ones. In Vietnam, this dominance has more pronounced manifestations. Not only the role of the National Assembly deputies as Party members to participate in the legislative process, but the drafting of bills is also often directed by the competent committee. The opinions of the committees determine the direction of the bill, even the specific content of the bill[36]. If it is approved by the Party Committee or with bills related to important issues, which may be the consensus of the Politburo or the Central Committee of the Party, that will be the basis for deciding the bill to be approved by Parliament. Meanwhile, the review of constitutionality is not an independent stage. It may arise at the stage of application of the law, which has been accompanied by the examination and appraisal of the bill. The concept of the Party's supreme decision-making has created the attaching importance to the conformity with the Party's guidelines, when bills are considered for approval, and it has led to the restriction of constitutional activities in Vietnam. Thus, the tradition of operating political power in Vietnam creates ambiguity in determining the position of power among the ruling Party, the State, and the people. This entails the challenge of linking the People's power to the constitutional protection.

V. Conclusion

The conception of the 2013 Constitution marks an advancement in the thoughts on constitutionalism in Vietnam. Compared to previous constitutions, components of constitutionalism are more clearly manifested, at least from the wording of the new constitutional provisions. The 2013 Constitution has more comprehensively affirmed the constitutional supremacy and initially affirmed that a constitutional protection mechanism needs to be built. Not only that, the 2013 Constitution placed the Party, State together with the people in the spirit of respecting the law and further strengthened the sense of protection of human rights and basic rights of citizens in modern

[36] Giang, To, Cuong Nguyen Van, "The ruling party through legislative, executive and judicial power in Vietnam", http://hoiluatgiavn.org.vn:8080/dang-cam-quyen-thong-qua-quyen--lap-phap-hanh-phap-va-tu-phap-o-viet-nam-d2552.html. Accessed on 22/10/2021.

society. Although the advantages of the 2013 Constitution on the idea of the rule of law have been recognized, they are accompanied by considerable challenges in the implementation of the Constitution. The lack of a specific constitutional protection mechanism and legal-political traditions makes the awareness of constitutional issues not raised. The problem of constitutionalism in Vietnam is not about what are stipulated in the constitution but how to address theses issues fully and properly so that constitutional values really thrive in practice.

【研究ノート】

会社法第 9 条 3 項の概要とその適用：モンゴルにおける会社法の実務に進点をあてて

The Concept of Article 9.3. of Company Law and its Application: Focusing on Company Law Practices in Mongolia

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GANKHUYAG　Davaanyam*

Abstract

According to a bedrock principle of Company law, a shareholder has limited liability towards their company's creditor. This principle is stipulated in Article 9.3 of the Company Law of Mongolia. However, some lower courts in Mongolia have applied Article 9.3 of the Company Law differently and have imposed proportional liability on shareholders of limited liability companies (LLC) rather than a limited liability.

Therefore, this paper closely examines the limited liability of shareholders as a bedrock principle of corporate law and its basis. In addition to the above, this paper also discusses how applying Article 9.3 of the Company Law to impose proportional liability on shareholders may not be feasible, and even if it were feasible, there are difficulties in terms of litigation costs and debt collection. Furthermore, imposing proportional liability on shareholders of LLC may adversely affect the economy and society in the situation of Mongolia, where 99.7% of company forms are LLC.

In conclusion, this paper proposes that the court should apply provisions related to distortion of limited liability, such as Article 9.5(judgment proofing) of the Company Law, and article 19.1(fraudulent transfer) of the Bankruptcy law rather than applying Article 9.3 of the Company Law if there is an abuse of corporate form.

目次

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I. はじめに

モンゴルでは、営利活動を行う際に、一般的に利用されるのが会社である。統計局よると、全体的に営業活動を行っている 9 万 6336 千の事業者[1]のうち、7 万 3221 千（約 76%）は、会社の形態を選択している[2]。その理由の一つは、会社法第 9 条 3 項における株主有限責任の原則にあると考えられてきた[3]。

しかし、近年の有限会社[4]に関する裁判実務では、会社法第 9 条 3 項の文言を比例無限責任と解釈し、会社の債務につき、株主に対して比例無限責任を課す判決が少数みられる。とりわけ、モンゴルの会社形態として有限責任を原則とする株主会社と有限会社があるものの、その 99.7%が有限会社となっている。そこで、比例無限責任を肯定する裁判例がもたらす経済的社会的効果が大きいため、会社法第 9 条 3 項の適用が注目されている。

そのため、本論文では、株主責任を巡る理論や裁判実務などを通して、モンゴル会社法第 9 条 3 項の概要とその適用を明らかにすることが目的とする。

II. 原則としての株主有限責任とその便益

株主有限責任は、1991 年の事業活動法（Аж ахуйн үйл ажиллагааны тухай хууль）により、はじめてモンゴルに導入された[5]。その後、1995 年の組合・会社法(Нөхөрлөл, компанийн тухай хууль)[6]、1999 年の会社法(Компанийн тухай хууль)[7]を通じて、2011 年の現行会社法(Шинэчлэн найруулсан Компанийн тухай хууль)に継受された。

1991 年の事業活動法と 1995 年の組合・会社法では、会社形態として、株式会社と有限会社が設置され、両社において株主有限責任が採用された[8]。ただし、株主有限責任は、学説上原則として主張されておらず、裁判実務上も、それを巡る紛争が起きることはなかった[9]。その理由は、市場経済へと体制移行時のモンゴルでは、会社の仕組みについて知識を有するものが少なかったほか、会社法の実務が定着していなかったからいえる。

その後、1999 年の会社法における株主有限責任は、はじめて会社の法人格とは独立した

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[1] 個人・組合・会社を含む。

[2] モンゴル統計局「ビジネス ID リストに載っている商人・その数・営業継続期間・その形態・業種」(最終閲覧日 2022 年 10 月 16 日：http://www.1212.mn/)。

[3] Б.Амарсанаа, Компанийн засаглал, компанийн эрх зүйн тулгамдсан асуудал, 12 (2012); J.Anderson, G. Korsun & P. Murrel, Ownership, Exit and Voice after Mass Privatization: Evidence from Mongolia, 7 *Economics of Transition* 7, no.1 (1999): 226-227 ; ХЗҮХ, Бизнесийн эрх зүй, 48 (ХЗҮХ, 2003) .

[4] 日本における特例有限会社に相当。

[5] 23 条 1 項, Anderson, Korsun & Murrel, “Ownership, Exit,” 226.

[6] 29 条 1 項（株式会社）、87 条 1 項（有限会社）。

[7] 会社法第 9 条 3 項。

[8] 会社法第 87 条 1 項。

[9] Д.Дүгэржав, Ж.Дашдорж, Компанийн эрх зүй, 47-49 талууд (2003) によると、株主の債務につき、会社が責任を負うべきかという法人格に関する議論が存在していた。

条項として新設され[10]、その文言がそのまま、2011 年の現行会社法第 9 条 3 項に継受された。学説上も、株主有限責任は、会社法における大原則として評価された[11]。学説上の立場は、法に関する経済学分析(economic analyses of law)に依拠し、所有と経営が分離されている株式会社のみならず、有限会社に及ぶものであった[12]。

株主有限責任の経済的便益として従来から主張されてきた「①社会に散在する資本の集中[13]、②監視費用の削減[14]、③株式取引市場の流動化[15]、④分散投資の促進[16]、⑤投資決定の容易化[17]等」は、所有と経営が分離されている株式会社が中心となるものである[18]。しかし、最近では、会社形態を通して事業を行う場合に、会社債権者は会社の責任財産に対する監視に集中できるため、監視費用が減少するという議論が有力である[19]。この点で、所有と経営が分離されていない有限会社における有限責任も、社会的効率性の観点から支持される[20]。

このように、モンゴル会社法における株主有限責任は、株式会社のみならず、所有と経営が分離されていない有限会社においても、その経済的便益が認められ、大原則として評価される。

III. 会社法第 9 条 3 項の概要とその適用

会社法第 9 条 3 項では、「株主は、会社の債務につき責任を負うことなく、自己保有の株式数（割合）に限って責任を負う」と規定されている。この条項は、1999 年の会社法により、2011 年の現行会社法に引き継がれた。

しかし、確定判決に基づいて強制執行を行う執行機関は、同条項における「株主は…自己

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[10] 会社法第 9 条 3 項。

[11] Г.Дававаням, Морал хазардын асуудлаас үүдэх толгой компанийн хариуцлага, 16 тал (Адмон., 2020).

[12] Адил.

[13]Henry G. Manne, Our Two Corporation System: Law and Economics, *Virginia Law Review.* 53 no. 2 (1967): 262.

[14]Frank H. Easterbrook & Daniel R. Fischel, Limited Liability and the Corporation, *Chicago Law Review* 52 no. 1 (1985): 95. 有限責任によって、株主責任が限定されることになるので、会社の経営に対する株主の監視費用が大幅に軽減される。See Richard A. Posner, The Rights of Creditor of Affiliated Corporation, *Chicago Law Review* 43 no. 3(1976): 503. また、株主が負担すべき監視費用の削減は、所有と経営の分離が促進されることにも繋がる。See Nina A. Mendelson, A Control-Based Approach to Shareholder Liability for Corporate Torts, *Columbia Law Review* 102, no. 5 (2002): 1217. Г.Дававаням, "Морал хазард," 16 参照。

[15] Paul Halpern, Machael Trebilcock & Stuart Turnbull, An Economic Analysis of Limited Liability, *Toronto Law Journal 30* no. 2 (1980): 136-137; Easterbrook & Fischel, "Limited Liability," 96.

[16]Halpern, Trebilcock & Turnbull, "An Economic Analysis," 142; Easterbrook & Fischel, "Limited Liability," 96.

[17]Halpern, Trebilcock & Turnbull, "An Economic Analysis," 143-145; Easterbrook & Fischel, "Limited Liability," 97.

[18]これらが閉鎖会社又は親子会社に及ばないことについて、Halpern, Trebilcock & Turnbull, "An Economic Analysis," 147-149; Phillip I. Blumberg, Limited Liability and Corporate Groups, *Journal of Corporation law* 11, no. 2 (1985-1986): 623-626; Г.Дававаням, "Морал хазард," 16 参照。

[19]Henry Hansmann & Reinier Kraakman, The Essential Role of Organizational Law, *Yale Law Journal* 110, no. 3 (2000): 399-400; Г.Дававаням, "Морал хазард," 16 参照。

[20] Г.Дававаням, "Морал хазард," 18-19.

