ISSN 2188-1952

Nagoya University Asian Law Bulletin

Vol. 10
2024.10

招 待 論 文 Invited Articles

個 別 論 題 Thematic Papers

論説（Research Articles）

資　　料 Documentation

Center for Asian Legal Exchange

Nagoya University Asian Law Bulletin Vol.10

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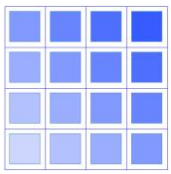
Date of Issue ♦ October 31, 2024

ISSN ♦ 2188 – 1952

Free electronic version available at https://cale.law.nagoya-u.ac.jp/publications/law

Nagoya University
Asian Law Bulletin

Vol.10, October 2024



Center for Asian Legal Exchange
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Nagoya University Asian Law Bulletin
第 10 号

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Invited Papers

【Invited Paper】

Korean Statutory Interpretation Practices within the Executive Branch and Its Applicability to Other Nations

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Contents

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I. Introduction

According to common understandings of the separation of powers, the legislature makes law, the executive implements it, and the judiciary declares what the law is. This understanding leads to the preposition that interpretation is the domain of the judiciary. Thus, most attention associated with the interpretation of law has frequently been given to the judiciary. However, in practice, the executive agency has always interpreted law. The executive agency's statutory interpretation (hereinafter "agency interpretation") occurs as an inevitable element of implementing law.[1] There are few laws executable without first being interpreted. To apply said laws to actual cases, agencies must give them meaning by adopting interpretations. In this respect, the executive agency is a primary interpreter of law.[2] While a court's interpretation is always a backward interpretation on a specific case, the agency interpretation is pre-emptive and thus primary. Overwhelming numbers of laws and provisions of laws are applied as law as interpreted by the agencies. The court's interpretation is always published in writing in a fixed format through litigation. In contrast, agency interpretation takes diverse forms. To name a few; regulations, manuals, statements of policies, decisions, adjudications and so on. The majority of agency interpretations are confirmed and applied to without being reviewed by the judiciary. In many cases, no one is adversely affected by agency interpretation, or people who are adversely affected do not bring suit or are foreclosed from lack of standing or other reasons.[3]

The Constitution of the Republic of Korea (hereinafter "Korea") and framework acts presuppose the agency interpretation. Article 69 of the Constitution sets forth the duty in the President's oath of office, which requires him to faithfully discharge his duty to protect the Constitution. The President is subject to impeachment if he violates the law in the execution of his duties. Articles 75 and 95 provide that the President, the Prime Minister, and the Minister

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[1] TheCapitolNet, ed. Statutory Construction and Interpretation, TheCapitol.Net, Inc. p.109 (the executive branch must interpret a law so that it can carry out the law properly. "Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law." *Bowsher v. Synar,* 478 U.S. 714, 733(1986)).

[2] Mashaw, Jerry L., "Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation." Administrative Law Review, vol. 57, no. 2, Spring, 2005, p.503; Mashaw, Jerry L, "AGENCY-CENTERED OR COURT-CENTERED ADMINISTRATIVE LAW? A DIALOGUE WITH RICHARD OIERCE ON AGENCY STATUTORY INTERPRETATION." Administrative Law Review, vol. 59, no. 4, Fall, 2009, p.889; Strauss, Peter L, "When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History." Chicago-Kent Law Review, vol. 66, no. 2, 1990. p.321; For views on agency statutory interpretation, see also Pierce, Richard J, "How Agencies Should Give Meaning to the Statutes They Administer: A Response to Mashaw and Strauss." Administrative Law Review, vol. 59, no. 1, Winter 2007. pp.197-206; "Roundtable: Statutory Interpretation in the Executive Branch." Administrative and Regulatory Law News, vol. 31, no. 3, Spring, 2006. pp.6-11; Moss, Randolph D, "Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel." Administrative Law Review, vol. 52, no. 4, Fall 2000, pp.1303-1330.

[3] Mashw, Jerry L, "AGENCY-CENTERED OR COURT-CENTERED ADMINISTRATIVE LAW? A DIALOGUE WITH RICHARD OIERCE ON AGENCY STATUTORY INTERPRETATION." ibid, p. 894, 896.

may issue decrees and ordinances for the execution of matters entrusted to them by statutes and for the enforcement of statutes. In addition, Article 107(3) authorizes the establishment of an administrative appeals system within the executive branch. The President must clarify and give meaning to the law in order to faithfully and lawfully carry out his constitutional duties; protecting the Constitution, executing the duties delegated to him by statute, and performing general law enforcement functions. Agencies are the executors of the President's constitutional responsibilities. The employees of the executive agency are public officials having a duty to implement the law as well as the executors of the duties of the President. The Administrative Procedure Act stipulates that public officials may request an interpretation from the relevant agency if the statute is unclear, and the administrative agency that receives the request shall comply with the request (§5(2)).

The rise of the administrative state in the 20th century has reinforced the power of both the agency interpretation and administrative legislation. In the U.S., for example, "in 2013 alone, federal agencies filled nearly 80,000 pages of the Federal Register with adopted rules, proposed rules, and notices. By contrast, the 113rd Congress (2013-2014) enacted just 144 public laws for a total of 1750 pages in the Statues at Large."[4] The situation in Korea is similar. As of March 2023, the number of statutes was 1,600. In comparison, there are 3,288 pieces of subordinate legislations and 19,426 regulations enacted by the executive branch.[5] Scholars' attention is mainly focused on two issues. First, with respect to the relationship between the National Assembly and the executive, much of the concern has centered on the principal-agent problem, that is, how to ensure that the executive agency faithfully carries out the intentions of the National Assembly. Secondly, regarding the relationship between the executive and the judiciary, the levels of deference to agency interpretations has been the main issue. The checks on the executive branch by the National Assembly are relatively well established. The National Assembly Act requires the executive branch to report to the National Assembly when issuing decrees and ordinances. The National Assembly can recommend amendments if it believes that the scope of the law has been violated (the National Assembly Act §98-2). Upon determining that disposition, adjudication, and other actions based on agency interpretation violates the law, the National Assembly may initiate an audit or investigation (the National Assembly Act §127, §127-2), summon and question the minister or agency officials in charge (the National Assembly Act §121, §122, §122-2, §122-3). Court deference to agency interpretations is not as

[4] Walker, Christopher J, "INSIDE AGENCY STATUTORY INTERPRETATION." Stanford Law Review, Vol.67, No. 5, MAY, 2015, p.3. <http://www.stanfordlawreview.org/wp-content/uploads/sites/3/2015/05/67_Stan_L_Rev_999_Walker.pdf>

[5] MOLEG, Korean Law Information Center <https://www.law.go.kr/lawStatistics.do?menuId=13&subMenuId=557>

prevalent in Korea as it is in many other jurisdictions. If an administrative agency has discretion under the provisions of a statute, its interpretation will be deferred to as long as it has not abused it or exceeded the scope of the discretion granted.

This paper is not intended to contemplate legislative control of administrative interpretation or judicial deference. It aims to observe agency interpretation focusing on interpretive disagreements between administrative agencies and between central and local governments. Interpretation is an intrinsic component of the daily work of executive agencies. Statutes are written in abstract language to cover a wide range of social situations. Self-executable statues are rare. As society has become more complex and diversified, the number of vague and opaque laws and provisions has inevitably increased. The number of laws involving multiple agencies is also increasing. In addition, laws, let alone an individual law, are practically always parts of bigger systems, and even the most careful drafting can result in flaws in the overall contextual implementation. Moreover, provisions of laws are often determined through politically dynamic processes. These factors not only create provisions that require interpretation, but also make it difficult to secure a single opinion within the executive branch.

Each agency tends to become obsessed with its own policy objectives. Legal issues are difficult to negotiate, and agencies are often slow to concede to other groups. Officials have been trained that they must act in accordance with the law, and the best interpretation is considered legitimate. The possibility of being held accountable for actions based on unlawful or even simply mistaken interpretation makes officials uncompromising and timid. The mechanisms for policy coordination do not work for disagreements over legal interpretation, which often leads to administrative deadlock. Such processes make it more difficult for local governments to enforce laws if the central government gives ambiguous answers to local government questions. Local government is most closely connected to most people's daily lives. Its enforcement includes various licenses, and permits, etc., which can be urgent and compelling for concerned citizens. Undue delays and ambiguous government opinion can also create a breeding ground for irregularities and corruption. The judiciary is not helpful because it only gives opinions retrospectively through litigation on a case. Court precedent is not available because the issues agencies face are novel and without precedent. To solve these problems, the Korean government has devised a system to unify government interpretations and provide quick answers so that deadlocked administrative functions can move forward. This new scheme has been operating successfully for almost 20 years and has attracted interest from some other jurisdictions. This paper aims to introduce this new agency interpretation practice and the challenges it has faced in its implementation and operation. This paper is not an academic study of interpretive practices but a general introduction to Korean practices. It will not conduct any

empirical research of its own but be limited to utilizing academic literatures, documents published by MOLEG, interviews with officials, and personal experiences. Since some of the participants are still active in the public sphere, their personal information is anonymized.

Part II presents an overview of the current agency interpretation practices, the history of agency interpretation practice and its legal basis, the background of the current agency interpretation scheme, its characteristics, operations and achievements, concerns from academics, and general assessment. Part III turns to similar institutions in other countries, which the Ministry of Government Legislation (hereinafter "MOLEG") referenced when designing the current scheme. Since the agency interpretation practice of Korea was originally based on the Japanese institution, I will take a look at the characteristics of the current scheme by comparing it with the Japanese system and the older Korean system. Part IV examines the applicability of the Korean system to other jurisdictions, bearing in mind that it's probably impossible to say precisely which countries it's suitable for. As someone who participated in the 2005 reform and subsequent operational implementation, I would like to share the problems that had to be overcome in the reform process, the challenges in the operational implementation, and how they were overcome, so that those who want to introduce the system into different jurisdictions can refer to this paper.

II. Executive Agency Statutory Interpretation of Korea

1. Overview

The Korean agency interpretation scheme endows MOLEG with the power to determine authoritative opinions within the context of the executive branch. It is intended to quickly resolve interpretive disagreements between central agencies and between the central and local governments to prevent administrative delays.

Each agency tends to have its own policy-oriented interpretation, and these disagreements are not easily resolved. Rather than trying to reach full consensus, the intervention of a neutral third party can be a shortcut to resolution. Conventional wisdom may think of courts as the third-party interpreter, but courts cannot be a good candidate in most inter-agency conflicts. Agency interpretive conflicts require proactive resolutions before taking actions. Courts, in contrast, are always reactive and backwards-gazing. The Korean government designated MOLEG as the third party and final interpreter inside the executive branch. Arguably, MOLEG interpretation is more akin to a court than an executive agency. It seeks the best interpretation in the context of the entire law rather than any specific agency's policy. As an agency of the

executive branch, however, it is fundamentally different from a court in that it is under the jurisdiction of the President. In another difference from the courts, MOLEG considers the specific case behind its interpretations, but only clarifies and determines the meaning of the provisions in question and does not decide the specific cases. It provides an opinion that is clear enough to resolve the case underlying the question but does not directly decide the case. The application and disposition based on the interpretation is left to the competent agencies. The Statutory Interpretation Deliberation Committee (hereinafter "Deliberation Committee") has been established to ensure fair interpretation by MOLEG, and its operation is in accordance with quasi-judicial procedures.

The reason MOLEG was determined to be an interpretive authority within the executive branch was because of its mission and history. Like the French Conseil d'Êtats, MOLEG had dual functions, advising during the process of legislative bill drafting and adjudicating cases in the event of administrative appeals.[6] It is involved in the process of enacting laws and all administrative rules, responsible for compiling the statute book, keeps all the original laws the form they were originally promulgated in and maintains government legislation-related materials, and builds a comprehensive database on laws and regulations. This demonstrates that MOLEG is the agency keeping the most authentic sources on legislative intent and general history. Furthermore, MOLEG has no business other than reviewing and interpreting laws. At the same time, it has relationships with all agencies due to its duty of reviewing all legislation within the executive branch. These factors were deemed appropriate to maintain fairness.

2. History of Agency Interpretation

The founding fathers of the Korean Republic chose a Western model of the state, giving up the monarchy that had existed for over 500 years prior.[7] They grappled with the transplantation and indigenization of an advanced, but unfamiliar legal systems for the first time in Korean history. Focusing on agency interpretation, a proto type is found in the Constitution and basic laws, where the founding fathers' thought can also be extrapolated.

The government they designed was a presidential system with parliamentary elements added. Along with the President and Vice President, there was a Prime Minister and the State Council (The First Constitution §68). The President and Vice President were elected by a vote in the National Assembly (The First Constitution §53). The Prime Minister was appointed by

[6] The Administrative Appeals System was under the control of the Ministry of Government Legislation, which, as the secretariat, was responsible for the operation of the Administrative Appeals Commission. In 2007, it was reorganized into the Anti-Corruption & Civil Right Commission.

[7] Korea had a 518-year history as a dynastic state called "Chosun Dynasty."

the President with the approval of the National Assembly (The First Constitution §69). Judging by the first Constitution, the founding fathers seemed to have pursued the separation of powers, but rather than a strict separation, they preferred checks and balances on the premise of cooperation through overlapping functions. The President had the right to propose legislative bills (The First Constitution §39), veto and promulgate bills (The First Constitution §40) and to enact subordinate legislation (The First Constitution §58 and §74). Judicial power was vested in the courts (The First Constitution §76). It seems that interpretation was understood as a logical part of enforcement of laws. This understanding is presumed from the fact that statutory interpretation within the government was carried out as one of the main tasks of MOLEG from the time the government was established. According to the Organizational Decree of MOLEG in 1948, matters concerning the interpretation of laws and treaties were stipulated as the duties of MOLEG.[8] There is no mention of agency interpretation in the Government Organization Act or any other statute. This contrasts with Japan, where the Act on the Establishment of the Cabinet Legislation Bureau explicitly mentions interpretation as a task of the bureau.

As such, MOLEG has been given the authority to interpret laws within the executive branch since its establishment of Korea. It began as a ministerial-level central agency under the Prime Minister. The core duty of MOLEG was reviewing legislative bills drafted by the government, presidential decrees, and ministerial ordinances. The department in charge of legislative review was composed of three bureaus. Statutory interpretation was within the duties of these bureaus. Since each bureau was in charge of a certain number of central agencies, the interpretation of laws under the jurisdiction of the central agencies was conducted by that bureau.

When the Prime Minister system was abolished in 1955, the government was reorganized. Organizations under the Prime Minister were merged into other ministries. MOLEG was reduced to the Legislative Office under the Ministry of Justice. The Legislative Office was mainly in charge of reviewing laws, and the Legal Affairs Bureau was responsible for legal advice for the government. However, both the Legislative Office and Legal Affair Office performed statutory interpretation.[9] This ambiguous division of duties was resolved in 1984 when the Prime Minister system was re-established, and the government was reorganized. MOLEG began to assume the agency interpretation duty as it rose to the level of a ministry level central agency, as requested by each central agency, except for cases involving laws under

[8] MOLEG, 10th Anniversary White Paper on Statutory Interpretation Reform, Disabled Peoples' International Korea Press, 2015, p.13.

[9] ibid, p.15.

the jurisdiction of the Ministry of Justice.[10] The laws under the jurisdiction of the Ministry of Justice are listed in the MOU signed between MOLEG and the Ministry of Justice.[11] There is no provision for agency interpretation in the statute, but it is stipulated in the Presidential Decree on the Organization of MOLEG as its task. In 2005, with the institutional reforms, the Regulations on the Management of Legislative Affairs was amended to provide detailed regulations on agency interpretations.

3. Reform of Agency Interpretation and its Background

The year 2005 was a watershed year for the agency interpretation practices. On December 30, 2004, at the Ministerial Meeting on Regulatory Reform, the Prime Minister ordered the preparation of a drastic improvement plan for agency interpretation practices, and accordingly, the interpretation system was greatly reorganized. The following summary[12] is what the Ministerial Meeting for Regulatory Reform found to be the problem and what it adopted as a solution.

1) Local governments tend to request interpretation of laws from central agencies to avoid liability or to avoid audits.
2) Central agencies also have a practice of giving vague and ambiguous answers to avoid liability.
3) The practices of local governments and central agencies lead to administrative waste and grievances from citizens.
4) There is a need for mandatory third-party review to ensure that vague interpretations do not become a means of avoiding accountability.
5) It is possible to have a third-party review internally, such as an advisory lawyer, but it is not advisable because the opinions of different third parties may differ.
6) In order to unify the government's opinion and ensure the legality and validity of the administration, it is desirable for a government agency to be in charge of interpretation.
7) If the interpretation of the central agency is unclear or clearly erroneous, local governments should be allowed to request an interpretation directly from the agency in charge of interpretation.

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[10] Presidential Decree on Organization of MOLEG (Presidential Decree 11593, Dec 31, 1984) §1.; Presidential Decree on Organization of the Ministry of Justice (Presidential Decree 11592, Dec 31, 1984) §1.

[11] According to the MOU, the Ministry of Justice has jurisdiction over 113 laws, including Civil Code, Commercial Code and Criminal Code.

[12] MOLEG, “Report on Proposals to Improve the Agency Interpretation” January 25, 2005.

In addition to the issues summarized above, there were also disagreements found in the interpretation and corollary delays in decision-making among agencies, and evasion of responsibility among agencies was found to be very common. It is noteworthy that the Ministerial Meeting for Regulatory Reform approached the agency interpretation as a matter of public grievance. The Prime Minister's instruction was to set up a new bureau-scale organization. Several ministries were interested in hosting the organization. It did not take much time, however, for MOLEG to be selected as the most appropriate agency. MOLEG has been performing interpretation work since the establishment of the republic, in charge of reviewing and improving laws and, therefore, it retains all historical data. It was considered that MOLEG had no other project related to substantive policies than reviewing laws, so fairness in interpretation could be ensured. Accordingly, the Prime Minister instructed MOLEG to come up with reform plans. MOLEG prepared an amendment to the Regulations on the Management of Legislative Affairs after consulting with the relevant agencies such as the Ministry of Justice, the Ministry of Home Affairs and the Ministry of Finance, and it was noticed in newspapers and official gazettes for people's comments. In 2005, when MOLEG prepared a brief of its yearly work plan for the President, he ordered that citizens may file a request for interpretations from MOLEG.[13] MOLEG reflected the order and revised the Regulations on the Management of Legislative Affairs. In July 2005, the Regulation on the Management of Legislative Affairs went into effect, and a department dedicated to interpretation, the Bureau of Statutory Interpretation, was established.

4. Operation and Procedure of Agency Interpretation

MOLEG interpretations are processed by the following procedure: request → preliminary review → deliberation by the Deliberation Committee → finalization of opinion → reply.

Request: MOLEG interpretation commences with the request of legitimate requester or requesters; central government agencies, local governments, and civil petitioners. Article 26 of the Regulations on the Management of Legislative Affairs stipulates that a competent agency shall request interpretation where there is a conflict in interpretation with other central agencies, local governments, or civil petitioners regarding the statutes under its jurisdiction. On the other hand, where a central government agency intends to file the interpretation of any statute under the jurisdiction of another central agency, the agency must first hear the opinion of the competent agency having jurisdiction over the relevant statute. Local governments also first

[13] MOLEG, 10th Anniversary White Paper on Statutory Interpretation Reform, p.26.

request to the central agency having jurisdiction over the statute to interpret it and receive its answer before requesting MOLEG's assistance. If the answer is unclear or wrong, the local government may request MOLEG to interpret the relevant statute, appending the details of the agency's reply. If the central agency does not reply within one month, the local government may make its request without appending the details of the reply by the central agency. A civil petitioner may make a request directly or entrust the central agency to request assistance from MOLEG. If a civil petitioner thinks that a statutory interpretation made by the central agency having jurisdiction over the relevant statute contravenes statutes, the petitioner may entrust the central agency to request MOLEG to interpret the relevant statute. However, if the central agency does not request MOLEG to make the statutory interpretation within one month or notifies the petitioner that it does not request MOLEG, a civil petitioner may directly request MOLEG intervention to make the desired statutory interpretation. In 2005, civil petitioners became able to request interpretation according to the instructions of then President, but it was very limited. To facilitate civil petitioners' request for interpretations, MOLEG amended the Regulations on the Management of Legislative Affairs in 2010 to relax the requirements for requests and has set up a virtual window in the Government Legislative Support Center on February 16, 2015. Civil petitioners can apply for interpretation through this center (www.lawmaking.go.kr).

Preliminary Review: When a request for interpretation is received by MOLEG, it is forwarded to the Bureau of Statutory Interpretation. In that bureau, three departments are in charge of interpretation work, and the delivered request is assigned to a staff member in siad department, and the person in charge is designated. Government officials working in the bureau all have considerable experience in the work of legislative review or are qualified as lawyers. The person designated as the person in charge of the request identifies the opinions of the relevant agencies, investigates the facts that form the background of the interpretation, and if there are precedents for interpretation, they are referred to, and review opinions are prepared and submitted to the preliminary review meeting presided over by the Director General of the bureau. The meeting is composed of the Director General and directors of the bureau and is held every week. MOLEG has published an interpretation practice manual for the officials in charge to refer to.[14]

The interpretation of MOLEG is to promote consistent enforcement of laws by unifying the government's views. The Regulation on the Management of Legislative Affairs stipulates the direction and matters to be considered in interpretation. That is, first, the statutory

[14] MOLEG, Statutory Interpretation Workbook, 2020.

interpreter shall clearly ascertain the background and purpose of the legislation in question and determine the actual status of implementation of the relevant statute, identify and verify the detailed background of and grounds on which the issue was raised, and sufficiently hear the opinions of related agencies, such as the central agency having jurisdiction over the relevant statute (§27(1)). The regulation further writes as follows; where it is necessary to hear opinions under paragraph (1) 3, MOLEG may request related administrative agencies, such as the central agency having jurisdiction over the relevant statute, to explain unclear matters or to submit necessary materials. In such cases, the related agency must conscientiously comply with the request, and cooperate therewith (§27(2)). Preliminary review opinions are presented to the Deliberation Committee.

Deliberation by the Deliberation Committee: All legitimate interpretation requests are presented to the Deliberation Committee. The committee consists of 9 members including the chairperson. The vice minister of MOLEG becomes the chairperson. The remaining members are designated by the chairperson from the pool of members at each meeting. Members' careers, genders, work areas, etc. are taken into consideration and for the purpose of ensuring fairness in the composition of the committee. Members should be qualified as lawyers who have worked in the related field for more than 10 years, those who hold a position of associate professor or higher teaching law at a university, public officials of level 4 or higher in the executive agencies, or public officials equivalent to the above. As of February 2023, the committee's pool has a total of 153 members. Of these, 79 are lawyers, 62 are university professors, 6 are researchers working at research institutes, and others are professionals such as tax attorneys, accountants, patent attorneys, etc. The committee convenes with a majority quorum and makes resolutions with the consent of a majority of the members present. In practice, there are very few cases where all nine members are not present. In cases where the head of a local government requests interpretation, if the committee decides different from the opinion of the central agency in charge, the consent of six members is required. Oral arguments by civil petitioners related to interpretation or public officials of related agencies are guaranteed. Both parties may be represented by an attorney. Each interpretive case is assigned to different members. The member is entitled to the assistance of the staff of the bureau, if necessary, for the review of the case entrusted to him. The committee member in charge of review first argues his/her opinion on the committee meeting, and then free discussion is followed before rendering decision. The committee meets weekly. In cases where professional review is required, specialized committees or subcommittees may be set up for each field (§27-3(7)). The committee has adopted quasi-judicial procedures. Oral argument is guaranteed, when there is a conflict of interest with any parties, committee members are excluded or recused, and ex-parte contact is

prohibited. The committee's opinion only interprets the text of the law but does not take the disposition to resolve the case at issue. The application and disposition based on the interpretation is the responsibility of the competent agency.

Final Opinion and Reply: Final opinion is determined by the minister of MOLEG. Legally, the minister is not bound by the opinion of the Deliberation Committee but de facto, acts as if bound. According to MOLEG, not a single case has ever been decided differently from the committee opinion. A final opinion is usually made within one week of the committee's deliberations reflecting opinions discussed in the committee. One of the reasons for improving the legal interpretation system in 2005 was prompt work processing through quick answers. The Regulation on the Management of Legislative Affairs specifically stipulates expedited reply. Article 27(4) says that MOLEG in receipt of a request for a statutory interpretation under Article 26, shall promptly notify the result thereof to the agency that has requested the statutory interpretation or to the civil petitioner; and where replying to the request for the statutory interpretation, it shall also notify the head of the central administrative agency having jurisdiction over the relevant statute and related administrative agencies, and where a statutory interpretative agency has made a decision, the head of a central administrative agency having jurisdiction over the relevant statute, of the result of a statutory interpretation requested by a civil petitioner under Article 26(8), the head of the central administrative agency shall notify, without delay, the civil petitioner of the opinion of the relevant agency on the relevant result (§17(5)). The format of the interpretation of MOLEG consists of a summary of the question, all conflicting opinions, the decision, and its rationale. It is like the decision of a court in form. The interpretation opinions are accumulated in a database called the National Legal Information Center (https://www.law.go.kr/LSW/main.html) and can be accessed by anyone through the Internet.

5. Achievement

Since the institutional reform in 2005, the process of agency interpretation has made significant progress both in quantity and quality compared to the previous nominal interpretation system. First, looking at the number of cases, it has increased by more than 20 times compared to the number in the past system (table 1). Table 1 only shows the data for three years before the system reform, but there was no significant difference even before that period.

[table 1] comparison of the number of cases processed.

year	2002	2003	2004		2019	2020	2021
Number of replies	14	12	23		452	454	470
Settlements via consultations	-	-	-		100	116	122

※ Data: Interpretation Bureau of MOLEG

Settlement via consultation means that if the opinion of the civil petitioner and the opinion of the competent central agency are the same, it is handled without being presented to the Deliberation Committee. Before 2005, there was no such system because civil petitioners could not request interpretations. The number of interpretation requests has fluctuated since 2005 but has shown a steady upwards trend. In 2010, there was another system improvement, and after this improvement MOLEG provided statistical data by dividing it into before and after 2010 as shown below table 2 and table 3.

As seen from Tables 2 and 3, the number of applications increased significantly in 2005 and 2010 respectively, when the system was reformed. Until 2010, there were cases where requests that should have been filed to the Ministry of Justice were mistakenly applied for and transferred, but since 2011, such cases have been rare. Simple settlement in table 2 means that the interpretation bureau staff directly handled the interpretation request because it did not meet the legal requirements, or the content was clear, or the issue itself was not to the extent of being presented to the Deliberation Committee. The number of requests has increased significantly since 2010, and the number registered as agendas to be presented to the Deliberation Committee has increased, but the number replies has not changed significantly, staying between 450 and 500 over 10 years. It may indicate that this is an appropriate number given the current number of staff members and operating procedures. Table 3 shows the period required to proceed. It takes about 38 days in 2021, up from 28 days in 2011. This shows some setbacks compared to the original plan to respond within 30 days. According to statistics from MOLEG, the Deliberation Committee was held an average of 48 times a year.[15] This number means that the committee was held every week except in unavoidable cases. Over the entire period, the number of rejections which corresponds to the dismissal in the litigation, seems too many for whatever reason. MOLEG argues that civil petitioners tend to apply interpretation regardless of the requirements. Settlement through consultation was introduced to somehow give answers to civil petitioners even in that case. High rejection rate may be improved through more easily

[15] MOLEG, 10th Anniversary White Paper on Statutory Interpretation Reform, p.56.

stipulating guidelines for interpretation requests, writing in plain language, and through more publicity.

MOLEG evaluated itself in its 10-yar history that the new interpretation system has contributed to resolving administrative inefficiency and public distrust caused by delayed interpretation. At the time of designing the new interpretation scheme, the goal was to reply within 30 days. As of 2021, it takes about 39 days, so it is falling short of the original goal. However, in the case of litigation, it takes at least six months from filing a lawsuit to a decision in the trial court. Considering this, 39 days is a short time.[16]

[table 2] Data on Interpretations before 2010

	2005	2006	2007	2008	2009	2010
Requests	276	673	839	833	671	737
Registrations	158	394	482	450	420	493
Replies	97	338	341	320	304	364
Withdrawals	3	28	42	14	26	27
Rejections	74	170	218	185	252	250
Simple Settlements	0	30	69	111	104	86
Transferred to MOJ	43	98	1	91	-	1

※ Data: Interpretation Bureau of MOLEG

[table 3] Data on Interpretations after 2010

	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Requests	1744	2008	1716	1804	1708	1425	1509	1690	2447	2592	2870
Registrations	796	731	677	878	844	718	700	782	754	723	923
Replies	501	358	406	434	440	529	501	506	452	454	470
Withdrawals	40	68	51	66	86	58	36	30	66	66	58
Rejections	171	226	136	372	261	153	207	87	159	164	193
Settlements via Consultation	-	-	-	-	-	-	-	48	100	116	122
Period of process	28.3	28.3	32.6	33.7	29.1	40.4	39.5	38.8	35.8	38.3	37.9

※ Data: Interpretation Bureau of MOLEG

[16] ibid, p.59.

6. Some Concerns from Academia

The current agency interpretation scheme has gained relatively positive reviews for its performance over the past 15 years, but there are also some concerns.[17] High rejection rate and the low number of requests from local governments have been pointed out. Interpretation is often requested as a prerequisite for approval and permission closely related to the daily life of the people. As of 2021, the average period of 39 days can be said to be too long. A scholar who analyzed the interpretation work of MOLEG concluded as one of its causes that the workload was excessive.[18] He argues that since the number of experts is insufficient compared to the amount of work, faithful investigation and review are not possible. As of 2010, 11 professionals deal with 800 cases per year, excepting rejected cases, average over 20 cases per person and this workload is excessive compared to similar organizations in the United States, France, and Japan.[19] He also analyzes that there is a structural problem in securing the expertise of the officials (staffs) in charge of interpretation. According to him, in the United States, each agency, especially the agency equivalent to MOLEG have staff with lawyer qualifications carry out interpretation work. In the case of France and Japan, excellent manpower is hired through competitive tests, and in particular, in Japan, where there is an organization most similar to the Korean system, the interpretation is carried out by the best manpower dispatched from each ministry, and their pride is high.[20] On the other hand, in Korea, excellent officials and lawyers selected through competitive examinations are recruited, but once they get used to the work, they are transferred to other departments, so there is a problem in securing expertise. He asserts that overwork and lack of expertise make officials just follow precedents and fall into mannerisms instead of struggling to solve problems creatively, and morale cannot be high. There are also concerns that the Deliberation Committee and officials may be more policy-oriented than legal principle. His concern is based on the Regulations on Management of Legislative Affairs. Its Article 27 (1) stipulates as follows; **"**for the correlation of the governmental statutory interpretation and for consistent enforcement of a statute, a statutory interpretative agency shall pay attention to" --- "the background and purpose of legislation and actual status of implementation of the relevant statute" --- "the detailed background of and grounds on which the issue was raised" --- "opinions of --- the central administrative agency having jurisdiction over the relevant statute". The concern of this regulation centered on

[17] Shin, Bonggi, "Recent trends in statutory interpretation in Korea", Kyungpook Natl. Univ. Law Journal vol. 35, February, 2011, pp. 221~254; MOLEG, ibid, pp.79-87.
[18] ibid, pp.231-232.
[19] ibid, pp.231-232, 234.
[20] ibid, p.232.

unifying government opinion, and it may be inclined to defer the policy judgment of the competent agency rather than seeking the sound legal opinion. After reviewing the committee's deliberation materials, he assessed that there were no irregularities, but requested that the deliberations should consider legislative purposes, history, precedents, and legal principles.[21] He also strongly criticizes the provision of the Regulations on Management of Legislative Affairs on the binding force of the committee opinion. This issue should be approached from two angles. One is whether the decision of the Deliberation Committee has binding force against the minister of MOLEG. The majority theory argues that there is no legal binding force, but there is a de facto binding force. The other point is whether it binds the relevant agencies. The majority argue that there is no legal binding force. Article 27 (6) of the Regulations on Management of Legislative Affairs provides that MOLEG "shall request the head of the related central administrative agency or the head of the related local government to provide information on --- whether any related affairs have been processed under the statutory interpretation; where any related affairs have been processed inconsistently with the statutory interpretation, the ground therefor". He is not happy with this provision because it acknowledges itself the interpretation is not binding.[22] Endowing the executive interpretation with legal authority may cause constitutional controversies. But there's also no reason to have a provision that confesses no-binding force.

7. Evaluation in General

Agency interpretation of MOLEG seems to be receiving relatively positive reviews from academics and by itself. However, there is no empirical evaluation. Now that the program has been launched for 20 years, it is necessary to conduct a more comprehensive empirical study on whether the original problems have been solved and whether there is a need for further improvement. The following discussion is centered on the self-assessment of MOLEG, based on its 10 years of operational experience.

Mediator of Social Conflicts: MOLEG assessed that prior agency interpretation practice played a role as a mediator within the government when there is a disagreement in the interpretation of the law. Since the reform of the system in 2005, it has expanded to the role as a mediator of social conflicts.[23] Since 2005, MOLEG has resolved conflicting interpretations between central agencies, central and local governments, and civil petitioners and the governments. In the past, such conflicts have led to delays in policymaking and law enforcement,

[21] ibid, p.240.
[22] ibid, pp.240-242.
[23] MOLEG, 10th Anniversary White Paper on Statutory Interpretation Reform, p.81.

causing social conflicts and public grievances, but the new scheme has given citizens, local governments, and related agencies other than the competent agency a means to resolve them, and as a result, it has served to resolve social conflicts. The laws requested for interpretation include Housing Act, Land Use Act, Building Act which are closely related to people's daily lives. In the early days of the new system, there were concerns that MOLEG might unilaterally support the opinions of the ministries in charge. All interpretive opinions are replied to thorough review of the Deliberation Committee, and the committee has tried to ensure fairness in composition and operation. According to data of MOLEG, about 29% of the cases were answered with opinions different from those of the competent ministries.[24] It is evaluated that the operational performance so far was reliable, fair, and speedy. Officials of MOLEG also have made efforts to ensure fairness with the belief that if fairness is lost, the interpretation system will face existential crisis. In this way, they earned an evaluation of fair interpretation.[25] In consideration of administrative precedents, court precedents, and legal principles as well as fairness of interpretation, the officials made concerted efforts for the best interpretation.[26] If there are frequent cases where the interpretation is criticized by outsiders, or when a disposition based on the interpretation is overturned by the court, the interpretation may not be trusted. So far, the interpretation of MOLEG has been trusted as being speedy and fair, and it plays the role of mediator of social conflicts by interpreting laws which are related to socially important policies.

Preliminary Remedy to Protect People's Right and Interests: The administrative act or disposition (*Verwaltungsakt*) has a binding effect, which must be obeyed by people including all governmental organizations until withdrawn by the competent agency or revoked by the authority or annulled by judicial review. The same is true of unlawful disposition. Even if a complaint is filed, the unlawful is not automatically suspended. There must be a court decision to suspend execution. After administrative action, ex post remedy requires a lot of time and money. In Korea, there are administrative appeal and administrative litigation as ex post remedies for unlawful administrative disposition. Administrative appeal aims to ensure the legality of agency disposition and to provide convenient legal remedy to civil petitioners. Compared to administrative litigation, a decision is made quickly, but it takes several months. Administrative litigation, as mentioned above, takes at least six months from the filing of the

[24] ibid, p.81.

[25] See infra IV. 5.

[26] MOLEG created "Statutory Interpretation Workbook" to standardize work processes by presenting court precedents, interpretation precedents, agenda processing procedures, and checklists.

lawsuit to the judgment of the trial court.[27] Even if there are legal remedies, they have a fatal limit in that they are ex post relief. Agency disposition is related to measures covering administrative acts in everyday life, such as issuing licenses, permissions of gas stations and restaurants, etc. Even though there is a difference of opinion on the interpretation of the law, it can be considered harsh from the point of view of civil petitioners to wait until the disposition is made, and then file a lawsuit. Agency interpretation provides civil petitioners with an opportunity to argue before disposition. Through direct request, civil petitioners can take their grievance to the authorities, which has the effect of expediting the administration by breaking the deadlock and has contributed to the redress of grievances. From the perspective of agencies, illegal dispositions can be prevented through careful disposition by referring to the opinions of neutral institutions. Interpretation by a third party also has the positive effect of preventing abuse of discretionary power. In fact, major motivation of the reform of agency interpretation was to prevent possible harm (damage) to civil petitioners caused by delays of administrative acts and corruption due to ambiguous interpretation. After reform, the number of agency requests according to civil petitioners' demand and direct requests from civil petitioners has increased significantly, which shows that the new system is establishing itself as a preliminary legal remedy for people. According to MOLEG, the 2005 reforms resulted in 77 civil petitioner-initiated requests for interpretations in 2009, and the 2010 reforms resulted in 277 in 2011.[28]

Contribution to Administrative Transparency and Efficiency: The interpretation system has contributed to administrative transparency. Theoretically, whole laws form an organic whole, code. The authors of laws are deemed omnipotent, considering all circumstances, so there should no errors or contradictions. There are contradictions, ambiguous and opaque expressions not only in the entire legal order but also in a single Act. In many cases, legal texts are written in the context of political dynamics. There are even missing parts which are needed for execution (supplement). The competent agency in charge tends to interpret this situation in a way that is favorable to its own ministry. Even if the officials in charge try to seek the best interpretation, the organizational goal and the instructions of the head of the agency will have an impact, and since the decision-making in the bureaucratic organization is carried out along the vertical chain of command, it is inevitably influenced by the organizational intention. In addition, it is not clear on what principle the interpretation of agencies is based. Interpretive opinions do not have a certain format, and in many cases can only be estimated implicitly as a premise of a policy. Interpretations that intertwine the interests of agencies are not easily

[27] MOLEG, 10th Anniversary White Paper on Statutory Interpretation Reform, p.84.
[28] ibid, pp.44-45

conceded or negotiated, and policy decisions related to those interpretations tend to stalemate. This is even more so in the absence of a neutral third party to mediate these conflicts. Experience shows that simple policy decisions are resolved relatively easily through the President's Office or the Prime Minister's Office. However, in legal conflicts, procedural and substantive fairness, and legal persuasiveness tend to be more persuasive and authoritative than bureaucratic coordination. MOLEG is not an agency that makes substantive policy decisions. It has no business except reviewing legislative bills and regulations. It has no policy goals which may distort interpretive opinion. Lack of substantive business, seeking best interpretive opinion can be policy goal of MOLEG. The interpretive opinion has a certain format, is written and published. The details of the decision, arguments and the reason for the opinion are disclosed and published. In this respect, the interpretation is transparent. When there is a stalemate due to conflict in interpretation, related agencies and even civil petitioners can request interpretation, so the deadlock can be resolved quickly. Ambiguous provisions of laws which are interpreted in multiple ways make the officials in charge timid in taking swift decisions for fear of being reprimanded or audited afterward. MOLEG interpretation gives authority to one of multiple conflicting opinions, authorizing the officials to make decision without fear of reprimand.

