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JAPAN

PREFACE

With the evolution of the market-oriented economy as well as the increase in cross-border transactions, there is an urgent need to conduct research and comparisons of judicial systems and the role of law in development in Asian countries. The Institute of Developing Economies, Japan External Trade Organization (IDE-JETRO) established two research committees in FY 2000: Committee on "Law and Development in Economic and Social Development" and Committee on "Judicial Systems in Asia." The former has focused on the role of law in social and economic development and sought to establish a legal theoretical framework therefor. Studies conducted by member researchers have focused on the relationship between the law and marketization, development assistance, trade and investment liberalization, the environment, labor, and consumer affairs. The latter committee has conducted research on judicial systems and the ongoing reform process of these systems in Asian countries, with the aim of further analyzing their dispute resolution processes.

In order to facilitate the committees' activities, IDE has organized joint research projects with research institutions in seven Asian countries, namely, China, India, Indonesia, Malaysia, Philippines, Thailand and Vietnam. To encourage the sharing of the findings of respective researches on the role of law in development, legal systems and the reform process in Asian countries, and to promote research cooperation and scholarly exchanges among research counterparts, IDE sponsored a roundtable meeting entitled "Law, Development and Socio-Economic Change in Asia" in Manila on November 20-21, 2000. We would like to express our sincere gratitude to the members of College of Law, University of the Philippines, for their cordial cooperation in organizing the meeting. Committee members from Japan and researchers from the seven Asian countries participated in the meeting. Presentations by the respective researchers were followed by lively discussions.

The sessions of the first day of the meeting, titled Judicial Reform in Asia: Current Issues and Challenges, focused on the issue of judicial reform, which has been discussed in recent years both in many Asian countries, and among development assistance donors. The presentations were devoted to the philosophy, social and economic background of judicial reform movements as well as - specific reform plans in each country. The sharing of basic information on judicial systems and the

experiences of judicial reforms contributed to a further understanding of different judicial systems and dispute resolution processes in Asia.

The sessions of the second day, titled Rethinking “Law and Development”: An Asian Perspective, focused on the role of the law in socioeconomic dimensions in Asian countries in its current development process, while taking into consideration the discussions on “Law and Development” held in the 1970s and 1980s. The participants looked into economic laws and the marketization process in Asia, including contract law and legal technical assistance. Studies were also presented in the areas of social laws such as labor law, social security law and environmental law. Critical discussions on “Law and Development” were carried out in order to promote a rethinking of the conventional research framework on Asian law.

This publication is the outcome of the two-day roundtable meeting, and is based on the papers submitted for the meeting and the record of discussions. We believe that this is an unprecedented work in its comprehensiveness, and hope that this publication will contribute as research material and for the further understanding of the legal issues we share.

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Institute of Developing Economies

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Opening Remarks

Raul C. Pangalangan
Dean, College of Law
University of the Philippines

There was a time when this conference would have been most unusual. It is an international discussion but our topic is the erstwhile internal issue of governance and the administration of justice. Indeed I recall a local survey about judicial delay and corruption in the Philippines, funded by an American foundation, and during the public presentation of the survey results, a Filipino judge stood up to ask what a foreign group was doing, intruding into a sovereign matter. He pointed, quite correctly, that the justice system is a preeminently public concern monopolized by government and impervious, so it seemed, to international oversight.

Perhaps until the early 90s that argument was still tenable. Today, however, international financial institutions (or IFIs) – the World Bank, the IMF, the ADB, the USAID – have candidly focused on "governance and the rule of law", transparency and anti-corruption. Whereas before the activists working in NGOs cried "imperialism" against World Bank projects and the IMF conditionalities, today they hitch a ride upon these programs and work hand-in-hand in shared crusades.

Our topic therefore is the convergence of two entirely distinct legal developments. One branch is dominated by "law and development", the other by "human rights." The first is concerned with economics, the other with justice. The first is concerned with enlarging the social surplus, the pie, so to speak; other, with how the pie is cut up and shared. The first is concerned with needs, the other with rights. The first is concerned with responsiveness by government, the other with accountability to the governed. And thus they converge.

Yet for the first forty years of the existence of the IMF and the World Bank, they always insisted that their charters prohibited them from taking into account political considerations, and had been oblivious to the grave human costs of their programs. A hydro-electric dam must be built to generate power, no matter that it will displace tribal communities from their ancestral homes. Electricity is good economics, tribal deaths are a side-story because they deal with human rights. Joseph Gold, then General Counsel of the World Bank, wrote an essay saying "political considerations are

prohibited by the charter of the World Bank." Besides, he said, these social questions are domestic in character, and an international organization has no business poking its nose into matters internal to the sovereign. (I wrote my entire LL.M. thesis arguing against this in 1985!)

Today, these IFIs sing a different tune. First, stated most plainly, their financial assistance was going down the drain – often, down the pockets of corrupt government officials – and they realized that their work would amount to nothing unless they first corrected the domestic structures that insulated government from the governed. Second, "human rights" concerns, though political in origin, nonetheless have economic consequences. Witness for instance tribal protests to sabotage the Chico dam project in northern Philippines. The political, indeed, has dollars-and-cents consequences. Finally, legal structures, they say, are also economic resources, value-generating or value-consuming in their own way. Hence they call for "stakeholder participation" (or what we non-bureaucrats would call "democracy"), "transparency" (or what we also call accountability), or "governance deficit" (or what ordinary people feel when they do not trust their government).

Our forum today thus breaches the wall between the political and the economic, the claims of justice and the ways of the market, the domain of the international and the realm of national sovereigns. But it breaches yet other walls. One is the dilemma of applying Western liberal legality in Asian contexts, where culturally-rooted notions of rights are not internalized and where the social infrastructure for the individual – the egoistic self in Rawlsian logic – does not exist. Witness Rawls, in A THEORY OF JUSTICE, saying that every person possesses rights that even the good of society cannot override, versus the collectivist notion that the good prevails over rights, that justice is always "situated" and contextual, that rights are not fixed markers but fluid, eternally negotiable bargains – all deeply ingrained Asian impulses. There is the danger then that by focusing on law, we examine the veneer of legality that sits atop a core of soft norms. The second dilemma is that of applying Western liberal legality in transition economies, socialist economies now partially marketizing, where what Western democrats hope is the rule *of* law becomes a vehicle for local elites' rule *by* law, i.e., the use of law as an instrument of state power, thus liberalizing the market without liberating its people.

Ah, yes, there is yet something else unique about this forum. It used to be that comparative studies about Asian legal systems were invariably done outside Asia, perhaps in Europe, often in America. One such international conference I attended was

held in Hong Kong, but it organized by Stanford Law School. Other meetings were organized by the Harvard Law School's East Asian Legal Studies Program. Finally, the Asian Yearbook of International Law is published – surprise – in Rotterdam, by a Dutch professor of Chinese blood and Indonesian descent. Today's gathering, therefore, is one of the very first forums on Asian law, development and justice to be held in Asia and be organized by fellow Asians. On that note, today's meeting is truly historic, and I am delighted that you have chosen my country for the honor.

Opening Remarks

Naoyuki Sakumoto
Institute of Developing Economies

Distinguished guests and speakers:

Let me take this opportunity on behalf of Institute of Developing Economies /Japan External Trade Organization (IDE/JETRO) to express our gratitude to all the participants for your attendance to this Roundtable Meeting on "Law, Development and Socio-Economic Changes in Asia", here in Manila. Presently we are carrying out nine joint research projects with overseas research counterparts of seven countries, including China, Philippines, Malaysia, Thailand, Indonesia, Vietnam and India. All these counterparts are kindly participating in this Roundtable Meeting. Please allow me also to extend our sincerest appreciation to Prof. Pangalangan, Dean of College of Law, University of the Philippines, as well as to the member staff of the College, who have kindly provided assistance to hold this Roundtable Meeting. Moreover, I would like to thank the Japanese professors who are with us today.

In this meeting, we will discuss two research topics: "Judicial Reforms in Asia: Current Issues and Challenges" and "Rethinking of Law and Development: An Asian Perspectives", respectively on November 20 and 21, 2000. When we look at the recent radical changes in the economic and political environment in Asia, we will immediately notice that such changes are seriously affecting our legal climate to a considerable extent. Globalization, marketization and democratization movements are sweeping over all Asian countries. The economic crisis in Thailand, which started in July 1997, plunged not only the Asian economies but also the world economy into a complete mess. Asian countries exposed their fragility in its structural and institutional aspects. As a result, drastic legal reforms or dynamic legal changes have been taking place to cope with such deficiencies. These are what we call new challenges in many Asian countries. We are trying hard to establish our new and own legal regime or governance.

With regard to Indonesia, the dictatorial Suharto political regime, which had lasted for as many as 32 years, was finally overthrown by democratization movement of the Indonesian people. It should be remembered that the most decisive moment to topple

down the Suharto regime was the serious economic crisis triggered by the considerable depreciation of Rupiah currency against US dollars in 1997. Almost three years have passed since the downfall of President Suharto; however, Indonesia has not yet witnessed its political and economic stability. Rather, they are falling into more unstable conditions, despite the fact that a large number of laws and regulations have been promulgated during these three years.

On the other hand, international organizations such as the World Bank, IMF or ADB, and developed countries, are discussing the most effective way of providing technical legal assistance to Indonesia, because different donors and overseas governments have been providing d legal assistance to Indonesia in an uncoordinated way. Some emphasize the importance of introduction of economic laws such as Insolvency Law or Anti-monopoly Law in order to achieve her rapid economic recovery, whereas others prioritize the eradication of KKN (Corruption, Collusion and Nepotism) in Indonesia. Some stress the need to support capacity building at the local government level, while others are interested in pushing democratization process of Indonesia ahead more strongly. Not only international organizations and developed countries but also NGO groups are supporting human capacity development in Indonesia.

It is clear form these examples that, analyzing the economic development in Asian countries, we cannot ignore the accumulation of social problems found everywhere in Asia. They are not necessarily traditional issues but modern legal issues. We need to sophisticate our legal tools in order to solve such modern type social problems such as environmental problems, consumer protection, labour issues, and human rights. We can also witness such discussion as developmentalism versus anti-developmentalism or globalism versus anti-globalism. I believe that it is the time for us to stop to think or to rethink how the development should be and the role of law in such a process should be in Asia.

Every Asian country is facing with various legal issues that have to be resolved. However, our historical, as well as political, economic and social situations are different from each other. We need to start our discussion from the very beginning but from the very essential part of our legal studies.

It is our sincere wish to discuss actively in order to exchange our academic ideas

on the aforementioned two subjects. It will help develop our knowledge on other Asian countries and comparative insights. The time allowed for us is only two days, however, we would like to make the most use of our time in order to enjoy discussion and to share different views and understandings on the role of law in the process of development as well as the legal changes in Asia.

Thank you very much again for your participation and we strongly hope that our Roundtable Meeting will finally become a very fruitful one.

Day 1

JUDICIAL REFORM IN ASIA
CURRENT ISSUES AND CHALLENGES

SESSION I

COUNTRY REPORTS ON JUDICIAL REFORM (1)

The Judicial System in Thailand: An Outlook for a New Century*

Vichai Ariyanuntaka**

Introduction

Perhaps we are blessed with living in interesting times. In 1997 Thailand witnessed the transition of its economy from phenomenal success and double-digit or near double-digit growth to near collapse verging on the state of bankruptcy in many financial quarters. Lawyers, like any other profession, bear the burden of bringing Thailand out of this predicament. This is a time for re-thinking, re-planning and re-structuring Thai's legal infra-structure to create the legal environment friendly to international trade and investment. The legal environment whereby legal rights, local and foreign, shall be equally protected and enforced under Thai law and the dispute resolution mechanism in Thailand. The legal environment of good faith and trust worthiness. The legal environment which will lead Thailand to the more glorified days of international trade and investment and the recovery of Thai economy as a whole.

Under the new Constitution promulgated in 1997, substantial changes have been made in Thai political, social and legal environments. A Constitutional Court has been established. The system of administrative courts has also been established. In the field of criminal justice system, a human right oriented approach is preferred to the traditional strict appliance of 'law and order' approach. In the field of civil justice

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* This is the précis of a research entitled "The Judicial System in Thailand: An Outlook for a New Century", undertaken by the Central Intellectual Property and International Trade Court in Thailand in conjunction with the Institute of Developing Economies (JETRO-IDE) of Japan. Members of the working group for the research comprise of seven judges from various courts of justice in Thailand and two legal officers acting as secretariat. Each judge is assigned to write a chapter on his expertise. A few meetings are conducted to interview players in each compartment of the legal profession. Meetings among the working group members are conducted to arrive at certain consensus. All members are responsible for the final draft. Justice Prasobsook Boondech, the Chief Justice of the Central Intellectual Property and International Trade Court graciously acts as the honorary advisor to the research programme. The précis is prepared at a short time to fulfill the requirement of the Roundtable Meeting on Law, Development and Socio-Economic Change in Asia, to be held in Manila Philippines on 20-21 November 2000. The working group reserves the right to make changes during further research and meetings. The views expressed in this paper represent the personal opinions of the authors and do not necessarily reflect those of the Central Intellectual Property and International Trade Court.

** Judge, Central Intellectual Property and International Trade Court, Thailand

system, case management by the judge and alternative dispute resolution (ADR) are encouraged.

Recent Trends in Dispute Resolution Mechanism in Thailand

Novelties in the administration of civil justice in the court of justice in Thailand may be listed as follows:

(1) The Practice Guidance by the President of the Supreme Court on Court-Annexed Conciliation and Arbitration.

(2) The Establishment of Intellectual Property and International Trade Court.

(3) The Establishment of Bankruptcy Court.

I. Practice Guidance on Court-Annexed Conciliation and Arbitration

Similar to the English practice where the Lord Chancellor may issue *Practice Directions*, the President of the Supreme Court in Thailand may issue *Practice Guidance* for judges in order to achieve uniformity and fair dispense of justice. Influenced by the much publicized use of ADR in the United States, in 1996 the President of the Supreme Court issued the Practice Guidance on court-annexed conciliation and arbitration. The Practice Guidance may be summarized as follows:

(a) In cases where the presiding judge is of the opinion that there is a reasonable chance of amicable settlement between the parties, the court shall initiate the conciliation process.

(b) In cases where the conciliation fails and the issue in dispute involves technical point of fact where the assistance of a neutral or an expert may be helpful in the speedy resolution of the case, the court, with the approval of the parties may appoint an arbitrator to rule on the matter given. The award thus rendered by the arbitrator, if approved by the court, shall be incorporated in the final judgment.

(c) In cases where the conciliation fails and the presiding judge considers that it might not be appropriate for him or her to continue sitting in the case, he or she may withdraw from the case except where it is contrary to the intention of both parties.

(d) Each court may designate a special room for conciliation purposes. The atmosphere shall be informal. The judge and the lawyers shall not put on

their gowns.

(e) Where a speedy settlement is achieved, the court may consider returning the court fees to the parties. At present the court fees stand at 2.5% of the amount in dispute but not exceeding 200,000 baht (approximately US$ 5,300) payable at the filing of the Claim. This is designed as an incentive for settlement in certain cases.

Conciliation is now practised by courts of justice throughout the country with encouraging figures of success. Even cases at the appellate level may be settled by conciliation. It is widely used in the Civil Courts in Bangkok, in the civil jurisdiction of provincial courts throughout the country, in the juvenile and family courts for cases concerning family law, in the Central Labour Court for cases of labour disputes and in the Central Intellectual Property and International Trade Court for cases of intellectual property and international trade disputes.

II. Establishment of the Intellectual Property and International Trade Court

In late 1996, the Act Establishing the Intellectual Property and International Trade Court and Its Procedure 1996 was passed by the Parliament. The Act was the culmination of a joint effort between the Ministry of Justice and the Ministry of Commerce in the wake of negotiations between Thailand and the United States as well as the European countries on trade related aspects of intellectual property rights. In fact Thailand is exceeding its obligation under Article 41(5) of the TRIPS Agreement[1]by establishing the IP & IT court.[2] Article 41(5) simply states:

> *It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general... Nothing in this Part creates any obligation with respect to the*

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1 The Agreement on Trade-Related Aspects of Intellectual Property Rights. See Ariyanuntaka "Enforcement of IP Rights in Accordance with Obligations under the TRIPS Agreement: A Thai Perspective", *Botbandit* (Journal of the Thai Bar Association) December 1995, at 179.

2 Under the Act, a Central Intellectual Property and International Trade Court is established with the jurisdiction of Bangkok Metropolis and its vicinities with the possibility of additional Regional IP & IT Courts to be established later by Act of Parliament.(ss 5 and 6)

distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.

However, the IP & IT Court is established to create a 'user-friendly' forum with specialized expertise to serve commerce and industry. International trade is added to the jurisdiction of the court for the reason that in a country like Thailand specialized Bench and Bar in IP and IT should be grouped together for easy access and administration. Not least for want of sufficient workload to warrant a separate court !

The followings are some of the prominent features in the new court system:

(1) Liberal use of Rules of the Court to facilitate the efficiency of the forum.

(2) Exclusive jurisdiction in the enforcement of arbitral awards in intellectual property and international trade matters.

(3) Panel of three judges to constitute a quorum. Two of whom must be career judges with expertise in IP or IT matters. The third member of the panel shall be an associate judge who is a lay person with expertise in the matters. A double guarantee of specialization !

(4) Availability, for the first time in Thai procedural law, of the '*Anton Piller* Order' type of procedure.

(5) Possibility of the appointment of expert witness as *amicus curiae.*

(6) Leap-frog procedure where appeals lie directly to the IP & IT Division of the Supreme Court.

While establishing a new court is not an easy task, the promotion of it to international commerce and industry is most difficult of all. One will have to create the right 'legal environments' to attract international commercial litigation. Reputation, integrity, expertise, convenience, accessibility, expenses, respect and the enforceability of judgment in jurisdictions where it matters most are but some of the criteria one considers hard when choosing a forum to conduct international commercial litigation.

III. Establishment of Bankruptcy Court

1. Procedure in the Bankruptcy Court

Formal insolvency mechanisms are currently governed by the Thai Bankruptcy Act 1940. This legislation went through four amendments, i.e. Bankruptcy Act (No.2)

1968, Bankruptcy Act (No.3) 1983, Bankruptcy Act (No.4) 1998 and Bankruptcy Act (No.5) 1999. Basically, there are two mechanisms provided by the current law. The first one is the liquidation or bankruptcy procedure and the second is the reorganization or rehabilitation procedure.

The law was comprehensively amended in 1998 and 1999 due to the need of a reform in the bankruptcy law. The reorganization procedure and some other changes are the result of the effort by the government to modernize the system. To strengthen the changes made to the law, the Thai parliament also approved the establishment of a specialized bankruptcy court.

The details of each procedure are shown below.

2. Bankruptcy Cases

In general, the bankruptcy of individuals, partnerships and companies is concerned with the realization of the assets subject to the bankruptcy charge, and with the distribution among all administration for the benefit of these creditors under the bankruptcy law. The law in this area is solely governed by the Bankruptcy Act 1940 (B.E. 2483) (BA). The term "execution" itself is never mentioned in the Act, but instead it is called "administration of the bankrupt's property". The officer in charge of the said process is called an official receiver who, by law, must be a qualified lawyer and recruited by the Ministry of Justice.

2.1 Receiving Order

The administration does not commence until a receiving order is made against a debtor. To obtain such order, a creditor will have to file a bankruptcy petition against the debtor and satisfy the court of the required grounds under BA ss. 9, 10. The trial for the issue will be set and the outcome will depend upon the evidence (BA s. 14). Once the receiving order is made against a debtor, he will, by the effect of the order, cease the control of his assets which, by law, is vested in the official receiver.

It should be noted that at this time the debtor is not yet bankrupted by law, albeit not far from it. It is the obligation of the official receiver to proceed further, that is to forthwith advertise the order, call for the first creditors' meeting and make a public examination of the debtor in court (BA ss. 28, 31, 42, 43).

2.2 Meetings of Creditors

The first creditors' meeting is crucial for the debtor since the matter is for the creditors to decide whether the debtor should be adjudicated bankrupt (BA s. 31). The debtor may submit a proposal in the meeting of creditors to settle the issue which, in order to succeed, will need a special resolution in favor of it, i.e. a resolution by a majority of creditors whose claims equal three quarters of the total claims of creditors who present at the meeting personally or by representation and have voted on such resolution (BA s.6). The proposal is forbidden if it is against the principle of *pari passu*, i.e. proportionate distribution. Unless the proposal is successful, the case will be redirected to the court and a bankruptcy order will then be made.

Other creditors meeting may be called by the official receiver at such time as may be proper, compulsory by law, court order or demanded by the required numbers of creditors (BA s. 32).

2.3 Composition and Realization of Assets

The debtor may propose a composition to the creditors' meeting during this time, but it requires a special resolution at the creditors' meeting.[3] If the debtor fails to secure a composition, the court will adjudicate the debtor a bankrupt.

It is the responsibility of the official receiver, with assistance from the creditors, to undertake the gathering of all assets which are distributable under bankruptcy law. The power of the official receiver in this respect is far wider than that of the executing officers. The process may involve seizure of property in a similar manner to the enforcement of judgment in civil cases. However, property belonging to third parties may also be seized if it is in the possession or disposition of the debtor in the course of trade or business of the debtor by consent of the owner under the circumstances which create the view that the debtor is the owner when the petition in bankruptcy is filed against the debtor (BA s. 109 (3)).

Further, the official receiver is entitled, under BA ss. 118 and 119, to claim payment of money or demand the delivery of property from the bankrupt's debtors. The aforementioned claim or demand will have to be in the form of a written notice informing such person what he will be deemed to be indebted as such unless he submits his denial in writing with reasons to the official receiver within 14 days from the date

[3] Special resolution requires the supporting of at least three-quarters of the value of debts and the majority in the

the notice takes effect.

When the denial is submitted, an investigation will be carried out by the official receiver to determine whether or not the bankrupt's debtor is actually indebted to the bankrupt. If the official receiver believes so, a second notice will then be served upon the bankrupt's debtor and he, if objecting to it, must apply to the court for a hearing on such issue within 14 days.

In the case where there is no objection from the bankrupt's debtor or the court has made an order against him, if the demand or court order is not complied with accordingly, the official receiver is empowered to apply for a writ of execution against such a person and enforce it in the same manner as in civil cases.

The work of the official receiver does also include the process of recovery of the assets disposed by the bankrupt to third parties. The official receiver may apply by motion to the court to nullify the transfer of property on the following grounds:

- Fraudulent transaction under BA s. 113.
- Transaction made within 3 months preceding the petition with the intention to prefer some creditors under BA s. 115. (The qualified time for transaction made with insiders is a year.)

The property may be sold by the official receiver in any manner which shall be convenient and most beneficial to the creditors. However, a sale other than by auction will require the approval of the creditors' committee except it is permitted by law (BA s. 19, 123).

2.4 Distribution

To be entitled to dividends of the assets of the bankrupt, every unsecured creditor is required to submit a formal claim, known as a proof of debt, to the official receiver within a period of 2 months from the date of publication of the receiving order (BA s. 91). The claim has to show that the debt in question is provable under BA ss. 92-94. Secured creditors can submit a formal claim only if he has complied with one of the conditions under BA s. 96.

The official receiver will, without delay, examine all the claims and subsequently report his opinions to the court which will finally decide whether each

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number of creditors attending and voting.

claim should be dismissed or allowed in full or in part (BA s. 104-107).

Preferential debts and expenses of the official receiver have priority over other claims and will be paid out in order stated in section 130. Ordinary debts rank equally among themselves and will be paid out on *pari passu* basis, i.e. ratable proportionate. Payments must be made at all times not exceeding 6 months from the date of the bankruptcy order unless the court permits an extension of time. (BA s. 124)

2.5. Termination of the Administration

The debtor can be released from bankruptcy in three major ways, a composition after bankruptcy, a discretionary discharge and an automatic discharge. The first two actually came with the 1940 Act whereas the third was newly included into the Act by the Bankruptcy Act (No.5) 1999. In short, a bankrupt if wants to be released before the period of three years from the date of adjudication may try to reach a compromise with creditors through a composition process after bankruptcy or may apply to the court for a discretionary discharge order. In any case, a bankrupt will be automatically released from bankruptcy after the period three years expire. It is to be noted that claims based on debtor's fraudulent conduct and tax claims cannot be discharged.

3. Reorganization or Rehabilitation

The process of business reorganization under the new law is more like a hybrid of US Chapter 11 type and the Judicial Management of the Singaporean law. In short, this reorganization could be described as the court supervised formal attempts to restructure the finances of a financially distressed enterprise. The new provisions contain very detailed provisions on reorganization procedure. The law is intended to prevent business from being driven into unnecessary bankruptcy because of temporary liquidity problems. In order to solve the problems, the law subjects indebted enterprises to a reorganization proceeding if a creditor or the debtor files a petition with the court and if the debtor owes at least 10 million baht to one or more creditors. Reorganization is provided for companies both private and public, and for other enterprises as may be provided by ministerial regulations. None of the regulation is yet in existence.

Upon filing the petition, the moratorium or automatic stay under section 90/12 will come into effect and will prevent secured and unsecured creditors from pursuing their debts, enforcing their civil judgment or filing a bankruptcy petition against the

debtor but to participate in the reorganization proceeding. A court trial will be set to decide if the reorganization order is to be issued. It is stated very clearly in the law that the trial must be conducted in the speedy manner in order to prevent any delays. If the court is satisfied that the debtor is insolvent and has the possible potential of achieving the success of the business restructure, the court will issue the reorganization order. Once the reorganization order is issued, the court will have to appoint a planner to form a reorganization plan. The planner will also have the power to run the business during the reorganization under the supervision of official receiver and the court.

The proposed plan must be put to a vote by creditors within 3 months after the appointment order and must be approved by a special resolution of creditors with certain qualified majority. Only the creditors who have filed their proofs of claim with the official receiver of the business reorganization within one month from the date of the publication of the appointment of the planner order have the right to vote. If the plan receives the approval from creditors, it will then be submitted to court for a confirmation. Motions against the confirmation may be filed with the court on the basis that there is an unfair treatment of creditors.

The details of each plan could vary depending upon the problems and status of business. A composition can be provided for the plan, as well as a capital reduction or increase. The time period limitation for the plan is five years but may be extended by the court. If the process fails to help the business, the court could declare the enterprise bankrupt and the liquidation under the bankruptcy law will follow.

3.1. Automatic Stay

Moratorium or automatic stay is the major element of the reorganization law in every jurisdiction. The question is to understand the scope of the automatic stay in each country since it varies very much from one to another

Thai automatic stay has a very wide scope and will come into effect at the very beginning. Section 90/12 provides that upon the acceptance of the reorganization petition by the court, the so-called "automatic stay" will be effective. This does not depend on whether or not it is the petition from the debtor or creditors like in the US jurisdiction.

The stay will have the effect to both secured and unsecured creditors. The stay will freeze all the civil suits and bankruptcy actions against the company. Secured creditors will not be able to enforce payment of debt against the asset, which is security,

unless allowed by the court. This approach is in line with the concept of adequate protection in many jurisdictions. The court can allow the enforcement against security if it can be shown that there is no sufficient protection of the rights of secured creditors.

During the stay but before the reorganization order is issued, the existing management can still have control over the company subject to the limitation that it can only conduct the ordinary course of business. To do something further than the ordinary course of business, the management will need a leave of the court.

The stay will be effective until, (a) the expiration of period of time for implementation of the plan, (b) the date on which the plan is accomplished successfully, or (c) the date on which the court dismisses the petition, disposes of the case, repeals the order for a business reorganization, cancels the business reorganization, or issues a receiving order.

3.2 Management

With the concept of appointing someone as a planner, the law has to balance the interest of the shareholders and creditors reasonably. The concept under the US Chapter 11, i.e. giving priority to the debtor to form a plan, and both the concept under the English Administration, i.e. appointing an independent licensed practitioner to take control over the company, influenced the Thai legislation.

Although section 90/16 provides that the Minister of Justice may prescribe ministerial regulations relating to the registration and qualifications of the planner, until now there is still no such regulations. The debtor may have the edge over creditors if it proposes someone as the planner. The law provides that if there is more than one person proposed as the planner, the one proposed by the debtor should be the planner, except at the creditors' meeting, there is a vote amounting to two-thirds of the debt value of the creditors attending and voting deciding otherwise. Therefore, to this extent, it is correct to say that management may or may not change hands during the forming plan period.

Once the plan is completed and submitted to the creditors' meeting, there might be another possible change of the management. The one who will have the power to run the business in accordance with the plan is called a plan administrator. The plan must state who the plan administrator is. It is accepted that the planner and the plan administrator may not be the same person.

The plan administrator must prepare a report of the plan implementation and submit it to the official receiver every three months. The removal of the plan

administrator for wrongdoing or fraud can be done by a court order. Creditors may change the plan administrator through the amendment of the plan. In any case, the plan administrator will cease the control of the company once the court orders that the rehabilitation comes to an end. Who will take over depends upon the outcome of the rehabilitation. If the outcome is a successful one, current holder will recontrol the company. On the other hand, if the plan fails, official receiver will come to have the control.

3.3 The Plan

The new law does give the plan formed within its scope some more advantages than the one done for the purpose of an informal workout. First, the interest of equity holders seems to be very much limited. All the powers relating to the decision-making on the future of the company is now shifted to creditors. This includes the powers to decide to reduce and increase the capital. Conversion of debts into equity is also allowed.

The credit given to the company under the plan does enjoy a priority right over existing unsecured debts. It is very unfortunate that the superpriority is not adopted by this legislation.

For cases filed with the court prior to 22nd April 1999, the plan is deemed to be accepted by the creditors if it receives a special resolution, i.e. a resolution by a majority of creditors whose claims equal three quarters of the total claims of creditors present at the creditors' meeting in person or by proxy and voting on such resolution. For cases filed after the said date, the procedure for voting is very different since creditors will be classified into groups and some groups may be crammed down to accept the plan.

IV. Future Trend of Legal Education in Thailand

In the future, many legal education institutes are looking forward to accelerating their legal education improvement of producing appropriate personnel to serve the society. Many universities annually improve their curriculums to muster up students who will have their areas of expertise in the period the first or second year of studying. The curriculum will be more intense in each area and more legal subjects are provided for students to choose. This effect comes from the changing of society. The more areas of study occur, the more in-depth of knowledge is in need. The area of laws

is inevitably effected. At present, it is the age of information technology where phenomenon has been bringing the world to no boundary. It is the era of international exchanging of information, which brings about many implications. International matters play the important roles in the world communities in many areas, especially in business activities. When the market of international business transaction is in need of personnel, most of educational institutes are moving toward those needs. With no exception to the legal education institutes, they are trying to serve this personnel shortage, which, however, has long been lacking. Even thought the long plan to produce international practicing lawyers from undergraduate and postgraduate students has been being on the way as mentioned earlier, there is also urgent need to provide some knowledge on international legal forum to current practitioners both lawyers and non lawyers in the community. Some of the outstanding education institutes, then, are managing to provide significant education in this area of international legal matters. They are coming with short course and medium course where students will obtain the diploma after going through the course. Some institutes provide Master Degree to a successful student who implements their long term course. One of the programs which is interesting and should be mentioned here is the Master of Arts in Economic Law 2000 provided by Chulalongkorn University. This program is designed under the consideration of the drastic trend of global economy, monetary transaction and international investment under the scope of the World Trade Organization (WTO) and the scope of regional groups such as European Union, NAFTA, AFTA, APEC, etc. In the section of economy and business of the country, the relation between law and financial & investment market has been increasing in every moment. The new creation of cooperation between private institution in investment, establishment of business organization, business negotiation, utility of new financial instruments needs to be approached with competent particular business concept together with legal perception as well. Due to the limited numbers of experts in this area, the program is, therefore, designed to prepare and produce both lawyers and businessmen who have conception and knowledge in global and regional economic law for the global business community. This program eliminates obligation, which the legal curriculum structure is always created significantly toward legal technical profession whereby a law student neglects the concept of other areas outside legal scope. This program, therefore, combines relation between law and economics in the sense of correspondence, which will create a candidate who gains vision and integrated concept and can serve the community in the mist of the changing of the

global economic phenomenon. Qualification of a candidate who will be admitted to study is: graduated with law, economics, business administration or accounting degree and having working experience in those fields not less than 3 years or if graduated with other degree than those three, a candidate must have no less than 4 years experience or if a candidate has postgraduate degree, experience is not needed. However, a student who has less legal basic must take special courses on particular fundamental legal subjects approved by the Board of Postgraduate Study. The time of fulfillment is not more than 4 years and not less than 2 years. A student must accumulate at least 39 credits to graduate with the master degree. The curriculum subjects are as follows:

Compulsory subjects with total of 27credits	
Economic Analysis of Law	3 credits
Relationship between Law and Business	3 credits
Contract Negotiation and Drafting	3 credits
Law relating to Business Organization and Management	3 credits
Tax and Business	3 credits
Laws relating to International Business	3 credits
Settlement of Disputes in Business	3 credits
Criminal Law and Economic Crimes	3 credits
International Economic Regulations	3 credits
Noncompulsory subjects with total of 9 credits	
Law of International Commercial Transactions	3 credits
Tax and International Business	3 credits
Business Tax Planning	3 credits
Laws relating to Business Finance	3 credits
Law on Marketing Planning	3 credits
Law relating to Industry and Labor	3 credits
Law relating to Commercial Credits	3 credits
Law on Securities	3 credits
Law on Derivatives and Derivative Market	3 credits
Law on Business Planning	3 credits
Important Business Contracts	3 credits
Law and Contract for Real Estate Development	3 credits

Intellectual Property Law	3 credits
Natural Resources, Environment and Law	3 credits

Thesis with total of 12 credits

Individual Study with total of 3 credits

Individual Study on Economic Law and Business Law	3 credits

In the meantime, the Bar Association has also been working on transcending its curriculum to meet new legal environment. The Bar, upon legal experts brainstorming, concluded the future legal trends and created norms toward those tendencies to produce more productive lawyers to the community. Upon the conclusion, the appropriate lawyer is compared with social architect or engineer. He or she should have very keen legal knowledge in particular area. Economic, social, and politic matters will be important for all lawyers to understand those situations and its implications. Lawyers, therefore, will be able to manage to establish justice in the society, which is the step toward elevating quality and integrity of Thai community. Lawyers should be able to protect state interest and sovereignty. Toward the qualified lawyer, there must be concrete strategies to improve and establish legal knowledge and merit of all lawyers to serve the country. With those strategies, the Bar has concluded as follows:

There should be enough special curriculums in specific area of law for specialized lawyers such as in the area of Intellectual Property Law, International Trade Law, Administrative Law or Private International Law.

The way of learning and testing the students in Legal Education of the Bar must be differentiated from those in the universities. The curriculum must provide the opportunities of learning the law, understanding and applying them appropriately. The way of utilizing the law must be focused on its merit besides earning of interest.

The curriculum must also be concentrate on morality, ethical conduct and social responsibility. The improvement in this matter must be intense for the foreseen professional practices.

Legal Education of the Bar must expand its objective to cover all law practitioners. Not like in the past that the institute only provided legal personnel for the community of judicial, public prosecutor and litigation lawyer, the institute must presently serve the community out of the court as well by producing appropriate lawyers such as legal consultants to the field of business transaction.

From those educational moves of the Bar, we can foresee good pictures of legal profession of Thai Community in the future. If the Bar fulfills its expectation including the supplementation from legal educational markets in many learning Institutes, standard of Thai lawyer will be even better and levitate the society up to the anticipation.

V. Legal Profession Training and Development

Thai judiciary within the Ministry of Justice has long been providing legal training in its institution. Because judiciary is crowded with legal nobles and in the past there were not many numbers of judiciary, they, therefore, trained new comers individually. The way of training was more like on-the-job training where a candidate who was approved to work in the judiciary would be posted as Judge-Trainee and would be trained by a senior judge who had experience more than 20 years of judicial work. A senior judge would train a Judge-Trainee word for word by the reason of efficient training. The senior judge would have responsibility to contribute job operation knowledge in all areas from adjudicating through delivering a judgment. And more importantly, a senior judge would emphasize also on judicial ethic along the way besides professional training. Lectures and seminars were provided by high ranking and prominent justices from time to time. However, when there were the increasing numbers of new comers into the institute, the Ministry of Justice, therefore, established its Training and Seminar Division under supervision of the Office of the Judicial Affairs. This Training and Seminar Division had the main duty to organize training for Judge-Trainees before sending them to be trained with senior judges. In 1987, the Ministry of Justice realized that it was necessary to enhance judge and court personnel's knowledge and capability by means of pre-service training and continuing education programs in order to assist them in discharging their duties more efficiently and effectively. And due to the fact that the Training and Seminar Division had a very limited capability of manpower and place not enough to implement all training programs intended by the Ministry, therefore, under distinguished idea of Honorable Justice Sophon Ratanakorn, Permanent Secretary of the Ministry of Justice at that time, the Ministry of Justice eventually proposed and got approval from the government the project to expand and develop the Training and Seminar Division to be the Judicial Training Institute. Judicial Training Institute, nowadays, has its own twenty-storied building including more than 5 seminar rooms and 70 air-conditioning bedrooms for participants throughout the country to attend long term training. The Judicial Training Institute is annually running

various kinds of both legal and related knowledge training and seminar for all level of judicial personnel not only a Judge-Trainee training. Normally, more than 40 courses of training and seminar are conducted for judges in each year. These courses are combined with short term (3 to 10 days) and long term (4 months) courses.

Chinese Judicial System and its Reform*

Xin Chunying**
Zheng Qiang***

I. The People's Judicial System of China

In China, the structure of judicial system is as following: the judicial organization is the People's Court and it has the judicial power; the procuratorial organization is the People's Procuratorate and it has the procuratorial power; the investigative organizations are the Public Security Organization and the State Security Organization, and they have the investigative powers; the judicial administrative organization is in charge of the affairs of judicial administration according to law. The prison is subject to the judicial administrative organization. The special organizations of lawyer, notary, people's mediation and arbitration are all directed by the administrative organization. The above state organizations and social groups that are authorized by law have made up a complete People's Judicial System of China.

II. The Position of the People's Judicial System

According to the Constitution of the People's Republic of China, all the powers of state belong to the people and the organizations by which the people exercise their state powers are the National People's Congress and its Standing Committee. The administrative organization (government), judicial organization (court) and procuratorial organization (procuratorate) are elected and supervised by the People's Congress. In the central state organizations, the State Council is the Central People's Government and the executive organization of the supreme organization of state power, and it is also the supreme administrative organization; the Supreme People's Court is the supreme judicial organization; the Supreme People's Procuratorate is the legal

* Broadly speaking, there are four fields of Chinese judicial system concerning judicial systems of Mainland China, Hong Kong, Macao and Taiwan. This article just refers to the judicial system of Mainland China.

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supervision organization and the supreme procuratorial organization. Besides, the Central Military Committee is the Supreme military organization in charge of the military force of the state. The above four organizations lay equal and enjoy the equal positions to each other.

The functional departments such as the Ministry of Public Security, the Ministry of State Security and the Ministry of Justice are set up in the State Council. They are administrative organizations. But the former two are regarded as organizations with justice character for their functions such as criminal investigation, detention, preliminary examination and arrest; the Ministry of Justice is also with character of justice for its function of being in charge of prison, lawyer, notary and people's mediation.

At the local level, the People's Court, Procuratorate and Government enjoy the same equal positions and they directed by the People's Congress of their stages and must report their works to it. The departments of Public Security and Judicial Administrative are set up in the People's Government of different local stages. But in fact, the positions of the People's Court and Procuratorate of different levels are something lower than the their counterparts of the People's Government.

III. The System of Judicial Organization

According to the Constitution and the Organic Law of the People's Court, the People's Court is the judicial organization of the state. Its organic system is to set up: the local People's Courts of different levels, the Special People's Courts and the Supreme People's Court.

The local People's Courts of different levels are:

1. The grass-roots People's Courts which are set up at the levels of county, autonomous county, the city without district and the district of city;
2. The Intermediate People's Courts which are set up at the levels of prefecture, city and autonomous state;
3. The higher People's Courts which are set up at the levels of Province, Autonomous Regions and municipalities directly under the Central Government.

For the convenience of the people's litigation, some People's Tribunals are set

up in the grassroots People's Court as detached tribunals, rather than a trial grade. The special People's Courts are Military Court and the other special courts. The Military Courts are set up in three grades:

1. The grass-roots Military Court;
2. The Military Courts of greater military region and categories of troops.
3. The Military Court of the People's Liberation Army of China.
4. The other special courts are the Maritime Court and Railroad Transportation Court.
5. The Supreme People's Court is set up in capital Beijing.

The order of the system of the People's Courts ranking from the bottom to the top is very important and showing that the relationship between the upper and lower courts is the relation of instances, namely, the relation of trial supervision.

IV. The System of Procuratorial Organization

According to the Constitution and the Organic Law of the People's Procuratorate, the People's Procuratorate is the legal supervision organization of state. Its system consists of the Supreme People's Procuratorate, the local People's Procuratorate of different grades and some special procuratorates such as the Military Procuratorate. The Supreme People's Procuratorate is set up in capital Beijing. The local People's Procuratorate of different grades are :

1. The Procuratorates of province, autonomous region and municipality directly under the Central Government;
2. The Sub-procuratorates of province, autonomous region and municipality directly under the Central Government;
3. The procuratorates of autonomous prefecture, municipality directly under province and autonomous region;
4. The procuratorates of county, autonomous county, city and district under municipality.