保有の株式数（割合）に限って責任を負う」という文言を、有限会社において比例無限責任として捉え、株主に比例無限責任を課している。つまり、「株主は…自己保有の株式数（割合）に限って責任を負う」というのは、保有株式割合に基づく比例無限責任を意味するものであると解釈している。

そこで、執行機関の差押命令に関する裁判例の中には、執行機関が採用している比例無限責任を否定したうえで、有限責任を肯定するものと、比例無限責任を肯定するものという対立する二つの見解が存在する。裁判評議会(Shuukhiin Erunhii zuvlul)が運営する Shuukh.mn という裁判例の公開サイトで 9 条 3 項というキーワードで検索する（2022 年 08 月 15 日）と、株主有限責任を採用する判決が 5 件[21]、比例無限責任を採用する 2 件がある[22]。

1. 株主有限責任を採用する裁判例

ここでは、株主有限責任を採用する 5 件のうち、著名な裁判例を二つ紹介することに留まる[23]。

バヤンズルフ・スフバートル・チンゲルテイ区 2015 年 10 月 16 日第 6929 号判決

【事案】

首都執行機関は、グンベイス有限会社の債務返済の一環として、同社の株式の 34%を保有する株主である T.ダムデンドルジの所有するトヨタクラウン乗用車を 2015 年 5 月 10 日に差押えたため、2013 年 11 月 2 日に T.ダムデンドルジから当該乗用車を購入した B.バドラルが当該差押命令の取消を裁判所に対して求めた。

本件において、以下の事実関係が認定された。第一に、グンベイス有限会社の株式の 34%を T.ダムデンドルジが保有している。第二に、民事裁判所において、グンベイス有限会社には 39,672,000 トゥグルグ（約 180 万円）の債務返済義務があるため、首都判決執行機関が T.ダムデンドルジの所有するトヨタクラウン乗用車を差押えた。第三に、B. バドラルは、トヨタクラウン乗用車の価格を全部支払い、占用していた。

【判旨】

「首都執行機関は、法人における強制執行による債権回収をする際、グンベイス有限会社の株式の 34%を保有すること及び同社の発起人であることを理由に、T.ダムデンドルジの名義に登記されていた乗用車を差押えたのは民法第 25 条 1 項（法人格の条項）、会社法第 9 条 3 項（株主有限責任）…等に違反している。」

「したがって、グンベイス有限会社の債務返済の一環として差押えられた当該乗用車は他人が所有すること及び首都執行機関の強制執行による差押え手続きは違法であるとして、

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[21] Сүхбаатар дүүргийн шүүх, 2014.06.23 №2489; Баянзүрх, Сүхбаатар, Чингэлтэй дүүргийн шүүх, 2015.10.16 №6929; Баянзүрх, Сүхбаатар, Чингэлтэй дүүргийн шүүх, 2015.11.04 №Дугаар 7425; Улсын Дээд Шүүх, 2016.12.09 №001/ХТ2016/011373; Улсын Дээд Шүүх, 2018.04.17 № 001/ХТ2018/00617.

[22] Сүхбаатар дүүргийн шүүх, 2013.2.1 №513; Баянзүрх, Сүхбаатар, Чингэлтэй дүүргийн шүүх, 2015.9.17 № 6228.

[23] Г.Дабааням, Компани арилжааны эрх зүйн тулгамдсан асуудлууд, 5-9 (Соёмбо., 2020).

首都執行機関の 2015 年の 5 月 10 日の第 15/15-10 号差押命令の執行停止を求めた B.バドラルの請求を認容する根拠がある。」と判断した。

【検討】

本件は、少数株主に対する責任追及を否定した上で、善意な所有者を保護した点で著名なものである。しかし、B.バドラルの請求を認容する際に、民法第 114 条における善意な所有者保護について議論することなく、民法第 25 条 1 項における法人格、会社法第 9 条 3 項における株主有限責任の関する条項に基づき、T.ダムデンドルジに対する比例無限責任を否定した。その点で、疑問が残る。なぜなら、グンベイス有限会社の株式 34%を保有する株主である T.ダムデンドルジから、当該乗用車を購入した B.バドラルは、グンベイス有限会社の株主ではないからである。

いずれにしても、本件は、会社法第 9 条 3 項を株主有限責任として捉えた上で、会社の債務に対する少数株主の責任を否定した点で価値のあるものだと評価できる。

最高裁 2016 年 12 月 9 日第 001/XT2016/011373 号判決

【事案】

首都執行機関は、セイスフォン有限会社の債務返済の一環として、同社の株式の 70%を保有する株主であるタバントルゴイトランス有限会社の所有する「レクサス 570」乗用車を差押さえたため、タバントルゴイトランス有限会社が当該乗用車の差押命令の取消を裁判所に対して求めた。

本件において、以下の事実関係が認定された。第一に、セイスフォン有限会社は、地球物理学および地質学の研究と鉱山機械の販売を営業とする会社であること、第二に、タバントルゴイトランス有限会社は、必要な設備を購入するために、セイスフォン有限会社に投資し、同社の株式の 70%を保有すること、第三に、首都執行機関は、セイスフォン有限会社が事業活動を行っておらず、残余財産がないとの事由により、会社法第 9 条 3 項を比例無限責任として捉え、それに根拠に当該乗用車を差し押さえた。

【判旨】

スフバートル区地裁は、執行機関の差押命令が違法ではないと論じた。それに対して、高等裁・最高裁は、以下のように判示した。「首都執行機関のセイスフォン有限会社の債務返済の一環としてタバントルゴイトランス有限会社の所有するトヨタレクサス 570…乗用車を差し押さえた行為は、誤りである。その理由は、セイスフォン有限会社とタバントルゴイトランス有限会社は、別々に営業を行う独立した法人である。会社法の…第 9 条 3 項において、株主であるタバントルゴイトランス有限会社は責任を負わない。」（高等裁の判断）

「そのため、タバントルゴイトランス有限会社は債務者ではないのに同社の財産であるトヨタレクサス 570...乗用車を差し押さえた行為は、違法である。」（高等裁の判断）

最高裁は、高等裁が下した上記の判決を支持した上で、地方裁判所は「首都執行機関は会社法を適用する際に、当該条文を誤って解釈し、判決執行法第 133 条 4 項 4 号の規定に違反

した認定し、差押命令を取り消し、原告の請求を認容した原審の判断は…民事訴訟法を違反していない。」と判断した。

【検討】

本件は、親子会社の局面で問題となった株主に対する責任追及につき、会社法第 9 条 3 項を株主有限責任として捉え、セイスフォン有限会社の親会社に当たるタバントルゴイトランス有限会社の責任を否定した。事案においては、執行機関がセイスフォン有限会社の形骸化（営業を行っていない）と過小資本（残余財産がない）を問題にしていると評価できる。その場合、タバントルゴイトランス有限会社には、セイスフォン有限会社の過小資本による執行回避の目的があった可能性がある。しかし、過小資本による執行回避に関しては、最高裁により、検討が行われていない。

いずれにしても、本件は、単なる個人株主だけではなく、有限会社をベースにした親子会社の局面において株主の有限責任を肯定している点で、意義のあるものであると考える。

2. 比例無限責任を採用する裁判例

ここでは、比例無限責任を採用する二つの裁判例を紹介する。比例無限責任を採用したリーディングケースとして、スフバートル区 2013 年 2 月 17 日第 513 号判決があり、それと同じ立場を採るものとしてバヤンズルフ・スフバートル・チンゲルテイ区 2015 年 9 月 17 日第 6228 号判決が存在する。

スフバートル区 2013 年 2 月 17 日第 513 号判決

【事案】

首都執行機関は、オサクドル有限会社の債務返済の一環として、同社の株主である D.アリマー（35%）、G.バヤラー（40%）を債務者としてそれぞれ保有株式数（割合）に応じて債務を返済する義務があるとして強制執行を行った。G.バヤラーと D.アリマーは、会社法第 9 条 3 項に基づき、当該強制執行手続きの取消を求めた。

本件において、以下の事実関係が認定された。第一に、バヤンズルフ区の裁判所の 2010 年 10 月 12 日の第 1989 号判決により、オサクドル有限会社はウランバートル加熱ネットワーク株式会社に対して 16,967,950 トゥグルグ（約 72 万円）を支払うことになった。第二に、オサクドル有限会社の株式の 25%を T.ハリウン、35%を D.アリマー、40%を G.バヤラーそれぞれ保有している。第三に、同社の登記書に、資本金は 2011 年 1 月 28 日に 85.555.9 トゥグルグ増加され、合計 87.220.9 トゥグルグ（約 4 万円）になったことが登録されている。第四に、オサクドル有限会社には残余財産がない。第五に、T.ハリウンは自己保有株（割合）に応じ、4,252,000 トゥグルグ（約 18 万円）を返済として任意に支払った。

【判旨】

「首都執行機関は、登記書によると、当該会社の資本金は 85.555.9 トゥグルグが増加され、87.220.9 トゥグルグ（約 4 万円）として変更され、それが登記されたこと及び株式保有

に関してはG.バヤラーが40%、T.ハリウンが25%、D.アリマーが35%をそれぞれ保有している事実関係を確認した。」

「被告は、…2012年8月07日、同月16日に会社の発起人であるD.アリマーに5,938,782トゥグルグ（約26万）の債務返済を請求する…通知を送達した。当該通知書を原告が訴状と共に証拠として提出した。」

「それは、会社法第9条3項に『株主は、会社の債務につき責任を負うことなく、自己保有の株式数（割合）に限って責任を負う』と定めた条項に違反していない。従って、それぞれの株主には、保有株式数（割合）に応じる債務の返済義務があるため、判決強制執行行為は違法ではない。本件において株主の債務返済の義務が認められるので、原告の請求を棄却するのは適切である。」

したがって、オサクドル有限会社の債務を同社の株主であるD.アリマー（35%）とG.バヤラー（40%）らがそれぞれの株式保有数（割合）に応じ、履行するべきであると判示した。

【検討】

本件においてスフバートル区地裁は、執行機関の決定に従い、会社法第9条3項に基づき、有限会社の株主に対して比例無限責任を課した。その際に、会社法第9条3項における「株主は…自己保有の株式数（割合）に限って責任を負う。」という文言を比例無限責任として捉えているが、その根拠が必ずしも明確に述べられていない。

これに対して、執行機関がオサクドル有限会社の過小資本（資本金が4万円に過ぎず、株主が十分に出資していない）を問題にしている可能性がある。その場合、株主らには、オサクドル有限会社の過小資本による執行回避の目的があったか否かについて議論する必要があると考えられる。しかし、スフバートル区地裁は、認定事実に基づいて議論することなく、会社法第9条3項により、同社の株主であるD.アリマー（35%）、G.バヤラー（40%）に対して比例無限責任を追及した。

バヤンズルフ・スフバートル・チンゲルテイ区2015年9月17日第6228号判決

【事案】

首都執行機関が、ベリン有限会社の債務返済の一環として、同社の株式の 49%を保有する株主であるボルタム有限会社のカピトラン銀行と貿易開発銀行の預金を差し押えた。これに対して、ボルタム有限会社が、会社法第9条3項に基づき、当該ベリン有限会社に対する差押命令の取消を求めた。