Contribution to Unity of the National Legal System: There are 226 local governments.[29] They are divided into basic local governments and metropolitan governments. Both of local governments can enact ordinances and rules within the scope of not violating national laws and regulations (presidential decree and ministerial ordinance). Autonomous legislation is freely enacted within the scope of laws but the ability to enact local legislation is poor and not constant depending on local government.[30] Increasingly, the power of central agencies is transferred to local governments, and the demand for autonomous legislation is increasing. As a corollary, the need to harmonize autonomous and national laws has also increased. In general, central agencies issue guidelines or samples for enactment of autonomous legislation on the laws under their jurisdiction. Local governments sometime imitate the guidelines or samples rather than enacting legislations pursuant to the specificity of the local governments. Sometimes, it violates the scope of laws and regulations by attempting to draft autonomous legislations regardless of the central government's guidelines. MOLEG has provided advice on the enactment of autonomous legislation at the voluntary request of local governments and has been institutionalized as the demand increases. This role of MOLEG is evaluated to have contributed to the harmonious development of the overall national legal system, including local government ordinances and

[29] Ministry of the Interior and Safety, Local Government District and Research, 2022, p.4. <http://www.mois.go.kr>

[30] Local governance began with the constitutional amendment in 1987; prior to that, the Constitution stipulated that it be postponed until the reunification of Korea (Article 10 of addenda of the Constitution amended in 1972).

rules.

In addition to the above evaluations, I'd like to emphasize that the new system lays a foundation for public discourse which is appropriate to the development of definite agency interpretations. Unlike judicial and academic interpretation, agency interpretation is a field in its own right.[31] While some are concerned about the guidelines in the Regulations on Management of Legislative Affairs,[32] I'd rather see them as an example of how agency interpretation can work (be different from judicial interpretation). Administrative laws are enacted for policy purposes, to solve social problems of the time. If the meaning of the provision is interpreted differently from the original purpose when enforced, revision will be inevitable. If so, there is no reason to exclude the most appropriate interpretation in light of the purpose and historical data among the multiple reasonable interpretations, even in the name of seeking the best interpretation. The new interpretation scheme has established a deliberation committee, which has contributed to the standardization of interpretation procedures and opinion formats, and the establishment of normative standards for agency interpretation. In particular, it has exposed issues, arguments for and against, and the committee's opinions and reasons to external evaluation, and has established a system for virtuous development through internal and external dialogue. Enacting laws, implementing them, and judging actions based on the laws can be described as a dialog between the legislative, executive, and judicial branches. The new interpretation system has contributed positively to the development of the law by facilitating this dialog and public discourse.

III. Comparison with Agency Interpretation Practice of Other Countries

In the process of designing a new interpretation system in 2005, MOLEG conducted a survey on the agency interpretation practices in major countries. Prior to 2005, the Korean system was like Japan's Cabinet Legislation Bureau. The new interpretive scheme referred to the systems of the United States, France, and Germany based on the previous system. Looking at similar practices in other jurisdictions will help provide a more comprehensive understanding of the Korean system.

1. Model 1 (Japan, Cabinet Legislation Bureau)

[31] Mashaw, Jerry L, ""Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation.", p.503; Mashaw, Jerry L, "AGENCY-CENTERED OR COURT-CENTERED ADMINISTRATIVE LAW? A DIALOGUE WITH RICHARD OIERCE ON AGENCY STATUTORY INTERPRETATION.", pp. 902-903.

[32] Shin, Bonggi, "Recent trends in statutory interpretation in Korea" p.40.

The Cabinet Legislation Bureau of Japan served as a model for the Korean practice, so it is very similar to MOLEG in many ways, including its position, role, and function within the government. In this respect, the experience of over 100 years of the Cabinet Legislation Bureau could be a beneficial resource for the improvement of MOLEG. The Cabinet Legislation Bureau was established by the Cabinet Legislation Bureau Establishment Act. Article 3 of the Act stipulates (1) the examination of laws, Cabinet Orders, and treaties, (2) the drafting of laws and ordinances, (3) the interpretation of laws, (4) the investigation of domestic and foreign legislation, and (5) the general legislation as the main tasks. The statute clearly authorizes the power of statutory interpretation as the work of the Cabinet Legislation Bureau unlike Korea where presidential decree defines interpretation as the work of MOLEG. Interpretation is made at the request of the Prime Minister, the cabinet and the ministers. Only ministry-level central agencies having generic responsibility for laws under the jurisdiction may request interpretation.[33] Other agencies, local governments and civil petitioners are not allowed to request interpretation. A request for interpretation are submitted and replied in the form of documents, which are the final opinions within the government and become the norms governing politics and administration.[34] Since it is an institution in charge of the interpretation of the law in the government, it is also responding to the questions of Diet on legal issues.[35]Answering questions from the Diet is another way in which the Cabinet Legislation Bureau differ from MOLEG. The Cabinet Legislation Bureau has the power to interpret the Constitution as well as the statute and regulation. According to the responses to the questionnaire on the work of the Cabinet Legislation Bureau, “opinions on legal matters”, as defined in Article 3(3) of the Act, shall be construed to include opinions on the Constitution.[36] In Korea, the agency interpretation is bifurcated: the Ministry of Justice is responsible for the interpretation of private laws such as civil code and commercial code and criminal law, while MOLEG in charge of administrative laws. In Japan, however, the Cabinet Legislation Bureau has jurisdiction over interpretation of all laws, including private laws. Since 2017, MOLEG has given interpretive opinions on administrative regulations when requested by agencies in charge, while the Cabinet Legislation Bureau does not comment on administrative regulations of agencies.

There is no particular method or direction of interpretation, which is, in Korea, stipulated

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[33] In the responses to the questionnaire on the work of the Cabinet Legislation Bureau

[34] MOLEG, 10th Anniversary White Paper on Statutory Interpretation Reform, pp. 232-239; Park, Yeongdo, “Legislative Bodies and Bill Review Systems in Major Countries.” Legislation, vol. 553, January 2004, p.17; MOLEG, “Report on Proposals to Improve the Agency Interpretation”.

[35] MOLEG, 10th Anniversary White Paper on Statutory Interpretation Reform, pp. 236-237.

[36] In the responses to the questionnaire on the work of the Cabinet Legislation Bureau

in the Regulations on Management of Legislative Affairs, summarized as 10 principles in U.S.A. The Bureau said, however, "starting with the Constitution, considering the intention of the legislature or the social situation as the background based on the text and purpose of the law at issue, and it is logically confirmed while paying attention to maintaining the consistency of the whole."[37] The interpretation of the Cabinet Legislation Bureau does not have a legal binding force. However, the law stipulates interpretation as one of the tasks, and the Minister of the Cabinet Legislation Bureau officially express his interpretation opinion. The long history and tradition gave the interpretation a de facto authority. An official of the Bureau argues that when a law explicitly authorizes interpretive power, it is implied that the opinion should be respected, which is the basis of authority. The following table 4 provides a quick overview of the Korean and Japanese interpretation system. As seen from the table, before 2005, the Korean system was very similar to Japan's, provided that it was divided into the Ministry of Justice and MOLEG, with the Ministry of Justice in charge of private laws. The number of interpretations per year is similarly low, with less than 20 cases. Since the reform in 2005, the number of cases has increased more than 20 times. Since 2005, Korea's agency interpretation has changed to a system that is qualitatively different from the past and the Japanese system.

[table 4] comparison of agency interpretation in Korea and Japan

	Korea		Japan
	After 2005	Before 2005	
Laws subject to interpretation	The same as before (Administrative Regulations, if agency request)	Administrative law (Except private laws, criminal provisions)	All laws including the Constitution
Interpreting agency	The same as before	MOLEG & The Ministry of Justice	Cabinet Legislation Bureau
Request	Central Agency Local Government Civil petitioner	Central Agency	Central Agency
Legal Basis	Presidential Decree on the government legislative affairs	Presidential Decree of Organization of MOLEG	Statute (Act)
Organization/Procedure	Deliberation Committee Quasi-judicial procedure	No collegial body and procedure	No collegial body and procedure
Binding force	De facto binding	De facto binding	De facto binding
Numbers of cases processed	459*	14/12/23** (2002/2003/2004)	14 21/10** (2019/2020/2021)

[37] MOLEG, ibid, p. 238.

* The number is the annual average of the number of replies from 2011 through 2021.

** Average number before 2002 was not calculated. Thus, the table shows the cases processed from 2002 to 2004 in Korea, and those from 2019 to 2021 in Japan. The number processed in the Cabinet Legislation Bureau are from the questionnaire for the Bureau.

2. Model 2 (U.S.A., The Office of Legal Counsel)

In the United States, the Office of Legal Council is responsible for the agency interpretation. The Constitution stipulates that the President shall "faithfully --- preserve, protect and defend the Constitution" (§2(1)(8)). The President should understand and interpret the law accurately in order to preserve, protect and defend the Constitution, and needed experts to advise him. 28 U.S. §511. stipulates that the Attorney General shall give his advice and opinion on questions of law when required by the President. The head of a federal department may request an opinion of Attorney General on legal matters, and the Attorney General is obliged to respond to such request.[38]The legal opinion of the Attorney General is prepared by the Office of Legal Council under the Department of Justice. It was established to write legal opinions, and 28 U.S. §511 can be said to be the basis for the establishment of the Office of Legal Council.[39]Its role is regulated by Federal Regulations (28 C.F.R. §0.25). According to subparagraph a and c of the provision of the regulation, it performs the task of (a) preparing the formal opinions of the Attorney General; rendering informal opinions and legal advice to the various agencies of the Government; and assisting the Attorney General in the performance of his functions as legal adviser to the President and as a member of, and legal adviser to, the Cabinet, and (c) rendering opinions to the Attorney General and to the heads of the various organizational units of the Department on questions of law arising in the administration of the Department.

The Office of Legal Council determination process is not regulated by law, but seemingly follow the procedure (confirmed) in the form of best practice.[40] That is, final opinion is determined through the process of evaluating opinion requests, soliciting the views of interested agencies, researching, outlining, and drafting, secondary review of draft opinions and finalizing opinions.[41]Although the law does not stipulate how to interpret the law, it operates its own guiding principles. The guiding principles includes an accurate and honest appraisal of

[38] ibid, pp. 224-225.

[39] ibid, pp. 224-225.

[40] U.S. Department of Justice, Office of Legal Counsel, MEMORANDUM FOR ATTORNEYS OF THE OFFICE, May 16, 2005.

[41] ibid

applicable law (even if that advice will constrain the administration's pursuit of desired policies), thorough and forthright advice, obligation to counsel compliance with the law, reflection of the institutional traditions and competencies of the executive branch as well as the views of the incumbent President, due respect for the constitutional views of the courts and Congress, public disclosure of its written legal opinions, the highest possible quality and he best possible view of the law, consideration of all affected agencies, maintenance of good working relationships with its client agencies (especially the White House) and clear stance on the nature of advice.[42]

The interpretation of the Office of Legal Council does not have a legal binding force, but it is final and has a de facto binding force within the executive branch. According to "Principles to Guide the Office of Legal Counsel", "OLC's legal determinations are considered binding on the executive branch, subject to the supervision of the Attorney General and the ultimate authority of the President."[43] There is no collegial body that decides opinions. Nevertheless, it is worth noting that interpretation is determined based on the guiding principles, and through the procedure in form of best practice.

3. Model 3 (Germany, Ministry of Justice, Nationaler Normenkontrollrat)

German Ministry of Justice carries out the tasks of MOLEG and the Korean Ministry of Justice. It is known that legislative bills are strictly reviewed in the light of past painful experience. The basis for the Ministry of Justice to carry out interpretation work is the Basic Law. The highest authority for agency interpretation is the Basic Law, and based on Article 65(4) of the Basic Law, the Federal Service Regulation (*Geschäftordnung des Bundesregierung*), which is the Korean equivalent of the Government Organization Act, was established. According to the regulation, the federal government will coordinate the interpretations of its agencies as a consensus body. Common affairs of each ministry are governed by the Federal Agencies Common Affairs Regulations (*Gemeinsame Geschaeftsordnung der Bundesministerien*). Within the executive branch in Germany, the institutions that represent interpretation of laws are the Ministry of Justice and the Federal Commission for Normative Control (*Nationaler Normenkontrollrat*). Within the Ministry of Justice, a Deliberation Committee belonging to each Bureau and Department performs interpretation work. The *Nationaler Normenkontrollrat* was established by the *Koalitionsvertrag* in 2005. Then, on August 4, 2006, *Gesetzes zur Einrichtung eines Nationalen Normenkontrollates (NKR-Gesetz)*

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[42] Principles to Guide the Office of Legal Counsel, December 21, 2004. <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2927&context=faculty_scholarship>

[43] ibid.

was enacted, giving it a legal basis. The role of *Nationaler Normenkontrollrat* is the Korean equivalent of the Deliberation Committee for Interpretation. There are no general regulations or guidelines on the interpretation. There is no regulation on when the competent agency exercises the right to interpret, what are the requirements for interpretation, what procedures should be followed, and what elements to consider. The role of the Ministry of Justice in the process of interpretation is only to make recommendations for individual cases, and the final decision maker is the minister of the competent ministry, who has generic responsibility for the law at issue. Agency interpretation has no binding legal force.[44]

4. Model 4 (France, Conseil d'Êtats)

The organization responsible for the final interpretation of administrative laws in the government is the Council of State (Conseil d'Êtats), which was created in 1799. The Council of State advises the government on the preparation of legislative bills, ordinances, and certain decrees, responds to the questions of the government on legal affairs and conducts research pursuant to the request of the government. It is the final interpreter and arbiter of administrative laws. Its decisions bind the executive agencies, local governments, or any other agency invested with public authority. Through carrying out its functions of judging and advising the executive branch, the Council of State ensures that the administration operates in compliance with the law.[45]

At first glance, it corresponds to MOLEG of Korea in that its functions are authoritatively interpreting law as well as advising on legislation. The advisory function for preparation of legislative bill is like MOLEG. However, the role of the judging and interpreting laws amounts to the Supreme Court of Korea. It is not appropriate to apply this model to MOLEG. The issue of how to perform dual functions, i.e., legislative and judicial functions simultaneously, and how to carry out fairly in accordance with the constitutional principle of checks and balances, is also a concern for MOLEG. While there may be concerns that the dual functions may risk constitutional value of checks and balances, the reputation of the highest authority has been earned over a long period of operation. In this regard, its operational principles and practices, challenges and overcoming experiences are worth studying for the improvement of MOLEG.

5. Model 5 (China, Vietnam)

Other models are found in jurisdiction of the former Soviet Union such as China and

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[44] MOLEG, 10th Anniversary White Paper on Statutory Interpretation Reform, pp. 240-246.

[45] MOLEG, ibid, pp. 247-256; Park, Yeongdo, "Legislative Bodies and Bill Review Systems in Major Countries." p.12; MOLEG, "Report on Proposals to Improve the Agency Interpretation".

Vietnam. In China, not only the courts but also the legislature has the right to interpret laws. In addition to the interpretation of law as a premise for solving a specific case, the court may issue general abstract interpretation guidelines, which is essentially quasi-legislation. The standing committee of the National People's Congress carries out interpretation as function of law-supervising power.[46] Article 45 of the Legislative Law stipulates that the power to interpret laws belongs to the Standing Committee of National People's Congress, and it is to make interpretations where laws have any of the following circumstances: (1) the specific meanings of the laws' provisions require further clarification; (2) new situations arise after the laws' enactment, so it is necessary to clarify the legal basis for their application. The Article 46 defines who may request interpretation such as the State Council, Central Military Commission, Supreme People's Court, Supreme People's Procuratorate, and each special committee of the National People's Congress. Article 104 of the same law establishes the principles and limits of interpretation, requiring the interpretation of the Supreme People's Court and the Supreme People's Procuratorate to target specific articles of laws, to be consistent with the goals, principles, and original meaning of the legislation, and to report their interpretation opinions to the National People's Congress Standing Committee within 30 days. As such, the National People's Congress Standing Committee is the supreme authority on statutory interpretation. In practice, actual exercise of the interpretive power by the Committee is very limited. Instead of interpretation, most laws or their articles, when are not clear, are reenacted or amended or abolished but not interpreted."[47] The interpretation in the executive branch is said to be done by the State Council when it enforces the law concerned.[48]Judicial interpretation are done by the Supreme People's Court and the Supreme People's Procuratorate when they apply the law to the cases. Contrasting the National People's Congress's legislative interpretations, the judicial interpretations are very popular and play very important role in judicial practice.[49] Courts may issue opinions of general and abstract application in addition to interpretations that apply to a specific case.

In Vietnam, the party's supremacy over state is recognized as a constitutional principle, and the state uses law as a tool to govern society in accordance with the party's policy guideline. As in modern Western nations, the state power is divided into the legislature, the executive, and the judiciary, and the three branches are not equal, but rather cooperate with each other, with the legislature having a superior position. In the interpretation of the law, there are similarities

[46] Zhu Jingwen, Introduction to Chinese Law based on Data Analysis, Renmin University of China Press, 2015, p. 36
[47] ibid, p.36
[48] ibid, p.92
[49] ibid, p.92

with China. The legislature (National Assembly), its standing committee (Standing Committee of the National Assembly), has the constitutional right to explain the Constitution, laws, and ordinances.[50] However, it has rarely exercised that power in practice. The reasoning is that once a law is promulgated, it is complete and reflects the views of the Standing Committee of the National Assembly, and no further explanation is necessary.[51] While the executive branch is very active in interpreting the law, there is concern that each agency may use its discretionary power to bias interpretation in favor of the agency's policy interests. In some cases, interpretation is used as a bargaining process to get favorable interpretations by using relationships with government officials, and it has been criticized as a source of corruption.[52]Courts, as guardians of the rule of law, must be given adequate jurisdictional and discretionary powers to act as the final arbiter of legal interpretation, but it is argued that such powers are limited in the case of Vietnamese courts.[53] For example, when encountering a difficult legal problem for which law does not provide a definite answer, judges often seek trial guidance from higher courts or even from the Party's office or executive branch.[54]

This model recognizes the supremacy of the legislature in interpreting the law. Despite the similar structure, China and Vietnam are different in their operations. In China, the courts play a major role in interpretation,[55] while in Vietnam, the courts play a minor role while executive interpretation is active.[56]

IV. Applicability to Other Nations

A legal institution is not created in a vacuum but as a product of society. Every social problem is unique because it arises in the context of a society's politics, economy, culture, and traditions. Similar legal issues, however, are not specific to a particular society, but are found in almost all societies. Authors designing a new legal institution to solve legal problems will likely emulate an existing or foreign system rather than write a new one from scratch. Successful foreign systems should at the very least be referenced as a part of best practices. However, the success of a system in one society is not a guarantee of successful operation in another. An

[50] Lien, Bui Bich, "Legal Interpretation and the Vietnamese Version of the Rule of Law." National Taiwan University Law Review, vol. 6, no. Symposium Issue, March 2011, p.327.
[51] ibid, p.328.
[52] ibid, pp. 329-330.
[53] ibid, pp. 330-331.
[54] ibid, p.330.
[55] Zhu, Jingwen, Introduction to Chinese Law based on Data Analysis, p.36.
[56] Lien, Bui Bich, "Legal Interpretation and the Vietnamese Version of the Rule of Law.", p.329.

institution is designed to respond to the problem of that society, and it would be unlikely to be completely transferable to another country. Some scholars go so far as to say that legal transplantation is impossible.[57] All legal institutions are created within a complex fabric of political, economic, social, cultural, and historical factors. An institution that looks the same may have a completely different outcome in a different environment.

The reform of agency interpretation practice in 2005 was designed to combat the problems of Korean society at the time, and it has worked well over the past two decades. As seen recently with the governments of Korea and the Republic of Indonesia (hereinafter "Indonesia") signing an MOU to set up an organization like MOLEG in Indonesia, some countries are now looking to emulate the Korean system.[58] However, the Indonesian authorities just translating foreign words into their language and directly copying MOLEG would likely not work as expected. What was the background and problem that led to the creation of the system? What were the difficulties in introducing the system, what were the success factors, what were the challenges in the operation process, and how did they overcome them? Finding the answers to these questions and applying them to domestic situations will help foreign governments find realistic alternatives. Thus, I will content myself with describing what has been successful and what has been barriers, based on my experience over the past 20 years of implementing and operating the MOLEG program. I will focus on five factors: 1) definition of the problems and their causes, 2) levels of political support, 3) the level of the rule of law and governance in general, 4) practices and their histories, and 5) levels of commitment of the officials in charge.

1. Definition of Problems and their Causes

The reform of agency interpretation in 2005 was meant to respond to the problems Korea faced. It was not the theoretical conclusions of a few elites but were prompted by the practical needs of interpretive work in the entire executive branch. Conflicts and delays were an outward manifestation and not the root cause of the issue. For example, why does the disagreement between legal interpretation creates a deadlock and why is it problematic? Isn't there a set of principles that resolves such situations, i.e., in cases of conflicts between central agencies, the competent agency opinion prevails, and the relationship between the central government and the local government is that the local government must obey the central government's decision? The competent agency may push ahead regardless of the conflicting interpretations of the other agencies, and the central government may decide authoritatively regardless of the conflicting

[57] Cowan, Rosaline Baindu. "The Effect of Transplanting Legislation from One Jurisdiction to Another." Commonwealth Law Bulletin, vol. 39, no. 3, September 2013, pp. 480.

[58] MOLEG, Press Release, "MOLEG signs MoU with Indonesia's Cabinet Secretariat", September 11, 2018.

opinions of local governments. In Korean society before 1990, the problem at issue in 2005 might not have been a problem. When it comes to legal matters, however, Korean society in 2005 did not work in the old way anymore. It was democratized and the people's sense of legal rights had increased. Government officials' belief in the rule of law had also improved. Policy decisions could be resolved through the coordination function of the Prime Minister's Office, but for legal problems, parties sought the authoritative opinions and the best interpretations. From this perspective, the problem was not an aberration, such as a momentary abuse of authority or sabotage, but rather a side effect of the maturation of the rule of law and the establishment of good governance. In other words, it was a systemic problem rather than a human problem, such as corruption, or incompetence. The solution was not to further motivate or punish officials, but to improve the system. The Ministerial Meeting for Regulatory Reform believed that the attitude of the officials was generally justified, and neglecting these problems could lead to administrative waste, corruption, and people's distrust against the government. The solution designed was to establish a neutral organization within the executive branch that would give the voice in the interpretation of laws.

The Korean example suggests that the countries looking to adopt the Korean system should first analyze in depth what problem they are trying to solve. For example, conflicts over statutory interpretation between agencies, and between the central and local governments may be prevalent in any society. However, the causes may vary from society to society. If the root problem is not about the best interpretation but about turf battles between agencies, or power struggles between central and local governments, or the distribution of benefits and interests between agencies, then a solution like MOLEG is unlikely to suit the problem. If the problem is the abuse of power, corruption, or sabotage by officials, reforming the civil service system, introducing appropriate training programs, and improving disciplinary and punitive system would be more effective.

A researcher diagnosed the problem in Indonesia; "the President holds power over the administration and may appoint ministers and heads of agencies. However, some ministries and agencies are established by statute"[59], "political transactions are often behind the creation of new institutions, and the executive is often powerless to prevent the growth and establishment of new agencies within themselves.", "Often, members of the House of Representatives urge the establishment of these new agencies through the bills they have initiated. Commonly, when a new law is passed to address a specific issue, the bill will also instruct the establishment of a

[59] Wijaya, Mas Pungky Hendra, et al. "Reforming Bureaucracy in Indonesia: The Legal Challenges of Reorganization." International Trade and Business Law Review, 22, 2019, p.237.

new agency to administer that issue, despite it also falling under the responsibility of existing agencies. This has --- resulted in a large overlap in authority and functions between institutions",[60] "often mentioning the nomenclatures of a ministry or agency in their sectoral law is used as a device to preserve their existence and enlarge their power, … there is a tendency for government agencies to expand their powers and functions through legislation. --- often a new agency is established with the purpose of providing a high-ranking position in the public sector for certain people who are affiliated with a certain political party. … the President often does not have full discretion to develop his or her own administration or restrict the rampant creation of new agencies established under statute. This is in part due to lack of support from the House of Representatives for reform, … new parliamentary bills often contain proposals to establish a new agency, despite the relevant functions already being performed by an existing agency."[61] "The other major problem created by legislation is disharmony between --- new and existing laws and regulations. --- civil servants face difficulties in the implementation of such laws due to incoherency in statutes and policy documents."[62]

As the analysis above shows, not only are there too many organizations, but overlaps among them. This chaotic situation has been knowingly and intentionally created by actors in political power games. Under this circumstance, it would be difficult to establish MOLEG-like organization, which coordinates the creation of and reform of agencies under a grand plan. However, adoption of a MOLEG-like agency which has both functions, coordination of government legislation and interpretation, could be a final goal in itself, not a means to reform. In Korea, government organizations are established by statute, so theoretically, the legislature (the National Assembly) can establish a government agency at its discretion, but usually the executive branch takes the initiative to create, abolish, and reform agencies. It is kind of enshrined comity between the National Assembly and the executive branch.

The above researcher argues "establishing a new overarching legal framework to regulate the sizes and functions of public sector institutions and setting conditions on the creation of new agencies are important steps for effective reorganization and successful administrative reform in Indonesia." For that purpose, a MOLEG-like organization would be desirable but doing so is also asking those who currently wield power to give up their vested interests. Political consensus will be a prerequisite for successful adoption.

[60] ibid, p.239.
[61] ibid, p.240.
[62] ibid, p.241

2. Political Support

Reform, especially the reorganization of government, involves a shift in power, and creates resistance from the people with a stake in the existing system. The change of the agency interpretation was a minor reform, but it was not an exception. While many factors interact to make reforms successful, political support would be critical to suppress the resistance from vested interest. In 2005, Korea was in the midst of a government-wide reform drive. The executive branch was led by a reform-minded President. He initiated major reforms from the beginning of his administration. The reforms were not only promoted by the entire government, but were also systematically implemented throughout term of the President, with firm support from a group of scholars and consulting companies. The reforms were not just legal reforms, but were systematically implemented with the goal of changing behavior through training courses. The reform of the interpretation system was driven through in this atmosphere, and in particular by the direction of the President and the Prime Minister. Carried out with the directive of the President and Prime Minister, it took a lot of negotiation and persuasion with the relevant institutions to revise the relevant laws and regulations and secure the correct personnel for the organization. Depending on the country, minor changes to the existing system might be enough to adopt MOLEG model. For some jurisdictions, constitutional change may be required. For example, in countries like Vietnam and China, the People's Congress is the supreme authority on statutory interpretation, and courts may issue general and abstract opinions that are not predicated on resolving specific cases. In these jurisdictions, the establishment of a MOLEG-like organization in the executive branch may need constitutional reform. In countries with advanced legal systems, organizations such as the Department of Justice play this role. Each ministry or department has legal experts, or administrative law judges to handle legal issues. These jurisdictions have already overcome the problems faced by Korea.

In the case of Indonesia, as we saw above, much of the confusion stems from parliamentary legislation, and political clans and regional interests are diagnosed as being involved. It is vastly different from Korea in terms of population, land size, ethnicity, and socio-cultural diversity. The legal system alone is a mixture of several legal systems.[63] Since the first day of independence, Indonesia has attempted political and legal reforms, both large and small.[64]Reform fatigue and insensitivity to reform are also said to be prevalent.[65] Even the creation of a small government agency can have complex and significant impacts on existing

[63] Hartono, Sunaryati. "Indonesia's Legal Reforms in a Nutshell." Uniform Law Review, vol. 7, no. 4, 2002, pp. 991-994.
[64] ibid, p.1002.
[65] Hwuang, Yoonwon et al, Public Administration and Public Policy in Indonesia, Daeyeong Publishing Co, 2013, pp. 326-327.

organizations. Even if it is only the creation of a single governmental agency, its successful establishment requires not only the revision of laws and regulations, but also a change in vision, philosophy, past practices, ways of working, attitudes and so on. Even if the head of the executive branch pushes hard for an organization like MOLEG,[66] it's doubtful that it can garner the full support of the social and political establishment.

3. Level of Rule of Law and Governance in General

The 2005 reforms are not made independent of the level of democratization and governance in Korea at the time. Under the revised constitution of 1987, a civilian government was launched, and society democratized at a rapid pace. There was a peaceful transition of power between the ruling and opposition parties, and political democratization took root. A large number of voluntary civil society organizations emerged. The civilian government repealed or reformed many outdated and authoritarian laws and practices. The newly established Constitutional Court declared numerous undemocratic and authoritarian laws unconstitutional, contributing to constitutionalism and the rule of law. The 1998 financial crisis gave people the painful experience of being forced to reform by the external environment. A series of social changes and painful experiences served to create positive environment for the rule of law. Regarding the rule of law, I would point to the reduction of corruption and the establishment of good governance. Efforts to combat corruption have been a major policy of all governments since the founding of the Republic of Korea. But for all the rhetoric, the results have been less impressive, and corruption has been rampant.[67] Compared to legal reforms, such as the reform of outdated and authoritarian laws in the early 1990s, people's behavior has not changed as much. According to the CPI index published by Transparency International, Korea scored 4.29 out of 10 in 1995, ranking 27th out of 41 countries. In 2005, it scored 5.0 and ranked 40th out of 159 countries.[68] Although the score hasn't changed much since 1995 and the ranking is also not satisfactory, there has been improvement compared with the authoritarian era. The Roh, Moo-hyun government's anti-corruption efforts marked a turning point and were well-received by international organizations and contributed to an improvement in CPI index.[69] The

[66] The MoU between MOLEG and the Indonesian Cabinet Secretariat was signed in the presence of the Presidents of both countries. Indonesia requested that MOLEG's staff be dispatched to Indonesia with the signing of the MOU, and the staff was dispatched, but further cooperation has been suspended due to the outbreak of Covid-19.

[67] Kim, Eunkyung et al., The Structure, Mechanism, and Trends of Corruption in Korea(I), Korean Institute of Criminology, 2015, pp. 13-17.

[68] Transparency International-Korea, <http://ti.or.kr/do/cpi.php?ptype=view&idx=690&page=1&code=cpigcb>

[69] Kim, Eunkyung et al., The Structure, Mechanism, and Trends of Corruption in Korea(I), Korean Institute of Criminology, p. 204.

administration explored structural and institutional alternatives to eradicate corruption, recognizing the limitations of the government-led anti-corruption promotion system used by previous governments. It recognized civil society as partners in policy, and addressed the issue of corruption from a governance perspective. Corruption control strategies were premised on the recognition that corruption can occur in the private sector, such as the business community and civil society.[70] Around this time, there was a shift in emphasis from "rule by government" to "rule by governance" in partnership with civil society. Diverse legal schemes were designed to allow civil society to participate in policy making process. Throughout its tenure, the administration made consistent efforts to increase civil society participation, which was considered to have contributed significantly to the transparency of the society and the new governance that makes civil society a partner in national affairs. The government has undergone many organizational changes, old practices have been reformed with the introduction of new management tools, and there have been significant changes in the behavior of government officials. The increased accountability of public officials to civil society has naturally led to an improvement in the rule of law. The 2005 reforms were accomplished against this backdrop.

Corruption is considered to be one of the biggest problems facing the Indonesian government.[71]Even the courts and the institutions that are supposed to monitor corruption are corrupt.[72]Corruption is not conducted in secret under the table, it is carried out right on top of the table, so to speak. Officials often play the role of a middleman or, a broker.[73] Eliminating corruption would be a condition and prerequisite for reform, it has been at the heart of administrative reform efforts.[74] Corruption in Indonesia is a legacy of long-standing authoritarianism, nepotism, and cronyism. Power cartels of political parties, politicians, bureaucrats, and businessmen are at the center of corruption as an economic and political mechanism. The challenge of reform is to break them down.[75]Since the fall of the authoritarian government, reforms have been underway, but corruption has not improved much. According to Transparency International, Indonesia's CPI index in 2022 ranks 80th out of 100 countries worldwide, and reportedly, the Indonesian government lamented that it has regressed to 2014 levels.[76]

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[70] ibid, pp.202-204.

[71] Hwuang, Yoonwon et al, Public Administration and Public Policy in Indonesia, p.196.

[72] ibid, p.331.

[73] ibid, p.324.

[74] ibid, p.324.

[75] ibid, p.325.

[76] HanInPost, "according to Transparency International, Indonesia's CPI in 2022 was 110th out of 180 countries, down 14 notches from the previous year, and was evaluated as returning to 2014 levels", March 5, 2023. <https://haninpost.com/archives/66739>

A positive factor is that since the democratization process began, NGOs and civil society organizations have had the opportunity to participate in politics, and their capacities have expanded. The government has also been working hard to establish a democratic political and governance system.[77]The Korean government's efforts to engage civil society as a partner in the fight against corruption and push for reforms, not just the introduction of a MOLEG-like organization, would be also instructive.

4. Practices and their Histories

The current agency interpretation practice is built on its predecessors, and it is not new in that sense. MOLEG was in charge of interpreting laws within the executive branch since the founding of the republic, which modeled after Japan's Cabinet Legislation Bureau and the Conseil d'Êtats of France. Furthermore, it is important to note that MOLEG had the power to review all legislative bills initiated by the government and all subordinate legislations. Even laws proposed and passed by the National Assembly are sent to MOLEG, which acts as a clearance agency, reviews them for constitutional and legal soundness, and decides whether to promulgate them for the President. In other words, MOLEG is not only involved in the enacting process of all laws also has historical records of all laws and regulations. Apart from its interpretative work, MOLEG was recognized as the most authoritative body in terms of issuing opinions on the enactment and maintenance of laws and regulations. At the time, MOLEG maintained its status as the secretariat of the Administrative Appeals Commission, which, like a court, is a quasi-judicial body that makes adjudication on specific cases. Therefore, it was considered natural for MOLEG to assume the final interpretation of the law from a neutral position within the executive branch, and there was no shift of power between agencies. The new system was just a feature tacked on to the old system and met with little resistance.

The Cabinet Secretariat of Indonesia is a ministerial-level agency directly under the President that has the authority to coordinate and align the opinions of relevant ministries in the formulation of government legislation, and can be compared to MOLEG.[78] As mentioned above, however, the Cabinet Secretariat (*Sekretariat Kabinet*), the National Law Development Agency (*Badan Pembinaan Hukum Nasional*), the Ministry of Law and Human Rights (*Menteri Hukum dan Hak Asasi Manusia*), the Ministry of State Secretariat (*Kementarian Sekretariat Negara*) share or jointly perform functions of Korean MOLEG.[79] In this sense, there is

[77] Hwuang, Yoonwon et al, Public Administration and Public Policy in Indonesia, pp.324-325.

[78] MOLEG, Press Release, ibid.

[79] Lee, Yeonji, A Study on the Improvement of Government Legislative Process of Indonesia – a Comparative Study with Korea, 2020.

technically no such organization as MOLEG. In particular, considering the duplication of functions is often created by political circles, if Indonesia intends to reform the Cabinet Secretariat taking after MOLEG, political consensus will be prerequisite. The example of Korea, where a protracted battle between MOLEG and the Ministry of Justice over the authority to interpret laws in the executive branch was resolved through an MOU between the two ministries, illustrates how difficult it can be for ministries to give up their established tasks.[80]

5. Efforts of the Staffs Members for Establishing the Best Precedents

Unlike judges, whose status and independence of work are guaranteed, the interpretive opinions of MOLEG are determined by members of the Deliberation Committee who are appointed by the minister of MOLEG, aided by bureaucrats who must comply with the boss's instructions. As a result, the opinions of MOLEG can be subject to internal and external pressures. Moreover, because MOLEG opinions are not legally binding, it was possible that the new system could create more problems than it solved if powerful administrative agencies refused to comply with the interpretive opinions when they were contrary to agency interests. Indeed, the early members of the Interpretation Bureau deserve to be praised for overcoming such influences from both internal and external sources, to secure trust in their impartiality. A few examples will make it easier to understand and empathize with the struggles of these early employees.