The sub-procuratorate of province, autonomous region and municipality directly under the Central Government, is a grade of procuratorate, not the detached one. The provincial and county procuratorates can set up their detached organizations in

mineral, farming and forest areas depending on the practical requirements. The prosecutor's office can be set up as detached organization in town and township by the procuratorates of county, city and district under municipality according to the decision of the Supreme People's Procuratorate. The special People's Procuratorate are the Military Procuratorate, Railroad Transportation Procuratorate which are corresponding to the special people's courts. The system of the People's Procuratorates ranks from the top to the bottom, just as the general practice in some other countries of the world. The Supreme People's Procuratorate directs the work of the local People's Procuratorates of different levels and the work of the special People's Procuratorates, while, the upper grades direct the work of the lower grades. The relationship between the People's Procuratorates is to direct and to be directed.

V. The System of Investigative Organizations

According to Chinese law, the Public Security Organizations and the State Security Organization are parts of the administrative organizations of the country. They are in charge of the criminal investigations and become the state investigative organizations by nature. The system of them is as following:

1. The system of the public security organizations are:

(a) The Ministry of Public Security in the State Council is in charge of the security of whole country;

(b) The Public Security Bureaus are set up in every provinces, autonomous regions and municipalities directly under the Central Government;

(c) The public security sub bureaus are set up in the district of municipalities directly under the Central Government;

(d) The public departments are set up in prefectures, autonomous prefectures;

(e) The Public Security Bureaus are set up in cities, counties and the autonomous counties;

(f) The Public Security Sub bureaus are set up in the districts of cities;

(g) The Grassroots Public Security Station or the Special Public Security Officer is set up in residential districts of city and the towns of county;

(h) The Grassroots Public Security Station is not a grade of public security organizations.

(i) The upper directs the lower among the public security organizations.

The Public Security Bureau (or departments) is also found in the systems of railway, transportation, civil aviation, forest and so on. The safeguard organization is established in army system too.

2. The system of the State Security Organizations is:

(a) The Ministry of State Security is set up in State Council;

(b) The State Security Bureaus are set up in every province, autonomous regions and municipalities directly under the Central Government;

(c) Some State Security organizations or officers are set up in the other areas according to the practical requirements.

(d) The relationship between the upper and the lower of the state security organizations is to direct and to be directed.

VI. The System of Judicial Administrative Organizations

According to the law of China, the judicial administrative organization is the necessary part of state administrative organization and in charge of the judicial administration of the country. Its system is as following:

1. The Ministry of Justice is set up in the State Council and in charge of the works of the whole country in prison, lawyer, grassroots legal service, notary and the people's mediation and so on and so forth;
2. The Bureau of Justice is set up in every provinces, autonomous regions and municipalities directly under the Central Government;
3. The Bureau of Justice is also established in the districts of municipalities directly under the Central Government, prefectures, states and cities;
4. The Bureau of Justice is set up in counties and autonomous counties;
5. The Group of Justice or Judicial Assistant are set up in town, township and the residential district of greater cities.

The system and tasks of the judicial administrative organization is still in the process of development and has not gotten a stable form. All the organizations of prison, lawyer, notary, the people's mediation and arbitration are equal and have no the vertical leaderships to each other.

VII. The Qualification and Appointment of Judicial Personnel

In China, the judicial personnel means persons who do the job of justice. According to Article 94 of Criminal Law of China, the judicial personnel refers to the persons who have duty to investigate, prosecute, judge, control and oversee the prisoners. Generally speaking, the judicial personnel means judges and prosecutors in China.

In the Law of Judges and the Law of Prosecutors promulgated on 28th February 1995, the qualification and appointment of judges and prosecutors are provided in the same way as following:

1. The necessary qualifications for judges and prosecutors

(a) To have the nationality of P.R.C.

(b) More than 23 years old;

(c) To support the Constitution of P.R.C.

(d) To have good political and professional qualification and good conduct;

(e) In good health;

(f) To graduate from college law major or the other majors but have the knowledge of law and to have worked more than 2 years; or those obtain the bachelor's degree on law and has worked more than 1 year; but those who obtain master or doctor degree will not be subject to the limitations of working seniority.

2. Provisions for judges and prosecutors currently in office

For those, who had been appointed as judges or prosecutors before the Law of Judges and the Law of Prosecutors came into force and do not possess the qualifications of the record of formal schooling provided, must be trained in order to satisfy the demands of the two laws within time limit; or, they will be dismissed or removed to other positions.

3. Provisions for not be allowed to be judges and prosecutors

The laws of judges and prosecutors provide that the following persons are not allowed to be judges and prosecutors:

(a) Used to be punished for crime;

(b) Used to be discharged from public employment.

VIII. The Guiding Thought and Basic Principle of the People's Judicial System

According to the current Constitution of P.R.C., the guiding thought of the People's Judicial System is Marxism and its Chinese edition the theory of Deng Xiaoping. Under the guidance of the rationale of state and law of Marxism, in accordance with the Constitution of P.R.C., from the very situation of China, summing up the experiences of the People's Justice, the Judicial System of China at present is built up. Following aspects shows the concrete meaning:

1. To uphold the thought line of emancipating the mind and seeking the truth from facts;
2. To uphold the rationale that the superstructure serves the economic basis;
3. To uphold the uniform principle of legal systems;
4. To uphold the aim of serving the people wholeheartedly;
5. To uphold the leadership of the Communist Party.

The basic principles of the People's Judicial System can be summed up from the Constitution, the organic laws of the People's Courts and the Procuratorates, the procedural law and some other law concerned. They are:

1. The principle of judicial sovereignty;
2. The principle of judicial uniform;
3. The principle of judicial independence;
4. The principle of judicial check;
5. The principle of judicial democracy;
6. The principle of judicial equal;
7. The principle of judicial realism;
8. The principle of judicial convenience.

IX. The Judicial Procedural System

In China the judicial procedural system is divided as three parts, the civil procedure, criminal procedure and the administrative procedure. The making of the codes of procedural law was in the past 20 years in China. For a long time before that, the judicial activities just followed the principles provided by the constitution, organic

laws of court and procuratorate and experiences summed up from the judicial practices.

The first procedural code was criminal procedural law made in 1979 and revised in 1996. The revised edition of the criminal procedural code has 225 articles and embodies the spirit of reform for making use of the advanced legal experiences of the west countries such as the doctrine of the presumption of innocence and so on.

As to the civil procedure, the courts handled cases with experiences of trial practice for a long time until 1982 when the Code of Civil Procedure (trial implementation) was promulgated. The code was revised in 1991 with 270 articles, more concrete and easy to be used.

The Code of Administrative Procedure was made in 1989 and came into force in 1990 which was the regulation for the purpose so-called " citizen sues officials". But this code is something too simple and needs a new revision based on the experiences of practice.

X. The Three Main Aspects of Chinese Judicial Systems

There are three main aspects in Chinese judicial systems.

1. The Civil Judicial System

The civil judicial system consists of the systems such as notary, mediation, lawyer, arbitration, adjudication and implementation around the handle of civil and economic disputes, or the so-called civil and commercial cases.

2. The Criminal Judicial System

The criminal judicial system, around the handle of criminal cases, consists of the systems such as investigation, public prosecution, adjudication, lawyer and prison which include the contents of the prevention of offence, prosecution of the criminal suspect, testifying the crime, punishment to convicts and reforming the convicts to new persons.

3. The Administrative Judicial System

The administrative judicial system, around the handle of administrative cases,

consists of the systems of administrative review, adjudication and lawyer.

XI. The Problems with the Current Judicial System

It's not a long time since Chinese judicial system was set up. So it is far more from complement in many aspects. The problems it has mainly are as following:

1. The Localization of Judicial Power

The local protectionism and the department protectionism are so serious that they make the local courts can not exercise their judicial powers independently and make lots of effective judgements, especially the judgements of economic cases, couldn't be enforced. Why is it so terrible? Because all the local courts were produced by the local power organs the people's congress and the local judges are all appointed by the local power organs too. Meanwhile, the local departments of the Communist Party and governments can control and manage those judges and the financial budgets of the local courts. So the local departments of the Communist Party and governments have many approaches to intervene the particular cases which should be handled independently by the courts. In this way, the local courts have become the tools just to be used to defend the local or department interests. For example, due to its personnel and matter interests are all subject to the railroad department, people regard the Railroad Transportation Courts as the watchdogs of the railroad department.

2. The Administration of Adjudication

The appearances of the administration of adjudication are in two aspects, which exist within the court and between the grades of trial. The former is that the court leaders, who do not try case directly, make the judgement for the case by the administrative powers and lead to the separation of trial and judgement. The last one is that the lower courts often report the hard case they think to the upper before the judgement is made, and the upper courts often direct how the case should be judged to the lower court, in this way the appeal right of litigants are damaged completely.

3. The generalization of judges' quality

The organic laws of the People's Court and the People's Procuratorate only make general regulations for the judges and prosecutors, but have no concrete professional, moral and mental demands in a long time. The judges and prosecutors are treated as common cadres of Party and government department with lower treatments. This leads the generalization of judge's quality. Though the laws of judges and prosecutors promulgated in 1995 made some concrete provisions for the qualifications of judges and prosecutors, there needs some time to be strictly carried out of them.

4. The decentralization of the judicial administration

The court, procuratorate, investigative and judicial organizations have their own systems which are independent to each other. The qualification exams for the judges, prosecutors and lawyers are held respectively, without the uniform demands and standards. There are no uniform legal safeguards to judges and prosecutors also remains a problem.

5. The formalization of the supervision from the People' Congress

The mechanism of supervision from the People's Congress is not perfect at present. One of the channels for the people to appeal is to write to the department for letter set in the People's Congress. But the department is called as "the transfer post" for it has no positive power to help the people who write to it but transport the letters which rarely noticed by the court. The litigants often feel very difficult to find the access to justice.

XII. The Thinking of Reform

The above problems are seriously damaging not only the judicial system of China, but also the society and people's psychology as well. So it has aroused the great attentions of Chinese people and their leading levels. The media have reported many important meetings, documents and reform measures on the subject. We can say that , corresponding to the tide of the world today, a movement of judicial reform has begun in China. Many reform thinking have been made for the present judicial system, the following are the consensus reached by the most people.

1. To reform the personnel and financial system of the judicial system, namely the persons, finance and equipment must be controlled vertically by the Central in order to safeguard the judicial organizations to exercise their functional powers independently and fairly and get rid of the local intervene.

2. For overcoming the protectionism from the local and government department, a proper reform must be done to the establishment of the courts. For example, to make some judicial areas to which some circuits can be set up to handle the appeal cases and review the death penalty cases. To close all the special courts except the military court, the cases handled by them can be tried by the circuit trial from the higher court or the special trials.

3. To strengthen the grassroots courts, their detached trials, the organizations of arbitration and mediation, in order to exert their functions completely. The aim is to make most civil and commercial cases be solved by arbitration or mediation, to make most criminal cases be tried in the grassroots courts, that the courts up the intermediate grades could focus on the important and complicated cases for the first instance and appeal. To raise the qualifications of judges and prosecutors and decrease the amounts of them, while increase the amounts of judicial assistants.

4. To set up some special trials in the grassroots court, such as the trials respectively for juvenile, family and employment. To assimilate some persons form social associations as part- time judges and they can handle special cases together with the full-time judges.

The Legal and Judicial Reform during the Renovation Period in Vietnam

Dao Tri Uc*

I. The Reform of the Vietnamese Legal System

Since the "Doi moi" Policy was carried out in Vietnam in 1986, we Progressively have been abolishing the bureaucratic centralized economic management and building the multi-sectoral commodity economy regulated by the market mechanism. The 1992 Constitution of the Socialist Republic of Vietnam officially provides the construction of the market economy in Vietnam. The Vietnamese State has striven to build a Jurisdictional State of the People and has implemented the policy on the international and regional integration. In that context, the role of the law is being heightened.

The Law during the social renovation period in Vietnam deeply attached to the new task of the State and closely associated with politics. It is the fact that the law not only plays the "Service" role but also is use as the symbol of value of the sound policies.

The Vietnamese Law at present performs the function to establish the minimum sphere of power and define adequately the rights for the people those are under the management in order to prevent false interventions, abuse authority and oppression upon them. To meet this demand, our State has set up the Administrative Courts and the Economic Courts belonging to the People's Court system. And thus, justice and democracy - the two legal fundamental principles, are essential basis for the activities of the State and the whole legal system, which are regulated in the constitutional law, the administrative law, civil law, labour law, economic law, criminal law, criminal procedure, etc.

It is important to apply the law as the "Service" tool for the Vietnamese market in order to *create the equal legal position within the traders*. Our 1992 Constitution (Article 22) provides the primary legal basic for this matter. Furthermore, the Congress

of the Vietnamese Communist Party held at the beginning of the year 2001 will put emphasis on every economic sector that is a component element of our economy.

Keeping up the regular operation market, it needs to *undertake the essential conditions for the market*. Primarily, that requires to create and maintain a fundamental infrastructure for the production. It is vital for productive activity, which is known as the service, the information service, the prediction, the advertising service, the insurance, the intermediary, the credit, the payment, etc. *Those mentioned are the infrastructure of the market*.

The role of the law on conducting the market in the transferred economic period is concretized into the following directions :

a) The regulated extent : Provisions are immediately provided to create the general legal situations for the establishment and activity of the market.

For this question, we are building the long term legislative strategy and promulgating the laws adapted the needs of the market economy. For example, the new promulgated laws will be more specific and of clear-cut; promulgating the under-legal documents is restricted; the regional and international intergrations are speeded up; the priority is to undertake the agreements with the other members of ASEAN and APEC and to step up the pace of getting admitted to the WTO.

b) Continually perfecting the internal laws and the law on foreign investment creates the general legal basis for all the enterprises.

In June 2000, the National Assembly of the Socialist Republic of Vietnam amended the Law on Foreign Investment in Vietnam, which establishes the more favorable legal environment for the foreign investors who want to invest in Vietnam. The new amendment and supplement in the Law on Foreign Investment are shown in the following aspects:

Firstly, one of the things that the foreign investors pay much attention on is how to reduce the risk in business to the lowest level. The Law on Foreign Investment in Vietnam is amended to allow the enterprises with foreign-owned capital to buy foreign currency at the Commercial Banks for irregular exchange or other exchange permitted;

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to strengthen the measures, assuring the balance of foreign currency for some special investment projects; to give favourable conditions for enterprises to open a bank account in the foreign countries and use it and to mortgage the value of the land use right; to define more clearly the responsibility of compensation and site clearance and to apply irretroative principle for ensuring the interest of investors if there is a legal amendment to implement the guarantee and assure the investment of the important projects; to provide the flexible mechanism in applying the external laws and settling the disputes in accordance with international customary laws.

Secondly, the law widens the self-control right in management and business operation of the enterprises with foreign-owned capital and abolishes the inessential intervention of the State in their regular actions. At present, the laws intend to be amended making the enterprises with foreign owned capital and Vietnamese enterprises closer and establishing the equal legal basis on management for both forms in accordance with the provisions of the current law on enterprises and the international customary laws. The law restricts the sphere applied "being of one mind" principle in management and activity of the joint-venture enterprises, and extends the right of initiative of the investors in selecting the investment forms.

Thirdly, applying the foreign laws is regulated as a completely new norm: "Foreign investment in Vietnam is abided by this law and the concerned provisions of the Vietnamese laws. In case, Vietnamese laws have no provisions for a particular situation, the parties are able to come to an agreement in a written contract to apply the foreign laws, for which this application are not bound to oppose the fundamental principles of the Vietnamese laws".

c) Establishing the legal basis adapted more suitably to the market for the credit and banking system.

We have promulgated a lot of legal documents which regulate the activities of the State Banks and Credit organs in order to construct and to implement effectively the national monetary policy; to heighten the State administration on currency and the banking operations; to develop the multi-sectoral market economy under the control of the State; to assure the interest of the State and protect the legitimate rights and interest of organizations and individuals; to ensure the credit organs to operate strongly, safely and effectively and to carry out the national monetary policy.

The Vietnamese State has policies that give priority to mobilizing the internal sources and make use of maximum of the external sources; that extent the credit investment and free all the productive capacity; that take advantage of the potentiality of all the economic sectors and ensure the decisive role of the state owned enterprises, the socialist orientation and the national sovereignty; that guarantee the financial system and national currency; that help developing the cooperation and integration into the World; that undertake the national industrialization and modernization; that meet the demand of social - economic development; and that ensure the national security and defense and improve its people's life.

d) Conducting the capital market.

At present, we are carrying out the equitisation of state-owned enterprises. The Article 1 of the Government decree N^0 28/CP dated 7 March 1996 on turning the state-owned enterprises in to the shared companies is defined: The Equitisation is "to turn a state-owned enterprise into a shared company", This issue is defined more clearly in the circular N^0 50 TC/TCDN of the Finance Ministry dated 30 August 1996: "Turning the state-owned enterprises into the shared companies (called equitisation) is a measure to change an enterprise owned by State into the one owned by multi-sectors, in which a portion is possessed by State".

After the pilot programme, on 7 May 1996 the Government promulgated Decree N^0 28/CP and officially stimulated "turning the state-owned enterprises into equitised enterprises" and the aim of the equitisation is stated as: (i) Mobilizing capital (to be used for development and transferring the technology) from the executives and workers of enterprises as well as from domestic and overseas individuals and economic entities. (ii) The favourable conditions are given to the contributed capital owners and the enterprises' staffs to have their shares and to play their roles as the masters of their companies, which create the motive for running business effectively in those enterprises.

The equitisation of the state-owned enterprises is the huge policy of Vietnamese State and its Party. It was initially guidelined and conducted by our Government in Pilot Programme in 1992 and up to 31 December 1998, 116 state-owned enterprises had been equitised in whole country, in the which there are 19 central enterprises, 90 local enterprises and 7 enterprises belonged to the General Company 91. Up to now, over 100 state-owned enterprises have registered to equitise their companies during 1999 - 2000

period.

e) Conducting the activity of the insurance.

In accordance with the policy on developing the market economy, the Government promulgated Decree N^0 100/CP dated on 18 December 1993 on the insurance business. The Decree permits the multi-sectoral enterprises to take part in the insurance business.

Recently, after the foundation, some insurance companies quickly establish their branches and representative offices in many parts of the country and operate stably to meet the varied insurance needs of the customers. The existence of various typed insurance companies and the competition permitted by laws among them create the positive effects, make the proportion of insurance fees reasonable, reflect just cost of the insurance and give advantage to the customers who buy the insurance. The competition causes the good service of the insurance companies towards the customers is paid attention and the service now is better than it was when there was only one company operated.

At the same time, the foundation of the joint-venture insurance companies have been carried out between Vietnamese parties and foreign parties. When we have favourable condition, the companies with foreign-owned 100% capital will be permitted to operate.

f) Creating the legal basis to fight effectively against the unwholesome business undertaken.

Anti-monopoly and anti-unwholesome competition is a completely new question in Vietnam. Recently, Vietnam has no particular legal documents on anti-unwholesome competition or anti-monopoly. However, provisions for this matter; which are scattered in various legal documents, have established a wholesome competed environment and fought against abusing the superiority to control and threaten the market.

The stated laws against the illicit competition mentioned above derive from the fundamental principles of the Civil Law and due to a visibly increasing problem that requires the justice power to protect the equal competition, and thus the competition now becomes a specific area of laws. On the basis of the general principal provisions in

Constitution, the Civil Code of Vietnam is regulated the general fundamental principles, in which the basic principles of respect for state interest, public interests and the legitimate rights and interests of other persons (Article 2), respect for good morals and traditions (Article 4), respect for personal rights (Article 5) are provided. All the activities of the competition are bound to follow these basic principles. To violate the personal rights, to take full use of prestige to cause damage for others, to disparage, to coerce and threaten partners are all considered as the illicit competed deeds violating the basis principles of the Civil Code. The Trade Law of Vietnam concretizes those basic principles into the activities of traders, in which there are two articles (Article 8 and 9) related directly to the activities of competition.

Different from the law on anti-unwholesome competition, the law on anti-monopoly is said a new area of laws in Vietnam and this law seems to have no tradition. During the war, the economy was bought to a standstill, so the national capitalist had no chance and no conditions to develop that's why the capital concentration led to monopoly did not occurred.

The purpose for considering, permitting or registering the foreign trade contracts, contracts of transferring technology, issuance of Investment Licence and giving a permission for the direct competitive tender files of the foreign companies is to eliminate the unfavourable clauses for Vietnam. The first stamp of the law on anti-monopoly is found in provisions of the Civil Code (Articles 809 - 825) and they are concretized by Decree 45/1998/N§-CP dated 1 July 1998 on transferring technology. Article 13 of this Decree has provisions on eliminating and against competition. For example, the party who receives the technology is bound to buy particular materials, the dimension of production, consumer market and technology level of the receiving party is eliminated. When the National Office of Industrial Property of the Ministry of Science Technology and Environment looks into the contract of transferring technology and finds out any of its provisions that are limitations of unfair competitions, it will act the same functions with cartels in the world. The illicit competition and taking use of superiority in the Vietnamese market nowadays has been raising sharply, so researching, promulgating and implementing the law on competition and anti-monopoly become necessary. The recent regulations scattered in various legal documents have established the basic principles for a new future area of laws, the law on competition and anti-monopoly. If there is a stable law for competition, the tendency of "criminalize"

economic-civil disputes will be decreased and therefore, the interests of victims are protected and it will deter and educate the competitors to compete frankly and honestly, and for which the competited activities fully perform their economic functions. Lately we commenced to draft the law on anti-unwholesome competition and anti-monopoly.

The law has an important role in implementing the social policy.

The 1992 Constitution reflects a new pace of development of the Vietnamese society : *to institutionalize the social policy of the State* is to carry out a progressive, consistent social policy for people and placing people in the central position of the social economic strategy.

The social policies as well as any state policies, which can only be implemented and performed the most thoroughly and effectively when they are defined in the particular legal forms, are ensured to be carried out by adequate legal mechanism.

For meeting two those demands, the legal system of the State for social issues must be established as a legal institution that consists of rules governed various fields of the society, however, these social policies are applied connectedly together.

In recent years, the State has supplemented and promulgated new legal documents directly related to issues on the social policies. They are the 1992 Constitution, the Labour Code; Law on Health Care for the People; Law on Environment Protection, Land Law; some new legal documents on salary, social insurance, management of religious activities, fighting against the social evils, etc. All these legal documents include the new contents and directions for the social policies in our renovation period at present. However, the implementation now meets many difficulties. Some policies cannot be carried out because on one hand the solutions for those issues are not synchronous, thorough and consistent or the solutions for settling a particular problem do not suit for other matters of the social policies in general or implementing some of the social policies is not consistent with the implementing the economic policy or other policies of the State. On other hand the renovation for this area of law is an unsystematic style of work. Furthermore, there has no law to regulate many fields of the social policy. Perfecting the legal system for regulating the issues of the social policy intends to concretize the constitutional provisions and the effective legal mechanism is created to implement those regulations in the real life.

II. The Judicial Reform in Vietnam

Nowadays, our State pays much attention to the judicial reform. The judicial reform lays out some important tasks during the process of building a jurisdictional State in our country.

Continuously building and perfecting the legal documents are the basis for the activities of the judicial organs in the judicial system.

Strengthening the system of judicial organs.

First the jurisdiction of the People's Courts is re-delimited, then, step by step the jurisdiction of the District Courts is widened. The structure and activity of the People's. Procuracy are reformed with the intention to strengthen the prosecution and the judicial supervision. This renovation of the investigative organs tends to establish a unique system, so the recent dispersed system does not exist (At present we have the investigative organs of the Ministry of the Interior, the People's Procuracy and the Ministry of Defence).

The organs of legal enforcement and the reciprocal judicial organs are also reformed with the intention to train and to re-educate judges, court clerks, inspectors, procurators, notaries, experts and lawyers so that they have a good political quality, good morals, public-spirited and impartiality and good professional knowledge ensuring that mechanism is pure and strong.

The basic characteristic of the implementing legal organs of the State is that it is a system of institutions belonging to the State machine and this system performs the basic function of the State to protect the society on the basis of laws and legal principles. Only these organs present the state power to use the state enforced measures and the jurisdiction (of the civil case, criminal case, ...) is only of Courts.

The judicial system - a unique system of the proceeding process.

This conclusion is based on the interactive and systematic relation within the processes and the social facts.

Article 127 of the 1992 Constitution stipulates a system of judicial organs and then defines:

"At the local, establishing the suitable organizations of the people in

order to settle the breach of law and small disputes of the people stipulated by law".

The Constitution regulates the role of jurisdiction only belonging to the courts: "The People's Supreme Courts, the Local Courts, the Military Courts and other courts defined by law are the judicial organs of the Socialist Republic of Vietnam" (Article 127). Article 72 of the Constitution (concretized in Article 10 of the Criminal Procedure Code) affirms "No person will be held guilty until a judgement of " Guilty "by the court has come into legal force". So the systematic and institutional characteristics of the judicial system themselves show the central role of courts (of jurisdiction) in the judicial system.

That role and position of the jurisdiction present firstly its legal characteristic of all the various measures which the society and the State use to settle the disputes and interest contradiction.

Because of that important role, progressively not only the civil disputes and criminal cases, but also the administrative, labour, economic and commercial disputes have been turned to the legal procedure of the courts.

- Role of intermediate conciliation in the judicial actions.
- Procedure for direct negociation in the prosecution of the Vietnamese international arbitration.
- Criminal procedure.
- Court procedure for civil cases (Civil Procedure)
- Procedure for settling the economic cases (Economic Procedure)
- Legal Procedure of the Vietnamese international arbitration Centre to the Chamber of Commerce and Industry on Vietnam.

In our Country, at present, the Reform of the judical system is carried out on the basis of the following principles:

- \- Strengthening more favourable and democratic procedures for citizens.
- \- Ensuring the fairness and justice in trial
- \- Ensuring the independence for the Judges.
- Strengthening the inspecting role of the People's Supreme Courts in which

there are the role to sump - up the real trials and to give the direction for applying the laws.

In 1995, under the decision of the Minister of Justice, we set up the **Centre for Training Judges and other Judicial Office** as a Department of Hanoi Law University. After its foundation, the Centre held many courses for the judges of local courts to foster the judges' professional abilities, to specialise in settling the economic, labour and administrative cases. The participants of these courses who were the judges from Criminal or Civil Courts are now appointed to the new courts in the People's Courts system such as Economic Courts, Labour Courts and Administrative Courts. The Centre also organized a training judges course for the Provincial Courts secretary all over the country. There were over 100 learners in this in-service course. The Prime Minister promulgated Decision N^0 34/1998/Q§-TTg dated 10 February 1998 on establishing the **Training Judicial Offices School**. The Decision points out the school is situated in Hanoi, dependent on the Ministry of Justice and has task to train judges and other judicial offices in intensive and in-service forms. At present, the School is building its structure and organization to get ready for fulfilling its function and its task assigned. It continues the training judges course for over 100 learners who were changed from the Centre for Training Judges and Other Judicial Office. In the future, judges, lawyers, notaries, etc will be definitely trained here. Now in Vietnam, there is Court Professional School dependent on the People's Supreme Court. The School has tasks to foster and to improve the professional abilities and skills for the Judges in power.

Nowadays, we are carrying out the 2nd term of office on the judges appointment, grasping thoroughly the renovation spirit and the important significance of the regulation of the appointment and implementing seriously, strictly the process of selecting and appointing judges regulated by law. Up to now, the President has appointed 914 judges for the Provincial Courts (in which there are 48 chief-judges, 13 chief-judges ad interim, 110 deputy chief-judges) and 2265 judges, for the District Courts (in which there are 534 chief-judges and 485 deputy chief-judges). Those judges of the People's Local Courts who were selected and appointed by the President in comparison to the judges determined in the decision of the Standing Committee of the National Assembly are short of 1488 judges, in more details: at the provincial level 1118 there were 925, there are short of 193 (17%), at the district level 3515, there were 2220,

there are short of 1295 (36%).

The activities of lawyers:

The Bar association is established in order to give legal advice to the citizens and to the organizations regulated by the Constitution, by the Ordinance on Organization of Bar Association and other legal provisions of the Socialist Republic of Vietnam. The lawyers Association has task to protect the legitimate rights and interests of citizens and organizations, to ensure the Law and the Socialist regime. In Vietnam, lawyers work for a professional organization called the Bar Association.

Each province or city controlled by the centre or an administration at the same rank has a Bar Association. Bar Associations are encouraged, assisted, guided, controlled and supervised by the State in accordance with the provisions of the Ordinance on Organization of Bar Association and the detail provisions of the Regulation (promulgated attachment with Decree No 15-HDDBT dated 21 February by the Ministerial Council)

Since the Ordinance on Organization of Bar Association was promulgated, 61 Bar Associations have been established and they, step by step, have strengthened, stabilized and developed.

Bar Associations meet an important demand to give legal advice for citizens and organizations they contribute noticeably to protecting the legitimate rights and interests of the citizens and organizations, to implementing the principle to live and to work under the constitution and laws, and to building a jurisdictional State of and for the people.

To catch up with the new requirements for social development, the legal programme of the National Assembly laid down the amendment of the 1987 Ordinance on organization of Bar Association.

At present, the necessary formalities to be submitted to the Government for consideration and to the Standing Committee of the National Assembly to promulgate a new Ordinance have been quickly and fully worked out.

Statistics of Bar Associations is estimated upto June 2000.

Order	Bar Association	Branches	Lawyer							Qualification	
			Total	Province	Practising	Trainee	Specialized	Secondment	Teacher	Bachelor	Equal-qualification
1	In the whole country : 61	68	1471	321	1060	411	919	553	173	1125	218
2	%		100	22	72	28	62	38	12	85	15

Source : Ministry of Justice

Reform of the Judicial System in Japan: Current State and Theory- Training of Legal Practitioners -

Akira Rokusya*

Introduction

Presently, discussions over reforms of the judicial system are being held across a broad range of areas within the Japanese society. Directly triggering these discussions was the Diet's passing of a law for establishing a council specifically for deliberating over such reforms and presenting its opinions in June of last year. The Council has been energetically studying this issue under the watchful eye of the public and has periodically made public the content of its discussions. A look at the discussions shows that the opinions to be made public in July of next year may change part of the Japanese judicial system - a system that has remained basically untouched for about 100 years.

Below, I will study the number of legal practitioners and method of training them - the issue discussed particularly often in current deliberations over reforms of the judicial system - based on the point of how the modern judicial system of Japan was born.

I. Process of Formation of Judicial System in Japan

About 130 years ago, in 1868, the government known as the "Edo Bakufu" was toppled and the new Meiji Government was born. The Edo Bakufu Government had held power for over 260 years and had maintained an isolationist policy shutting the country off from the rest of the world for almost all of that period. During that period of isolation, Japan fell behind Europe in modernizing its society and industry.

The U.S. and European countries had pressured the Edo Bakufu before its collapse to end its isolationist policy. At that time, Japan concluded treaties with five countries, including the U.S. and Great Britain, committing itself to open up for trade.

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These treaties were extremely disadvantageous to Japan in two points. The first point was the recognition of extraterritoriality, that is, Japan's waiver of its right to prosecute foreign nationals committing crimes in Japan under Japanese law. The second point was the surrender of tariff autonomy, that is, Japan's waiver of its right to set its own tariff rates.

The Japanese Government did everything in its power to negotiate to reverse these unequal treaties with the U.S., Great Britain, etc. The U.S., Great Britain, and others declined the requests from Japan to amend the treaties giving as their reasons Japan's lack of a modern judicial system. Faced with this, the Government hurried to put together a modern judicial system.

Japan, however, lacked the foundations for creating a judicial system acceptable to the U.S. and Great Britain as a result of its long years of isolation. Japan consequently dispatched numerous officials to Europe to study its laws and brought over legal scholars from France and Germany to Japan to provide assistance. This enabled it to set up its own judicial system in a short time and prodded Great Britain and other countries to accede to its requests to amend the treaties. What happened to cause the entire country to start talking about reforming this judicial system about 100 years later in modern day Japan?

The judicial system is comprised of three elements. The first is the establishment of a code of laws, the second the establishment of a trial system, and the third the establishment of a method for training legal practitioners.

Many of the starting points of the debate in modern day Japan can be found in the process of formation of the three elements of the judicial system.

1. Establishment of code of laws

About 130 years ago, when the Japanese Government was trying to establish its code of laws, it first studied and decided to introduce the code of laws of France. Germany still did not have a uniform code of laws. In swift succession, however, Prussia won a war with France, unified Germany, and created a new code of laws. Viewing these successes, Japan reversed its policy and decided to introduce the German code of laws. As a result, the then Japanese Constitution, Civil Code, Criminal Code, Commercial Code, Code of Civil Procedure, and Code of Criminal Procedure were established under the influence of German law.

Later, after the end of the Second World War, the Constitution and the Code of

Criminal Procedure were completely overhauled under the strong influence of American law. The Code of Civil Procedure was totally revamped to bring it in line with modern day Japanese civil trial practice in 1996. The amendments were put in force in 1998.

2. Establishment of trial system

The trial system was first established around 1879 with reference to the French system. Next, in 1890, the Court Organization Law was established with reference to German law. This law continued up until the Second World War.

The Court Organization Law organized the courts into the Supreme Court at the top, the Appellate Courts under it, and the District Courts and Sub-District Courts under them. The public prosecutors were organized into Public Prosecutors Offices provided in each court. The judges and public prosecutors were therefore members of the same organization in the broad sense. The Minister of Justice held the right of monitoring the two in the administration of the judiciary. During those times, courts separate from the Ministry of Justice called "Administrative Courts" examined administrative cases.

Judges were appointed and promoted by a framework called the "career system". Under the career system, a judge was appointed while young and gradually rose inside the organization. This system continues up to the present. This system is however also currently under study.

In Japan, legal experts take the lead in administration of the law. In 1923, however, the jury system was introduced for some criminal cases. The jury system was born in England and inherited by the Americans, so this would mean that Japan introduced a non-German or French judicial system at that time. The jury system, however, was suspended in 1943 as the Second World War intensified. Even after the end of the war, it remained suspended and has continued so even today. The best approach to a system of participation of the public in the law, as typified by the jury system, is also being studied as part of today's reform of the judicial system.

When the Second World War ended, the philosophy of the judicial system of the U.S., as best represented by the right of the courts to examine unconstitutionality, entered Japan. The division of the judges and public prosecutors in the organizational structure also became important.

The new Court Organization Law organized the courts into the Supreme Court at the top, followed by the High Courts, the District Courts, and the Summary Courts.

The Administrative Courts were abolished and all administrative cases examined by the ordinary courts. Further, the Family Courts were newly established to examine family cases and juvenile cases. The Family Courts are parallel to the District Courts and under the Higher Courts.

The public prosecutors are organized under the Public Prosecutors Office Law into the Minister of Justice at the top followed by the Supreme Public Prosecutors Office, the High Public Prosecutors Office, the District Public Prosecutors Office, and the Sub-District Public Prosecutors Office.

The method by which judges are appointed in Japan is set down in the Constitution of Japan. The Chief Justice of the Supreme Court is appointed by the Emperor by nomination of the Cabinet. The other 14 Supreme Court Justices are appointed by the Cabinet. The judges of the High Courts and other judges of courts other than the Supreme Court are appointed from a list of nominees of the Supreme Court. As opposed to this, the right to appoint public prosecutors rests with the Cabinet for the managing public prosecutors and the Minister of Justice for the general public prosecutors.

The judges and public prosecutors are never chosen by election.

The remuneration given to judges and public prosecutors is made much higher than that of general civil servants. This is believed to be one reason why almost no corruption of judges or public prosecutors has been seen in Japan. In today's Japan, corruption being taken up as a theme in the reform of the judicial system is inconceivable.

3. Establishment of method of training legal practitioners

The Meiji Government also hurried to train legal practitioners, the persons making up the judiciary, in order to reverse the treaties. By 1889, just over 20 years after the formation of the Meiji Government, over 1000 judges had been trained and stationed around the country. Public prosecutors were trained along with the judges.

Before the Second World War, Japan trained judges and public prosecutors separate from the attorneys. Today, the three are trained together. Persons desiring to become one of the three are required to pass a national bar examination and then train at and graduate from the Legal Training and Research Institute before becoming a judge, public prosecutor, or attorney. The training used to extend over a two-year period for a long time, but was shortened to 18 months in 1999. The system of training persons

passing the bar examination at the Legal Training and Research Institute has continued for about 50 years.

Reform of the system for training legal practitioners has become one of the central themes of the today's reforms of the judicial system.

II. Deliberations in Judicial Reform Council

The Japanese Diet established a law in June of last year establishing a council for reform of the judicial system. In July of last year, the Judicial Reform Council was established under the Cabinet.

Under this law, the Council is empowered to conduct investigations and deliberations over the basic measures required for reforming the judicial system and improvement of the foundations of the judicial system. The investigations and deliberations cover the role which the judiciary should play in Japanese society in the 21st century, the realization of a judicial system more accessible to the public, the involvement of the public in the judiciary, and the best approach to legal practitioners and the strengthening of their roles and functions.

The Government explained to the Diet the need for reform of the judicial system stating that Japanese society will become more complex, varied and international in the 21st century and that the judicial will become more crucial for Japan to transform from an advanced-control type society into a post-check type society.

The 13 members of the Council were appointed by the Cabinet with the consent of the Diet. Among the 13, six are persons with experience in the practice of the law and legal scholars, while seven are knowledgeable in other fields. The members are listed in Attachment 1. Several among the persons with experience in the practice of law have experience as judges and public prosecutors. None are currently employed as such however.

The Prime Minister himself is in charge of the Council. Such a Council is of the highest type. Its opinions are respected and the chances for those opinions to be put into effect are high.

The Council is obligated by law to submit its opinions regarding reform of the judicial system within two years. The Council was established in July of last year, so more than one year has already passed. An interim report is scheduled to be released in November of this year. The debate is reaching its conclusion.

The Council first pinpointed the problems in the current judicial system. Its

findings are summarized in the points at issue of Attachment 2. According to these, the fields which the Judicial Reform Council is investigating and deliberating on are divided into those relating to the institutional framework and those relating to the human framework. These correspond to the improvement of the trial system and the method of training legal practitioners among the three elements constituting the judicial system. The improvement of the code of laws is not being investigated or deliberated on by the Council.

III. System for Training Legal Practitioners in Japan - Current State and Direction of Reforms

The Judicial Reform Council is continuing with its investigations and deliberations on the points at issue of Attachment 2. Among these, the points of by how much to increase the number of legal practitioners and how to train legal practitioners appear to be being hotly debated. Therefore, I would like to point out the problems in and consider the training of legal practitioners.

First, let us consider the issue of the number of legal practitioners in Japan.

As seen in Attachment 3, the number of judges has less than doubled from 1890 to today, 110 years later. The current population of Japan is 126 million. Around 1890, it was probably about 40 million. The population increased about three-fold. When considering the fact that Japanese society has evolved during that period and the number of cases of a complicated nature and difficult resolution has increased, this increase in the number of judges is just too small. The number of attorneys has increased more than 10-fold in the same period. As shown in Attachment 4, however, when compared with other countries, the number of legal practitioners per 100,000 population is low - both in judges and attorneys. Even leaving out the litigious U.S., the ratio of practitioners in Japan is still lower than the European countries which it based its laws on 100 years ago.

As a result, as shown in Attachment 5, the number of cases where attorneys have been appointed has fallen. Under the Code of Civil Procedure, presence of attorneys is not compulsory in a civil suit. Further, according to Attachment 6, even when a legal problem arises, consultation with an attorney is not necessarily general practice among the Japanese. Further, looking at Attachment 7, there are issues where the shortage of legal practitioners is perhaps being met by occupations related to the law.

Further, according to Attachment 8, legal practitioners, in particular attorneys, tend to concentrate in the large cities. This trend has become further advanced recently.

Therefore, second, we will study the reasons why there are so few legal practitioners in Japan and the problems associated with this. The reason for the low number of legal practitioners in Japan will become clear from Attachment 3. The number of legal practitioners is governed by the number of persons passing the bar examination. The number of persons passing the bar examination has in the past been artificially sharply limited.

As a result, in present day Japan, for general students desiring to become legal practitioners, passing the bar examination has become extremely difficult with just ordinary effort. Challenging the bar examination has become a dangerous choice best described as a gamble. Therefore, some of the persons with appropriate qualities to serve as legal practitioners are believed to be avoiding the risk of the bar examination and selecting other occupations. Further, most persons wishing to challenge the bar examination pay exorbitant tuitions to preparatory schools providing special instruction on how to take the bar examination since they cannot pass the examination by just the legal courses in their universities.

Further, in Japan, broad study at the university is not required as a qualification for taking the bar examination. Therefore, persons taking the bar examination seldom study legal courses other than those aspects of the law covered by the bar examination, history, foreign languages, or the natural sciences. Consequently, the number of persons passing the bar examination who lack a general education, are not proficient in a foreign language, and lack the ability to negotiate with foreigners appears to have increased.

In view of the above situation, the Judicial Reform Council is studying the introduction of a new system under which Japan would establish a new graduate school specialized in educating legal practitioners in Japan, providing students with education in the legal practice, and having graduates take the bar examination. Further, the Council is studying a proposal to increase the number of persons passing the new bar examination after the establishment of the graduate school for training legal practitioners to an annual 3000. Last year, exactly 1000 persons passed the bar examination. Up to just 10 years ago, around 500 persons passed the exam each year. If six times the number of persons pass the bar examination every year and make their way into society, how will the Japanese judicial system change?

Conclusion

Under current conditions in Japan, not much progress tends to be made in reforms in any field. The pace of reform of judicial system can be said to be particularly slow. Major reforms are being promoted for the method of training legal practitioners in the judicial system. This is considerably difficult to realize, however. The reason is that it is necessary to simultaneously sharply increase the number of legal practitioners and improve their quality.

Legal practitioners deal with people in vulnerable positions in society or persons in distress in the performance of their jobs, so training is inherently difficult. I believe that when considering the reforms of the judicial system, in particular the method of training legal practitioners, we should aim at creating a system able to train legal practitioners who can understand the feelings of vulnerable people or persons in distress and can be truly trusted by the public and therefore we educators in the schools of law of the universities should more seriously tackle this issue.