本件において、以下の事実関係が認定された。第一に、裁判判決より、ベリン有限会社は故郷道路の事業を行う有限会社に対して210,776,965トゥグルグ（約960万円）を支払うことになった。第二に、ボルタム有限会社は、ベリン有限会社の49%の株式を保有する。第三に、ベリン有限会社 51%を保有する個人株主の L.ボロルマーの不動産に銀行による抵当権が設定されている。第四に、ベリン有限会社の債務の49%に相当する額（約470万円）で、ボルタム有限会社の預金口座が凍結された。

【判旨】

「原告のボルタム有限会社は、債務者であるベリン有限会社の発起人であり、同社の 49%の株式を保有していることがベリン有限会社の定款によって証明されている。会社法第 9 条 3 項では、『株主は、会社の債務につき責任を負うことなく、自己保有の株式数（割合）に限って責任を負う。』と定めている。」

「ボルタム有限会社の保有する 49%の株式は、ベリン有限会社の定款によると、1 株額は 10 トゥグルグ、全部で 13,290,025 株があり、（ボルタム有限会社が）保有する株式に対する実際の払込額の 132,900,250 トゥグルグ（約 604 万円）になる。首都執行機関の 2015 年 5 月 14 日の第 2/17657 号通知書及びボルタム有限会社の預金を差押えた金額は、103,280,713 トゥグルグ（約 469 万円）であるため、（ボルタム有限会社が）保有する株式に対する払込額の 132,900,250 トゥグルグ（約 604 万円）を超えていない。」

そのため、会社法第 9 条 3 項に基づき、ボルタム有限会社の請求を棄却し、株主のボルタム有限会社に対して、比例無限責任を課したが、責任範囲を 49%の株式に対する払込額の 2 倍を上限とした。

【検討】

本件において、バヤンズルフ・スフバートル・チンゲルテイ区地裁は、執行機関の差押命令に従い、ベリン有限会社の 51%を保有する支配株主が支払不能であるため、49%を保有するボルタム有限会社に比例無限責任を課した。その際に、会社法第 9 条 3 項における「株主は…自己保有の株式数（割合）に限って責任を負う。」という文言を比例無限責任として捉えており、ボルタム有限会社がベリン有限会社の債務につき、49%の保有株式割合に相当する責任を負うと論じた。しかし、比例無限責任の範囲について、49％の株式に対する払込額の２倍を上限とし、それ以上の責任を認めない旨を示した。

また、執行機関の差押命令の問題意識も必ずしも明確に述べられておらず、スフバートル区 2013 年 2 月 17 日第 513 号判決の動向に従うものであるが、責任範囲について、株式に対する払込額の 2 倍を上限として点で相違点が見られる。

IV. 執行機関と裁判所の問題意識と学説

モンゴルの裁判実務では、会社法 9 条 3 項における「…保有する株式数（割合）に限って責任を負う」という文言を比例無限責任として捉え、株主に比例無限責任を課している下級審判決が少数見られる[24]。下級審におけるスフバートル区 2013 年 2 月 17 日第 513 号判決・最高裁 2016 年 12 月 9 日第 001/XT2016/011373 号判決からみると、執行機関と裁判所の問題

[24] そのうち、バヤンズルフ・スフバートル・チンゲルテイ区 2015 年 9 月 17 日第 6228 号判決は、比例無限責任の範囲に上限を設定している。

意識として、過小資本に基づく裁判執行の回避（Judgment proofing）に対処しようとしていた可能性がある[25]。そこで、債権者保護の立場を採用されば、裁判執行の回避に対処するために、株主に比例無限責任を課すことが支持されるかもしれない。また、バヤンズルフ・スフバートル・チンゲルテイ区 2015 年 9 月 17 日第 6228 号判決は、比例無限責任の範囲について株式に対する払込額の 2 倍とする上限を設定している点で、スフバートル区 2013 年 2 月 17 日第 513 号判決・最高裁 2016 年 12 月 9 日第 001/XT2016/011373 号判決とは異なるが、その上限を超えていない限り、比例無限責任を認めている。

しかし、監視費用の削減などの有限会社における有限責任の便益を踏まえると、株主に無限責任を課すことは合理的ではない。また、モンゴルでは、有限会社が中心となっている社会事情を見ても、株主の比例無限責任を肯定することは、経済成長を縮小する結果となるほか、立法政策からみても、現実的ではない[26]。

また、現行会社の母国となる米国法の議論を見ても、不法行為の局面において比例無限責任を主張した Hansmann & Kraakman（1991 年）説[27]に対して、以下の批判が強く、一般的に認められていない。具体的に述べると、米国の学説は、①比例無限責任は、実行不可能であり、たとえ実行できたとしても、訴訟費用と債権回収の点で困難がある[28]、②受動的な少数株主にも責任を負わせることになり、合理的ではない[29]と批判している。

モンゴルにおいても、Hansmann & Kraakman（1991 年）説に対する米国の学説による批判は、妥当性があると思われる。なぜなら、①会社法では、有限会社の設立時の株主数を 50 人とする上限がある(5 条 1 項)ものの、それ以降の株主数に上限が設定されておらず、4140 人の株主も持つ有限会社が存在するので、訴訟費用と債権回収の問題が生じる[30]。②会社形態のうち、99.7%は有限会社となっているほか、有限会社の多くは、会社経営に関心が低い少数株主を有しているので、受動的な株主の責任が懸念される[31]からである。また、裁判例

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[25] 株主は執行回避の目的で、会社に出資せずに、その事業活動に必要な資金を賃貸借契約、ローン契約によりに提供することがある。Henry Hansmann & Reiner Kraakman, “Toward Unlimited Shareholder,” *Yale Law Journal* 100, no. 7 (1991):1882-1883; 後藤元『株主有限責任制度の弊害と過小資本による株主の責任』（商事法務　2007 年）121 頁参照。

[26] モンゴル内閣と商工会議所が共同で毎年発表するトップ 100 社のリスト（最終閲覧日 2022 年 10 月 22 日：https://www.mongolchamber.mn/p/363）によるとトップ 100 社のうち、87 社は有限会社となっている。

[27] この論文は、不法行為債権について株主の比例無限責任を提案した。Henry Hansmann & Reiner Kraakman, “Toward Unlimited Shareholder,” 1932-1933.

[28] Janet C. Alexander, Unlimited Shareholder Liability through a Procedural Lens, *Harvard Law Review* 106, no. 2 (1992): 388-339 & 418-444. See Mendelson, “A Control-Based Approach,” 1280.

[29] 少数株主に責任を負わせると、支配株主の負担額が減少するので、支配株主にあえてモラル・ハザードの動機が生じる。See Mendelson, “A Control-Based Approach,” 1258 & 1282. 少数株主が会社の意思決定に影響を与えることができないため、責任を課しても効果がない。 Timothy P. Glynn, Beyond “Unlimited” Shareholder Liability Vicarious Tort Liability for Corporate Officers, *Vanderbilt Law Review* 57 no. 2 (March 2004): 378-380; 向井貴子「株主有限責任のモラル・ハザード問題と非任意債権者の保護」九大法学 91 号 267 頁、387 頁(2005 年; Г.Дававаням, “Морал хазард,” 16 参照。

[30]モンゴル国立法人データベース（最終閲覧日 2023 年 1 月 25 日：http://opendata.burtgel.gov.mn/lesinfo/2693321）によるとトップ５の銀行の一つである Khaanbank 有限会社は、4140 人の株主を有している。

[31] モンゴル内閣と商工会議所が共同で毎年発表するトップ 100 社のうち、87 社の有限会社の株主構造を見ると、多くの有限会社において、少数の支配株主が存在し、会社経営を行っている(最終閲覧日 2023 年 1 月 25 日：https://www.mongolchamber.mn/p/377)。

の中には、比例無限責任の範囲につき、上限を設定した点で、Hansmann & Kraakman（1991年）説とは異なるアプローチを採用したものもあるが、Hansmann & Kraakman（1991 年）説に対する学説上の①と②の批判を免れることができない。

したがって、株主有限責任は、株式会社のみならず、有限会社においても原則として捉えることが望ましい。そこで、裁判執行の回避などの事案類型に対してどのように対処すべきかが、依存として問題となる。事案類型の利害調整の視点からすると、解決策として個別的法規制に委ねるべきであると考える。モンゴル法では、個別的法規制として、裁判執行の回避に関する会社法第 9 条 5 項、株主の詐害行為による財産移転に関する破産法第 19 条 1 項、株主債権の劣後化に関する民法第 240 条 1 項などが存在している。

このように、モンゴル会社法において株主有限責任は、原則として評価すべきである。その上で、株主有限責任により起きる問題については、事案類型に応じた個別的規制により対処すべきである。

V. 終わりに

株主の有限責任は、会社法の基本原則となっている。この原則は、2011 年の現行会社法第 9 条 3 項により明文化されており、株式会社のみならず、有限会社においても原則として位置付けられる。

しかし、会社法第 9 条 3 項における「…保有する株式数（割合）を限って責任を負う」という文言につき、比例無限責任と解釈し、株主に無限責任を課した執行機関の差押命令・これを肯定する下級裁判例が少数みられる。執行機関の差押命令・裁判例の多くは、有限会社の局面で比例無限責任を採用する理由について明確に述べていない。一部の執行機関の差押命令・裁判例は、裁判執行の回避を比例無限責任の問題にしている。

また、比例無限責任を肯定することは、会社形態の 99.7%が有限会社・トップ 100 社のうち、87 社が有限会社となっているモンゴルでは、社会事情と株主有限責任が生み出す経済的便益からみて、現実的ではない。さらに、モンゴルの現行会社法の母法たる米国法上の議論に参考にしても、不法行為の局面に限って比例無限責任を主張する Hansmann & Kraakman（1991 年）説に対しては、学説上の批判も強く、一般的に認められていない。また、Hansmann & Kraakman（1991 年）説に対する米国の学説上の批判は、モンゴルの有限会社とその裁判実務においても当てはまる。

したがって、一部の執行機関の差押命令・裁判例が問題意識としている考えられる裁判執行の回避に関する事案類型等に対して、会社法第 9 条 5 項における裁判執行の回避・破産法 19 条 1 項における株主の詐害行為による財産移転、民法第 240 条 1 項における株主債権の劣後化等の個別的規制により、対処すべきである。

【研究ノート】

モンゴル環境法における「環境」の意味内容に関する考察
Consideration of the Meaning and Content of “Environment” in Mongolian Environmental Law

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Abstract

This paper considers the meaning and content of the "environment" in Mongolian environmental law. Therefore, this paper elucidates that the meaning and content of the "environment" in Mongolian environmental law have changed from the time when the main target was the natural environment to the time when the target was the living environment and social environment of people.