Some members of the Korea Communications Commission are required to be nominated by the National Assembly before his appointment by the President. Accordingly, the National Assembly determined the candidate and recommended him for appointment to the agency in charge. However, the agency and the National Assembly disagreed on the interpretation of the relevant provisions and the competent agency requested an interpretation from MOLEG. MOLEG replied that the National Assembly's interpretation was not appropriate, canceling the nomination. It goes without saying that the National Assembly exerted tremendous pressure during the deliberations of the Deliberation Committee of MOLEG. Officials in charge of the case were summoned to the National Assembly and required to answer questions. The National Assembly believed that MOLEG would not dare to overturn the National Assembly's decision. In the end, the National Assembly had no choice but to comply with the interpretation of MOLEG, surprising even the members of the National Assembly, which in turn elevated the profile of MOLEG.[81] A landfill is a typical nimby facility and is shunned by nearby residents.

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[80] See supra II.2.

[81] Seoul Daily Newspaper, "Qualification controversy over telecommunications commission candidate" June 9, 2014. <https://www.seoul.co.kr/news/newsView.php?id=20140609500167>; MediaToday, "the interpretation of MOLEG

There was a case where the majority floor leader of the National Assembly, on the demands of his constituents, pressured MOLEG to interpret the law to say that a landfill could not be built in the area at issue. He demanded that the names of the members of the Deliberation Committee who participated in the deliberations be made public and bluffed that he would have the relevant authorities investigate whether there were any irregularities in the decision-making process. Regardless of his pressure, MOLEG responded with an opinion contrary to his request and did not provide him with the members' names. In another case, a person in the President's Office called the minister of MOLEG to ask for a favorable interpretation. The demands of the President's office are not insignificant to the executive officials. However, the official in charge explained that not only did MOLEG have to provide the best interpretation of the law, but the outcome cannot be predetermined as it is decided by a vote of the members of the Deliberation Committee through a quasi-judicial process. The resulting outcome was different from what the person had wanted. The demands from within MOLEG are perhaps the most serious pressures. Government officials are obliged to act in accordance with the law and to obey the orders of their superiors. In this respect, the demands of the minister are hard to resist. Ministers are frequently influenced by unavoidable external favors. Once, a minister was asked by an official of the office of the Prime Minister for a specific interpretation, and the minister wanted to attend a committee deliberation and give his opinion and help achieve the desired outcome. However, the director of the Interpretation Bureau advised that it was not appropriate, and the minister did not attend. In reality, in its 20 years of operation, there has never been a single case where an interpretive opinion decided by the Deliberation Committee has been ignored and overridden with a different opinion. These examples illustrate the myriad of factors that can derail a program if not addressed with commitment and courage. It would not be legally and practically feasible to legislate to prevent anticipated adverse effects or undesirable influences. The success of the system relies heavily on the commitment of the officials who run it and their courage in the face of undue pressure. Good precedents would be hard to set at the beginning, but once they are established, they would become a source of authority that is hard for anyone to break.

The Cabinet Legislation Bureau of Japan and the Conseil d'Êtats of France were often referenced during the process of designing MOLEG. The legal basis of the Cabinet Legislation Bureau for the interpretation of laws is not much different from that of MOLEG. The high level of authority of its interpretation would be the result of good precedents accumulated over a long

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legitimate", April 24, 2014. <http://www.mediatoday.co.kr/news/articleView.html?idxno=116207>; Asia Today, "Broadcasting Commissioner Says He Agrees with interpretation of MOLEG, April 25, 2014. <https://www.asiatoday.co.kr/view.php?key=20140424010015003>

period of time. Its interpretative opinions that differ from the prime ministers have been found.[82] Acknowledging political and cultural differences, it is unlikely that an executive agency would have a conflicting opinion with the prime ministers. When asked whether the dual functions of the Conseil d'Êtats which are advising the preparation of legislative bills as well as judging and interpreting laws advised by itself, is contrary to the separation of powers and interferes with the impartial interpretation of laws, Justice Christine Maugüé of the Conseil d'Êtats replied that there is no such problem due to the trust to the organization earned through its long history.[83]The experience of Korea and other advanced countries suggests that even if there are institutional shortcomings, the dedication and courage of the officials who run them can make up for the deficiencies and proactively improve the system.

Many countries in Asia are struggling with corruption. Indonesia also still grapples with corruption. It is not expected that officials will have the courage to defy internal and external pressures when corruption is rampant. However, it has been a historical reality that it is usually a few visionaries who drive reform. Korea has been also plagued by corruption in the past. The dedication of a few leaders eventually has led to changes of public attitudes and behavior. Attempting to put in place the right institutions would be a worthwhile endeavor, even if there are many challenges.

V. Conclusion

Transplanting from a foreign system is challenging, maybe even impossible. However, there are many examples of successful adoption and indigenization of foreign legal systems. Korea has a long history of adopting unfamiliar Western systems and adapting them to suit its own circumstances. The Korean Constitutional Court is based on the German constitutional court system and has been transformed into a model suitable for Korea, leading to social change. MOLEG has been modified into its current form by modeling itself after the Cabinet Legislation Bureau of Japan. Asian countries, including Indonesia, have a similar historical experience to Korea, and have tried to transplant foreign legal systems.

Legal reform in Indonesia has been underway since the very first days of the country's existence, and there have been successes and failures. One scholar has pointed out the lessons learned from past experiences show that transplantation is not just a matter of translating the

[82] 日本經濟新聞, "法制局の壁を人事で突破", October 1, 2022 <https://www.nikkei.com/article/DGXZQOCD2747O0X20C22A9000000/>

[83] from Q & A at a conference held by MOLEG

words of foreign laws, it is a holistic, organic effort that involves politics, society, and culture. For reform to succeed, the problem must be accurately diagnosed, and political consensus and support must be in place. If corruption is endemic in the political and economic elite and the civil service, any institutional reform is doomed to failure. This is why it is necessary to build governance with civil society organizations as partners in policy. Throughout the 80s and 90s, many countries were undergoing reforms towards democratization and openness. Corruption is still widespread and there are negative predictions for successful reforms as a result. However, there are also positive factors such as the growth of NGOs and civil society organizations and their participation in the policy process. Social change tends to be driven by a small group of dedicated and motivated people. From this perspective, it is argued that MOLEG is a model that can be adapted to solve the problems of a society by reflecting and adapting to local conditions.

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【Invited Paper】

Em'power'ing *chihō* ?
The Adoption of the SDGs Framework Its Consequences on Local Governance

Marco Zappa*

Abstract

Since 2015, the UN-sponsored Sustainable Development Goals (SDGs) have become a dominant policy framework in Japan. Its adoption has favored the strengthening of international partnerships and has influenced trends in policymaking domestically, in the so-called regions (*chihō*) particularly with regards to initiatives at the urban planning and management level. The SDGs framework and its standardized measuring indicators have in fact come to encompass previously devised policies in respect of Information and Communication Technologies (ICT)-based ecologically sustainable urbanism (*smart city*). Considering these facts, what makes a city *smart* today? How do previously widespread ideas on smart cities (SCs) interact with new frameworks such as that of the SDGs? How, in other words, do international commitments affect local policymaking? This article will offer a preliminary multilevel analysis focusing on both national and local policymaking level to show how the SDGs framework has become all-encompassing and comprehensive. Furthermore, the adoption of said framework appears consistent with long-standing national level policies intended to foster local government (jichitai)'s autonomy and financial self-sufficiency. With the adoption of the SDGs framework, *jichitai* have increasingly leveraged on their capacities to (a) use a common language (that of the SDGs) to comply with the central government's directives; (b) create a place identity through the implementation of specific policies in respect of technology or welfare; and (c) foster partnerships with private actors.

* Ca' Foscari University of Venice. This research was made possible by the Nagoya University Center for Asian Legal Exchange (CALE) where I had the opportunity to work as Visiting Scholar in early 2023. Specifically, I would like to express my gratitude to Martina Baradel, Giorgio Colombo, David Green, Aziz Ismatov, Makino Emi, Matsumoto Yurika, Murakami Masako, Naiki Yoshiko, Saitō Kazuhisa and Yokomizo Dai for their help, support and advice.

Contents

I. Introduction

According to a recent report in the Mainichi Shimbun, by 2025, new buildings in the two cities of Tokyo and Kawasaki will have to be equipped with solar panels. Despite a projected rise in housing costs, the two local administrations have proved adamant about their respective CO2 reduction strategies[1]. With their respective decisions, the two municipalities will be at the forefront of Japan's decarbonization strategy[2]. In reality, local governments across Japan have been working on this issue since the mid-2010s. The transformation of Tokyo into a "smart city", for instance, has been central in the program of current governor Koike Yuriko since the inception of her term. In a February 2018 policy speech, Koike pledged to cut the city's CO2 emissions to zero by, among the other measures, investing in electric mobility, renewable energy generation, implementing new standards for environmentally friendly construction, safeguarding the urban green, promoting small and medium enterprises' productivity through advanced technology and expanding the city's railway network[3].

The idea to improve urban life and reduce the discomforts of cities for its inhabitants and surrounding natural environments has been at the center of national and local governments' agendas throughout the globe since the early 2010s, when it has appeared clearly that cities – particularly large business centers across the world – would continue growing as a consequence of economic globalization and the digitalization of the global economy[4]. In the last three decades, neoliberal turns

[1] The Mainichi, "Kawasaki to Become 2nd City in Japan to Require Solar Panels on New Buildings," *Mainichi Daily News*, February 9, 2023, https://mainichi.jp/english/articles/20230209/p2a/00m/0sc/004000c.

[2] Announced by former Prime Minister Suga Yoshihide in October 2020, the strategy aims to cut Japan's carbon emissions by 46% from the 2013 level and reach "zero" emissions by 2050. Marco Zappa, "A 'Post-Carbon' Diplomacy? Japan's Southeast Asia Conundrum," May 26, 2021, https://www.twai.it/journal/tnote-101/.

[3] Yuriko Koike 小池百合子. "Heisei 30 Nen Dai Ikkai Togikai Teireikai Chiji Shisei Hōshin Hyōmei 平成 30 年第一回都議会定例会知事施政方針表明" Tokyo Metropolitan Government 東京都, February 21, 2018. https://www.metro.tokyo.lg.jp/tosei/governor/governor/shisehoshin/30_01.html.

[4] Saskia Sassen, *Cities in a World Economy*, 5th ed. (Thousand Oaks: SAGE, 2019), 2.

across industrialized economies have pushed cities and regions to compete for resource attraction at both a national and global scale. Resultingly, 80% of the world's GDP is already generated in cities and, according to WB estimates, 50% of the world's population already lives in urban areas. In slightly more than 20 years, 6 billion people will live in cities[5].

Such trends naturally affect Japan as well as the EU, where this researcher is based. UN data show that 71 per cent of EU citizens live in cities and, according to recent European Commission (EC) study, by 2050, functional urban areas such as Luxembourg, Stockholm and Brussels, medium size capitals (Vienna, Budapest, Prague) and large regional cities (Munich, Bologna) will increase their current population by 25-50 percent[6].

This poses great challenges to local and national administrators, particularly in the face of a growing demand for all kinds of services, from infrastructures to housing, from education to public health. The concept of a *smart* city, that is, a place where the use of information and communication technologies (ICT) makes urban spaces more efficient and sustainable economically, socially and environmentally, has gradually emerged as a leading policy idea embodying a technology-based one-fit-all solution to urban problems in advanced economies[7].

Since the outbreak of the COVID-19 pandemic in early 2020, however, we have witnessed, with some degree of difference around the world and even within the so called "Global North", how flawed certain narratives on smart cities were and how challenging life in the city, particularly for the poorer and more vulnerable, might be when *disruption*s (restrictions on the movements of people and goods, rising sea levels, earthquakes and other natural disasters or armed conflicts) affect the "normal" workings of a city. Critics point to the lack of a systemic approach to city planning and management that tend to ignore SC surroundings and the costs that need to be sustained to carry energy and resources to the city[8]. And yet, technological solutions to urban issues remain dominant in those high- and middle-income economies that since 2015 have adopted the UN Sustainable Development Goals (SDGs) as a framework to assess their growth. Several SDGs such as affordable clean energy (Goal 7), resilient infrastructure and sustainable industrialization (Goal 9) inclusive, safe, resilient and sustainable cities (Goal 11) have a direct correlation with urban life while others such as gender

[5] The World Bank, "Urban Development: Overview," Text/HTML, World Bank, April 3, 2023, https://www.worldbank.org/en/topic/urbandevelopment/overview.

[6] European Commission. Joint Research Centre, *The Future of Cities : Opportunities, Challanges and the Way Forward*, EUR (Luxembourg. Online) (LU: Publications Office, 2019), https://data.europa.eu/doi/10.2760/375209.

[7] Francesco Gonella, "The Smart Narrative of a Smart City," *Frontiers in Sustainable Cities* 1 (2019), https://www.frontiersin.org/articles/10.3389/frsc.2019.00009.

[8] Gonella.

equality (Goal 5), inclusive economic growth (Goal 8), responsible consumption and production (Goal 12) and climate action (Goal 13), given the aforementioned phenomena, inevitably concern urban areas more than the rest. As it will be shown below, since 2016 the SDGs have become a key feature of policymaking in Japan at both the national and local levels. The Tokyo metropolitan government has set up an entire webpage to share and monitor information on the progress of single local authorities within the municipality on each of the 17 SDGs. In other words, SDGs have become a set of managerial tools applied by a wide range of private and public organizations [9] that, in addition, are deemed to have a positive impact on their activities[10].

Considering these facts, what makes a city *smart* today? How do previously widespread ideas on smart cities (SCs) interact with new frameworks such as that of the SDGs? How, in other words, do international commitments affect local policymaking? Against this backdrop, based on a recent field trip to Japan, this article will focus on the first two research questions discussing the prospects of a multilevel analysis of smart city policies in Japan and provide a preliminary analysis of an illustrative case of local urban policy-making within the SDGs framework, that of Toyota city, in Aichi Prefecture.

II. Research approach

First, let us clarify the approach to the present research. As argued above, the narrative on smart cities (SCs) has so far proven far-fetched and at times misleading[11]. In fact, the strive for city livability and resilience calls into question several intertwined issues that need to be addressed systemically and from a multi-level perspective.

A focus on mere technological shifts is not enough. Adopting a sociological view on technology, it is clear that "technology has no power of itself (…) but "[o]nly in association with human agency,

[9] Armando Calabrese et al., "Implications for Sustainable Development Goals: A Framework to Assess Company Disclosure in Sustainability Reporting," *Journal of Cleaner Production* 319 (October 15, 2021): 128624, https://doi.org/10.1016/j.jclepro.2021.128624; Enrico Guarini, Elisa Mori, and Elena Zuffada, "Localizing the Sustainable Development Goals: A Managerial Perspective," *Journal of Public Budgeting, Accounting & Financial Management* 34, no. 5 (January 1, 2021): 583–601, https://doi.org/10.1108/JPBAFM-02-2021-0031.

[10] Adriana Cristina Ferreira Caldana et al., "Development of a Sustainable Brand Identity Model: Fostering the Implementation of SDGs in the Brazilian Power Sector," *Benchmarking: An International Journal* 29, no. 9 (January 1, 2021): 3008–29, https://doi.org/10.1108/BIJ-06-2021-0363; Jose Manuel Diaz-Sarachaga, "Monetizing Impacts of Spanish Companies toward the Sustainable Development Goals," *Corporate Social Responsibility and Environmental Management* 28, no. 4 (2021): 1313–23, https://doi.org/10.1002/csr.2149.

[11] Gonella, "The Smart Narrative of a Smart City"; Adam Greenfield, *Radical Technologies: The Design of Everyday Life* (London ; New York: Verso, 2017).

social structures and organizations, fulfil its functions" [12]. In other words, technologies become embedded in routines, patterns of behaviour, regulations, and so on, becoming themselves actors (though non-human) in a wide network of interactions [13].

To borrow again from Geels, SCs, interpreted as indicated earlier as ICT-based residential communities, are not just an assemblage of innovation applied to urban life. Rather, they at the center of specific a "sociotechnical configuration" that is informed by factors such as their geography and environment; infrastructure and energy supply systems; industries; markets; cultural and symbolic capital; information inflows and outflows; and regulations and policies at the central and local level.

To better exemplify, land use is subject to a series of laws and regulations promoted by both central and local governments; one locale's cultural or symbolic value originates from interactions between local governments, visitors, media, and local communities [14]. State agencies can also be involved in the promotion or the enhancement of one locale's image and attractiveness [15]; in this respect, they might use ideas and concepts that have been shaped by multilateral organizations such as the UN. Then, space utilization and mobility patterns within the SC are shaped by the previous policy choices [16], the existing infrastructure and by the daily use of their inhabitants [17]. The design of a SC depends on R&D processes conducted by private companies with public support [18], and, in addition, by global idea diffusion among experts and practitioners influencing problem identification and proposed solutions[19]. Finally, the materialization of a SC depends on a rewarding system (financial, symbolic, moral, etc.) that might attract developers as well as customer-citizens [20].

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[12] Frank W. Geels, "Technological Transitions as Evolutionary Reconfiguration Processes: A Multi-Level Perspective and a Case-Study," *Research Policy*, NELSON + WINTER + 20, 31, no. 8 (December 1, 2002): 1257–74, https://doi.org/10.1016/S0048-7333(02)00062-8.

[13] Bruno Latour, "Technology Is Society Made Durable," *The Sociological Review* 38, no. 1_suppl (May 1990): 103–31, https://doi.org/10.1111/j.1467-954X.1990.tb03350.x.

[14] Silvio Cristiano and Francesco Gonella, "'Kill Venice': A Systems Thinking Conceptualisation of Urban Life, Economy, and Resilience in Tourist Cities," *Humanities and Social Sciences Communications* 7, no. 1 (November 5, 2020): 1–13, https://doi.org/10.1057/s41599-020-00640-6.

[15] Simon Anholt, "Place Branding: Is It Marketing, or Isn't It?," *Place Branding and Public Diplomacy* 4, no. 1 (February 1, 2008): 1–6, https://doi.org/10.1057/palgrave.pb.6000088.

[16] Edward W. Soja, *Postmodern Geographies: The Reassertion of Space in Critical Social Theory* (London: Verso, 1989); Henri Lefebvre, *The Production of Space* (Oxford, OX, UK ; Cambridge, Mass., USA: Wiley, 1991).

[17] Ash Amin and Nigel Thrift, *Seeing Like a City* (John Wiley & Sons, 2017).

[18] Andrew DeWit, "Japan's Smart Cities" (Unpublished, 2018), https://doi.org/10.13140/RG.2.2.31383.06561.

[19] Sarah Moser, "'Two Days to Shape the Future': A Saudi Arabian Node in the Transnational Circulation of Ideas about New Cities," in *The New Arab Urban*, ed. Harvey Molotch and Davide Ponzini (New York University Press, 2020), 213–32, https://doi.org/10.18574/nyu/9781479880010.003.0010.

[20] Andrew DeWit, "Japan's Radical Energy Technocrats: Structural Reform Through Smart Communities, the Feed-in Tariff and Japanese Style 'Stadtwerke,'" *The Asia-Pacific Journal: Japan Focus* 12, no. 48–2 (November 26, 2014): 10.

Politically motivated entrepreneurship and speculative land use emerge in the literature as guiding motives for new city building (including *smart* and *green cities*)[21]. In Japan's case, SC are usually not built from scratch but grow out of the initiatives of actors promoting a technological transition involving a small-scale local community, or are installed within larger cities, as model areas for a large-scale transition and even for showcase purposes.

In the present theorization, it is argued that international agreements, partnerships and state-to-state cooperation influences policy ideas and decisions with regards to urban planning and management and the promotion of SCs. If on the one hand, they prove one government's commitment to a certain set of values and ideas, on the other, at the local level, the adoption of a common international framework such as the SDGs is a leverage for local governments facing issues such as depopulation and slow economic growth, to increase their image and attract new residents.

For instance, as also discussed elsewhere[22], Japan and the EU have been working together on a joint strategy to respond to climate change since the mid-2010s. Since the launch of the Agenda 2030 and the SDGs and, more importantly, with the 2015 Paris Agreement on climate change, the government of Japan (GOJ, hereafter) has aligned its strategies for economic growth, urbanization, greenhouse gases (GHG) reduction and energy efficiency to the UN-sponsored narrative. In its 2021 comprehensive energy and climate strategy, the GOJ highlighted smart communities and cities as a priority area to achieve carbon emission reduction, energy efficiency and quality of life improvement through the enhancement of ICT and cloud-based services in such areas as mobility, energy and environment, disaster risk reduction and medicine and healthcare[23]. To achieve these targets, in 2022, the GOJ allocated 111.7 billion yen (765 million euro) to several smart-city related financing schemes [24] and promoted multilateral engagements with, more relevantly the EU and ASEAN countries on sustainable development and technology-based climate action. For instance, as a follow-up to the 2018 Strategic Partnership Agreement (SPA), at the 2021 EU-Japan Summit Brussels and Tokyo signaled

[21] Sarah Moser, "New Cities: Old Wine in New Bottles?," *Dialogues in Human Geography* 5, no. 1 (March 2015): 31–35, https://doi.org/10.1177/2043820614565867; Hyun Bang Shin, "Envisioned by the State: Entrepreneurial Urbanism and the Making of Songdo City, South Korea," in *Mega-Urbanization in the Global South: Fast Cities and New Urban Utopias of the Postcolonial State*, ed. Ayona Datta and Abdul Shaban (London/New York: Routledge, 2016), 18; Sarah Moser and Laurence Côté-Roy, "New Cities: Power, Profit, and Prestige," *Geography Compass* 15, no. 1 (January 2021), https://doi.org/10.1111/gec3.12549.

[22] Marco Zappa, "Towards European 'Smart Communities'? EU's Energy Preoccupations and the Lesson of Post-Fukushima Japan, " IAI Papers (Rome: Istituto Affari Internazionali, December 2022).

[23] Government of Japan, "Action Plan of the Growth Strategy," June 18, 2021, https://www.cas.go.jp/jp/seisaku/seicho/pdf/ap2021en.pdf; DeWit, "Japan's Smart Cities."

[24] Tokunaga Tarō, and Shimobe Junko 徳永太郎・下部純子. "The future of smart cities as seen from the 2022 government budget 2022 年度予算案から見たスマートシティの行方." *The new frontline for citizen coordination/PPP community development* 新・公民連携最前線｜PPP まちづくり, March 10, 2022. https://project.nikkeibp.co.jp/atclppp/021900032/022400009/.

their resolve to build a "Green Alliance to protect the environment, stop climate change and achieve green growth" pledging to "share knowledge and experiences" in order to achieve "climate neutrality" through specific actions for "smart cities research and innovation" that can involve third parties, particularly in developing countries [25].

In this regard, in July 2022, during a meeting with Japan's Prime Minister Kishida, the Indonesian President Joko Widodo expressed his appreciation for Japan's "knowledge and technology" envisaging its utility for the development of the new capital of Nusantara in East Kalimantan, Indonesian Borneo. Nevertheless, Widodo's words may be interpreted more broadly as evidence of the impact of Tokyo's "science and technology diplomacy". As I have shown elsewhere, since the creation of a "Climate Change Division", the MOFA has been engaged in promoting Japanese solutions to environmental and societal problems in developing countries in cooperation with Japanese universities, research centers and private companies. In the last decade, MOFA scientific experts have helped the ministry to build a broader network and to internationalize Japanese solutions toward the achievement of the SDGs [26].

Instead, at a local level, the adoption of the SDGs framework seems to be working as a way to promote policy innovation, place identity and accountability on the part of the local governments, and, at the same time, decentralization with the long-term aim to disenfranchise local administrations from their dependence on financial transfers from the central government through a broader engagement with the private sector and external funding entities. This issue will be explored in the following paragraphs.

III. Reframing national and local urban policy agenda: implementing the SDGs framework

To go back to our research questions, what has been done, in practice, in Japan with regards to the SC issue? In this section I will focus on government of Japan's and local governments' initiatives between the 2010s and 2020s and on a specific case, that of Toyota, in Aichi Prefecture. Particularly, Tokyo's reform initiatives toward administrative decentralization and the role of local governments (*chihō jichitai*) will be discussed.

[25] Government of Japan and European Commission, "Towards a Green Alliance to Protect Environment, Stop Climate Change and Achieve Green Growth," May 27, 2021, https://www.consilium.europa.eu/media/49932/eu-japan-green-alliance-may-2021.pdf.
[26] Marco Zappa, "Smart Energy for the World: The Rise of a Technonationalist Discourse in Japan in the Late 2000s," *International Quarterly for Asian Studies* 51, no. 1–2 (April 21, 2020): 211–12, https://doi.org/10.11588/iqas.2020.1-2.10999.

The linkage between the promotion of renewable energy, new urbanization patterns and historical disjunctures in modern Japanese history, such as the Tohoku earthquake and tsunami and the Fukushima n. 1 disaster, has been underlined elsewhere[27].

Here, the key role played by local authorities, at the village, city, and prefectural levels, will be stressed. Japan's constitution art. 92-94 recognize the principle of local autonomy, the right for citizens to elect their prefecture governor democratically and give the local governments the power to manage properties, affairs and administration and to enact their own regulation within the law. Given this paper's limited scope, however, it will suffice to say that structural reforms sponsored by several cabinets between the early 1990s and early 2000s, aimed at reining in the central government's financial allocations to prefectures while transferring part of the tax base to the local governments, have fallen short of their targets[28]. However, several administrative procedures such as central government approval in the relevant area of city planning, have been curtailed resulting in the transfer of more responsibilities to local assemblies. At the same time, these initiatives have not properly made up for the growing demand of financial resources caused by a partial devolution of powers, spurring, if anything, a drive toward inter-prefectural competition for resource attraction. In this context, urban areas have benefitted the most, attracting flows of people and capital from both Japan and abroad[29].

In a sense, the GOJ's recent push on building a "society 5.0", or a "society based on future technologies" (*mirai gijutsu shakai jissō)*, where ICT and Artificial Intelligence (AI)-based solutions (drones, robots, etc.) are implemented in various sectors such as agriculture, manufacturing, service and logistics to foster rural revitalization [30], can be considered, in fact, as a part of the long-term plan to materialize decentralization. If on the one hand, environmental and energy issues have served as the dominant framework within which policy could be articulated, the importance of disaster preparedness shall not be overlooked.

There are currently more than a hundred smart city projects broadly categorized as Eco-cities (*kankyō kyōsei toshi*), Transit-oriented development (TOD) areas (*kōkyōkōtsū shikōkata toshi kaihatsu*) and Resilient cities (*saigai ni tsuyoi machidzukuri*). By enhancing ICT, (particularly the Internet of Things (IoT), and big data), vehicle automation and car sharing service (Mobility as a Service, MaaS)

[27] Zappa, "Smart Energy for the World."

[28] Towa Niimura, "Decentralization Reform in Japan," *Seikei Hōgaku* 89 (December 2018): 101.

[29] Hideo Nakazawa 中澤英雄 "The Centre and The Periphery: The End of the Myth of Equal Development 地方と中央―「均衡ある発展」という建前の崩壊" in *Heisei Shi* 平成史. (Tokyo: Kawade shobō sinsha 河出書房新社, 2014).

[30] Tokunaga Tarō, and Shimobe Junko 徳永太郎・下部純子. "The future of smart cities as seen from the 2021 state budget, part 1 第 1 回 2021 年度予算案から見たスマートシティの行方." *The new frontline for citizen coordination/PPP community developmen*t 新・公民連携最前線｜PPP まちづくり, March 2, 2021, https://project.nikkeibp.co.jp/atclppp/021900032/021900002/.

and biometrics-based services (such as automatic remote bus-fare payments), each smart city project aims at the resolution of a specific issue, but, in addition, the GOJ has identified thirty "super cities" where intersecting issues are addressed in a more comprehensive manner, primarily through efficient data management, always within the SDGs framework[31].

Recent GOJ initiatives aimed at enhancing ICT utilization for infrastructure management and maintenance have centered around a series of subsidy programs and public awareness initiatives. Under the II Abe cabinet, for instance, such efforts have been expanded under the banner of the "society 5.0" whose scope encompassed both urban and rural areas (*chihō*). Against the backdrop of a sluggish pace of installation of optical fiber and 5G in remote areas, both the Suga and Kishida cabinets have stepped up their efforts in promoting digitalization and infrastructure modernization.

The current Japanese Prime Minister, Kishida Fumio, has gone as far as to launch a Digital Garden City Nation (DGCN) plan aiming to capitalize on previous experiences and spur "bottom-up growth" through massive public and private investments in the digital sector and infrastructure modernization (Kishida 2022). On top of these initiatives, the GOJ has designated more than 200 administrations as SDGs model cities (*SDGs mirai toshi*) and local governments' SDGs model projects (*Jichitai SDGs moderu jigyō*)[32].

Under the GOJ's direction, several public-private and community-based projects have gathered attention in the last decade. A key feature of GOJ's subsidy programs is their being proposal-based; i.e., to have access to the GOJ's support local governments have to submit plans and strategies (*sōgō senryaku*) that are monitored and assessed by ad hoc expert committees.

Project proposals need to be written along certain standards that are defined by the central government, and particularly by the Cabinet secretariat (*naikaku kambō,* CS) which is in charge, among other things, of coordinating and monitoring the GOJ's initiatives in the area of regional revitalization. Since 2014, with the entering into force of the "City, people, job creation Law" (now repealed), the GOJ has stepped up its efforts to promote local economic development and revitalization drafting successive medium term comprehensive strategies (*sōgō senryaku*) that it expects to be reflected in single local authorities' growth plans (*chihō ban sōgō senryaku*). At the core of these instructions was the urge to spur "local Abenomics", to promote local innovation, local branding and

[31] The Government of Japan, Prime Minister's Office 首相官邸. "Japan's Smart Cities: Solving SDGs-related and global issues through Japan's Society 5.0 日本のスマートシティーSDGs など世界が抱える課題を日本の Society5.0 で解決." October 29, 2020. https://www.kantei.go.jp/jp/singi/keikyou/pdf/smart_city_catalog.pdf.

[32] Cabinet Secretariat, Regional Revitalization Bureau 内閣府地方創生推進事務局. "The rural revitalization through the SDGs and the Environmental Future City visions 地方創生 SDGs・「環境未来都市」構想." 2020. https://www.chisou.go.jp/tiiki/kankyo/index.html.

the productivity of local services through a mix of financial, educational and informational supports, with the ambitious aim to "create a new inflow of people in the regions" (*chihō e atarashii hito no nagare o tsukuru*)[33].

Specifically, the strategies have integrated a series of standard managerial tools and concepts such as the Plan Do Check Act (PDCA) used to promote continuous improvement (*kaizen*) of the local performances based on a series of Key Performance Indicators (KPI) which must respond to the specificities of individual projects or specific local contingencies[34]. In addition, local governments are encouraged to create their own networks across sectors of society and beyond prefectural and regional boundaries. For instance, in a CS' city, people, and job creation bureau report, local administrators are urged to engage with external experts, young people in the deliberative phase and to benchmark with other administrations[35]. Against this backdrop, the government agency has guidelines and manuals (*tebiki*) available on its portal, providing advice to local administrators for a successful submission.

In this context, the implementation in the first half of the 2010s of "microgrids", i.e., local self-sufficient electric power networks supported by small-scale power generators (usually PV), storage units, and ICT-based energy management systems (smart meters, home energy management systems [HEMS], etc.) allowing for energy efficiency and CO2 reduction, fits in the GOJ's revitalization targets, particularly as they are central to the promotion of local innovation and disaster preparedness[36]. Large companies such as Panasonic and Toyota have been directly engaged in the establishment of the so-called "smart communities". The Fujisawa Sustainable and Smart Town (Kanagawa Prefecture) is a notable example. A cluster of 2–3 story "smart" housing units with PV panels installed on the roof, surplus energy storage facilities (usually solid oxide fuel cell batteries), electric vehicles (EVs) charging facilities, HEMS and energy data management system (EDMS) connected to the Internet, built on a former Panasonic plant, it is almost entirely powered by REs (70 percent of the total energy demand) and has reduced CO2 emissions, ensuring energy reserves in case of power outages.

More recently, community-led smart communities have emerged. Flagged as a successful revitalisation project by the Ministry of Economy, Trade and Industry (METI), that of Naraha, a small

[33] Jichitai Tsūshin Online 自治体通信 Online. " On the City, People, Job Creation Law まち・ひと・しごと創生法について." June 29, 2020. https://jt-tsushin.jp/articles/column/casestudy_machi-hito-shigoto_sosei.

[34] Jichitai Tsūshin Online 自治体通信 Online.

[35] Cabinet Secretariat, Bureau for city, people, job creation 内閣官房まち・ひと・しごと創生本部事務局. "Survey report on the advancements of the general strategy for the rural areas 地方版総合戦略の策定状況等に関する調査結果." September 9, 2021, https://www.chisou.go.jp/sousei/about/chihouban/pdf/sakuteijoukyou210909.pdf.

[36] In fact, smart communities may ensure reliable life continuity plans (LCPs) with regards to their capacity of securing energy in case of crisis Hiromi Okubo et al., "Smart Communities in Japan: Requirements and Simulation for Determining Index Values," *Journal of Urban Management*, October 12, 2022, https://doi.org/10.1016/j.jum.2022.09.003.

town affected by restrictions on residency after the 2011 Fukushima Daiichi nuclear accident, is an elucidatory case. The smart community management features a community energy management system (CEMS) enabling the mutual supply of surplus energy between commercial and disaster public housing facilities built after the 2015 lift of the residency ban and its management is entrusted to a local incorporated association (*ippan shadan hōjin*), Naraha Mirai, on behalf of the city government[37]. Currently, a 40 percent of the total energy supply is locally generated by solar panels installed on buildings and its goal to become energy self-sufficient and carbon neutral by 2030. Similar projects have been initiated in nearby communities, such as Soma and Namie [38].

IV. The SDGs at a local level level: the case of Toyota City

In a sense, the adoption of the SDGs as a comprehensive framework through which to promote and monitor local and national development has favored administrative simplification and decentralization. The effects are evident in the strategies of individual local governments which have successfully won bids for revitalization programs such as Toyota City (Aichi Prefecture). In 2018 the GOJ designated Toyota, a town in the Nagoya greater metropolitan area, an SDG-future city. The bid for this nomination stemmed out of previous efforts by the local authorities and stakeholders to make Toyota a "hybrid city" aiming at a consistent CO2 reduction (50 percent on the 1990 levels by 2030 and 70 percent by 2050). Being the site of the first historic Toyota Motor Company factory, the city boasts a long history as a manufacturing hub and, concomitantly, a developed agricultural sector and rich natural environment. The municipality includes a urban area proper, where manufacturing, transport and housing facilities are concentrated, and a mountainous outskirt. Against this backdrop, since 2009, upon its official designation as an environmental model city (*kankyō moderu toshi*), the city has become a site of experimentation and exhibition of new developments in mobility (electric scouters and cars, car-sharing systems) and housing (smart houses) thanks to state subsidies and tax discounts aimed at favoring the creation of an energy self-sufficient community. Following 3.11, Toyota became part of a broader GOJ's effort to promote low-carbon city making (*teitansō toshi zukuri*) in Japan and elsewhere. As envisaged by former Foreign Minister Gemba Koichirō at the Rio United

[37] Naraha Mirai ならはみらい. "About us - Naraha mirai: project description ならはみらい事業内容." *Ippan shadan hōjin Naraha Mirai* 一般社団法人ならはみらい. Accessed November 18, 2022, https://narahamirai.com/aboutus/service/.
[38] Shigen enerugī chō. 資源エネルギー庁."the Local Mutualism for Renewable Energy Award: Case-Studies 地域共生型再生可能エネルギー事業顕彰 事例集" (Ministry of Economy, Trade and Industry 経済産業省資源エネルギー庁, 2022), https://www.enecho.meti.go.jp/category/saving_and_new/advanced_systems/saiene_kensho/doc/case-studies_r3.pdf.

Nations Conference on Sustainable Development (Rio + 20) in June 2012, Japan would contribute to sustainable, resilient and green urban development globally based on the country's "many years of experience in advancing energy conservation and recycling"[39].

Despite the December 2012 leadership transition and the return of an LDP-led cabinet under former PM Abe Shinzō, the GOJ remained consistent with its UN pledge embracing the Paris declaration and adopting the SDGs framework in 2015. In 2016, the Abe cabinet appointed a Council for the promotion of the SDGs and proceeded with the designation of several Japanese cities, including Toyota, as "SDGs model cities" as a segue to previous initiatives. In November 2018, the Council for the promotion of the materialization of a connected society in Toyota (*Toyota-shi tsunagaru shakai jisshō suishin kyōgikai*) was formed with the direct involvement of major private and public stakeholders such as Chūbu Electric, the regional energy utility, Toyota Motor Corp., the Nagoya University Institute of Innovation for Future Society and Mitsubishi UFJ Bank[40].