LIST OF ATTACHMENTS

Attachment 1. List of Members of Judicial Reform Council

Attachment 2. Points at Issue in Judicial Reform Council

Attachment 3. Trends in Population of Legal Profession in Japan

Attachment 4. Comparison of Number of Attorneys and Judges in Different Countries

Attachment 5. Change in Rate of Appointment of Attorneys in Ordinary Civil Suits of First Instance

Attachment 6. Persons Consulted When Legal Problems Arise

Attachment 7. Number of Jobs in Legal Profession and Related Occupations in Japan

Attachment 8. Concentration of Attorneys and Judges in Large Cities of Japan

[Attachment 1]

List of Members of Judicial Reform Council
(Titles as of Time of Appointment)

Chairman:
Sato, Koji, Professor of Law, Kyoto University (Constitution)

Vice-chairman:
Takeshita, Morio, Professor Emeritus, Hitotsubashi University and President, Surugadai University (Code of Civil Procedure)

Members:
Ishii, Koji, President, Ishii Iron Works Co., Ltd. and Chairman of Economic Law Committee of Tokyo Chamber of Commerce and Industry

Inoue, Masahito, Professor of Law, Tokyo University (Code of Criminal Procedure)

Kitamura, Keiko, Dean of Faculty of Commerce, Chuo University

Sono, Ayako, Author

Takagi, Tsuyoshi, Vice-president, Japanese Trade Union Confederation

Torii, Yasuhiko, President, Keio University

Nakabo, Kohei, President of Resolution and Collection Organization, Attorney at Law, and former Chairman of Japanese Federation of Bar Associations

Fujita, Kozo, Attorney at Law and Former President of Hiroshima High Court

Mizuhara, Toshihiro, Attorney at Law and Former Superintending Prosecutor of Nagoya High Public Prosecutors Office

Yamamoto, Masaru, Executive Vice-president, Tokyo Electric Power Co., Inc. and Chairman of Planning Subcommittee, Economic Law Committee, Federation of Economic Organizations

Yoshioka, Hatsuko, Secretary-general, Shufuren (Housewives Association)

[Attachment 2]

Points at Issue in Judicial Reform Council

1. Institutional Framework

(1) Realization of judiciary more readily accessible to public
- o Best approach to attorneys
  - o Expansion of access to attorneys
  - o Measures to cope with the shortage of attorneys
  - o Relationship of attorneys and the quasi-legal professions, etc.
- o Expansion of the legal aid system
- o Best approach to alternative dispute resolution (ADR) besides court proceedings
- o Best approach to open/offering of information on administration of justice

(2) Best approach to civil justice responding to public expectation
- o Expansion of access to the court of justice
- o Reinforcement and speed up of civil trials
- o Measures to cope with the cases which require professional knowledge
- o Best approach to civil execution system
- o Reinforcement of the administration check function by the administration of justice

(3) Best approach to criminal justice responding to public expectation
- o Investigation/trial procedures corresponding to the new era
- o Reinforcement and speed up of criminal trials
- o Public defense counsel of suspects/defendants

(4) Public participation in administration of justice
- o Jury system/magistrate system
- o Best approach to system of public participation in the administration of justice

2. Human Framework

(1) Judiciary population and the judicial training system
- o Proper increase of judiciary population
- o Best approach to judicial training system
  - o Best approach to national bar examination system and judicial training system
  - o Role of education at university law schools

(2) Hosoichigen system for leveling legal profession

(3) Reinforcement of personnel system of the court of justice/prosecutors office

3. Others
- o Preparation for internationalization of the administration of justice
- o Securing a judicial budge

[Attachment 3]
Material provided by Supreme Court and
Materials of Judicial Reform Council

Trends in Population of Legal Profession in Japan
(Persons, Percentage)

Year	Judges	Public prosecutors	Attorneys	Total	Persons passing bar exam	Rate of passage of bar exam ****	Graduates of LL.B *****
1980	1,531	481	1,345	3,357			
1912	1,129	390	2,036	3,555			
1926	1,136	564	5,938	7,638			
1945	1,189	658	Unk.	Unk.			
1949	2,139*	1,667**	5,855	9,661	265***	10.31	
1950	2,261	1,675	5,862	9,798	269	9.59	
1960	2,387	1,761	6,439	10,587	345	4.13	15,000
1970	2,605	1,983	8,888	13,476	507	2.51	31,000
1980	2,747	2,092	11,759	16,598	486	1.70	39,000
1989	2,818	2,092	13,900	18,810	506	2.18	43,000
1995	2,864	2,092	15,540	20,496	740	3.01	50,000
1999	2,949	2,223	17,283	22,455	1000	2.94	50,000

* Including number of summary court judges
** Including number of assistant public prosecutors
*** Bar examination starting from this year
**** Persons passing test/applicants x 100
***** Numbers of graduates of LL.B.

[Attachment 4]
Material provided by Supreme Court

Comparison of Number of Attorneys and Judges in Different Countries
(1997) (Number of Persons)

	U.S.	U.K.	Germany	France	Japan
No. of attorneys	906,611	80,868	85,105	29,395	16,398
No. per 100,000 population	339.87	154.89	103.77	50.15	13.0
No. of judges	30,888	3170	20,999	4,900	2,899
No. per 100,000 population	11.6	6.07	25.6	8.4	2.3

[Attachment 5]
Material provided by Supreme Court

Change in Rate of Appointment of Attorneys in Ordinary Civil Suits of First Instance
- Rate of Cases in Which Attorneys Were Appointed for Both Plaintiff and Defendant -
(Percentage)

	District courts		Summary courts	
	1963 / 1998		1963 / 1998	
Tokyo District Court	58.3	43.6	30.4	1.2
Osaka District Court	48.8	43.6	21.9	1.1
Nationwide	39.2	40.9	11.1	1.2

[Attachment 6]
Material provided by Supreme Court

Persons Consulted When Legal Problems Arise
- Survey of Council for Reform of Judicial Training System (1994) -
(Multiple Answers Allowed, Percentage)

Acquaintances, friends, and relatives	36.9
Attorneys and bar associations	21.0
National, municipal, or other government offices	12.1
Superiors and colleagues at work	10.3
Tax accountants and judicial scriveners	10.0
Consultation offices	5.1
Courts	5.1

[Attachment 7]
Material provided by Supreme Court

Number of Jobs in Legal Profession and Related Occupations in Japan
(1999) (Number of Persons)

Legal profession	22,455	(*20,730)
Tax accountants	63,806	
Administrative scrivener	35,393	
Judicial scrivener	17,097	
Certified public accountants	12,168	
Patent agents	4,141	

* Number excluding summary court judges and assistant public prosecutors

[Attachment 8]
Material provided by Supreme Court

Concentration of Attorneys and Judges in Large Cities of Japan
(Number of Persons)

	Attorneys		Judges	
	1963 / 1998		1963 / 1998	
Tokyo	3,242	7,786	488	699
Osaka	833	2,368	238	312
Nationwide	6,932	16,852	2,445	2,881

Discussion in Session I

Outline of the Discussion

There was consensus among the participants on the importance of judicial reform, which has been taking place since the late 1990s in each country, as a key to success in today's world. It was pointed out that international organizations such as the IMF have played a significant role not only in restructuring economic related laws but also in reforming judiciary systems in developing countries. However, some participants expressed doubt regarding this fact, insisting that solutions had to be found from within rather than from the outside. It is true that the international organizations are making efforts to achieve uniformity throughout the world so that the trade can be carried out smoothly in the economy of each and every country. Nevertheless, it was stressed that to the extent that local needs prevail against economic globalization, the reforms must be thoroughly indigenous.

What are the reasons for delays in civil cases in Asian countries? Some participants argued that one reason was economic crisis and another debts. Others opposed this interpretation, arguing that the main reason was the laxity in the implementation of laws and court procedures, claiming that this was why civil procedure reforms and the establishment of special courts were frequently observed in the 1990s in Asian countries.

Special courts such as the commercial court in Indonesia and the intellectual property court in Thailand were established to deal with matters that were expected to arise with the establishment of a more market-oriented economic system. The problem pointed out was how judges, who were not familiar with economic and financial corporate business, could issue decisions on these cases. From this point view, the device of appointing ad hoc judges for particular cases gathered the interest of participants. For example, Thailand has introduced some ADR schemes involving specialists (non lawyers) into procedures not only as witnesses, but also as a kind of arbitrator.

In addition, special quasi-judicial institutions such as the National Human Rights Commission in India have come into existence in the 1990s, and Indonesia is

preparing to form a special court which will have some jurisdiction on human rights. However, the jurisdictions and procedures used in these courts are often different from ordinary courts. For example, the National Human Rights Commission in India, like international human rights instruments, is limited to issuing recommendations. The Ombudsman system is a part of good governance, although it seems that the political pressures are heavy and little action has been taken in the case of Indonesia.

There was also debate on the prosecutors system (procuracy) in Vietnam and China. The system was adopted based on the system used in the former Soviet Union. The prosecutors in those countries do not only act as the public prosecution for crimes, but also supervise the judgments in civil cases, administrative cases and other cases. This is quite different from the system used in market economy countries. In socialist countries, many people perceive the procuracy, rather than the judiciary, as the top level of the judicial system. It is clear that this system is quite different from the Ombudsman system, too.

A question was raised from the floor regarding the proper balance between control over the judiciary and its independence. One answer was to have a Code of Judicial Conduct, and the other was to ensure that proceedings were open in order to permit oversight by citizens.

Finally, one participant stated in order to achieve reform in the judicial system from the perspective of judicial independence, transparency, accountability and the quality of the legal profession, what is needed is something called inventiveness. This point appears to give meaning to exchanging views on judicial reforms.

SESSION II

COUNTRY REPORTS ON JUDICIAL REFORM (2)

The Philippine Judicial System

Raul Pangalangan[*]

I. A Brief History of the Philippine Judiciary

Before the advent of legal regimes patterned after the Spanish and American models, the Philippines had an indigenous system of laws enforced by political units called the *barangays* presided over by local chieftains (*datus*). Settlement of disputes was governed by both written and unwritten laws, consisting of ancient codes and oral customs and traditions. Peace and order were maintained through these indigenous procedures and sometimes spiritual beliefs on divine punishment and retribution guided the communities in determining the guilt of individuals during public trials.[1]

Under both the Spanish and American regimes, the first courts were established under the laws of the colonial governments. The Spaniards created a supreme court in Manila, the *Audencia Real,* to check the powers of the Governor General; the *Audencia Territorial* of Manila which is an appellate court; and the Courts of First Instance and justice of the peace courts which were established in the territories where the Spaniards exercised sovereignty.[2]

The above-mentioned courts were abolished during the American regime and replaced with a new system modeled after the American judicial system. A Supreme Court was created consisting of a Chief Justice and six associate justices who were appointed by the Philippine Commission and held office at its pleasure. In each province there was one court of first instance, and additional judges also served wherever they were assigned. The *1935 Constitution* provided for an independent judiciary as the rule making power was transferred from the Legislature to the Supreme Court, to promulgate rules concerning pleading, practice and procedure in all courts and the admission to the practice of law.

When the Imperial Forces of Japan occupied the Philippines during the Second

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World War, courts remained in existence with no substantial change in their organization and jurisdiction, with the Supreme Court able to preserve its impartiality and legal consistency under a military administration until the restoration of normalcy after the war.[3]

II. The Philippine Judiciary

Judicial power, as defined under the *1987 Constitution of the Philippines*, includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.[4] This power is vested in the Supreme Court created by the Constitution and such other lower courts established pursuant to laws enacted by Congress.[5] Appointments to the judiciary are limited to natural-born Filipino citizens and members of the Philippine Bar, and a Member of the Supreme Court must be at least forty years old and must have been for fifteen years or more a judge of the lower court or engaged in the practice of law in the Philippines.[6] A Judicial and Bar Council, under the supervision of the Supreme Court, was created by the Constitution to screen and recommend applicants to judicial positions who must possess proven competence, integrity and independence.[7] The Office of the Court Administrator, on the other hand, assists the Supreme Court in the supervision and administration of the lower courts and their personnel.[8]

At the apex of the Philippine judicial system is the *Supreme Court* composed of a Chief Justice and fourteen Associate Justices, who may sit *en banc* or in its discretion, in divisions of three, five or seven members.[9] The *Court of Appeals* is headed by a Presiding Justice with fifty one (51) Associate Justices as members, which exercises its functions and duties through seventeen divisions, each division composed of three members, and sits *en banc* only for the purpose of exercising administrative, ceremonial or other non-adjudicatory functions.[10]

Regional Trial Courts are established in the thirteen judicial regions of the country, of which at present there are 950 existing courts, each branch presided over by a judge. *Metropolitan Trial Courts*, *Municipal Trial Courts*, *Municipal Trial Courts in Cities*, and *Municipal Circuit Trial Courts* are the first level courts. There are presently 82 Metropolitan Trial Courts in Metro Manila for the National Capital Region; 141

Municipal Trial Courts in Cities; 425 Municipal Trial Courts; and 476 Municipal Circuit Trial Courts.[11] For Muslim Filipinos in Mindanao, *Shari'a District* and *Circuit Courts* were created and established in five judicial regions therein, to adjudicate disputes and matters under the provisions of the *Code of Muslim Personal Laws of the Philippines*.[12] The *Shari'a Appellate Court* was also created to exclusively decide appeals from cases tried in the Shari'a District Courts.[13]

A special court, the *Sandiganbayan*, was established to try and decide cases of graft and corruption committed by certain public officers or employees in relation to their office, as provided by law. It is composed of a Presiding Justice and fourteen Associate Justices, and sits in divisions of three members each and the divisions may sit at the same time.[14] Another special court is the *Court of Tax Appeals* which adjudicates appeals involving internal revenue and customs cases in order to assist the government in the expeditious collection of taxes as well as provide a forum for taxpayers against unjust and erroneous tax assessments and impositions. It is composed of a Presiding Judge and two Associate Judges.[15]

In addition to the regular trial courts, Congress recently created *Family Courts* which shall be established in every province and city. These courts shall exclusively try criminal cases involving minor offenders or victims, civil cases for annulment of marriage, marital property relations, as well as petitions for guardianship, custody, adoption, and all other cases of domestic violence committed against women and children.[16] Also, in the interest of a speedy and efficient administration of justice, selected regional trial courts have been designated to try and decide exclusively "heinous crimes" such as kidnapping, robbery, illegal drugs possession and sale, violations of intellectual property laws and libel.[17]

Lastly, there are the quasi-judicial agencies which derive their quasi-judicial powers either from the Constitution or their respective charters. There are three constitutional commissions: the Civil Service Commission, the Commission on Audit and the Commission on Elections.[18] Other quasi-judicial agencies are the Central Board of Assessment Appeals, Securities and Exchange Commission, Office of the President, Land Registration Authority, Social Security Commission, Civil Aeronautics Board, Bureau of Patents, Trademarks and Technology Transfer, National Electrification Administration, Energy Regulatory Board, National Telecommunications Commission, Department of Agrarian Reform (in implementation of the Comprehensive Agrarian Reform Law), Government Service Insurance System, Employees Compensation

Commission, Agricultural Inventions Board, Insurance Commission, Board of Investments, and Construction Industry Arbitration Commission.[19]

The *barangay* as a local government unit also fulfills an important function in the judicial process. Disputes in certain cases have to be brought initially before the *barangay* conciliation panel as a pre-condition for filing an action in court. The parties therein may also agree in writing to submit the case for arbitration to the said panel. An amicable settlement or arbitration award may be enforced by execution as any court decision within the prescribed period.[20]

III. The Department of Justice

The Department of Justice is the government's principal law agency which serves as its legal counsel and prosecution arm. Its functions include investigation of crimes; prosecution of offenders; administration of the correctional system; implementation of laws on the admission and stay of aliens, citizenship, land titling system, and settlement of land problems involving small landowners and members of indigenous cultural minorities; and provision of free legal services to indigent citizens.[21]

The Department is organized into the Department Proper and other constituent units. The Department Proper is composed of the Office of the Secretary and the Undersecretaries, Technical and Administrative Service, Financial Management Service, Legal Staff and the Office of the Chief State Prosecutor. Other constituent units of the Department are: Office of the Government Corporate Counsel, National Bureau of Investigation, Public Attorney's Office, Board of Pardons and Parole, Parole and Probation Administration, Bureau of Corrections, Land Registration Authority, Bureau of Immigration, and, Commission on the Settlement of Land Problems.

The National Prosecution Service is under the supervision and control of the Secretary of Justice, and is comprised by the Prosecution Staff in the Office of the Secretary of Justice, the Regional State Prosecution Offices, the Provincial and City Fiscal's Offices. The Regional State Prosecution Offices, and Provincial and City Fiscal's Offices are primarily responsible for the investigation and prosecution of all cases involving violations of penal laws.[22]

IV. Lawyers and Legal Education

In the Philippines, the practice of law is a privilege granted only to Filipino

citizens. An applicant for admission to the Philippine Bar must be a resident of the Philippines, at least 21 years of age and of good moral character who must show that no charges against him or her involving moral turpitude have been filed or pending in court.[23] The required educational qualifications is a bachelor's degree in arts and sciences (pre-law course) and the four-year law course with completed courses on civil law, commercial law, remedial law, criminal law, public and private international law, political law, labor and social legislation, medical jurisprudence, taxation and legal ethics.[24] In addition, the applicant must obtain a passing average in the bar examinations administered annually by the Supreme Court.[25]

The Integrated Bar of the Philippines (IBP) is the official national organization of lawyers and membership therein is compulsory. This compulsory membership and financial support to the IBP is aimed at elevating the standards of the legal profession, improving the administration of justice, and enabling the bar to discharge its public responsibility more effectively.[26] For judges, there is the Philippine Judges Association composed of incumbent Regional Trial Court judges, which aims to improve the administration of justice and maintain a high standard of integrity, industry, and competence in the judiciary. Lawyers may also join voluntary bar associations such as the Philippine Bar Association, the Philippine Lawyer's Association, The Trial Lawyer's Association of the Philippines, Vanguard of the Philippine Constitution, All Asia Bar Association, Catholic Lawyers' Guild of the Philippines, Philippine Society of International Law, and Women Lawyers Circle.

Professional ethics is governed by the rules provided in the Constitution, laws enacted by Congress, court decisions, and rules promulgated by the Supreme Court concerning the discipline of lawyers and judges. Lawyers holding certain public offices, including those of the President, Members of Congress, other executive officers, governors, city and municipal mayors, judges and other judicial officials or employees, are prohibited by either the Constitution or legislation to engage in the practice of law during their incumbency.[27] The Supreme Court exercises disciplinary powers over all lawyers throughout the country, about three-fourths of which are based in Metro Manila.[28] It has meted out various actions against erring members of the Philippine Bar, ranging from fine and censure to the severe punishment of disbarment.

Lawyers are expected to fulfill their sworn duties to the public, the Court, the Bar, and the client. They should promote respect for law, keep abreast of legal developments, uphold the integrity of the profession, respect the court and judicial

officers, assist in the speedy and efficient administration of justice, and serve their clients with candor, fairness, loyalty, diligence and competence. Failure to live up to these standards may subject the lawyer to criminal, civil or administrative liability in the proper cases.

V. Court Procedures

On the Supreme Court is vested the power to promulgate rules concerning the protection and enforcement of constitutional rights, pleading and practice and procedure in all courts, which shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase or modify substantive rights.[29] Rules of procedure of special courts and quasi-judicial bodies shall remain effective unless disapproved by the Supreme Court.[30]

A policy of strict observance of the hierarchical organization of courts is maintained by the Supreme Court which shall not entertain direct resort to it unless the redress desired cannot be obtained in the appropriate courts or where exceptional and compelling circumstances justify availment of a remedy within and calling for its primary jurisdiction.[31] Jurisdiction of the various courts are conferred by laws enacted by Congress, without prejudice to the jurisdiction of the Supreme Court in those cases enumerated in the Constitution.[32]

The *1997 Rules of Civil Procedure* amended Rules 1-71 of the *1964 Rules of Court,* as amended, incorporating therein the new rules on venue of real and personal actions, the additional requirement for certification under oath by the principal party against "forum-shopping" in initiatory pleadings as well as petitions before the Supreme Court and the Court of Appeals, execution of judgment pending appeal, and procedure on appeal, among others.

The *Rules of Criminal Procedure* also underwent revision just recently. The *Revised Rules of Criminal Procedure* has been approved by the Supreme Court and shall take effect on December 1, 2000 after its publication. Changes were made in the provisions governing the prosecution of civil action in criminal cases by disallowing any counter-claim, cross-claim or third party complaint of the accused which cause of action may be litigated in a separate action, but making an exception for criminal cases involving violations of the Bouncing Checks Law where the civil action shall always be instituted with the criminal case. Other amendments include the incorporation of the

provisions of the "Speedy Trial Act of 1998" under Rule 119 (Trial); the addition of a provision under Rule 114 (Bail) which entitles the accused to challenge the validity of his arrest or the legality of the arrest warrant, the absence of irregularity of the preliminary investigation, despite his having applied for bail, provided he raises such objections before entering his plea; and a new provision stating that the prosecution for violation of special laws shall be governed by the provisions thereof (Sec. 5, Rule 110).

Rules of Family Courts are still being drafted by a Committee formed by the Supreme Court, which are expected "to effect important changes in the disposition and handling of cases concerning child abuse, petitions for custody and adoption, summary judicial proceedings under the Family Code, criminal cases involving children, and domestic violence against women and children, among others."[33]

Judicial processes in the Philippines have been criticized as slow and delivery of justice often delayed. The clogging of court dockets remains a formidable challenge to the present Supreme Court leadership which has already begun implementing the needed reforms and actions to address the problems identified. Current measures being undertaken are geared not only at preparing the Philippine judiciary for the e-technology global society but also at further strengthening the independence and integrity of the judiciary as a co-equal branch of government.

VI. Current Trends and Developments

The present leadership of the Supreme Court is determined to effect genuine and relevant reforms in the judiciary towards improving significantly its efficiency and effectiveness. Imbued with missionary zeal, the Supreme Court under the competent leadership of Mr. Chief Justice Hilario G. Davide, Jr., set forth the following objectives and goals: (1) Dispose of the existing backlog of cases in all courts; (2) Study and address the causes of failure to observe the periods to decide cases mandated by the Constitution; (3) Vigorously implement the programs of the Philippine Judicial Academy (PHILJA) on conducting continuing legal education on a broader basis; (4) Engage in long-range planning, especially as regards allocation of human and other resources, to effectively respond to changes while preserving the core values of the Judiciary; (5) Promote alternative modes of dispute resolution; (6) Exact strict observance of working hours; and (7) Maximize available court technology and adopt new and appropriate forms of technology.[34]

The *Technical Assistance (TA) to the Philippine Judiciary on Justice and*

Development Project is being implemented by the Supreme Court with the assistance of the United Nations Development Programme (UNDP) and the National Economic Development Authority (NEDA). The objective of the Project is to "strengthen the quality of justice in the Philippines by enhancing the efficiency and effectiveness of the Philippine Judiciary in the next millennium towards sustainable human development." The technical assistance phase aims to "enhance the efficiency and administration capacity of the Philippine Judiciary by undertaking a system-wide institutional research on its judicial rules, processes and operating systems focusing on how to further increase access to justice, especially the poor and disadvantaged."[35]

At the forefront of judicial reforms implementation is the *Philippine Judicial Academy* established and institutionalized as the educational arm of the Supreme Court. On top of its seminars, symposia and training for judges, lawyers and court personnel under the continuing judicial education program, PHILJA also assisted the Supreme Court in the implementation of the Pilot Project on Mediation/Conciliation (funded by the SC-UNDP and PHIL EXPORTS-TAPS) under the court-led alternative dispute resolution (ADR) program in the Regional Trial Courts of Mandaluyong City and Valenzuela City, and, in the completion of the "Management Study of the Judiciary" (a component of the SC-UNDP Technical Assistance). The policy of promoting the different modes of alternative dispute resolution (ADR) was adopted in response to the dramatic increase in the number of cases filed in court, the growing complexity of these cases, the need for specialized and technical knowledge in their resolution, and the inherent limitations of litigation.

In 1999, the PHILJA conducted the following: "Training the Trainors Program for Family Courts," "Gender-Sensitivity Seminar for the Philippine Judiciary," "Judges Workshop on the Anti-Domestic Violence Bill," Workshop on Video-Conferencing in Trials of Cases Involving the Testimony of Children," and "Securities and Exchange Commission (SEC) Program." To strengthen the managerial capabilities of judges, PHILJA has introduced seminars on "Total Quality Management (TQM) for Trial Court Judges and Court Personnel." In relation to this, the Supreme Court has devised the Trial Court Performance Standards (TPCS) which set five key areas by which judges would gauge their performance: access to justice; expedition and timeliness; equality, fairness and integrity; independence and accountability; and public trust and performance.

Aside from the UNDP, other private international agencies are actively

supporting the Philippine judicial reform program: United States Agency for International Development (USAID) through The Asia Foundation (TAF) and the Trade Investment Policy Analysis and Advocacy Support (TAPS). The World Bank is also extending its support on the belief that an effective, efficient and fair judicial system would contribute to improved economic performance.

Just recently, the Supreme Court approved the Rules on Mandatory Continuing Legal Education (MCLE) recommended by the Integrated Bar of the Philippines, which will require lawyers to complete 36 hours of continuing legal education in legal ethics, trial and pre-trial skills, alternative dispute resolution, updates on substantive and procedural laws and jurisprudence, legal writing and oral advocacy, and international law and international conventions. The MCLE program is envisioned to develop "a legal profession that provides quality, ethical, accessible and cost-effective legal service to our people."[36]

Conclusion

The foregoing judicial reforms are but a necessary and integral aspect of the current reforms in the Philippine public sector. The goal is to transform the Philippine judiciary into a dynamic and responsive branch of government that is "independent, effective and efficient, and worthy of public trust and confidence." [37] As a democratic and republican State, the Philippines is committed to promote social justice in all phases of national development.[38] And as a member of the community of nations seeking new ways to strengthen and enhance their democratic institutions, it reaffirms its commitment to the rule of law and equality of all peoples.

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[1] Teodoro A. Agoncillo, *History of the Filipino People,* pp. 41-44.

[2] Jose R. bengson, *The Philippine Judicial System*, pp. 6-8.

[3] Agoncillo, *supra*, p. 395; Conrado Benitez, *History of the Philippines*, p. 499.

[4] Article VIII, Section 1, *1987 Constitution*.

[5] Article VIII, Section 1, *1987 Constitution.*

[6] Article VIII, Section 7, *1987 Constitution*.

[7] Article VIII, Section 8, *1987 Constitution*.

[8] Article III, Section 6, *1987 Constitution.*

[9] Article VIII, Section 4 (1), *1987 Constitution*.

[10] *Batas Pambansa Blg. 129* (1980), as amended by Executive Order No. 33 (promulgated July 28, 1986) and *Republic Act No. 8246* (approved on December 30, 1996).

[11] Profile of Lower Courts by Provinces as of December 31, 1999 prepared by the Court Management Office of the Supreme Court, See Annex "E" of the *1999 Annual Report of the Supreme Court of the Philippines*.

[12] *Presidential Decree No. 1083,* promulgated on February 4, 1977.

[13] *Republic Act No. 6734*, "The Organic Act for the Autonomous Region in Muslim Mindanao," approved on August 1, 1989.

[14] *Presidential Decree No. 1486*, as amended by *Presidential Decree No. 1606* (effective December 10, 1978), *Republic Act No. 7975* (approved on March 30, 1995), and *Republic Act No. 8249* (approved on February 5, 1997.

[15] Republic Act No. 1125 (1954)

[16] *Republic Act No. 8369,* "The Family Courts Act of 1997."

[17] Administrative Order No. 104-96, October 21, 1996.

[18] Article IX, (A) Section 1, *1987 Constitution*.

[19] Rule 43, 1997 Rules of Civil Procedure.

[20] *Republic Act No. 7160* (Local Government Code of 1991), Book III, Title One, Chapter 7, Secs. 399-422.

[21] Executive Order No. 292, *Revised Administrative Code,* Title III, sections 1 and 2.

[22] Presidential Decree No. 1275, Section 1.

[23] Article XII, Sec. 14, second paragraph, *1987 Constitution*; Sec. 2, Rule 138, Revised Rules of Court.

[24] Secs. 5 and 6, Rule 138.

[25] Secs. 9, 10, 11 and 14, Rule 138.

[26] Rule 139-A, Sec. 1.

[27] Art. VII, Sec. 13, Art. VI, Sec. 14, Art. IX-A, Sec. 2, Art. XI, Sec. 8, *1987 Constitution*; Rule 138, Sec. 35; *Republic Act No. 7160* (The Local Government Code of 1991)*,* Sec. 90.

[28] Manuel Flores Bonifacio and Merlin M. Magallona, *Survey of the Legal Profession* (1982).

[29] Art. VIII, Sec. 5 (5), *1987 Constitution*.

[30] *Ibid*.

[31] Philnabank Employees Association v. Estanislao, 227 SCRA 804 (1993); Santiago v. Vasquez, 217 SCRA 633 (1993).

[32] Art. VIII, Secs. 2 and 5, *1987 Constitution*.

[33] 1999 Annual Report of the Supreme Court of the Philippines, p. 117.

[34] Davide Watch.

[35] Tradition and Transtion: The First Year of the Davide Watch, pp. 101-102.

[36] *Ibid*, p. 100.

[37] Davide Watch.

[38] Art. II, Secs. 1 and 10, *1987 Constitution*.

Alternative Dispute Resolution as an Alternative Means of Accessing Justice in Malaysia

Sharifah Suhana Ahmad*
Christina Suvariaru**

Introduction

In 1858 an English judge delivered judgment on a case concerning an absconding labourer on the island of Penang off the west coast of Malaysia, then a colony of Great Britain, which firmly entrenched the position of English law as the law of the land for the island.[1] The application of English law to Penang, and subsequently the entire of Malaya and the Borneo States of Sabah and Sarawak delivered a uniform legal system based on the English legal system to the diverse inhabitants of the nation which is now known as Malaysia. Malaysia came to accept English common law and rules of equity as the cornerstone of its legal system[2] and fashioned a judiciary modeled closely upon the judicial structure of the English court system.[3] The common law system, with all its attendant adversarial rules of civil and criminal procedure, became the mainstay also of the Malaysian legal system. Since independence in 1957, the Malaysian legal system, especially the judicial system, has witnessed several changes[4] and has been faced with several challenges, some of which have been severe and have cost it dearly in terms of integrity.[5] It is not within the limited scope of this paper to delve deeply into all the issues pertaining to the challenges to the Malaysian judicial system, and this paper will therefore focus on the current problem besetting the judicial system and the developments consequent thereupon.

I. "Justice Delayed Is Justice Denied"

In March of this year, statistics were revealed showing the enormous amount of backlog of cases in the Malaysian courts:

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Cases pending in the courts as at February, 2000

Magistrate's Court	Civil Criminal **Total**	173,898 472,273 **646,171**
Sessions Court	Civil Criminal **Total**	91,603 3,037 **94,640**
High Court	Civil Criminal **Total**	50,245 1,682 **51,927**
Court of Appeal	Civil Criminal **Total**	5,123 444 **5,567**
Federal Court	Civil Criminal Motions **Total**	35 36 164 **235**

Source: The New Straits Times, 24 March 2000, p. 1.

A Law Co-ordination Committee was formed, chaired by Minister in the Prime Minister's Department, and involving interested parties such as the Bar Council, the Attorney-General's Chambers and the police. With regard to the backlog of criminal cases, one of the ways identified to resolve the problem was to have the court determine whether a case was still active. If witnesses could not be traced or exhibits had gone missing, the court should order a discharge not amounting to an acquittal.

For civil cases, the parties were unanimous that mediation should be made an integral part of case management, and that since at present mediation was not compulsory, there might be a need to amend the law to incorporate it into case management.

In the Industrial Court,[6] with eight Industrial Court Chairmen serving at the eight Industrial Courts in the country, the number of backlog of cases rose from 535 in 1995 to 1,027 in 1999. The Ministry of Human Resources, under which the Industrial Court is placed, has established a task force to find ways to settle the cases. The Ministry admits that one of the most effective ways of reducing the backlog of cases is to have the parties settle their dispute through mediation and conciliation without having to refer to the Industrial Court for arbitration.[7]

The Civil Courts System, with its limited number of judges,[8] has shown that it

is unable to cope with a growing population that is increasingly better educated and which has became more litigious. The demand for better access to justice has led to the growing importance of alternative dispute resolution in Malaysia, and in recent years, a number of mediation bureau and specialized tribunals have been established to settle cases which would otherwise have landed in the civil courts.

II. Alternative Dispute Resolution Centres in Malaysia

1. The Kuala Lumpur Regional Centre for Arbitration

One of the earliest alternative dispute resolution centres to be established is the Kuala Lumpur Regional Centre for Arbitration (KLRCA) established as a non-profit organization in 1978 under the auspices of the Asia African Legal Consultative Committee. The Centre has established its own arbitration rules which are similar to the UNCITRAL Arbitration Rules, with certain modifications and adaptations. Its jurisdiction is limited to resolving disputes of an international nature, where the parties must either belong to or be residents of different jurisdictions or the dispute must involve international commercial interest. International arbitration conducted by the Centre are excluded from the jurisdiction of the courts.[9] The High Court is empowered to enforce an award once it has been rendered in a KLRCA proceeding.[10] The KLRCA Arbitration Rules create a great deal of flexibility in the conduct of the proceedings of the arbitration, and provide the parties with wide discretion as to the choice of arbitrators, the place of the arbitration and the applicability of the procedural rules.

2. The Insurance Mediation Bureau

In 1992, the Insurance Mediation Bureau (IMB) was established after a spate of complaints by policy holders against insurers. The Bureau is designed along the lines of the British Insurance Ombudsman Bureau, and the “mediator” does not merely assist parties to resolve their dispute but also makes decisions.

The IMB is established as a company limited by guarantee which has a membership comprising all insurance companies. The mediator is appointed by a council which includes representatives from outside the industry. The Bureau’s jurisdiction is confined to complaints in respect of awards of up to RM100,000. Complaints may be received from individuals as well as companies and currently, over 90% of the complaints are from individuals.[11] The mediator’s jurisdiction is limited to

settling disputes on general and life policies, excluding third party claims. Cases which have gone to court cannot be brought for mediation.

A case is normally resolved within two to three months[12] and it can be initiated by a letter and the process can be conducted entirely through correspondence. The service is free and while the complainant may engage a lawyer, he has to bear his own legal fees as costs will not be awarded. The mediator's decision is binding on the insurer but not the policy holder. In 1997 insurers were directed by the Central Bank to publicise the Bureau. As a consequence, the number of cases heard by the Bureau rose from 375 in 1998 to 483 in the first eight months of 1999.[13]

3. The Banking Mediation Bureau

Established in 1997, its structure is very much like the IMB. It is a company limited by guarantee with a membership comprising all the banks, finance companies and merchant banks. The mediator is appointed by a council which has representatives from outside the industry. The mediator can hear disputes involving the charging of excessive fees, misleading advertisements, ATM withdrawals, unauthorized use of credit cards and guarantors. The bulk of cases so far comprise of ATM withdrawals. A case is normally resolved within two to three months and matters which have gone to court cannot be mediated by the Bureau. A case may be initiated by letter, but the Mediator must meet the parties. Such sessions normally take only about two hours.

Once again, the service is free and while the complainant may engage counsel, costs will not be awarded. The mediator's decision is binding on the bank but not the complainant. The mediator is limited in his jurisdiction to awards of up to RM25,000. The Bureau handled about 144 cases in 1999.

In both the IMB and the Banking Mediation Bureau, the procedures established are flexible and informal and strict rules of evidence do not apply.

4. Tribunal for Consumer Complaints

This new tribunal is established under the Consumer Protection Act, 1999. Membership of the Tribunal is by appointment of the Minister and consists of a Chairman and Deputy Chairman from among members of the Judicial and Legal Service and not less than five other members from the legal profession.[14] Proceedings before the Tribunal have been simplified in that a consumer only needs to lodge a claim in the prescribed form and pay a prescribed fee.[15] At the hearing of a claim every party

is entitled to attend and be heard, but no party is to be represented by an advocate and solicitor.[16] A corporation or unincorporated body of persons may be represented by a full-time paid employee while a minor or any other person under a disability may be represented by his next friend.[17] The Tribunal is to make its award without delay and where practicable within sixty days from the first day of hearing.[18]

A point of interest is section 107 which enjoins members of the Tribunal to assess whether, in all the circumstances, it would be appropriate for the Tribunal to assist the parties to negotiate an agreed settlement. Where the parties have reached an agreed settlement, the Tribunal must approve and record the settlement and the settlement shall then take effect as if it were an award of the Tribunal.[19] Every agreed settlement and award of the Tribunal is final and binds all parties to the proceedings and is deemed an order of a Magistrate's court and is to be enforced accordingly.[20]

The Tribunal's jurisdiction however is limited to where the total amount in respect of which an award is sought does not exceed RM10,000.[21] The Tribunal does not have jurisdiction over matters in respect of land, wills or settlement, goodwill, any chose in action or any trade secret or other intellectual property.[22]

5. Copyright Tribunal

The Copyright Tribunal was recently launched by the Domestic Trade and Consumer Affairs Minister.[23] The power to establish the Tribunal is given under the Copyright Act, 1991,[24] but it is only now that the Tribunal has been set up with limited jurisdiction confined to settling disputes on royalties for translation of Bahasa Malaysia literary works.[25] The power includes the power to settle disputes relating to the calculation of royalty and determination of rates on literary and creative works.

The Chairman of the Tribunal is appointed by the Minister from the ranks of lawyers and other professionals who are experts in copyright laws. Proceedings before the Tribunal are heard of and disposed by the Chairman and three other members selected by the Chairman. There is a right of appeal from the decision of the Tribunal to the High Court to be made within 30 days of such decision.

6. Malaysian Mediation Centre

The Malaysian Mediation Centre (MMC) recently established under the auspices of the Bar Council joins a growing line of alternative dispute resolution centres in Malaysia. At present the MMC accepts only commercial matters but it has every

intention of expanding its scope of services to cover civil matters at a later stage. The majority of cases mediated so far involve construction agreements and other business agreements. The type of mediation offered by the MMC is the facilitative model of mediation, with the mediator as a neutral party who assists the parties to negotiate a settlement. The mediator will not make a ruling or finding unless expressly requested by all parties involved.

The MMC may accept cases at any stage, whether pre-trial, commencement of legal proceedings, during proceedings, etc. Parties may initiate mediation by filing a joint submission or request for mediation together with a non-refundable processing fee of RM100. Mediators registered with the MMC must be of at least seven years' standing as an Advocate and Solicitor of the High Court of Malaya and a member of the Malaysian Bar with a valid practicing certificate. In order to encourage the use of mediation as a means of resolving disputes, members of the Bar have been encouraged to adopt a Mediation Clause in contracts and agreements prepared by them, to the effect that in the event a dispute is not resolved within fourteen days, "the parties must submit the dispute to the Malaysian Mediation Centre (MMC) of the Bar Council Malaysia…"

III. Specialist Courts

Among specialist courts, or courts dealing exclusively with one main subject matter, the Small Claims court, the Juvenile Court and the Industrial Court have been established.

Recently, The National Advisory Council for the Integration of Women in Development (NACIWID) submitted a proposal to the government for a unified system of family courts.[26] With this new system, it was hoped that there would be improvement in the judicial system, "where there is a huge back-log of unsettled family dispute cases, as well as long processes and delays in reaching settlements."[27]

The proposed Family Court is to include facilities such as childcare and counselling services which are provided in other Asian countries, such as Singapore. The Family Court would emphasise "conciliation and co-operation, rather than conflict and contention."

Conclusion

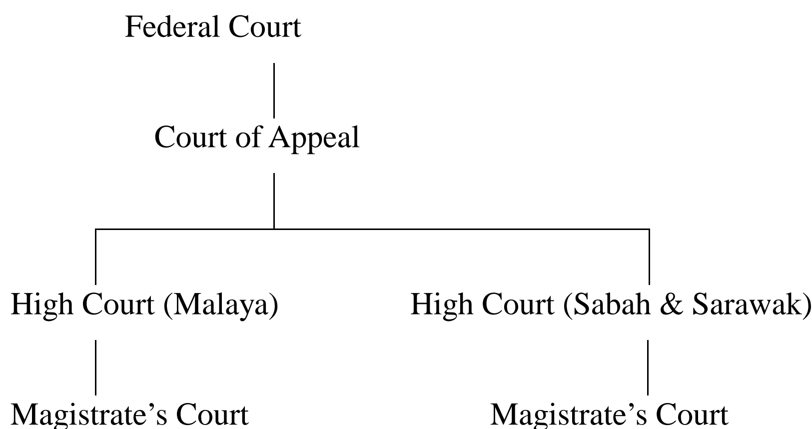
The growth of alternative dispute resolution within the Malaysian Legal System perhaps is in response to a public cry for justice which has become increasingly difficult to obtain at the hands of the traditional adversarial system of litigation. There is a demand for a system which is cheaper, simpler, speedier, more effective and also less adversarial in nature. There is, therefore, a growing affinity for conciliatory methods of dispute settlement, preferably without the presence of lawyers, where the procedures are easy enough for the layman to follow and strict legal rules do not apply.

ENDNOTES

[1] Regina v Willans (1858) 3 Ky 16.

[2] Civil Law Act, 1956, s. 3(1); s. 5.

[3] Current Malaysian Court Structure – Article 121, Federal Constitution.