目次

I. はじめに

1992 年に制定された現行モンゴル憲法では（以降、「1992 年現行憲法」という）、それ以前の旧憲法（1924 年・1940 年・1960 年）にはなかった「環境権」に関する明文規定、すなわち、「モンゴル国の市民は、次の基本的権利と自由を有する：健康、安全な環境に生きる権利、環境汚染、自然の均衡喪失から保護される権利を有する」という規定が設け

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られた（16 条 1 項 2 号）[1]。しかしながら、モンゴル法において環境権の対象となりうる「環境」とは何かは、自明ではなく、それを明確にする必要がある。本稿では、モンゴル法における「環境」等について、現行憲法と旧憲法における関連する条文を取り上げ、「環境権」の対象である「環境」とは何か、その対象範囲を検討する。その際、比較検討するため日本の環境法の対象となる「環境」とは何を示しているかに関する議論を参照する。なお、本稿では、「市民」と「人民」という異なる用語が法文上用いられる場合もあるが、モンゴル法において、“irgen＝иргэн”＝「市民」と“ard tumen=ард түмэн”＝「人民」という文言は、双方とも「モンゴル国籍を有する者」を意味しており、同義である。

II. モンゴル法における「環境」等について

1992 年現行憲法および「環境基本法」といえる 1995 年制定の“Baigali orchiniig khamgaalah tukhai huuli＝Байгаль орчныг хамгаалах тухай хууль”＝「自然環境保全に関する法律」（以下、「自然環境保全法」という）における「環境」とは何か、どのような意味をもつのかを明確にするため、旧憲法における「環境」等の関連する規定を検討することから始める。まず、（1）では、1924 年・1940 年・1960 年憲法上の「環境」等について検討し、次に、（2）では、1992 年現行憲法における「環境」等について検討する。最後に、（3）では、モンゴル法における「環境」等に関する規定において用いられているモンゴル語の「環境」に類する多様な用語が用いられている事情があり、それは、環境法における「環境」の意味内容を理解するにあたって、如何に影響を与えるのかについて簡潔に検討する。

1. 1924 年・1940 年・1960 年憲法上の「環境」等について

1992 年現行憲法以前の旧憲法は、モンゴルが社会主義体制であったときのものである。旧憲法では、自然環境資源を含んだ「環境」等について、いかなる定めを設けていたのかを確認する。

まず、1924 年憲法では、モンゴル人民共和国内にある土地、鉱山、森林、河川およびそれらの資源は、以前から全ての人民の財産であり、それは現在の人民共和国の諸規定に適合していることから、これら財産は人民の支配の下にあるものとして、個人の所有権を

[1] 山口幸二によるモンゴル憲法の日本語訳では、「環境権」に関する条文を次のように翻訳されている。「モンゴル国民は、次の基本的権利と自由を保護され、享受する：健康、安全な環境に生活する権利、環境汚染、自然の均衡の喪失から保護される権利を有する」（山口幸二（解説・訳）「モンゴル国」萩野芳夫＝畑博行＝畑中和夫編『アジア憲法集（第二版）』（明石書店、2007 年）459 頁以下。）

設定することはできないと定めていた（3 条 1 項）[2]。モンゴルの環境法学の代表的研究者である O.アマルフー（以下では、敬称は省略する）は、この 1924 年憲法の規定は、モンゴルにおいて土地その他の自然環境資源は歴史的に国の所有物であり、全ての市民の財産であったことを憲法上明確にしたものであること、さらに、その後も土地その他の環境資源について個人の所有権設定を禁止する趣旨であったと指摘した [3]。

次に、1940 年憲法では、「環境」等について以下の二つの条文があった。一つ目は、同憲法 5 条で、「すべての土地とその地下の物、森林資源、水資源、工場、冶金、鉱山、金鉱脈、鉄道、自動車道路、水上および航空輸送、通信、銀行、草刈り施設、国有企業は、国有であり、全ての人民の財産である。これらについて所有権を設定することはできない」と定めていた。二つ目は、同憲法 8 条で、「土地は国の所有物であり、すべての人民の財産であるため、人民および労働組合に牧草地用と農業用の土地を無償で賦与する」と規定していた [4]。当時、1940 年から 1960 年代の環境に関する国家政策では環境資源の利用促進を一つの目標とし、その前提となる地質調査や探鉱が実施され、言い換えれば環境資源の利用促進とともに「環境」保護を重視する考え方を基礎にしていたとされている [5]。

最後に、1960 年憲法 10 条では、「すべての土地とその地下の物、森林資源、河川資源、工場、鉱山、発電所、鉄道、自動車道路、水上および航空輸送、通信、銀行、…それらのすべては国の所有物、言い換えれば、全ての人民の財産である」と定め [6]、1940 年憲法における「環境」に関連する規定とほぼ同様であった。

以上を整理すると、旧憲法において「環境」等とは、主として、土地、森林、河川やその他の自然環境資源の対象とするものであって、それは国の財産であり、すべての市民の財産であるという考え方が明文で規定されている。 このように、1992 年現行憲法以前のモンゴルの環境法において「環境」とは、主として自然環境を意味内容とするものであったといえる。以下では、前記したように、1992 年現行憲法では、市民に「環境権」が保障されるようになったことを受け、モンゴルの環境法における「環境」の意味内容が如何に変化しているのかについて検討する。

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[2] Бүгд Найрамдах Монгол Ард Улсын Үндсэн хууль 1924.11.26-ний өдөр. 「モンゴル人民共和国憲法」1924 年 11 月 26 日制定、モンゴル法令集データベース公式サイト https://legalinfo.mn/api/front/cons-detail-1924.html（最終アクセス日 2022 年 12 月 13 日）。

[3] О.Амархүү “Байгаль орчныг хамгаалах монголын зан заншил, хууль цааз (Уламжлал, шинэчлэлийн асуудал)” УБ., 2000 он, 74 дахь тал. O.アマルフー『自然環境保護に関するモンゴルの習慣と法令〈習慣・革新の問題〉』（ウランバートル市、2000 年）74 頁。

[4] Бүгд Найрамдах Монгол Ард Улсын Үндсэн хууль 1940.06.30-ны өдөр. 「モンゴル人民共和国憲法」1940 年 6 月 30 日制定、モンゴル法令集データベース公式サイト https://legalinfo.mn/api/front/cons-detail-1940.html（最終アクセス日 2022 年 12 月 13 日）。

[5] O.アマルフー、前掲（3）85 頁。

[6] Бүгд Найрамдах Монгол Ард Улсын Үндсэн хууль 1960.07.06-ны өдөр,. 「モンゴル人民共和国憲法」1960 年 7 月 6 日制定、モンゴル法令集データベース公式サイト https://legalinfo.mn/api/front/cons-detail-1960.html（最終アクセス日 2022 年 12 月 13 日）。

2. 1992 年現行憲法上の「環境」と「環境権」等について

次に、1992 年現行憲法では、「環境権」に関する明文規定があるため、①「環境」等に関連する規定と②「環境権」に関する規定を紹介する。

まず、①「環境」等に関連する規定については、「モンゴル国内の土地、下層土、森林、水源、動物、植物及びその他の環境資源は、人民の支配および国家の保護の下にのみ置かれる」と規定している（6 条 1 項）。また、同条 2 項は、「モンゴル国の市民の所有でない土地、下層土、地下資源、森林、水源、動物は国家の公的財産である」と定めている [7]。更に、同条 3 項は、「牧草地、共用の土地、国の特別用土地を除く他の土地は、これをモンゴル国の市民のみに所有させることができる。ただし、この所有の対象には下層土は含まれない。市民がその私有する土地を、売却、交換、贈与、担保等により外国人、無国籍者の所有に移転すること、また国家機関の許可なく、他者に占有させること、利用させることは、これを禁ずる」と定めている。

このように 1992 現行憲法では、土地について市民の所有権や占有権を認める一方、市民が所有していない土地、下層土、森林、水資源、動物等は国家の財産であり、国家の保障の下に存在する旨を宣言している。このことは、現在のモンゴルでは、個人の所有と占有の下にない土地等の上記の環境資源に関し、依然として環境資源の国有化という思想が強くあり、国家の環境保全義務も重要な役割を果たすといえる。なお、国家の環境保全義務については、後述する。

次に、②「環境権」について、現行憲法では、「モンゴル国の市民は、次の基本的権利と自由を有する：健康、安全な環境に生きる権利、環境汚染、自然の均衡喪失から保護される権利を有する」と定めている（16 条 1 項 2 号）。この規定について、以下の二つの点を中心に検討する。

第一に、この「環境権」の対象である「環境」とは何を示しているかである。この点について、1992 年現行憲法案を作成する際に貴重な貢献を果たしていた憲法学者 B.チミドは、「健康、安全な環境に生きる権利、環境汚染、自然の均衡喪失から保護される権利」について、ここでいう「環境」とは、自然環境だけではなく国家統制や規制等により形成される社会環境も含まれる（例えば、犯罪がない安全な社会環境など）と指摘していた [8]。また、モンゴルの環境法学の代表的研究者の一人である T.センゲドルジは、1992 年憲法の一つの特徴は市民の環境権及び環境保護義務（16 条 1 項 2 号、17 条 2 項）を初めて憲

[7] 2019 年 11 月 14 日の憲法改正により、従来は「…国家の財産である」という部分は「…国家の共有財産である」と変更された。詳細は、モンゴル憲法改正、2019 年 11 月 14 日、モンゴル法令集データベース公式サイト https://legalinfo.mn/mn/detail?lawId=103596&showType=1（最終アクセス日 2022 年 12 月 13 日）。

[8] Б.Чимид, “Үндсэн хуулийн үзэл баримтлал : хүний эрх, шүүх эрх мэдэл” УБ., 2004 он, 20 дахь тал. B. チミド『憲法理念〈人権・司法権〉』（ウランバートル市、2004 年）20 頁。

法において定めたことを高く評価した [9]。また、O．アマルフーは、自らの立場について「憲法学者G.ソフドによる、環境権はモンゴル法の歴史において 1992 年現行憲法ではじめて導入された新しい概念であり、その環境権は市民の財産権分類に含まれるという指摘と同じ立場である」と述べている [10]。

第二に、1992 現行憲法では、「環境」に関する国家の環境保全義務を根拠付ける条文が設けられている。その根拠条文として、次の二つの条文が考えられる。一つ目は、憲法の 19 条 1 項に「国家は、人権、自由を保障するための経済的、社会的、法的及びその他の保障を創設し、人権、自由の侵害と闘い、侵害された権利を回復し行使させる義務を市民に対して負う」と定めている。また、憲法 38 条 2 項 4 号では、「内閣は、国の法律を執行し、経済、社会、文化の諸機構を指揮する一般責務に従い、以下の基本的な権限を有する――取り巻く環境の保護、自然環境資源の合理的な利用と回復の措置の実施」と定めている。

上記の「健康、安全な環境に生きる権利、環境汚染、自然の均衡喪失から保護される権利」における「健康、安全な環境」については、自然環境だけではなく、生活環境、社会的環境をも含む広義の「環境」を意味するという立場が強い。しかしながら、その後の「環境汚染」とは自然環境の汚染のみか、それとも、生活環境の汚染も含む概念であるのかについて解釈が十分に行われていない。また、現行憲法上、「環境権」の明文規定があり、市民は健康、安全な環境に生きる権利を有し、環境汚染と自然の均衡喪失から保障されるよう国家に対して要求する権利もあり、それに加えて、環境資源の国有化の観点からも環境権の保障に関する国家の役割が重視されているのではないかと考える。