From that moment onwards, the city administration has proven active in advertising materials aimed at attracting new residents and official documents illustrating the city's efforts to achieve its sustainability targets and materializing the "smart city". In this regard, in 2020, the city government laid out a 3-year plan (2021-23) ("*minna ga tsunagaru – mirai ni tsunagaru sumāto shiti*") setting a series of medium to long-term strategies for the city administration centered on the achievements of the SDGs. Premised on an analysis of the strengths and weaknesses (such as its rich natural and cultural heritage, or the growth of the elderly population and its exposure to a possible large-scale natural disaster), the report first details its development targets for 2030 identifying its economic, social and environmental priorities, then, it moves on to discussing its achievements referring to a series of detailed SDG-related KPI (e.g., number of startups, number of vacant houses, or the public participation for a community-based health service). Besides enhancing its clean energy production at 117,000 kW and reducing the production of burnable waste per capita at 131 g per day, the city aims to increase the number of smart houses by nearly 300 hundred units, reduce the number of deaths caused by car accidents, promote human resource development for innovation and attract investments in advanced technologies. Furthermore, it aims at enhancing its support services for elderly residents aged 65 to 75 and female workers, and at reducing service access unbalances between urban and rural

[39] Koichiro Gemba, "Speech by Foreign Minister Koichiro Gemba United Nations Conference on Sustainable Development (Rio + 20)" (Ministry of Foreign Affairs of Japan, June 20, 2012), https://www.mofa.go.jp/policy/environment/warm/cop/rio_20/fm_speech_en.html.

[40] Toyota-shi 豊田市. "Video: Toyota's Future City Vision 未来都市豊田ビジョン動画." Toyota Shi/Toyota City 豊田市, November 29, 2018, https://www.city.toyota.aichi.jp/shisei/kankyoumodeltoshi/1027993.html.

residents[41]. The document further elucidates the city commitment for SDG-related information and its active participation in a network of relations with NGOs, NPOs, local associations, companies, international organizations such as the UN Department for Social and Economic Affairs (DESA) and foreign city governments (such as that of Bandung, Indonesia) for the cross-sectional and global promotion of the SDGs. In this regard, it is of particular interest the launch of the SDGs point initiative, aimed at promoting awareness among citizens on the importance of the UN development framework through economic and financial incentives (by collecting SDGs points, citizens can receive discounts on purchases of food and other goods).

As maintained by the city mayor Ōta Toshihiko, the SDGs offered a "lingua franca" for improved communication between administrators, universities and enterprises in their joint effort to tackle a series of social issues (such the ageing of the local population or disaster preparedness), to improve the residents' quality of life and finally to establish a new paradigm of city and community building[42].

Ōta, who was reelected for a third term in 2020 and serves as president of the Tōkai branch of the Japan Association of City Mayors, has been a catalyst of this reform process. Upon election in February 2012, his administration has embarked in a series of initiatives aimed at promoting a new image of the city as a pivot for innovation in the energy, mobility and wellness areas. In May 2012, on a site formerly occupied by the city hospital, the city government launched a neighborhood-sized open-air museum, Ecoful Town, showcasing urban solutions for ecological sustainability, particularly "smart homes" equipped with solar panels that Toyota Home (the housing branch of the Toyota Group) has later built in two areas of the municipality, Takahashi-chō and Higashiyama-chō. The following year, an experimental city-wide electric vehicle (EV) sharing service was also implemented[43]. Toyota's physical and institutional proximity to Toyota Motor Corp. has undoubtedly provided the foundation for Toyota City's flagship Sakura project which is aimed at creating awareness and disaster preparedness using plug-in hybrid cars as mobile storage batteries in case of major power outbreak following a large-scale earthquake or tsunami.

Upon Toyota's designation as an SDGs future city by the GOJ in 2018, the exhibition has been renewed and its contents reframed along the lines of the SDGs framework with the goal to sensitize the local population to the city efforts in this regard. Significantly, apart from the smart houses installed in 2012, the site features an interactive exhibition featuring electric scouters, a humanoid robot, and,

[41] Toyota-shi 豊田市. "The Toyota SDGs Future City Plan (2021-2023): A smart city connecting everyone to each other and to the future 豊田市 SDGs 未来都市計画（2021～2023）みんながつながる ミライにつながるスマートシティ." 2020, 11-15, https://www.city.toyota.aichi.jp/_res/projects/default_project/_page_/001/025/483/keikaku_02.pdf.

[42] *"Think SDGs 2021" International Conference in Toyota*, 2021, https://www.youtube.com/watch?v=AiGGtm2GajE.

[43] Rick Docksai, "Ecoful Town: A Neighborhood Tour of Green Innovation," *The Futurist*, December 2012.

just outside the main pavilion, one of the country's few hydrogen stations provided by Tōhō Gas, a major Japanese energy company.

Certainly, the COVID-19 pandemic has certainly hampered the city's aforementioned awareness raising initiatives. The activism described above is in fact in stark contrast with data that were collected during a site visit in March 2023. At the time of this researcher's visit, the site, despite functional, looked deserted. In spite of the visit's timing (during the weekend), no other visitor accessed the main pavilion to see the exhibition. Only one customer refueling his vehicle at the hydrogen station could be observed as evidence of the site's functionality for the local resident community. Several parts of the exhibition such as an experimental solar energy-powered urban farming unit installed by construction company Daiwa Lease and an off-grid cabin, shut down. On top of this, moving on from the Ecoful Town to the city's major transit routes, it appeared clearly that a majority of commuters were driving their own private cars rather than shared vehicles[44]. Despite its empirical nature, this data may help to explain why according to the aforementioned report, the city of Toyota was lagging in comparison with the national average on single SDGs such as number 11 (sustainable cities and communities) and 13 (climate action)[45].

V. Conclusion

As shown above, since 2016, the SDGs framework has become the dominant policy framework within which urban policies have been conducted. At the international level, the GOJ's adoption of the SDGs has favored Japan's affiliation with the international society and enabled the strengthening of partnerships with like-minded regions and countries. The SPA and successive agreements with the EU clearly demonstrate how international commitments combined with the absorption of values and institutions may lead to enhanced interactions and, possibly, to the establishment of common mechanism to tackle global issues.

From a local perspective, however, the adoption of the SDGs framework has had a specific impact. First, it has changed the way local and national governments interact. To use Geels' concept, the SDGs have caused a shift in the sociotechnical configuration (the assemblage of geographical, economic, technological and social factors at the foundation of our societies) upon which national and local

[44] Site visit, 4 March 2023.

[45] Toyota-shi 豊田市. "The Toyota SDGs Future City Plan (2021-2023): A smart city connecting everyone to each other and to the future 豊田市 SDGs 未来都市計画（2021～2023）みんながつながる ミライにつながるスマートシティ." 24.

initiatives in respect of SCs had been shaped. The UN-sponsored complex of ideas and values has come to encompass previous GOJ initiatives (Environmental model cities, etc.) that had characterized local policies with regards to environmentally sustainable urbanization, energy saving, GHG reduction and disaster preparedness. To say it with Toyota city mayor Ōta, the SDGs provided a "common language" for national and local administrators, non-governmental organizations and businesses.

Second, speaking a common language inevitably leads to simplification and efficiency in the interactions between these various actors. However, the changes in actual policies are only slight. What shifts is the broader framework and the way policies are articulated within them. The case of Toyota city is elucidatory. In recent years, the city government has been proactive in respect of the SDGs, and yet, several policy outcomes (the creation of the Ecoful town open-air exhibition, its partnerships with local businesses such as Toyota Corporation, etc.) were the result of policies predating the adoption of the SDGs as an official policy framework.

Third, after urging local governments to adopt comprehensive strategies through a series of initiatives since 2014, the SDGs have become integrated, on the one hand, in a local and national management and monitoring system of progress and achievements of local governments in certain sectors. On the other, they have become part of the code local administrators need to adopt in their applications for central government's fundings, interactions with private partners and international peers. The use of this code has favored in recent years policy diffusion and with it, the diffusion of new and allegedly more sustainable urban models (centered on the idea of "smart community" or "smart city") that are deemed to be more resilient to the structural problems affecting Japan (such as a super-ageing society or the risk of a large-scale natural disaster). With the adoption of the SDGs framework, extant ideas on smart cities and communities have been adapted and are now subject to management and monitoring conducted using specific measurement standards based on the UN Agenda 2030. In this sense, "smart" comes to signify entrepreneurial in so far as local administrators are increasingly formulating policies using tools such as the PDCA and KPIs which were originated in a business management context.

Fourth, such efforts seem to be consistent with neoliberal reforms initiated in the early 2000s by the GOJ. By promoting the SDGs framework in its comprehensive strategies and by urging local governments to adopt them, the GOJ is pushing local administrators to reducing their dependence on transfers from the central government, creating new partnerships with external funders and specifically forge alliances with the private sector, with the inescapable gradual privatization of formerly public services and spaces (energy provision, public transport, healthcare, housing and so forth). As illustrated by the case of Toyota City, at the local level, administrators are also working to create a

widespread consensus among the population (a case in point is the creation of the SDGs point system that allows Toyota residents to get discounts on the purchase of goods and services). Again, the transformation of residents into customer-residents is apparent.

Further research into this matter will have to carefully investigate a series of questions. First, what kind of inequalities is produced by unequal access to technology and hence sustainability? Second, in light of the previous question, a gap between narrative and actual sustainability exits. To tackle this issue, it is necessary to ask ourselves where do key materials for electric vehicles battery come and at what cost? What is the cost of equipping houses with solar panels in terms of waste and emissions needed to manufacture and export solar panels? What will be of the technologies described above when new ones will be made available? Finally, standardized measures often miss the complexities of a certain specific territory and its social arrangements reducing complexity to figures. Is it possible to envision community-based solutions that use technology without alienating local practical and theoretical knowledges? What kind of regulation can allow for this? Ambitious as it may seem, a new research agenda in the issue of sustainability and urban development cannot overlook the aforementioned questions.

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【Invited Paper】

E-justice Implementation in Central Asian (Kyrgyzstan, Uzbekistan and Kazakhstan) and East Asian Countries (Japan, Republic of Korea and Indonesia)

Aliia Maralbaeva*

Abstract

Development of e-justice (i.e., implementing IT tools in courts) is one of the core issues of digitalization of the judiciaries globally. This article aims to examine development of e-justice systems in six Asian countries in order to provide insights for successful e-justice deployment in Japan. In three Central Asian countries e-justice initiatives have been supported by foreign donors' assistance (World Bank, USAID, UNDP, EU, IDLO, and UNODC). The judiciaries implement e-justice systems for improving access to justice, transparency, fair trial, and efficiency. However, in practice, they face challenges in achieving these goals. This study presents a *theory of fragmentary divergence*. It helps to elaborate and illustrate why e-justice initiatives in practice lead to partial deviations from initially expected goals, which raise several key points of concerns. The case studies of e-justice implementation models in three Central Asian countries (Kyrgyzstan, Uzbekistan and Kazakhstan) and three East Asian countries (Japan, Republic of Korea and Indonesia) are examined. The article is based on analysis of national legislation and publicly available information on e-justice, analysis of the role of foreign donors' assistance, and supplemented by an interview with a Japanese expert. The study provides recommendations for improving the implementation of e-justice in Japan.

Key words: e-justice, access to justice, law and technology, judicial reform, digital transformation

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Contents

I. Introduction

Development of e-justice (i.e., implementing digital tools in courts) is one of the core issues of digitalization of the judiciaries globally. The Covid-19 pandemic accelerated reforms on digital transformation of judicial systems, including internal business processes in courts and external communication with litigants.

This article aims to examine development of e-justice systems in six Asian countries in order to provide insights for successful e-justice deployment in Japan. The implementation of e-justice raises important question of how it impacts on access to justice, fair trial, transparency, efficiency, and personal data protection.

According to the World Bank's Doing Business Ranking 2020, which included court automation as one of the main aspects of measurement, the ranking of three Central Asian countries was presented as follows: Kazakhstan - 25, Uzbekistan – 69, and Kyrgyzstan - 80. The ranking of three East Asian countries showed: Republic of Korea – 5, Japan – 29, and Indonesia – 73[1].

Japan adheres a conservative approach to e-justice implementation compared to other Asian jurisdictions examined in this study. Analysis of e-justice development could add value to the Japanese

[1] Doing Business Ranking 2020, World Bank. Available at: https://archive.doingbusiness.org/en/doingbusiness (Accessed 1 August 2024).

judiciary's digital journey. In three Central Asian countries (Kyrgyzstan, Uzbekistan, Kazakhstan), e-justice initiatives have been supported by Western foreign donors' assistance (World Bank, USAID, UNDP, IDLO, EU, and UNODC). Mainly, the foreign assistance programs have focused on capacity building of judges, court staff, defence lawyers, technical support and expert consultations. In this regard, this experience could also be useful and contribute to development of Japanese foreign aid programs to Central Asian countries regarding this issue.

This article presents a *theory of fragmentary divergence* based on analysis of e-justice development in six Asian countries mentioned above. It helps to elaborate and illustrate why e-justice initiatives in practice lead to partial deviations from initially expected goals, which raise several key points of concerns. This theory could be useful for decision-makers who initiate and promote e-justice initiatives as part of the digital transformation of the judiciary and for foreign donors who support them.

The methodology of this study is based on analysis of national legislation and publicly available information on e-justice development in respective countries, analysis of the role of foreign donors' assistance and supplemented by an interview with a Japanese expert.

Part II presents the theory of fragmentary divergence. In Part III, the main findings based on analysis of approaches to e-justice development supported by foreign donors' assistance in three Central Asian countries are examined. Part IV presents the main findings based on analysis of e-justice development approaches in three East Asian countries. Part V examines the potential of CALE in promoting e-justice research in the Asian region. In Part VI, key recommendations for improving the implementation of e-justice in Japan are provided.

II. Theory of Fragmentary Divergence

This section presents a *theory of fragmentary divergence* developed from an analysis of e-justice implementation in six Asian jurisdictions. This theory is based on the *three-layers legal technology framework*. Hartung et al. highlight three interconnected layers of legal technology tools that can be applied in the justice sector[2]. The three-layer framework includes 1) enabler technologies (i.e., platform infrastructure), 2) support process solutions (i.e., e-case management, e-registration of cases, and e-workflow which support daily activities of judges and court staff), and 3) substantive law

[2] Hartung et al. (2022) The Future of Digital Justice, Boston Consulting Group, p. 7.

solutions (i.e., e-filing, e-summons, e-notification, and equal treatment of digital and paper documents) (see Table 1).

Table 1. Three-layers legal technology framework

<table>
<tr><th colspan="2">Layer</th><th colspan="4">Processes and tasks</th></tr>
<tr><td rowspan="2">Substantive Law Solutions</td><td rowspan="2">3</td><td>Litigation</td><td rowspan="2">Collection of case facts and research of law</td><td rowspan="2">Application of law in final decision</td><td rowspan="2">Enforcement</td></tr>
<tr><td>ADR</td></tr>
<tr><td rowspan="2">Support Process Solutions</td><td rowspan="2">2</td><td colspan="4">Case management</td></tr>
<tr><td colspan="4">Document and knowledge management</td></tr>
<tr><td rowspan="2">Enabler</td><td rowspan="2">1</td><td colspan="4">Platform Infrastructure</td></tr>
<tr><td>Security</td><td>Cloud</td><td colspan="2">Connectivity</td></tr>
</table>

Source: BCG analysis (Hartung et al. 2022)

In addition, the theory of fragmentary divergence is based on the concept elaborating *relationship between law and technology*. On the one hand, e-justice implementation envisages legal reforms. On the other hand, e-justice literature highlights "a potentially conflicting relationship between the regulatory regimes of law and technology" [3]. For this reason, changes in legal procedures should follow or run in parallel with the use of digital tools[4].

E-justice scholars highlight that digital tools are implemented in courts to improve access to justice, transparency, and efficiency[5]. However, less attention is paid to partial deviations from initially expected goals and controversial outcomes that emerge as a result of their implementation in courts. The six Asian case studies examined in this article draw attention to four key points of concerns that could undermine expected goals of e-justice.

The theory of fragmentary divergence does not intend to undermine the positive impact of e-justice or to question the positive results of e-justice achieved by six Asian jurisdictions. It draws attention to partial deviations from initially expected goals of e-justice (improving access to justice, transparency, efficiency and personal data protection) in practice and identifies 4 key elements of concerns. For this reason, the term "fragmentary divergence" is used.

The theory of fragmentary divergence is based on the hypothesis that the implementation of e-justice systems without a holistic approach could lead to partial deviations from expected goals of e-justice. As a result of research, 4 key elements of concern are revealed: 1) a dilemma of double

[3] Lupo G., Bailey J. (2014). Designing and Implementing e-Justice Systems: Some Lessons Learned from EU and Canadian Examples, *Laws*, 3(2) pp. 356.
[4] Ibid.
[5] Fabri M., Contini F. (eds.) (2001), *Justice and Technology in Europe: How ICT is Changing the Judicial Business*, Kluwer Law International.

victimization; 2) contradictions between law and technology; 3) contradictions between the right to a fair trial, data privacy and technology; and 4) lack of judiciary's ownership of e-justice platforms (see Figure 1).

Figure 1. The theory of fragmentary divergence: key elements of concern

A dilemma of double victimization means that a victim of a crime or misdemeanor whose rights have been violated is re-victimized by the disclosure of his or her private life through the online broadcasting of court proceedings.

The issue of *contradiction between law and technology* arises when legal provisions prescribe the use of digital tools to improve access to justice, transparency and efficiency, although such digital tools have not been deployed in practice, or when legal provisions create barriers to access to justice via digital tools.

The issue of *contradiction between the right to a fair trial, data privacy and technology* arises when digital tools do not ensure confidentiality between the accused/defendant and the defence lawyer, and disclose personal data of litigants in judgments published online.

Lack of judiciary's ownership of e-justice platforms arises when e-justice platforms are developed by third parties (e.g., a state agency within the executive branch of government that raises concerns about the principle of the separation of powers, or a private company). In cases where foreign donors support e-justice initiative, each foreign donor tends to focus on only one type of e-justice system. As a result, it may be difficult to technically integrate separate e-justice systems supported by different foreign donors into one justice chain. For this reason, the judiciary of the recipient country should adopt a holistic approach and have a detailed strategy for the implementation of e-justice, based on the objectives it intends to achieve and a real assessment of the infrastructural, human and financial resources available.

Thus, the theory of fragmentary divergence highlights key points of concern that could be considered and addressed by decision-makers who initiate and promote digital transformation reforms in judicial system, and by foreign donors who support them.

III. Implementing e-Justice Systems: The Central Asian Cases and Foreign Donors' Assistance

This section examines approaches to e-justice implementation in three Central Asian countries (Kyrgyzstan, Uzbekistan and Kazakhstan).

1. E-justice in Kyrgyzstan: a deliberate approach

The judicial system of Kyrgyzstan includes the Constitutional Court, Supreme Court, 8 appellate courts and 64 courts of first instance[6].

Procedural legislation, the Decree of the President of the Kyrgyz Republic № 47 which approves "The State Target Program 'Development of the Justice System of the Kyrgyz Republic for 2023-2026'" and Action Plan of its realization laid legal foundation for digital transformation of the judiciary.

Since 2004, Kyrgyz judiciary's e-justice initiatives have been supported by several foreign donors' assistance such as the World Bank, USAID, IDLO, and EU (see Table 2). The main goals of implementing e-justice systems include improving access to justice, transparency, fighting corruption, and efficiency. The judiciary aimed to use digital tools in courts to overcome challenges such as unbalanced workload ratio of judges[7], lack of digital recording and monitoring of case flow, incompleteness of trial minutes, lack of or limited public access to judgments, high costs of transporting defendants or accused persons from remand centres to courts[8].

The IT agency "Adilet Sot" of the Judicial Department of the Supreme Court supports e-justice implementation in local courts and the apex court.

Since 2004, the Kyrgyz judiciary has started its digital journey. In 2017, the Automated Information System "Sud" (hereinafter: AIS "Sud") - a centralized, modular-based e-justice system for judges and court staff for e-case management, workflow, automated allocation of cases among judges, creation of judicial panels, scheduling of court hearings, and preparation of documents was

[6] The official website of the Supreme Court of the Kyrgyz Republic. Available at: http://sot.kg (Accessed 17 September 2024).
[7] https://kg.akipress.org/news:1584195 (Accessed 17 September 2024).
[8] http://sot.kg/post/tsifrovizatsiya-sudebnoj-sistemy-nahoditsya-v-postoyannom-dvizhenii (Accessed 17 September 2024).

implemented in three pilot courts. Since 2018, it has been introduced in all local courts and the Supreme court[9], except the Constitutional Court.

The research revealed positive impact of e-justice systems. Remote hearings via videoconferencing ('RHVC') have a positive impact on access to justice during the Covid-19 pandemic. Automated case allocation balances the workload of judges based on an algorithm and ensures the independence of judges from chairpersons of courts. It allows judges and court staff to digitally record and monitor the flow of filed and pending cases and their compliance with procedural deadlines. [10].

Table 2. Foreign donors' projects supporting e-justice implementation in Kyrgyzstan

№	Title of project	Year	Foreign donor	Outcome
1	Court Information and Management System Development	2002-2004 2009-2010	World Bank	Court Information and Management Systems for courts of general jurisdiction (two versions)
2	Judicial Strengthening Program	2011-2018	USAID- IDLO	Website of the Supreme Court, online database for publication of court decisions
3	Trusted Judiciary	2018-2021	USAID- IDLO	Technical and expert assistance, capacity building, online database of judgments, support for the implementation of AVR of court hearings in criminal proceedings
4	Rule of Law in the Kyrgyz Republic – 2nd phase (ROLPRO 2)	2018-2022	EU implemented by GIZ, IRZ	Technical and expert assistance, capacity building, support to AIS Sud, AIS "Enforcement Proceedings, 'Digital Justice' Portal, Online Training Platform of the Higher School of Justice
5	Ukuk Bulagy	2021-2026	USAID	Support digitalization in courts
6	JUST4ALL	2022-2025	EU, UNODC	Support digital solutions in probation and criminal justice information management

[9] Kabar Information Center: Automated Information System of Courts http://sot.kg/post/iats-kabar-avtomatizirovannaya-informatsionnaya-sistema-sudov (Accessed 17 September 2024)

[10] AIS "Sud". Available at: http://admin-sot.sot.kg/public/sites/4/2019/07/AIS-Suda.pdf (Accessed 17 September 2024)

Audio-visual recordings ('AVR') of court hearings and online publication of judgments with anonymized personal data of parties have a positive impact on transparency. Between 2013 and 2022, 409 750 cases, 386 753 judicial acts, and information about 643 980 court hearings were published on the official website act.sot.kg[11] . Since 2023, the court decisions have been published on the Digital Justice Portal[12].

Despite the positive impact, the Kyrgyz judiciary faces challenges in implementing e-justice. Lack of integration between AIS "Sud" and other e-justice platforms managed by the General Prosecutor's Office, the Ministry of Justice, the State Service for the Enforcement of Sentences under the Ministry of Justice, and other state bodies[13]. For this reason, courts still use paper-based workflow. Use of RHVC raises concerns for a fair trial in the absence of a digital tool to ensure confidentiality between client and defence lawyer. Internationally, it is good practice to include a "whisper button" in the videoconferencing system to keep communications between the accused/defendant and defence lawyer confidential. This could be implemented in Kyrgyz courts. In addition, increasing the number of training courses for judges, court staff, and lawyers, and introducing e-justice courses for law and IT students in universities could have a positive impact on the development of e-justice.

The Civil Procedural Code allows online broadcasting of court hearings only with the consent of the court[14]. This raises the dilemma of double victimization and concerns about the protection of personal data of parties, witnesses and other participants to litigation, because their consent is not taken into account. In order to overcome this dilemma, the legal provision of the Civil Procedural Code has to be amended to include the consent of parties to proceedings.

The analysis also revealed a contradiction between law and technology with regard to e-filing. Despite the fact that Civil Procedural Code and Administrative Procedural Code establish legal provisions for e-filing through courts' websites, the district courts do not yet have websites. Appellate courts and the Supreme Court do have, but they do not have digital tools for e-filing thus far[15]. It is planned to provide e-filing under the umbrella of the 'Digital Justice' Portal, which is currently under development.

[11] http://act.sot.kg/ru (Accessed 01 June 2024)

[12] https://portal.sot.kg/ru/grsa?id=5&page=1&instance_ids=1&judicial_chamber=1 (Accessed 01 June 2024)

[13] Maralbaeva, A. (2024). Evolution of e-Justice Platforms: from ICT in Courts Towards 'Digital Justice' Portal in Kyrgyzstan. *International Journal for Court Administration*, *15*(1), 6. p. 7. Available at: https://iacajournal.org/articles/10.36745/ijca.582 (Accessed 12 June 2024)

[14] Article 13, Civil Procedural Code. Available at: https://cbd.minjust.gov.kg/111521/edition/3087/ru

[15] The official website of the Supreme Court of the Kyrgyz Republic. Available at: http://sot.kg (Accessed 17 September 2024).

E-justice systems have been implemented with support of different foreign donors' assistance. Foreign donors have made a positive contribution to the development of e-justice. Meantime, while supporting e-justice implementation, each foreign donor is responsible only for digitising only one stage of the justice chain. As a result, this could raise concerns about technical integration between developed e-justice systems in the future. Therefore, the e-justice strategy of the Kyrgyz judiciary should follow a holistic approach to e-justice in order to achieve the expected goals.

Overall, the analysis of e-justice development revealed a deliberate approach and a fragmented outcome due to the lack of integration between the main e-justice systems within the justice chain thus far.

2. E-justice in Uzbekistan: an incremental approach and detailed procedural regulation

The judicial system of Uzbekistan comprises of the Constitutional Court, Supreme Court, 204 district (city) criminal courts, 80 inter-district, district (city) civil courts, 14 inter-district administrative courts and 71 inter-district, district (city) economic courts[16].

Procedural legislation, the 2020 Decree of the President of the Republic of Uzbekistan "On additional measures to further improve the functioning of the courts and increase the efficiency of justice", and the 2020 Resolution of the President of the Republic of Uzbekistan "On measures to digitize the activities of the judiciary" laid a legal basis for e-justice initiatives.

Since 2013, e-justice systems have been developed and supported with foreign donors' assistance such as the USAID and UNDP (see Table 3). Firstly, e-filing was introduced in the writ proceedings. Then, it was extended to civil proceedings. For 11-years, the Uzbek judiciary's digital journey has rapidly evolved from the E-SUD/E-xSUD deployed in all courts to the umbrella digital portal "My.sud.uz" and the e-justice platform "Adolat", which provide various judicial services to the public. The latter allows online monitoring of the application process and preliminary (pre-trial) hearings, and proposes to simplify the electronic submission of data and documents by participants in a court session[17].

[16] The Supreme Court of Republic of Uzbekistan. Available at: https://old.sud.uz/ru/ (Accessed 17 September 2024).

[17] Ismatov A., Covid-19 and Digital Transformation Challenges: Experiences from Uzbekistan and Japan. *Alatoo Academic Studies Journal*, Vol. 1, 2023, p. 486.

Table 3. Foreign donors' projects supporting e-justice implementation in Uzbekistan

№	Title of project	Year	Foreign donor	Outcome
1	"Reform of Civil Proceedings: Effective Court Administration".	2013	UNDP	E-SUD
2	"Partnership for the Rule of Law in Uzbekistan"	2014	USAID	E-xSUD, electronic database of judgments, videoconferencing equipment
3	"Rule of Law – Central Asia"	2018-2024	GIZ	Capacity building (public lectures)

In contrast to Kyrgyzstan, where the IT agency "Adilet Sot" is an institution within the judicial system, in Uzbekistan the state unitary enterprise "Unicon.uz" under the Ministry of Digital Technologies has developed two main e-justice systems: the E-xSUD and "Adolat" for judicial system. On the one hand, this may raise concerns about the ownership of the main e-justice platforms by the judiciary. On the other hand, it avoids a potential conflict of interest if there were a dispute between the IT agency within the judiciary responsible for digital tools in the courts and the IT company providing equipment for e-justice systems.

The research showed positive impact of e-justice. The E-SUD implemented in all 89 civil courts significantly reduced time and paper costs in the writ proceedings[18], simplified judges' work, and reduce time of proceedings in civil cases[19]. The E-SUD was merged with the E-xSUD information system in economic, administrative and criminal courts. The E-xSUD aims to improve access to justice through e-filing. It is integrated with the e-government user identification system, the central database of individuals and legal entities, and the inter-agency integration platform[20].

Nabiev emphasizes that E-SUD has several shortcomings that cause difficulties for ordinary citizens such as language, some procedural actions in the system are still inaccessible and the user cannot perform them, complex design of the interface. This resulted in a lack of interaction and made judge's work more complicated than simplified[21].

Remote hearings via videoconferencing improve access to justice and reduce financial and time costs. In contrast to Kyrgyzstan, where parties or witnesses who would like to participate in remote

[18] National Information System for Electronic Court Proceedings E-SUD: Practical Guide for Users (Nacionalnaya informacionnaya sistema elektronnogo sudoproizvodstva E-SUD: Prakticheskoe posobie dlya polzovateley). Available at: https://www.undp.org/ru/uzbekistan/publications/nacionalnaya-informacionnaya-sistema-elektronnogo-sudoproizvodstva-e-sud-prakticheskoe-posobie-dlya-polzovateley (Accessed 17 September 2024).

[19] Uzbekistan's e-judicial system proved its efficiency in the COVID-19 pandemic conditions (Sistema elektronnogo sudoproizvodstva Uzbekistana dokazala svoyu effektivnost' v usloviyah pandemii COVID-19). Available at: https://www.usaid.gov/ru/uzbekistan/news/e-justice-system-uzbekistan-proves-its-worth-amid-covid-19 (Accessed 17 September 2024).

[20] E-xSUD. Available at: https://us.uz/products/post-29 (Accessed 17 September 2024).

[21] Nabiev A. (2021). Digital Justice in Current Conditions of the Republic of Uzbekistan (Cifrovoe pravosudie v nyneshnih sloviyah Pespubliki Uzbekistan), *Journal «StudNet»*, № 4/2021.

hearings should go to the nearest courts where their identity must be proven, in Uzbekistan parties can use mobile videoconferencing application[22] or go to court which assists in conducting remote hearings[23].

Online publication of judgments improves public access. As for June 2024, 814,421 judgments on economic cases, 105 103 judgments on administrative cases, 1 606 529 judgments on civil cases, 302 359 judgments on criminal cases, and 2 602 525 judgments on administrative violations are published online[24]. However, similar to Kyrgyz 'Digital Justice' Portal, the Uzbek e-portal for online publication of judgments does not have a digital tool for key words search which could increase efficiency and safe much time.

Audio-visual recordings of court hearings ('AVR') are used in civil, criminal and administrative cases. However, according to procedural legislation, a copy of the audio-visual recording of court hearings is given to parties with permission of the court.

Analysis of the procedural legislation revealed a detailed regulation of AVR, remote hearings via videoconferencing and online publication of judgments. At the same time, it also showed a contradiction between law and technology. Despite the fact that digital tools allow remote hearing through videoconferencing, the Civil Procedural Code and the Economic Procedural Code establish a fee for court hearings via videoconferencing[25]. According to the Ruling of the Presidium of the Supreme Court dated on 25 October 2018 № RS-59-18, since 1 November 2018, the cost of a court hearing via videoconference has been set at 25 percent of the minimum wage and shall be charged by the court hearing the case[26]. On the one hand, this can be explained by intention to support e-justice systems' implementation financially. On the other hand, it raises concern in terms of improving access to justice. In Kyrgyzstan and Kazakhstan, there are no fees for remote hearings via videoconferencing.

[22] Users can download it from the official website https://vka.sud.uz/app/Desctop_ru.pdf (Accessed 17 September 2024).

[23] Resolution of the Plenum of the Supreme Economic Court of the Republic of Uzbekistan (Postanovlenie Plenuma Vysshego Hozyajstvennogo Suda Respubliki Uzbekistan "O nekotoryh voprosah primeneniya ekonomicheskimi sudami norm processual'nogo zakonodatel'stva pri provedenii sudebnyh zasedanij v rezhime videokonferencsvyazi"), dated 19.05.2018 No. 17. https://lex.uz/docs/2534029 (Accessed 17 September 2024).

[24] https://public.sud.uz/report (Accessed 17 September 2024).

[25] Article 132, Civil Procedural Code of the Republic of Uzbekistan, 2018. Available at: https://lex.uz/docs/3517334; Article 116, Economic Procedural Code of the Republic of Uzbekistan, 2018. Available at: https://www.lex.uz/acts/3523895 (Accessed 17 September 2024).

[26] Expenses related to holding a court hearing via videoconference. Available at: https://old.sud.uz/ru/%D1%80%D0%B0%D1%81%D1%85%D0%BE%D0%B4%D1%8B-%D1%81%D0%B2%D1%8F%D0%B7%D0%B0%D0%BD%D0%BD%D1%8B%D0%B5-%D1%81-%D0%BF%D1%80%D0%BE%D0%B2%D0%B5%D0%B4%D0%B5%D0%BD%D0%B8%D0%B5%D0%BC-%D1%81%D1%83%D0%B4%D0%B5/ (Accessed 17 September 2024).

Online broadcasting of court hearings raises the dilemma of double victimization. To overcome this dilemma, the Uzbek procedural legislation allows online broadcasting only with the consent of parties and authorization of the presiding judge of court hearing[27].

Overall, e-justice implementation was initiated and developed by the Supreme Court with technical support of the state unitary enterprise under the Ministry of Digital Technologies and supported by foreign donors' assistance. However, enforcement proceeding is not fully digitized thus far. Digital tools in this field are still being implemented[28].

3. E-justice in Kazakhstan: an advanced approach and Artificial Intelligence

The judicial system of Kazakhstan comprises of the Constitutional Court, Supreme Court, 21 appellate and equivalent courts and 376 district and equivalent courts[29].

The legal foundation for digital transformation of the judicial system includes the Nation's Plan "100 Concrete Steps" (2015)[30], procedural legislation and the Strategy for ICT (digitalization) of judicial system.

The Supreme Court of the Republic of Kazakhstan developed and has ownership on the e-justice systems implemented in courts. The foreign donor's assistance is limited by technical expertise (see Table 4).

Table 4. Foreign donor's project supporting e-justice implementation in Kazakhstan

№	Title of project	Year	Foreign donor	Outcome
1	Rule of Law	2020-2025	USAID implemented by ABA ROLI	Technical expertise

The research showed an advanced approach to e-justice implementation and its positive impact. Moreover, the judiciary implemented several Artificial Intelligence ('AI') tools within e-justice platforms.

[27] Article 208, Civil Procedural Code. Available at: https://lex.uz/docs/3517334 (Accessed 17 September 2024).

[28] Decree of the President of the Republic of Uzbekistan "On Additional Measures to Reform and Digitalise the System for Enforcement of Judicial Acts and Acts of Other Bodies" (Ukaz Prezidenta Respubliki Uzbekistan "O dopolnitel'nyh merah po reformirovaniyu i cifrovizacii sistemy ispolneniya sudebnyh aktov i aktov inyh organov") dated on 03.01.2024 No. UP-1. Available at: https://lex.uz/ru/docs/6723275 (Accessed 17 September 2024).

[29] Supreme Judicial Council of the Republic of Kazakhstan National Report No. 6 On the State of Judicial Personnel in the Republic of Kazakhstan, Astana, 2024. Available at: https://www.gov.kz/memleket/entities/vss/documents/details/600182?lang=ru (Accessed 18 June 2024).

[30] Nation's Plan "100 Concrete Steps" (Plan Nacii - 100 konkretnyh shagov), 2015. Available at: https://adilet.zan.kz/rus/docs/K1500000100 (Accessed 17 September 2024).

In 2014, Kazakh judiciary's digital journey has started with implementation of the umbrella e-portal called "Judicial Cabinet"[31], which allowed e-filing, paying state duty, choosing mediator and submitting an application for mediation electronically. Between 2014 and 2022, the number of lawsuits submitted online sharply increased from 5 % to 90 %. As a result, it reduced the workload of court clerks as the main details of documents filed were filled in by litigants when submitting electronic applications[32]. Civil and criminal justice have been digitalized.

Since 2016, the "Judicial Cabinet" has been integrated into the new umbrella e-justice platform "Tərelik", which includes AI tools to support judges in all courts. It also includes audio-visual recording system ('AVR'), the Supreme Court's website, and integrates them with 32 databases of public agencies, organizations and banks. Automated allocation of cases eliminates subjectivity and potential corruption risks[33].

As for the enforcement proceedings, some courts are integrated with penitentiary institutions, which allows the electronic exchange of materials related to execution of sentences (e.g., parole from punishment, replacement of punishment with a more lenient type) in several regions of Kazakhstan[34]. AI is also used to issue writs for the enforcement of maintenance for minor children and for judicial analytics[35].

AVR is applied in criminal and civil cases[36]. The materials of AVR are confirmed by the electronic digital signature of the judge[37]. Parties have access to AVR records through the online portal "Judicial Cabinet", including its mobile version. AVR reduces workload of the court clerks.

Remote hearings ensure access to justice. In 2022, more than 52 000 court hearings were held via videoconferencing and 280 000 court hearings were held via mobile videoconferencing [38].

[31] Judicial Cabinet. Single window for access to electronic services of the judicial bodies of the Republic of Kazakhstan Available at: https://office.sud.kz/ (Accessed 17 September 2024).

[32] Digitalization. IT technologies in courts. Available at: https://www.sud.gov.kz/rus/content/cifrovizaciya (Accessed 17 September 2024).

[33] Ibid.

[34] On the Transformation of Justice in the Framework of Digitalization Available at: https://sud.gov.kz/rus/tag/cifrovizaciya (Accessed 17 September 2024).

[35] Digitalization. IT technologies in courts. Available at: https://www.sud.gov.kz/rus/content/cifrovizaciya (Accessed 17 September 2024).