[4] For example, when all appeals to the Privy Council were finally abolished in 1985, a Supreme Court was instituted. Subsequently, in 1995, a Court of Appeal was created, and the Federal Court became the final Court of Appeal.

[5] For example, the crisis in the Judiciary which saw the removal of the then Lord President, Tun Salleh Abas, and recently, the erosion of confidence in the Malaysian Judiciary consequent upon the Anwar Ibrahim trials, leading to the publication of the Report "Justice in Jeopardy – Malaysia 2000".

[6] The Industrial Court is established under the Industrial Relations Act 1967 as a special court to deal with industrial relations and industrial disputes between employer, employee and their trade unions.

[7] There is provision for conciliation to be conducted by officials of the Industrial Relations Department (Director General of Industrial Relations) of the Ministry of Human Resources, but due to shortage of trained officials, many disputes still end up at the Industrial Court, causing a severe backlog.

[8] There are 51 High Court judges, for the whole of Malaysia; 7 judges in the Court of Appeal, and 4 judges of the Federal Court.

[9] Arbitration Act, 1952, s 17, awards are final and conclusive, but questions of law may be stated for deliberation by the High Court – s. 22.

[10] Arbitration Act, 1952, s. 27; s. 31.

[11] The New Straits Times, 12 September 1999.

[12] ibid.

[13] The New Straits Times, 12 September 1999.

[14] Act 599, s. 86(1).

[15] ibid, s. 97.

[16] S. 108(2).

[17] S. 108(3).

[18] S. 112(1).

[19] S. 107(3).

[20] S. 116(a) & (b).

[21] S. 98 (1).

[22] S. 99(1); see also s. 100(1), where the Tribunal may have jurisdiction to hear and determine the claim even if the value of the subject matter exceeds ten thousand ringgit; and s. 101(1), where a claimant may abandon so much of a claim that exceeds ten thousand ringgit in order to bring the claim within the jurisdiction of the Tribunal.

[23] The New Straits Times, 15 September 2000.

[24] Section 28.

[25] The New Straits Times, 15 September 2000.

[26] The New Straits Times, 25 September 2000.

[27] ibid.

JUDICIAL REFORMS IN INDIA

Surinder Kaur Verma*

I. Judiciary

India has long history of dispensation of justice. The Vedic and other texts also speak about the delivery of justice. Though there were no courts constituted during the monarchial period, the king used to act as a judge and dispose of the complaints. With the advent of the East India Company and British for trade and later as rulers significant changes took place. The judicial developments and reforms took placer during the British period mainly in three Presidencies of Bombay, Madras and Calcutta, separately. The high courts at Bombay, Madras and Calcutta were established in the year 1862. However, a uniform and well-organized judicial system came to be established for the whole country, which was later inherited on becoming independent on August 15, 1947. After independence, constitution provided for establishment of the supreme court of India, and a high court for each state or states.

The Court structure in India is pyramidal in nature. Unlike the American model of dual court system – federal and state – India has monolithic system. The judicial service has practically the same structure with variations in designations. Designations of courts connote their functions. Workload determines whether the presiding officer should preside over both courts with power under relevant statutes conferred on him. The courts at the base level cater to the needs of the society in respect of disputes not involving high pecuniary stakes though the designations of the courts and the personnel manning them differ from state to state. By and large, they fall into a pattern starting from the bottom, known as Subordinate Judiciary, High Courts and finally the Supreme Court of India, as given under.

Subordinate Judiciary

At the base level, there are courts variously described as Munsif Magistrate or

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Civil Judge (Judicial Division), Judicial Magistrate First Class(JMFC). In some states, Munsif is also described as District Munsif. In some states, there are posts of Judicial Magistrates, Second Class but they have ceased to exist. The situation at the present is (as evident from the data collected), that at the base level, there is the court of Munsif/ District Munsif/ Magistrate or civil Judge/ JMFC. This is what is called the court of primary or initial jurisdiction. Most of the disputes, subject to a ceiling on pecuniary limit, are brought to these courts for their resolution. In some states where workload does not justify existence of two separate cadres, the Munsif is also invested with power of JMFC. Similar is the situation with regard to Civil Judge (Junior Division) as in the case of Maharashtra and Gujarat. Members of this cadre, when posted in large urban areas are assigned either exclusively civil or exclusively criminal work. When they are posted in Metropolitan areas, they are described as Metropolitan Magistrates. Vertically moving upward, the next set of courts are described as courts of District and Sessions judge which also include the courts of Additional Judge, Joint Judge or Assistant Judge. In some states there is a court called court of Civil and Sessions Judge. These courts generally have unlimited pecuniary jurisdiction and depending upon the power conferred on the incumbent officer in charge of the court, it can handle criminal cases where maximum punishment would not exceed 7 years. In some states, these courts with unlimited pecuniary jurisdiction are called courts of Civil Judge (Senior Division) and in some states they are described as Courts of subordinate judge. Courts have also been set up under two statutes called the Provincial Small Causes Court Act applicable to places other than Presidency Town and the Presidency Town Small Causes Court Act applicable to Presidency Towns. The first mentioned is subordinate to District Court and the last to High Court. The judges in charge of these courts are designated as Small Causes Court Judge, the first among equals called the chief judge of the court. The Court of the District and Sessions Judge at the district level is the principal court of original jurisdiction and is presided over by an officer called the District and Sessions Judge. The designation district court is derived from the Code of Civil Procedure and Sessions Court from the Code of Criminal Procedure. As a rule, same officer invested with power under both the statutes preside over the court known as District and Sessions Court. The next hierarchical stage in the pyramid structure of courts at state level is the High Court is the highest court set up under Article 214 of the Constitution.

High Court

The high court stands at the head of a state's judicial administration. Before independence 3 high courts were established in the country by the then British Government. After independence, 16 more high courts have come to exist, thereby increasing total strength at 19. No high court is superior to other and has territorial jurisdiction only over matters and cause of action rising within the periphery of its territory.

The Supreme Court of India

The supreme court of India, as the highest court of the country was established on January 26, 1950. The Supreme Court has wide jurisdiction over original, appellate and advisory matters. The court occupies the most vital and dignified position under constitutional set up and is entrusted with the power to give final verdict in all matters relating to interpretation of constitution, laws and their enforcement. It is empowered to issue directions, orders, writs. The court encourages settlement by arbitration, and gives acknowledgment to international arbitration as well. The court has wide appellant jurisdiction over all courts and tribunals set up in the country. The constitution has empowered the court to grant special leave from any judgment, decree, determination, sentence, or order in any cause or matter made by any court or tribunal in India. The Parliament is authorized to confer on the court any additional powers to entertain and hear appeals from criminal proceedings. The court has special advisory jurisdiction in matters specifically referred to it by the President of India. Constitution of India declares the Court to be a court of record, whereby it is vested with powers to punish for its contempt. The Court consists of 26 Judges including the Chief Justice of India, who is described as the sole head of Indian Judiciary.

Over the years in tune with the changing times, new rights have come to be recognized. This spearheaded the reforms in the justice delivery system. For example, to deal with specific legal issues the concept of special courts and tribunals is recognized and these have been constituted at various levels. Besides, the concept of Public Interest Litigation and Social Action Litigation has been recognized. One of the most significant developments during the 80's is the relaxation of the traditional *locus standi* rule. A brief description of the developments that have taken place in the other areas of justice delivery system in India are given as under:

II. Public Prosecutors and Judicial Reforms:

The independence of public prosecutors and their role in dispensing justice has contributed in the justice reforms in India. The history of functioning of Directorate of Prosecution or public prosecutors in India reveals that, during the British rule, the public prosecutors were under the direct control of the police department. Later keeping in view the Law Commission of India's recommendations and also in pursuance of the constitutional mandate for separation of executive from judiciary they are brought under the control of home department and legal departments.

Despite these developments the statistics reveal that there are large number of acquittals due to various reasons including the poor performance of public prosecutors. Various recommendations have been made from time to time for strengthening the prosecution and thereby justice delivery system.

III. Legal Profession and Judicial Reforms:

The Advocates Act is an epoch-making enactment in the history of legal profession in India. It marks the realization of a long cherished dream of the members of the Bar, namely the unification of the Bar in India. The delivery justice system mainly depends on the quality and conduct of legal professionals since they are the persons who are appointed and elevated to various judicial positions depending on their experience. Prior to the enactment of the Advocates Act in 1961, there were various enactments governing the legal profession with different grade of practitioners. All this has been given go-by. The Act now prescribes identical qualifications for enrolment throughout India, there being one All – India Bar Council, presiding over all the state Bar Councils. The enrolment of advocates rests with the Bar Councils. During the year 1995 the Central Bar Council introduced one-year compulsory apprenticeship after graduation in law as necessary qualification for enrollment as an advocate. However, the Apex court of the country struck it down in 1999. Judiciary has played a considerable role in shaping path of legal profession and in maintaining good conduct and adherence to high standards and professional ethics in legal practice. The recent judgment of the apex court clearly exemplifies the high standards set by the judiciary by prohibiting strikes by lawyers. The court went to the extent of suggesting compensating litigants by the errant lawyers. Further the Law Commission of India in 1998 made recommendations to be implemented by the government for strengthening and streamlining the legal profession

in India through the amendment of the Advocate Act.

IV. Legal Education and Judicial Reforms:

Legal education in India has its roots in English history. This heritage has had a profound effect on the development of legal education, on the evolution of legal institutions, and on outlook of law in India. The structure of Indian Law is erected on the foundation of the English Common law. Before independence, there was no uniform pattern of legal education in the country. At the time of independence and before it law colleges did not hold a place of high esteem, nor was the law during that period an area of profound scholarship or enlightened research. During those days most of the lawyers did not educate themselves from India, but went to Europe and mainly to England for the study of law. Though British Government had established law schools in various parts of the country, preparation for the most part, was through apprenticeship in the offices of the members of the Bar. After independence, a period from1958 to 1962, witnessed growth in number of law schools. These were opened indiscriminately with scarce or no resources by municipalities, without any rational planning. Law examinations were thrown open to students who did not even attend any formal course of law. Major development took place in this field after 1961. Parliament enacted Advocates Act in year 1961 incorporating recommendations of Law Commission of India. This Act constituted the Bar Council of India, conferring on it powers to prescribe standards of legal education and recognize law degrees for enrollment of persons as advocates. Consequently some uniformity and desired changes were introduced in this sphere. After 1975, no non-collegiate degree holder in law was enrolled as advocate. And after 1967, the degree in law is of no value if the course of study in law was not pursued by regular attendance and by attending requisite number of lectures, tutorials and moot courts. After 1979, the Bar Council of India took complete control over the area of legal education. In 1980, the Government of India for the first time constituted a working group for examining the status and quality of legal education in the country and to suggest necessary changes for improving quality of legal education being imparted in the country. In 1983, the Bar Council of India gave recognition to five year integrated course in law in addition to three-year course that is recognized by it. In recent years the legal education committee of the Bar Council of India has taken to the task of inspecting law schools in the country and it is taking action against those who are not

adhering to standards prescribed by it. After 1998 every law school has to compulsorily submit annual report to the Bar Council of India, detailing out number of students on its roll, teachers, their pay scale, expenditure, library resources, etc. failing which the errant law school either has to pay fine of Rupees 50,000/- or face risk of cancellation of license to run law school. Legal education has thus travelled a long journey and introduced desirable changes.

V. Procedure

Civil Procedure: The procedural law of the country governing and regulating civil matters is enacted in a very detailed statute called the Code of Civil Procedure. Before 1859, there was no uniform procedure regulating civil matters. Different parts of the country had different procedural requirements. In 1859, the first uniform Code of Civil Procedure was enacted. Due to defects found in its working amendments were introduced to it in the year 1877. In the year 1908, new Code was enacted that worked until 1976 when by way of amendments some major changes were brought into it. This Code provides for establishment of civil courts in the country, their jurisdiction, their powers, functions as well as manner in which civil suit is instituted and trial is conducted. It details out every thing minutely, living no gap for speculation. Due to some lacunae found in the working of the present Code, Parliament has enacted Amendment Act of 1999. This Code is still in the way of enforcement due to stiff opposition from legal professionals who are opposing certain changes. It is expected that it will be enforced soon with some minor alterations.

Domestic Procedure: Speaking in the past, even while the affairs of the country were responsibility of the East India Company, there used to be regulations in the nature of administrative instructions in regard to the conditions of service of the company's employees. The first batch of the rules was framed in 1920. They applied to all officers in India. These rules were amended from time to time and were re-issued in 1924. These rules continue in force even after independence by virtue of constitutional provisions. They constitute an exhaustive code as regards disciplinary matters. Apart from these safeguards provided to employees, various enactments and rules constituted domestic tribunals to adjudicate such disciplinary matters. Not only employees of industry / state but even private employees by virtue of Article 21 of constitution are provided procedural safeguards. Judiciary has always been vigilant and applies

principles of natural justice in adjudicating any matter before them.

Criminal Procedure: Before 1882, there was no uniform law of criminal procedure for the whole of India. However, there existed separate Acts, mostly rudimentary in their character, to guide the courts in the erstwhile provinces and presidency towns. In 1882, the first uniform criminal procedure code came into existence. The Code of Criminal Procedure1898 supplanted it. This Act of 1898 has underwent changes in 1955.

In 1955 extensive amendments were made with intent to simplify the procedure and expedite the trial.

In 1973 the Act of 1898 was repealed by the Code of Criminal Procedure, 1973 which was brought into force in 1974.

In 1976 in pursuant to 41st Report of Law Commission of India, major amendments were brought to the Code. The committal proceedings were omitted and only aggrieved person is given right to start proceedings. After 1976 every government was given power to declare any area as metropolitan area if the population of the same exceeds one million. The revised set up of criminal courts and allocation of magistrate functions between judicial and executive magistrates brought out in 1976 was in conformity with the constitutional goal of separation of executive from judiciary.

In 1978 additional duty was imposed on the police officer of reporting and transporting the seized property to the court or any person on bond who undertakes to produce the same before area Magistrate. Before this amendment the police officer seizing any property had to report to the officer in-charge of the police station. In 1978 some additions were made to the Code to enable the Magistrate to detain the accused for a period over 15 days if adequate ground exists. Further an exception to general rule that complaint must be made by the aggrieved person was made by allowing in certain specific circumstances complaint from his near relations if he or she is lunatic or idiot or incapable of complaining because of some sickness or due to any other valid reason. The Code was further enlarged to empower state government for speedy disposal of petty cases and in this context, gave power to the Magistrate to impose fine on the accused of petty offences and release him. In the same year defamation was made a compoundable offence. Besides the amendment prescribed minimum imprisonment of 14 years to those who are convicted of an offence punishable with death.

In 1980 new provisions were incorporated in the Code empowering the court as well as the police officer to release the accused on bail in a bailable case unless it

appears reasonable ground like accused is guilty of offence punishable with life imprisonment or death or has been previously convicted of the same. Further Executive Magistrate has been given duty as well as certain powers for keeping peace in his area.

In 1983 while keeping in view the increasing number of dowry deaths in the country, the government while creating new offences under the Indian Penal Code, 1860 has incorporated a provision under the Code of Criminal Procedure to deal with incidents of dowry deaths and cruelty to married women by the husband and in-laws. Provision was made for inquest by Executive Magistrates for post-mortem in all cases where a woman has died within 7 years of her marriage under unnatural circumstances. Further to end police torture leading to deaths of accused persons inside the jails/prisons the same amendment provided for inquest by nearby Magistrate in case of death of a person in police custody. Further a new provision was added to the Code to allow a criminal court hold trial of cases relating to rape and other offence against women in-camera.

In 1990 two new provisions were added to facilitate ongoing investigations in the matter of kickbacks and commission by a foreign gun factor AB. BOFORS of Sweden finalizing sale of its product to the Ministry of Defence, Government of India. The necessity of such a provision was felt because of money paid was all to be deposited in the accounts of the accused persons in the banks of Switzerland.

In 1993 to enlarge the list of all those who are under duty to report to the police or nearby Magistrate if they happen to be aware of the commission of any offence or intention of any person to commit offence of kidnapping for ransom.

VI. Alternative Dispute Resolution in India

ADR or Alternative Dispute Resolution – as a concept – is not new in India, though the nomenclature ‘ADR’ is. The basic idea of resolving disputes and discords between members of the community through the intervention of men of goodwill and standing within the community and abiding by their verdict is not new to the Indian ethos. There is a historical evidence to suggest that in many parts of India closely-knit communities of artisans, tradesmen and other had their own system of dispute resolution and their own for a with well developed procedures. These institutions, known as *Pugas, Srenis* and *Kulas* functioned as alternative for a for resolution of disputes outside the King’s courts. These systems gradually declined and diminished in importance with the

advent of the English legal system introduced during the British period starting from the Bengal resolution of 1772. The establishment of hierarchical structure of courts by the East India Company on the lines of the King's Courts, the enactment of elaborate Codes, the emergence of the legal profession modeled on the lines of its British counterpart and the doctrine of precedents – all contributed to the gradual formulation of the dispute resolution procedures and its rigid institutionalisation in the form of the Court system prevailing today. In many parts of the country, the system known as *Panchas* and *Panchayats* functioning at the present, within village and tribal communities, contain the quintessence of the ancient system.

With the adoption of the Constitution guaranteeing freedoms to the citizens and the establishment of an independent and powerful judiciary, with powers of judicial review, the spread of literacy and the considerable increase in the level of awareness of their social, economic and political rights by larger sections of the populace, the demands on the justice delivery and dispute resolving institutions came under tremendous pressure, as reflected in the number of cases that are taken to the courts. The most telling index of the malaise is the sheer size and number of cases pending in courts. In 1995 that there were over 25 million cases pending in about 80000 courts in India. While the number of fresh institution of cases steadily increased, the rate of disposal of cases, especially at lower levels, remained static or worse. All this prompted the search for alternatives to court litigation.

The first initiative that was taken was the drafting of a new law of arbitration for the country to replace the outmoded and antiquated Arbitration Act, 1940. With the new law, a new Chapter in the history of legal and judicial reforms began in India.

Again in 1996, new enactment apart from updating the law of arbitration gave a comprehensive, statutory framework for Conciliation. Arbitration and Conciliation are, under the new legislation, independent and autonomous procedures deriving support from the courts. They do not require constant supervision and control from Courts. They do not require constant supervision and control from Courts. It has opened up tremendous possibilities. These alternative mechanisms are less expensive, quicker, and less intimidating than the machinery of courts. Also, they are more sensitive to the concerns of the disputing parties. They dispense better justice, result in less alienation between the parties and satisfy their desire to retain a certain degree of control over the process of resolution.

Tribunals, Commissions and Special Courts :

Two decades after framing of the Constitution, it was realized that the existing courts of law were insufficient to meet the judicial aspirations of the people and deal with all types of disputes. Various new problems arose in the new socio-economic context and as result of this, besides traditional judicial system it became imperative to look out for other for a, which addressed these new problems as well as provided speedy disposal. Hence, were set up tribunal, commissions, district boards, etc., which entertain and dispose of large number of disputes every year. These are constituted by the Act of Legislature and are invested with specific judicial powers. They have a permanent existence and are adjudicating bodies. The basic and fundamental feature common to both the courts and the tribunals is that both discharge judicial functions and exercise judicial powers inherently vested in a sovereign state. Some of these are:

CAT : The Supreme Court sits only in Delhi and High Courts in capital cities of the States and, the number of complaints against administration is very large. For every infringement of right, it is impossible for an ordinary citizen as well as government servant to move the proper court. Administrative tribunals were therefore, set up, with the aim and object to provide speedier justice to public servants regarding their service complaints or dispute and ease burden of the judiciary. Besides the principal bench at Delhi, the benches of the tribunal are established at seven additional places, at Allahabad. Calcutta, Guwahati, Madras, Bombay, Nagpur and Bangalore. Until 1997, it exercised the entire jurisdiction, powers and authority exercisable by all courts except the Supreme Court of India in relation to recruitment and service but after the declaration of section 28 of the Administrative Act, 1985 as unconstitutional by the Supreme Court of India in *L.. Chandra Kumar v/s UOI,* power of judicial review of legislative action of Administrative Tribunal is limited and made subject to the High Court to judicial review.

Customs, Excise and Gold Control Appellate Tribunal (CEGAT) : set up in 1982, for hearing appeals of Excise, Customs and Gold Control matters.

Family Courts : were established in 1984 to provide effective and less expensive remedy and to promote conciliation in securing speedy settlement of disputes relating to marriage and family affairs.

Commission for Protection of Consumers : In 1986 Consumer Protection Act was passed to directly protect consumers. It provided a three-tier system for settling consumer disputes, via: District Level Fora, State Commissions and finally National

Commission.

The list of other such tribunals, commissions and special courts that have been constituted to deal with particular types of cases is endless. For example, Appellate tribunal for smuggler's forfeited property; Income Tax Appellate Tribunal; Railway Claims Tribunal; Railway Rates Tribunals; TADA Tribunal; Motor Accident Claims Tribunal; Authorities under the Industrial Disputes Act, 1947-Labour Courts, Board of Conciliation, Industrial Tribunal; Environment Tribunal; Special Court for trial of offences Relating to Transactions in Securities Act, 1992; Special Courts in relation to Andhra Pradesh Land Grabbing (Prohibition) Act, 1982; MRTPC; Cooperative Appellate Tribunals and many other such courts constituted under Acts of State Legislature according to exigencies arising.

Evolution of Legal Aid Boards, Lok Adalats in the Country:

Since 1952, the Government of India also started addressing to the question of legal aid for the poor in various conferences of Law Ministers and Law Commissions. In 1960, some guidelines were drawn by the Govt. for legal aid schemes. In different states legal aid schemes were floated through Legal Aid Boards, Societies and Law Departments. In 1980, a Committee at the national level was constituted to oversee and supervise legal aid programmes throughout the country under the Chairmanship of a Judge of the Supreme Court of India. This Committee came to known as CILAS (Committee for Implementing Legal Aid Schemes) and started monitoring legal aid activities throughout the country. The introduction of Lok Adalats added a new chapter to the justice dispensation system of this country and succeeded in providing a supplementary forum to the litigants for conciliatory settlement of their disputes. In 1987 Legal Services Authorities Act was enacted to give a statutory base to legal aid programmes throughout the country on a uniform pattern. This Act was finally enforced on 9th of November, 1995 after certain amendments were introduced therein by the Amendment Act of 1994. The National Legal Service Authority was constituted on 5th December 1995 replacing CILAS.

Provision of Free Legal Aid

If a person belongs to the poor section of the society having annual income of less than Rs. 18,000/- or belongs to Scheduled Caste or Scheduled Tribe, a victim of natural calamity, is a woman or child or a mentally ill or otherwise disabled person or an

industrial workman, or is in custody including custody in protective home, one can avail free legal aid from the legal aid boards functioning in the district courts, high courts and the Supreme Court. The aid so granted by the Committee includes cost of preparation of the matter and all applications connected therewith, in addition to providing an Advocate for preparing an arguing the case. Any person desirous of availing legal service through the Committee has to make an application to the Secretary and hand over all necessary documents concerning his case to it.

VII. Public Interest Litigation

Although the proceedings in the Supreme Court arise out of the judgements or orders made by the Subordinate Courts including the High Courts, but of late the Supreme Court has started entertaining matters in which interest of the public at large is involved and the Court can be moved by any individual or group of persons either by filing a Writ Petition at the Filing Counter of the Court or by addressing a letter to Hon'ble the Chief Justice of India highlighting the question of public importance for invoking this jurisdiction. Such concept is popularly known as 'Public Interest Litigation' and several matters of public importance have become landmark cases. This concept is unique to the Supreme Court of India only and perhaps no other Court in the world has been exercising this extraordinary jurisdiction. A Writ Petition filed at the Filing Counter is dealt with like any other Writ Petition and processed as such. In case of a letter addressed to Hon'ble the Chief Justice of India the same is dealt with in accordance with the guidelines framed for the purpose.

VIII. *Amicus Curiae*

If a petition is received from the jail or in any criminal matter if the accused is unrepresentated then an Advocate is appointed as *amicus* curiae by the Court to defend and argue the case of the accused. In civil matters also the Court can appoint an Advocate as *amicus curiae* if it thinks it necessary in case of an unrepresentated party; the Court also appoint *amicus curiae* in any matter of general public importance or in which the interest of the public at large is involved.

Discussion in Session II

Administration of the Lower Courts

The issue of the administration of justice in the lower courts was raised in the discussion of Session II. Some countries in the region are in the course of shifting supervisory powers from the Government to the Supreme Court, and the experiences of some countries were provided.

In the case of the Philippines, supervisory power was shifted from the Ministry of the Local Governments to the Supreme Court under the 1977 Constitution. Before that, all courts below the Supreme Court were administered by the Ministry of Justice and the Attorney General, who had control over judges and prosecutors, respectively. To be faithful to the principle of the separation of powers, the administration of lower courts was transferred to the Supreme Court, and a Court Administrator was created like that in the U.S. The Court Administrator must be a retired Judge or Justice. This has made the independence of the judicial branch genuine. The career of all judges, from trial court level, is not dependent upon the President.

Indonesia has plans to shift the responsibility from the government (Ministry of Justice) to the Supreme Court. However, there are questions regarding how to ensure that the Justices of the Supreme Court are honest.

In China, justice is administered in two ways. One is financially. The budget for each court is given from the central government to the local government. The second way is in terms of personnel. All officials are appointed by the local government. Generally speaking, these matters are governed by different party committees. The mass media is generally a very useful instrument for supervising the judiciary, but in China, its role is very limited. Journalists cannot criticize judges. This is why media law is being given much attention in China at present. The problem of corruption is very serious. When important persons or officials are concerned, there are sometimes interventions from the government or communist party at different levels.

In India's judiciary, court are not strictly speaking constitutional organs, so there is no question of exerting control over them except in cases where there is

misconduct; they can then be impeached by the parliament, and there is a procedure for this. The Attorney-General (or Advocate-General in the case of state courts) is a constitutional attorney, and can be appointed by the president of the country. However, other positions such as the Solicitor General and additional Solicitor Generals, are appointed through the Ministry of Law, and ultimately confirmed by the President. In the lower judiciary where the correction is entered, it is within the purview of the states concerned; the civil procedure codes prescribe the qualities and other matters. State laws are also applicable. The governor of the State generally has the power of appointment, but mainly where the high courts are concerned high courts, this power is shared by the state government and the state public service commission. Sometimes corruption arises in regard to the appointments of judges by the public service commission. The Supreme Court has been asking to be given total control over the finances of the courts.

The Activeness of Judges in Public Interest Litigation (PIL) in India

The matter of the activeness of judges was raised in relation to public interest litigation (PIL) in India.

Additional information was given, as follows: In India, the judge's role is different in criminal cases and in the PIL. The court procedure is very strict, particularly in criminal cases. Thus judges cannot be very active in that realm. They have to strictly follow the parameters of the law. In the area of PIL, however, the action or inaction of the government can affect the welfare of the public or a section of the public who have been deprived of their rights in a certain situation. In such cases, the court can act on the mere writing of a letter. This power is not given to or exercised by the lower courts. It is exercised only by the High Courts and the Supreme Court under Section 32 (the Supreme Court) and Section 226 (High Courts) of the Constitution. The court does not require that a letter be written to become active. It can also become active in response to a rumor. If there are newspaper reports that something wrong is being done because of government inaction, the court may become very active, issue notices, and ask the parties to appear before it. The Government and officials also may be called to appear before the court and submit their replies and the actions which they are taking. The court can monitor whether the directions it has issued have been implemented or not. In

the PIL cases involving the Government's water battle of the Government, the Court took the government's water authority to be a sort of legislation, found that the government was not acting and would take some time to implement legislation, and found that irreparable damages would be done to the public in that period. In this case, the court did not specifically define whether this authority was under the Ministry of Water Resources or Ministry of Environment. So both Ministries will go to the court to review its judgment and receive further directions. This was a case where the Court itself found that immediate remedy or action was required. If the court acts on a petition submitted by particular parties, they will be summoned.

On the matter of judicial review, the following comments were raised. The issue can be responded to at two levels: the level of procedure and the level of substance. In order to stop a government action, plaintiffs must ask for an injunction. In order to compel a government to perform an act, a writ of mandamus must be received. To stop a lower judicial body, a prohibition is used. However, the nature of a petition is a certiorari. The test is whether there was a grave abuse of discretion. These are the standards, or a sort of sacred incantation. The grave abuse of discretion can amount to a lack of jurisdiction. The scope of judicial review was expanded not in a procedural way but rather through the definition of judicial power. There is a second paragraph under the provision of the Supreme Court stating that judicial power shall include the power of the court to adjudicate well-defined rights. This is a settled definition. This is where they expanded it with the phrase, "and to review grave abuse of discretion committed by any government agency."

Alternative Dispute Resolution (ADR)

Additional information on ADR in some countries was provided as follows.

In Thailand, ADR started from arbitration about 20 years ago, before the economic boom. There were many investments from abroad, and most of the commercial contracts had arbitration clauses. These clauses invariably used the International Chamber of Commerce in Paris, or the AAA in New York or London. Thus it was nearly always a form of one-way traffic when there was an arbitration clause. Most countries are members of the New York Convention for Recognition and Enforcement of Foreign Arbitration Award of 1958, and as an obligation under this Convention, are required to implement foreign arbitration awards. Every country of the

region has established an arbitration center of its own. It started from the establishment of the Kuala Lumpur Commercial Arbitration Center, which was connected to the Asia African Legal Consultative Committee (AALCC). The possession of an arbitration center may be important for the national prestige of the legal professions. It may be possible to go to an arbitration center in a neutral country in Asia for resolution of disputes on commerce or industry, instead of going to Paris or elsewhere in Europe.

In Vietnam, there is an arbitration center under the Chamber of Commerce in Hanoi. China has the China International and Economic Arbitration Commission (CPAC) which has been very active. Because of the economic boom there, most transactions carried out under contracts have to go under the CPAC.

India also has ADR courts. The importance of having a center for arbitration is well known. It was in 1984 that the model law on arbitration was made by AALCC, and after that in almost every country in the region, laws on arbitration were drafted. India enacted the Arbitration and Conciliation Act of 1996. It was conceived as part of the judicial system. The court stands on an agreement between the parties. In certain cases, the courts will ask the parties whether they would like to select arbitration. Under the draft amendment clause of the Civil Procedure Code, if a contract includes an arbitration clause, the parties must accept arbitration. On the other hand, conciliation has not yet been but at par with arbitration, although it is a part of the Act. If, during the conciliation proceedings, there is some difficulty that needs some clarification on a legal point or procedures, the courts will not intervene and certainly will not issue a decree unless a lawsuit is filed, Whereas in the case of arbitration, an appeal can be filed to the high court or to the Supreme Court as the case requires. However, there is no appeal in conciliation. It is entirely up to the parties. The parties must register the conclusion with the court. This means that the case has been settled finally according to ADR. It is not clear whether the *res judicata* rule is applicable in any particular case. It should be noted that according to information from the Arbitration Center in Malaysia, in international arbitration cases, even the member countries of AALCC do not invoke the jurisdiction of the facilities of the Center. Instead, they go to international arbitration centers such as ICC in London or other bodies. Even if they invoke the procedure of the ALCC, they go to Western arbitrators and not to the arbitrators in the region.

SESSION III

PERSPECTIVE FOR JUDICIAL REFORM IN ASIA

Alternative Dispute Resolution for Consumer Protection: Consumer Complaints Handling Systems in Japan

Shinya Imaizumi*

I. ADR for Consumer Protection

The aim of this paper is to review the roll of alternative dispute resolution (ADR) in the field of consumer protection in Japan and other Asian countries. In recent years, with the increasing public concern about consumer affairs, many Asian countries have enacted rather comprehensive consumer laws. It is not surprising that such laws have special mechanisms and procedures to improve access to justice, or give redress to consumers suffering from grievances or damages. The need to provide these special mechanisms or procedures comes from the large number of factors that act to keep consumers away from formal litigation before the courts. In general, the amount of damages of the complaints lodged by consumers is so small that it is not worthwhile for consumers to bring a case to the court that is likely to be expensive and time consuming. Even if such damage is substantial, resorting to litigation is the option that consumers want to avoid, because they can not see in advance how much they have to pay, and how many days they have to be absent from their jobs for their hearing. Furthermore, entrepreneurs are usually juristic persons and there is imbalance between consumers and entrepreneurs in information, legal or other technical knowledge, economic power, the ability to pursue legal proceedings and so on. It is therefore necessary to offer mechanisms or procedures to modify such problems and to improve access to justice for consumers.

The approaches adopted to improve access to justice can be divided into two types: (1) the first is to reduce barriers blocking consumers' access to litigation, and to enhance the use of the procedures before the court, such as class actions or group action[1] or legal aid, and (2) the second is to provide forums "outside the court", that is,

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1 The Consumer Protection Act 1979 (amended 1998) of Thailand has two special procedures for dispute resolution for consumers. First, under the CPA, any private consumer association certified by the Consumer Protection Board has the right to bring the case to the court on behalf of its member consumers. Certification of consumer

alternative dispute resolution (ADR).

It seems that consumer laws provide ADR by administrative agencies. Court-annexed ADR, such mediation or conciliation, is provided by more general laws such as civil procedure law. ADR by business or private organizations is also an important path for consumers. Usually it does not have special laws authorizing it.

ADR by administrative agencies can be found in some legislation in Asia, such as the Consumer Act 1994 (Republic Act NO. 7394) of the Philippines and the Consumer Protection Act 1999 of Malaysia. In Malaysia, the Tribunal for Consumer Claims was established by the Act as an administrative organization, under the Ministry of Internal Trade and Consumer Affairs. This tribunal offers arbitration on the cases where damages do not exceed 10,000 RM, and does not include personal injuries or death. Consumers can select other procedures like small claim procedures or this Tribunal, but if the injured party chooses to file the case to the Tribunal, the defendant company is obliged to come before the Tribunal. The Philippine's Consumer Act also provides conciliation and arbitration by government officials such as those of the Department of Trade and Industry.

Japan seems to be reluctant to adopt the special procedures improving access to justice particularly for consumers. Instead, it has developed the consumer complaints handling schemes (in Japanese "*Kujo Shori*") by administrative agencies and by business or private organizations. Such schemes include some kinds of ADR such as counseling, mediation or conciliation.

In the drafting process of the Consumer Contract Law that was enacted last year, there were proposals to include provisions regarding the right of consumer associations to take action on infringements of that law. However, there were negative opinions to this idea mostly from the rigid attitude toward the matter of locus standi. Thus, in order to speed up the enactment of this Law, these proposals were not adopted even in the draft.

It should be noted that under the new Civil Procedure Code of Japan (promulgated in 1996, and came into force in October 1998), the small claim procedure

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associations had not taken place for almost 20 years, and it was in April 2000 that the fist consumer association was certified by the Board. No cases have been brought by consumer associations yet. Another procedure is that any official of the Office of Consumer Protection Board or a public prosecutor can bring the case to the court on behalf of consumers who have suffered damages, when those consumers file complaints to the Board and the Board finds that the case satisfies the some requirements provided by the law. For example, the case should be beneficial to promote consumer protection in general. There have been about 200 cases under this procedure, and all the cases were brought by the public prosecutors on behalf of the consumers that suffered damages. Most of

was newly introduced. Petitions under this procedure can be made only for monetary claims for amounts not exceeding 300,000 yen. The small claim procedures can be the impetus to improve access to justice for consumers. However, the number of cases under this procedure is still small, so it is too early to know whether this procedure contributes to consumer protection.

II. Consumer Complaints Handling Schemes in Japan

1. Administrative Agencies

Formation of the Japanese consumer law and consumer affairs administration was motivated by the experience of massive and widespread consumer damages such as those caused by polluted foods or side effect of medicines since the 1960s. There was also the influence of the international consumerism movement. Some ministries established divisions responsible for consumer protection affairs.

In 1968, the Basic Consumer Protection Law was enacted. It has only 20 sections, but even now it gives the basic framework for consumer protection and consumer affairs administration in Japan. Based on the policy framework under this Law, several individual legislations have been enacted.

Article 15 of the Basic Consumer Protection Law stipulates the responsibilities of the State, local governments[2], and entrepreneurs in solving consumer complaints. It provides:

> (1) Entrepreneurs shall make efforts to establish the systems necessary for providing adequate and prompt solutions to complaints lodged with regard to transactions with consumers.
>
> (2) Cities, towns and villages shall make efforts to offer mediation or other measures to solve complaints lodged with regard to transactions between consumers and entrepreneurs.
>
> (3) The State and prefectures shall make efforts to take necessary measures to offer fair and prompt dealings to complaints filed with regard to transactions between consumers and entrepreneurs".

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the cases relate to land or houses.

2 The local government system of Japan has two levels of local governments. There are 48 prefectures in Japan, and under the prefectures there are cities, towns and villages. Each local government has a governor and local assembly; both of them are selected by election.

Local governments

In 1969, the Local Government Law was amended to declare consumer protection as one of the duties of local governments. Many local governments have enacted consumer protection ordinances since the 1970s. Under such ordinances, each local government has established offices responsible for consumer protection, and established centers generally called "consumer life centers". In general, consumer life centers conduct activities concerning consumer affairs such as providing information, consumer education, product testing and inspection and complaints handling including consumer counseling and mediation. There are about 400 Consumer Centers nationwide now. Consumer counseling is the backbone of the Japanese consumer complaints handling system. Counseling is conducted mainly by permanent or temporary consumer counselors working at the centers. There are training courses and examinations for consumer counselors and advisors. Counselors can ask lawyers and other experts for support. The activities of each consumer centers depends on the size of budget or human resources of that local government. Some consumer centers of bigger local governments like the Tokyo Metropolitan Government have ADR programs such as mediation and conciliation other than counseling. If necessary, consumers will sometimes be advised to go to appropriate organizations like the National Consumer Affairs Center or PL centers for the products concerned, or schemes of other private organizations according to the issues.

Consumer Distress Relief Committee of Tokyo Metropolitan Government

The Tokyo Metropolitan Consumer Ordinance provides the establishment of Metropolitan Consumer Distress Relief Commission in order to offer fair and prompt dispute resolution to consumers in the manner of mediation or arbitration.

The number of the members does not exceed 22 persons, including academics (not exceeding 10), representatives of consumers (not exceeding 6) and representatives of business sectors (not exceeding 6). This Committee is an advisory body of the Governor of Tokyo. Complaints by consumers have to satisfy the requirements stipulated by the Ordinance, and if the Governor finds that it is necessary to resolve the case by the Committee, the case will be referred to the committee. Disputes that can be referred to the Committee shall relate to the complaints lodged by consumers suffering damages in their consumer life because of business activities of the entrepreneurs, and that adversely affect consumer life of Tokyo citizens.

When any case is referred to the Committee, the panel for mediation is formed, and the panel will hear opinions from both parties (consumers as complainant and traders), and try to resolve the case by proposing a compromising plan. The mediation panel also consists of representatives of academics, consumers and business. If any parties do not agree with the plan, the arbitration panel consisting of only academic members of the Committee will decide the arbitration, and recommend that both parties accept it. If any parties do not agree with it, the procedure comes to end.

Until 1998, the Committee had 15 cases. The results are as follows: mediation succeeded (10 cases), mediation partially succeeded (2 cases) and mediation failed (3 cases). Most of the cases concern door-to-door sales or telemarketing. Several cases include similar issues. That is, whether consumers can invoke the cancellation of the contract with the trader or selling company to the credit company. The decisions on these cases are considered to have contributed to the amendment of related laws such as the Law Concerning Door-to-Door Sales etc.

Prof. Akira Shoda, working as the chairman of this Committee, explained the nature of conciliation and arbitration procedures of the Committee as follows: It is not only offering solutions to individual cases, but also, "considering the basic ways of thinking about the cases, establishing a framework for decisions, and applying it to the concrete case for its solution." In other words, the Committee is the body that decides the approach of the Tokyo Metropolitan Government toward such type of disputes, and simultaneously offer solutions to individual cases[3].

It is interesting that the Tokyo Comprehensive Consumer Center has a program of legal aid for the parties of the cases where mediation or arbitration have not succeeded, and the parties to dispute bring the case to the court, or the consumer is sued by the company. In such case, the Tokyo Metropolitan Government provides loans to the consumer according to the conditions provided in the Rules.

National Level

As a national level consumer center, the National Consumer Affairs Center (NCAC) [4] ("*Kokumin Seikatsu* Center") was established by Law in 1970. It is a special

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3 "*Tokyo-to Shouhisha higai kyusai iinkai houkokushoshu shouwa nen 51- Heisei 12 nen*". (*Compiled Reports of Tokyo Metropolitan Consumer Distress Relief Commission.1976-1998* (1999), p. 3.

4 JCIC has changed its English name to the National Consumer Affairs Center, although its Japanese name has not changed.

governmental organization under the Economic Planning Agency (EPA)[5]. It has similar functions to those of consumer centers. It also acts as the coordinating organization among consumer life centers of local governments, consumer organizations and business sectors in making policy for consumer affairs. It supports the activities of consumer associations and consumer centers of local governments.

The numbers and content of the complaints lodged to consumer life centers of local governments or NCAC can be seen from the database system called PIO-NET which is administered by NCAC. In 1998, the total number of consumer complaints was about 620,000. This number includes the complaints that have not reached the level of "dispute" yet. Some of them are only inquiries about the safety of some kinds of products or asking for information before starting negotiations with the entrepreneurs. Most complaints are solved at the level of counseling or negotiations between consumer and entrepreneurs, although consumer life centers usually give advice to the consumers from the early stage of negotiations. If a consumer submits a complaint requesting inspection of products and that consumer center finds itself unable to conduct investigations because of a lack of facilities, the center may ask the NCIA or other organizations for support.

The information obtained from PIO-NET is used to support the necessity of enacting or amending the related laws. Of course, privacy of the consumers concerned is assured in PIO-NET.