前記した点であるが、旧憲法において「環境」等は、主として、土地、森林、河川やその他の自然環境資源の対象とするものであって、当時社会主義体制時の環境法において「環境」とは、大部分は、自然環境を対象とするものであったと結論付けた。他方で、1992 年現行憲法では、市民に「環境権」が保障された特徴があり、旧憲法と同様に「環境」等は自然環境を対象とする側面があり、かつ、「環境権」の保障対象とする「環境」とは自然環境だけではなく、市民が健康で安全な環境に生きるための生活環境及び社会環境を対象にするものとして対象範囲が拡大されている。従って、モンゴルの環境法における「環境」の意味内容は、自然環境を対象とする時代から、人の生活環境や社会環境をも対象とする時代に変化しているといえる。ただし、モンゴル法における「環境」等に関する規定に用いられているモンゴル語の文言に注意する必要がある。その理由は、上記の条文では、日本語での「環境」と「環境権」という訳語が適切であるか否かが疑問となるからである。以下では、モンゴル法において、「環境」等に関する規定において、「環境」

[9] Т.Сэнгэдорж нар, “Экологийн эрх зүй, газрын эрх зүй” УБ., 2015 он, 29 дахь тал.　T.センゲドルジほか『エコロジー法・土地法』（ウランバートル市、2015 年）29 頁。
[10] O.アマルフー、前掲（3）146 頁。

に類する多様な用語が使われていることについて検討を加える。

3. モンゴル法における「環境」に類する用語の多様性

モンゴル法においては「環境」に類する様々な用語が用いられている事情がある。ここでは、環境法における「環境」の意味内容を理解するにあたって、如何に影響を与えるのかについて簡単に検討する。

第1に、1992年現行憲法では、「環境」等に関する規定において、「環境」に類する意味を表すために異なる用語が設けられていることを紹介する。現行憲法を含めモンゴルの法令上、“eruul, ayulgui orchin=эрүүл, аюулгүй орчин”＝「健康、安全な環境」、“khureelen baigaa orchin=хүрээлэн байгаа орчин”＝「取り巻く環境」、“baigali orchin=байгаль орчин”＝「自然環境」というそれぞれ異なる文言を用いている点に注意が必要であろう。すなわち、上記の「環境権」に関する規定では、“eruul, ayulgui orchin=эрүүл, аюулгүй орчин”＝「健康、安全な環境」という文言が用いられている一方、“khureelen baigaa orchin=хүрээлэн байгаа орчин”＝「取り巻く環境」という文言が前記の同憲法38条2項4号「内閣は、国の法律を執行し、経済、社会、文化の諸機構を指揮する一般責務に従い、以下の基本的な権限を有する――取り巻く環境の保護、自然環境資源の合理的な利用と回復の措置の実施」で用いられている。また、同規定において、“baigaliin baylag=байгалийн баялаг”=「自然環境資源」という文言も用いられている。

更に、“baigali orchin=байгаль орчин”＝「自然環境」という文言は、2019年11月14日の憲法の一部改正を除き、「労働、健康の維持、子供の養育、自然環境の保全は、モンゴル国の全ての市民の一般義務である」（17条2項）との規定でも用いられている。ただし、2019年同改正によって、「市民は、健康、安全な環境に生きる権利の範囲において、地下資源を利用することにともなう自然環境に引き起こされる影響について知る権利がある」と定められ、「自然環境」という言葉の使用回数が増加している（6条2項）。

このように、現行憲法上の「環境」等に関する規定において、「環境」に類する多様な用語が設けられている。

第2に、1992現行憲法だけではなく、他の個別法令上の「環境」等に関する規定において、「環境」に類する用語の多様性を確認できる。本稿では、モンゴル法令集のデータベース公式サイト（https://www.legalinfo.mn/）に前記の「環境」に類するいくつかのキーワードで検索した結果をもとに、以下の表1「モンゴル法令において『環境』に類する用語が使われた法令数」を作成した。

表 1. モンゴル法令において「環境」に類する用語が使われた法令数

法令の類型	使われている用語・回数			
	khureelen baigaa orchin ＝хүрээлэн байгаа орчин ＝取り巻く環境 **＝周囲世界**	khureelen bui orchin ＝хүрээлэн буй орчин ＝取り巻いている環境 **＝周囲世界**	baigali orchin ＝байгаль орчин ＝自然環境 ＝自然世界 ＝自然周囲	amidrakh orchin ＝амьдрах орчин ＝生活世界 ＝生活環境
法律	48	14	142	13
国会決定	5	1	133	—
国際条約	7	19	30	6
大統領命令	—	—	9	—
憲法裁判所の判決	1	1	8	1
最高裁判所の判決	2	—	11	—
政令	5	7	473	3
省令	2	49	137	1
局・庁令	—	—	5	—
県・首都会議の決定	—	—	116	2
県・首都知事の命令	—	—	11	—

出典：2022 年 12 月時点でモンゴル法令集のデータベース公式サイトである https://legalinfo.mn/mn を参照し、筆者が作成した。

上記「表１」の結果を分析すれば、モンゴル法において、“khureelen baigaa orchin=хүрээлэн байгаа орчин”＝「取り巻く環境」、“khureelen bui orchin=хүрээлэн буй орчин” ＝「取り巻く環境」、“baigali orchin=байгаль орчин”＝「自然環境」という文言の使い分けは明確ではなく、また、同一法令のなかでも、それらの文言が無作為的に用いられており、厳密な使い分けがあるとは言いがたい。一例を挙げれば、生物多様性条約（Convention on Biological Diversity）のモンゴル語の翻訳では、国連環境計画（United Nations Environment Programme）という言葉を “NUB-iin khureelen bui orchinii hutulbur=НҮБ-ын хүрээлэн буй орчны хөтөлбөр”＝「国連環境計画」 や “NUB-iin baigali orchnii khutulbur＝НҮБ-ын байгаль орчны хөтөлбөр”＝「国連自然環境計画」と翻訳されている[11]。さらに、ここでも、日本語でいう「環境」に当たる用語は、モンゴル法令のなかで、“khureelen baigaa orchin=хүрээлэн байгаа орчин”＝「取り巻く環境」や“baigali orchin=байгаль орчин”＝「自然環境」というように用語を統一せずに用いられている。

[11] Монгол Улсын Олон Улсын гэрээ, Биологийн олон янз байдлын тухай конвенц. モンゴル国の国際条約「生物多様性条約」モンゴル法令集データベース公式サイト https://www.legalinfo.mn/law/details/1228?lawid=1228&sword=%D0%B1%D0%B0%D0%B9%D0%B3%D0%B0%D0%BB%D1%8C%20%D0%BE%D1%80%D1%87 （最終アクセス日 2022 年 12 月 13 日）。

更に、1995 年制定の自然環境保全法のなかに、“Baigali orchin＝байгаль орчин”＝「自然環境」に関する定義がある。同法でいう“Baigali orchin＝байгаль орчин”＝「自然環境」とは、「人の生活、活動に、直接および間接に影響するモンゴル国内の土石圏、水圏、生物圏、大気圏とそれらの相互関係の周囲をいう」と定義している（3 条 2 項 1 号）[12]。一方、2016 年制定の“Eruul akhuin tukhai huuli=Эрүүл ахуйн тухай хууль”「衛生に関する法律」では、“khureelen baigaa orchin=хүрээлэн байгаа орчин”＝「取り巻く環境」について定義がある。ここでは、「取り巻く環境」とは、「人の生活、活動に直接および間接に影響する自然、社会の環境をいう」と定義している（同法 3 条 1 項 2 号）[13]。

以上を整理すると、モンゴル環境法における「環境」等に関する規定において、「環境」に類する多様な用語があるものの、主として、“Baigali orchin＝байгаль орчин”＝「自然環境」と、“khureelen baigaa orchin＝хүрээлэн байгаа орчин”＝「取り巻く環境」、という二つの用語が設けられる傾向がある。前者の “Baigali orchin＝байгаль орчин”＝「自然環境」は、 “Baigali＝байгаль”＝「自然」と “orchin＝орчин”＝「環境」という二つの単語から成り立ち、モンゴル語の意味内容として、「自然」を意味する “Baigali＝байгаль”という語彙が用いられている。従って、モンゴル環境法において、前者の“Baigali orchin＝байгаль орчин”＝「自然環境」という用語が設けられる文言は、主として「自然環境」を対象とする「環境」という意味で使われる可能性が高い。他方で、後者の“khureelen baigaa orchin＝хүрээлэн байгаа орчин”＝「取り巻く環境」とは、“khureelen baigaa＝хүрээлэн байгаа” ＝「取り巻く」と、“orchin＝орчин”＝「環境」という二つの単語から構成され、モンゴル語の意味内容として、“khureelen baigaa＝хүрээлэн байгаа”＝「取り巻く」とは、前者と比べると、直接に「自然」を意味する内容ではない。そして、モンゴル環境法において、後者の“khureelen baigaa orchin＝хүрээлэн байгаа орчин”＝「取り巻く環境」という文言が設けられる場合、ここでいう「環境」とは自然環境を含めて、人の生活環境、社会環境を対象とする傾向があるといえる。最後に、以下では、日本の環境法学における「環境」とは何かという議論を中心に日本法の検討を進める。

III. 日本法における「環境」と「環境権」概念について

以下では、日本の学説上で議論されている「環境権」でいう「環境」とは何かを中心に考察する。

[12] Монгол Улсын хууль, Байгаль орчныг хамгаалах тухай. 1995.03.30-ны өдөр. 「自然環境保全に関する法律」1995 年 3 月 30 日制定、モンゴル法令集データベース公式サイト https://www.legalinfo.mn/law/details/8935（最終アクセス日 2022 年 12 月 13 日）。

[13] Монгол Улсын хууль, Эрүүл ахуйн тухай хууль. 2016.02.04-ний өдөр. 「衛生に関する法律」2016 年 2 月 4 日制定、モンゴル法令集データベース公式サイト　https://legalinfo.mn/mn/detail/11635（最終アクセス日 2022 年 12 月 13 日）。

まず、日本法において「環境」という言葉が使われるようになったことについて、畠山武道は、従来日本ではほとんど用いられなかった「環境」という言葉が“environment”の訳語として選択されていたこと、かつ「環境」という言葉は、まずは学術用語であり、“environment”と同様に、主体とそれを取り巻く周囲の物事や事象を分離し、物事・事象を客観的に分析し、政策的、技術的対応を考えるという点が備わっていることを確信する必要があると指摘する[14]。