[36] AVR in judicial system (AVF v sudebnoj sisteme). Available at: http://astanazan.kz/?p=6096 (Accessed 17 September 2024).

[37] E-justice - modernising real results (Elektronnoe pravosudie - modernizacii real'nyj rezul'tat). Available at: https://online.zakon.kz /Document/?doc_id=35830897&pos=4;-90#pos=4;-90 (Accessed 17 September 2024).

[38] Digitalization.IT technologies in courts https://www.sud.gov.kz/rus/content/cifrovizaciya (Accessed 17 September 2024).

Egezhanova highlights that e-justice rapid development requires the improvement of judges' digital skills, literacy and knowledge[39].

Although online access to the AVR and online broadcasting of court hearings improves transparency, it also raises the dilemma of double victimization. To overcome this dilemma, the Kazakh procedural legislation allows online broadcasting only with the permission of the court and taking into account the opinion of parties[40]. However, the lack of detailed regulation of this issue in procedural legislation can lead to a potential contradiction between law and technology. For instance, if the defendant agrees to the online broadcasting of a court hearing and the victim does not, a judge should make a decision based on clearly established criteria.

In contrast to Kyrgyzstan and Uzbekistan, there is no publicly available database which provides access to judgments online. Only authorized users have access to the online database of court decisions[41]. This can be explained by the intention to protect personal data of litigants.

Overall, the analysis showed an advanced approach to e-justice implementation supported by AI tools. The Supreme Court plays a leading role in developing e-justice systems implemented in courts. Despite the impressive results already achieved by the Kazakh judiciary, there is still room for improvement in terms of partial digitisation of enforcement proceedings.

IV. Implementing e-Justice Systems: East Asian Cases

This section examines approaches to e-justice implementation in three East Asian countries (Japan, Republic of Korea and Indonesia).

1. E-justice in Japan: a conservative approach

The judicial system of Japan comprises of the Supreme Court, 14 high courts (appellate courts), 253 district courts, as well as family courts and summary courts[42].

[39] Egezhanova D. (2023) Some Issues of Development and Improvement of Digital Education of Judges (Nekotorye voprosy razvitiya i sovershenstvovaniya cifrovogo obrazovaniya sudej), *Bulletin of L.N. Gumilyov Eurasian National University*. *Law Series*, № 2(143). p. 28.

[40] Article 19, Civil Procedural Code, Available at: https://adilet.zan.kz/rus/docs/K1500000377 (Accessed 17 September 2024).

[41] https://auth.zakon.kz/account/login?returnUrl=%2F&returnApp=SUDBASEV2 (Accessed 17 September 2024).

[42] Monami Nohara (2023), Digital Reformation of Japanese Civil Procedures and its Future Prospects, Working paper. p. 8. Available at: https://law.stanford.edu/wp-content/uploads/2023/08/Monami-Nohara_digital-reformation-of-Japanese-civil-procedures1.pdf (Accessed 17 September 2024).

Although videoconferencing was introduced in 1998 for remote hearings in preparatory civil proceedings, Japan, one of Asia's largest economies, has taken a conservative approach to digitising the courts, with a mixture of top-down and bottom-up approaches.

Since 2001, several e-justice initiatives have been launched. According to the 2001 Written Opinion of the Judicial System Reform Council, the Supreme Court should have to form and publicly announce a plan for introducing information technology. Machimura highlights an importance of a bottom-up approach. The initiative was taken by the courts themselves. For instance, they provided online access to property information from real estate auctions via the Broadcast Information of Triset system[43].

In 2004, the online statements were introduced in the Article 132-10 of the Civil Procedural Code[44]. The online statement is an e-document attached to the email to be sent to the court. However, there were no regulations and procedures for its realization in practice. The pilot project was implemented in the Sapporo District Court for the exchange of documents such as explanation of evidence, the date of the next hearing, and the submission of a petition. While e-mail petitions were allowed, the preparation of the case record and its original must be in writing, and inspection must also be in writing. It simply replaced traditional document delivery with electronic form. Between 2004 and 2009, only 2 or 3 statements were submitted online. The problem was how to identify a document submitted online without a digital signature. Until 2022, the Supreme Court of Japan did not issue a special regulation that could specify the procedure for submitting an online statement to the courts. [45]. This example showed a contradiction between law and technology.

In 2006, a procedure of applying for payment request using electronic data processing system was introduced. According to this e-justice system, pre-registered creditors could, in principle, file petitions and make inquiries for payment request cases via the Internet 24 hours a day, 365 days a year. Fees could also be paid electronically. Parties could track the progress of the case and receive e-notifications with their consent[46].

In April 2021, the Supreme Court launched the Digital Promotion Division which is responsible for promoting digital reform in civil and criminal proceedings[47]. It consists of judges and IT specialists.

[43] Machimura Y. (2020) Information Technology and Civil Justice in Japan. p. 362. Available at: https://www.seijo-law.jp/pdf_slr/SLR-086-361.pdf (Accessed 17 September 2024).
[44] Ibid. p. 363
[45] Interview conducted on December 6, 2023.
[46] Interview conducted on December 6, 2023.
[47] Japanese Courts Promoting Digital Reform. Available at: https://sp.m.jiji.com/english/show/17270 (Accessed 17 September 2024).

The Supreme Court outsourced the development of the digital program to a private firm[48]. The Supreme Court and the Ministry of Justice work together on digitalization of the justice system[49].

Reforms of digitization of courts has started with the civil litigation. The Subcommittee of the Code of Civil Procedure (IT-related) of the Legislative Council comprises of all key stakeholders involved in the digitalization of civil justice such as judges, court staff of the Supreme Court and magistrate courts, representatives of Legislative Council, professors from universities, representatives of two Japanese private companies focused on technology, business solutions and AI, Ministry of Justice, Cabinet Legal Affairs Bureau and representatives of Federation of Housewives'[50] Association, Japan Federation of Labor Union, and the President of the Japan Federation of Judicial Scrivener's Associations[51].

The 2017 Japanese Government's Strategy for Future Investments, the 2022 Rule of the Supreme Court on Submitting an Online Statement to Court and the 2022 Amendments to Civil Procedural Code comprise legal foundation for digital transformation of civil litigation aimed to improve accessibility, transparency and efficiency. The amendments to Civil Procedural Code include three main phases of e-justice development: 1) e-court (usage of web conferences); 2) web hearing; 3) online filing (e-filing, e-case management).[52]

In November 2023, in accordance with the Decree of the Supreme Court № 5, 2023, the e-justice platform for civil litigations called "Mints" was deployed in all branches of the district courts[53]. It enables e-filing based on the Article 132-10 et seq. of the Civil Procedural Code. At present, e-justice platform "Mints" can only be used by defence counsels, because it is available for cases where both parties have their own counsel and both counsels agree to use it[54]. It allows uploading, downloading, printing and exchanging documents (e.g., claims, copies of written evidence, explanations of evidence, requests for evidence, miscellaneous petitions and documents that require a fee to file a motion)[55]

[48] Interview on December 6, 2023.

[49] Japan to introduce electronic arrest warrants, interrogation records. The Japan Times, 2023. Available at: https://www.japantimes.co.jp/news/2023/12/04/japan/crime-legal/electronic-arrest-warrants/#:~:text=The%20Justice%20Ministry%20plans%20to,pick%20up%20at%20the%20courts. (Accessed 20 June 2024)

[50] It means consumers.

[51] 法制審議会民事訴訟法（ＩＴ化関係）部会委員等名簿 Available at: https://www.moj.go.jp/content/001354537.pdf (Accessed 10 December 2023)

[52] Monami Nohara (2023), Digital Reformation of Japanese Civil Procedures and its Future Prospects, Working paper. p. 7. Available at: https://law.stanford.edu/wp-content/uploads/2023/08/Monami-Nohara_digital-reformation-of-Japanese-civil-procedures1.pdf (Accessed 17 September 2024).

[53] 民事裁判書類電子提出システム（mints）とは https://www.courts.go.jp/saiban/online/mints/index.html (Accessed 10 December 2023).

[54] 初めてご利用の方へ 最高裁判所事務総局 改訂年月日：2023.3.1. Available at: https://www.mints.courts.go.jp/user/user_firsttime.pdf (Accessed 10 December 2023).

[55] Ibid.

which can be submitted by facsimile transmission according to Article 3, Paragraph 1 of the Rules of Civil Procedure. However, the use of "Mints" does not exclude a paper-based workflow because submitted documents are printed out by the court and handled as case files.

The "Mints" has limitations that have a positive impact on personal data protection. For instance, in order to protect the confidentiality of litigants, it is not possible to upload a document declaring confidential matters or a document containing confidential matters or matters to be inferred. The petition for confidentiality must be submitted in writing. The users should be very careful when uploading documents, because the files cannot be deleted. After release of a judgment, the case information (including uploaded files) will be deleted. At the same time, if the case has been appealed, the "Mints" allows the exchange of case materials between the district and appellate courts[56].

In addition, the use of audio-visual recordings ('AVR') of interrogations is limited. AVR is used in cases involving serious crimes that are conducted by lay judges[57] and where the prosecutors conduct their own investigation. According to statistics compiled by the Japan Federation of Bar Associations, the number of cases in which AVR is required by law is less than 3% of all criminal cases. Crucially, interrogations of witnesses or suspects who have not been arrested are exempt from recording, even in the specified category of cases[58]. In addition, meetings between defence lawyers and defendants in remand centres have not yet been digitised due to the strong protection of defendants' rights in the Constitution of Japan[59].

In order to improve access to justice, once the amendments to the Civil Procedural Code have been adopted, preparatory hearings may be held online via Microsoft Teams with the mutual consent of parties. The Microsoft Teams can be used only by courts and attorneys. However, this raises the issue of proper identification of parties and witnesses. The online examination of witnesses is at the discretion of the court. In 2025, transfer to online litigation is planned[60]. The use of Microsoft Teams for remote hearings also raises concerns about the transmission of litigants' personal data via foreign e-platform.

In contrast to the Central Asian judiciaries examined above, Japan's judiciary does not allow the online publication of full texts of judgments and any form of courtroom broadcasting to the outside

[56] Ibid.

[57] The Japanese Judicial System. Available at: https://www.nichibenren.or.jp/en/about/judicial_system/judicial_system.html (Accessed 17 September 2024).

[58] Miyatuka T. (2023), Japan's "Hostage Justice" System, Human Rights Watch. Available at: https://www.hrw.org/report/2023/05/25/japans-hostage-justice-system/denial-bail-coerced-confessions-and-lack-access (Accessed 17 September 2024).

[59] Interview conducted on December 6, 2023.

[60] Ibid.

world[61]. On the one hand, it reduces transparency of judicial system. On the other hand, it protects the judiciary from a dilemma of double victimization.

Overall, the analysis of e-justice development revealed a conservative approach. The Japanese judiciary's digital journey has started with implementation of remote hearings and e-filing platform in civil litigation, which have a positive impact on access to justice. At the same time, there are concerns regarding transparency in terms of limited use of AVR and prohibition of online broadcasting. This can be explained by cultural features of the Japanese legal system and deliberate attitude towards openness of the courts in terms of protecting the privacy and personal data of litigants, witnesses and other participants of trials.

2. E-justice in Republic of Korea: a holistic approach

The judicial system of Republic of Korea includes the Constitutional Court, Supreme Court, 6 high courts (appellate court), patent court (appellate court), 18 district courts, family courts, administrative court, and bankruptcy court[62].

In 1976, the Republic of Korea has started its digital journey with the initiative of a group of judges who had a desire to better manage their cases, with strong support from the Supreme Court. A feasibility study on the use of IT technologies in courts was conducted by the Korean Institute of Science and Technology. Since then, the IT tools used in courts have evolved from simple case database to sophisticated, comprehensive and integrated web-based e-justice systems[63].

The Republic of Korea followed a three-pronged approach which includes: 1) building the capacity of judges and court staff to develop and implement IT tools in the courts; 2) improving legal framework; 3) providing financial incentives for lawyers to use e-filing and raising awareness among court users.

The Supreme Court focused on building the in-house capacity by establishing the Judicial IT Management Center in 2008 and developing legal and technical capacities of judges and court staff through in-country and overseas training programs. The Supreme Court demonstrates judiciary's ownership and involvement to e-justice systems implementation.

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[61] Xu J, Liu C. (2020) How Does Courtroom Broadcasting Influence Public Confidence in Justice? The Mediation Effect of Vicarious Interpersonal Treatment. *Front Psychol*. Jul 29; 11:1766. p. 1. Available at: https://www.frontiersin.org/journals/psychology/articles/10.3389/fpsyg.2020.01766/full (Accessed 17 September 2024).

[62] Cho S. (2021) A Brief Introduction to the Korean Judicial System and Court Hierarchy, Briefing Paper 13. p. 8. Available at: https://law.unimelb.edu.au/__data/assets/pdf_file/0011/3899198/ALC-Briefing-Paper-13_Cho.pdf (Accessed 17 September 2024).

[63] Gramckow H., Ebeid O., Leveraging Technology to Improve Service Delivery in the Justice Reform in South Korea, *Just Development*, Issue 10, 2016. p. 1

The 2002 Civil Procedure Act, the 2005 Act on the Application of Electronic Documents of Demanding Procedures, the 2010 Act on the Use of Electronic Documents in Civil Litigations laid down a legal foundation for the implementation of e-justice.

However, the process of e-justice implementation was not smooth. There were technical, social, and financial challenges that hindered its development such as "system failure and unreliability, different infrastructure platforms for information exchange across the judicial branches and with other agencies, information and system security concerns, judges and officials lacking basic computer skills, resistance from the users", and a lack of legal framework for electronic proceedings[64]. However, the Supreme Court overcame these challenges through several successful measures, including capacity-building trainings, a 10% reduction of court fees for lawyers who use e-filing, introduction of e-docket viewer that allows lawyers to manage multiple lawsuits in different jurisdictions, and significant increase of budget for the judiciary[65].

The analysis of e-justice implementation showed that the Supreme Court took a strong leadership role and followed an incremental approach to e-filing. Firstly, e-filing was introduced in the Patent Court, and then extended to civil, family, bankruptcy and administrative courts[66].

The study revealed positive impact of e-justice on civil and criminal proceedings. In addition to the e-case management system, Korean e-justice systems include: judge support system, information exchange, public information service, e-court systems which allows e-filing, e-money claim, e-entrusting, e-property inquiry, e-courtroom, audio-visual recording and videoconferencing[67]. In contrast to other Asian jurisdictions examined above, the Korean judiciary has been able to transform the entire criminal justice chain from paper-based to digital format.

The Electronic Case Filing System allows litigants and their attorneys to file cases and other court documents, documentary evidence and digital evidence, share court documents, as well as access court information, procedures and receive notifications electronically. In order to protect privacy and security of litigants, access to e-files is not available to the public.

[64] Chongthammakun R. (2014) Preliminary Study Report on e-Court Development and Implementation: Lessons Learned from Korean e-Court Experience. p. 34.

[65] Vilquin J., Bosio E. (2013) Improving Court Efficiency: the Republic of Korea's E-court Experience, World Bank p .67. Available at: https://archive.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB14-Chapters/DB14-Improving-court-efficiency.pdf (Accessed 17 September 2024).

[66] http://eng.scourt.go.kr (Accessed 20 June 2024)

[67] Vilquin J., Bosio E. (2013) Improving Court Efficiency: the Republic of Korea's E-court Experience, World Bank, 2013 p.67. Available at: https://archive.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB14-Chapters/DB14-Improving-court-efficiency.pdf (Accessed 17 September 2024).

The Korean Information of Criminal Justice Services is an electronic work system by which four criminal justice agencies (police, prosecution service, courts, and the Ministry of Justice) perform investigation, indictment, trial, and execution work through the standard information system, and jointly use the resulting information and other documents. The system, called "Electronic-Summary Procedure", has significantly shortened the handling period from 4 months to 28 days for summary procedures, such as the preparation of documents, transfer of cases, indictment, summary order, and forwarding of documents in summary indictment cases[68]. For instance, summary proceedings for drunk driving or unlicensed-driving can be conducted completely electronically[69], and the results of proceedings can be received via e-mail or SMS[70].

In order to ensure transparency, the Online Judgment Search Service provides access to court decisions[71]. Only the Constitutional Court enables online broadcasting of court hearings. Before 2017, videotaping, taking photographs or live broadcasting in a courtroom without prior permission of the presiding judge were not permissible. The defendants' consent or the court's permission were needed. In 2017, a high-profile case changed the situation. The Supreme Court enacted a regulation allowing the broadcasting of court hearings if the cases are considered to be of "greater public interest".[72] By limiting the broadcasting of court hearings to high-profile cases, the risk of a double victimization dilemma was reduced.

Overall, Korean judiciary's digital journey revealed a successful example of a bottom-up approach, supported and led by the apex court. Other Asian jurisdictions examined in this study could use the Korean experience as a good practice. It shows how a holistic approach to e-justice helps achieve main goals, ensures judicial ownership and involvement in the development of e-justice platforms, and mitigates the risks of double victimization.

3. E-justice in Indonesia: a nimble approach

The judicial system of Republic of Indonesia comprises of the Constitutional Court, Supreme Court, appellate courts and courts of first instance. The appellate courts include: High Court, High Religious Court, High State Administration Court, and Military High Court. The Court of General Jurisdiction, Religious Court, State Administration Court, and Military Court are courts of first

[68] https://fgn.kics.go.kr/en/jsp/kics/contents.jsp (Accessed 20 June 2024).
[69] https://fgn.kics.go.kr/en/jsp/kics/overview.jsp (Accessed 20 June 2024).
[70] https://fgn.kics.go.kr/en/jsp/kics/expectedBenefits.jsp (Accessed 20 June 2024).
[71] e-Trials. Available at: https://eng.scourt.go.kr/eng/judiciary/eCourt/eTrials.jsp (Accessed 20 June 2024).
[72] Top court OKs live TV broadcast of sentencing hearings in lower courts. Available at: https://en.yna.co.kr/view/AEN20170725007000315 (Accessed 17 September 2024).

instance[73]. There are Special Courts within the Court of General Jurisdiction such as Human Rights Courts, Commercial Courts, Corruption Courts, Children's Courts. In addition, there are Tax Court and Industrial Relations Dispute Settlement Court[74].

Since 2017, Indonesia's judiciary has started its digital journey aimed to fast, simple and low-cost trials. The Roadmap of Indonesian judicial reform for 2010 - 2035 focused on development of courts based on digital law. The Supreme Court took a leadership role and filled gaps in procedural legislation by enacting main regulations that laid the legal foundation for e-justice: Regulation № 9 of 2017 on the Template and the Guidance of Verdict Writing, which enabled the paperless issuance of the verdict, Regulation № 3 of 2018, which focuses only on electronic administrative process and case registration, Regulation № 1 of 2019 on Case Administration and Electronic Litigation, which enables e-Court and e-Litigation systems, Regulation № 6 of 2022 on the Electronic Administration of Cassation and Case Review Legal Remedy Submissions and Proceedings at the Supreme Court. E-justice is being implemented to overcome challenges of the judicial system, such as difficult access to courts, slow processes in handling cases and delays[75].

Since 2018, the main e-justice system, called "e-Court" has been launched in public court, religious court, and state administrative court[76]. In 2019, it was implemented in all civil cases, administrative and criminal cases[77]. There are 910 courts throughout Indonesia that are connected to the e-Court system[78]. All three court instances are digitised.

[73] Sufiarina, Sufiarina and Fakhriah, Efa Laela (2012) One Roof Judicial System in Indonesia, Indonesia Law Review: Vol. 2: No.3, Article 5. p. 328. Available at: https://scholarhub.ui.ac.id/ilrev/vol2/iss3/5 (Accessed 17 September 2024).

[74] Indonesian Legal System. Part 3. p. 62. Available at: https://www.aseanlawassociation.org/wp-content/uploads/2019/11/ALA-INDO-legal-system-Part-3.pdf (Accessed 17 September 2024).

[75] Putra D., A Modern Judicial System in Indonesia: Legal Breakthrough of E-Court and E-Legal Proceeding, *Jurnal Hukum dan Peradilan*, Vol. 9, no. 2 (2020), p. 275-279.

[76] Ibid. p. 281

[77] Nguyen Bich Thao, Truong Huynh Nga E-Courts In Indonesia And Experience For Vietnam: Towards Judicial Harmonization and Modernization in the ASEAN Region, p. 1. Available at: https://law.unimelb.edu.au/__data/assets/pdf_file/0009/4356675/NGUYEN-Bich-Thao-and-TRUONG-Huynh-Nga.pdf (Accessed 17 September 2024).

[78] Sahira Jati Pratiwi, Steven, and Adinda Destaloka Putri Permatasi (2020). The Application of e-Court as an Effort to Modernize the Justice Administration in Indonesia: Challenges & Problems, *Indonesian Journal of Advocacy and Legal Services*, vol. 2, no.1, p. 43.

The e-Court includes e-workflow, e-filing, e-payment of fees (e-SKUM), e-summons, e-litigation (i.e., e-exchange of trial documents), and e-verdict[79]. Courts publish their decisions online. Witnesses and experts can be heard remotely via Zoom.[80]

Meantime, the e-Court system has limitations. Only verified lawyers and registered users have access to this system. The e-Court is used from the registration of a lawsuit to the trial. The evidentiary trial takes place in the courtroom, except for the manual verification of trial documents. After that, the judgment is announced via the e-Court. However, the content of judgment is usually only the verdict without any legal considerations. This condition raises concerns because it allows the court to change the content of the considerations. In practice, an e-announcement of the decision is left to the judges handling the case[81]. The consent of both parties to held litigation via the e-Court system is mandatory. Otherwise, the trial cannot be held electronically and will carry on under the conventional procedure[82].

The research showed that e-justice systems have a positive impact on speedy and low-cost litigation[83]. In addition, they minimize contempt of court by parties[84]. The Constitutional Court broadcasts court hearings online to ensure transparency[85].

Challenges in the e-justice implementation affect the achievement of its goals. In addition to inadequate internet network access for many isolated areas of Indonesia, the potential disclosure of confidential information, and the lack of awareness of public and legal professionals regarding the use of e-Court[86], there is limited knowledge among court staff and reluctance of parties[87]. The Supreme Court could follow the Korean experience and provide financial incentives for litigants to use e-Court.

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[79] Nguyen Bich Thao, Truong Huynh Nga E-Courts In Indonesia And Experience For Vietnam: Towards Judicial Harmonization and Modernization in the ASEAN Region, p. 5-6. Available at: https://law.unimelb.edu.au/__data/assets/pdf_file/0009/4356675/NGUYEN-Bich-Thao-and-TRUONG-Huynh-Nga.pdf (Accessed 17 September 2024).

[80] Yoesuf, Juliani & Ramadhansyah, Fery & Elviyanti, Sinta & Salamah, Ade. (2023). Strengthening The Implementation of E-Court-Based Judiciary As A Legal Protection In The Implementation of E-Litigation-Based Trials. *Jurnal Hukum dan Peradilan*. 12. 293. p. 309 10.25216/jhp.12.2.2023.293-318.

[81] Ibid. p. 312.

[82] Nguyen Bich Thao, Truong Huynh Nga E-Courts In Indonesia And Experience For Vietnam: Towards Judicial Harmonization and Modernization in the ASEAN Region, p. 8. Available at: https://law.unimelb.edu.au/__data/assets/pdf_file/0009/4356675/NGUYEN-Bich-Thao-and-TRUONG-Huynh-Nga.pdf (Accessed 17 September 2024).

[83] Ibid. p. 3.

[84] Putra D. (2020). A Modern Judicial System in Indonesia: Legal Breakthrough of E-Court and E-Legal Proceeding, *Jurnal Hukum dan Peradilan*, Vol. 9, no. 2, p. 275, p. 289, 293.

[85] Constitutional Court of the Republic of Indonesia. https://en.mkri.id/ (Accessed 17 September 2024).

[86] Putra D. (2020). A Modern Judicial System in Indonesia: Legal Breakthrough of E-Court and E-Legal Proceeding, *Jurnal Hukum dan Peradilan*, Vol. 9, no. 2 (2020), pp. 275, p. 291-292.

[87] Nguyen Bich Thao, Truong Huynh Nga E-Courts In Indonesia And Experience For Vietnam: Towards Judicial Harmonization and Modernization in the ASEAN Region, p. 4. Available at: https://law.unimelb.edu.au/__data/assets/pdf_file/0009/4356675/NGUYEN-Bich-Thao-and-TRUONG-Huynh-Nga.pdf (Accessed 17 September 2024).

Overall, the analysis of e-justice development revealed a nimble approach. In contrast to other Asian jurisdictions examined above, the Supreme Court played a pivotal role in legally legitimizing implementation of e-justice. The Indonesian judiciary implemented a single e-justice system "e-Court" for all courts in a relatively short period of time, which has had a positive impact. However, digitization has not yet extended to the examination of evidence in trial.

V. CALE and Promoting E-justice Research in Central Asian and East Asian Regions

The Center for Asian Legal Exchange at Nagoya University (CALE) is a leading and unique institution in Japan that conducts comprehensive research on the development of legal systems and promotes legal education assistance programs in South, South East, East and Central Asia[88]. CALE's highly qualified and well-experienced staff and associate scholars greatly contribute to producing new legal knowledge, enhancing cooperation among Central and East Asian law schools, and promoting mutual understanding and intercultural communication.

The analysis of e-justice development in six Asian countries examined in this study revealed positive impacts, challenges, and key points of concern. Most Asian jurisdictions faced the same challenges in developing e-justice, including low level of awareness about e-justice systems. In addition, there is a lack of e-justice- focused courses in law schools for law and IT students who intend to develop their careers in the judiciary. Legal reforms in the field of digital transformation of the judiciaries demonstrate relevance and importance of research and raising awareness among the public and legal community, as well as sharing good practices in Asian region.

In this regard, CALE could play a key role and take the lead in supporting research, legal education assistance programs and trainings for legal professionals focused on e-justice implementation in the Central and East Asian regions. This initiative could have a positive long-term impact on Japan and other Asian countries in terms of producing new legal knowledge and exchanging expertise and experience on e-justice development in terms of rapid development of AI and its potential to improve business processes in courts.

[88] Küpper H. (2011) Structures of Japanese and German international legal co-operation with formerly socialist countries compared, *CALE Discussion Paper № 5*, p. 15. Available at: https://cale.law.nagoya-u.ac.jp/wp/wp-content/uploads/2023/03/DP-No.-5.pdf (Accessed 17 September 2024).

IV. Conclusion

This article examined e-justice implementation in three Central Asian countries (Kyrgyzstan, Uzbekistan, and Kazakhstan) and three East Asian countries (Japan, Republic of Korea, and Indonesia). The analysis showed that each country follows its own approach to e-justice development. They have achieved successes and have faced challenges on their digital journey, taking into account available institutional, technical and financial aspects, as well as the capacity of judges and court staff.

The hypothesis of the theory of fragmentary divergence is confirmed. All six Asian judiciaries examined in this study demonstrated good achievements in the implementation of e-justice. The analysis showed that a holistic approach based on a mix of bottom-up and top-down approaches can lead to a successful digital journey.

At the same time, some Asian judiciaries have to some extent been confronted with a lack of integration of e-justice systems within the justice chain due to ongoing digitalization of enforcement procedures. As a result, their e-justice systems are fragmented thus far.

Four key elements of the theory of fragmentary divergence have been identified in the analysis of e-justice development in Asian jurisdictions: 1) a dilemma of double victimization; 2) contradictions between law and technology; 3) contradictions between the right to a fair trial, data privacy and technology; and 4) lack of judiciary's ownership of e-justice platforms. These could be taken into account by judiciaries and foreign donors supporting e-justice initiatives in order to avoid challenges during the process of digital transformation.

As a result of this study, several lessons can be drawn for Japan.

Firstly, the role of the Supreme Court is pivotal for successful implementation of e-justice initiatives. It is important to determine the national strategic vision for e-justice development, to identify main goals, taking into account available institutional, technical, and financial resources, the capacity of judges and court staff, and the cultural peculiarities of the nation.

Secondly, e-justice platforms should ensure the main guarantees of fair trial and protect privacy and personal data of litigants, witnesses and other participants of proceedings. For instance, the use of a "whisper button" in the videoconferencing system in courts could keep communication between the accused/defendant and defence lawyer confidential.

Thirdly, if online broadcasting were allowed to increase transparency, clear criteria for its use could be set out in procedural legislation. This will reduce the dilemma of double victimization.

Fourthly, the capacity of judges, court staff and court IT specialists and their involvement in e-justice implementation are one of the key aspects. Therefore, it is important to increase their awareness

and digital skills. At the same time, raising public awareness is also pivotal. In addition, financial incentives for defence lawyers using e-filing could also increase their involvement.

Finally, local e-justice platforms for videoconferencing could be developed in order to reduce the risks of transmitting personal data of litigants and other participants in court hearings via foreign videoconferencing platforms and applications. This could ensure judicial ownership of e-justice platforms and cybersecurity issues.

Acknowledgements

The author expresses sincere and deep gratitude to the Center for Asian Legal Exchange (CALE) at Nagoya University for the warm welcome and opportunity to develop this research, to the Director of CALE, Professor, Dr. Masako Murakami for her helpful comments and feedback, to Associate Professor, Dr. Aziz Ismatov for his useful comments, feedback and kind support during the research stay, to Assistant Professor Emi Makino, Ms. Yurika Matsumoto and other CALE's staff for their hospitality and kind administrative assistance, without which this research would not be possible.

The early version of this article was presented at the "International Online Workshop "E-justice, Data Protection and Human Rights in Japan, Germany, Italy and Central Asia" jointly organized by CALE and the Institute of Legal Informatics and Judicial Systems, National Research Council of Italy in Bologna on 27 November 2023.

個別論題

Thematic Papers

【Research Article】

Vietnam's Effective Enforcement of Handing over of a Child in International Parental Child Abduction Cases: Acceding to the 1980 Hague Convention (2)

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Contents

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III. Japan's Experience with Enforcing the Return Order

An investigational study of Japan's Ministry of Foreign Affairs (MoFA) in 2012 said that foreign governments reported more than 200 international parental child abduction (IPCA) cases to Japan.[1] As a result, Western governments and media criticized Japan for lacking a mechanism to return abducted children.[2] Consequently, Japan ratified the Convention and enacted the *Implementation Act* in 2014.[3] To give effect to the Convention, Japan has gradually improved its legal system, especially the regulations on compulsory execution measures by amending the *Implementation Act* in 2019.

1. The Implementation Act

The *Implementation Act* took effect on April 1, 2014.[4] It provides for the handling of IPCA cases and establishes the competence of relevant authorities and persons. Principally, it focuses on the procedures for a child's return. The Act is applied *mutatis mutandis* pursuant to several domestic legal documents, such as *Civil Execution Act*, *Domestic Relations Case Procedure Act*, and *Civil Procedure Code*. Though Japan has succeeded in handling IPCA cases with prominent amicable results, the execution of return orders have encountered difficulties with noncompliance and unenforceable cases.

(1) Overview of the child's return procedure

Under Articles 3 and 4 of this Act, the left-behind parent (LBP) seeking the child's return will file a petition to the MoFA, designated as Center Authority of Japan (JCA). Once the JCA decides to assist in a return case, they attempt to locate the child, contact the taking-parent (TP), and facilitate communication between the parents. JCA can request governmental and private organizations, such as schools, hospitals, telecommunications carriers, and utility providers, to provide the child's location

[1] Masayuki Tanamura, "International Child Abduction Cases and the Act for the Implementation of the Hague Convention," *Japanese Yearbook of International Law*, vol.57 (2014): 25, accessed November 5, 2019, https://heinonline.org/HOL/P?h=hein.journals/jpyintl57&i=42.

[2] Colin P. A. Jones, "Will the Child Abduction Treaty Become More Asian - A First Look at the Efforts of Singapore and Japan to Implement the Hague Convention," *Denver Journal of International Law and Policy*, vol.42, No.2 (2014): 289, accessed January 16, 2021, https://heinonline.org/HOL/P?h=hein.journals/denilp42&i=113.

[3] Japan's MoFA, "Overview of the Hague Convention."

[4] Ibid; National Diet of Japan, *Act No.48 of June 19, 2013*, accessed October 2, 2019, https://assets.hcch.net/docs/e9492775-1c19-4b0f-846b-d96a8e330f84.pdf.

information and ask for help from the prefectural police (Art.5). In addition, JCA encourages the parents to talk for an amicable resolution and provides them with up to four cost-free alternative dispute resolution (ADR) sessions.[5] Such sessions, namely mediation, out-of-court settlement, or conciliation, can be held before, during, and after the court proceedings.[6]

The LBP also can petition the court to obtain a judicial return order. Only Tokyo and Osaka Family Courts have jurisdiction over IPCA cases (Art.32).[7] The court may dictate either that the parent not bring the child to depart from Japan by a *ne exeat* order or that they surrender the abducted child's passport to prevent further removal (Art.122). If the parties agree, the court may refer the case to settlement or conciliation at any time; if they can reach an agreement, it will have the same effect as a final and binding order (Arts. 100, 144). The court continues the judicial proceedings if the parents do not consent to settle or fail to resolve the issues amicably through conciliation (Arts. 146, 147). The abducted child is not a party of the case, but they may intervene in the return proceedings (Art.48(1)).[8] The presiding judge can appoint an independent lawyer for the child; besides, to understand the child, a family court investigating officer will interview the child and report to the judge (Arts. 51(1)-(2), 79, 80). The return procedure aims to finish within six weeks as desired in Article 11 of the Convention; otherwise, the court needs to explain this to the LBP (Art.151).

If the court determines to return the child, it will make a judicial decision by a final order which includes the main text, the reasons, the parties and statutory agents, and the court (Arts. 91-94). The parties may file an immediate appeal to a high court within two weeks from the date that the order is notified to them, and the abducted child may also appeal against the final order decreeing their return (Arts. 101, 102). Appeal against the final order made by a high court to the Supreme Court by either a special appeal or an appeal with the high court's permission is probable (Arts. 108, 111). Moreover, modification due to change in circumstances or retrial also possibly challenges a final and binding return order (Arts. 117(1), 119). When the return order becomes effective but the TP fails to comply, the LBP can file a petition to Tokyo and Osaka Family Court, as execution court, for compulsory execution (Art.134; *Civil Execution Act*, Arts. 171(2), 33(2)(i)(vi), 22(vii)).

[5] Zushi, "Japan's Experience," 82.

[6] Ibid.

[7] Japanese judicial system, as of 2019, includes the Supreme Court, 8 High Courts, 50 District Courts, 50 Family Courts located at the same places as the district courts, and 438 Summary Courts. See Japan's Supreme Court, "Court in Japan," 1, accessed March 15, 2021, https://www.courts.go.jp/english/vc-files/courts-en/file/2020_Courts_in_Japan.pdf.

[8] Masako Murakami, "Japan's Recent Approach to The Hague Child Abduction Convention and Its Procedural Issues," ZZPInt 22 (2017): 340. (hereinafter "Japan's Procedural Issues").

(2) Enforcement of handing over a child

Under Article 2 of the Convention, Japan must apply the most expeditious procedure available within its territories to return the child. Although the *Civil Execution Act* had three types of compulsory execution measures to enforce obligations of action or inaction, there was no regulation on the execution on a child.[9] Therefore, the *Implementation Act* introduced a "two-tiered execution method" for the first time in Japan.[10] If the TP fails to comply with the return order, the LBP will request the execution court (Tokyo or Osaka Family Court) to proceed with the compulsory execution.

At first, the LBP will ask to apply indirect compulsory execution (Arts. 134(1), 136). Upon the petition for indirect compulsory execution, the court obliges the TP to pay the LBP a certain reasonable amount of money (Art.134(1); *Civil Execution Act*, Art.172(1)). This pecuniary sanction puts the TP under psychological pressure to return the child.[11] If two weeks elapse from the day on which the sanction order became final and binding, but the TP fails to return the child, the LBP has to file a petition for the execution by substitute (Art.136). In this petition, the LBP needs to specify a return implementer to return the child to the state of habitual residence (Art.137). However, the court will dismiss the petition without prejudice if the proposed person is inappropriate in light of the child's interest (Art.139). Usually, the court will accept the LBP or a closed relative of the child as the return implementer.[12] If the execution court accepts the LBP's petition, it will issue an execution by substitute order. This order designates a return implementer and a court execution officer to carry out necessary acts for releasing the child from the care of the TP (Art.138). The LBP files this order to ask a court enforcement officer of any district court where the child is residing to enforce the case.[13]

The execution court and enforcement officer will carry out necessary measures to release the child from the TP, then hand over him or her to the return implementer (Arts. 134(1), 140; *Civil Execution Act*, Art.171(1)). To release the child, the executors can apply the direct civil compulsory execution. First, they will persuade voluntary handover of the child. If it is not successful, they can enter the residence of the TP and other places possessed by the TP and search for the child. They may ask for help from the police or use force to eliminate the TP's resistance. They also may have the return implementer meet the child or the TP and give the return implementer instructions. For the

[9] Masako Murakami, "Case Proceedings for the Return of An Abducted Child and the Compulsory Execution in Japan," *Japanese Yearbook of International Law*, vol.57 (2014): 48-53, accessed November 5, 2019, https://heinonline.org/HOL/P?h=hein.journals/jpyintl57&i=51 (hereinafter "Case Proceedings").

[10] Ibid.

[11] Ibid, 50.

[12] Ibid, 51.