Number of Consumer Complaints Received

	1995	**1996**	**1997**	**1998**	**1999**
Tokyo	75,910	83,459	87,059	87,584	46,659
Tokyo Metropolis	31,987	31,643	30,548	30,144	15,270
Cities, Towns and Villages in Tokyo	43,923	51,816	56,511	57,440	31,389
Nationwide	510,566	577,863	611,154	626,640	-

Source: National Consumer Affairs Center

5 EPA was responsible for the coordination of consumer affairs administration. According to the administrative reform, the EPA was merged into the Cabinet Office from 6 January 2001. It remains the center of consumer affairs administration in Japan.

2. Business or Private Organizations

Business Sector's Attitude toward Consumer Complaints

As seen already, Article 15 of the Basic Consumer Protection Law provides that entrepreneurs shall make efforts to establish the systems necessary for providing adequate and prompt solutions to complaints lodged with regard to transactions with consumers.

It is very common that large numbers of complaints are received by a company regarding its products or services every day. Many companies now find that such complaints provide very important information for development of new products and services, marketing, improvement of corporate image, and efficient management. Many companies have improved their customer service sections, including call centers. Such centers have a database of all the complaints and they can easily find information on the type of products causing troubles, the content of complaints and so on.

PL Centers

When the Product Liability (PL) Law was enacted in 1994 (came into force on 1 July 1995), there were fears that it would cause an explosive increase in complaints and case concerning product accidents and worrying about the increase of the amount of remedies like PL cases in the United States. This made companies review their systems for handling complaints.

Many companies started to review and improve their systems on dealing of complaints from consumers. And business or industrial associations started to provide mechanisms for dispute resolution regarding PL. In order to handle the complaints after PL Law, many business associations have established so-called "PL centers" to offer fair and prompt solution to consumer complaints regarding the quality or defectiveness of products. There is no special law regarding the organization or function of PL centers. The establishment of such centers was encouraged by the resolution of the National Diet attached to the PL Law in June 1994. It states: "In considering the effectiveness of fair and prompt dispute resolution system that does not depend on the court for dispute resolution for remedies of consumer damages, alternative dispute resolution systems should be encouraged and enhanced…"[6]

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6 The Ministry of International Trade and Industry (MITI) of Japan also issued the (non-binding) administrative

More than ten PL centers have been established for certain kinds of products such as automobiles, pleasure boats, medicine, chemical products, electric home appliances, beverages, cosmetics, fire safety equipment, gas and kerosene appliances.

Most PL centers are established within the business or industrial associations. Sponsorship by the business or industry organizations make it easy to find persons who have knowledge and experience regarding accidents caused by the products concerned. However, securing fairness and neutrality is very big issues for such PL centers. So PL centers are trying to appoint the members of such mediation or conciliation committees from lawyers, academics, representatives of consumer associations, administrative officers, etc. Some PL centers also establish advisory committees and managing boards with such members.

The Conciliation Committee of Automobile Product Liability Counseling Center has 12 members, comprising 4 attorneys, 6 professors (law, engineering and so on) and 2 consumer counselors or advisors. This Center was established as a foundation independent from the business association of automobile industry, and lawyers and professor occupy some posts of this Center, such as directors, auditors and advisors.

Most PL centers publish their activities by newsletters, annual reports, and websites, etc. According to such information, the number of conciliations and arbitrations seems to remain small. One PL center attributes this to the fact that most product accident cases are resolved by negotiations between consumers and companies, with only the remainder brought into PL centers. Furthermore, in the cases brought into PL center, the issue is not the matter of law, but the matter of fact, such as the cause of the accident.

After about 5 years have passed since PL Law came into force in 1995, the number of the cases on PL Law is still very small, and most of them are against the plaintiff. This may be because of the screening by ADR of business sectors and consumer centers in the early stage of disputes. In addition, the cases that come to the court may be difficult cases for the consumer side. The lack of leading judgments seems to cause somewhat a vagueness about product liability law. It should be noted that there was the case admitting product liability as to the damages caused by foreign objects in a glass of orange juice in a hamburger shop in Japan. The claim for damages was for 400,000 yen, but the court (Nagoya District Court) ordered the payment of

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instructions in October 1994, entitled "Toward the Establishment of Alternative Dispute Resolution System by

100,000 yen.

Conclusion

The consumer complaints handling scheme in Japan has contributed to consumer protection in two senses. Firstly, it has offered Japanese consumers dispute resolution methods at small cost. Secondly, the cases reported, and dealt by, the consumer complaints dealing system contribute to identifying issues and problems with current consumer protection law, and contribute to the law making.

There are two different views concerning ADR. The first emphasizes the prompt and adequate solution of individual cases, and so ADR is seen as an effective method for improving access to justice. Another view is emphasizes rule-making through the litigation or "test cases" for the benefit of consumers in general, and so prefers resolutions before the court than ADR, which sometimes makes it possible for entrepreneurs to avoid unfavorable decisions for them by compromising or negotiating individual cases.

However, it seems that if ADR can offer solutions to the some categories of conflicts or disputes which are scarcely brought to formal litigation, the decisions or result of ADR can add information about consumer needs. As the experience of the Japanese consumer complaints handling system suggests, if we deliberately organize ADR and analyze its decisions or result, especially by administrative agencies, they can contribute to identifying the problems or needs in consumer life, and be used in making policies on consumer affairs and enacting individual legislation.

To enhance such function of ADR in identifying consumer problems, the results of ADR must be published in a manner that shows the types of disputes, legal issues, the means of resolution adopted and so on, taking into account protection of the privacy of the parties concerned.

Products" [in Japanese] to promote PL centers.

Perceptions of Judicial Function in Administrative Litigation
--A comparative study of the judicial behaviour in Japan and India--

Hajime Sato*

Introduction

Public Law Litigation,[1] in which courts are requested to scrutinize the operation of large public interest institutions, has been a problematic phenomenon in many countries, including Asian countries like India and Japan, during the last two or three decades, and has raised critical debate regarding the judicial function.

First of all, let me present two examples.

First example: In the well-known "Unfair Juice Labeling Case" in Japan, the plaintiffs (the Federation of Housewives and its Chairwoman) attacked the Fair Trade Commission's (FTC's) finding in relation to the Japan Juice Association's application for "a fair competition agreement relating to labeling of fruit juice beverages etc", by bringing objection proceedings.[2] The FTC and the aforementioned producer association prepared this agreement, because it had become an object of public concern that producers were using so much misleading labeling of fruit juice. The plaintiffs argued that the agreement approved by the FTC was oriented toward producer's interest at the cost of fair and precise labeling and the interests of general consumer. However, the FTC dismissed this objection as lacking standing. Consequently, the plaintiffs brought a judicial review action to quash this dismissal measure. The Supreme Court delivered a judgment, which established the standard of standing needed for both the objection proceedings and the suit against administrative agencies.

Only if the plaintiffs have suffered damage to a right or "a legally protected interest," and moreover, only if this is concrete and individualistic, they will be entitled

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[1] Although it has been discussed under a variety of names, e.g., public law litigation or institutional litigation in the United States, public interest litigation or social action litigation in India, Gendaigata sosyo(the contemporary model litigation) in Japan, I would like to use the word "Public Law Litigation" as a neutral word, which refers to a litigation model that involves large public interests, without local characteristics.

[2] The Supreme Court, Showa Year 53 (1978) 13 February, Minshu vol.40 no.1 p.1. For more details of the case, S. Sugai & I Sonobe, Administrative Law in Japan, (Tokyo: Gyousei, 1999) pp.126-127.

to maintain proceedings and/or an action against an administrative disposition.[3] The upshot of these requirements is that to be no more than a general consumer is to lack the necessary standing qualification.[4] The Supreme Court dismissed this action.

Second example: In India, an advocate filed a writ petition, which asked the Supreme Court to direct cinema halls to exhibit slides containing information and messages on the environment, free of cost, so that people could be made aware of their social obligations in matters of environment and be encouraged to avoid acting as polluters.[5] The petition also asked that "environment" be made a compulsory subject in schools and colleges in order to spread general awareness.

The Supreme Court of India, issuing many directions, held that licences of all cinema halls, touring cinemas and video parlors should be conditional on the exhibition, free of cost, of at least two slides on the environment in each show. The Court also directed Ministry of Environment to generate appropriate slide material within two months, and to start producing information films of short duration.

Threshold issues like standing qualification were not raised at all, since in India, the standard of standing had been relaxed thoroughly in "public interest litigation." The Supreme Court of India has declared that "a broad rule is evolved which gives the right of locus standi to any member of the public acting bona fide and having sufficient interest in instituting an action for redressal of public wrong or public injury."[6]

Although it can be observed that the Supreme Court of Japan has been relaxing the rule of standing gradually, there are a couple of other standards that prevent the public from pursuing an action in administrative litigation cases.

How can we explain this difference between the situations in India and Japan? I find one answer in their ways of understanding the judicial function.

I. The Features of Public Law Litigation

Although Public Law Litigation is not defined precisely, it has been regarded as a departure from the traditional model of litigation.

Chayes, observing the new movement of the judicial function in the United

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[3] Sugai & Sonobe, Id. p.127.

[4] In Japan, suits based on rights and duties of individual citizen's interests form the center of administrative litigation. For suits that do not aim to protect individual plaintiff's rights and interests but only aim to preserve the legal order, specific statutory provision is required. Sugai & Sonobe, Ibid.

[5] M.C. Mehta v. Union of India, A.I.R. 1992 S.C. 382. For more detail, S. Ahuja, People, Law and Justice – casebook on public interest litigation, vol.2, (Hyderabad: Orient Longman, 1997) pp.430-431.

[6] Janata Dal v. H.L. Chowdhary, A.I.R. 1993 S.C. 892.

States, described the traditional lawsuit as “a vehicle for settling disputes between private parties about private rights.”[7] According to him, the defining features of this type of civil adjudication are as follows: (1) The lawsuit is bipolar, (2) Litigation is retrospective, (3) Right and remedy are interdependent, (4) The lawsuit is a self-contained episode, (5) The process is party-initiated and party-controlled.

By contrast, the public law model transposes many of the characteristics of the traditional litigation.[8] (1) The scope of the lawsuit is shaped primarily by the court and parties, (2) The party structure is sprawling and amorphous, (3) The fact inquiry is predictive and legislative, (4) Relief is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees, (5) The remedy is not imposed but negotiated, (6) The decree does not terminate judicial involvement in the affair, its administration requires the continuing participation of the court, (7) The judge is not passive, but active, with responsibility not only for credible fact evaluation but for organizing and shaping the litigation to ensure a just and viable outcome, (8) The subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy.

In short, the “new” type of litigation is characterised as a public, multi-polar, and flexible forum for the airing of social grievance, while the traditional litigation is as a private, dualistic, and remedially limited system of dispute resolution.

A variety of criticisms have been expressed on public law litigation cases.[9] Among them, the most powerful line of criticism argues that judicial behaviour in these cases might violate the traditional separation of powers principles. Those critics point out that the administration of institutions is an executive function, thus public law litigation cases, especially when the courts deliver innovative decisions, bypass majoritarian political controls.

Although these critics may appear persuasive, we can certainly raise one question; is it possible to separate powers to three branches so neatly?

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[7] A. Chayes, “The role of the Judge in Public Law Litigation,” Harvard Law Review, vol.89 no.7 p.1281 (1976) pp.1982-83. Another understanding of public law litigation can be found in, e.g., T. Eisenberg & S.C. Yeazel, “The Ordinary and the Extraordinary in Institutional Litigation,” Harvard Law Review, vol.92 no.3 p.465 (1980).

[8] Chayes, Id. p.1302.

[9] For example: L.L. Fuller, “The Forms and Limits of Adjudication,” Harvard Law Review, vol.92 no.2 p.353 (1978).

II. An Economic Approach to Public Law Litigation

By using the terms "Law and Economics" or "Economic Analysis of Law", the features of public law litigation can be described as follows[10]; (1) the new litigation cases have more "externalities" than the traditional cases, (2) in the new type cases, "asymmetries" and/or the lack of mutuality/interchangeability between plaintiffs and defendant, are acuter than the traditional cases, i.e. plaintiffs are always individual citizens or associations that do not have enough information or resources to pursue their actions, while defendants are usually governmental agencies or big companies. For the purpose of this paper, the former is worth mentioning more thoroughly.

"Externalities" is defined as a cost or benefit that actions of one or more people imposes or confers on a third party or parties without their consent. According to Ota, there are three types of externalities in a judicial case.[11] First, the commencement of action itself has externalities, which exert influences or impacts upon society. Secondly, remedies given by courts have externalities. The remedies may affect third parties who are not participants in the proceedings. Thirdly the interpretation or application of law itself is law-making by judges, thus this will affect third parties, because it will surely have some influence on similar cases that may occur in future.

Because these externalities are more apparent, standing qualification has been the most problematic of the controversies in public law litigation cases, and also participation of the third parties to the litigation has been discussed frequently in these cases. Although it has been strongly supposed in legal theories that there are no legal effects on third parties who do not participate in the proceeding, externalities have inevitably been involved in all litigations, more or less.

To sum up, the traditional litigation cases nevertheless involved those externalities, while these can be found more apparently in public law litigation cases. Thus a question arises. If both the traditional model and the new model have externalities, how can we say that the traditional model is inside the judicial function, and that the other is not? Furthermore, in parliamentary democracy, the interests of an organized sector, such as industry and labour, tend to be over-represented compared to the interests of an under-organized sector, such as general consumers; thus, the public law litigation cases have a role to provide one channel, which is supplementary to the

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[10] R. Cooter & T. Ulen, Law and Economics, (Harper Collins Publisher, 1988). S. Ota "Atarashii taipuno sosyo to Minji sosyo seido," Jurisuto, vol. 91 p.58 (1991 Jan.).
[11] Ota, Ibid.

parliamentary and administrative procedures.[12]

III. On the Principle of Separation of Power

Chayes, listing six advantages of the judiciary in deciding the public law litigation cases, went further to discuss as follows:

"In any event, I think, we have invested excessive time and energy in the effort to define—on the basis of the inherent nature of adjudication, the implications of a constitutional text, or the functional characteristics of courts – what the precise scope of judicial activity ought to be. Separation of powers comes in for a good deal of veneration in our political and judicial rhetoric, but it has always been hard to classify all government activity into three, and only three, neat and mutually exclusive categories. In practice, all governmental officials, including judges, have exercised a large and messy admixture of powers, and that is as it must be."[13]

"I am inclined … to urge…a willingness to accept a good deal of disorderly, pragmatic institutional overlap. After all, the growth of judicial power has been, in large part, a function of the failure of other agencies to respond to groups that have been able to mobilize considerable political resources and energy. And despite its new role, the judiciary is unlikely to displace its institutional rivals for governing power or even to achieve a dominant share of the market."[14]

It is clear from these quotations that what matters is how we perceive the judicial function. From this point of view, I would like to compare the situations in two countries, namely, Japan and India. However, more effort will be made to analyse the former than the latter.

IV. Administrative Litigation in Japan

1. A brief history of Administrative Litigation in Japan

Before World War Ⅱ, Japan had the Administrative Litigation Court, which was independent from ordinary law courts.[15] In 1889, the Meiji Constitution was

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[12] Ibid.

[13] Chayes, op. cit. 1307.

[14] Id.1313.

[15] On the history of administrative law in Japan, J.O. Haley, "Japanese Administrative Law – Introduction," Law in Japan, vol.19 p.1 (1986), H. Wada, "The Administrative Court under the Meiji Constitution" Law in Japan, vol.10 p.1 (1977). Sugai & Sonobe, op. cit. pp.11-99.

introduced, which had Article 61 providing:

"No suit at law, which relates to a right alleged to have been injured by illegal dispositions of administrative authorities and which shall come within the jurisdictions of the Court of Administrative Litigations, shall be taken cognizance of by a Court of law."

It is this provision that set a pattern for the future continental type administrative law that developed in Japan[16]. Only one Administrative Litigation Court existed as the first-instance and last-resort court, and the jurisdiction of the Court was very limited. The Administrative Court Act enacted in 1890, only listed assessment of taxes and their collection, refusal of trade-licenses and public work cases as litigious matters.

In 1946, during the occupation by the Allies, the new constitution was enacted, and provided for administrative litigation just as for civil cases.[17] As a result, the Administrative Litigation Court was abolished and replaced by ordinary law courts. The judicial system was transformed from a continental law system with an administrative litigation court to Anglo-American type administrative lawsuit proceedings by ordinary law courts. However, Japanese administrative law has never done away with the old theories of administrative litigation, as can be seen from the fact that the Administrative Case Litigation Act of 1962 (ACLA) changed the system back again into a peculiar system, in which ordinary law courts act "as if they were direct descendants of the administrative litigation court of the old days."[18]

Why has such a curious thing been happening?

2. The "Osaka Airport Case"

In the well-known "Osaka Airport Case," the plaintiffs, bringing a civil action from the court of first instance, demanded for injunctive relief to curtail the use of a state-run airport.[19] Against the judgment of the appeal court, which not only affirmed the injunction but also extended the time period covered by it, the further appeal to the Supreme Court resulted in a judgment holding that the action was an inappropriate form

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16 Sugai & Sonobe, op. cit. p.26.

17 Article 76 provided that the "whole judicial power should be vested in law courts." This clause means that the power of adjudicating administrative litigations should be included, so that not only civil and criminal cases but also administrative cases would be included in the "whole judicial power."

18 Sugai & Sonobe, op. cit. p.30.

19 The Grand Bench of the Supreme Court, Showa Year 56 (1981) 16 December, Minsyu vol.35 no.10 p.1369. For more details, J.O.Haley, op. cit. p.13, Sugai & Sonobe, op. cit. p.121.

of action. The reason given was that a "civil law" application for an injunction is an incorrect use of the law, since the matter applied to a "state-run airport".

As Sonobe analysed, the judgment clearly distinguishes between civil suits and administrative suits, regardless of the fact that under the ACLA, it is stated that administrative litigation is to be treated as a special branch within civil litigation.[20] Although this is a problem of the difference in procedure of the same Court of Justice, there is a further problem. Whether the ACLA include injunction as a final remedial measure against the administrative bodies or not remains undecided. In short, the Court's decision left the plaintiffs with no clear avenue to challenge the operation of the state-run airport.

Under the ACLA, a court will review an agency determination only if it involved an administrative disposition (gyosei syobun). This test is extremely important, as Dziubla regarded this test as a barrier to administrative litigation[21]. If agency action involved an administrative disposition, then review lies under the Act, if it did not, then review lies, if it exists at all, under ordinary civil procedure rules[22]. According to the Supreme Court, "the term phrase disposition by an administrative agency does not refer to all action that an agency takes based on law. Rather, it refers to those actions based on law that a national or public organization takes that directly structure or determine the rights and duties of citizens."[23] For example, if an agency rejects/permits some applications, such as license application (the disposition of applications), or if an agency orders a store to close for selling spoiled food (disadvantageous dispositions), it determines the rights of the citizens and it is an administrative disposition, thus subject itself to judicial review.

However, it is not clear in the ACLA, other statutes and case law whether there exist any administrative dispositions in a case like "Osaka airport." Because this action was brought at the stage of operating public facilities and there is no clear

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[20] Sugai & Sonobe, Ibid.

[21] R.W. Dziubla, "The impotent sword of Japanese justice: the doctrine of Syobunnsei as a barrier to administrative litigation," Cornell International Law Journal, vol.18 p.37 (1985). He pointed out two problems that can result from this test. The first problem is that individual rights may suffer because by the time judicial review is allowed, the court is faced with a fait accompli that it is unwilling to undo. The second is that the delay in judicial review of administrative actions causes administrative agency personnel to develop increased bureaucratic insularity.

[22] J.M. Ramseyer & M. Nakazato, Japanese Law – an economic approach, (Chicago: The university of Chicago Press, 1999) p.196.

[23] The Supreme Court, Showa Year 39 (1964) 29 October, Minsyu vol.18 no.8 p.1809. Ramseyer & Nakazato, Id. p.197. This definition of justiciability is terribly restrictive compared to American standards, Dziubla, op. cit. p.44.

administrative disposition at that stage[24]. So there is a possibility that, although the Supreme Court suggested that suits like "Osaka Airport" should come from administrative litigation procedure, the review may not lie on this kind of disputes under the Japanese administrative litigation system.

3. Lack of effective remedies

The corresponding side of this concept "administrative disposition" is the lack of effective remedies. The ACLA provides the annulment action, which is a demand for quashing the administrative disposition, as a main remedy (Torikeshi Sosho (lawsuit seeking the annulment of administrative measures)), supported by a remedy for a failure to act (Fusakui Iho Kakunin Sosho (lawsuit for confirmation of illegality of nonfeasance)).[25]

In the case of annulment action, the applicant must find some administrative disposition to be the subject-matter of the proceedings. In the case of omission, proceedings for a failure to act cannot be brought unless the qualified applicant has first addressed a formal request for administrative dispositions to the defendant.

The actions, which do not come within one of the categories provided by the Act, are called implied complaint actions (Mumei Koukoku Sosho (innominate action)). Although actions similar to Anglo-American injunctions and mandamus suits compelling the government to do or refrain from doing specified actions have been discussed as implied complaint actions, whether this type of actions could be recognized or not has remained vague.

3.1 Approaches to mandamus

The typical case of proceedings for a failure to act (Fusakui Iho Kakunin Sosho) is that, when the administrative authorities have to make some disposition within a due period on a citizen's application based on law, for example on an application for a license to run a store, and after the period there are no reply from the agency. Then the citizen can sue to have the illegality of official omission established. The result of this suit is to confirm some obligation of administrative agencies to act.

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[24] Dziubla argues that the doctrine of administrative disposition delays judicial review of administrative actions until a time when any review would be futile. Dziubla, op. cit. p38.

[25] For more details, Haley, op. cit. pp.7-8, Dziubla, op. cit. pp.41-42, Ramseyer & Nakazato, op. cit. pp.196-202, Sugai & Sonobe, op. cit. p.134. As mentioned earlier, it should be noted that in the ACLA, there is no procedure equivalent to the Anglo-American Action for a declaration or injunction. The courts cannot consider the legal

This is the nearest the Japanese have come to mandamus. According to Sugai, "the timid Japanese law approached mandamus with several fits of hesitation, but in spite of that, it was an improvement on the old law, according to which only an annulment of illegal administrative dispositions was allowed, whereas ordering and compelling administrative agencies to act and do something was held to be against the separation of powers doctrine and alleged therefore to be unconstitutional."[26]

However, can a citizen demand that a court should order administrative bodies to give an applicant a license? The Act does not list such a remedy. Then, in Japan this type of litigation has been discussed as implied complaint action.

In the early days of post-World War Ⅱ, the legal scholars and the courts decided that this action was impermissible, because only after an administrative disposition had been given, the litigation should lie against administrative bodies; otherwise, the separation of power doctrines would be infringed. However, by now, almost all scholars and also the courts may accept this type of suit, mainly because the concept of ripeness has been imported from United States.[27]

Although this bipolar type (applicant v. administrative agency) innominate action for duty-imposing suits (Gimmu Zuke Sosho) is basically accepted by legal scholars and the courts by now, the multi-polar type is not. Suppose there is a company that causes pollution, and residents brought a suit in a court demanding a judgment that orders an administrative agency in charge to invoke its regulatory power against that company. In this case, there are normally no statutorily provided application procedures for citizens to invoke regulatory power of administrative agency; thus, the citizen cannot utilize the remedy for a failure to act. As long as otherwise provided by some specific statutory provisions, this type of action has not been accepted as a remedy in the field of administrative law in Japan, since it is thought that it would destroy the balance of power between the judiciary and the executive.[28]

3.2 Approaches to injunction

The other type of implied complaint action having been discussed is injunction. The annulment action for quashing administrative disposition certainly has an effect similar to that of the injunction, but this is available only if administrative dispositions

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position of the applicant in the abstract without specific statutory provisions.

[26] Sugai & Sonobe, op.cit. p.84.

[27] K. Shiraishi, "Kohojyo no Gimukakuninsosyo ni tsuite," Koho Kenkyu, vol.11 p.46 (1954).

precede the suit. The feature of this suit is ex post facto. Are there any possibilities whether the demand for an injunction against administrative agencies lies in the case where no administrative disposition has been delivered yet or in the case where there is no clear administrative disposition, like the Osaka Airport case?

Suppose that an administrative agency is about to give a permit to a person who applied to build an apartment building. Then the residents nearby worried about environmental effects that will be caused by this construction. The residents bring suit in a court demanding an injunction against the administrative agency to refrain the agency from giving a permit. It seems that this type of innominate action would be accepted, with strict conditions.[29]

Then how about the Osaka Airport type? As mentioned before, there are no clear answers, although some scholars are discussing the possibility of allowing similar type of injunction in civil proceedings by some innovative interpretations.[30]

4. Analyses

What are the reasons for these difficulties in bringing actions and getting remedies against the administrative agencies in Japan? One reason is that the ALCA provides as its main remedy the annulment action that quashes the administrative disposition. Behind this format of the Act, there is a strong hypothesis that the judicial review of the administrative actions is a tool to correct the illegality that was caused by administrative dispositions after administrative bodies exercised their rights to first decision (Daiichiji Handan Ken, right to judge the matter first) and thus made authorization determinations.[31] One judgment by a district court says that "in the light of separation of power, it is the administrative agency that will decide first whether the executive power is to be exercised or not, and jurisdiction of an ordinary court in administrative litigation cases should basically remain ex post review to judge whether the administrative disposition is legal or not after the executive branch has decided the matter."[32]

Then what is the right to first decision of administrative agencies? It is now clear that first, administrative agencies hold the rights whether or not to exercise their

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28 For example: H. Shiono, Gyoseiho dainihan, (Tokyo: Yuhikaku, 1994) pp.185-194.
29 Id. pp.190-193.
30 Id. pp.193-195.
31 K. Ohama, "Mumeikokku sosyo to Shihoken," in Sensyu Daigaku Imamura Horitsu Kenkyusitsu ho, vol.17 p.33 (1990) pp.37-43.

powers, and second, administrative agencies can decide the matter independently to achieve the best results.

The next question is this. Why should the ordinary courts defer to the first decision rights of administrative agencies? It is widely regarded that the executive function is to achieve the public purposes or policies, while the judiciary holds only a passive function that applies law to certain litigation and it is not a branch that achieves goals actively. That is to say, the judiciary cannot exercise the right to first decisions to achieve statutory goals.

As some scholars have pointed out, this thought has its origin in particular understanding of the separation of power principle under the Meiji Constitution, where it was considered that judicial control over the executive is an infringement of executive power by the judiciary.[33]

Under the Meiji constitution, the emperor had all the power and only when it infringed the rights of property or freedom of the subjects, was the power regulated by law. However, it seems to me that, under the new constitution, the executive is given its base to act only by constitution and statutes enacted by the legislature, the representatives of the people, and the judiciary must control the executive if it violates law, regardless of exercising its right to first decision. Furthermore, the judiciary under the new constitution, which is based on the supreme consideration of liberty and rights of individuals, has a role to protect human rights. In other words, the new constitution established the rule of law in Japan.[34]

V. Public Interest Litigation in India

India has developed quite a different pattern of judicial function in administrative litigation cases. It is in Public Interest Litigation cases, a large part of which involve the omissions of the executive branch, that the judiciary in India showed its innovative operation, as Barr evaluated it as the world's most active judiciary.[35]

Its distinctive characteristics include liberalization of the rules of standing,

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[32] Nigata District Court, Showa Year 54 (1979) 30 December, Gyosyu vol.30 no.3 p.671.
[33] For example, S. Takayanagi, Gyoseihoriron no Saikosei, (Tokyo: Iwanami, 1985) pp.1-5, Ohama, op. cit. pp.37-43.
[34] Takayanagi, op.cit.. pp.1-22, Ohama, op .cit. pp.41-43.
[35] C. Baar, "Social Action Litigation in India: the Operation and Limits of the World's Most Active Judiciary," in Comparative Judicial Review and Public Policy, eds. D.W. Jackson and C.N. Tate (Westport, CT: Greenwood Press, 1992) pp.77-87.

procedural flexibility, a creative and activist interpretation of legal and fundamental rights, and remedial flexibility and ongoing judicial participation and supervision.[36] Why could the judiciary in India carry out such decisive action? Needless to say, there are many factors to be considered, I would like to cast light on the perception of the judicial function that appeared in the decisions delivered by the Supreme Court.

In S. P. Gupta v. Union of India,[37] in which the plaintiffs contended that a circular letter issued by the Law Minister infringed the independence of the judiciary, Justice Bhagwati directly discussed the judicial function.

" …there may be cases where the State or a public authority may act in violation of a constitutional or statutory obligation or fail to carry out such obligation, resulting in injury to public interest… Who would have standing to complain against such act or omission of the State or public authority? …To answer these questions it is first of all necessary to understand what is the true purpose of the Judicial function … Is the judicial function primarily aimed at preserving legal order by confining the legislative and executive organs of government within their powers in the interest of the public or is it mainly directed towards the protection of private individuals by preventing illegal encroachment on their individual rights? The first intention rests on the theory that Courts are the final arbiters of what is legal and illegal … We would regard the first proposition as correctly setting out the nature and purpose of the judicial function, as it is essential to the maintenance of the rule of law that every organ of the State must act within the limits of its power and carry out the duty imposed upon it by the Constitution or the law …"[38]

The judicial function in administrative litigation, as understood by Bhagwati, is

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[36] There are numerous articles on Public Interest Litigation in India, for example, J. Cassels, "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible," the American Journal of Comparative Law, vol.37 no.3 Summer 1989 pp.495-519. P.N. Bhagwati, "Judicial Activism and Public Interest Litigation," Columbia Journal of Transnational Law, vol.23 1985 pp.561-577. Idem, "Social Action Litigation: the Indian Experience," in The Role of Judiciary in Plural Societies, eds. N. Tirucheruvam and R. Coomaraswamy (London: Frances Printer, 1987) pp.20-31. R. Dhavan, "Law as Struggle: Public Interest Law in India," Journal of Indian Law Institute, vol.36 no.3 July-Sept. 1994 pp.302-338, C.D. Cunningham, "Public Interest Litigation in the Indian Supreme Court: a study in the light of American experience," Journal of Indian Law Institute, vol.29 no.4 Oct.-Dec. 1987 pp.494-523. S.K. Agrawala, Public interest litigation in India: a critique, (Bombay: Tripathi, 1985). U. Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India," in The Role of …, pp.32-60.

[37] A.I.R. 1982 S.C. 149. pp. 189-190.

[38] Id. p.190. He went further to discuss as follows: "If public duties are to be enforced and social collective diffused rights and interest are to be protected, we have to utilize the initiative and zeal of public-minded persons and organizations by allowing them to move the Court and act for a general or group interest, even though they may not be directly injured in their own rights. It is for this reason that in public interest litigation—litigation undertaken for the purpose of redressing public injury--enforcing public duty protecting social, collective, diffused rights and interests or vindicating public interest, and a citizen who is acting bona fide and who has sufficient interest has to accord standing."

not passive but active, and it can be said that he perceived that the judiciary as well as the executive is obliged to achieve public, statutory, and constitutional purposes.

In contrast, according to P. Shin, Justice Mukharji followed the path of judicial self-restraint.[39] In State of H.P. v. Umed Ram, a case involved in road constructions to the hilly areas, Mukharji pointed out that "judicial review of administrative action or inaction where there is an obligation for action should be with caution and not in haste,"[40] and concluded that it was the legislature that were entitled to fix priorities for expenditure to satisfy basic needs of the people, upon the judgment and recommendation of the executive. However, at the same time, he also said, "To the residents of the hilly areas as far as feasible and possible, society has a constitutional obligation to provide roads for communication."[41] In short, in this case, Mukharji took an expansive interpretation of the constitutional right to life, while taking a cautious view of judicial function to enforce that right.

From Japanese eyes, Mukharji's view is judicial activism rather than judicial self-restraint. Surely he showed the way of judicial deference to the legislature and the executive in the sphere of remedy, but he did not defer to them at all in deciding what is the right of the people and what is the purpose of the constitution.

Conclusion

It is true that there are many other reasons and factors to be considered, but I am sure that it is clear from the above discussions that one reason why the judicial behaviour in cases where large public interest is involved differs between Japan and India lies in the way the judicial function is perceived.

As judicial reform has been taking place in many Asian countries, and also as the rise of litigations that involve large public interest is inevitable in modern society, I believe that it is important to re-think the judicial function, because "it is first of all necessary to understand what is the true purpose of the judicial function"[42] to deal with the cases, as Bhagwati described.

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[39] P. Singh, "Justice Savyasachi Mukharji's perception of Judicial Function in Public Interest Litigation – a tribute," Delhi Law Review, vol.13 (1991) p.145.
[40] A.I.R. 1986 S.C. 847, p.855.
[41] Ibid.
[42] A.I.R. 1982 S.C. 149. pp. 189-190.

Discussion in Session III

International standard

The discussion in the Session III concentrated on the matter of international standard in consumer protection and other areas.

In some developing countries, there are opinions against the imposing of high standards for promoting consumer's rights. Such opinions argued that, for a poor country, it is hard to impose high standards developed in wealthy countries and if such standards are imposed, it would be bad for business, and it would impede the flow of investments. Another point is that the giving emphasis on consumer protection sometimes would merely shift the problem to other areas. There is an example in the Philippines that the company shifted the blame to their employees and simply deduced it from their salaries. In other words, what started out as a consumer problem ended up as a employment law question. The second problem is between WTO rules and social labeling or eco-labeling. The example mentioned was the case of tuna in which certification as dolphin safe was required according to certain environmental regulations. Same problems can be seen in the problem of child labor free. These are consumer based measures but at the same time they are in the jargon of WTO regulations.

A comment against this opinion argued that the poverty of the country should not be an excuse not to protect the consumers' interest. In this regard, the case of India was mentioned as having a precise mechanism on consumer protection under the Consumer Protection Act.

Another comment also argued that we should not make underdevelopment as an excuse for not protecting someone's rights, but it pointed out that there should be making difference the case of children and the case of intellectual property rights (IPR) or strict liability. The industrialized countries came to think of IPR after they reached a certain point of economic welfare. It is not fair to insist even to the least developed countries to have IPR or strict liability. It criticized such attitude as intending to expand their market in the future on the ground of globalization.

Another aspects of this matter was raised by a comment as follows: These views sometimes can be seen in developing countries that some of those standards may be used as tool for economic sanctions to developing countries by making use of social ladders and social clause. However, it should be given much concern on the recent

trend that some of the social labeling initiatives so far defeated the by WTO panel. In the future the matter of such standards may become one of the most problematic issues. Some of the standards in Japan are under the international level and there are contradictions between competitors and the local market where only stronger industries can make use of such standards and compete against other companies. It can be a question of unfair competition or monopoly rather than social lobbying. We have to approach this question from both sides, from the social aspect as well as from the economic aspect. We should not be too simplistic by saying that one justice is just for all this.

It was added by the reporter that consumer protection was not only the matter of international standards, and more important points was to identify local needs local standard for consumer protection. The result of ADR can be a source for identifying the problems in each country.

Administrative litigations

The information about the situation of administrative litigation in India was added as follows: In India, there is one retired judge who was very active in environmental law and famous as a "green judge". Each time a case comes to his court, the enterprises or manufacturers would have a hard time. There was a case regarding a school bus accident. The courts concluded that there should be two teachers in the school bus, and that conductors and drivers should have much experience and that there should not be more than 70 children in the bus. That was the direction given to the school and the administration to avoid a similar mishap to happen again. The similar directions were also seen in the case regarding the overcrowding jails. The courts always keep an eye to see that these directions are being followed. Looking at the size of the country and the laxity of the law, the jail officers find some loopholes to give excuses why they could not comply in letter and spirit. It was argued that these should not be a pretext not to abide by these things. The locus standi in India have not taken any of these issues. The Supreme Courts and the High Courts have the power to judicial review. That means reviewing their judicial and administrative actions. When they are not doing that will bring the courts in the scheme of separation of powers and they will be acting as a watchdog in activities of the state.

Day 2

RETHINKING OF “LAW AND DEVELOPMENT”: AN ASIAN PERSPECTIVE

SESSEION IV

LAW AND MARKETIZATION

Southeast Asian Law in Transition: The Law and Political, Economic and Social Systems in the Post Crisis of 1997

Nobuyuki Yasuda[*]

Introduction

The Asian financial crisis which first broke out in Thailand in 1997 spread in an instant to Indonesia, Malaysia, South Korea, and the rest of Asia. These countries suffer from institutional problems which made them vulnerable to the crisis, and some of which have been working to make reforms under the guidance of the IMF and the World Bank. There is a growing recognition that the crisis was due not only to simple technical glitches in economic policy, but institutional issues involving the very culture of the region.

Considering the current situation in Japan, which has been pressed to make fundamental reforms in its politics, economy, and institutions due to its serious 10-year long recession, we may hypothesize the existence of an East Asian type capitalism different from the western-derived capitalism. This capitalism was based on different system and values from and has lost out to the western, in particular the Anglo-Saxon capitalism in the current wave of globalization which began in earnest while incorporating elements of the information technology revolution in the 1980s and is being forced to change. This can be glimpsed from the terms "transparency", "accountability", and "self responsibility" being bandied about as slogans of reform in almost all of Asia. It is considered essential to change from the old "rule of man or relationships" to a system of "rule of law" clarifying the responsibilities of the individuals. Reform of the judicial system is consequently becoming the issue of the utmost important in all the countries of Asia.

This paper proposes the concept of two types of capitalism, and considers the best approach to judicial reforms in the fields of politics, the economy, and society in

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Asia through a comparison of these.

I. Two Types of Capitalism: Market Capitalism and Community Capitalism

As a factor on the Asian side which invited the economic crisis since 1997, it has been explained that “East Asia had exposed itself to financial chaos because its financial systems were riddled by insider dealing, corruption, and weak corporate governance, which in turn had caused inefficient investment spending and had weakened the stability of banking system” (Radlet and Sachs, 1998), and that "all suffered from a lack of transparency about the ties between government, business, and banks, which has both contributed to the crisis and complicated efforts to defuse it. " (Fisher, 1998).

Rajan and Zingales (1998) consider the current crisis to have been caused by the financial business practices typically seen in Asia compared with those of the western, in particular the Anglo-Saxon, model, describing them as "relationships versus an arm’s length system". According to them, the former "ensure a return to the financier by granting her some form of power over the firm being financed (for example, monopoly) ", while the latter should be called the “Anglo-Saxon system, where the financier is protected by explicit contracts … (and therefore) institutional relationships matter less and the market becomes a more important medium for directing/governing the terms of transactions". That is, for relationships, maintaining and strengthening relationships between the parties in question are considered important rules of behavior and therefore there is a tendency to lean toward exclusion of outsiders or secrecy. The arm’s length philosophy stresses competition based on free decision-making by the parties involved. Transparency and accountability are emphasized as presuppositions.

The approach to relations between economic entities as in the former case is the same as the features used when comparing the Japanese system with the western, in particular, the American system, such as seen in the "inter-personalism” of Yoshitoshi Hamaguchi or the “relationalist” understanding of contracts [1]. The stress on "relationships" as spoken of in interpersonal relations in China and the "personalism" in Southeast Asia etc. are related to this as well. From this, it is possible to postulate a "community capitalism" in contrast to the Anglo-Saxon "market capitalism" - which

may be called genuine or textbook capitalism based on individualism and market competition[2]. The current crisis can be concluded to have resulted from the defeat of the Asian "community capitalism", which depends on interpersonal relations and lacks any rationalist basis, by the Anglo-Saxon "market capitalism", which is based on rational contractual relations.

More detailed features of these two types of capitalism are given in the following table.

Market capitalism	Community capitalism
Western (Anglo-Saxon) model	Asian model
Hunting and commercial type	(Rice growing) agricultural type
Monotheism	Polytheism
Competition	Cooperation
Individualism	Communalism (group consciousness)
Financing and services	Manufacturing
Legal and contractual relations (rule of law)	Nonlegal and interpersonal relations (rule of man)
Transparency and openness	Closeness and exclusion
Accountability (explicit explanation)	Tacit understanding (full trust)
Neutral government (noninterference in market)	Positive government (developmental state)

Market capitalism is pedigree capitalism with roots in Western Europe. As exhibited so strikingly by the actions of the hedge funds and other financial institutions in the current crisis, it has a hunting and commercial nature in the point of targeting short-term profit. While such lightning transactions are unquestionably products of the new information technology era, western capital found them amenable because of its familiarity with the game of competition in the market place. In capitalism, economic entities are linked with each other by free contracts while using the medium of market competition. Considering the fact that contracts are predicated on independent, free individuals, individualism is naturally reflected in this type of capitalism. This individualistic and contractual view is historically deeply rooted in monotheistic, that is, Judeo-Christian traditions. Further, it is naturally essential to clearly define the relations between parties (transparency) and clarify responsibility for their actions (accountability). The question is how to guarantee free and fair activities of individual

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1 See Macneil, I, 1985 on the Relational Contract

2 Note that Dodd, 1999 postulated the models of "lineal family type capitalism" and "individualistic capitalism" based on the family structures. The former is typically seen in the capitalism of Germany, Japan, and Asia, while the latter appears to be limited to the Anglo-Saxon capitalism of the West. Hasmpden-Turner and Trompenaars,

economic entities. Direct interference of the government in the market is averted, while the role of the judiciary as a neutral mechanism for solving disputes between parties has become essentially important. Economic freedom is ranked parallel to political democracy[3].

Before Western European capitalism was introduced, Asian society was basically agricultural. In particular, in the East Asian monsoon rice-growing society, communal cultivation and communal work were essential. As a result, people lived out their lives cooperating with others in village communities based on polytheistic beliefs and farming etiquette. It is difficult to image that individualism and its extension, capitalism, would be born from this. Capitalism spread in earnest in these regions starting from the introduction of market capitalism, that is, genuine capitalism, from Western Europe in the process of their colonization or modernization. This capitalism, however, had to change in the process of being transplanted to such a foreign soil.