また、畠山は、日本法のなかで、「環境」という言葉はとくに注意することもなく用いられてきたが、「環境」という言葉は、きわめてあいまいで多義的であるということも述べている[15]。そして、畠山武道は、ある物理的・生物的な外部条件が「環境」として認識されるためには、以下の二つの要件が必要であると述べている。その一つ目は、環境の変化を人や社会が察知することである。環境の変化が人や社会に目に見える影響を与え始めたとき、人や社会は問題を認識し、対応を考える。二つ目は、環境に対する人や社会の価値観が変化することであると述べている[16]。このことについて、岩間昭道は、日本の環境保全法制における保全の範囲ないし対象である「環境」概念の範囲が「その時代の社会的ニーズ」や「国民的意識の変化」にしたがって変動するものとされていることが一つの特徴であると述べている[17]。

更に、下山憲治は、環境とは、特に人や生物を取り巻く外界という広い範囲を含む概念であることを述べ、したがって、法律問題として取り扱う「環境」とは、ある者による外界への影響力の行使が騒音や汚染など自然的要素を媒介にして他者に悪影響を及ぼしたり、開発により自然環境や景観が破壊されることによる影響など、それが法的に解決すべき課題であると評価されたものに限定されることを述べている。そして、一般的には、その悪影響が、人の生存に不可欠な自然的要素に関わる場合には権利論に、一方、景観や自然環境の場合には国家の義務論になじみやすいものと指摘されている[18]。

以上を整理すると、一般的に「環境」という言葉は広い範囲の意味をもつ概念であるため、環境法のなかで、とくに、「環境権」でいう「環境」とは何を意味するべきかについて説明がなされている。更に、「環境権」について、一般的には、基本的人権としての意義（基本権としての環境権）と実体法的な差止請求権の根拠となる私権としての意義（私権としての環境権）とがあると指摘されている[19]。このような実体的環境権とは別に手続的な環境権についても議論が広がっている。例えば、下山は、福島第一原発事故後の

[14] 畠山武道「環境の定義と価値基準」新美育文ほか編『環境法大系』（商事法務、2012 年）36-37 頁。
[15] 畠山武道、前掲（14）28 頁。
[16] 畠山武道、前掲（14）29-30 頁。
[17] 岩間昭道「日本国憲法と環境保全」長谷部恭男ほか編『現代立憲主義の諸相　下』（有斐閣、2013 年）557 頁。
[18] 下山憲治「環境権・環境保全義務―福島第一原発事故をふまえて―」坂口正二郎ほか編『憲法改正をよく考える Talking Constitution Seriously』（日本評論社、2018 年）138-139 頁。
[19] 淡路剛久「自然保護と環境権―環境権への手続的アプローチ―」環境と公害 25 巻 2 号（1995 年）8 頁。

除染や帰還等施策などに関する各種決定への住民等の参加を求める手続的根拠の一つとして環境権を位置付ける考え方もあると指摘している[20]。また、大塚直は「環境権」について、参加権としての環境権、いわゆる手続的権利としての側面も重要となっているが、従来までの実体的権利としての側面も重要であると述べている[21]。

IV. おわりに

本稿では、モンゴル環境法における「環境」等に関する規定において、「環境」とは何を対象とするか、その「環境」の意味内容について、旧憲法及び 1992 年現行憲法において「環境」等についてどのように規定されているのかを中心に検討した。

そこで、旧憲法上の「環境」等に関する規定でいう「環境」とは、主として、自然環境を対象とするものであって、かつての社会主義体制下のモンゴルの環境法において「環境」等は、大部分は、自然環境を意味内容とする傾向が強かったといえる。他方で、1992 年現行憲法では、市民に「環境権」が初めて保障された。そして、1992 年現行憲法上の「環境」等に関する規定でいう「環境」とは、旧憲法と同様に、自然環境を対象とする意味があるものの、かつ、市民に健康で安全な環境に生きる権利が保障され、そこでいう「環境」とは自然環境だけではなく、人の生活環境、社会環境を対象範囲に含めた「環境」を示すものとなっている。このように、本稿で取り上げて旧憲法をはじめ社会主義体制時のモンゴルの環境法における「環境」等の対象と意味内容が、1992 年現行憲法を含める現在の環境法上の「環境」等の対象と意味内容が、流れとして、自然環境を対象とする「環境」から、人の生活環境と社会環境を含める「環境」という拡張傾向があるといえる。

上記の拡張傾向は、本稿の日本法の考察で指摘した点、いわば、環境法学にいう「環境」等の対象と意味内容は、その当時の社会的ニーズと人の価値観の変容に合わせて変化されるものであるという指摘と軌を一にするともいえるであろう。

最後に、モンゴル法における「環境」等の規定に用いられているモンゴル語の文言に注意する必要があり、日本語での「環境」という訳語が適切であるか否かに注意が必要であろう。モンゴルの環境法における「環境」等の規定において、「環境」に類する多様な用語が設けられているが、総じて、“Baigali orchin＝байгаль орчин”＝「自然環境」と、“khureelen baigaa orchin＝хүрээлэн байгаа орчин”＝「取り巻く環境」、という二つの単語が用いられる傾向がある。本稿では、モンゴル法における「環境権」それ自体の意味内容及び環境権の対象範囲に関する検討が不十分であるため、この点を今後の課題とする。

[20] 下山憲治、前掲（18）133 頁。
[21] 大塚直『環境法〈第 4 版〉』（有斐閣、2020 年）68-69 頁。

【資料】

カンボジア・日本法教育研究センター修了生の現況調査報告

A Report on the Current Situation Survey of Graduates of the Research and Education Center for Japanese Law in Cambodia

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目次

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I. はじめに

本稿は、2022 年 12 月に実施した、カンボジア・日本法教育研究センターの修了生の現況調査の報告である[1]。

名古屋大学大学院法学研究科は、2008 年に、カンボジア・王立法律経済大学（Royal University of Law and Economics: RULE）と共同で、RULE 内にカンボジア・日本法教育研究センター（Research and Education Center for Japanese Law in Cambodia: CJLC）を設置した。2023 年は、CJLC の設置から 15 周年にあたる。そこで、筆者らは、これまでに CJLC を修了した修了生たちの現況を把握するべく、調査を試みた。

以下では、まず、CJLC の基礎情報を紹介した後（II）、調査結果を報告する（III）。

II. CJLC の基礎情報

CJLC のある RULE は、1949 年に設立された法・経済学院（l'Institut d'Études Juridiques et Économiques）を前身とする。1975 年から 1979 年までの民主カンボジア政権（いわゆる「ポル・ポト政権」）時代には、知識人を敵視する政権により閉鎖を余儀なくされたが、同政権崩壊後の 1982 年に、行政・司法分野の幹部を養成する学校として再建された。1988 年にプノンペン大学（the University of Phnom Penn. 1996 年に王立プノンペン大学〔the Royal University of Phnom Penn〕に改称して現在に至る）の傘下に入り、その一学部となったものの、2003 年に分離独立して現在の RULE となった。法学部（Faculty of Law）、行政学部（Faculty of Public Administration）、経済経営学部（Faculty of Economics and Management）、経済情報学部（Faculty of Informatic Economics）の 4 つの学部と 1 つの大学院課程（Graduate Program）があり、1 万人を超える学部生・大学院生が在籍している。名古屋大学との関係では、王立プノンペン大学法経学部時代の 1998 年に名古屋大学法学部と部局間協定を締結し、分離独立後の 2013 年には名古屋大学との全学協定を締結した。その間の 2008 年には、前述のように、両大学が共同で CJLC を設置し、現在に至っている。

CJLC は、カンボジアにおける名古屋大学の教育・研究の拠点である。教育面では、日本の社会、文化、言語を理解し、比較法的な視点を備えた法律実務家・研究者を養成すべく[2]、日本語教育と、日本語による日本法教育を提供している。CJLC は、毎年 10 月頃、RULE の法学部および行政学部に在籍する学生（新入生）の中から 20-30 人程度を選抜する。選抜された学生は、CJLC で、1 年次から 4 年次までの 4 年間をかけて日本語を学ぶとともに、2 年次には日本法準備授業として日本事情・日本史・公民を、3 年次には日本の憲法を、4 年次

[1] この調査は、公益財団法人・高橋産業経済研究財団の助成金による研究「カンボジア人若手研究者・実務家との協働による持続可能な法学教育・研究活動のための調査研究」により実施した。

[2] 日本法教育研究センターのミッションポリシーは、「発展途上国ないし体制移行を経験した国である母国の法の現状・構造的問題を理解し、 母国の法制度について基礎的な知識を持ちながらも、それに対して批判的な問題意識を持つことを通じて、母国に必要とされる法改革に貢献でき、かつ、日本との懸け橋となるような人材を育成し、そのための教育研究上の協力関係を発展させる」である。

には日本の民法を学ぶ。RULE が午前部（7-12 時）・午後部（12-17 時）・夜間部（17-20 時半）の 3 部制であることから、CJLC の学生は、たとえば午前は RULE で学び、午後からは CJLC で学ぶ（あるいはその逆）というように、RULE の授業のない時間帯に CJLC の授業を受講する。4 年次の冬に、名古屋大学大学院法学研究科の留学試験を受験し、合格すれば、翌年秋から同研究科博士前期課程に留学することができる。また、CJLC 修了後に、数年の実務経験を経て、大使館推薦による国費外国人留学生として来日する修了生もいる。一方で、CJLC を修了するまでに成績不良や経済的な問題、他分野の学業に集中したい等の理由で退所してしまう学生も少なくなく、4 年間のプログラムを修了できる学生は入所者の 3 分の 1 から 4 分の 1 程度にとどまる。

III. 修了生の現況

1. 調査の概要

今回の調査の目的は、第 1 に、CJLC 修了生の現況と連絡先を把握し、今後の共同研究等に際しての情報共有を容易にすることであり、第 2 に、CJLC の 15 年間の活動の成果および課題を分析するための参考情報を得ることである。

調査対象者は、CJLC を 2012 年に修了した 1 期生から 2022 年に修了した 11 期生までの計 88 人である（表 1 参照）。

期（修了年）	修了者数
第 1 期生（2012 年）	8 人
第 2 期生（2013 年）	8 人
第 3 期生（2014 年）	9 人
第 4 期生（2015 年）	7 人
第 5 期生（2016 年）	8 人
第 6 期生（2017 年）	8 人
第 7 期生（2018 年）	12 人
第 8 期生（2019 年）	11 人
第 9 期生（2020 年）	6 人
第 10 期生（2021 年）	6 人
第 11 期生（2022 年）	5 人
計	88 人

表 1　CJLC 修了生数（年度別）

質問 1	お名前を入力してください。
質問 2	CJLC を修了した年を教えてください。
質問 3	連絡先を教えてください（email）。
質問 4	Telegram のアカウントを教えてください。（任意）
質問 5	Facebook のアカウントを教えてください。（任意）
質問 6	現在お勤めの機関・団体・会社を教えてください。本業・副業ともに回答をお願いいたします。（複数選択可）
質問 7	RULE 卒業・CJLC 修了後大学院に進学しましたか？（→「はい」の場合、質問 10～12 へ）
質問 8	今後 CALE/CJL から、共同研究等の案内があれば、興味がありますか？
質問 9	この研究の結果は、雑誌・報告書等にて公表される予定ですが、その際はあなたのお名前や個人を特定する情報に関わる情報は使用いたしません。また取得したメールアドレスや SNS の ID は、今後 CALE／CJL からの連絡のために利用します。しかし、その他の目的で利用することはありません。以上の個人情報の取り扱いにご同意いただけますか？
質問 10	RULE 卒業後大学院に進学した人は、進学した大学院の名前を教えてください。
質問 11	取得した最終学位を教えてください。
質問 12	その学位はいつ取得しましたか？