[13] Japan's Supreme Court, Rules No.5 of 1979 on Civil Execution [民事執行規則], partially amended as of November 27, 2019, Article 158, accessed May 27, 2021,https://www.sn-hoki.co.jp/data/pickup_hourei/onct/MINJISHI-KISOKU20191127-5.html.

child's interests, releasing the child can be carried out only when the child is with the TP (Art.140(3)) to let the child say goodbye to the TP and give a final chance to the TP voluntarily hand over the child.[14] The JCA may have a representative to attend the enforcement scene and provide necessary cooperation (Art.142). Finally, the return implementer will repatriate the child to the habitual residence (Art.141) and submit the JCA proof of return, for example, a copy of the passport with immigration stamp and air ticket.[15]

(3) The successes and shortcomings of the Act in executing return orders

As stated by the JCA, as of April 1, 2019, Japan received 91 petitions to return children to a foreign state. The *Implementation Act* has established a pretty comprehensive mechanism to handle these cases. The JCA has not yet informed any case that was unsuccessful in locating the child.[16] The court can decide within a relatively short period, about 70 days, to reach a final decision in the first instance, as same as the court conciliation's result, and 131 days in the appeal instance. The Global Report in 2015 calculated that on average contracting states needed 125 days and 190 days, respectively.[17] Remarkably, the amicable achievements were outstanding, with 70% of the cases, while the Global Report in 2015 said that the average proportion of cases that achieved agreement was 30%.[18] Specifically, of 91 petitions, 74 cases were concluded, including 50 cases finished with different amicable solutions and 24 cases that needed court orders.[19] In addition, many parents consented to letting their children stay in Japan. Of 50 agreements, 23 cases were for non-return, compared with 27 cases that agreed to return.[20] These achievements have illustrated Japan's endeavor in implementing the Convention.

However, Japan exhibits a high proportion of noncompliance with return orders.[21] From April 1, 2014, to February 28, 2019, the execution courts received 16 petitions and rendered 16 indirect enforcement orders. Accordingly, there were five cases that the child was returned following the indirect enforcement and before proceeding to direct enforcement. These cases had only one child in each case, and they are just from zero to four-year-old. Of the other 11 cases, after the indirect enforcement order became final, the LBPs have not requested execution by substitute in four cases

[14] Zushi, "Japan's Experience," 85.
[15] Japan's MoFA, "Brief Summary of Implementation Procedures of the Hague Convention in Japan," accessed April 1, 2021, https://www.mofa.go.jp/files/000034153.pdf
[16] Japan's MoFA, Hague Convention Division, "Implementation Status (Monthly Update)," accessed May 1, 2020, and May 1, 2021, https://www.mofa.go.jp/fp/hr_ha/page22e_000249.html
[17] Murakami, "Japan's Procedural Issues," 344.
[18] Zushi, "Japan's Experience," 83-84.
[19] Ibid, 83.
[20] Ibid.
[21] Murakami, "Japan's Procedural Issues," 344.

and already petitioned in the left seven cases. Of these seven cases, the executors attempted direct enforcement but failed in six cases, and an LPB withdraw the petition in one case.[22]

The enforcement failed in all six cases that applied for execution by substitute because of three main reasons. First, some TPs took unfair advantage of regulating their mandatory appearance with the child at the enforcement scene (Art.140(3)). They could thwart enforcement by intentionally going somewhere or leaving the child with relatives, then when the executor came, either or both the child and the TP were absent.[23]

Second, some children firmly refused to be returned.[24] They usually were from three to eleven-year-olds, relatively older than the children in the successful indirect enforcement cases. Additionally, they had siblings;[25] thus, the court had to consider not separating them. One example is enforcing the Decision of the Japanese Supreme Court on December 21, 2017 (*Case of 2017*). An American father and a Japanese mother have two sets of twins, 11 and six years old. The family lived in the US. In July 2014, the mother and four children went to Japan. She promised to return home in August 2014, but she broke her word. The father applied the return procedure and finally got the return order for four children in January 2016. In September 2016, upon the father's petition, the executor tried hard to persuade the children. However, they strongly refused to meet the father and return. Finally, the executor declared the order unenforceable.[26]

Third, some TPs strenuously resisted the handover of the child.[27] The Decision of the Japanese Supreme Court on March 15, 2018 (*Case of 2018*) illustrates this challenge. A Japanese couple had two children, and the family moved to the US in 2002. In 2004, the couple had another son. In January 2016, the mother backed Japan with the youngest son and remained there without the father's consent. Upon the father's petition, in September 2016, the Tokyo Family Court issued a return order of the son. On May 8, 2017, the court execution officer tried to persuade and release the child but could not succeed. The mother was unpersuadable, refused to open the front door, and wrapped herself closely with the child in a single duvet bedcover when the executor entered the house through the second-

[22] Zushi, "Japan's Experience," 85-86.
[23] Ibid, 86-87.
[24] Ibid, 86.
[25] Ibid.
[26] Murakami, "Japan's Procedural Issues," 345-346; HCCH's International Child Abduction Database (INCADAT), *HC/E/JP 1387*, accessed February 4, 2021, https://www.incadat.com/en/case/1387.
[27] Zushi, "Japan's Experience," 86.

floor window. Furthermore, the 13 years old boy insisted on staying in Japan and declined to return to the US. As a result, the executor closed this unenforceable case.[28]

The unsuccessful enforcement of return orders disclosed several limitations of compulsory execution under the *Implementation Act*. Although the mandatory indirect execution was effective in some cases, in other cases, it was "operationally too rigid and needlessly time-consuming," especially in cases where the TP determined not to return the child by all means.[29] Both cases above took months or a year from when the return order became effective to the execute by substitute, which contributed more to the children's refusal because they almost integrated with the new environment. Besides, if the TP was tough and recalcitrant, there were no effective means to enforce the order.[30] This situation occurs mainly because Article 140(3) of the Act requests the TP's appearance when releasing the child. Besides, if both parents are at the enforcement scene and the TP fiercely resists, the child will fall into a high-conflict situation.[31] These difficulties urged Japan to improve the enforcement mechanism for the better operation of the Convention.

2. The Amended Implementation Act

Japan amended the *Implementation Act* by the *Amendment of Act No.2 of 2019,* enforced from April 1, 2020, to enhance the effectiveness of compulsory execution.[32] However, compared to the Convention and the Guide's requirements, Japan still has several obstacles in executing a child's return.

(1) The amendments

In May 2019, the National Diet approved the Bill for Partially Amending the *Civil Execution Act* and the *Implementation Act*, which came into force on April 1, 2020.[33] The procedure of the child's return (as described in part III.1.(1)) remains unchanged. Based on the causes of enforcement failures under the 2014 *Implementation Act,* the amendments have overcome the drawbacks in legal aspects relating to the mandatory indirect compulsory execution and the TP's appearance. In addition, it

[28] Murakami, "Japan's Procedural Issues," 347-348; INCADAT, *HC/E/JP 1388,* accessed February 4, 2021, https://www.incadat.com/en/case/1388.

[29] Zushi, "Japan's Experience," 87.

[30] The U.S. Department of State's Office of Children's Issues, *Action Report on International Child Abduction*, July 2018:12, accessed May 25, 2021, https://travel.state.gov/content/dam/NEWIPCAAssets/pdfs/2018%20Action%20Report%2090%20Day%20ICAPRA%20Action%20Report%20for%20TSG%20(1).pdf

[31] Zushi, "Japan's Experience," 87.

[32] Ibid.

[33] Japan's MoFA, "Overview of the Hague Convention;" National Diet of Japan, *Act No.48 of 2013* and *Act No.4 of 1979*, amended by *Act No.2 of 2019*, accessed June 1, 2020, http://www.japaneselawtranslation.go.jp/law/detail/?vm=04&re=01&id=3484&lvm=02, http://www.japaneselawtranslation.go.jp/law/detail/?printID=&re=02&lvm=02&vm=02&id=3483.

revised several provisions to improve the flexibility of the execution court and executor and to ensure the child's best interests better.

The *Amended Implementation Act* revises three significant issues in the enforcement phase and simultaneously refers to relevant provisions of the *Amended Civil Execution Act*. First, the execution court may accept to skip the indirect compulsory execution in certain circumstances. One instance is when the court finds that the TP will not return the child even if the court applies the indirect execution to the TP. Another situation is where it is necessary to immediately carry out an execution by substitute to prevent imminent danger to a child (Art.136(ii)(iii)). This change is expected to make the enforcement procedure faster than the 2014 *Implementation Act* in high-conflict cases. Second, the child's release is possible even without the TP's appearance. Instead, the LBP is required to be at the enforcement's scene. If the LBP cannot appear, they can file a petition to have permission to their representative, and then the execution court can accept to release the child (Art.140(1); *Civil Execution Act*, Art.175(6)). Third, if the child stays in a third party's place, such as the grandparent's house, kindergarten, or school, the court execution officer can release the child if the said third party agrees. Moreover, instead of the consent of the said third party, with careful consideration, the court execution officer can still do so if the execution court gives permission (Art.140(2); *Civil Execution Act*, Art.175(2)). This change, along with the second one, "is expected to allow more flexibility to court execution officers as to when, where, and how to carry out the child's release, and thus make execution by substitute more effective" than the 2014 *Implementation Act.*[34]

Furthermore, the new Article 138(2) regulates that the execution court may issue compulsory execution orders without interrogating the TP. It can happen if the interrogation prevents the achievement of the purpose of compulsory execution, such as an imminent danger to a child. Additionally, the executor must cooperate with and consult the family court investigating officer and technical experts, who investigated and reported the child's situation in court proceedings.[35] These regulations give more discretion and flexibility to the executor in carrying out the child's release and are helpful for the executor to understand the child's situation for a more friendly release.

(2) Assessing the feasibility of the Amended Implementation Act

According to the MoFA, after 19 months since the amended law came into effect, the successful rate of enforcement is increasing from 44% before April 1, 2020, to 80% after that date. It seems very

[34] Zushi, "Japan's Experience," 87.

[35] New Article 91 of *Rules on Implementation of the Convention* apply new Article 161 of *Rule on Civil Execution.* See Masako Murakami, "Enforcement Procedure of Handing over a Child under the Act on Implementation of Hague Convention" [Thủ tục thi hành trao trả trẻ em theo Luật Thực thi Công ước La Hay] (presentation, Workshop on Divorce Involved Foreign Elements, JICA and Vietnam's Supreme People's Court, December 16, 2020 – hereinafter "Workshop on Divorce"), slide 11.

optimistic and proves that the more detailed and specific the regulations, the more effective they are in these cases.[36] However, the practice needs more time to evaluate the effectiveness of the amendments. In addition, compared with the Guide's requirements, the feasibility of the amended Act is still left with several problems related to two matters: (1) the compulsory measures; and (2) the return order process.

The most significant aspect of the enforcement of handing over a child is compulsory execution measures. As specified by the Guide, available effective compulsory measures with limited conditions for their application are the most critical factor in execution. The *Amended Implementation Act* has achieved some extent in this matter, but the compulsory measures still have three drawbacks. First, the indirect compulsory execution puts psychological pressure on the TP; nevertheless, the LBP needs to file another petition for enforcement procedure to collect the money (*Implementation Act,* Art.150; *Civil Execution Act*, Arts. 43-167). Somewhat, the regulation reduces the power of this sanction as the fine does not affect the TP immediately. Its implementation may not happen if the LBP is tiresome with the procedure or even forgives the TP after the child's return.

Second, the Act is not strong enough because of lacking a measure to address the situation where execution by substitute failed, such as the imprisonment of the TP. If the TPs acknowledge that their resistance will help them keep the child and not be punished, they will have an incentive of non-compliance, as in the *Case of 2018* mentioned in part 3.1.3 where the mother wrapped the child in a single duvet bedcover. Interestingly, as of April 2019, in two cases, including the *Case of 2018*, the LBPs filed petitions for habeas corpus relief after the execution by substitute failed. Eventually, all the children were returned to the USA.[37] The habeas corpus, however, is not a coercive measure under the *Implementation Act*. Subsequently, Japan's scholars have discussed whether the LBP can use habeas corpus in the first place rather than petition for the Hague return procedure.[38]

Third, relating to the condition to apply compulsory measures, the LBP must file a petition in each step of the enforcement proceedings, wait for issuing the decisions, and see whether the TP appeal because all judicial decisions are open to appeal. The Guide encourages the contracting parties to abolish the requirement of a formal request.[39] Instead, the court or public authority can initiate the enforcement because they are well aware of the procedure.[40] Unfortunately, the amended

[36] Japan's MoFA, "Implementation Status (Monthly Update)," accessed Dec 15, 2022, https://www.mofa.go.jp/files/100012160.pdf
[37] Zushi, "Japan's Experience," 87.
[38] Murakami, "Japan's Procedural Issues," 349-350.
[39] HCCH, "The Guide," Para 29.
[40] Ibid.

Implementation Act still keeps the burden of procedure on the LBP, which decelerates the child's return.

Another significant aspect of accessing the feasibility of the amended Act is the return order proceedings. The Guide also has many requirements for this procedure because its results directly affect the enforcement. The *Implementation Act* has four primary obstacles that make enforcement of return orders difficult. First, the most prominent challenge in the enforcement of return orders is the child's objection, as mentioned in *Case of 2017* and *Case of 2018* in part 3.1.3. Although the court has paid attention to listening to the child's voice, the result has not been satisfied. The family court investigating officer interviews the child and reports to the judge, then the judge, based on the report, decides whether to consider the child's opinion or not.[41] A survey found some noticeable issues of IPCA cases in Japan where children objected to be returned. The family courts did not consider the voice of children under the age of six, and several courts rarely consider the intention of children aged 6–10. Significantly, the courts usually considered over 10-year-old children's voice but did not accept their wishes in some exceptional cases.[42] The *Case of 2017* reveals that the children did refuse to return, but the court considered several aspects and did not satisfy their wishes.[43]

Second, as regulated in Articles 91-94 of the *Implementation Act*, the return order is not detailed and specific enough. The court that grants the return order only decides whether to return the child or not. The court that executes the return order will determine the actual return process, particularly the method for execution by substitute.[44] This separation leads to another step in that the execution court assesses the child's situation to enforce the order. These regulations seem to reduce the burden on the hearing court to consider the specific issues of the return procedure and provide the execution court flexibility and discretion during the enforcement proceedings. However, this approach causes the TP and the child "who are refusing voluntary return [not] to comprehend the actual impact or threat."[45] It is almost inconsistent with the Guide's recommendations in principle 4 (paras 77-88). Accordingly, the court should address as precisely as possible all the matters of the enforcement procedure in the return order, such as "dates for travel, who has to take the child on board which flight, who is to buy the plane ticket."[46] Moreover, the order should have cascading options, such as:

[41] Murakami, "Japan's Procedural Issues," 350-351.
[42] Ibid, 351.
[43] Ibid, 345.
[44] Ibid, 352.
[45] Ibid.
[46] HCCH, "The Guide," para 78.

(i) The respondent mother is ordered to return the child into the applicant father's custody by (date) at the latest with a view to returning to State X; the mother can avoid the handover of the child to the applicant by notifying the Court before that date that she has returned to State X with the child.

(ii) The Court orders the immediate return of the child to State X and permits the respondent mother to accompany the child. Should the mother fail to return the child before (date), the Court orders the child to be returned to the father's custody with a view to returning to State X.[47]

Such return orders will make the TP and the child know their responsibilities and deadlines for voluntary compliance. The execution court will strictly follow the steps to enforce the case rapidly.

Third, although the Guide suggests that the contracting parties should minimize the opportunities for any further delay once a judgment has become final, the *Implementation Act* provides many legal challenges against the final order. One is special appeals, where the final order contains misconstruction or violation of the Constitution (Art.108). The other is the appeal with permission, where the final order is inconsistent with the Supreme Court's precedents or involves material matters concerning the construction of laws and regulations (Art.111). Although Articles 109 and 112 of this Act regulate that these appeals do not have the effect of a stay of execution, they still have exceptions. Moreover, this Act is "going so far as to allow a losing party to apply for a retrial *after* appeals have been exhausted (Arts.119-120)."[48] In principle, these legal challenges are reasonable and correspond with Japan's civil procedure law, and the cases applied to these appeals are rare. Nevertheless, they are inconsistent with the Convention and the Guide's requirements, that a final and binding return order should be expeditiously enforced rather than be further questioned.[49]

Interestingly, Article 117 of the *Implementation Act* provides a modification of the final and binding return order due to changes in circumstances. Modification of custody decree is common in domestic family law, however, the Guide does not include the modification of the final and binding return order as an extraordinary legal challenge to the return order,[50] what makes this Article is an Japan's unique in developing the rule of domestic law when implementing the Convention. In practice, there was an IPCA case applied this Article. In the *Case of 2017,* just one month after the final return

[47] Ibid, para 86.
[48] Jones, "First Look at the Efforts of Japan," 314.
[49] Ibid.
[50] HCCH, "The Guide," para 61.

order, the father had financial difficulty; the family house in the U.S. was put to auction so he started to live at an acquaintance's house. After the enforcement failed, the mother petitioned to modify the return order. Japan's court accepted her request under Article 117 of the *Implementation Act*, then the petition for return was subsequently dismissed.[51] Nevertheless, as Justice Hiroshi Koike's supplementary opinion, the court should be cautious about applying Article 117 to ensure compliance with the Convention's goal of the child's return.[52] In addition, the court needs to consider the stay of execution under Article 118 of this Act carefully.

Finally, under the Guide, the time frame for mediation should be just within two weeks or three 3-hour sessions on two consecutive weekends.[53] Under Article 140 of the *Implementation Act*, if the parties agree to conciliate, the case will be transferred to apply the *Domestic Relations Case Procedure Act*. Although Japanese court conciliation work results are outstanding, this ADR method has no regulation on the time limit for its proceedings. Therefore, if the TP does not have goodwill, they can use this option as a tactic to prolong the return proceedings. The following statistics demonstrate this weakness. As of April 1, 2019, of 14 conciliation agreements of return the child, one case failed in enforcement, and two cases were in the process of realizing the child's return.[54] More recently, from April 1, 2020, to April 1, 2021, of five new court orders to return, one case is ruling in lieu of conciliation, which means the conciliation failed, and the case went back to a court hearing.[55] Additionally, of 16 newly concluded cases, eight cases finished with ADR agreements (50%), and eight cases obtained the court order (50%).[56] Compared to the proportion of 70% of the amicable solution settled cases as of April 1, 2019, this decrease may admit that the conciliation may not be always productive.

IV. Proposals for Vietnam on improving the enforcement procedure

As Vietnam has not yet been a member state of the Convention, many requirements described in part II.3 above are brand-new. Besides, according to the enforcement of handing over the child in Vietnam, the current mechanism necessitates improvements.

[51] Murakami, "Japan's Procedural Issues," 345-346; INCADAT, *HC/E/JP 1387*, 2-4.
[52] INCADAT, *HC/E/JP 1387*, 5.
[53] HCCH, "The Guide," Para 89.
[54] Zushi, "Japan's Experience," 83
[55] Japan's MoFA, "Implementation Status."
[56] Ibid.

1. Accede to the Convention and establish the key authorities

According to the MoJ statistics, Vietnamese citizens have had marriage relations with citizens of 50 countries and territories. The number of registered international marriage cases in 2017 was 18,337 couples and in 2018 was 17,440 couples.[57] Consequently, the number of divorce disputes and IPCA have increased. Unfortunately, there are no official statistics on the IPCA cases involving Vietnamese. Most of the cases are mainly known by the press, involved lawyers, or are listed in the reports of some states where children were removed to Vietnam.[58] Vietnam has no legal mechanism to handle such cases, therefore, it should accede to the Convention — a popular mechanism to prevent and solve IPCA cases amicably and for the children's best interests. With adherence to handling the IPCA cases under the Convention, Vietnam can show a supportive attitude toward the international community's rule of law.

To become a reliable member of the Convention, Vietnam should prepare carefully before acceding. In particular Vietnam can enact a law to implement the Convention and simultaneously improve the related law such as the *CPC*, and *LCJE*. Many countries, such as Japan, submitted to the HCCH a final bill of the *Implementation Act* that regulates IPCA cases' proceedings. This preparation came in advance and made Japan ready to implement the Convention right after becoming the contracting party. Remarkably, Japan has amended both the *Civil Execution Act* and the *Implementation Act* to more effectively enforce the handing over of a child in IPCA cases.[59] From this experience, Vietnam can shorten the legal improvement process by revising the *LCJE* while enacting a new law to implement the Convention.

Relating to the key authorities, the CA, the court, and the enforcement agency are critical in the return process. However, this article briefly discusses them due to its limitation. First, the organ with the most potential to be the CA is the MoJ because it is the Vietnam national organ for the HCCH and its functions are strongly related to implementing the Convention.[60] The MoJ can focus on locating the child, request police, custorm, local authorities to apply protective measures, provide and encourage the parties to achieve an amicable solution, and after that, arrange the actual return. It may

[57] Vietnam's MoJ, "The Ministerial Research," 125-126.

[58] For example, The U.S. Department of State's Office of Children's Issues, *Annual Report on International Child Abduction 2022*, May 2022: 173, accessed Dec 15, 2022, https://travel.state.gov/content/dam/NEWIPCAAssets/pdfs/2022%20ICAPRA%20Annual%20Report.pdf

[59] MoFA of Japan, Overview of the Hague Convention and relted Japanese Legal Systems, updated on Nov 22, 2022, accessed Dec 15, 2022, https://www.mofa.go.jp/fp/hr_ha/page22e_000250.html

[60] International Law Department, Vietnam's MoJ, "Report on Evaluation on Current Law, Functions, Mechanism on Cooperation of Related Minitries, and Proposals for Vietnam in Acceding to the 1980 Hague Convention" [Báo cáo Đánh giá hiện trạng thể chế, chức năng, nhiệm vụ, cơ chế phối hợp của Bộ, ngành liên quan và đề xuất cho Việt Nam gia nhập Công ước La hay 1980], (report on Seminar on Comments on the Report, Hanoi, June 6, 2019): 20-47.

instruct or advise the LBP's legal representative swiftly transfer the case to the court if no agreement is reached in a reasonable timeframe,[61] then encourage the TP to comply with the order, and monitor the enforcement of the return. Second, to concentrate on the jurisdiction, Vietnam can designate specialized family and juvenile courts in provincial-level courts of Ha Noi, Da Nang, and Ho Chi Minh City to handle the IPCA cases; if either party appeals, the provincial-level court can rapidly transfer the files to the high court. The court needs to set out a rigid time frame for both first and appellate instances and respect more the rights of the child to be heard. The content of the return order should follow the recommendations relating to detailed information on the return procedure and cascading options mentioned in part II.3 above. The court can also enhance the role of court-annexed mediation in the judicial phase, however, the time frame should be within two weeks.[62] Third, although the jurisdiction is concentrated in three provincial-level courts of Ha Noi, Da Nang, or Ho Chi Minh, if the child stays in another centrally-controlled city or province, the Civil Judgment Enforcement Agency (CJEA) of three cities will entrust the case to other provincial-level CJEA. The CJEAs will notify the LBP about the transfer of the case under Article 39 of the *LCJE*.

2. Enforcing the return order which need to hand over of a child

(1) Initiating enforcement procedure

The *LCJE* has two mechanisms to initiate enforcement proceedings for the custody decrees: upon the petition and *ex officio*. Both of them are applicable for executing the return order and each method has its advantages and disadvantages.

Enforcement upon the petition follows the principle of respecting the parties' will. The parties have the rights and responsibilities to implement the judicial order. If the parties request the state to protect their rights, the state will start executing. Filing a petition to start the enforcement procedure also makes the amicable solutions in the previous stages more meaningful because the parties can implement the judgment voluntarily. However, this mechanism has several drawbacks. First, in respect of the time, after having the return order, formal service of the order from the court to the parties takes some days. If the TP fail to implement the return order, the LBP may request enforcement but it takes time and even money to apply. Last, suppose the CJEA enacts the decision to enforce the return order, the TP will continue to have ten days to implement it voluntarily. These periods are significant and can delay the enforcement of a child's return.

[61] HCCH, Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I – Central Authority Practice, para 4.16.
[62] HCCH, "The Guide," Para 89.

Enforcement *ex officio* for provisional measures is different from enforcement upon the petition in several aspects. It seems to be a powerful method for executing the return order. This mechanism can avoid most drawbacks regarding time. The court will immediately transfer the order to the CJEA. The CJEA will instantly issue the enforcement decision, and the executor will promptly verify the case to enforce. If the child stays in another locality, the CJEA directly entrusts the order to the competent CJEA to execute the case. Besides, this method is more proper for the IPCA cases than the enforcement upon the petition because of two characteristics. One feature is, the return order is a specific judicial decision because it does not decide the merit of the custody dispute. Japan has clarified this characteristic in Article 134 of the *Implementation Act* and Articles 171(2), 33(2)(i)(vi), and 22(vii) of the *Civil Execution Act*. Moreover, it must be final and binding, and enforceable because the executor should merely apply coercive measures once for the child's best interest.[63] However, the mechanism to enforce the provisional measure in domestic cases could be used in IPCA cases since it is urgent to promptly return the child to habitual residence. This enforcement mechanism is suitable for the child's return as it does not request the parties to petition for enforcement of the order and demands the quick response of all competent authorities. The other feature is, applying the enforcement *ex officio* for provisional measures under Article 120 of the *LCJE* still guarantees the encouragement of the parties' voluntariness and the child's best interests. Concretely, before applying the coercive measures, the law emphasizes that the executor must cooperate with the local government staff and child protection organizations to persuade the TP to return the child voluntarily.

From Japan's experiences and the HCCH's recommendations, enforcement *ex officio* is quite suitable for enforcing the return order in Vietnam. However, Vietnamese lawmakers are somehow favorable to the enforcement upon the petition, which corresponds with domestic cases. Because the number of enforcement of the return order is not many, the drafters of Vietnam's implementation act may consider persuading the Government and National Assembly to choose the mechanism of enforcement *ex officio* the return order as same as for provisional measures.

(2) The compulsory execution measures

The biggest challenge in implementing a return order is where the TP stubbornly keeps the child and the executor must apply coercive measures to force the child handover. Three coercive measures stipulated in Article 120 of the LCJE are applicable in this IPCA case. However, as analyzed in section II (Vietnam's Background), these measures still have many limitations. Here are the proposals for the

[63] HCCH, "The Guide," principle 3.1.

application procedures, order, and method of implementing coercive measures to solve child return cases requiring forced handover of a child more properly.

Under the premise that the return order is detailed and comprehensive, the CJEA can quickly execute the order *ex officio* for the return order in an IPCA case as the same as for provisional measures. In light of a detailed order with cascading options, the CJEA will enact a decision on return order enforcement. The decision restates the deadline and the parties' responsibility. Immediately after issuing the decision, the executor serves it to the parties to make them aware of the preparation and be ready for the child's return. Meanwhile, the CJEA will act as an agency to guide and support the parties for voluntary compliance. The executor cooperates with related authorities to support the parties in realizing the child's return. If the TP fails to return the child as ordered, the CJEA and executor instantly apply coercive measures to compulsorily execute the handover of the child. Accordingly, Vietnamese legislators need to stipulate the order of priority in using such measures and the content of each.

First, as in a domestic case, the executor records the violation of the TP and asks the director of provincial-level CJEA to issue a decision on sanctioning administrative violation. As the provincial-level CJEA enforces the return order, it can enact the monetary sanction conveniently. The TP may have extra five days for voluntary compliance with the return order. However, Vietnam can learn from the amendment of Japan's *Implementation Act* on enforcing without indirect execution. The CJEA can skip the monetary sanction if the TP is not likely to return the child, or if it is necessary to release the child as soon as possible to prevent imminent danger to the child. On the other hand, collecting the fine from the TP is a challenge for the executor because it is state debt. The executor can instruct the TP to pay the fine or deduct it from the TP's bank account or income to recover this small debt.

Second, as soon as the extra time for voluntary compliance expires or when the fine is skipped, the executor can carry out the physical removal of the child. This compulsory measure should take precedence over the criminal sanction to eliminate the prolongation of the TP's retaining the child. The executor imposes a decision on the enforcement of the physical removal and then directly releases the child. Furthermore, Vietnam can take the Japanese amended *Implementation Act*'s regulations on the physical removal of the child as a good example. Regarding the time to enforce, Article 46(2) of the *LCJE* is still applicable. The execution should be taken place during the daytime on regular weekdays. If the child is small, the executor may, in person or allow the LBP, come to take the child when they are sleeping at noontime or early morning, from 6 a.m. In terms of location, apart from the TP's residence, it is reasonable to permit the enforcement in other places such as kindergarten, school, and grandparent's house with careful consideration of privacy protection and unexpected behavior of

the child. Concerning the participants, the LBP's appearance instead of the TP's is appropriate. The regulations on LBP or their agent can be the same as Japan's Act. Like domestic cases, the police, prosecutor, and local staff can support and supervise the enforcement. Additionally, there may have the participation of a psychologist, representatives of Vietnam's CA, and child rights protection organizations. However, the enforcement team should not be too crowded. They may wear casual clothes rather than uniforms to limit the psychological influence on the child.

Finally, if the physical removal failed, the CJEA will request the procuracy to start the criminal procedure against the TP. The application of criminal punishment is currently not regulated except in the *Penal Code*. The Supreme Court, the Supreme Procuracy, and relevant ministries, namely the MoJ, Ministry of Public Security, and MoFA, can formulate a joint circular to specify the procedures. If the TP promptly hands over the child to the LBP or their agent when being prosecuted, the court may consider reducing the punishment. If the TP is still stubborn and resists, the court may apply an appropriate level of the penalty framework. Besides, if the physical removal of the child is eventually successful but the TP is aggressively against the enforcement, the criminal sanction still can be applied, with a lighter penalty, to demonstrate the strictness of the rule of law and prevent potential cases.

(3) The conditions to ensure the effective enforcement

To ensure the effective enforcement of the return order, Vietnam should consider several related matters, namely the relation with the child in the return procedure, modification of the return order, formal sservice, statistics of IPCA, and improving the domestic legal system.

First, a professional should help the court and the enforcement agency create a friendly relationship with the child. Interactions with many strangers from the judicial to enforcement site will make some children feel uncomfortable. Accordingly, Vietnam may consider building and maintaining the acquaintance and understanding between the child and a psychologist or independent lawyer. The professional who investigated the child in the return procedure may continue to participate in the execution procedure. Additionally, Vietnam's Women Union can organize social workers to support children from the very first stage, when Vietnam's CA locates the child's address, till the end of the handover procedure. If Vietnam can have investigating officers or psychologists in family courts like in Japan, this team can play a very active role in this task.

Second, Vietnam's legislators should clearly and strictly limit the grounds for modification of a final and binding return order and its impact on the enforcement of this order. Currently, Vietnam provides that the retrial will make a stay of execution. To hear a retrial, the court can request the CJEA inform the progress and result of enforcement for a complete resolution of the case (*CPC*, Arts. 354(3), 19(3)). However, there is no such regulation for modification proceedings. Thus, Vietnam's legislators

can learn from Article 117 of Japan's *Implementation Act* and the current proviso of the *CPC* to regulate the relation and effect of modification on the enforceability of return orders. The Supreme Court may enact a modification petition form, which has a section for the request for a stay of execution. The petition to modify must have the CJEA's confirmation if the new circumstances are directly related to children. The court will simultaneously consider accepting the petition and order to stay of execution. If a case was entrusted to another CJEA, the coordination between the trial court and the executing CJEA must use the internet to transfer information and files swiftly.

Third, the executor may serve the procedure document at an appropriate time. As recommended in the Guide and somewhat regulated in Article 39(2) of the *LCJE*, the executor can serve at the moment of proceeding to enforcement of the physical removal to prevent the TP from taking the child to avoid the enforcement. Besides, the MoJ should regulate a specific statistical form for the IPCA cases referring to Japan's report. The precise and separate statistics of IPCA cases are necessary for the monitoring and evaluating enforcement. Consequently, the CJEA and executor will better understand their role in this job and have a better incentive to fulfill it.

Last but not least, the Vietnamese government needs to improve the domestic legal system on enforcement of handing over a child for domestic cases. By assessing the shortcomings and limitations of the *LCJE* and related laws, there is a big gap between the current regulations and the international standards in ensuring prompt, effective, and safe enforcement of such cases. The mechanism for domestic and international cases should be synchronized and unified. As a result, Vietnam can enhance the courts, CJEAs, and relevant authorities' proficiency in dealing with cases involving children. Furthermore, Vietnam can have a balance in terms of policy and practice when solving domestic and international cases. Japan has encountered criticism regarding this matter because domestic abduction cases have not been applied as the same as international ones.[64]

V. Conclusion

IPCA cases have happened more frequently in recent years in Vietnam. However, Vietnam has no regulations to handle this new phenomenon. This deficiency of law has made the administrative and judicial authorities confused about the merit of the case and their jurisdiction to resolve it. To effectively deal with IPCA problems, and enhance the policy on child protection and judicial

[64] "European Parliament Urges Japan to Revamp Child Custody Rules," *The Japan Time*, July 9, 2020, accessed January 20, 2021, https://www.japantimes.co.jp/news/2020/07/09/national/european-parliament-japan-child-custody/.

cooperation, as a member of the HCCH, Vietnam is planning to accede to the Convention. Although Vietnam has a mechanism to enforce the handover of a child in the return process, the current regulations will not be compatible, especially concerning enforcement if Vietnam becomes a contracting party to the Convention. Because Japan's approach and experience with attempting to integrate their law with the Convention's goals is an update on the enforcement procedure, this offers Vietnam an opportunity to learn good experiences and avoid ineffective matters. This research contributes a comparative study on both regulations and practices of Japan to help Vietnam complete the legal mechanism to effectively enforce the return order as well as the handing over of a child according to the Convention's goals.

This article proposes that Vietnam needs to prepare well to ratify the Convention. The CA should be the MoJ, with the two main tasks of locating the child and monitoring the enforcement procedure. The courts hearing IPCA cases should be the three provincial courts in the same territory with three high courts. The court can build a team of experts to assist judges in investigating children and prescribe the time frame for all court instances and criteria for the content of the return order. In addition, the government can enhance the court-annexed mediation within a limited period. All CJEAs across the country may have jurisdiction to enforce the return order under the *LCJE*'s provisos on entrusting. The government can establish an enforcement procedure for the return order and handing over a child in IPCA cases similar to enforcement *ex officio* of the provisional measure under the current *LCJE*. This procedure may ensure a prompt return and does not require the LBP additional administrative burdens. Regarding coercive measures, Vietnam can improve the law by referring to Japan's regulations on the physical removal of the child and circumstances in that the monetary sanction is not mandatory. In addition, Vietnam's legislators should also consider service procedures, child protection specialists, modification of the return order, and administration in the CJEA system.

Although the enforcement of the return order is the last stage in the return procedure, it can evaluate the quality of the previous phases and the effectiveness of legal mechanisms in practice. Scrutiny of the practice in this article is limited since the cases that applied direct coercive measures in Japan and Vietnam are rarely available for public access to protect children's privacy. It may take several more years to complete this research by assessing the enforcement of the return cases in Japan under the *Amended Implementation Act*. In addition, the Special Commission on the Practical Operation of the Convention has been regularly studying and updating the good practices of the contracting parties to address the problems in the enforcement phase. Therefore, continuous research following the updated guidance will be necessary to make better recommendations for improving

Vietnam's effective enforcement of the handing over of a child not only in IPCA but also in domestic cases.

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Third-Party Funding in International Arbitration: Lessons for Uzbekistan

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Abstract

International arbitration has already proven to be a fast and efficient method of dispute resolution in international investment and commercial relations. But this settlement procedure is costly enough that it can be quite challenging for an impecunious party to afford. As a consequence, due to financial hurdles, parties with strong cases who lack sufficient funds might find themselves unable to afford justice. Therefore, for the purpose of delivering justice, Third-Party Funding has become a most-preferred form of financing in the dispute resolution system. Risk-diversification and its non-recourse basis have become the most attractive factors of this financing method. However, this form of funding has already gained considerable criticisms from scholars and practitioners due to substantial and procedural law issues related to it. This is mainly because these issues can pose some problems to the confidentiality of arbitration and related materials, the independence and impartiality of arbitrators as well as to the professional ethics of counsel in funded disputes. In order to deal with these issues, there should be some form of regulation by states because self-regulation has proven itself to be inadequate.

Contents

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I. Introduction

The purpose of this paper is to discuss and analyze the contemporary problems of Third-Party Funding (hereinafter - TPF) in international arbitration. It also covers country-specific issues which have been an object of discussions for the governmental agencies of Uzbekistan. The state has faced this booming TPF industry and its impact on international arbitration through ISDS cases in addition to which certain third-party funders have become particularly active in the CIS region by promoting their services as well.