What was born from this was community capitalism. Priority was given to group harmony as opposed to the autonomy and freedom of the individual and to cooperation as opposed to competition. Group consciousness (communalism) and cooperation enable the abilities of the group to be exhibited to the fullest through the pooling of information, but are by nature closed to the outside and exclusionary and further tend to result in less rational management as a result of ties among group members. These non-(market)economic factors are complemented, adjusted, and integrated with various industrial and fiscal policies by the state and government as symbolized by the “developmental state”[4].

Market capitalism is suited for commercial activities based on individual freedom and self-responsibility in view of its source, while community capitalism reflects the nature of an agricultural society and therefore has merits in production of material goods through "communal work" of groups of people. This approach to labor is basically similar to the approach of agriculture although the turnaround time is shortened. Japan has achieved rapid industrialization since the Meiji Restoration and was able to achieve high growth again from the ashes of the Second World War due in

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1997 postulated similar models from a survey of business practices of seven developed countries.

3 von Pfeil, 1998 stated, while citing the arguments of Shumpeter and Hayek, that "capitalism is free and fair competition that leads to profits. Democracy is free and fair competition that leads to better governance" and concludes that neither capitalism nor democracy have been born in Asia.

4 Chalmars Johnson, 1982, analyzing Japan’s Ministry of International Trade and Industry, defined Japan to be a "developmental state" in nature - different from an American-type market state and a Soviet-type socialist state and thereby focuses on the communal (collusive) relationship between the public and private sectors. This

large part to its success in organizing manpower in this mode. Japanese management proponents argue that behind this success was largely the establishment of a group consciousness through lifetime employment, the seniority system, the "ringi" corporate consensus-building system, QC activities in the factories, and other institutionalized bottom-up practices.

Since the 1970s, Japanese companies have invested heavily in East Asia. This was through joint ventures and mostly in the manufacturing sector, so these Japanese-style management practices permeated both labor and management in this area. The countries receiving the avalanche of Japanese investment motivated by the Plaza Accord of 1985 achieved startling economic growth - then termed the "East Asian Miracle" [5],through a strategy of export-oriented industrialization.

The stress there was on interpersonal relations in production and management. Production was improved by close communal cooperation and the pooling of knowledge in the process. That is, an extremely specific form of community capitalism was formed as an extension of agricultural society. Even in investment strategy, in sharp contrast to market capitalism, which has as an essential element a return on short-term investment, it was possible to achieve superiority in respect to the ability to set long-term strategies. In the 1980s, the western-style market capitalism grew fatigued and stagnated due to individualistic labor-management relations. The Asian companies were able to flourish due to the superiority of their system on the production floor - leaving aside the fact that such communalism concealed the infringement of the rights of the individual workers.

This being said, the fact is that community capitalism differs from market capitalism, that is, genuine capitalism, and harbors institutional problems. While Japan achieved high levels of growth by a close linkage between labor and management by the lifetime employment and seniority systems, it failed to sufficiently consider capital (stockholders). Behind this, on the one hand, was the entrenchment of a system of indirect financing by financial institutions protected as a group by the government in the process of the post-war government-led economic development. On the other hand, there were various factors on the stockholders' side enabling this such as the capital gains enjoyed due to the permanent like rise of stock prices resulting from the rapid economic growth.

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relation applies to all Asian developmental states including China. See also , Woo-Cumings, 1999

The globalization which began in earnest at the end of the 1980s caused particularly revolutionary changes in financial technology. The advances made in information technology enabled capital to cross national borders in the blink of an eye. As a result, **first**, industrial production lost its old superiority and fell under the dominance of the financial and service sectors. **Second**, the policies of countries and governments regarding industry and financing were greatly reduced in effectiveness. The former was due to business organization, while the latter due to government, business, and society. These became issues in the structural reforms in these countries after the crisis.

II. Two Types of Capitalism: Comparison of Business Organizations

A comparison of the two types of capitalism by business organization reveals the following. In western style market capitalism, differences are pointed out between the Anglo-American type stressing the market and the European type stressing social fairness. The two however are the same in being predicated on business organizations being formed by individuals or independent economic entities. Therefore, business organizations (joint stock companies) are comprised of independent parties such as company stockholders and managers (these also being groups of independent entities)[6]. The biggest objective is the maximization of profit. In so far as profit belongs to the stockholders, that is, the owners, the stockholders have the final authority and the main obligation of the managers is to provide the stockholders with the maximum dividends.

Along with the growth in the size of companies, the dispersion of stockholders has become unavoidable. In the process, a phenomenon of "separation of management from ownership" has occurred. As a result, stockholders and managers constitute independent and contractual parties in a company. Properly balancing the interests of the two has become an important issue in corporate law. To clarify their relative interests, transparency of business accounting and clarification of accountability are considered essential in determining management responsibility. A system of business accounting has developed for disclosure of information.

In particular, in the U.S., workers are basically considered external factors of business organizations. Companies have been refined into financial mechanisms for the

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5 World Bank, 1993.

6 Workers, an important factor giving rise to wealth in a company, are being recognized as one of the main components of a company through the participation of laborers in management. In the U.S., they are outside the

creation and distribution of profit to the stockholders and managers[7]. In market capitalism, a business organization is strongly by nature a financial mechanism or fictitious product rather than an organization for production. For this reason, in the West, takeovers and other transactions of the companies themselves are routine. Needless to say this reflects the hunting and commercial nature of market capitalism.

One of the features of a western-style business organization is that the biggest goal of management is to increase dividends to the owners of the corporation, that is, the stockholders. This results in the pursuit of short-term profit as a corporate strategy and makes long-term business planning difficult. On the other hand, there is the merit that thinking of companies as a mere means for generating profit makes it easy to transform or reorganize them to meet with changes in the market and economic situation.

The legal framework of the corporate system in the Asian countries is based on company laws and other business related laws introduced from the western countries. For example, in basically the same way as the West, company laws are set based on the rights and obligations of stockholders and managers over their companies. The actual situation, however, is considerably different, it has been pointed out. Many companies are owned and managed by the same group members. Even in large companies listed on the stock exchanges, there are no clear contractual relations between the (dominant) stockholders and managers and a company. The relation between the two in the distribution of profits is also unclear. In such close knit relations, transparency and accountability, predicated on managers and stockholders as being separate parties, are not that important.

This approach to business management may be similarly seen in the prewar "zaibatsu" and postwar “corporate groups” of Japan, the "chaebol" of South Korea, the "relationships" characteristic of ethnic Chinese-run companies in Southeast Asia, and the "conglomerates" of Indonesia. In Japan, before the war, relations between stockholders and managers consisted of integral, personal relations in the "zaibatsu". In the postwar “corporate groups”, the bonds between management and workers were strengthened (for example, with the lifetime employment system and seniority system). As a result, it is pointed out, responsibility toward the stockholders has been neglected.

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company and considered as parties to a labor contract with the same.

[7] As is well known, in Europe, from the viewpoint of the stress on social fairness, progress has been made in the institutionalization of the voice of workers (management and profit participation) in company laws ever since the

This kind of relationship, however, as seen not only inside companies but within corporate affiliations (Keiretu), forms a net extending down from the main banks and encompassing the entire range of business activities including even subcontractors. As shown so forcefully by the term "a corporate family", companies and corporate groups form single entities. Differences between entities inside them have been cast aside.

Communal elements have been generally present in the other Asian countries as well as shown by their traditions of relationships and inter-personalism. In addition, the business investment of Japan in the rest of Asia starting in the 1970s increased at a faster pace in the late 1980s, as mentioned. Along with this, Japanese business management techniques evolved into a more broad-based form in East Asia as a whole while resonating with the local communal elements.

The community capitalist companies of Japan and the rest of Asia demonstrated superiority in the fields of production and manufacturing. **First**, in these fields, business organizations are not mere financial profit-making mechanisms, but groups of people organized for the communal cooperation of turning out a physical product. On the production floor, solidarity between managers and workers and among workers works positively to increase productivity in a major way. **Second**, the manufacturing sector requires factories and other production facilities, so the time span of management becomes long. These companies tend to invest with a long-term perspective, even if resulting in minus profits in the short term, rather than working to generate profits while closely following movements in the market.

Whatever the case, these companies are extensions of the mode of agricultural production and have little familiarity with transparency and accountability, which are predicated on disclosure of management information such as short-term profit and loss. Their management techniques, however, make it difficult to obtain a grasp of the state of management, especially of financial status by clear figures. Further, when excessively relying on communalism, there is a strong possibility of the spread of nepotism and cronyism. This danger becomes greater in the field of financial services which does not produce physical products and has to be managed by abstract figures. The current crisis was also caused by this vulnerability.

Facing international wave of liberalization and deregulation together with acceleration of free movement of goods, capital and services called "globalization" of

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end of the Second World War.

the 1990s, Japanese capitalism failed to reorganize an effective financial system based on transparency and accountability after the collapse of the economic bubble and entered a period of long-term stagnation. Further, the Asian countries were thrown into crisis due to the roller coaster run in speculative financial capital as seen in the hedge funds, the symbols of market capitalism, due to the above problems inherent in community capitalism. As seen here, the Asian-style community capitalism, strong in manufacturing, was tripped up by the western capitalism based on globalization of financing. This can be said to be the true lesson of the current Asian crisis[8].

III. East Asian Systems and Law Reform: Law and Politics, the Economy, and Society

As a result of the current crisis, Asian community capitalism has been forced to change to the individualistic western market capitalism in the economy, politics, and society. These changes were compelled by market force - strengthened overwhelmingly by the information revolution, as epitomized by globalization. As a result, the effectiveness of the former developmental state type policies with regard to the economy and society is being sapped.

There is no denying that there are major problems in the political system under the Asian-type community capitalism. Capitalism naturally cannot stand without support of the nation state. As time goes by, the state (government) finds greater room for intervention in the economy and society as is seen in market capitalism modeled on the West as well. In market capitalism, however, even in this case, the state is considered an independent public institution which functions as a neutral political mechanism to govern but to be independent from private interest such as business companies. As a result, transparency is sought between the two. As opposed to this, in community capitalism, like with other relations, the relation between the state and companies is non-contractual and personal. In terms of mobilizing the resources of the state for economic development through companies from a long-term perspective without giving that much consideration to short-term costs, community capitalism can be said to have its own measure of sense for a developmental state pursuing "development" above all. The natural results, that is, the lack of transparency between

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[8] Due to the financial crisis and the subsequent austerity policies imposed by the IMF, the manufacturing sector suffered from a massive production surplus and reached an impasse. This further exacerbated the economic conditions in these countries. For this, see FEER, Oct. 1, 1998, 10-15.

the government and business and the lack of economic accountability, however, inhibit rational economic management. As seen in recent incidents in Japan, there is the inherent problem of it creating a hotbed of economic and political corruption[9]. Further, in the Asian developmental states, protest against this type of corruption of power has been forcibly suppressed. The problem of corruption, nepotism, and strong-arm tactics can be said to be the Achilles heel of community capitalism and the developmental state.

In this article, we will predict or assess what kind of changes will occur or should occur in the law on three systems, political, economic and social<see **Appendix**>[10], of Southeast Asia as a result of the crisis.

1. The Political System and the Law

The political system is basically the area relating to power. In that area, there is naturally a relationship between the dominant and the subordinate ("command principle" referred at Appendix by the author). The political system of Southeast Asia is characterized by "developmental dictatorship" and authoritarian systems, but can be understood as not being comprised of mere means of physical and psychological coercion, but as including also nepotism and cronyism and being strongly defined by communal values.

As a result of the current crisis, however, at least at the nation state level, the limits of coercion have been exposed. The amendment of the Thai Constitution in 1997, right after the crisis broke out, and the search for a new Constitutional Governance in Indonesia in the midst of all of the turmoil there show that there is a marked shift toward the western style market democratic system. Along with the complete protection of the right to vote and be elected, appointments of the military as to the national assembly members are being cut back (Indonesia) and fundamental reforms made in the assemblies based on this (Thailand). Further, as a result of the crisis, a "civil society" supporting such governance is being actively debate.[11]

In this debate, along with the amendment of the election system, the curbing of

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[9] This postulation naturally is persuasive in Japan as well. Yuzo Niiyama (1999) gave the existence of "hindsight, supervisory state interference" as a reason for the lack of the concept of "fairness" in the corporate culture of Japan, but our opinions match in the point that this collusion between developmental states and business at least made the crisis more serious.

[10] These three systems are predicated on three types of legal principles hypothesized by the writer, that is, politics = command principle, economics = market principle, and society = community principle. For the three types of legal principles, see the attached table in appendix

the power of the president, measures to prevent corruption as seen in Indonesia and Thailand, and other reforms on the national level, local community level activities such as exposure of corruption of local officials are being introduced. The latter however has more to do with the devolution of power to the local governments and stronger participation of the public in politics.

Democracy is naturally predicated on the idea of the "rule of law". The improvement of the judicial system, in particular the reconstruction and strengthening of the judiciary, which had not necessarily functioned sufficiently up until now, is becoming an important issue. The establishment of clean, efficient courts is essential for ensuring human rights, which are being stressed in the process[12], and is considered important for smoothing economic activity in the market capitalism model.

Regarding human rights, along with such a system of guarantees by the judiciary, the concept of "Human Rights Commissions" to serve as organizations for enlightening all levels of the public about human rights and fighting for the same more flexibly is being more actively pursued. These commissions have already been successively established in the Philippines and Indonesia and in Thailand as well by the 1997 Constitution[13]. This movement recognizes and strengthens human rights at the grass roots level and may give birth to a new concept of human rights different from the one argued over by the opposing camps in the old "human rights versus Asian values" debate[14]. Further, in the midst of the internationalization of the concept of human rights, for example, an international human rights organization such as a human rights commission may take form in Asia.

Power is already being devolved to the local governments at a considerable speed. This issue is tied to separatism as well seen by the independence of East Timor. If this is linked with the activities of the NGOs etc. aiming at the construction of a civil society, a new concept of **a multicultural nation** state may be born.

2. The Economic System and the Law

As clear from the current crisis, in particular as it relates to financial services,

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[11] For example, “Asia’s Reformers, Winning or Losing” FEER Nov.5 1998, PP10-18)

[12] This movement and theory of Judicial Reform of the World Bank can be learned from the information of its home page (http://www1.worldbank.org/publicsector/legal). Judicial reforms are discussed in the sections on Constitutional Review and Government Liability, Judicial Independence: “What it is, How it Can be Measured, Why It Occurs, Human Rights Instruments and Judicial Reform, and Access to Justice”.

[13] The Human Rights Law of 1999 in Indonesia strengthens the power of Human Rights Commission, which have now a kind of settlement mechanism to solve the human rights disputes.

the Asian countries have undeniably been backward in their institutions. Modernization of these institutions is therefore a major issue. he old unwary, lackadaisical measures used up until now, however, have to be revised. This is seen in the reversion of Malaysia to a fixed exchange rate. If considering the fact that introduction of foreign capital is necessary for the economic growth of these countries, in the long term, Asia will probably head in the direction of an international framework (for example, an Asian Monetary Fund (AMF)) under the umbrella of ASEAN or a larger entity such as ASEAN plus 3 (Three Chinas, Korea and Japan).

If viewing the movement toward liberalization of trade etc. in APEC and the WTO along with financing, the role of the government in international economics is steadily declining. It appears inevitable that the Asian countries will be incorporated into the international market system.

Financial regulations, intellectual property law, investment laws, bankruptcy laws, and other economic regulations are being forced to change from regulatory laws **(law as policy**) giving governments large discretionary powers to institutional laws (**law as institution**) aimed at providing rules for resolution of disputes. The legislation of competition laws now being advanced all over the world may be considered part of this. Further, hopefully the basic laws and judicial system for running the same will be reformed to serve as the basic system for supporting the market.

Of course, in the manufacturing and agricultural sectors which produce physical objects, a communal value system should function effectively in its own right. Such values may be maintained separately from the law. Further, in so far as these countries are still oriented toward "development", development policies will be significant. As a result, the role of the nation state cannot be overlooked.

Economic liberalization cannot be stopped in Asia unless the current wave of globalization is ended. As a natural consequence, the problem of market failures will be unavoidable. Social unrest broke out in Indonesia when the value of the currency dropped, although temporarily, to one-sixth of its height. Unemployment is becoming a serious problem in other countries as well. These problems must be solved in short order. As explained next, in so far as this makes urbanization and marketization of the lives of the people unavoidable, the nation state will be expected to play an aggressive role in combating unemployment and correcting the disparity between the rich and poor and in

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[14] See Bauel & Bell, 1999 for more detailed discussion on this problems.

protecting the environment[15].

3. The Social System and the Law

The biggest victims in the current crisis have been the workers, urban residents, and farmers[16]. They have rapidly been impoverished. The World Bank report proposes that a safety net be built for them as an urgent task while giving due consideration to the environment. Several reports point out that even the rural areas, which have functioned as shock absorbers in economic crises up until now, cannot necessarily be expected to play the same role today after the industrialization and urbanization of the 1980s[17]. Further, urban populations are increasingly breaking down into individuals and nuclear families. The large helpful extended families and local mutual assistance organizations of the past also no longer function as before.

In view of this situation, construction of a social security system on a national level has become essential. How should it be designed? In view of the fact that the national society security systems of many industrialized nations are on the verge of bankruptcy, it is not possible to introduce the systems of those countries as they are. Consideration should be given to revitalizing the mutual aid organizations of the villages and towns now on the brink of extinction. Starting in the 1980s, a kind of cooperative association has been at work in city slums and rural areas with the cooperation of foreign NGOs. This will become increasingly important in the future.

The devolution of power to the local governments and participation by the common people mentioned in the section on the political system would seem to suggest large possibilities in relation to this. Therefore, such local government organizations are by nature not only mere base level political organizations, but also communities of all of the people relevant to the lives of the public. Negative elements such as nepotism and cronyism undeniably enter into the picture, however. In that sense, the participation of domestic and foreign NGOs as outside collaborators will be important in keeping these ills to a minimum.

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[15] For this issue, see The World Bank; 1998, and "Will Government Help?" FEER, Oct. 8, 1998, 10-13

[16] In Indonesia, the country suffering the most from the current crisis, it was reported that 17 million people faced a food crisis and that 4 million households in Central and East Java only had one meal a day (FEER, Oct. 1, 1998, 90).

[17] The World Bank, 1998, FEER, Oct. 8, 1998

Conclusion

Above, we looked at the factors behind the Asian financial crisis which spread rapidly starting in 1997 and the directions in law reforms for overcoming the same. A consensus is reportedly being reached among the industrialized countries, though with different nuances in the West, regarding the need for some sort of regulation of the hedge funds and other global speculative financial capital which triggered the crisis. Along with this, the economic situation in all of the countries except for the still turmoil wracked Indonesia, is gradually settling down.

The conflict between the market and community, however, will be difficult to complete resolve considering the qualitative differences in the principles between the two, that is, the market principle and the community principle. This is because there will unavoidably be routine contradictions and clashes between globalization, which is powered by the market, and society, which seeks to ensure its continuity through social cohesiveness.

The existing framework of the "nation state" is being eaten away by globalization on the one hand, and starting to loose its effectiveness in the midst of the diversification of various communities trying to ensure their own solidarity. The European Union extends over nations and yet recognizes political communities of a level lower than the nation state. This suggests this.

Further, as opposed to the pervasion of multinational enterprises into the arena of nation states in search of profit, that is, liberalization and deregulation, organizations are also being born from NGOs formed from various civil societies promoting the protection of the environment and human rights. Therefore, the nation states, which used to be the centers of power, are being limited to the role of mechanism for coordinating between multinational enterprises (business organizations) and NGOs (social organizations). This coordinating power is passing on the one hand to larger international organizations, for example, the UN, super-state organizations such as the European Union, and sector wise coordinating organizations such as the WTO and OECD. On the other hand, it is gradually devolving to smaller communities, for example, local governments. Based on this understanding, regional international organizations such as ASEAN, which has substantially weakened functioning as a result of the current crisis, should again increase in importance as the crisis ebbs.

As economic systems do not encompass all dimensions of human life, market

capitalism is not necessarily all powerful. The market is an essential apparatus in the process of exchange of goods between people. This is because even limited to economic acts, clearly people live in communalism in the production and consumption of physical goods. In so far as the market has to have only winners and losers, in the most basic areas of people's lives, production and consumption, adjustment by communalism is unavoidable. If looking at the revival of the social democratic governments in Europe[18], the idea that the market should be regulated from the viewpoint of social fairness is picking up steam. We witnessed that NGOs revolt fiercely against Global marketing powers at Seattle in September 1999 when Bank and IMF meeting as held. This indicates that the community force at global level starts blocking against market force which mobilized the current globalization, and building its own global community beyond the nation- states based on our community principle.

[18] Gidens, 1998

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Appendix

Three Types of Legal Principles

Principles	Community Principle	Market Principle	Command Principle
Basic relation	Unifying and solidifying	Horizontal, and equivalent	vertical order and obedience
Basic value	Fraternity	Liberty	Equality
Model social action	one for all, all for one	Voluntary exchange of goods	compulsion by the superior
Core sphere or dimension	Communal society (community)	Economic society (economy)	political society (state)
State model	(commune state) proto-states	Modern capitalist state Colonial states	(former) socialist state developmental states
General pattern of norms	not clear, depending on community feeling	Supplying clear interpretation rules	giving discretionary power to the authority
Typical branch of law	family law	Civil and commercial law	public (political) law
Nature of disputes settlement	Amicable settlement (mediation or conciliation)	Adjudication by third party (like courts)	reconsideration by the authority
Basic value for the settlement	Identification (solidarity)	Legality (justice)	Reasonableness (fairness)
Typical settlement Agent	Community mediation or conciliation center	Judicial Courts	Administrative tribunal

Similar Trichotomy

Name	Community Principle	Market Principle	Command Principle
Unger, R, (1986)	Customary-interaction law	Legal order and legal system	Bureaucratic law
Nonnet & Selznick (1977)	Responsive law	Autonomy law	Strict law
Kamenka & Tay (1980)	Gemeinschaft type of law	Gesellshaft type of law	Bureaucratic-administrative type of law
Ghai Yash (1986)	Custom	Market	State and its law
Miller (1976)	Primitive	Market	Hierarchy
Pollani, P. (1977)	Reciprocity	Exchange	Market
Paul Tillich (1954)	Love	Justice	Power

Sources: Unger R..M., *Law in Modern Society; Toward a Criticism of Social Theory*, New York, The State Press, 1976. Nonnet P. and Selznnik, P, *Law and Society in Transition, Towards Responsive Law*, New York, Happer Colphan Books, 1978. Kamenka Augen and A.E. Tay, Social Traditions, Legal Traditions" (in Kamenka &Tay (eds.), *Law and Social Control*, Edward Arnold, London,1980. Ghai Yash, "Land Reform and Paradigm of Development: Reflections in Melanesian Constitutions" (in P. Sack (ed.) *Legal Pluralism*, Proceeding of Canberra Law Workshop VII, Research School of Social Science, ANU, 1986). Miller, D., *Social Justice*, Clarendon, Press, 1976. Polanyi, K., *The Livelihood of Man*, (ed., by H.W. Peason, New York, Academic Press, 1977.Paul Tillich, *Love, Power and Justice*, Oxford University Press, 1954.

Indonesian Contract Law

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Introduction

Since 1967 Indonesia has taken an ever increasing open door policy with regard to foreign investments and foreign trade.

Since then thousands and thousands international contracts have been concluded, both between Indonesian private companies and foreign companies, as well as between Indonesian state companies and transnational corporations.

From the beginning, foreign contract models have just been adopted and translated in the Indonesian language, without much thinking and research, whether those foreign concepts are in line with Indonesian contract – and business law. On the contrary, very often the principles of Indonesian contract law has been thwarted and re-interpreted, in order to accommodate the foreign concepts into Indonesian law.

Through the 35 years or so of intense foreign influence, especially of American law in Indonesia, Indonesian Contract and Business Law has been astray far from what it theoretically should have been, given the fact that our Civil and Commercial Code of 1848 looks almost the same as it was some 150 years ago, except for a change of the Indonesian company law.

Indeed, our Contract Law, especially with regard to international contracts mainly consists of customary law as agreed to by both Indonesian and foreign business partners. With respect to foreign investments, banking – as well as the capital market, government regulations decide on the form of the contract and other exceptions to the rules and principles laid down in the Civil Code. So that now we have numerous laws and regulations on specific contracts, while the Law on Contracts in the Civil Code of 1848 only serves as the general principles of Contract Law in Indonesia.

Entering into the 21st century with its global economy, and its e-commerce, it is understandable that Indonesia cannot any more rely on such an outdated Contract Law,

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even if they only represent the “General Principles of Contract Law”.

Contract law is regarded as part of Indonesian private law, particularly as part of the Law of Obligations. Indonesian law is often described as a member of the “civil law” group as found in Continental European countries such as France and Holland, as opposed to the common law systems such as those in the United Kingdom and its former colonies. Part of Indonesian Private Law as inherited from the Dutch colonial Government are two codifications i.e. the Civil Code (*Burgerlijk Wetboek*) and the Commercial Code (*Wetboek van Koophandel*). Those codes were originally derived from the French codification as enacted on March 21, 1804 which we know as the Code Napoleon. Therefore, the existing contract law which applies in Indonesia today, consists of the Netherlands-Indies Law of Obligations as contained in the Civil Code of 1848. Hence, we feel that a number of provisions should be modernized, repealed, or replaced with new and internationally compatible norms as the Civil Law of the Netherlands has already been changed. Whilst other norms which are still relevant may be maintained.

As a new emerging economic country and part of the world society, Indonesia cannot avoid the current trend of globalization of law which tend to harmonize to a certain degree all legal norms of the world, especially in economic and business relations. This might be imposed by a single coercive regional and global organization and as a consequence of the memberships of regional and global cooperation such as the WTO (World Trade Organization)[1], APEC (Asia Pacific Economic Cooperation) and AFTA (Asean Free Trade Association). AFTA will fully enter into force in 2003, and WTO in 2020.

The economic and financial crisis[2] in fact coincides with the first stage of implementation of those regional and global liberalization forces, which needs even more certainty and predictability of international commercial contracts.

A. Brief History of Contract Law in Indonesia

Before the Dutch ruled over the Indonesia Archipelagos, each tribe or clan living on these islands were governed by their own Customary or Adat Law, which also included Contract Law. Although the rules differed one from the other, but they had 3 (three) features in common, which Prof. Van Vollenhoven described as “(1) communal,

[1] Ratification of the Agreement on Establishing World Trade Organization by Act No. 7 of 1994.

(2) cash and carry, and (3) concrete .

In 1855 article 131 of the Netherlands Indies State Law (State Gazette No. 2 of 1855) legally divided the Indonesian population into three groups, i.e. :

(a) Europeans, including Japanese;
(b) Foreign Orientals; and
(c) Indigenous Indonesians.

Article 163 of that law ruled that:
(a) the Civil and Commercial Code applied to Europeans and Japanese;
(b) The Civil Code and the Commercial Code, concept for those parts concerning personal law, marriage and inheritance also applied to Foreign Orientals.
(c) Indigenous Indonesians were not governed by the so-called “European Laws”, except in the case they legally obtained the same status as “Europeans” by Decision of the Governor-General.

Hence the Civil and Commercial Code never applied to Indonesians. Except in the most exceptional case, when an Indonesian request to the Governor-General was granted to be regarded as an European. This was possible only, in the case he had a Dutch education, married a Dutch or European woman, spoke Dutch at home with his wife and children, became a Christian and was completely living in a Dutch environment.

For the bulk of Indonesians, however, the Civil Code and hence Contract Law as contained in the Civil Code, never applied, and Indonesians have nothing to do with so-called European Law.

It was only since 1967, after the Foreign Investment Law was promulgated that the Company Law under the Commercial Code and the Contract Law under the Civil Code were made applicable to (indigenous) Indonesian citizens by Governmental Regulation, which later was confirmed by the courts through case law. Whilst the “European” Contract Law and Company Law were still a novelty for Indonesians, at the

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[2] Since the middle of 1996 up to the present time

same time foreign elements (especially American legal principles and clauses were introduced in the Investment Contracts between foreign investors and Indonesian businessmen. The use of the English language combined with the underlying English legal concepts of Contract – and Company Law resulted in a terrible mixture of rules and clauses in the Investment Contracts resulting in a state of confusion as to what the law really is, and how a clause should be legally interpreted by lawyers and judges.

That is why, especially with the dawn of electronically agreed contracts, coinciding with the globalization of commerce and investments in the 21st century, it is high time that Indonesia reforms and modernizes its Contract Law to the needs of Indonesians, as well to those of the international business world.

Background of the Indonesian Civil Code

It is often said that Indonesian Civil Law belongs to the group of the Continental "Civil Law Systems", as opposed to the "Common Law Systems".[3]

This description is not wrong to the extent that much of Indonesian law derives from the Dutch and the French. However, the statement is not entirely true.

As Sudargo Gautama[4] said that when the first Dutch ships landed in the Indonesian Archipelago, they did not find a juridical "empty land". The land was full of legal institutions. There was diversity of laws from the beginning of the days of the VOC (*Vereenigde Oost Indische Compagnie*) or United East Indian Company. From the beginning of Dutch colonization, the inhabitants of the Indonesian Archipelago, have been divided for legal purposes into various "population groups" (*bevolkingsgroepen*). This distinction was not entirely based on racial differentiation, but was also based on economic considerations. There was also a distinction between residents and non-residents, Dutch nationals and foreigners, but no distinction was more important than the division into population-groups, as regulated by State Gazette 1855 No. 2.

For example, matters concerning daily transactions in private life, such as what kind of contracts one could enter into, whether one could own land and where, from whom one could inherit and in what ways ; all such matters depended on the population group one belonged to. This was so, because different rules of contract law, property law and inheritance law existed for each group. Each group had its own legal system,

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[3] Timothy Lindsey, *An Overview of Indonesian Law,* in Indonesia Law and Society, Sydney: the Federation Press, 1999, p. 1.

[4] Sudargo Gautama, *The Commercial Laws of Indonesia,* Bandung : Citra Aditya Bakti, 1998, p. 3.

separate regulations administered by separate government officials and regulated by separate codes or laws. Very different systems of law existed side by side in Indonesia for centuries, although transactions between the various groups were possible which was governed by principles and rules of Interpersonal Law. In special cases unified regulations were made like in the case of the Criminal Code, which applied to all groups of inhabitants.

B. Application of the Civil Code and General Principles of Contract Law

Part of Indonesian Private Law as inherited from the Dutch are the Civil Code (*Burgerlijk Wetboek*) and the Commercial Code (*Wetboek van Koophandel*). These codes (except for a few exceptions), were practically Dutch translations from the French Code Civil and Code du Commerce. The Civil Code was promulgated in Indonesia by Government Announcement on April 30, 1847, Government Gazette 1847 No. 23 and applied since the 1st January 1848.

Article II (the Transitional Regulation) of the Indonesian Constitution of 1945 states that all the existing state institutions and regulations will still apply, as long as no new ones have been established in accordance with this Constitution. This provision was made, in order to prevent a legal vacuum. Hence the old regulations and codes before our independence on August 17th, 1945 continue to apply till the present time. Nevertheless, the Government assisted by the National Law Reform Agency (Badan Pembinaan Hukum Nasional) is scrutinizing which of the old laws will have to be replaced by new ones. Some 400 laws and/or regulations will have to be replaced by new ones.

The recent development pertaining to contract law and commercial transactions has been the enactment of Act No. 1 of 1995 on the Limited Liability Company (PT), the Fiduciary Securities Act (No. 42 of 1999), and the Futures Trading Contract by Act No. 32 of 1997. Standard contracts are regulated in specific regulations such as Act No. 8 of 1999 on Consumer Protection and Act No. 18 of 1999 on Construction Services. At present a bill is being prepared for Mining Activities including mining and license contracts. Provisions concerning contracts which are prohibited can be found in Act No. 5 of 1999 concerning the Prohibition of Monopoly and Unfair Business Competition.

Contract Law as a Source of Obligations

The Civil Code was promulgated in the year 1848 together with the Commercial Code. The law of contracts under the Civil Code (*Burgerlijk Wetboek*) is laid down in Book III of the Civil Code, starting with Article 1233 through Art. 1456. The 5th Chapter of Book III (art. 1457 to art. 1850 CC) regulates the so-called "nominated" or specific contracts, such as sale of goods, barter, hiring, etc.

Book III of the Civil Code, under the heading "Obligations", contains :

(a) the law of contracts as the principal source of obligations,

(b) the management of affairs without mandate, and

(c) the law of torts or wrongful acts.

(d) Nominated contracts.

Every obligation is born either by agreement or by legislation [5]. There is no definition on what obligation is in the Civil Code. Legal science stipulates that obligation is a legal relation between two or more persons which site within the field of the law of property, establishing to one party the right to get something or have something to be done by the other party, who has the obligation to fulfill such right. Legal relations happen every day, so the law grants "rights" to one party, and "obligation" to the other party and vice versa. Elements of obligations are : legal relations, property, parties, and something to give or to be done (prestatie) [6]. If one of the parties does not respect or breaches such legal relationship, the law will be enforced in order that the relationship will be fulfilled or restored. For example : A agrees to sell a bicycle to B. As a result of that agreement, A is obliged to give his bicycle to B and at the same time has the right to its price from B, whilst B is obliged to pay the price of that bicycle to A. If A does not fulfill his obligations, then the law will "force" him to do so by legal means.

However, not all social relations result in the enforcement of the law of obligations. An agreement to go for an outing or a picnic will not bear an obligation, because such agreement is not an agreement in the legal sense. Such agreement falls within the category of moral obligations, because the non-performance of the obligation results in a reaction from other members of society as a bad attitude. The non-

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[5] Article 1233 Civil Code.

[6] Mariam Darus Badrulzaman, *Civil Code Book III and Its Explanation* (KUHPerdata Buku III Hukum Perikatan dengan Penjelasan), Bandung, Alumni, 1993, p. 3.

performance party will be hated by the other, but it is non-actionable before the court.

Sources of obligations are agreements (contract) and legislation. [7] Obligations born by Law can be born by mere Law (*uit de wet alleen*) or as a result of human action (*uit de wet ten gevolge van 's mensens toedoen*) [8].

Furthermore obligations as a result of human actions can be lawful or unlawful acts or torts (*onrechtmatige daad*).[9]

Obligations born by mere Law are obligations between the parties concerned (with or without intention of the parties). For example : date of expiration (*verjaring*) is an event where the legislators determine an obligation to a particular person. Because of the date of expiration, someone might be released from doing something or acquiring a right or obligation to do for something ; the death of a person will result in legal obligations to his heirs, the birth of a child results in the obligation to the parents in order to take care of their infant (Article 321 Civil Code).

Obligations which arise from the Law as a result of human lawful acts are for instance a voluntarily handling of other people's interests (*zaakwaarneming*), because the Law determines that some rights and duties must be performed by the handles, similar to the rights and duties in such cases as if an agreement was made. Article 1354 Civil Code states that "if someone, without having obtained an order for it has voluntarily handled another person's matters, he has an obligation to continue and finish that matter (business) until the people represented is able to do that matter by himself. The person, whom the other person has represented, has an obligation to compensate all costs which was spent on his behalf.

Obligations resulting from the Law but caused by unlawful acts is enacted in Article 1365 of the Civil Code, saying that those who causes another person to suffer losses, based on his fault, must restore the losses.

As Article 1233 Civil Code states that "obligations are born from contract or from legislation". That means that Law and Contracts are sources of obligations. This gives the impression as if the sources of obligations are only limited to those two sources mentioned above. However, based on the extensive interpretation on natural obligations in an Supreme Court decision of March 12, 1926, obligations can also be based on good faith or decency (good deed) as a source of a "natural" obligation

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[7] Article 1233 Civil Code.
[8] Article 1352 Civil Code.
[9] Article 1353 Civil Code.

(*natuurlijke verbintenis*) which can not be sued before the court to obtain full compensation, but if performed, releases the performer of his obligation.

General Provisions and Open System of Book III of the Indonesian Civil Code

The law of contract is an "open system", which means that everybody is free to make any kind of contract. Special contracts or "nominated contracts" are regulated in the Civil Code being only the most popular kinds of contracts. Because Book III of the Civil Code is an open system, the articles in Book III actually provide only General Guidelines of Contract Law. With such general provisions, people could conclude whether or not they have made a legally valid contract.

Freedom of Contract

The freedom to make contracts of whatever kind is regulated in Article 1338 paragraph 1 of the Civil Code, which provides that all contracts which have been legally concluded, have the same force as a legislative act for the parties who had concluded the contract. As a consequence of the open system of the law of contracts, the provision laid down in Book III of the Civil Code have the character of optional law. This means that the parties are free to ignore those provisions by making for themselves rules in their contracts deviating from or even contrary to those provisions laid down in Book III[10], except that they cannot deviate from the basic rules of legality, justice, good intentions and fairness, whenever the parties have not made any provision concerning a certain matter in the contract.

Book III of the Civil Code consists of a General Part (art. 1233 – 1456), containing the general rules of the law of obligations and contracts and a Special part regulating special contracts (art. 1457 – 1855). The general principles of the law of contracts in the Civil Code form the principles not only for contracts regulated in the Civil Code itself, but also for those regulated in the Commercial Code and in other special acts or regulations.

Most articles of the law of contract, private law in general, are additional legal provisions (*aanvullend recht*), which apply in case the parties had not agreed otherwise. The additional legal provisions also apply only when both parties consent to that. Here the legislators made a fiction of presumed intention of the parties. Such fiction is needed

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[10] R. Subekti, *The Law of Contracts in Indonesia, Remedies of Breach,* Jakarta : Haji Masagung, 1989.

in order to synchronize with the principle of consensus of the parties. Apart from that, such legal presumption is needed to determine the rights and duties of the parties and also to prevent any legal dispute, or for the sake of legal certainty.

The elements of obligations are : the parties, legal relations, property, and something to give or to be done (prestatie).[11]. In Book III the law of obligations is part of the law of property (*vermogensrecht)*, which distinguishes between absolute rights and relative rights. Absolute rights (or rights in rem) are regulated in Book II of the Civil Code, whilst relative rights are regulated in Book III of the Civil Code. Property rights are rights which have economic value or can be counted in sums of money. So it should be clearly understood that the obligation to give or do something (prestatie) valued in money or other economic value has an important role in the law of obligation. This legal character is to be distinguished from the moral obligation which are not enforceable by law.

The Civil Code also regulates a number of so called “nominated” contracts, such as the contract of sale, barter or exchange, lease, contract of labour, partnership, association, donation, deposits, loans, “natural contracts” like gambling and life annuity, agency, guarantee and compromise.

Contracts of insurance and transportation overseas are regulated by the Commercial Code, and contracts of transportation over land and by air are regulated by special laws or ordinances.

Other commercial transactions have been provided by many Laws outside the Civil Code and Commercial Code such as the Contract for the establishment of a Limited Liability Company (PT) regulated in Act. No. 1 of 1995 on Liability Company, Fiduciary Securities in Act. No. 42 of 1999, and Futures Trading Contracts in Act. No. 32 of 1997. Standard contracts have been enacted in special rules such as in Act. No. 8 of 1999 on Consumer protection and Act No. 18 of 1999 on Construction Service, while at present a bill is being prepared for mining activities, including mining and license contracts. Finally, in Act. No. 5 of 1999 concerning Prohibition of Monopoly and Unfair Business Competition there are provisions on contract clauses, which are prohibited.

Definition and Scope of Contract Law

Chapter II of Book III of the Civil Code concerns “Obligations born from

[11] Mariam Darus Badrulzaman, *Civil Code Book III and Its Explanation (KHUPerdata Buku III Hukum*

Contract or Agreement". The use of the words "contract" or "agreement" in Book III have identical meaning, Article 1313 of the Civil Code define a contract (or agreement) as an "act by which one or more persons bind themselves towards two or more other persons, with the intention to create obligations".

The term "act" between two or more persons in this article should be understood as "legal act", because both parties are required to consciously know or could or should have known of the legal consequence which would occur in the future. Hence the parties intentionally were engaged in such act for the purpose of its legal consequence. In other words, the legal consequence was indeed something that was intended by the parties. For example in the decision of the Court of Central Jakarta in the case between **Alfa Indonesia** vs, **Jakarta Lloyd** No. 64/1979, the defendant posed that the shipping agreement included a special agreement (*benoemde overeenkomst*). Article 506 of the Civil Code namely stated that a Bill of Lading is a letter in which was written that on a certain date the carrier received a certain (kind or amount of) goods to be delivered at a certain place of destination where it should be delivered to a certain person. The bill of lading also contains a set of conditions for transfer goods. Therefore it was convincingly clear that the **Bill of Lading** was indeed a unilateral declaration (*eenzijdig*) made by the carrier/defendant and that it was not an agreement between the two parties (*overeenkomst*) as stipulated in Article 1313 Civil Code.

The law of Book III of the Civil Code concerns contracts in the field of private law. Agreements in public institutions or organizations are not covered by the Civil Code. Public law concerns public law relations, namely relations between states or between public institutions and organizations. However, in the last thirty years increasingly the state conclude contracts with individual persons or private companies concerning private law matters. Such as whenever the government has to buy computers or stationeries from a private company for the purpose of government procurement.

In recent times there are two opinions on that issue. If the state acted in the quality of the state (*iure imperii*) the legal relationship results in a public law relation. Whereas if the state acted in her economic capacity (iure gestiones) [12] as for instance as a state company, private law on the matter should be settled by private law provisions. In such case the provisions of Book III of the Civil Code apply.

Perikatan dengan Penjelasan), Bandung : Alumni, 1993, p. 3.