表 2　質問項目

期（修了年）	回答者数	回答率
第 1 期生（2012 年）	8 人	100.0%
第 2 期生（2013 年）	4 人	50.0%
第 3 期生（2014 年）	7 人	77.8%
第 4 期生（2015 年）	4 人	57.1%
第 5 期生（2016 年）	8 人	100.0%
第 6 期生（2017 年）	7 人	87.5%
第 7 期生（2018 年）	9 人	75.0%
第 8 期生（2019 年）	6 人	54.5%
第 9 期生（2020 年）	6 人	100.0%
第 10 期生（2021 年）	6 人	100.0%
第 11 期生（2022 年）	5 人	100.0%
計	70 人	79.5%

表 3　回答者数・回答率（年度別）

調査には Google フォームを用いた。質問項目は、後述する研究協力者らと相談しつつ、まずは日本語で作成し（表 2 参照）、研究協力者の一人であるサウム・ロッタナー（Som Ratana）氏がカンボジア語に翻訳した。

調査対象者への協力依頼は、研究協力者や CJLC 修了生の同窓会組織を通じて、Facebook や Messenger、Telegram 等を利用して行った。

調査は、2022 年 12 月 9 日から 14 日までの期間に実施した。5 日間という短い期間ではあったが、調査対象者の約 8 割から回答を得た。ただし、期毎の回答率には 50%から 100%までばらつきがある（表 3 参照）。なお、期の数え方について、CJLC 在籍中に 1 年間程度の留学をした場合などに入学時の期と修了時の期がずれることがある。CJLC では修了時の期を基準として修了生を把握しているため、回答者が入学時の期を記入した場合には、こちらで修了時の期に改めた。

2.　職業

質問 6 は「現在お勤めの機関・団体・会社を教えてください」である。回答は、「行政機関」「法律事務所（弁護士）」「法律事務所（パラリーガル）」等の選択肢から適当なものを選ぶか、適当なものが見当たらない場合には「その他」を選んだ上で自由に記入できる形式とした。公務員や弁護士として働きつつ大学で教えている等、複数の職に就いている可能性も考えられるため、複数回答可とした。

就職		延べ人数
行政機関		15 人
司法機関	裁判官	1 人
	書記官	1 人
法律事務所	弁護士	4 人
	パラリーガル	8 人
教育機関（大学・学校等）		12 人
その他民間企業		23 人
NGO 等非営利団体		7 人
外国政府機関（大使館等）		1 人
その他（進学等）		8 人
計		延べ 80 人

表 4　職業（質問 6）

回答結果を見ると（表 4 参照）、民間企業に就職した修了生が多いのは当然として、行政機関や司法機関、法律事務所への就職も少なくない。教育機関に勤務する者も多いが、「行政機関」との兼職が 2 人、「法律事務所（パラリーガル）」との兼職が 1 人、「その他民間企業」との兼職が 2 人、「NGO 等非営利団体」と

の兼職が 1 人、というように兼職が多く、おそらくは「教育機関」以外の職を本職としながら、大学で非常勤講師として教えているものと推測される。また、選択肢が「教育機関（大学・学校等)」であるため、大学以外の初等・中等教育機関や日本語学校等も含まれている可能性がある。

なお、回答を個別に見ていくと、実際にはパラリーガルであるのに「その他民間企業」を選択していたり、留学中の者が「教育機関」を選択していたりするなど、質問者の意図とは異なる回答も散見された。この点は、回答者本人にも確認した上でいずれ修正したいと考えているが、今回の報告では調査の回答をそのまま集計した。

3. 進学

質問 7 は「RULE 卒業・CJLC 修了後大学院に進学しましたか？」という問いに対して、「はい」または「いいえ」を選択する形式である。43 人（修了生 88 人の 48.9%、回答者 70 人の 61.4%）が「はい」と回答しており（表 5 参照)、大学院進学率はきわめて高い。なお、「はい」という回答のうち、学位の取得を目的としない Exchange Program 等のプログラムに参加したのみのものは、こちらの判断で「いいえ」として扱った。

はい（大学院に進学した）	43 人	61.4%
いいえ（大学院に進学していない）	27 人	38.6%
計	70 人	100.0%

表 5　進学の有無（質問 7）

回答が「はい」の場合には、質問 10 で進学先の教育機関名を、質問 11 で最終学位を、それぞれ訊いた。質問 10 は、進学先の教育機関を自由記入式で尋ねた。大学院に進学した者は 43 人であるが、うち 2 人は 2 校に進学したため、延べ人数は 45 人である（表 6 参照)。進学先の国名は、教育機関名から推定した。オーストラリアに留学した 1 人を除き、およそ半数が日本に留学し、残り半数はカンボジア国内で進学した。日本に留学した者のうちでは、CJLC からの留学試験制度をもつ名古屋大学への留学者が圧倒的に多いものの、大使館推薦による国費外国人留学生制度等を利用して名古屋大学以外の大学に留

進学先		延べ人数
国	大学	
日本（23 人）	北海道大学	1 人
	東京大学	1 人
	横浜国立大学	2 人
	名古屋大学	17 人
	神戸大学	2 人
カンボジア（21 人）	王立法律経済大学	16 人
	国立経営大学	1 人
	ビルド・ブライト大学	2 人
	パンニャサストラ大学	1 人
	不明	1 人
オーストラリア	メルボルン大学	1 人
計		延べ 45 人

表 6　進学先の教育機関（質問 10）

学した者も散見される。カンボジア国内の進学先では、母校である RULE の大学院に進学した者が大多数である一方で、国立経営大学（National University of Management）、私立のビルド・ブライト大学（Build Bright University）、同じく私立のパンニャサストラ大学（Paññāsāstra University of Cambodia）の大学院に進学した者も若干名いる。

博士号取得者	5 人
修士号取得者	23 人

表 7　最終学位（質問 11）

問 11 は「取得した最終学位を教えてください。」という問いに対して「博士号」「修士号」等の選択肢の中から適当なものを選ぶ形式である。回答によれば、博士号取得者が 5 人（修了生 88 人の 5.7%、回答者 70 人の 7.1%）、修士号取得者が 23 人（修了生 88 人の 26.1%、回答者 70 人の 32.9%）であった（表 7 参照）。

カンボジアでは、就学率は低いと言われている。教育・青少年・スポーツ省（Ministry of Education, Youth and Sport: MoEYS）が作成した資料によれば、2021-2022 年度の純就学率は、初等教育（6 年間）が 92.98%[3]、中等教育は前期（3 年間）が 68.55%、後期（3 年間）が 39.35%であった[4]。また、高等教育では、総就学率は 12.43%だという[5]。また、年度毎の学位取得者数から推測するに（表 8）、大学院（修士課程）に進学するのは学部卒業者の 10-15%程度と思われる。それらの情報を踏まえて CJLC 修了生を眺めると、彼らがかなり特異な高学歴集団であることがわかる。その理由は不明であるが、筆者の印象では、CJLC 修了生は、優秀さもさることながら、教育によって資格を得たり能力を向上させたりすることで社会的地位を上昇させることに理解があり、かつ、そのための費用を負担できるだけの経済力のある家庭の出身者が相対的に多いように思われる。この印象が正しいかどうかは、今後の検証が必要である。いずれにしても、CJLC 修了生がカンボジアの平均を大きく上回る高学歴集団であることは事実である。彼らの知識・経験は、今後のカンボジア法の研究や法整備支援事業においてきわめて有用であるものの、同時に、それは多くのカンボジア人の知識・経験とは乖離している可能性もあることを心に留めておく必要があるだろう。

年度	学士号取得者	修士号取得者	博士号取得者
2016-2017 年度	39,543 人	4,159 人	17 人
2017-2018 年度	36,049 人	3,822 人	15 人
2018-2019 年度	38,709 人	4,613 人	20 人
2019-2020 年度	32,640 人	3,296 人	31 人
2020-2021 年度	31,056 人	4,159 人	55 人

表 8　カンボジアにおける 2016-2021 年度の学位取得者数

（出典）MoEYS, *Education Congress: The Education, Youth and Sport Performance in the Academic Year 2020-2021 and Goals for the Academic Year 2021-2022*, c2022, p. 100.より筆者作成。

[3] MoEYS, *Education Congress: The Education, Youth and Sport Performance in the Academic Year 2020-2021 and Goals for the Academic Year 2021-2022*, c2022, p. 71. (http://moeys.gov.kh/en/media-center/education-congress/education-congress-the-education-youth-and-sport-performance-in-the-academic-year-2020-2021/) [accessed on December 20, 2022]

[4] MoEYS, *op. cit.*, p.95.

[5] MoEYS, *op. cit.*, p.109.

4. 共同研究への関心

最後に、質問 8 は、共同研究への関心を尋ねるものであり、「今後 CALE／CJL から、共同研究等の案内があれば、興味がありますか？」という質問に対し、「興味があり、一緒に研究したい」から「興味がない」までの 4 つの選択肢の中から適当なものを選ぶ形式である。事前の予想では、「興味があり、一緒に研究したい」のは 10 人程度と推測していたが、回答者のほぼ半数にあたる 33 人（修了生 88 人の 37.5%、回答者 70 人の 47.1%）から積極的な回答が得られた（表 9 参照）。これは嬉しい誤算であった。今後は、短期的には日本側の研究者・実務家らが提案する共同研究に彼らにも参画してもらいつつ、中長期的には彼らが独力で研究できること、あるいは、彼らが日本側の研究者・実務家らとの共同研究を主導できるようになることを目指して、引き続き協力関係を保っていきたい。

興味があり、一緒に研究したい。	33 人	47.1%
興味があり、一緒に研究するのは難しいが、アンケートなどには協力したい。	17 人	24.3%
協力できるかどうかわからないが、情報は提供してほしい。	19 人	27.1%
興味がない。	1 人	1.4%
計	70 人	100.0%

表 9　共同研究への関心（質問 8）

IV. おわりに

今回の調査により、CJLC 修了生の約半数が RULE 卒業・CJLC 修了後に大学院に進学していることや、修了生の 4 割近くが共同研究に関心をもっていることが明らかになった。今後は、彼ら日本語・日本法の知識を有する CJLC 修了生を活用し、彼らとの共同研究を推進することで、カンボジア法の研究や法整備支援事業のさらなる発展が期待できる。