Even if arbitration is praised for its fast and effective nature, this method of adjudication is costly. Consequently, not all the parties who are involved in a dispute are ready to initiate expensive arbitral proceedings.[1] There might be a case where an impecunious party has a strong case on the merits, but has no financial resources to hire top-notch lawyers, bear the costs of arbitral proceedings, or handle other expenses related to arbitration.[2] Thus, in an attempt to prevent this state of defenselessness,[3] TPF has become an alternative solution for this ongoing problem by removing "*the risk of a world where only rich claimants are entitled to justice…*".[4]

TPF introduces an unrelated party, with no prior interest in a dispute who offers financial services for a claimant/respondent to initiate, continue, or complete the arbitral proceedings.[5] In case of victory the funder will obtain remunerations for its investment – or they will receive nothing if the case is unsuccessful. Instead, the funder might still be obliged, dependent upon the terms of the funding agreement, to cover the costs of the prevailing party.[6] Thus, this type of funding is usually provided on a "non-recourse basis".[7]

Even if this method of financing is regarded as "access to justice", this opportunity is not always readily available for a party who needs it. This is because there are certain problems, such as

[1] Frignati Valentina, "Ethical implications of third-party funding in international arbitration", *Arbitration International*, Volume 32, Issue 3, 2016, 505-522, 506.
[2] Ibid.
[3] Yves Derains, 'Foreword' to Third Party Funding in International Arbitration, [Dossier, ICC Institute of World Business Law, 2013], p. 5.
[4] Christopher P Bogart, "Overview of Arbitration Finance" Third Party Funding in International Arbitration, [Dossier, ICC Institute of World Business Law, 2013], p.50-56, 52.
[5] Mohamed F. Sweify, Third Party Funding in International Arbitration: A Critical Appraisal and Pragmatic Proposal, [Cheltenham, UK: Edward Elgar Pub., 2023], p. xvi.
[6] Lansi Niccolo, "Third Party Funding in International Commercial Arbitration – An Overview", *Austrian Yearbook on International Arbitration,* (Kluwer Arbitration: 2012), 89-91, 85.
[7] Cheng-Yee Khong, Mohamed Abdel-Wahab and Nathan Landis, "Third-Party Funding in MENA Region", *Dispute Resolution International* 15, no. 1, May 2021, p. 175-198, 176.

bargaining imbalances,[8] conflict of interests, and confidentiality issues which frequently arise in TPF-aided arbitrations. Thus, for the purpose of investigating these ongoing problems, this study will carry out its analysis in the following order.

First, for the purpose of providing a detailed portrayal and comparative analysis of TPF, this paper provides information on the emergence, associated problems and regulatory frameworks of TPF in international arbitration in both common and civil law countries (II). Then, the main focus will take a jurisdictional approach, by analyzing pertinent questions on TPF in the case of Uzbek legislation (III). In this context, this part of the paper explores only the country-specific issues of TPF in investor-state dispute settlement (ISDS) and international commercial arbitrations (ICA). Based on the reflections on the investigations, this paper will initiate certain recommendations for the Uzbek legislation (IV).

In the course of the study, this paper employs comparative and empirical methodology for the purpose of clarifying critical points of the research by comparing foreign countries` respective laws and analyzing ISDS cases.

II. Overview of Third-Party Funding in International Arbitration

Third-Party Funding initially developed in the form of litigation funding at the end of the twentieth century in Australia by the founders of IMF Bentham.[9] Later, the system was introduced to investment arbitration and then years later to international commercial arbitration [10] as well. Consequently this funding mechanism has obtained its present modern shape and become an integral part of international arbitration.

1. Emergence of Third-Party Funding

Historically, litigation funding was once classified as a crime in England and conceived as a threat to the integrity of the judicial process based on the Statue of Westminster in 1275.[11] At that time it

[8] Anish Wadia and Shivani Rawat, "Third-Party Funding in Arbitration - India's Readiness in a Global Context", *Transnational Dispute Management*, vol.15., issue 2., February 2018, p. 1-25, 20.

[9] Oliver Gayner, Susanna Khouri, "Singapore and Hong Kong: International Arbitration Meets Third-Party Funding", *Fordham International Law Journal* 40, no 3, (April 2017), 1033-1046, 1035.

[10] Nadia Hubbuck, Thomson Reuters Arbitration Blog, http://arbitrationblog.practicallaw.com/third-party-funding-and-the-pitfalls-of-privilege/

[11] A. Wadia and S. Rawat, "Third-Party Funding in Arbitration – India`s Readiness in a Global Context", *Transnational Dispute Management*, 2018, 2.

was framed in the doctrine of maintenance and champerty, firstly developed in England and then accepted in other common law countries. Later, in 1967, the doctrine was decriminalized by the Criminal Law Act of the UK[12] but champertous contracts have remained unenforceable on the grounds of public policy until recent years. The contemporary regulation of TPF in arbitration and litigation funding are partly different in the UK.

Meanwhile, in civil law countries, the doctrine of maintenance and champerty does not exist, but the usage, conception, and regulation of TPF itself vary jurisdiction by jurisdiction.

In France, one of the most arbitration friendly countries, TPF is not explicitly regulated, but it has been addressed by arbitral and other non-legislative bodies, such as ICC International Court of Arbitration[13] and the Paris Bar.[14] However, based on the implications of the decision of the Court of Appeal of Versailles,[15] TPF agreements are considered *sui generis*[16] (unqualified) contracts[17] that can be implicitly validating as non-prohibitive against the French law. Furthermore, the Paris Bar has also approved TPF through its resolution in 2017 by addressing the issue of conflict of interests and disclosure problems in third-party funded claims.[18] Even if this approval of TPF can be considered an important step, it cannot change the French law directly.[19] Thus, the absence of formal guidance or regulation along with strict confidentiality obligations of lawyers have decreased Paris`s value as a potential seat of arbitration[20] rather that other TPF-friendly countries, such as Singapore.[21]

In Italy, there is no law that expressly regulates or prohibits the use of TPF.[22]The funding agreements do not correspond to any of the typical contracts that are regulated by the Civil Code of Italy. However, the Article 1322(2) of the Civil Code states that "*the parties can also make contracts that are not of the types that are particularly regulated, provided that they are directed to the*

[12] Criminal Law Act of UK, 1967, s 14 (2).

[13] Jonathan Barnett, Lucas Macedo, and Jacob Henze, Third-Party Funding Finds it Place in the New ICC Rules, January 5, 2021, https://arbitrationblog.kluwerarbitration.com/2021/01/05/third-party-funding-finds-its-place-in-the-new-icc-rules/#:~:text=11(7)%20of%20the%202021,the%20outcome%20of%20the%20arbitration

[14] The Landscape of Litigation Funding in France, November, 2023, https://www.clydeco.com/en/insights/2023/11/the-landscape-of-litigation-funding-in-france

[15] Cour d'appel de Versailles, 1 juin 2006, 05/01038.

[16] "…*of its own kind or class; unique or peculiar*" (Black's Law Dictionary).

[17] Nikolaus Pitkowitz, Handbook on Third-Party Funding, [The US: Jurist Pub., 2018], p.215.

[18] Benjamin Button-Stephens, "Paris Bar Approves Third-Party Funding", May 4, 2017, https://globalarbitrationreview.com/article/paris-bar-approves-third-party-funding

[19] Lisa Bench Nieuwveld, Victoria Shannon, Third-Party Funding in International Arbitration, Second Edition, [The Hague: Kluwer Law International, 2017], p. 304, 226.

[20] Olivier Marquais and Alain Grec, "Do`s and Dont`s of Regulating Third-Party Litigation Funding: Singapore vs France", Asian International Arbitration Journal, 2020, 16 AIAJ, p. 49-67, 63.

[21] Ibid, 67.

[22] Lisa Bench Nieuwveld, Victoria Shannon, Third-Party Funding in International Arbitration, Second Edition, [The Hague: Kluwer Law International, 2017], p. 304, 228

realization of interests worthy of protection according to the legal order".[23] The Article implicitly indicates that funding agreements, as atypical contracts worthy of protection, are not contrary to the public order of the state.

Switzerland also has a unique approach to third-party funding. For example, in 2003, the draft law "On Prohibition of Litigation Financing by Third Parties", proposed by Cantonal Council of Zurich, was challenged by the Swiss courts.[24] The Federal Supreme Court in Lausanne set aside the draft law on December 10, 2004, by providing that "prohibition of third-party funding would be unfavorable for freedom of commerce".[25]

Japan is also one of the economies that can be a frontier market for third-party funding.[26]The state has large economy and a potential infrastructure in the financial sector; it is indeed a sleeping giant to the industry.[27] The TPF market is however relatively new in Japan and lacks clear prohibition or explicit regulation. Notwithstanding this fact after major law amendments in Singapore and Hong Kong,[28] scholars and practitioners as well as certain governmental bodies and institutions in Japan have already begun discussions about uncertainties and possible regulations of TPF in Japan.[29] This is because unlike Singapore and Hong Kong, maintenance and champerty does not exist in Japan as well. In other words ambiguity exists about whether TPF is permissible in Japan.[30] Therefore, the official response from the government is needed for the TPF market to be well-situated and further expanded in Japan.[31]

[23] Article 1322(2), Freedom of contract and contents of contracts, Civil Code of Italy.

[24] Global Arbitration Review, Craig Miles and Zagata Vasani http://www.lalive.ch/data/publications/Third_Party_Funding.pdf

[25] Ibid.

[26] Daniel Allen and Yuko Kanamaru, Chapter 10: Japan, *The Third-Party Litigation Funding Law Review*, Fifth Edition, November, 2021, 103, https://www.mhmjapan.com/content/files/00050663/The%20Third%20Party%20Litigation%20Funding%20Law%20Review.pdf

[27] Ibid.

[28] Ibid.

[29] Natalie Yap, "Third-Part Funding in Japan: Opportunity for a Clear Policy" (Future developments), April 30, 2021, *Kluwer Arbitration blog*, https://arbitrationblog.kluwerarbitration.com/2021/04/30/third-party-funding-in-japan-opportunity-for-a-clear-policy/

[30] Daniel Allen and Yuko Kanamaru, Chapter 10: Japan, *The Third-Party Litigation Funding Law Review*, Fifth Edition, November, 2021, 103, https://www.mhmjapan.com/content/files/00050663/The%20Third%20Party%20Litigation%20Funding%20Law%20Review.pdf

[31] Ibid.

2. Contemporary problems

Presently the first and foremost issue of TPF in international arbitration is whether it should be regulated by states' statutory laws, or be left to self-regulation.[32] This argument has been widely discussed by arbitration scholars and practitioners[33] around the world. This is because there are certain economic and legal consequences of nonregulated or heavily regulated TPF in any jurisdiction; *i.e.* nonregulation or insufficient regulation of this high-risk industry can lead to market misconduct,[34] while, in case of excessive regulation, possible third-party funding companies and investors will look for other jurisdictions to carry out their businesses. However, so far, both arbitration institutions and states around the world have been enacting regulatory instruments that aimed at a "light touch approach", except the Resolution on "Responsible Private Funding of Litigation" of the EU for litigation (and arbitration) processes.[35]

The second issue arising out of the usage of TPF for international arbitrations is the matter of confidentiality.[36] A party who is seeking a potential funder will undoubtedly exchange information and documents with the prospective third-party funder and its experts. Moreover, a potential funder can further ask for related materials and information on the case in order to weight the possibilities of success. This exchange of documents and information can further continue even after the funding itself is obtained.[37] Arbitration was once praised for its confidentiality but current modern trends are forcing this dispute resolution mechanism to become more open and transparent.[38] Nonetheless, for the purpose of eliminating possible confidentiality problems, some scholars suggest concluding a robust confidentiality agreement or non-disclosure agreement with a potential funder.[39]

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[32] Oliver Gayner, Susanna Khouri, "Singapore and Hong Kong: International Arbitration Meets Third-Party Funding", *Fordham International Law* Journal 40, no 3, (April 2017), 1033-1046, 1041.

[33]Gian Marco Solas, "Third-Party Funding: Law, Economic and Policy", [UK: Cambridge University Press:2019], p. 1-348, 291. "There are certain issues, such as financial capacity and professionalism of funders as well as the protection of information exchange with lawyers and clients, due to the risky implications that could follow, do need proper regulation attention. Another reason is that regulation, per se, enhances legal certainty with regard to TPF, which may facilitate its emergence and hence spur its private and social benefits".

[34] Oliver Gayner, Susanna Khouri, "Singapore and Hong Kong: International Arbitration Meets Third-Party Funding", *Fordham International Law Journal* 40, no 3, (April 2017), 1033-1046, 1042.

[35] https://www.europarl.europa.eu/doceo/document/TA-9-2022-0308_EN.html#title1

[36] Nadia Hubbuck, *Thomson Reuters Arbitration Blog*, http://arbitrationblog.practicallaw.com/third-party-funding-and-the-pitfalls-of-privilege/

[37] Ibid.

[38] James Hope, "Transparency in International Arbitration", *Commercial Dispute Resolution*, https://www.cdr-news.com/categories/expert-views/6376-transparency-in-international-arbitration

[39] Nadia Hubbuck, *Thomson Reuters Arbitration Blog*, http://arbitrationblog.practicallaw.com/third-party-funding-and-the-pitfalls-of-privilege/

The third issue emanates from the conflict of interests between a funder and an arbitrator. As a prominent arbitration practitioner, Marc J. Goldstein maintains that "the financing industry is highly-concentrated, and also symbiotically joined the cadre of law firms with which many arbitrators in high demand are affiliated".[40] Besides, some lawyers who were affiliated to the top law firms have already formed their arbitration/litigation funding companies.[41] As a consequence, these chains of interpersonal relationships can give rise to an impulse to make repeated nominations of a particular arbitrator to various disputes funded by the same funder, which can easily affect the arbitrator`s independence and impartiality and leads to bias.[42]

In fact, the driving reason for these arbitrators' repeated nominations can be the funder's inevitable interest in the outcome of the case[43] and, thus, the wish to control the arbitration process in its favor, or avoid any potential liability of damages against the funded-party.[44] This means that the funder who invests a substantial amount of money in a dispute may influence the process of arbitration in a significant and obvious manner[45] by forcing the funded party to appoint a particular arbitrator or a lawyer to its dispute.[46] Therefore, in this conflict issue, the disclosure of the existence of a funder (the name and address of the funder) and a funding agreement (existence or/and content) appeared to be not just sensible, but a vital procedure.[47]

The fourth issue arises out of the hidden relationships between a funder and counsel. Actually, the primary duty of counsel in a particular dispute is to act in the best interests of his/her client and to keep the confidential materials undiscovered. These fundamental principles are considered as cornerstone building-blocks of the lawyer`s professional obligations.[48] But, the existence of hidden

[40] Goldstein, MJ., Should the Real Parties in Interest Have to Stand Up?, *Transnational Dispute Management* 8:4, 2011, p. 8.

[41] Corporate Europe Observatory, Chapter V: Speculating on Injustice: Third-Party Funding of Investment Disputes, Gatekeepers, https://corporateeurope.org/en/trade/2012/11/chapter-5-speculating-injustice-third-party-funding-investment-disputes

[42] Bernardo Cartoni, Third-Party Funding: Gambler`s Nirvana or Useful Tool? Recent Developments in Hong Kong and Singapore, *SSRN*, 2018, p.9.

[43] Caroline Overgaard and Johan Tufte-Kristensen, Disclosure of Third-Party Funding in Commercial Arbitration, *Nordic Journal of Commercial Law*, No.2 (2020), p. 7.

[44] Mohamed F. Sweify, Third Party Funding in International Arbitration: A Critical Appraisal and Pragmatic Proposal, [Cheltenham, UK: Edward Elgar Pub., 2023], p. 95.

[45] Caroline Overgaard and Johan Tufte-Kristensen, Disclosure of Third-Party Funding in Commercial Arbitration, *Nordic Journal of Commercial Law*, No.2 (2020), p. 7.

[46] In the case of *Quasar de Valores and Others v. Russia*, *Quasar* was financed through donation by *Menatep* (the company that not a professional or institutional funder, but a small shareholder in *Yukos*) – was itself a claimant in a parallel ICSID arbitration against Russia. One of the main procedural problems in this dispute was that Russia claimed that *Quasar* was not a true party in this case, and was not *domini litis* in choosing its counsel and experts. This is because the *Quasar*`s counsel was a member of *Menatep*`s advisory board; hence, the respondent argued that the entire arbitration was an "abuse of process".

[47] Oliver Gayner and Susanna Khouri, Singapore and Hong Kong: International Arbitration Meets Third-Party Funding, *Fordham International Law Journal* 40, no.3 (April 2017): 1033-1046.

[48] Carolyn B. Lamm and Eckhard R Hellbeck, Third-party funding in Investor-State Arbitration, [Dossier, ICC Institute of World Business Law, 2013], Chapter 9, p.101-121, 109.

relationships between counsel and a funder can easily jeopardize the counsel`s independence and objectivity in the case as well as his/her loyalty to his/her client. In other words, the counsel`s previous or continuing relationships with the funder might force him/her to provide advice that cannot serve in the best interests of the client, but rather serve that of the funder.[49] For instance, the funded party`s counsel might consider a settlement agreement for the dispute as a better option for his/her client, but the funder might insist on proceeding with the arbitration.[50] Or, the funder might try to reach a settlement for the purpose of recovering its investment along the way, while the funded party prefers to persist.[51] In these occasions, the counsel might find himself in a complex triangular relationship, and/or be forced to provide legal advice that is not favorable for his/her client.

In this regard professional ethical requirements in relation to TPF related issues should be reflected in a state`s national legislation and /or guidelines on lawyer`s activities.

3. Regulatory Framework

The regulatory framework of TPF varies jurisdiction by jurisdiction. For example, TPF is voluntarily self-regulated in England and Wales through the Association for Litigation Funders (ALF). The recent UK Supreme Court judgement in *PACCAR vs Competition Appeal Tribunal and others (2023)*[52] however has put third-party funding agreements (TPFAs) in an uncertain position; *i.e.* the court reasoned that TPFAs are classified as "damages-based agreements"[53] (DBAs) that are subject to statutory regulation by the Courts and Legal Services Act 1990 and Damages-Based Agreements Regulation 2013.[54] This means that the TPFAs which do not comply with the formal requirements that are applicable for DBAs are not enforceable in the UK. This judgement led the UK government to announce its initiative, of March 4, 2024, to adopt a new law that will clarify the post-*PACCAR* uncertain landscape.

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[49] Ibid.

[50] Frignati Valentina, "Ethical implications of third-party funding in international arbitration", *Arbitration International*, Volume 32, Issue 3, 2016, 505-522, 512.

[51] Giorgio F. Colombo and Dai Yokomizo, "A Short Theoretical Assessment on Third-Party Funding in International Commercial Arbitration", *Journal of Law and Politics*, (280): 2018, 12 p. 109-124, 122.

[52] https://www.supremecourt.uk/cases/docs/uksc-2021-0078-judgment.pdf

[53] DBAs are a type of funding agreement entered into between a solicitor and a client under which the payment made to the solicitor depends on the success of the claim rather than an hourly rate – the solicitor will usually take a percentage of the damages awarded. The use of DBAs in civil litigation is tightly regulated by the Damages-Based Agreements Regulations 2013, https://www.nortonrosefulbright.com/en/inside-disputes/blog/a-lifeline-for-damages-based-agreements

[54] Robert Bradshaw and Robert Denison, UK Supreme Court Holds Many Litigation Funding Agreements to be Unenforceable: What Next For Third-Party Funding, Lexology, https://www.lexology.com/library/detail.aspx?g=2cb784f9-9e11-4d5d-8c00-92ff5d026307

Meanwhile, in Singapore, Hong Kong, Australia,[55] Republic of Ireland and Nigeria, TPF is regulated by statutory law. In addition, statutory regulation of TPF in both litigation and international arbitration is also expected in the European Union.[56]

In Singapore, the Civil Law (Amendment) Act 2017[57] (hereafter - CLAA) was passed by the Parliament as a state`s statutory law that lays down certain requirements for funded parties and third-party funders as well. The Arbitration (Amendment) Ordinance 2017 of Hong Kong[58] was also enacted in 2017, but the specific sections on TPF came into force in 2019. Before explicit laws were adopted, in Singapore, TPF was illegal based on the doctrine of maintenance and champerty, while in Hong Kong[59], it was unclear whether TPF is operable in arbitrations.[60]

The similarities of Singaporean and Hong Kong`s laws are that both adopt "a light-touch approach" towards TPF by abolishing maintenance and champerty and excluding the role of lawyers as funders in the TPF process. In addition, the respective laws define the "funding agreements" by removing donations from the considerations of TPF.[61] But the differences can be clearly noticed on the matters of non-compliance with the prescribed requirements, the scope of the TPF law, and the interpretative provisions.

As to the first difference, Singaporean law is considerably shorter and non-compliance of the requirements leads to serious consequences, such as loss of the right to be a funder. In Hong Kong law however non-compliance does not lead to any serious consequences by default.[62] That is, funders` failure to comply with the requirements of the Ordinance does not render them liable for any penalties. Nevertheless, the Code of Practice of Hong Kong encourages funders to comply with the requirements

[55] The Treasurer of the Commonwealth of Australia, on May 22, 2020, announced that third-party funders will be subject to financial regulations, such as Australian Financial Services License (AFSL) and Australian Securities and Investments Commission (ASIC) Managed Investment Scheme (MIS) regulations. https://www.ibanet.org/article/B2482AAE-EA07-4A8F-AB7A-6DD6EEC4CBC3

[56] https://www.europarl.europa.eu/doceo/document/TA-9-2022-0308_EN.html#title1

[57] Civil Law (Third-Party Funding) Act 2017 of Singapore, https://sso.agc.gov.sg/SL/CLA1909-S68-2017

[58] Arbitration (Amendment) Ordinance 2017 of Hong Kong, https://www.elegislation.gov.hk/hk/cap609?SEARCH_WITHIN_CAP_TXT=third%20party%20funding

[59] In *Unruh and Seeberger* case, the question of "whether the doctrine of maintenance and champerty apply to agreements concerning arbitrations in Hong Kong" was left open by the Justice Ribero PJ of the Hong Kong Court of Final Appeal and cause a great deal of uncertainties for practitioners. Thus, this uncertainty did not give a chance for TPF to flourish.

[60] Can Eken, A Detailed Comparison of Third-Party Funding Regulations in Hong Kong and Singapore. *Asia Pacific Law Review*, 29(1), 2022, 25-46, 26.

[61] Both, Singaporean and Hong Kong laws fail to define TPF clearly on the ground whether "donations" are considered TPF in their respective jurisdictions. Referring to the funding agreement is a contract between two parties to cover the partial or entire cost of the arbitration in return for remuneration from the awards or financial return from the award excludes the possibility of becoming donations as TPF. This particularly important where in the cases of *Philipp Morris vs Uruguay* as well as *Menatep vs Russian Federation*, the parties were financed by donations.

[62] Can Eken, A Detailed Comparison of Third-Party Funding Regulations in Hong Kong and Singapore. Asia Pacific Law Review, 29(1), 2022, 25-46, 40.

set down in the Article 98S of the Ordinance. Otherwise, any non-compliance can be taken into account, and could be used by the parties as admissible evidence in the proceedings.[63]

The second difference of the TPF laws is that the scope of CLAA applies only to international arbitration, while the Hong Kong Ordinance covers arbitration in general, *i.e.* international and domestic. This is mainly because Singapore adopted a dual system where it enacted different laws for international and domestic arbitrations.

The third difference relates to the certain requirements for the funders and the interpretative provisions in these two instruments. For instance, under the Singaporean law, a funder must possess at least SGD 5 million capital as a start, and its business place can be outside of Singapore.[64] Under the Hong Kong law a funder should have at least HKD 20 million capital,[65] but this requirement is not mandatory. Furthermore, the interpretative provisions on TPF are clearly set in the Hong Kong Arbitration Ordinance 2017, but the CLAA refers these matters to the Arbitration Act and International Arbitration Act of Singapore. In this regard, Hong Kong law uses more flexible and definitive language without omitting any terms.

The latest regulations on TPF have also been made in Nigeria[66] and the Republic of Ireland.[67] On May 26, 2023, the Arbitration and Mediation Act was signed by the president of Nigeria with the provisions on TPF related regulations. This Act introduces two important but peculiar points of TPF in Nigeria, namely:

a) donations and grants are considered third-party funding investments;[68]
b) based on the disclosure of TPF and the request of the respondent, the tribunal may order the funded party or its counsel to provide the tribunal with an affidavit confirming whether or not the Funder has agreed to cover an adverse costs order.[69]

[63] Ibid.

[64] Singapore Civil Code (Amendment) Act 2017, Qualifications for "qualifying Third-Party Funder, 4B, https://sso.agc.gov.sg/SL/CLA1909-S68-2017

[65] Hong Kong Code of Practice for Third-Party Funding of Arbitration, Capital Adequacy Requirement 2.5 (2), https://www.gld.gov.hk/egazette/pdf/20182249/egn201822499048.pdf

[66] The Arbitration and Mediation Act 2023 of Nigeria defines TPF agreement to mean a contract between the Third-Party Funder and a disputing party, an affiliate of that party, or a law firm representing that party, in order to finance part or all of the cost of the proceedings, either individually or as part of a selected range of cases, and such financing is provided either through a donation or grant or in return for reimbursement dependent on the outcome of the dispute or in return for a premium payment.

[67] Arbitration Act 2010 of the Republic of Ireland, 124, 5A

[68] The Arbitration and Mediation Act 2023 of Nigeria, Section 91(1), https://ww.lawyard.org/wp-content/uploads/2023/05/Arbitration-and-Mediation-Act.pdf

[69] The Arbitration and Mediation Act 2023 of Nigeria, Article 62(3), https://www.lawyard.org/wp-content/uploads/2023/05/Arbitration-and-Mediation-Act.pdf

On July 23, 2023, the legislator of the Republic of Ireland, after a long period of discussions, enacted the law on "The Courts and Civil Law (Miscellaneous Provisions) Act 2023", which provides TPF is permissible in ICA in Ireland.[70] Thus this legislative reform added a new section (Section 5A) to the Arbitration Act 2010 of Ireland, which made clear that litigation funding prohibitions are not applicable to dispute resolution proceedings in the state.[71]

In addition, the European Union has also been in the course of regulating TPF in the territory of its members states. On September 13, 2022, the European Parliament voted to approve a resolution proposing a Directive "On Responsible Private Funding of Litigation", a regional instrument which aims at regulating TPF in both litigation and international arbitration[72] in the EU. The draft resolution lays down stricter requirements for third-party funders by proposing to create an authorization system for funders (including capital adequacy requirements and dedicated supervisory body), setting a maximum cap for funders` share of profit (40 percent), imposing minimum mandatory requirements for the funding agreements and other matters.[73]

III. Third-Party Funding in Uzbekistan

This section will discuss and analyze the current issues arising out of the usage of TPF in both international investment and commercial arbitration in Uzbekistan. For the purpose of establishing a clear understanding of the state`s attitude and regulatory framework towards TPF, this part of the study presents only selected issues that are particularly important for the country itself.

1. TPF in international investment arbitration

In 2011 *Oxus Gold*, a British company, commenced arbitration proceedings[74] against the Uzbek government on the grounds of unfair treatment.[75] In order to finance its arbitration process and hedge against the possible cost of an award, *Oxus Gold* in 2012 concluded a funding agreement with

[70] A First Third-Party Funding in Ireland, July 26, 2023, https://www.beauchamps.ie/publications/1200

[71] Arbitration Act 2010 of the Republic of Ireland, 124, 5A https://www.irishstatutebook.ie/eli/2023/act/18/enacted/en/print#sec124

[72] https://uklitigation.cooley.com/eu-plans-to-regulate-third-party-funding-in-litigation-and-international-arbitration/

[73] European Parliament Resolution of 13 September 2022 with recommendations to the Commission on "Responsible Private Funding of Litigation" (2020/2130(INL)), P9_TA(2022)0308, https://www.europarl.europa.eu/doceo/document/TA-9-2022-0308_EN.pdf

[74] https://www.italaw.com/cases/781

[75] Selvyn Seidel and Sandra Sherman, ""Corporate Governance" rules are coming to third-party financing of international arbitration", Third-Party Funding in International Arbitration, DOSSIERS ICC Institute of World Business Law, International Chamber of Commerce, 2013, Chapter 3, 32-50, 37.

Guernsey-registered *Gretton limited*, an affiliate of major third-party funder *Calunius Capital*, [76] and issued a press release by voluntarily disclosing the existence of the funding agreement. [77] After obtaining a successful award *Oxus Gold* initiated a proceeding before a Paris Court to recognize and enforce the award,[78] while *Gretton limited,* as purported assignee of *Oxus Gold*'s, sought to enforce the award in the Swiss courts (local courts and the Supreme Court, 2017)[79] and a US District Court[80] (District Court of Columbia, 2019) against Uzbekistan.[81]

In essence, the *Oxus Gold* case became a wake-up call for international arbitration and industry as well[82] by making arbitration practitioners and scholars pay special attention to TPF generated issues as well as its governance. [83] Concurrently, this case has also become the main reason for the government of Uzbekistan to study TPF from the standpoint of its potential role as a main catalyst for frivolous and vexatious claims in ISDS. Thus, the criticisms have evolved under the arguments where the whole TPF system in ISDS enables the funders to take advantage of the economic sources of the host states,[84] generating a considerable burden for their taxpayers.[85] As a consequence, these elevated number of ISDS cases can deprive or delay the process of developing the state`s major projects aimed at the public welfare and sustainable socio-economic targets.[86]

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[76] Established in January 2007, this London-based funder of litigation and arbitration has been authorized and regulated by the UK Financial Services Authority ("FSA") as an investment adviser since June 2007. *Calunius* is a founding member of the Association of Litigation Funders of England and Wales that established the Code of Conduct for Litigation Funders. Its team is made up of four partners with various back- grounds, including former investment bankers and litigators and one partner with extensive experience within *Allianz Prozess Finanz*, the former litigation funding subsidiary of the *Allianz Group*. *Calunius* funds commercial litigation and arbitration claims in both domestic and international contexts. It does not, however, provide funding for domestic court proceedings in the United States.

[77] Dr Maxi C. Scherer, "Third-party funding in international arbitration: Towards mandatory disclosure of funding agreements", Third-Party Funding in International Arbitration, DOSSIERS ICC Institute of World Business Law, International Chamber of Commerce, 2013, Chapter 8, 95-101, 95.

[78] https://jusmundi.com/fr/document/decision/en-oxus-gold-plc-v-republic-of-uzbekistan-the-state-committee-of-uzbekistan-for-geology-mineral-resources-and-navoi-mining-metallurgical-kombinat-memorandum-opinion-of-the-us-district-court-for-the-district-of-columbia-on-grettons-petition-to-enforce-arbitral-award-wednesday-6th-february-2019

[79] *Gretton Limited v Uzbekistan* before the Swiss Federal Supreme Court, Case No. 5A_942/2017

[80] https://www.italaw.com/sites/default/files/case-documents/italaw9886.pdf

[81] Islambek Rustambekov, Some Issues of Investment and Mining Arbitration in Uzbekistan, *Beijing Law Review*, Vol. 13, No. 4, December, 2022.

[82] Selvyn Seidel and Sandra Sherman, "Corporate Governance" rules are coming to third-party financing of international arbitration (and in general)", Third Party Funding in International Arbitration, [Dossier, ICC Institute of World Business Law, 2013], 32-50, 32 *See also*, Hong-Lin Yu, "Can Third-Party Funding Deliver Justice in International Commercial Arbitration", *International Arbitration Law Review*, Volume 20, Issue 1, 2017, pp. 20-34, 32

[83] Hong-Lin Yu, "Can Third-Party Funding Deliver Justice in International Commercial Arbitration", *International Arbitration Law Review*, Volume 20, Issue 1, 2017, pp. 20-34, 31

[84] B.Rakhimov, "Important Points of Third-Party Funding in International Investment Arbitration", *Uzbek Law Review*, 2/2022, p. 77-79, 78.

[85] Ibid.

[86] Ibid.

In this regard, the United Nations Conference on Trade and Development (UNCTAD) has also expressed its concerns as follows:

> The significant increase in investment disputes over the last decade has given rise to the concern that investors may abuse the system. Investors may be eager to claim as many violations of the applicable IIA as possible in order to increase their chances of success. This may take a heavy toll in terms of time, effort, fees and other costs, not only for the parties to the dispute, but also for the arbitral tribunal. It is within this context that several countries have advocated a procedure to avoid "frivolous claims" in investment-related disputes, namely claims that evidently lack a sound legal basis…[87]

Bearing the above-mentioned arguments in mind, the author claims that the Uzbek government`s first argument that TPF encourages frivolous and vexatious claims is greatly debatable among arbitration scholars and practitioners. One the one hand, there are certain facts one can legitimately note which indicate that TPF can bring a deluge of non-meritorious claims in arbitration,[88] but on the other hand, these accusations seem inappropriate by considering the very motives of TPF itself.

As far as frivolous and vexatious claims are concerned, the dispute of *Quasar de Valores and Others v. Russia*[89] can be an example. In this case, the claimant, *Quasar* commenced an arbitral process against Russia based on the allegations of the Russian government`s illegal expropriations through its executive and judiciary powers. The *Quasar*`s claim was entirely financed by *Menatep* (the company is not a professional or institutional funder, but a passive shareholder in *Yukos*) through donation. The funder, *Menatep*, was itself a sole claimant in a huge parallel ICSID arbitration against Russia based on the same illegalities that were invoked by *Quasar*.[90]

Evidently, one can legitimately wonder that who is the real party in interest in this dispute,[91] and what was the main purpose of this donation? Can this case, as the author argues, represent some of the characteristics of the frivolous and vexatious claims?

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[87] United Nations Conference on Trade and Development, UNCTAD, A Mechanism to Avoid "Frivolous Claims", p.82, https://unctad.org/system/files/official-document/iteiia20073_en.pdf

[88] Mohamed F. Sweify, Third Party Funding in International Arbitration: A Critical Appraisal and Pragmatic Proposal, [Cheltenham, UK: Edward Elgar Pub., 2023], p. 94.

[89] https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/258/renta-4-s-v-s-a-and-others-v-russia

[90] Antonio Crivellaro, Third-Party Funding and "mass" Claims in Investment Arbitration, [Dossier, ICC Institute of World Business Law, 2013], Chapter 11, p.137-152, 142.

[91] Ibid.

However, the dissenting opinions around the topic of whether TPF can be an impulse for frivolous and vexatious claims in ISDS are inconclusive. In this realm, some scholars maintain that third-party funders actually do not foster the filling of frivolous claims.[92] This is because they are rational profit makers with their determined motives to make profit with meritorious claims.[93] Therefore, in TPF, there cannot be any concerns on revenge, specific deterrence, or philanthropy.[94]

On the whole, one should always be skeptical of funders motives about their unwillingness to finance unmeritorious claims. As Mick Smith of third-party funder *Calunius Capital* puts it: "*the perception that you need strong merits is wrong – there is a price for everything*".[95]

The Uzbek government`s next concern on TPF expands to the issues of adverse costs.[96] This is because the very presence of a third-party funder in a case can be considered a red flag.[97] That means a funded claimant could be in a shaky financial situation that is not able to handle an adverse costs award.[98] If a tribunal issues an award in favor of the respondent, the state cannot recover its costs from the deprived claimant or from the third-party funder.[99] This is because a third-party funder is not typically a party to the arbitration agreement[100] or to the final award.

The seriousness of this problem can be noticed in the case *S&T Oil v Romania*[101]. In 2007, *S&T Oil* commenced an ICSID arbitration against Romania based on the government`s illegal attempts at expropriation. In the course of procedural preparation, the claimant failed to provide a payment of the advance on costs for the ICSID institution; hence, the ICSID Secretariat decided to discontinue the process. Up until this point, the arbitral institution and the respondent, Romania, were unaware that

[92] Olivier Marquais and Alain Grec, "Do`s and Dont`s of Regulating Third-Party Litigation Funding: Singapore vs France", *Asian International Arbitration Journal*, 2020, 16 AIAJ, p. 49-67, 53.
[93] Gian Marco Solas, "Third-Party Funding: Law, Economic and Policy", [UK: Cambridge University Press:2019], p. 1-348, 235.
[94] Ibid.
[95] US Chamber Institute for Legal Reform, Selling Lawsuits, Buying trouble: Third-Party Funding Litigation Funding in the United States, October, 2009, p. 6, https://legaltimes.typepad.com/files/thirdpartylitigationfinancing.pdf
[96] B.Rakhimov, "Important Points of Third-Party Funding in International Investment Arbitration", *Uzbek Law Review*, 2/2022, p. 77-79, 79.
[97] Dmytro Galagan, Patricia Zivkovich, "If They Finance Your Claim, Will They Pay Me If I Win: Implications of Third-Party Funding on Adverse Costs Awards in International Arbitration", *European Scientific Journal ESJ* 2015 (Special Edition), 1-18, 2, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2604048
[98] Ibid.
[99] B.Rakhimov, "Important Points of Third-Party Funding in International Investment Arbitration", *Uzbek Law Review*, 2/2022, p. 77-79, 79.
[100] Stavros Brekoulakis, "The Impact of Third-Party Funding on Allocation for Costs Applications: The ICCA-Queen Mary Task Force Report", 2016, https://arbitrationblog.kluwerarbitration.com/2016/02/18/the-impact-of-third-party-funding-on-allocation-for-costs-and-security-for-costs-applications-the-icca-queen-mary-task-force-report/ *See also*, Giorgio F. Colombo and Dai Yokomizo, "A Short Theoretical Assessment on Third-Party Funding in International Commercial Arbitration", *Journal of Law and Politics*, (280): 2018, 12 p. 109-124, 123.
[101] https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/277/s-t-oil-v-romania

behind these arbitral proceedings there was a third-party funder (*Juridica Investments*).[102] The identity of the funder and the existence of the funding agreement became known when the funder itself initiated separate arbitration proceedings against *S&T Oil* under LCIA Rules for the breach of the funding agreement. [103] Meanwhile, *S&T Oil* filed a RICO[104] complaint against the funder based on the allegations of imposing an illegal agreement on the company. However, this RICO complaint was dismissed and the parties were ordered to continue their London arbitration.[105]

The interesting part of this case is that the respondent, Romania, in the ICSID arbitration was unaware that the claimant was insolvent, and backed by a particular third-party funder.[106] On top of that, Romania almost faced the risk of not recovering its own arbitration costs in case of victory. This is because the tribunal did not provide any security for costs from the outset of the arbitration.[107]

In this regard, the mandatory disclosure requirement of the content of a funding agreement (full disclosure) becomes helpful. This procedure determines the potential application of security for costs.[108] This means, in extreme situations, the opposing party and the tribunal wish to ensure whether the funding agreement has a binding provision, *i.e.* a commitment on adverse cost liability that can be borne by the funder.[109] For this purpose, some scholars even go further to make it mandatory to disclose even the solvency of the third-party funders themselves in arbitration proceedings, especially in ISDS.[110]

[102] Antonio Crivellaro, Third-Party Funding and "mass" Claims in Investment Arbitration, [Dossier, ICC Institute of World Business Law, 2013], Chapter 11, p.137-152, 145.
[103] Kirstin Dodge, Jonathan Barnett, Lucas Macedo, Patryk Kulig, "Third-Party Funding and Reform of the ICSID Arbitration Rules", *Revista Romana de Arbitraj*, Vol.15, No.3, 2021, p. 24.
[104] Racketeer Influenced and Corrupt Organizations (RICO) Act, the US Federal Act of 1970.
[105] Antonio Crivellaro, Third-Party Funding and "mass" Claims in Investment Arbitration, [Dossier, ICC Institute of World Business Law, 2013], Chapter 11, p.137-152, 145.
[106] Umika Sharma, Third-Party Funding in Investment Arbitration: Time to Change Double StandardsEmployed for Awarding Security for Costs, *Kluwer Arbitration Blog*, 2018, https://arbitrationblog.kluwerarbitration.com/2018/07/29/third-party-funding-investment-arbitration-time-change-double-standards-employed-awarding-security-costs/
[107] Ibid.
[108] Tsang-fang Chen, "Development in Responses of Arbitral Tribunals to Third-Party Funding in International Investment Arbitration", *Contemporary Asia Arbitration Journal* (CAA Journal) 15, no. 1 (May 2022), p. 1-24, 7.
[109] Caroline Overgaard and Johan Tufte-Kristensen, Disclosure of Third-Party Funding in Commercial Arbitration, *Nordic Journal of Commercial Law*, No.2 (2020), p. 8.
[110] Antonio Crivellaro, Third-Party Funding and "mass" Claims in Investment Arbitration, [Dossier, ICC Institute of World Business Law, 2013], Chapter 11, p.137-152, 145.