[12] Compare with Barry E. Carter and Phillip R, Trimble, *Foreign Sovereign Immunity and the Act of State Doctrine,* Boston : Little, Brown & Co., 1991, pp. 449 – 697.

For example in the decision of the District Court (*Residentiegerecht*) of Batavia, March 18, 1927 in the case of "**Excess Teaching Hours**".[13] A, a mathematic teacher, who was appointed by the Department of Education became Head of a Preparatory Team for the opening of the Medical School in Surabaya, had been given the task to give mathematic lessons to the student candidates. The task as a teacher has exceeded the number of teaching hours agreed upon, because the change of teaching schedules from the Department of Education.

Based on those reasons he sued the Department of Education c.q. State in order to pay the "excess of teaching hours". The legal reasoning of the Court Decision said that the legal relationship between plaintiff and defendant was a relation between employee and the state. Such relationship was not a private agreement, but had a public law character. Article 40. I.S. (*Indische Staatregeling*) stipulates that payment of wages for public employees is unilaterally decided by the state. Therefore, intervention by another party, even though by the Court, was not excepted. This indicated the difference between public law and private law. In other words, the private law provisions in Book III do not applied for agreement in the field of public law.

This was the situation in 1927. But recently there is a group of lawyers, who have modified this theory, saying that in specific cases Book III CC might be applicable to government contracts.

General Conditions for Validity of Contract

Article 1320 Civil Code provides for the general conditions by which a contract is valid. Such conditions concern the subject and the object of the contract. This article stipulates that for a contract to be valid, it must comply with 4 (four) conditions, namely : (1) consent between those who bind themselves (the parties); (2) capacity of the respective parties to conclude an obligation;, (3) a certain (specific) subject matter, and (4) a legal cause.

When the conditions mentioned above are fulfilled, a contract is complete and valid. The validity of a contract is, as a rule, not bound to formalities. Only by exception the law prescribes formalities for a certain number of contracts.[14] The first two conditions are conditions pertaining to its subject, and the last two conditions are

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[13] Translated from J. Satrio, *Hukum Perikatan, Perikatan Yang Lahir dari Perjanjian,* Bandung : Aditya Citra Bakti, 1995, pp. 30 –32.

conditions pertaining to its object. A contract containing defective subject, namely concerning the consent of the parties or whenever one party has not obtained the capacity to conclude an obligation, does not invalidate such contract (*nietig*), but often only raises the possibility for the other party to claim that the contract is void (*vernietigbaar*).

On the contrary, whenever the subject matter is not certain or whenever the cause is not legal, such defects on the object of the contract result in the contract being void by law.

1. Mutual Consent Between Those Who Bind Themselves

In concluding a contract there has to be at least two persons who take opposite positions and have the intention to come to a mutual agreement (consent). Hence, a consent means a meeting of minds [15].

According to Prof. Sudargo Gautama :

> *"By a free consensus (meeting of minds) is meant that both parties have voluntarily given their consent or have voluntarily agreed to the contract. According to article 1321 of the Civil Code the consent is not valid when it is the result of error, coercion or deceit".*

The mere meeting of minds between two persons would not sufficiently conclude an obligation. The core consent is indeed an offer which was accepted by the other party. Offer and acceptance could come mutually from both parties. Therefore, the elements of offer and acceptance is very important to determine the birth of a contract. Unfortunately, the legislator did not provide a pattern which could be used to determine to what extent an offer or an acceptance is binding.

According to Sudargo Gautama [16] the principle of consensus concerns the formation of a contract. Generally no formal requirements are needed to make a contract binding. The mutual consent of the parties will be sufficient. The exceptions however made by the law are :

(a) Besides the mutual consent of the parties, the delivery of the subject will

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[14] R. Subekti, op. cit.
[15] R. Subekti, op. cit.
[16] Sudargo Gautama, *Essays in Indonesian Law*, Bandung : Citra Aditya Bakti, 1991, pp. 188 – 189.

be required to make the contract binding. This is the case in the following contracts : depository (sect. 1694 Civil Code); loan for use (sec. 1749 Civil Code); loan for consumption (sect. 1754 Civil Code).

(b) As regards certain contracts the mutual consent is required to be made in a certain written law form, namely an authentic deed (contract of donation, Article 1692 Civil Code), and the formation of a limited liability company, (Article 30 Commercial Code) or private deed (contract of compromise, Article 1851 Civil Code).

In the Netherlands it has been enacted in the *Nieuwe Burgerlijk Wetboek* (*New Civil Code*) Article 217 to 225. Here the legislator gave some provisions on offer and acceptance. According to Articles 219 – 225, a contract is formed by an offer and its acceptance. Articles 219 – 225 apply unless the offer consists of another juridical act or usage produces a different result. An offer is valid, null and void, or subject to annulment according to the rules which are applicable to multilateral juridical acts.

There are at least 4 (four) theories regarding the doctrine of consensus, namely : the Will's theory (*wilstheorie*), the sending theory (*verzendtheorie*), the knowledge theory (*vernemingstheorie*), and the trust theory (*vertrouwenstheorie*). The will's theory states that consensus is reached at the moment both parties have expressed their will, for instance by writing a letter to the other party. The sending theory says that consensus is reached at the moment the will to except is expressed by the acceptor to the offeror. The knowledge theory states that consensus is reached whenever the offeror should have known that his offer was accepted. And the trust theory states that consensus is reached, whenever one can reasonably presume that the offer has been accepted by the acceptor.

Asser [17] divided conditions for the validity of contract, in the core part (*wezenlijk oordeel*) or "essensialia" and the non-core part (*non wezenlijk oordeel*) or "naturalia" and "aksidentalia". Essensialia is a condition which is mandatory to a contract, something without which the contract cannot exist (*constructive oordeel*). Such are the conditions of consensus and the object of a contract. Naturalia is a part which "naturally" adheres to a contract, such as the obligation to assure that no defect goods shall be sold (*vrijwaring*). Aksidentalia means conditions adhered to a contract

[17] See Mariam Darus Badrulzaman, ibid.

which should be expressly agreed upon by the parties, such as the provisions on the parties' domicile.

2. Capacity of the Parties

Everybody is capable of concluding a contract, except those who are declared incapable by law. According to Article 1330 of the Civil Code, the following are incapable of concluding contracts : minors, those who are under guardianship and married women. By a decision of the Supreme Court in 1963, the provision as regards married women is declared illegal, so that now married women are capable of concluding contracts, without the assistance of their husbands. In case an incapable person has concluded a contact, his/her legal representative has the right to demand before the court the annulment of the contract. The person himself also can demand annulment, when he becomes capable or regains his capability. It is understood that the other party (that is the party who is capable) has no right to demand annulment of the contract.

3. A Certain Subject Matter

By a certain subject matter is meant a clear description of what is agreed to resulting in the certainty of the subject matter. This is necessary to enable the Judge to determine the duties of each party, when there arises a dispute. For example : a contract of sale of "rice for one hundred dollars"; shall be declared null and void for the reason that a certain subject matter is lacking, as it is not clear what kind or quality of rice is sold; moreover nothing is said about the quantity.

4. A Legal Cause

By a legal cause is meant that what has to be performed by either party is not contrary to the law, public order or public morality. A contract whereby one of the parties undertakes to commit a crime is null and void, because it has an illegal cause.

From what is said above, we can draw the conclusion that, in case of incapacity of one of the parties or in case of lack of free consensus, the injured party has to demand the annulment of the contract from the judge. In such cases the contract is voidable. On the other hand, in case of ambiguity about the subject matter, or in case of illegal cause, the contract is null and void from the start. In these cases the judge shall ex officio declare the contract null and void. In case of incapacity of one of the parties or in case

the imperfectness of the contract, whereas in the case of ambiguity about the subject or in the case of an illegal cause he is supposed to know the imperfectness of the contract at first sight.

The action for annulment of a voidable contract shall be brought within five years. This period shall begin : (1) In case of incapacity of one of the parties from the time that the incapable person becomes capable or gains his capacity; (2) In case of error, coercion or deceit, from the moment of detection or discovery of the error or the deceit or from the moment the coercion has ceased (Article 1454 of the Civil Code).

Breach of Contract

There are four different manifestations of breach of contract, i.e. whenever : (a) The debtor has not done anything to carry out his duty; (b) the debtor has done his duty but nor equivalent to what was promised in the contract; (c) The debtor has fulfilled his task, but too late; and (d) The debtor has done something that is contravention to the contract.

In all these cases the debtor is considered to be in default, as he has been neglecting his contractual duties. The law has laid down certain sanctions for such a debtor.

Debtor's Fault

Where the debtor has done something that is in contravention to the contract, it is obvious that he is in default. Also when a time limit is fixed in the contract for carrying out the duty and the debtor has passed this time limit, it is clear that the debtor is in default. But in other case, the creditor has first to remind or to summon the debtor to fulfill his contractual duties, as for instance, when the debtor has to pay a sum of money and it is not stipulated when he has to make the payment, or when the performance by the debtor, according to the creditor is not equivalent to what was promised in the contract.

According to judicial decisions an oral reminder is enough. To be safe, it is advisable for the creditor to remind by registered letter, so that he has proof of the reminder. According to the Civil Code there are four sanctions attached to a breach of contract : Compensation (costs, damages, and interest) : Cancellation of the contract; Transfer of risk of responsibility for the object of the contract; Payment of cost procedure; when it leads to recourse to a court.

Article 1266 of the Civil Code provides for a claim of cancellation of the contract against a debtor who is in default to fulfill his obligation. The cancellation of the contract is meant as a punishment for a debtor who has neglected his duties. Indeed it is sometimes felt hard by a debtor, especially when he has already incurred expenses for the fulfillment of his contractual duties. Article 1266, therefore, provides that the court could allow a period of grace to the debtor to give him an opportunity to perform. When the court is of the opinion that a cancellation of the contract will be disastrous to the debtor, while his fault is not serious, the court will refuse to cancel the contract, though, possibly, he will entertain a claim for compensation.

The right of a seller in a cash sale to reclaim the goods sold and already delivered to he buyer in case the buyer neglects his duty to pay the price of the goods, is in fact a right to cancel the sale without the intervention of the court. This right is to be exercised by the seller within thirty days from the date of the sale while the goods are still in the possession of the buyer (Article 1145).

Preliminary Research Report on the New Law of Obligation ***(by Setiawan, S.H.).***

1. This report is a preliminary research report conducted for the Law Reform Agency of the Department of Justice.

2. Use of the term "obligation". The term "obligation" is used quite correctly since it corresponds with the Dutch word "*verbintenis*", denoting that a legal connection has been made between two parties that imply rights and obligations. On the one hand, one party has the right to demand, while the other party is obligated to fulfil that demand (Prof. Subekti,SH).

3. Whereas, the term "agreement" is a translation of the word "*overeenkonst*", which is an event where two persons or parties agree upon something. This event covers a series of promises (Prof. Subekti,SH ibidem).

4. For these reasons, all terms used in this paper denoting "*verbintenis*" are translated into "perikatan" ; and all terms denoting "overeenkomst" are translated into "perjanjian".

5. There is still another term that is being used lately, namely the term "contract". This term has a narrower connotation as it is limited to its meaning as "written business contracts".

Therefore we still suggest to use the term "perjanjian".

6. Another word that is often used next to "perjanjian" is the word "persetujuan" for agreement. To my mind, "persetujuan" refers to the process of events, while "perjanjian" refers to the end-result of that process.

In this context we talk about written agreements and oral agreements.

7. Consistency in the difference in meaning between obligation (*verbintenis*) on the one hand and agreement on the other is shown in the explanation to Article 1233 BW [18]: "*Alle verbintenissen ontstaan of uit overeenkonst*, of de wet", meaning that obligations originate either from an agreement

[18] BW is the abbreviation of Civil Code or CC.

or from legislation.

8. Referring to Article 1233 BW, we arrive at the core problem of our system in the Law of Obligations.

The principle that an obligation originates, on the one hand from an agreement and on the other from legislation, can, according to the writer be adhered to.

9. When this principle is acceptable, then all following articles on the Law on Obligations that, in fact, are an explanation of this system, must, as a consequence also be acceptable.

10. The Law is a comprehensive system. And the Law on Obligation is no exception.

To make partial exceptions on the Law on Obligation will collapse the very system of the Law.

11. If, by this reasoning the principle system on the Law of Obligations is acceptable, then the next question will be, how must we approach the body of explanations of this Law, article per article?

Since the total system on the Law on Obligations with explanations of each of its articles form one inseparable entity, then the explanations of its articles must also be accepted. Exceptions will be only in those areas that have already been regulated in part or in toto in our national legislation, as, for instance, in the Law of agreements on Lease and Rents.

12. By mentioning this fact, the writer in no way denies that our Law on Obligations has partly become out-dated. It will, indeed, be ideal that Indonesia possesses a National system on the Law of Obligations, which is whole, complete and according to our legal aspirations.

But, legislative drafters understand that the forming of a National Law on Obligations is no easy task.

13. Legislative drafters usually find themselves facing with two extreme alternatives.

Either to overhaul the old legislation; or to accept and take over the old legislation. Because of their extreme nature, they both have their drawbacks and shortcomings.

14. But, if we must make a choice between the two, the writer prefers the second alternative.

Firstly, because drafting a new Law on Obligations already poses many problems from the outset that require a long time of discussions.

Secondly, the complete overhaul of old legislation with a completely new one, unless well prepared, will result in a Law that is far from perfect.

Thirdly, and this is most important, the Law on Obligations is a neutral area of law and does not contain sensitive substance.

Fourthly, in fact some regulations in the Law of Obligations in the CC have references that are quoted widely by the public when concluding agreements, both written as well as oral.

Fifthly, the Law may be perfected through case law.

When we study the renewal of the Civil Law in the Netherlands, for instance, we see that its process had taken no less than half a century. This luxury, however, this country can not afford.

15. What has been referred to above applies in particular to the national aspects of the Law on Obligations.

However, in its international context, and in this era of globalization, the area of law, in particular the Law on Obligations, is influenced by the Convention Law and the Community Law. (see Roy Goode, Reflections on the Harmonization of Commercial Law,…..)

Here, what is meant by Convention Law is for instance, the Vienna Convention on the Sale of Goods, while Community Law covers, among others, the "Directives to the European Economic Community"

Roy Goode further mentions that the Law on Obligations in its international context is faced with issues that are now better known as the harmonization of laws.

Harmonization of laws may be achieved through the following means:

1. A multilateral convention without a Uniform Law as such:
2. A multilateral convention embodying a Uniform Law;
3. A set of bilateral treaties;
4. Community legislation, typically a Directive;
5. A model Law;
6. A codification of custom and usage promulgated by an international non-governmental organization;
7. International trade terms promulgated by such an organization;
8. Model contracts and general contractual conditions;
9. Restatements by scholars and other experts.

Sooner or later Indonesia must face these issues, especially in this era of regional groupings where neighbouring countries need to harmonize their laws.

16. One of the first areas that will be impacted by regionalization, and for that reason needs to be harmonized first, is the Law on Obligations.

How do we approach the issue of harmonization? Although harmonization of laws is within the area of International Civil Law, yet in drafting the Law of Obligations we must be aware of possibilities.

17. Outside the impact of globalization on our National Law of Obligations, there are several matters that need our attention when we adjust or change the Law of Obligations in its present form as found in the Third Book of the Civil Code.

First and foremost is the principle of consensus. We all agree that the principle of consensus will be the basis for our future Law of Obligations.

However, we must focus on the *moment* when such consensus is reached.

Until now generally it is understood that consensus is reached at one certain point in time. In reality, in its development, this consensus is reached not only at a certain moment, but in fact, it forms a process. In this connection we know of the process at pre-contract, at time of signing the contract, and during implementation of contract. Therefore, when we are now asked about the exact moment that an obligation is born, which in Article 1233 of BW is so readily formulated with the wordings that obligations are born from an agreement, - then we are faced with a problem that is not so easily answered.

18. "*Informatieplicht*" (obligation to inform) and "Onderzoeksplicht" (obligation to investigate)

During the last decade a new thought has developed namely that parties bound in a contract, will each have obligations to perform.

In outline it can be said that the creditor (the party who extends something/goods and receives something in return) is obliged to provide sufficient information on what he is extending. Conversely, the debtor party (the party who receives something/goods and for that reason extends an amount for payment) must investigate or research and act prudently, so that the counter-performance received is commensurate with performance provided and vice versa. With this explanation, the writer has arrived at the second Article of the Law of Obligations which says that an obligation is aimed to provide something, to perform something and to not perform those actions as formulated in Article 1234 BW.

Or, jumping further to Article 1338 BW , this mentions that a contract must be made in good faith.

With the obligation to inform and the obligation to investigate, the term "good faith" must be placed in a different context than heretofore has been understood.

This is even before discussing aspects that have caused the decline of the supremacy of the principle of freedom to make agreements.

The decline in the supremacy of the principle to make agreements brings us to even more basic questions in our Law of Obligations, which must force us to change several of its principles and articles.

19. Does the principle of freedom to make agreements still exist?

The principle of freedom to make agreements is one of the cornerstones of our Law of Obligations. The regulations on the Law of Obligations, at least in its written form, is found in the Third Book of the Civil Code (BW).

The existence of this principle is reflected in Article 1338 of the Civil Code that mentions that all agreements that are legally based will act as Law to those parties who made these. This means that those parties entering an agreement can agree on any matter between them. For as long as whatever is agreed upon is legal, meaning not in contradiction with the law, social order and morals, the agreement is binding to those parties in the same way as laws are. And therefore, they may not contravene it.

However, with time, the freedom to make contracts has declined, as parties in the contract are no longer allowed to agree on matters as they wish. In certain cases, parties are not bound to what they have agreed in the contract. This indicates a decline in the supremacy of the freedom to make contract.

There are several reasons for this that originate from the internal developments of the law of contracts itself, as well as from outside, which we will discuss as follows:

20. The Role of the Legal system

An agreement does not exist in a vacuum. Despite the fact that Article 1338 BW clearly mentions that all agreements that are legally made are binding as law for those who signed, this however, does not mean that the law as found in the agreement made by both parties can be separated from the legal system that covers it.

Article 1338 BW uses the words *"yang dibuat secara sah"* (legally made). This means that whatever has been agreed upon by the parties is valid as law, for as long as whatever has been agreed is legal, meaning not contravening the law, social order and morals.

In the case where the agreement contravenes the law, social order and ethics then the contract is invalid by law *(van rechtswege nietig).*

The fact that the freedom to contract is limited by the legal system that covers the contract, - resulting in the fact that whatever has been agreed by the parties must not contravene the law, social order and morals, - this forms a logical constraint that ensues from the fact that a contract is allowed to exist only within a certain legal system.

The wish to introduce a "lex-mercatoria", especially in the framework of international civil laws must for this reason remain a wish. The fact remains that contract law still remains part of the legal system of a given country.

21. The Principle of Good Faith.

From the very beginning the principle of good faith has influenced the law on contracts. This principle was even identified in the statutes. Line 3 of the above-mentioned article, i.e. Article 1338 BW mentions that all agreements must be made on good faith.

What does "good faith" actually denote? In the law on contracts good faith is based on its being reasonable and just. The first is concerned with reason and the second with emotions. Both principles remind us of the concept of (kecermatan yang patut dalam hidup bermasyarakat) as mentioned in Article 1365 BW on acts violating the law.

Good faith in the contractual context indicates that there is a legal relationship between two or more parties. While the term "kecermatan yang patut dalam pergaulan hidup bermasyarakat" is used where no agreement has taken place.

Good faith implies that there is a contractual relation, and therefore is called a relationship concept. Whereas "kecermatan serta kepatutuan dalam pergaulan hidup bermasyarakat" is used in its general concept. However, in fact, the meaning of both is the same, says Prof. Mr. P.L. Wehry in his explanations on "Legal Developments of Good Faith in the Netherlands".

Still citing Prof. Wehry, good faith has two functions. Both these functions impact on the principle of freedom to contract.

22. Two Functions

Its First function

Good faith can add to the contents of a contract and can also add to the meanings of wordings in the laws on contract.

For example, in 1921 the High Court in Holland made a verdict on corporations or firms (HR.10 February 1921; NJ No.409), : “that although the law does not prevent a firm to establish another firm which competes with the old firm, but based on good faith, this is not allowed”

Therefore, in this case good faith adds, fills in discrepencies and completes that are not yet regulated by law. Is then the general principle of law not good faith?

Its second function

In its second function, good faith limits and annuls. This second function has actually been accepted in the doctrine before WWII, although the legal system of the time was still reluctant to concede.

Most famous example was the verdict of the High Court of the Netherlands on the amount of debts related to the rapid fall of the German Mark in 1931. The verdict is known as Mark is Mark Arrest.

The verdict is concerned with the question as who must bear the risk of fluctuating exchange rates in a loan contract? According toe Article 1756 BW such risk is with the creditor. Based on this article, however, in the 1931 verdict that the debtor only needed to repay the amounts of Marks he borrowed from the creditor, despite the fact that the value of the Mark had dropped drastically. (The original loan was DM125,000 at a rate of DM1=F.0.69; while at time of repayment the value of DM125,000 had dropped to below 1 cent.). The principle on good faith may limit the implementation of Article 1756 BW.

The Indonesian legal system has for long now made a fairer formulation. The Implementation of Article 1756 BW is limited by the principle of good faith. This formulation is used when there are fluctuations in the exchange rate, even when this is not mentioned earlier.

Most recent verdict based on this formulation was made in 1988 on the case of S.T. Silalahi against Suryono & co.

The Supreme Court ruled that to solve a civil case involving changes in exchange rate, the formulation used is that risks on rates of exchange must be borne by both parties in equal measure using the price of gold as benchmark. This formulation has become common jurisprudence until today.

23. Undue Influence

Thus far the law knows 3 (three) reasons why a contract is no longer binding to those who made it, these are reason of force, misleading and fraud. In the case where one of the three reasons have caused losses to one party, because there has been force, misleading or fraud, an annulment of the contract can be requested. Therefore, we see that, in fact the freedom to contract is already limited. Indeed, Article 1338 BW stipulates that what binds the two parties to the contract with the force of law are such agreements as what they themselves have legally put into the contract, insofar as this does not contravene the system of law, social order and morals.

In its further development, reasons mentioned in the law, including force, misleading and fraud are no longer the only reasons used to free a person from the obligations of contract.

Now, there is a fourth reason that is used to release a person from the obligations of contract, which lies outside the scope of law (at least in this country). This reason is known as undue influence (*misbruik van omstandigheden*).

Seen from the point of balance between the two parties in a contract, then an existing imbalance becomes one item in undue influence, which is not the imbalance between delivery and counter-delivery.

Rather, such imbalance has its emphasis on the process of the contract. Therefore, the school on undue influence does not only justify the doctrines on undue causes (*ongeoorloofde oorzaak*), but rather focusses on impaired will. The party that is under undue influence is not free to determine his will. One speaks, therefore, of impaired will (*wilsgebrek*), as the fourth reason for annulment of contract besides the elements of force, misleading and fraud. The imbalance must be sought in the position of the parties involved in a contract.

There having been a loss suffered as a result of such imbalance of positions becomes a condition in the case of undue influence.

The annulment of a contract for reason of undue influence is not annulled through law. Such annulment may be requested by the party who feels the loss. This annulment may also occur even to a contract made before a notary.

Annulment does not need to involve the entire contract. Partial annulment is also permitted.

In 1985 The Supreme Court made a ruling which is better known as the Luhur Sundoro case, with legal implications as follows:

- Despite the fact that the contract made in a notary act is legal, - where one person empowers another to sell the house in dispute to a third party or to himself, however, taking into consideration its history where the letter of attorney was made as a result of the house being made a collateral until such time of repayment, and as debts were not repaid in time, the contract was changed into a power of attorney to sell the house, - such a contract becomes a quasi contract, being in fact a replacement of its original contract regarding loans.

Furthermore, as the debtor was already tied to other loan contracts that already passed verdicts by the courts, and were, therefore, in force, the debtor was as a consequence placed in a weak position and under duress. When he was then forced to sign the items of contract in the notary act to justify him, the ensuing contract may then be classified as a one-sided contract, which *in casu* is unjust if wholly enforced upon the debtor."

- Because the debtor had admitted to his debts and had placed his house as collateral, furthermore, had given power to the creditor to (*hipotik*) the house, it must be concluded that the house in dispute had been promised to the creditor as repayment of his debts, which for the sake of fairness must be added with 2% per month, counting from the date that the debt was made.

For fairness sake, the house in dispute that was already impounded for other cases, must therefore be auctioned to repay other creditors."

The basis for such ruling reminds us of considerations in the Dutch case law on "*misbruik van omstandigheden*" or undue influence. According to the doctrine and jurisprudence of that country, m.v.o is an impairment of the fourth will besides that of the other three classical impairments of force, misleading and fraud. Ever since the new Civil Code was enforced in this country, m.v.o. or undue influence as the fourth impairment of will has been installed in the legal system.

There is a Dutch fairy tale that is often cited to describe undue influence, which Prof. Mr. JLP Cahen relates as follows:

Once upon a time there was daughter of a wheat miller, who found herself placed in a difficult situation because her parents boasted that she could weave wheat into gold thread.

The king believed and asked the girl to demonstrate her ability. If she succeeded the king would take her as queen. If not, then she would be killed. In this very difficult situation, suddenly there appeared a goblin, who said that he could help her with her task on one condition, that once the girl became queen, she must give her first born child to him.

It is, therefore, not surprising that the girl immediately agreed to the proposition, but it is also not surprising that when the girl became queen, she failed on her promise.

The moral of the lesson is: a promise is binding. But there is no obligation when it is given under duress.

24. Development of Standard Contracts

A contract or agreement always implies that there are two parties involved, whether they are debtor and creditor, or seller and buyer.

A contract follows an agreement. Despite the fact that, according to the latest thoughts, an agreement can not be viewed as merely one point in the entire process of the agreement, the fact that there is agreement always implies that there has been negotiations. An agreement occurs only after due process of negotiations where all conditions in the agreement had been discussed.

The term "process" also implies that a time frame was required.

Therefore, nowadays, an agreement is no longer considered as a mere point or moment in the process towards that agreement. In 1989 J.B.M.Vranken issued a book in the Netherlands entitled: "*Mededelings, Informatie and Onderzoeksplichten in het verbintenissenrecht*"

(Announcements, Information and Investigative responsibilities in the Law of Obligations). The title clearly explains its contents. In the Law of Obligations there exists the responsibility to announce, inform and investigate. Parties to the contract are responsible to inform each other and investigate all aspects pertaining to the contract. The aim being to attain a well-balanced contract that is founded on equal consent by both parties.

What happens in practice does not always follow this advice. In general, one of the parties to the contract who holds a position of monopoly, will always try to determine conditions one-sidedly. The other party, who holds no bargaining position must usually accept whatever conditions are mentioned in the agreement, on the basis of *take it or leave it.*

This situation is seen daily, whether these conditions are prescribed by a laundry, hotel or photo-printing. This does not even stop here. Large companies who hold monopolistic positions have already printed their draft contracts ready for signing by his business partner. This is also done by state companies such as in Telecommunications, Public Utilities etc.

Does the freedom to contract then still exist in this case? Although this practice is widely accepted and is allowed, the question remains as in how far do these private companies (who hold monopolies) have the authority to determine conditions of contract, that, in fact, according to Article 1338 BW is provided to both parties to the contract? From the point of view of Article 1338 BW a contract is, in fact, a law. And where all contracts are made according to a specific standard model, then, what is actually happening here is,- to borrow the term of the Dutch writer, Sluijter,- private legislation.

This is because those conditions as determined by the company in the above contract have become law, and, therefore, no longer form an agreement. Pitlo even goes so far as to call this a "dwang-contract", or a mandatory contract. Nonetheless, another well-known writer, Asser Rutten in his book "*Handleiding tot de Beoefening van het Nederlands Burgerlijk Wetboek*, 1974, states that " Every person who signs an agreement is responsible for the contents (of the agreement) which he (or she) has signed. Whenever a person adds his (or her) signature to a form of agreement on a book, that signature raises confidence that the signatory is aware of and wants the book, whose form he (or she) has signed. It is not possible for someone to sign any (agreement) whose contents he is not aware of". (Prof. Dr. Mariam Darus Badrulzaman SH, "Asas Kebebasan Berkontrak dan Kaitannya dengan Perjanjian", Buku/Standard, Makalah pada Upgrading Notaris, 27 April 1993.)

However, up to now this country has no regulations on standard contracts. In my view, negative excesses of a standard contract may be eliminated by using the theory of good intentions and abuse of circumstances.

One point is clear, though, and that is that with proliferation of standard contracts, the principle of freedom to contract is reduced.

25. The Law as an Instrument for Economic Policy Making

The decline in the freedom to contract is also caused by the use of law as instrument for Economic Policy-making. The use of law as instrument for economic policy-making is not new. During the world economic crisis in the 1920's, the Netherlands introduced what it called "*Crisiswetgeving*", which are legislation to overcome the economic crisis. In Indonesia this kind of legislation was used

in the 1950's, that even emerged in the form of the Criminal Economic Law. Here interaction was created between the law and the economy. And as a result a new branch of learning was established, that of Economic Law.

The most apparent trait of Economic law is its regulating role. This regulatory role of law, taken in its widest sense, - aimed to propel growth and development of the economy,- is the reason why the law remains no longer the basis for legal policies only. (What we now see is that) the role of law has now shifted to become an instrument of policy-making.

The shift in the role of law then caused changes in the structure and form regulating the laws themselves. Especially laws in their written form.

Ever since the French Revolution it was an established fact that Laws (in their formal sense) are the chief products and form of Legislation.

Laws as a product of parliament, and viewed as a means to limit the powers of the King (read: the Authorities) – have recorded all principles of law that are required to regulate life in society. In its later development, Laws no longer occupy a central position. Especially since the growth and development of Economic Law. The reason for this lies the process of its inception, where Economic Law was based on delegated legislation. Here we see regulating law by delegation of power.

For these reasons, the principles of Economic Law do not all appear in the form of Laws (in their formal sense). They appear in such forms as Government Regulations, Presidential Decisions, Ministerial Decisions etc. Most recent example (in the 1980s) in this country are regulations known as Paktri, Pakto, Pakdes etc. which in essence are policies made by the Authorities in the field of economy in the form of written regulations (laws).

As example, Ministerial Decision of the Minister of Finance No.1548 dated 4 December 1990 to regulate (!) the stock market, refers to Law No. 15 of 1952. Article 7 of this Law establishes that contravention of any rules in this regulation made by the Minister of Finance based on the Law, is a crime. Although this is not unusual in delegated legislation, these authorities must be used with care, especially when these are linked to legislation and legalities. To cite the words of Prof. Padmo Wahjono, the formation of laws based on delegated legislation must not divert from the most important principles of legislation, namely the ranking of strength (hierarchy) of regulations. Regulations of lower rank must not contain legal norms which are outside, or worse still contravene those of higher rank. It is natural that a Government Regulation may not be made against the Law. However, it must be conceded that this principle is not always adhered to.

Furher, Mr. NG Kalergis-Mavrogenis, legal writer of the Netherlands, in his book : The power and non-power of the legislator,1978, says that excessive use of delegated legislation may result in non-power of the legislator. The power of the legislator has then shifted to the executive, or to the administrator. Therefore, regulations will then be channeled through the function of the administration.

The impact of the development of economic law is mostly felt in the area of Civil Law, especially in the field of Law of Obligations and Contracts. The growth of economic law runs parallel with the receding of the freedom to contract. Economic Law that appears in its form as Public Law, is mandatory in nature. As a result, the essential nature of regulation in the Law of Obligations recedes to the background.

What do we face in delegated legislation?

First of all, for a certain length of time, we will face a situation that is equal to a vacuum in the rule of law. Whenever, for example a certain article in a specific law mentions that ensuing regulations will be established in a Government Regulation, then this means that for a certain period, until those ensuing regulations are established, we will find a vacuum in the law.

Secondly, over and above that – and this is most important – we actually face a vacuum in the provision of norms. The substance of these norms have (through such measures) been relegated by the legislators (meaning the Government and Parliament) to the executive.

Now more and more aspects of Contract Law show traits of public law that are mandatory in nature. Therefore, the basic principle of Contract Law that gives freedom to both parties to commonly agree

on what will be accepted as law and binding to both parties, is now no longer completely valid.

The principle of freedom to contract is in fact founded on the assumption that both parties involved in the contract are of equal strength, seen from the social as well as economic aspects. In reality this is rarely found. So that, therefore, the question is not so much on how we may give equal treatment to both parties, as to what measure of quality do we give to each party, in order that they may both be on an equal level.

Here we see the positive role of Economic Law at work. The authorities have come down by issuing regulations and laws that provide protection to the party that is socially and economically in weaker position. This is seen, for instance, in the case of consumer protection and product liability. Decision of the Minister of Finance no. 48 of 1991 dated 19 January 1991, on the subject of leasing, shows this kind of protection. The Decision says that leasing is a guided contract. A guided contract, according to noted writer Polak, is a contract whose conditions are based, not only on the basis of freedom to contract and on mutual consent by both parties, but whose minimal requirement must be to protect the weaker party.

This can be seen for instance in Article 8 of the above Decision.

However, when we compare this with similar regulations in the Netherlands on contract to buy and sell by installments, we see that the above-mentioned Ministerial Decision does not yet contain norms that are substantial in nature. Article 1576 C of the Civil Code of that country, governing buying and selling by installments, includes a default clause. This is a condition in the agreement where the deadline falls before due date. This clause is applicable where if one installment has been made, at least one tenth of total value of sales price must be paid; and in the case where several installments have been made, at least one twentieth of total value of sales price must be paid.

We foresee that regulating laws in Economic Law will have no small impact on the general development of Indonesia's Laws of the future.

26. In the context of international civil matters, the freedom to contract is often punctuated by a choice of law, which is limited by - what is known as - public policy.

Both parties agree that in the implementation of the contract and its implications, the contract shall adhere to the law of choice. Therefore, the principle question here must be whether the parties may choose their choice of law regardless? The answer to this is: negative.

The main issue in the choice of law is the balance between the freedom to contract on the one hand and public policy (ketertiban umum) on the other.

On the one hand the principle of freedom to contract justifies a choice of law. On the other hand, public policy limits the extent of choice.

"Choice of law in civil and commercial matters is characterized by two contradictory phenomena: party autonomy and mandatory rules of a public law nature" (Rene van Rooi, Maurice V. Polak, Private International Law in the Netherlands….)

Choice of law may be made for as long as this does not contravene public policy.

Supreme Court Regulation No.1 of 1990 on the system in the implementation verdicts involving Foreign Arbitration says that what is meant with the term '"public policy" are basic principles pertaining to the entire legal and social system of Indonesia".

Choice of law may also not mean " avoidance of law". In the doctrine, avoidance of law is sometimes called choice of law, in its incorrect meaning; whereas "choice of law" must be made with its correct meaning.

In choice of law we are faced with points of contacts, including citizenship, domicile, and location of item. Choice of law may be made only where relevant points of contact exist.

However, an avoidance of law, is precisely an effort to influence those points of contact. For example, relevant parties may change their citizenship, location of item in question or location where the contract was made.

Choice of law may only be made in the area of contract law; this is the area that is known as

regulating law. Choice of law is prohibited for example in the area of forced law.

Even in contract law, the freedom to make a choice of law is limited. Choice of law, for instance is prohibited in labour contracts.

Choice of law can only be justified when there exists a point of contact.

In the meantime, choice of law of both parties may be set aside when a stronger point of contact is in existence that is stronger than the actual choice of law itself. The following example cited by Prof. Kollewijn is often quoted, as follows:" When an Argentine citizen and a Dutch citizen, both domiciled in the Netherlands make a contract for goods to be transported from Domburg to Groningen and both parties choose to act under Argentine law, then, according to Kollewijn the choice of the Dutch law by the judge is a far stronger (choice)".

Therefore, choice of law is limited by particular systems of law only, namely those that have the most characteristic connection. It is not allowed to choose a law that has no connection whatsoever with the contract. Choice of law *may be made only with bona fide intention.* (Summary from Prof. Mr. Dr. S. Gautama, Pengantar Hukum Perdata Internasional Indonesia, 1977).

27. The Impact of the Era of Globalization

The freedom to contract is also effected by the era of globalization. With more transnational contracts made, more agreements were made by parties in Indonesia, in particular between an Indonesian and a foreign party who have chosen jurisdiction under foreign law.

In the context of choice of law we see that the jurisdiction of a foreign law – limited by the principles of public policy as explained above – has been, in this instance, chosen on purpose by parties involved in the contract. Here the word "on purpose" is used, as the possibility exists that choice of law was made in secret. Whereas, as a result of globalization, it is also possible that regulating laws of one country crosses its geographic borders without intention and not on purpose, even against the will of parties involved in the contract. Here we see the indications of *transnational reach of national regulations.*

In this ever-smaller world, more and more transnational relations occur in the area of law. Facing the impact of law (and economy) from overseas, countries do not all take the same stance and attitude. Take for instance the attitude of the Latin American countries. In the last decade there was what is known as the Calvo Doctrine (originating from Carlos Calvo, an Argentine lawyer), who was of the principle that *"a foreigner by entering a country to do business implicitly consents to be treated as are national firms. This means that a foreign firm does not have the right to invoke the protection of its own government in investment disputes."* These Latin American countries, are, for instance reluctant to join the Centre for Settlement of Investment Disputes (ICSID). The Board of arbitration of ICSID opens the possibility for settling disputes on capital investment between a foreigner and the government where investment is made.

However, lately the implementation of the Calvo Doctrine by Latin American countries seems to have relaxed. More and more countries now offer protection towards foreign ownership through what is called as *investment guarantee agreements.*

We have from university days been taught on the limitations of validity of legal regulations. This refers to the scope and range of jurisdiction of certain regulating laws, its time of validity, persons who are included under the regulation, and limitation pertaining to the territory where this jurisdiction prevails.

As to the latter, the territory of jurisdiction is bounded by the territory of the country where jurisdiction is made which at the same time reflects the sovereign boundaries of that country.

"Although the jurisdiction of national laws is normally limited to the particular nation, the reality is that actions taken outside the national boundaries can affect competition within the national market", thus Robock & Simmonds, in International Business & Multinational Enterprises, 1989. P. 188 and on.

It is on the basis of these principles of thought that certain countries, through their actions, expand their country's *reach of jurisdiction* into territories of other nations. "In recognition of this reality the US Courts have extended the US antitrust laws to actions abroad that substantially affect the

commerce of the US and competition in the US market", say Robock & Simmonds further. In this context, for example, a verdict made by a foreign arbitration body outside the territory of the United States on a commercial contract, which contravenes the Antitrust Law of the United States, can not be validated and may not be implemented within the United States. Thus, indirectly the Anti Trust Law of the United States has acquired the power of *extra-territorial reach*, that extend to cases outside the territorial jurisdiction of the United States.

Indirectly, this also limits the freedom of the parties to bind themselves in a contract (of arbitration).

Conclusion

From the discussions above, the reader may have seen how complicated the problems of legal reform are in Indonesia.

Firstly, the majority of Indonesians still live in their traditional environment, unaware of the pressures and demands of international business in an age of globalization.

Secondly, while the principles of (old) Dutch Contract Law has been recently introduced to the group of Indonesian businessmen, other (esp. American) principles of Contract and Company Law has at the same time been adopted in many Investment Contracts through specific clauses, such as clauses for arbitration by an American arbitration board, or other provisions, which are strange to Indonesian Contract Law, but not always illegal, if it has never been regulated.

What is more, all this has been made possible on the basis of the principle of freedom of contract.

Thirdly, while Indonesia still adheres to the pre-war legal theories, the Netherlands has already adopted its law to the needs of the 21st century by promulgating a New Civil Code, which also contains provisions which formerly formed part of Dutch Commercial Law.

Fourthly, in the meantime, international conventions and model laws have come into existence, making it possible for Indonesian legislative drafters to study them and use them as a model for our New Contract Law, which – as we have seen – is not only to be found in Book III of our Civil Code, but is scattered over a large number of other laws and regulations, including our Commercial Code.

Fifthly, Therefore before we can really embark on drafting a comprehensive Law of Contract in Indonesia, we will first have to study all those separate laws and regulations, and compare their principles with those of the International Conventions and Model Laws.

Sixthly, The conclusion we reach now is that a new Law of Contract Law can

at best consist of a list of general principles of Contract Law to be observed, which is in accordance with international practice and theory, but which does not violate the Indonesian idea of fairness, good faith and justice.

Seventhly, If so, the Indonesian Contract Law will maintain its feature of an "Open System", which allows for special regulations for specific contracts, provided the general principles of the Law of Contract are still upheld. This in fact results in an Indonesian Law of Contracts, rather than a Law of Contract.

Jakarta, 7 November 2000.

Legal Technical Assistance in Japan's ODA: An Implication for Law and Development

Miwa Yamada*

Introduction

Legal technical assistance in Japan's Official Development Assistance (ODA) started in 1996.[1] The first assistance was provided to Vietnam in the area of drafting civil code. As ODA's funding priorities shift from 'hard' infrastructure to 'soft' infrastructure such as human resources and law and legal institutions, the number of recipient countries as well as Japanese lawyers and law scholars who engage in the assistance has gradually increased.[2]

The Asian financial crisis in 1997 is said to be attributable to malfunction of market principle and lack of transparent rules. Consequently the need for 'rule of law' is emphasized in transient economies as well as economies that suffered from the crisis. In order to create predictability in the conduct of economic transactions, legal reforms started in Asia, to which bilateral and multilateral development assistance has been provided.