この調査にあたり、研究協力者として、前述のサウム・ロッタナー氏のほか、ジア・シュウマイ（Chea Seavmey）氏、リム・リーホン（Lim Lyhong）氏、スリン・シム（Sreang Sim）氏およびソン・ブンキアン（Song Bunkheang）氏の協力を得た。彼らは、いずれも CJLC の 1 期生であり、現在は公務員、弁護士、パラリーガル等として母国で活躍している。また、調査結果の整理・分析には、名古屋大学大学院法学研究科の西原圭亮氏のお手を煩わせた。各氏のご協力に感謝する。

Nagoya University Asian Law Bulletin 執筆要領

2021 年 8 月 30 日
編集委員会

本誌は、比較法学・比較政治学、法整備支援および日本語による法学教育を含むアジア諸国の法・政治に関する学術研究の成果として国内外から寄せられた原稿を掲載する。ただし、大学院生を除く学生からの投稿は、受け付けない。

本誌には、「論説」、「研究ノート」、「判例評釈」、「書評」、「資料」および「翻訳論文」等を掲載する。これらの原稿は、「翻訳論文」の場合における原典を除き、未発表であることを要する。本誌は、新たな学問的方法を導入し、比較分析手法を用い、十分に根拠のある議論や結論を提供し、および学術的出版物の国際的な標準に合致する研究成果を優先する。

原稿中では、次の諸点を明示することが期待される。
- 既存の理論上または実務上の問題についての詳細
- 一貫性のある分析手法および解決策の提示
- 先行研究および事例を踏まえた十分に根拠のある議論または提案
- 関係する書誌情報

I. 使用言語

本文の使用言語は、日本語または英語とする（日本語は横組みとする）。
「論説」および「研究ノート」には、本文の使用言語に関わらず、300 語程度の英文要旨を添付する。

II. 字数

1. 和文原稿の場合、「論説」は 2 万字程度、「研究ノート」等その他は 1 万字程度とする。英文原稿の場合、「論説」は 8 千語程度、「研究ノート」等その他は 4 千語程度とする。（図表、脚注、参考文献を含む。）
2. 「研究ノート」等その他であっても、貴重な資料を紹介する等の理由により、内容の性質上必要であると編集委員会が認める場合は、和文原稿は 2 万字程度まで、英文原稿は 8 千字程度まで掲載できるものとする。
3. 研究報告等の記録については、字数制限を設けない。

III. 執筆要領

1. 原稿の第 1 ページ上部には、表題、執筆者名を記載し、続いて要旨（「論説」および「研究ノート」のみ）および目次を記載する。メールアドレスおよび所属を最初の脚注に記載する。
2. 見出し番号は、以下に統一する。

章　I、II、III、……
節　1、2、3、……
項　(1)、(2)、(3)、……
目　(a)、(b)、(c)、……

3. 原稿は、原則として、Microsoft Word で作成する。それ以外のソフトを使用する場合は、事前に編集委員会に問い合わせること。
4. フォーマットは、以下の通りとする。

(1) 用紙サイズ：A4
(2) 余白：上 35mm、下 30mm、左 30mm、右 30mm
(3) 1 ページの文字数：横 40 字、縦 35 行（日本語）、縦 32 行（英語）
(4) 文字の大きさ：10.5 ポイント（日本語・英語）
(5) 文字の種類：MS 明朝（日本語）、Times New Roman（英数字）

5. 脚注は、以下の通りとする。

(1) 脚注はページの末尾に挿入する。（文末脚注ではない。）
(2) 文字の大きさ：8 ポイント（日本語・英語）とする。
(3) 文字の種類：本文と同様

6. 参考文献の表記方法については、著者の使い慣れたスタイル（日本語）または Chicago Manual of Style 17th Edition（英語）にしたがうこと。ただし、編集の過程で、編集委員会が調整を行う場合がある。
7. 図および表を挿入するときは、別紙に記載して提出する。図および表の見出しには通し番号を付し、挿入場所を指定する。

IV. 投稿

投稿希望者は、指定された締切までに、編集委員会にメールで投稿申請書および完成原稿を送付する。（送付先：cale-publication@law.nagoya-u.ac.jp）

V. 審査

1. 原稿は、招待原稿も含めて、編集委員会において一定の審査をおこなったうえで掲載する。
2. 投稿原稿については、内容・テーマ等を考慮し、編集委員会が 1 名または 2 名の査読者を選任することができる。
3. 編集委員会は、査読者の意見をふまえて、掲載の可否を決定する。掲載の可否は、メールで投稿者に通知する。

VI. 校正

初校のみを著者校正とし、その時点での大幅な加筆・修正は原則として認められない。

VII. 発行

1. 本誌は、原則として年 2 回発行する。
2. 本誌は、PDF 版を法政国際教育協力研究センター（CALE）ホームページに掲載する。

以上

Nagoya University Asian Law Bulletin –Instructions to Authors

August 30, 2021
Editorial Board

We invite domestic and foreign authors to submit for publication their academic research on topics related to law and politics in Asia, including comparative studies, legal and rule of law development assistance, or Japanese language for legal studies. ALB will not consider submissions from students, except for those enrolled into graduate level.

ALB publishes research articles, research notes, case analyses, book reviews, documentation, and translated articles. We consider only those submissions which were not published previously, except for translated articles. ALB gives a preference to research that introduces new scientific methods, broadly utilizes a comparative analysis model, presents well-grounded arguments and conclusion, and complies with international standards of academic publications.

Authors are expected to demonstrate the following necessary moments in their submissions:
- Description of existing theoretical or practical problem;
- Coherent analysis design and offered solutions;
- Well-grounded arguments or recommendations, including those which refer to empirical findings and specific cases;
- Contextual scientific bibliography.

I. Language

The articles must be submitted in English or Japanese. (The Japanese scripts to be published in horizontal alignment.) Notwithstanding the language of the submission, a research article or a research note must be accompanied by a 300-words abstract in English.

II. Length

1. For submission in English, a research article shall be of about 8,000 words. A research note or other types of articles shall be of about 4,000 words. For submission in Japanese, a research article shall be of about 20,000 characters. A research note or other types of articles shall be of about 10,000 characters. (These lengths are inclusive of graphics, footnotes and bibliography)
2. For reasons deemed by the editorial board to be substantively relevant to the revelation of valuable data or documents, a research note etc. may be published up to the length of 8,000 words in English or 20,000 characters in Japanese.
3. There is no length limits for records or proceedings related to a research report..

III. Technical Instructions to Authors

1. The title of the paper, the full name should be written on the top of the first page. Abstract (only for research articles and research notes) and contents should be followed. Working email and affiliation of the author should be written in the first footnote.
2. Heading and subheadings are expected to adopt the following orders:

Chapter – I, II, III, …
Section – 1, 2, 3, …
Paragraph – (1), (2), (3), …
Clause – (a), (b), (c), …

3. The paper should be in principle written in Microsoft Word. In case of different software being used, the author must consult with the editorial board in advance.
4. The page layout of the article must conform with the following details:

(1) Paper size: A4
(2) Margins: 35mm (top) and 30mm (bottom, left and right)
(3) Number of characters and lines: (For Japanese) horizontally 40 characters on each line and vertically 35 lines; (For English) 32 lines.
(4) Word size: 10.5 pt (Japanese/ English).
(5) Word font: MS Mincho (Japanese); Times New Roman (English).

5. Footnotes should be set as follows:

(1) Footnotes at the end of the relevant pages, not endnotes.
(2) Word size: 8 pt (Japanese/ English).
(3) Word font: Consistent with the main text.

6. Authors writing in English are required to provide the bibliography according to the Chicago Manual of Style 17th Edition. Authors writing in Japanese are expected to prepare the bibliography following the style which they are familiar with.
7. Graphics, pictures or tables should be submitted in a separate file. Captions for these graphics, pictures or tables should be properly numbered with specific indication of the place to which they are expected to belong in the final published version.

IV. Submission Process

Authors are requested to submit the application form and full paper to the editorial board (email address cale-publication@law.nagoya-u.ac.jp) by the designated deadline.

V. Peer-Review Process

1. The full papers, including those invited for special or other features, will be published only after having gone through deliberations by the editorial board.

2. The editorial board may decide to appoint either one or two referees to review submitted papers other than those invited for special or other features, taking into consideration its contents and theme(s) etc.
3. The editorial board will decide on acceptance (or condition acceptance) or rejection of the submission based on any comments made by the referee(s). The final decision will be notified to the author by email.

VI. Revisions

The author is allowed to revise only the first draft of the full paper. However, as a matter of principle, any major revisions or additions even to the first draft are not acceptable.

VII. Publication

1. In principle, the Bulletin is published twice every year.
2. The Bulletin is published in PDF form on the website of the Center for Asian Legal Exchange.

～ 編集後記 ～

この度、ALB(Asian Law Bulletin)第 9 号をお届けいたします。CALE は 2022 年に 20 周年を迎え、2022 年 9 月 20 日、20 日に CALE 設立 20 周年式典・シンポジウムを開催いたしました。2 日目の 20 日に行われた 2 つのセッション、'The Transformation of Legal Cooperation Philosophy- New Actors and Challenges in Asia'および'Comparative Law in Asia: Foreign law and the Virtue of Legal Transformations in Asia'では、外国による法的支援が与えるメリットだけでなく、歪みや課題をも詳らかにし、新たな方向性を模索する極めて刺激的な報告がなされました。この度の ALB 第 9 号は、これらのセッションで行われた報告のスピーカーのうち 3 名の方々による論考を収録し、また式典・シンポジウムの 1 日目に行われた個別報告の中からも、報告をもとにした論考を収録しております。いずれも法整備支援のこれからを考えるにあたって欠かすことのできない論考をご寄稿いただきました。そのほかにも、各国が直面する重要な課題に取り組む力強い論考をご寄稿いただいております。

本号に掲載した諸論考を見ましても、憲法、会社法、労働法、環境法、民法、独禁法など、多岐にわたる問題の解決が今まさに求められていると言えます。複雑な歴史や社会の変化の中で最適な解決を見つけることは容易ではありませんが、そのための重要な一歩となる論考をご寄稿いただいた執筆者の方々に敬意を表し、改めてお礼申し上げます。

ようやく COVID-19 による制約もほぼなくなり、自由に研究交流をすることができる環境が戻ってまいりました。今後ますます発展してく研究協力の一つの場となることが、本誌の果たすべき役割です。今後とも、皆様のご支援ご協力をお願い申し上げます。

ALB 編集委員長

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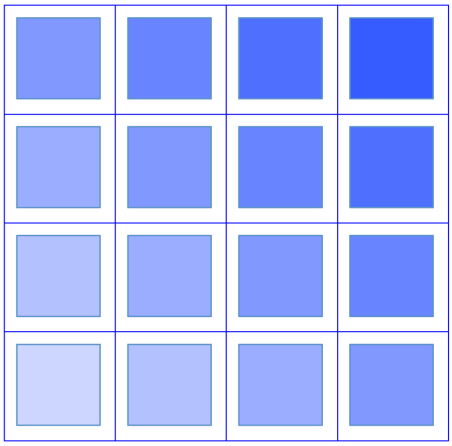

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