2. TPF in international commercial arbitration

As professor Hong-Lin Yu of the University of Stirling opines, "the need for governance on TPF become evident after *Oxus Gold Plc vs Uzbekistan*",[111] which can be a signal to international investment arbitration.[112] She continues in her statement that this regulatory necessity can also be particularly acute in international commercial arbitration where the funded parties might find themselves in a vulnerable position.[113] Based on these arguments, the professor strongly supports state`s involvement in TPF regulation in any jurisdiction.[114] This is because possible self-regulation is of little value, and institutional rules might be a partial solution to the issues.[115]

In this regard the growing necessity for the regulation of TPF can also be noticed in the recent efforts made by the Tashkent International Arbitration Centre (TIAC) and the Hong Kong International Arbitration Centre (HKIAC) in 2022. These two institutions entered into an agreement to administer arbitrations together[116] under the TIAC and HKIAC Cross-Institutional Rules.[117] The legitimate question of whether Uzbek legislation is in line with Hong Kong legislation on international commercial arbitration can be raised however. Hong Kong is in fact a booming venue where major international arbitrations take place. Hong Kong has also enacted a regulative instrument and institutional guidelines on TPF to deal with the associated issues of the industry. Meanwhile, in Uzbekistan, the respective laws are completely silent on this fast-emerging funding mechanism, despite major international funding companies becoming particularly active in promoting their services in the whole CIS region.[118]

Bearing the above-mentioned arguments in mind, the author argues that the lack of regulatory framework in the Uzbek legislation on TPF in ICA can generate a number of questions. For instance, there can be a valid question of whether TPF in ICA is operable under Uzbek law. In particular, a) What is the state`s conception of TPF, *i.e.* the notion of TPF in ICA in Uzbekistan? b) Are funding agreements valid under state law? d) How conflict of interests between a funder and an arbitrator as

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[111] Hong-Lin Yu, "Can Third-Party Funding Deliver Justice in International Commercial Arbitration", *International Arbitration Law Review*, Volume 20, Issue 1, 2017, pp. 20-34, 31.

[112] Selvyn Seidel and Sandra Sherman, "Corporate Governance" rules are coming to third-party financing of international arbitration (and in general)", Third Party Funding in International Arbitration, [Dossier, ICC Institute of World Business Law, 2013], 32-50, 32.

[113] Ibid.

[114] Hong-Lin Yu, "Can Third-Party Funding Deliver Justice in International Commercial Arbitration", International Arbitration Law Review, Volume 20, Issue 1, 2017, pp. 20-34, 33.

[115] Ibid.

[116] Louis Chan, "Central Asian Dispute Resolution: Uzbekistan`s New Arbitration Centre", The Hong Kong Trade Development Council, https://research.hktdc.com/en/article/MTM2ODAzNTk5OA

[117] Cross-Institutional Cooperation Arbitration Rules, https://www.hkiac.org/news/hkiac-and-tiac-sign-cooperation-agreement-adopt-tiac-hkiac-cross-institutional-arbitration

[118] Nikolaus Pitzkowitz, Handbook on Third-Party Funding in International Arbitration, [US: Jurist Publication, 2018], 328.

well as a conflict of interest between a counsel and a funder are handled under the Uzbek legislation, in case a third-party funder is involved?

With regard to the first question, one can legitimately wonder why a definition of TPF is actually needed? The short answer to this question is that without a precise and concrete definition, its perception and regulation would be unclear and amorphous.[119] In addition, legal certainty also necessitates a definition of TPF.[120]

In the case of Uzbekistan, this definitional dilemma is present in the legislation. Nether the Civil Code, nor the "Law on International Arbitration" touches upon the conceptual notion of third-party financing. In addition, no bylaws from the governmental bodies have addressed this issue. This is mainly because the very concept of third-party funding had not been an object of discussion for Uzbek scholars and practitioners until recent years.

In fact, in the wider sense, TPF can be described as a new and unexplored form of investment[121] (financial solution) to an impecunious party that is involved in a dispute. In a narrow sense, however, TPF can be quite multifaceted and complex in comparison with attorney financing, legal expenses insurance, loans, assignment of a claim and donations.[122] Therefore, these complications cause a great deal of problems in delineating the very legal nature of TPF.

With regard to the second question, Article 354(3) of the Civil Code of Uzbekistan stipulates that "the parties may conclude an agreement not provided for by law".[123] This article implicitly validates the legality of the funding agreements under the Uzbek legislation that are worthy of protection. In turn however the Code also provides a ground, Article 116, where "an agreement, the content of which does not comply with the requirements of the law, as well as made with a purpose that is obviously contrary to the foundations of law and order or morality, is void".[124] The crucial part in this article is that the very wording of "foundations of law and order and morality" is by its nature amorphous and

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[119] Mohamed F. Sweify, Third Party Funding in International Arbitration: A Critical Appraisal and Pragmatic Proposal, [Cheltenham, UK: Edward Elgar Pub., 2023], p. 172.

[120] Ibid.

[121] Valentina Frignati, Ethical Implications of Third-Party Funding in International Arbitration, *Arbitration International*, 32, 2016, 505-522, 508.

See also, Duarte G. Henriques, "A Third-Party Funding: A Protected investment?", *Spain Arbitration Review*, No.30, 2017, 101-141, 102; Giorgio F. Colombo and Dai Yokomizo, "A Short Theoretical Assessment on Third-Party Funding in International Commercial Arbitration", *Journal of Law and Politics*, (280): 2018, 12 p. 109-124, 123.

[122] Thanos Karvelis and Niel Coertse, "Third-party Funding of International Arbitration: have we evolved?", *Thomson Reuters Practical Law*, December 1, 2017, https://content.next.westlaw.com/practical-law/document/Ice91ed3ee4a711e79bf099c0ee06c731/Third-party-financing-of-international-arbitrations-have-we-evolved?transitionType=Default&contextData=(sc.Default)&firstPage=true&viewType=FullText

[123] Civil Code of Uzbekistan, Article 354(3), https://lex.uz/acts/-111189

[124] Civil Code of Uzbekistan, Article 116, https://lex.uz/acts/-111189

it is also left open even in the Commentary for the Civil Code of Uzbekistan. Overall, these above-mentioned two articles can be interpreted and applied for a particular case differently by state judges of Uzbekistan. In other words, establishing of the legal certainty for funding agreements is strongly at the discretion of national judges.

As to the procedural issues of conflict of interests between a funder and an arbitrator, Article 17 of the law on "International Commercial Arbitration" lays down disclosure requirements for the purpose of checking and disclosing the existing conflict issues. But the extent of disclosure is beyond the scope of this article in cases with the presence of a third-party funder.

3. Contingency fee agreements

The activities concerning legal services and the bar are mainly regulated based on the law "On Advocacy"[125] and the law "On Guarantees of the Activity of Advocacy and the Social Protection of Lawyers"[126] of Uzbekistan. The "Guideline for Lawyers` Professional Ethics" is also an important instrument aimed at setting the rules of conduct in Uzbekistan that were enacted on September 29, 2013, by the Resolution of the Conference of Lawyers of Uzbekistan.[127] Even if this instrument is not considered a normative-legal act of Uzbekistan, non-compliance of its rules can even lead to the early termination of a lawyer`s license.[128]

However, the above-mentioned legal instruments do not cover financial matters of the legal profession in Uzbekistan; thus, working on a contingency fee agreement is not regulated under state law. Based on a contingency fee agreement, a lawyer can advance an arbitration process by covering arbitration and expert fees in return for a substantial proportion of any recovery made,[129] which is practiced mostly in the common law world. But, working based on pure contingency fee agreements is prohibited in a number of civil law countries such as France,[130] Switzerland, Denmark, Portugal, Spain, Finland and other states as they characterize it as an unlawful *pactum de quota litis*.[131]

[125] https://lex.uz/ru/docs/-54503

[126] https://lex.uz/docs/-29626

[127]https://nrm.uz/contentf?doc=549533_advokatning_kasb_etikasi_qoidalari_(o‘zr_advokatlar_palatasining_ii_konferenciyasining_27_09_2013_y_qaroriga_8-ilova)&products=1_vse_zakonodatelstvo_uzbekistana

[128] Survey for Law Professionals in Uzbekistan, Mr. Shermatov Sherzod, a national lawyer of the "Constat" Law Firm, Uzbekistan, November 20, 2023.

[129] Charles Kaplan, Third-Party Funding in International Arbitration: Issues for Counsel, [Dossier, ICC Institute of World Business Law, 2013], Chapter 6, p.70-77, 71.

[130] https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000508793

[131] Charles Kaplan, Third-Party Funding in International Arbitration: Issues for Counsel, [Dossier, ICC Institute of World Business Law, 2013], Chapter 6, p.70-77, 71.

Contingency fees were also prohibited in Russia[132] based on the Resolution of the Constitutional Court of the Russian Federation (January 21, 2007) until 2020. However, taking into account the specific conditions of development of the legal system and the constitutional principles of justice, the Court did not exclude the right of the legislator to regulate contingence fee agreements in its jurisdiction. That is, the Constitutional Court of the Russian Federation opposed the possibility of establishing a "success fee" in the contract for the provision of paid services, but did not prohibit the settlement of this issue in a special legislation, which includes the Federal Law of May 31, 2002, № 63-FZ "On Advocacy Activity and Bar in the Russian Federation".[133] Presently, the Federal law "On Advocacy and the Bar", amended in 2020, expressly allows contingency fees for lawyers that promotes the developing of funding mechanisms.[134]

The Uzbek legislation shares a similar history with the Russian legislation in the fact that the two countries were in the Union of Soviet Socialistic Republics (USSR) for more than seventy years. Even after independence, the Uzbek legislator still observes and reviews Russian law for the purpose of developing its normative-legal base. Ironically the Uzbek legislation, unlike its Russian counterpart, has decided to leave open the legal certainty of contingency fee agreements in its jurisdiction.

IV. Conclusion

Based on the overall discussions and analysis as well as jurisdictional concerns related to TPF, one can easily expect that the third-party funding industry and its regulation have a promising future. The circle of known players in this field who are mutually engaged in the funded cases is however becoming narrow.[135] That means that the need for regulation on conflict of interests and regulative requirements for third-party funders will increase.

As to the concerns on frivolous claims and adverse cost issues of Uzbekistan in ISDS, several studies show that there is a little evidence to support the argument that TPF can stimulate frivolous

[132] Nikolaus Pitkowitz, Handbook on Third-Party Funding, [The US: Jurist Pub., 2018], p.330.
See also, The Constitutional Court of the Russian Federation. "Постановление Конституционного Суда РФ от 23 января 2007 г. N 1-П "По делу о проверке конституционности положений пункта 1 статьи 779 и пункта 1 статьи 781 Гражданского кодекса Российской Федерации в связи с жалобами общества с ограниченной ответственностью "Агентство корпоративной безопасности" и гражданина В.В. Макеева".

[133] Natalia Klyuchovskaya, "Success fee": from Foreign Experience to Domestic, February 26, 2020, https://www.garant.ru/news/1329251/; Наталья Ключевская, "Гонорар успеха": от зарубежного опыта к отечественному

[134] Evgeny Raschevsky, Vladimir Talanov, Natalia Soldatenkova and Yana Bagrova, Global Arbitration Review, May, 2023, https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/russia

[135] Milan Lazic and Milica Savic, Third-Party Funding and Access to Justice, *Revija Kopaonicke Skole Prirodnog Prava*, br. 2/2021, p. 135-148, 138.

and vexatious claims. While in the case of adverse cost issues the mandatory disclosure of funding agreements, a binding provision on adverse costs in particular, can be a solution.

In case of the TPF regulation in ICA, Uzbekistan can benefit from regulating this fast-emerging industry by taking a "light-touch" approach. This is because a majority of scholars favor the idea of soft regulation on TPF, which it can be very helpful if they are in the form of persuasive, collaborative and exhortative legal acts issued by institutional bodies and administrative authorities.[136] According to them, TPF regulation can strengthen the legal certainty of TPF in any jurisdiction by enhancing its emergence and stimulating its private as well as social benefits.[137]

[136] Gian Marco Solas, "Third-Party Funding: Law, Economic and Policy", [UK: Cambridge University Press:2019], p. 1-348, 291.
[137] Ibid.

【資料】

翻訳：ミャンマー連邦市民兵役法（国家平和発展評議会法 2010 年第 27 号）

Translation: People's Military Service Law of the Union of Myanmar (State Peace and Development Council Law No. 27/2010)

牧 野　絵 美*
MAKINO Emi

目次

Ⅰ．はじめに

本稿は、ミャンマー連邦共和国（以下、「ミャンマー」という。）において、2024 年 2 月 10 日に施行された市民兵役法（ミャンマー連邦国家平和発展評議会法 2010 年第 27 号）の翻訳[1]である。本法は、現行憲法であるミャンマー連邦共和国憲法（以下、「2008 年憲法」という。）が 2011 年 1 月 31 日に施行される以前のミャンマー連邦（Union of Myanmar）において、当時の最高意思決定機関であった国家平和発展評議会（SPDC）が[2]、1959 年の国

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[1] 本翻訳は、Asian Legal Information Institute のデータベース（http://www.asianlii.org/mm/legis/laws/pmslpadcln272010638/）に掲載された非公式英語訳を翻訳したものである。

[2] 1988 年 9 月、長年にわたるビルマ社会主義計画党による一党独裁体制と経済不振に対する不満により、学生らを中心に始まった民主化要求運動が全国的に発展し、治安回復を名目に国軍が全権を掌握

防法（Defence Service Act）[3]に代わるものとして制定したが、今日に至るまで施行されていなかった。

2021 年 2 月 1 日、国軍は、2020 年 11 月に実施された総選挙の不正を主張し、緊急事態を宣言した（2008 年憲法第 417 条）。ミンアウンフライン国軍最高司令官が立法、行政及び司法の三権を掌握し（同第 418 条（a）項）、国家行政評議会（State Administrative Council : SAC）が設置され（同第 419 条）、同評議会が現在の軍事政権の最高意思決定機関である[4]。憲法上、緊急事態の発令は延長期間を含めても最長 2 年までとされているが（同第 425 条）、国土を実効支配する軍事政権は、通常の状態ではないとして、2 度にわたり半年間の延長を行い[5]、緊急事態宣言の発令は、3 年を経過した。

国家行政評議会は、市民兵役法を 2024 年 2 月 10 日付で施行すると発表した[6]。2008 年憲法第 386 条は、「すべての市民は、連邦を防衛するために、法律の規定にもとづき、軍事訓練を受け、軍隊に従事する義務を有する」と規定する。

国軍は、圧倒的な武力で、民主化勢力が組織した市民防衛隊（PDF）及び少数民族武装勢力等による抵抗を抑えつけてきたが、内戦は長期化している。2023 年 10 月下旬以降、反軍政派の武装勢力による組織的攻撃が開始され、国軍は、劣勢に立たされ、兵力不足を解消するために、徴兵制を開始することにした。国軍は、約 6 万人規模の徴兵を計画している[7]。

市民兵役法によれば、徴兵の対象となるのは、18 歳から 35 歳の男性及び 18 歳から 27 歳の女性であり（市民兵役法第 2 条(b)項）、期間は上限 2 年である（同第 3 条(a)項）。医師、エンジニア及び技術者など専門職に就く男性は 45 歳、女性は 35 歳まで（同第 2 条(b)項）、期間は上限 3 年に引き上げられる（同第 3 条(c)項）。女性については、2024 年 2 月 20 日に

し、ミャンマー連邦が成立した。ビルマ連邦社会主義共和国憲法（1974 年憲法）は停止され、ソウマウン大将を議長とする国家法秩序回復評議会（SLORC）が設置された。1997 年 11 月、SLORC は、タンシュエ上級大将（1992 年 4 月、健康上の理由によりソウマウンが SLORC 議長を退任し、タンシュエが議長を引き継いだ）を議長とする国家平和発展評議会（SPDC）に改組されたが、SLORC からの実体の変更はなかった。2011 年 1 月に 2008 年憲法が施行され、2011 年 3 月にテインセイン大統領が誕生するまで、SPDC がミャンマーにおける最高意思決定機関であった。

[3] 本法の公式英語訳は、以下参照のこと。ミャンマー法務省法令データース https://www.mlis.gov.mm/mLsView.do;jsessionid=967D6C929DC52C23FD0386AFECE05DBC?lawordSn=932（2024 年 6 月 11 日筆者最終アクセス）。

[4] 軍事政権による緊急事態宣言の違憲性については、牧野絵美「国軍によるミャンマー政変と 2008 年憲法」法学セミナー2021 年 8 月号通巻 799 号（2021 年 7 月）69-74 頁を参照されたい。

[5] ミャンマー国営英字新聞 Global New Light of Myanmar "Extension of State of Emergency conforms with Constitution: CT response″（2023 年 2 月 2 日付）https://www.gnlm.com.mm/extension-of-state-of-emergency-conforms-with-constitution-ct-response/（2024 年 6 月 11 日筆者最終アクセス）。

[6] ミャンマー国営英字新聞 Global New Light of Myanmar "Date set for People's Military Service Law to come into force″（2024 年 2 月 11 日付）https://www.gnlm.com.mm/date-set-for-peoples-military-service-law-to-come-into-force/（2024 年 6 月 11 日筆者最終アクセス）。

[7] ミャンマー国営英字新聞 Global New Light of Myanmar "SAC Information Team leader clearly unveils no plan to recruit women for military service now"（2024 年 2 月 21 日付）https://www.gnlm.com.mm/sac-information-team-leader-clearly-unveils-no-plan-to-recruit-women-for-military-service-now/（2024 年 6 月 11 日筆者最終アクセス）。

今回の徴兵の対象から除外すると発表されたが[8]、独立系メディアによれば、2024 年 5 月下旬以降女性の徴兵の準備が進められており、2024 年 7 月から開始されるとみられる[9]。緊急事態下であれば、兵役期間は最長 5 年まで延長可能である（同第 4 条）。徴兵期間は、給与及び報酬が支給される（同第 16 条）。宗教団体の構成員、専業主婦、障害者及び身体検査で不適格とされた者は兵役を免除される（同第 22 条）。公務員、学生及び高齢の親を介護する者は、兵役が猶予される（同第 15 条）。徴兵を拒否したり、兵役を免れるために虚偽の申告をしたとき、最大 5 年の禁錮刑に処せられる（同第 23 条及び第 24 条）。

同法施行にともない、2024 年 2 月 13 日に、中央機関である中央市民兵徴兵委員会が設置された（同第 6 条）。同委員会は、副首相兼国防大臣を委員長とし、委員には、内務、国境、法務、情報、宗教・文化、入国管理・人口、労働、教育、保健、民族問題を担当する各大臣が含まれる[10]。なお、憲法上、国防、内務及び国境大臣は、国軍最高司令官により指名された国軍軍人が任命される（2008 年憲法第 232 条(b)項(i)(ii)）。2024 年 2 月 16 日に、第 1 回中央市民兵徴兵委員会が開催され、1300 万人が徴兵の対象であると発表され[11]、第 1 期生の軍事訓練が 2024 年 4 月 8 日から開始された[12]。なお、以下の約文中の亀甲括弧〔〕内は訳者が補足した部分である。

Ⅱ．翻訳

ミャンマー連邦市民兵役法（国家平和発展評議会法 2010 年第 27 号）（2010 年 11 月 4 日）

すべての市民は、ミャンマー連邦の独立、主権及び領土保全を保持する責務を有しており[13]、その責務を果たすために、国家平和発展評議会は、以下の法律、すなわち、国家を防衛することを目的として、すべての市民が軍事訓練を受け、兵役に従事するための法律を

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[8] 同上。
[9] 独立系メディア Democratic Voice of Burma (DVB) "Military makes preparation for women conscripts〃（2024 年 6 月 4 日付）https://english.dvb.no/military-makes-preparation-for-women-conscripts/（2024 年 6 月 11 日筆者最終アクセス）。
[10] ミャンマー国営英字新聞 Global New Light of Myanmar " Formation of Central Body for summoning people's military servants（ミャンマー連邦共和国連邦政府通知 2024 年第 1 号）〃（2023 年 2 月 14 日付）www.burmalibrary.org/sites/burmalibrary.org/files/obl/GNLM2024-02-14-red.pdf（2024 年 6 月 11 日筆者最終アクセス）。
[11] ミャンマー国営英字新聞 Global New Light of Myanmar "Central Body for Summoning People's Military Servants holds first coord meeting"（2024 年 2 月 17 日付）https://www.gnlm.com.mm/central-body-for-summoning-peoples-military-servants-holds-first-coord-meeting/（2024 年 6 月 11 日筆者最終アクセス）。ただし、1300 万人というのは、2024 年 2 月 20 日に女性を徴兵の対象から除外する以前の数字。2024 年 7 月には女性も徴兵の対象となった。
[12] ミャンマー国営英字新聞 Global New Light of Myanmar "People's military servants training No 1 begins across various commands"（2024 年 4 月 9 日付）https://www.gnlm.com.mm/peoples-military-servants-training-no-1-begins-across-various-commands/（2024 年 6 月 11 日筆者最終アクセス）。
[13] 2008 年憲法第 385 条は、「すべての市民は、ミャンマー連邦共和国の独立、主権及び領土保全を保持する義務を有する。」と規定している。

制定する。

第 I 部　名称、施行及び定義

第 1 条 (a) 本法は、「市民兵役法」という。

(b) 本法は、国家平和発展評議会が、命令により法律を制定した日に効力を生ずる。

第 2 条　この法律に含まれる以下の用語は、以下に示す意味を有する。

(a) 市民兵（public military servant）とは、この法律にもとづいて兵役に従事する市民をいう。

(b) 兵役に従事する資格を有する者とは、男性であれば 18 歳から 35 歳までの市民、女性であれば 18 歳から 27 歳までの市民をいう。男性の専門家（専門職）であれば、18 歳から 45 歳までの市民、女性の専門家であれば、18 歳から 35 歳までの市民をいう。

(c) 国軍技術者（tatmadaw technician）とは、国軍に勤務し、かつ国防評議会（Defense service council）の基準にしたがい、技術者や技術専門家として入隊した者をいう。

(d) 専門家（expert）とは、医師、エンジニア、技術者又は何らかの形で専門知識を実践する者をいう。

(e) 家族（family member）とは、親、夫又は配偶者、息子、娘又は兄弟姉妹をいう。

(f) 宗教団体の構成員（member of religious order）とは、

(1) 仏教であれば、仏教の宗教的目的のために永続的に奉仕する者で、僧侶、修行僧、尼僧など宗教的業務に関する証明書を有する者をいう。

(2) キリスト教であれば、宗教的職務を行う者で、教会が「聖職者」と認める者をいう。

(3) ヒンドゥ教であれば、托鉢僧（Sanyasi）、マハン（Mahan）又はヒンドゥ教僧侶をいう。

(g) 学生（student）とは、国が運営する大学、カレッジもしくは教育機関、又は政府が認める教育機関で学ぶ者をいう。

第 II 部　兵役期間

第 3 条　以下、兵役期間について規定する。

(a) 兵役に従事する資格を有するすべての市民は、24 ヶ月を超えない範囲で徴兵さ

れるものとする。

(b) 兵役に従事する資格を有するすべての市民が政府に国軍技術者として徴兵されたとき、その者は、36 ヶ月を超えない範囲で兵役に従事しなければならない。

(c) 専門家として兵役に従事することができる年齢に達しているすべての市民は、36 ヶ月を超えない範囲で兵役に従事することができる。

第 4 条　国家が緊急事態下であれば、政府は兵役を 5 年を超えない範囲で延長することができる。

第 5 条　市民兵の兵役期間を計算する際、1959 年国軍法にもとづく軍法会議にて下された他の形式の処罰の期間、及び軍法会議又は通常裁判所の判決期間は含まないものとする。

第 III 部　市民軍のためのさまざまな級の徴兵委員会の設置並びにその機能及び任務

第 6 条　政府又は政府により認可された機関は、市民軍を徴兵するための中央機関を設置する。

第 7 条　市民兵の徴兵のための中央機関は、以下のことを実施する。

(a) 必要に応じて、地域（region）級、州（state）級、県（district）級及び郡（township）級[14]の下部組織を設置する。

(b) 市民兵の徴兵者について、国軍身体検査委員会が、健康状態を検査する。

第 8 条　区（ward）又は村落区（village-tract）平和発展評議会は、12 月 31 日時点でそれぞれの区域に居住し、兵役に従事する資格を有する市民を集め、入隊させ、所定の基準により、1 月 1 日に郡級市民兵徴兵委員会に報告する。

第 9 条　郡級市民兵徴兵委員会は、以下のことを実施する。

(a) 兵役に従事する資格を有するすべての市民を登録し、その証明書を発行する。

(b) 発行された証明書を持つ資格を有する市民は、身体検査のために招集される。

第 10 条(a) 市民兵のために郡級市民徴兵委員会から招集された市民は、所定の期間内に、欠席することなく、徴兵命令に記載された部署又は部隊に出頭しなければならない。

(b) 本法に関連する目的で、兵役に従事する資格を有する者を招集する徴兵命令は、各個人に送付されなければならない。本人と連絡が取れないときは、証人の面前で家族のうちのひとりに渡さなければならない。その場合、命令が本人に受理されたものとする。

[14] 郡は、県を構成し、県は地域又は州を構成する（2008 年憲法第 51 条）。ミャンマーは、大きく分けて 8 つの民族により構成されているが、多数民族であるビルマ族が多数居住する地方を地域、残りの 7 つの少数民族が多数居住し、当該民族の名称を付した地方を州と呼ぶ。

第 11 条　市民兵として認定された市民は、認定された日から 1959 年国軍法に従わなければならない。

第 12 条　郡級市民兵徴兵委員会は、以下のことを実施する。

(a) 市民が兵役のために招集され、書面で兵役の免除、兵役期間の短縮、又は兵役の延期を申し立てたとき、以下の事実を確認する。

(1) 本人の経歴証明書が真正か否か。

(2) 理由が合理的か否か。

(3) 書面に十分な証拠や推薦書が添付されているか否か。

(b) 提出された経歴証明書が申立に十分でないとき、又は必要な証拠及び推薦書が欠落しているとき、委員会は申立人に〔経歴証明書、必要な証拠及び推薦書を〕要求するものとする。

(c) (a)項及び(b)項の要件が満たされたとき、兵役に招集された者の申立書は、国軍身体検査委員会の医療記録、並びに同委員会の調査報告及び見解を付して、県級市民兵徴収委員会に提出する。

(d) 委員会は、要件を満たし、郡において兵役に就く資格のある者を招集し、記録し、上級の委員会に提出する。

第 13 条　県級市民兵徴兵委員会は、郡級委員会からの申立書に意見を付して、地域・州級市民兵徴兵委員会に報告する。

第 14 条　地域・州級市民兵徴兵委員会は、県級市民兵徴兵委員会からの申立書に意見を付して、中央市民兵徴兵委員会に報告する。

第 15 条　(a) 中央市民兵徴兵委員会は、地域・州級市民兵徴兵委員会から提出された申立書を審査する間、以下の基準に該当する者に対して、兵役義務を一時的に延期することができる。

(1) 国軍身体検査委員会の勧告により、兵役に対して医学的適性を満たさない者

(2) 公務員

(3) 学生

(4)〔他の介護者がいない〕高齢の親を介護する者

(5) 薬物乱用の治療を受けている者

(6) 服役中の者

(b) (a)項に記載された者は、対象年齢を超えた後も、一時延期された兵役を果たさなければならない。

第 IV 部　市民兵の特権

第 16 条　市民兵は、兵役期間中、指定された階級と順位に応じた給与及び報酬を受けることができる。

第 17 条　市民兵が任務中に死亡、又は負傷したとき、国軍に定められている〔手当〕を享受することができる。

第 18 条　(a) 公務員が市民兵役義務に服しているとき、その兵役期間は、公務時間として認められる。

(b) 第 3 条及び第 4 条にもとづく兵役期間を終了した者は、元の職業又は類似の職業に再雇用される。

第 19 条　本人が第 3 条にもとづき兵役期間を終了し、自主的に国軍への入隊を希望するとき、規則（rules）及び規定（regulations）にしたがい、受け入れられる。

第 20 条　博士号若しくは専門職学位を取得した者、又はその時々に定められる基準を満たした者は、緊急事態下で、官報公示職（gazetted officer）に任命されることがある。

第 V 部　軍事動員

第 21 条　(a) 国家の防衛及び安全を危ぶむ非常事態が、ある地域又は国家全体で発生したとき、又は発生する十分な理由があるとき、政府は、資格を有するすべての若しくは一部の市民又は兵役を終えたすべての若しくは一部の市民を動員する命令を発する。

(b) (a)項にしたがって命令が出されたとき、動員された市民はすべて、所定の期間内に各徴兵委員会に出頭する。これらの者は、指定された部隊又は部署で軍務を遂行しなければならない。

(c) 中央徴兵委員会は、動員された市民に対し、要求に応じて本来の〔動員以前の〕任務を継続するよう指示し、割り当てることができる。

第 VI 部　兵役の免除

第 22 条　以下の者は、兵役を免除される。

(a) 宗教団体の構成員

(b) 専業主婦（離婚した者であっても、子のある者を含む）

(c) 恒久的な障害を持つ者

(d) 国軍身体検査委員会が、恒久的に兵役に適さないと認めた者

(e) 中央徴兵委員会の命令により免除された者

第 VII 部　罪及び刑罰

第 23 条　明白な理由なく以下の行為を行った者、又は行わなかった者が有罪となったとき、3 年以下の禁錮若しくは罰金、又はその双方が科される。

(a) 第 9 条(a)項にもとづき、郡級市民兵徴兵委員会が同委員会[15]に登録するよう招集した場合において、出頭しなかったとき。

(b) 第 9 条(a)項にもとづき、郡級市民兵徴兵委員会が身体検査のために招集した場合において、出頭しなかったとき。

(c) 第 10 条に規定される身体検査に合格した後、郡級市民兵徴兵委員会が兵役に就くよう招集した場合において、出頭しなかったとき。

(d) 第 21 条（b）項にもとづき軍事動員命令が出された場合において、事前に指定された部隊又は部署に出頭しなかったとき。

(e) 本法に関連して求められた事実を誤って述べたとき。

(f) 第 18 条(b)項にもとづき、兵役期間を終了した労働者を再雇用しないとき。

第 24 条　兵役を免れるために以下の罪を犯し、有罪となったとき、その者は 5 年以下の禁錮若しくは罰金、又はその双方が科される。

(a) 健康基準を満たさないために、病気又は負傷したように見せかけること。

(b) 障害者を装うこと。

(c) 自身の身体を傷つける、又は病気にかかること。

(d) 適切な治療を受けず、故意に病気を長引かせたり、障害を負わせたり、病状を悪化させたりすること。

(e) 自ら身体に傷害を与えること。

(f) その他の行為をすること。

第 25 条　本法にもとづき行動する公務員又は団体の構成員が、悪意をもって罪を犯す、又は不作為により、有罪となったとき、3 年以下の禁錮若しくは罰金、又はその双方が科される。

第 26 条　本法に違反する犯罪を幇助し、有罪が確定したとき、1 年以下の禁錮若しくは罰金、又はその双方が科される。

第 27 条　本法第 23 条にもとづき、罪を犯したとして告発されたとき、その者は信頼できる証拠を提出する責任を負う。

[15] 英語訳では “the center”であったが、ミャンマー語では「郡級市民兵徴兵委員会」であったため、「同委員会」とした。

第 28 条　第 23 条及び第 24 条に規定される罪を犯し、刑期を終えた後であっても、本法による兵役は免除されない。

第 VIII 部　一般規定

第 29 条　政府は、本法の規定を効果的に実施するために、必要な組織や委員会を設置し、任務を割り当てる。

第 30 条　本法第 26 条に対する違反は、〔刑事〕事件として認められる。

第 31 条　いかなる組織又は組織の構成員の行為も、真摯な意図をもって規定（regulations）及び手続（procedure）にしたがい、自らの責務を果たしている間は、刑事訴訟又は民事訴訟の責任を負わない。

第 32 条　本法を施行するため、国防省は、必要な規定（regulations）、細則（by-laws）、手続（procedure）、通知（annoucements）、命令（orders）及び指示（directives）を制定する。

第 33 条　1959 年兵役法は、本法により廃止される。

タンシュエ

上級大将、議長

国家平和発展評議会

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 10 号をお届けいたします。本号は、2022 年から 2023 年にかけて CALE 外国人研究員として名古屋大学にて研究された各国の気鋭の研究者らによる研究成果のほか、本研究科の修了生ないし在学生であり本国で当局の職員としても活躍されている方々の論稿、および本センター教員による論稿を掲載しています。2022 年は、COVID-19 による国際交流への制約がなくなってから CALE が研究員の受入れを再開した時期であり、そうした国際交流に基づく研究活動の成果を本号に掲載できることを大変嬉しく思います。

CALE および日本法教育研究センター（ＣＪＬ）の活動は現在転換期を迎えております。これまでの法整備支援事業の継続だけでなく、名古屋大学で研鑽を積み各国で活躍している研究者や実務家を中心として、各国との間で、未来の法政策を展望する共同研究・教育を実践するという新たな目標を設定し、そうした目標へ向けて具体的な活動を開始しています。そうした中で、本研究科修了生および本センター教員による研究成果を本号に掲載できることは、誠に象徴的なことでもあります。

昨今、世界はますます解決困難な諸問題に直面しており、そうした中で法という仕組みがどのような役割を果たしうるのかということを考えさせられます。本誌がそうした問題に果敢に取り組む研究の一つの場となることを願っています。

ALB 編集委員長

松田貴文（名古屋大学法政国際教育協力研究センター副センター長）

Nagoya University Asian Law Bulletin　第 10 号

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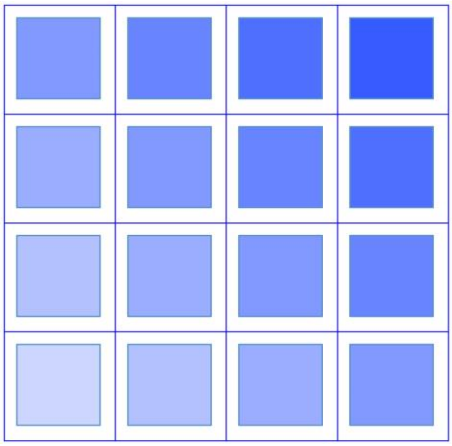
スフバートル モロム／松山聡史
編集補助　松山 聡史
表紙デザイン　松山 聡史
発行　名古屋大学法政国際教育協力研究センター（CALE）
〒464-8601　名古屋市千種区不老町
電話：+81(0)52-789-2325　Fax：+81(0)52-789-4902
Email：cale-publication@law.nagoya-u.ac.jp
URL : http://cale.law.nagoya-u.ac.jp
発行日　2024 年 10 月 31 日
ISSN　2188 – 1952

本誌はオンラインジャーナルです。http://cale.law.nagoya-u.ac.jp/publication/alb.html にてダウンロード可能です。

Nagoya University
Asian Law Bulletin



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