While providing support to developing countries, Japan itself is in the midst of judicial reform. Japan has experienced a sluggish economy mainly due to the vulnerability of its financial sector suffering scandals and bankruptcy, and legal reform is called for to shape a transparent rule-based society. Discretion of administrative organs that exercised anterior regulating powers is curtailed and individuals are expected to act at their own risk. Supported by the business circles, the Judicial Reform

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[1] Japan International Cooperation Agency (JICA), Presentation Paper at The International Symposium on "Legal Assistance Projects in Asia and International Cooperation" held on 13th-14th September, 2000 by Graduate School of Law, Nagoya University.

Japan's engagement in international legal training is traced back to the establishment of UNAFEI (United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders) in Tokyo in 1962 pursuant to the agreement with UN. Apart from UNAFEI, this paper focuses on 'legal technical assistance' recently started as technical cooperation projects carried by an aid agency of the Japanese government.

[2] As of November 15 2000, from 1999 to 2000 the total number of legal experts who engage in legal technical assistance in JICA's projects is 75 and the number of recipient countries is three, namely Vietnam, Laos and Cambodia. http://www.jica.go.jp

Council was established under the Cabinet last year to strengthen judicial function as a system for resolving disputes arising from the rule-based society.[3] Thus, Japan is facing the same challenge as that faced by other Asian countries.

All over the world, the number of lawyers engaging in legal technical assistance projects and the size thereof will be definitely increased. The field or sector where legal technical assistance is provided cannot be severed from the rest of the system and society. Legal technical assistance is the issue, not confined to only practitioners of projects, rather, all lawyers and law scholars inevitably need to discuss as an integral part of law and legal system that they are working on. The purpose of this paper is to raise questions about assumptions upon which legal technical assistance in Japan's ODA is based and to invite discussion on the role of law and legal institutions in developing Asia.

I. Definition of Legal Technical Assistance

The first question is whether it is adequate to categorize what is conducted by the name of 'legal technical assistance' as a technical cooperation project. Japan's ODA is classified into three categories: bilateral grants, bilateral loans and contributions to multilateral organizations. Japan International Cooperation Agency (JICA), a subordinate organization of the Ministry of Foreign Affairs, carries out the bilateral grants. This is further divided into grant aid cooperation and technical cooperation.[4] The latter means all the projects that send experts and invite trainees for the purpose of technology transfer.[5] Legal technical assistance is conducted in this technical cooperation scheme. JICA believes that it has succeeded in transfer of technology ranging from rice cropping to nuclear power, and legal technical assistance is necessary to provide the environment to effectuate and maintain the products resulting from past technical cooperation. JICA simply parallels between conventional technical cooperation and legal technical assistance.

Legal technical assistance is based on the premises that, firstly, what lawyers engage in as professionals (e.g. drafting, adjudication, prosecution, defending, counseling etc.) is categorized as 'technology,' and secondly, that it can be transferred.

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[3] http://www.kantei.go.jp/jp/shihouseido

[4] The grant aid cooperation occupies around one forth (US$2,781 million) of Japan's ODA in FY 1998. http://www.mofa.go.jp/policy/oda/summary/1999/

[5] The targeted technologies include administrative planning, public infrastructure building, agriculture and fishery, and public health and medical treatment. *An Introduction to JICA*, Japan International Cooperation Agency

In Japanese we call legal technical assistance *hou-seibi-shien*: '*hou'* means law, '*shien'* means assistance and '*seibi'* means to equip. The term literally means to assist in equipping countries with laws. '*Seibi'* is a word usually used in technical fields and coated with a neutral sound like 'technical' in English.

The name legal technical assistance seems to wipe out the social values and norms which laws entail in the society where the laws function. In other words, categorization as technical cooperation makes it possible for the Japanese government as well as other development assistance institutions to engage in legal technical assistance without raising the question of value concepts that their assistance may convey. Law is neither free of values or norms prevalent in society nor from its political structure. Regarding law as a technical instrument to bring about economic development, ODA makes inroads into the legal system of another nation, which might hitherto have been criticized for encroaching sovereignty.

Once it is agreed that legal technology is the same as scientific technology, the second question arises: Whether the technical skills and technology to be provided under the name of legal technical assistance are transferable to the recipients? It is useful to analyze legal technical assistance in comparison with conventional technology transfer projects. In a development theory the 'appropriate technology'[6] is the most effective technology in light of the technical level, the volume of resources, the size of market, and the social and cultural environment of the recipient country. Is the technology to be transferred under the name of legal technical assistance 'appropriate' in light of pre-existing, country-specific and non-legal factors of the recipient country? Donors tend to offer legal systems familiar thereto and recipient governments tend to desire state-of-the art laws, ignoring their preexisting conditions. They are not concerned about the appropriateness of the technology to be transferred.

It is argued that law is not transferable since non-legal constraints and resources differ in any two countries and different physical and institutional environment would not induce the same behavior in the people.[7] What about 'legal technology'? It seems that JICA and practitioners of legal technical assistance naively believe in transferability of legal technology. On the other hand, there are many critics

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[6] In the principle of optimization in economics, labor-intensive technology is appropriate for countries with abundant labor and scare capital, and capital-intensive technology for countries rich in capital but with little labor. Michael P. Todaro, *Economics for A Developing World*, 1992, Longman Publishing

[7] A Seidman & R Seidman, "State and Law in Third World Poverty and Underdevelopment" in Seidman & Seidman, *State and Law in Development Process,* 1994

who raise questions about the transfer of skills and techniques in legal work, without the conceptual understanding and analytical ability that develop from long-term experience in practice.

'Ownership' and 'participation' are other key words which development assistance institutions use in their projects. The idea is that the true ownership of development projects should belong to the people on site and that their participation in the projects is indispensable for their success and sustainability. This is the question whose and for whom developing assistance projects are. In most legal technical assistance, donors' counterparts are ministries of justice. Drafting new laws may be in the hands of a small number of people of the ministry and done hastily due to the urgent need for economic liberalization without citizens' knowledge. Lessons learned from conventional development assistance projects apply to legal technical assistance projects.

II. Relationship Between Law and Economic Development

After the original law and development movement retreated in the early 70's,[8] until recently the role of law and legal institutions were not the objects of development assistance projects. In conventional development assistance projects, lawyers' roles were drafting contracts and making the projects fit into the existing legal framework. It was after the publication of North's institution theory[9] that legal reform and legal institutions became significant targets of development assistance. Lawyers turned out to be implementers of projects to assist in establishing laws and legal institutions that induce economic growth.

Legal technical assistance is based on the assumption that a rational legal system that is calculable is an essential factor to bring about economic development. Before conducting thorough empirical examination of the role of law in economic development, development assistance organizations proceeded to provide legal technical assistance. In order to vindicate its Law and Policy Reform Projects, the Asian Development Bank published the book titled "*The Role of Law and Legal Institutions in Asian Economic Development 1960-1995*."[10] The results of the study

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[8] David M. Trubek & Marc Galanter, "Scholars in Self Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States", 1974 *Wisconsin Law Review* 1062-1102

[9] Douglass C. North, Institutions, Institutional Change and Economic Performance, 1990, Cambridge University Press

[10] Katharina Pistor and Philip A. Wellons, 1999, Oxford University Press

suggest that law made an important contribution to Asia's economic development and was most effective when it was congruent with economic policies.[11] In the study economic change was assessed on the basis of economic growth rates and other structural features of economies, i.e. the extent of state control over allocation of financial resources, size of state-owned sector and control over cross-border trade. Since the study was confined to formal economic law, it does not examine informal legal systems, and social and political components embedded in the systems. Therefore, it falls short of proving a direct causal link between law and economic development.

Even if a direct causation between law and economic growth is proved in future studies, still remains a question: Is such a finding enough to justify legal technical assistance? In other words, is economic development the only achievement that lawyers seek in their legal technical assistance? It brings us back to the fundamental question: what is development? Lawyers should not be satisfied with the finding of a positive causation of law and economic development. We need to study, whether quantitatively or qualitatively, the role of law and legal institutions from all dimensions of development in society. Thus, lawyers and law scholars face a challenge to establish a new law and development theory.

III. Legal Technical Assistance in Japan's ODA

Legal technical assistance in Japan's ODA does not answer the question of causality between law and economic development, still less the relationship between law and other dimensions of development.

Japan's ODA Charter provides the following basic philosophy of Japan's ODA: "Japan will implement its ODA to help ensure the efficient and fair distribution of resources and good governance in developing countries, thereby promoting the sound economic development of the recipient countries." It further states that ODA shall be provided with full attention to the recipient countries' efforts for promoting democratization and introduction of a market-oriented economy, and the situation regarding securing basic human rights and freedoms.[12] The Japanese government explains that Japan's legal technical assistance originates from the notion of good governance.[13] Although the Charter puts the introduction of a market-oriented economy

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[11] ibid, p1
[12] The ODA Charter (ODA taikou), adopted as a cabinet decision in June1992.
[13] ODA Annual Report (1999), The Ministry of Foreign Affairs

and securing human basic rights in tandem, the legal technical assistance in Japan's ODA currently devotes its resources mainly to the area of civil and commercial laws and the recipient countries in transient economy.[14] The Ministry of Foreign affairs states:

> Most countries in transient economy such as in Central Asia, Caucuses countries and Mongolia are located in geopolitically significant places and if democratization in these areas is obstructed, it will threaten the regional peace and security. Also in socialist countries such as China and Vietnam, the trend towards market economy cannot be drawn back. Therefore, ODA charter emphasizes the importance of supporting countries in transient economy.[15]

What this statement fails to do is to explain the relationship between market economy and democratization and securing basic human rights. Is it axiomatic that transition to market economy leads to democratization and fulfilling basic human rights?

Japan's legal technical assistance aims at facilitating market economy and bases its rationale on the implicit assumption that economic development will have spillover effects to bring about social development without assessing its actual effects on the people's lives in social, cultural and civil and political contexts. It mainly targets countries in transition from controlled economy to market economy, based on the idea that it is necessary to establish legal systems in compliance with global economic rules so that the nation will benefit from the world economy. A leader of Japan's legal technical assistance expresses the opinion that democratization and human rights will follow economic growth, and the urgent need of countries in transient economy is to equip themselves with laws and legal systems ready for economic globalization. Obviously, Japan's ODA puts its funding priority on enacting laws in compliance with the WTO and other international standards to accommodate the world economic system. Practitioners of Japan's legal technical assistance avoid discussing what the market economy will ultimately bring to people's lives in the recipient country. Enacting laws to introduce a market economy becomes an aim itself to achieve. While accommodating such needs, the role of law should not be confined to facilitating

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[14] supra note 1. Legal technical assistance to Vietnam between 1996 to 1999 was advices to drafting the following laws: Property Registration, Civil Procedure, Bankruptcy, Maritime, Commercial Law, Company Law, Anti-trust Law, Competition Law, Intellectual Property, Investment Law and Stock Exchange Law. Assistance to Cambodia is to be provided between 1999 to 2002 in the area of Maritime Law, Civil Law and Civil Procedures. Other targeted countries are Laos, Mongolia and Central Asian countries.

[15] ODA Annual Report (1998)

economic development, much less Japanese lawyers' role.

There is criticism against a recent rush to legal technical assistance. The question is not whether or how the assistance has the effects or impacts it aims for. Rather, it is whether Japan should engage in such assistance.[16] It is said that Japan's legal technical assistance presents Japanese law as a model to drive market economy without reflecting problems, distortion and by-products of the market economy, such as pollution, poverty and disparity.[17] The failures and limitations of law in industrialized systems tend to be masked. Legal technical assistance is only to pave the way for Japanese business in Asia, rather than to contribute to democracy and human rights in the recipient nation. On the other hand, advocates of legal technical assistance argue that Japan, with more than 100-year history since its reception of European laws, should contribute to Asian countries by showing them its experience and so forth requested by developing countries.

The argument depends on how we assess the Japanese history of modernization of law. This differentiates Japan from other donor countries in the West. Japan stands on an ambivalent position. While a member of the Western capitalism to promote market economy, Japan is still tormented by what she did in Asia before the end of World War II. Against such a background, Japan might intentionally refrain from directly touching human rights and democracy in its legal technical assistance.

The important difference between legal technical assistance and other intellectual support and technical cooperation is that it inevitably touches the notion of human rights, democratization and rule of law. In this respect, the name legal technical assistance does not express the great extent to which it reaches. Legal technical assistance provides a significant opportunity to discuss and exchange mutual ideas on those concepts that were avoided in conventional development assistance projects. Nevertheless, practitioners of the legal technical assistance in Japan's ODA seem to abandon the discussion itself.

We also need to realize that legal technical assistance is not a panacea. Since ODA is shaped by the relationship between Japan and recipient nations, there are limitations and risks in legal technical assistance in ODA. If legal technical assistance is ultimately for democracy and human rights as advocated in the ODA Charter,

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[16] For comprehensive discussion on Japan's legal technical assistance, see "On Legal Assistance to Developing Countries," Masanori Aikyo, *Societal System and Law*, No.1 June 2000.

[17] Makoto Shimizu, PP2-3, "100 Year History of Japanese Civil Code," *Horitsu-jiho*, Volume 70-10, 1998

attorneys and citizens, not prosecutors and judges, should directly benefit from such assistance. ODA is, however, an embodiment of the relationship between governments and provided pursuant to the agreements concluded between the governments. As long as the assistance is provided by government to government, the technical training targets judges, prosecutors and legal officers who are organs of the nation's system. It cannot be denied that such training may result in the excessive concentration of power in the state.

Another fact that should be noted is that Japan has been known for its administrative power regulating industries and markets, leaving its legal system dysfunctional, where laws played a marginal role in economic transactions. It is not desirable if developing countries that open their markets under external pressure look to Japan for legal technical assistance because of Japan's experience of administrative control and guidance, which once worked to protect domestic industries.

Looking at the current judicial reform in Japan, the purpose of the reform inclines to build a legal system to facilitate market principles, rather than to promote respect of freedom and human rights. It is based on the assumption that individuals are supposed to be economic actors who behave rationally according to market principles, and if a dispute arises, it should be settled by judicial procedure. There is criticism that the current judicial reform emphasizes economic rationality and disregards human rights. The direction of its current judicial reform in Japan demonstrates what Japanese think of law and judiciary. What Japanese lawyers are able to provide in legal technical assistance to developing countries reflects the standard and quality of Japanese legal and judicial systems and Japanese lawyers who administer.[18] Thus, the features of judicial reform currently in the process mould Japan's legal technical assistance in the future.

In providing ODA, Japan should consider how laws and legal systems function and are utilized by the people in recipient countries, as Japan should consider in its own judicial reform. In a rule of law state, law is consistent with social norms that embody citizens' sense of justice, and law is obeyed out of respect. Legal technical assistance should focus not on establishing new codes and regulations but on developing legal institutions and a community of judges, lawyers, and scholars that can shape law so that it conforms to reality. Further, it should be considered that the availability and accessibility of the judicial system be improved and that the opportunities to learn the

[18] Supra note 16, p30.

law and choose legal professions be equally open to the public.

Japan’s legal technical assistance in ODA has just started. Whether directly involved or not, lawyers and law scholars stand in the position to influence legal technical assistance projects. Our scholarly exchange will definitely shed light on the direction of legal technical assistance by Japan’s ODA as well as other donor organizations.

Law and Poverty Reduction

Omar Tiwana[*]

Distinguished guests, ladies and gentlemen - good morning.

When Ms. Yamada of the Institute of Developing Economies (IDE-JETRO) requested our office to provide some input at this roundtable conference on law, development and socio-economic change, we were pleasantly surprised particularly given the focus on the nexus between law and socio-economic change. This was so because the Asian Development Bank here in Manila is, at the moment, in the process of reviewing, among other law and policy reform projects, a regional technical assistance proposal for strengthening pro-poor legal and regulatory frameworks in selected developing member countries (or DMCS) of the ADB.

The broad aim of this regional technical assistance is to review the current state of implementation of legal and regulatory frameworks in selected DMCS as those frameworks impact on the poor, disadvantaged and women. Basically, this means identifying the key systemic and substantive legal barriers and constraints faced by the poor in the selected countries and determining whether such barriers and constraints are the result of lack of, or inadequate, or discriminatory laws; or, possibly, inadequate or marginal administrative or regulatory capacity in the country concerned.

More particularly, the proposed regional technical assistance, if approved, will look at how legal barriers and constraints on the poor in access to labor markets, credit markets, land and housing markets, social safety nets, new technology and similar factors undermine poverty alleviation. At the same time, it will focus on the quality of implementation of existing laws in the DMCS covered to see whether there is inadequate or discriminatory enforcement to the extent poor people are concerned. Third, it will also examine the lack of integration of core human rights relating to poverty reduction into national legal systems and how this impacts on the ability of the poor to participate fully in obtaining social benefits. Finally, it will review the role of NGOs and community based organizations or CBOs in the countries concerned as mechanisms for facilitating empowerment of the poor, disadvantaged and women and

[*] Counsel, Asian Development Bank.

explore other possible mechanisms to make the poor more aware of their legal rights and increase their empowerment and participation in use of legal and related channels.

At this point you might correctly wonder about the connection between empowerment and poverty. The obvious conclusion would suggest that those two variables are inversely correlated -- that is, the higher the incidence of poverty within a given population, the less that community is empowered through its individual members to exercise any legal rights. This is so because, in the absence of an enabling legal or regulatory framework, an empoverished community is typically precluded not only from access to material resources but also from any meaningful participation in decision-making that affects the quality of the lives of members of that community. Having said that, the converse seems axiomatic, namely: increased empowerment of a given group or members within such group should necessarily improve the ability of that community to get out of poverty.

The ADB's poverty reduction framework, set out in the ADB's poverty reduction strategy paper approved by our board in October of last year views poverty in terms of lack of empowerment as follows:

> *"...poverty is a deprivation of essential assets and opportunities to which every human is entitled...beyond income and basic services, individuals and societies are also poor -- and tend to remain so --if they are not empowered to participate in making decisions that shape their lives..."*

The ADB's poverty reduction strategy aims to provide socially inclusive development which results from pro-poor economic growth, social development and good governance.

The deprivations that characterize poverty are multi-dimensional. Of course, there is the material aspect which is traditionally measured in terms of income levels and access to the basics of human survival --- food, clothing, shelter. That has been the typical focus of the past generation of economists. But human well-being depends not only on the ability to afford particular services or products but from knowledge of the value of such services and, importantly, from the social inclusion or ability to participate that enables all community members to access basic services, infrastructure and goods.

Consequently, from a legal perspective, the critical element in any effort for

poverty alleviation is the existence of laws and a regulatory framework that allows access to proper knowledge of legal rights and that facilitates the ability of the poor to exercise those rights. This is what one might loosely term the essence of a 'pro-poor' legal and regulatory framework. Law reform efforts in the past have typically focused on areas such as capacity building in drafting of legislation or in judicial training or in improving court administration - essentially providing what MS. Yamada in her paper delivered earlier today calls transfer of “legal technology”. But there has been little focus on the poor in DMCS and their ability to exercise legal rights.

I am happy to report that the ADB, in 1998, initiated a regional technical assistance on *legal literacy for supporting governance.* That technical assistance pioneered work on the ways in which knowledge of legal rights by women and disadvantaged groups could be enhanced and made some preliminary assessments on the ways in which legal literacy could be effectively used as a tool for empowerment of women and the disadvantaged. The proposed technical assistance on strengthening pro-poor legal and regulatory frameworks, which I described at the outset, follows on the work done under this technical assistance but obviously with specific focus on the legal literacy of the poor. Importantly, it will also cover new ground in looking at ways to develop or to deepen existing mechanisms for increasing the ability of the poor to participate in realization of their legal rights.

In the context of what I would term "the legal right to participate" dimension of empowering the poor, I am also happy to note that Japanese institutions were some of the lead sponsors in a regional conference held in 1998 in Bangkok on providing legal services for underrepresented groups in East and Southeast Asia. The Japan Foundation Center for Global Partnership and Kobe University, along with a US law school and a university in Thailand, sponsored that conference which looked at ways in which to provide legal services to underrepresented groups, typically the poor, and cut down barriers -- legal, administrative, financial or otherwise -- that prevent access by underrepresented groups in Asian countries to justice systems.

Two possible approaches in this connection were explored at the 1998 conference. One was the use of subsidized legal services by means of legal aid clinics funded by the government or by law schools or other organizations. The other was through use of community or public interest law through work of community minded law firms or bar associations. Various issues were also addressed: these included:

- The extent of use of legal aid or self-help measures or some optimal

combination of both;

- What areas or scope should be covered by legal aid (only for criminal actions or for administrative or civil cases as well, for example);
- The proper role of bar associations and law schools in servicing the poor;
- Possible mechanisms for funding such activities through bar association levies or taxes on professional fees; and
- The types of legal incentives that would promote more effective public interest lawyering.

In addition to the work at the Bangkok conference, other groups such as the Ford Foundation have looked at mechanisms aimed at increasing the empowerment of the poor and disadvantaged in legal terms. This has been through reviewing use of alternative law groups (basically legal NGOs or CBOs), using non-lawyers or para-legals in connection with facilitating focus on issues of legal importance to particular communities and promoting law-related legal research to support policy and law reform, promote public awareness and provide an effective factual framework for public interest litigation.

These recent initiatives are an encouraging beginning. I hope this gathering can serve as an additional springboard to development of new ideas and initiatives on the types of capacity building efforts that can take place to make legal and regulatory institutions more sensitive to serving the needs of the poor. More importantly, I hope this roundtable conference can assist in finding ways to use the law to facilitate the increased participation and empowerment of the poor in understanding, protecting and enforcing their rights. Poverty alleviation is essential to what I earlier termed socially inclusive development which is the central aim of the ADB's poverty reduction strategy. Ms. Yamada, in her earlier paper, asked the question: is economic development the only achievement that lawyers seek in their legal technical assistance? Our response at ADB is "no". – economic development without more, falls short. We need to design and implement legal technical assistance that seeks to promote pro-poor economic growth, social development and good governance. One step in that direction is increased focus on the poverty-law nexus and ways in which legal and regulatory frameworks can be developed to promote poverty alleviation.

Discussion in Session IV

A contrasting of ‘market capitalism’ to ‘community capitalism’ stimulated the entire discussion of this session. Since the Asian Economic Crisis, Asian countries have been under pressure to reform their legal and judicial systems into functioning ones, based on Western concepts. The idea of Asian-based community capitalism drew interest from several participants. This idea was seen as a proposal for an antithesis to Westernization under the name of globalization, and as a clue for countries searching for a new direction for capitalism. One participant commented on this idea, suggesting that mixed capitalism/pluralist capitalism already exist, and that it is necessary to look at the respective components of capitalism named in this way. Whereas there seemed to be expectations for the emergence of community as a means to overcome the shortcomings of feudalism, there was criticism that communities can never be free from vested interests or cronyism. There was also a suggestion for an idealistic mixture of community principles and the methods of transparency.

The impact of the Asian Economic Crisis on law was then discussed. The Crisis was caused by a lack of the legal instruments and institutions necessary to provide for healthy banking and economic systems. One speaker pointed out that developing countries needed to immediately establish sound legal systems; however, putting such systems in place requires much time. Another participant suggested drawing a parallel between the Japanese experience in the Meiji Era and the current challenges facing Asian developing countries. However, huge differences were pointed out in terms of the strength of external pressures, development of information technology, and governmental capacities.

One participant expressed the fear that the wave of marketization might be so huge that it would destroy or adversely affect the social security system that had been cherished within traditional society. She added that there was a possibility that increasingly globalized markets would generate more marginalized people. She stressed that we need to closely watch social development, and not simply focus on economic development.

Further, with regard to the legal technical assistance provided by donor institutions, the accountability of such assistance was questioned. Participants questioned who would monitor the execution and enforcement of law and how it would

be done without treading on national sovereignty.

In the latter half of the session, questions on law and poverty were discussed. How do we distinguish poor people from non-poor people? How can we combat poverty by using legal instruments? One speaker proposed that focusing on the poor would be a more useful approach for development assistance than assisting the private business sector. This meant directly targeting the neediest rather than waiting for the trickle-down effect. This approach defines the poor in terms of the knowledge of rights and the ability to make actual use of those rights, and tries to promote legal incentives to allow them to get access to basic services. Opposing the use of legal instruments, another speaker suggested that an alternative mechanism to legal rights for protecting the poor and alleviating poverty could be established by stressing community solidarity. The argument was that we cannot demand everything or rely entirely on the government and formal legal institutions, but that the community has a responsibility that cannot be explained in legal terms. Still we were left with the following questions: Do legal rights and community bonds really stand in sharp contrast? Must camaraderie reject law?

SESSEION V

LAW AND SOCIAL JUSTICE

Economic Development and Social Development - Do the Two Goals Meet?

Shin-ichi Ago*

Introduction

The basic theme of the Human Development Report 2000[1] is the assumption that human development, which includes economic and social development, and human rights go hand in hand and that they cannot be detached. To the extent that the Report claims to be "unapologetically independent and provocative"[2], the assumption is perhaps subject to scrutiny. However, the Report with its large volume of statistics drawn from various reliable sources is fairly convincing. The following analysis is also based on the assumption that economic and social development, on the one hand, and economic and social rights are two sides of the same coin. It argues, however, that the inter-relationship between the "economic" factors and the "social" factors, which are used interchangeably in the Human Development Report, is not so self-evident. In fact, there are cases in which "economic" development and "social" development clash. In other words, the twin-like relationship between economic rights and social rights cannot be taken for granted.

I. Economic Rights and Social Rights

The answer to the above-captioned title appears almost self-explanatory. The fact that the International Covenant on Economic, Social and Cultural Rights places "Economic" and "Social" rights on equal footing shows that the two categories of rights have been conceived by the drafters of the Covenants as sets of legal rights, which can be grouped into the same international treaty. The UN Charter and the ILO Constitution also treat economic and the social rights, in such a way, that there is no doubt about the positive relationship between the two. In fact, some of the rights provided for in those

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1 Human Development Report 2000, UNDP, p. iii, p.9 etc.
2 ibid. p. i

international instruments are truly interchangeable. That is to say, whether they belong to the category of economic rights or social rights does not really matter. Take for instance the right of each person to enjoy a decent standard of living(Art. 11 of the Covenant on Economic, Social and Cultural Rights). It is an economic right and a social right, at the same time. A state party to the Covenant is promoting the social rights of its citizens by way of securing the economic right. Another example showing the inter-relationship, or interchangeability between social and economic rights can be found in the right to education. Article 13, para.2(a) of the Covenant, which provides for the right to a free primary education, can be considered as a provision of an economic right in that it compensates the education costs of citizens, but it is also a social right in that it offers basic education to individuals as citizens of a society. It is even a cultural right in the sense that it ensures the linguistic and historical “backbone” of a citizen.

We can go a step further and contend that economic and social rights cannot be dissociated from civil and political rights. Clear proof of this fact is demonstrated by the provisions on trade union rights, which can be found in both Covenants: Article 8 of the Covenant on Economic, Social and Cultural Rights, on the one hand and Article 22 of the Covenant on Civil and Political Rights, on the other.

While the indivisibility of economic rights and social rights appears to be obvious, it becomes less than self-explanatory, when the economic right is conceived in a wider scope, that is to say when we take examples from the group of rights categorized under the concept of the right to development. In other words, the relationship or the interchangeable nature of both rights becomes obscure in the field of the right to development. A clear case is shown in what is often referred to as a “development dictatorship”. The GDP of Indonesia may have grown, but social development did not follow to the same extent. The same argument applies to the relationship between some activities of international development institutions. International financial institutions, such as the World Bank or regional development banks, are certainly working to achieve economic growth for developing countries. However, their operations may clash with those of other international institutions, such as the ILO and UN human rights bodies, when their policy guidelines contain factors, which have different or adversary effects on the objectives of the activities of the UN bodies.[3]

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[3] A number of recommendations contained in the World Bank’s assistance package offered to Thailand during its

The somewhat problematical relationship between civil and political rights, on the one hand, and social, economic and cultural rights, on the other, is well known. While reconciliation has been made[4] to bridge the gap between the two, stubborn controversies still persist. It is still widely believed that economic and social rights are promotional in their nature and not self-executing and, the exercise of some of the civil and political rights have some negative effects in the realization of economic and social rights: an excessive exercise of the right to free association may end up in weakening the bargaining power of trade unions, thus resulting in a loss of the right to work (a social right.) The debate about the admissibility of the union-shop or closed-shop system during the drafting of the ILO Convention on Freedom of Association and the Protection of the Right to Organize (No.87) demonstrates this difficulty.

II. Economic Development and Social Development

Another example of controversy can be given in a possible clash of normative activities and operational activities of international institutions. International financial institutions, such as the World Bank and the IMF, operate with a view to assist member states in their efforts to raise economic growth, in other words to materialize their economic rights. An international normative organ, such as the ILO, on the other hand, has as its main mandate legislating in labour matters.

Let us take an imaginary case where a World Bank funded project clashes with the normative activity of the ILO: it is frequently observed that developing countries designate certain geographical areas as Export Processing Zones and apply different legal provisions in order to attract foreign investment. This type of special legal regime often includes a "non-union clause". It may also contain legal provisions suspending the application of certain labour laws which may also result in a non-implementation of internationally made commitments, namely the application of ratified ILO Conventions. It would appear, at first glance, that the Bank is not required to consider labour rights in its daily activities. In other words, the Bank would appear to be allowed to continue operating in a country which prohibits trade union freedom in general, or in a country in which forced or child labour can be abundantly found, for example. A development bank is under no legal duty to observe ILO Conventions. These duties are not provided

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financial crisis in the late nineties suggested deviation from various types of social policies Thailand had adopted, a minimum wage fixing system, for instance.

4 The efforts of the UNDP's Human Development Report Office with its innovative Human Development Index is

for under its constitutional instrument. Here we find a situation in which an economic right (the World Bank's right to operate according to its mandate) clashes with a social right (the ILO's right, or duty, to promote.)

During the 1960s when a conflict arose between the UN and the World Bank concerning its loan activities to South Africa and Portugal, the latter's position was clearly expressed in its legal office's view that the Bank is guided by its constitutional instrument and that there was no legal reason why it should follow the UN's decision to enforce economic sanctions on those countries. The World Bank even maintained that its Articles of Agreement prohibited the Bank from intervening in the "internal affairs" of the loan receiving countries.[5]

The question to be asked here is whether such financial institutions are truly immune from "political" decisions, or rather whether there is not a "legal" obligation which may be relevant to the World Bank or other regional banks. It is, at least, sensible to ask whether an international institution with similar or even the same membership (all the members of the Asian Development Bank are members of the ILO, for instance) can adopt practices that are very different from another institution. One could even go one step further to inquire into the question of whether there can be multiple "public interests" in a single international society. This question of the conflict between the UN and development banks can be discussed more generally as an illustration of the conflict between economic development and human rights, in other words, between economic rights and social rights.

It is commonly known that Bretton Woods institutions set conditions when they decide financing. The infamous "conditionality" issue has not only been discussed among academics, but it is also an issue that the world mass media has frequently addressed. For some of the conditions set by the IMF and the World Bank gave direct and imminent hardship to the general public of loan-receiving countries and ordinary citizens, therefore, easily feel their effects. If a development bank invites a recipient country to adopt an income policy, and connected with it are a variety of economic measures, such as the lifting of a minimum wage law or the discouragement of free wage negotiations between social partners, the Bank is directly involved in infringing some of the basic workers' rights. In many cases that kind of situation would entail infringement of treaty obligations of the recipient countries.

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important.

We wish to ask ourselves whether there is no breach of international law if the financial institutions are aware of possible conflicts of international obligations by the loan receiving countries, such as child labour, discrimination, freedom of association and forced labour. Is it not wrong under international law to grant loans to countries in which the financial institutions know that the recipients will use them in a way that is incompatible with the terms of public international law. The financial institutions may also be in a position to foresee the possible infringement of treaty obligations of the recipient countries if loans are executed in an inappropriate way. Recipient countries are usually economically under-developed and, consequently, often lack sufficient technical infrastructure in government administration to foresee such infringements of their international obligations. International institutions with professional lawyers employed in their legal departments are in a far better position to assess the international legal implications of economic development projects to which they give their support. They would, therefore, be responsible for checking the compatibility of the projects with various international treaty obligations, including ILO Conventions.

III. Harmonization of Economic Rights and Social Rights

If it is too far-fetched to assume that there exists a rule in international law that development banks and similar entities have a legal obligation to check the conformity with international obligations of recipient countries, we can still presume a general obligation of development banks to adhere to established rules of international law. We would recall the Advisory Opinion on the Reparation Case,[6] in which the Court stated that the United Nations enjoys rights and duties in international law in so far as legal personality can be attributed to it. While dissenting opinions criticized the "necessary implication" theory, which the majority of judges supported, the subsequent practice of the UN, as well as, other ICJ Opinions[7] seems to confirm the majority view. It is obvious that international institutions cannot bear all the rights and duties nation states do. On the other hand, there is no rule in international law, which restricts the duties of international institutions to those, which are clearly stipulated in the constitutional instruments of each institution. If there is a "necessary implication" in giving power to the UN to demand reparation, why should there not be another "necessary implication"

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[5] Ibrahim Shihata, *The World Bank in a Changing World*, Nijhoff, 1991, p.105.
[6] ICJ Report, 1949, p. 174ff
[7] For instance, the Advisory Opinion concerning the “Certain Expenses” case.

which makes the UN bear a certain set of international legal duties, which are not specifically mentioned in the constitutional instruments?

What the duties are, that international institutions must discharge because they have international legal personality, is a question, which has not been discussed substantially in the past. While not all of the rules of international customary law fall within the group of rules that cover international legal persons, few would contest that *ius cogens* be included here, such as the prohibition of slavery or piracy. The suppression of crimes against humanity is a relatively new rule, but it is considered to have entered into the realm of *ius cogens*.

It would be safe to maintain that international financial institutions, such as the World Bank, are obliged to observe the peremptory norms of public international law. It is, therefore, correct to insist on the compatibility of Bank operations with certain human rights standards as well as a number of ILO Conventions, which contain elements of *ius cogens*, the principle of freedom from forced labour being one of the most representative ones. The principle of non-discrimination underlies another set of Conventions, such as Convention No.111 and they are close to *ius cogens*. Whether the principle of freedom of association can be attributed with similar characteristics is a debatable question, but it would not be so very wrong to assert its status as customary international law, at least in the context of the ILO. In sum, the following can be maintained: the Bank is responsible under international law to ascertain the compatibility of its projects with a set of universally recognized rules of international law, particularly those which have attained the status of *ius cogens*.

Conclusion

This brief study started with the question whether economic rights and social rights are the same thing or not. We took up the case of a banking activity, which appears to clash with human rights standards. However, the conclusion (or an assumption, rather) is that it is not a clash but a conflict of legal rights, which must be resolved by resorting to the legal responsibility of certain international institutions, which derive from their legal personality in international law. It is by that process that economic rights and social rights can be harmonized.

Development, Disability and Law

Masayuki Kobayashi *

Introduction

The United Nations has announced that there are more than half a billion disabled people around the world who have some sort of disability and that an estimated 400 million live in the developing countries. However, with priority being given to economic growth, the issue of the disabled people has not arisen much in policymaking. Traditionally, the developing countries of Asia have treated social welfare as a social program for eliminating mass poverty. But because most of the resources were put into economic development, they have not made much progress in establishing and expanding social security or social welfare systems[1]. This can be well understood from the proposals during the current Asian economic crisis, which pointed out the urgent need to construct social safety nets in these Countries. Under these circumstances, the issues concerning the disabled people, that is, the rights and welfare of the disabled people have rarely been addressed. In this sense, the disabled people face double or triple barriers in the process of development. This report will summaries how the issue of the disabled people has been taken up in the international community and how it has developed in Asia, and propose a discussion on the possibility to include the issue of the disabled people as one of the issues of social development and the law.

I. Formation of Social Laws and Disability

After World War II, with the recognition that poverty and deprivation were caused by the international society and the political, economic, and social mechanisms of individual countries, the world began to accord the proper respect to the right to life and began to pay attention to social security, social welfare, and the required institutions. Japan on its part together with the civil rights, the Constitution included a clear

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provision on "social rights" relating to the guarantee of the right to life to workers and the socially disadvantaged people[2].

Under a totally free economy, the strong become increasingly stronger and the weak, that is, the workers, elderly, and disabled people, are liable to be driven into a state of poverty. To prevent this from occurring, modern capitalism seeks to achieve practical equality and real security rather than abstract principles of freedom and equality. That is, the socially disadvantaged seek realization of the right of life and the right of a decent living as their “Right”, while the power of the strong, that is, the capitalists and business, is restricted in some ways.

As a result, governments have adopted legislation and policies restricting one of the pillars of the market economy, the principle of freedom of contract, in order to ensure real equality. This has been done through the introduction of "social laws". Before that, many social issues, including the issue of the disabled people, were either left untouched or treated as a matter for charity. With the introduction of the social laws, however, rights and the principle of freedom of contract have been modified for assuring the right to life through the social security laws, social welfare laws, etc[3].

Japan had also changed from treating social security and social welfare as a charitable and remedial natures, to treating it as “essential”, and has guaranteed the provision of economic and human services for those ends. The government is providing these institutionally. For the disabled people, at the present time, the era has arrived of comprehensive services predicated on respect for the human rights of the beneficiaries, i.e., the disabled people, and enabling them to lead independent lives[4].

Welfare for the disabled people is important in the sense that the disabled people have the right to liberty and the pursuit of happiness. The disabled people are entitled to the same human rights in all areas of activity enjoyed by general citizens such as education, labor, and culture, not only life and basic daily needs such as food, clothing, and shelter[5]. When welfare of the disabled people is left to the individuals or families, life itself is sometimes threatened and no consideration is given to the peripheral issues of their lives and activities as citizens. Therefore, while the individual effort of the disabled people and the cooperation of their families are necessary for the

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1 Katsuhide Tani (ed.), *International Welfare in the Present Age – an Approach to Asia*, Chuo Hoki, 1991, p.156.
2 Susumu Sato, *Social Security and Social Welfare Law*, Seishin Shobo, 1990, p.7.
3 *Ibid*., pp.14-16.
4 *Ibid*., pp.26-27.
5 Yasuko Ichibangase & Susumu Sato (eds.), *Welfare and Human Rights of the Disabled People*, Koseikan, 1987,

disabled people to achieve independence and the pursuit of happiness, there are limits to this. Institutional guarantees by the government and action by society as a whole become necessary. And what is important in the process of developing these institutions are the initiative of the disabled people[6].

II. Development in International Community

The basic ideas behind welfare for the disabled people, rooted in the human rights of the disabled people, are influenced by trends in the UN and other parts of the international community.

The UN passed the Universal Declaration of Human Rights in 1948 in which it stated that all people are born free and equal in respect and rights. The content of the declaration was embodied in legally binding international conventions such as the 1966 "International Convention on Economic, Social, and Culture Rights" and the "International Convention on Civil and Political Rights". Neither of these has clear, direct provisions on the disabled people, but each calls for the equality of all people and the guarantee of widespread human rights and therefore is naturally interpreted as including the disabled people[7].

The UN also adopts declarations of human rights specifically covering the promotion of the human rights of the socially disadvantaged. For the disabled people, it adopted a Declaration on the Rights of the Mentally Retarded in 1971 and a Declaration on the Rights of the Disabled Persons in 1975. In the Declaration on the Rights of the Disabled Persons, it set down definitions of the disabled people, guarantees of the human rights of the disabled people, enjoyment of civil rights and political rights of the disabled people, the guarantee of the right to various services for promoting social integration, economic and social guarantees, and the right to work, which clarified the rights of the disabled people as human rights. It called upon member countries to establish legal and administrative systems meeting the diverse needs of the disabled people to enable them to enjoy a standard of living and right to living equal to non-disabled citizens based on the principle of encouraging their maximum independence[8].

As a specific expression of these declarations of human rights, 1981 was

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p.3.

[6] *Ibid.*, pp.4-5.

[7] *Ibid.*, p.159.

designated as the International Year of the Disabled Persons and the "World Programme of Action concerning Disabled Persons" was adopted in 1982 as a guideline for specific action based on this. The years 1983 to 1992 were designated the "International Decade of the Disabled" for promotion of this. "Full Participation and Equality" were made the themes of the International Decade of the Disabled and five targets were set. The final goal was the guarantee of the right of the disabled people for independence in daily living and participation in all fields of the economy, society, politics, etc. Each country was asked to take action in accordance with this. In this way, the international community started to treat the human rights of the disabled people as not just a mere idea, but as a social right by nature[9]. This had a tremendous effect on the member countries, in particular the developing countries.

The International Decade of the Disabled drew the attention of countries around the world to the issue of the disabled people. But the progress in the Asia-Pacific region was very slow that they were finally beginning to adopt measures concerning disability only at the end of the Decade. Recognizing that a second "Decade of the Disabled Persons" was necessary for building on and consolidating these gains, the ESCAP General Meeting adopted an "Asia-Pacific Decade of the Disabled" in 1992. Prior to this, ESCAP had adopted a "Strategy for Regional Social Development for 2000 and on". This called for the improvement of the quality of life for all people in the ESCAP region through the complete eradication of poverty, the realization of equality, and the promotion of participation in society with priority given to the disabled people and other socially disadvantaged. Its action plan, "Agenda for Action for the Asia and Pacific Decade of the Disabled Persons", identified national coordination, legislation, information, public awareness, accessibility and communication, education, training and employment, prevention of causes of disabilities, rehabilitation services, assistive devices, self-help organizations, and regional cooperation as areas of concern.

In the area of legislation, the action plan called for amendment or abolition of current laws having provisions restricting the disabled people, the establishment of basic laws relating to the protection of the rights of all disabled people, the establishment of laws aimed at prohibition of all types of discrimination of the disabled people and providing equal opportunity to the disabled people in education, training, employment, and rehabilitation, the establishment of laws for the elimination of all

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[8] *Ibid.*, p.175.

social and physical barriers to the disabled people, the establishment of laws for giving priority to individual support services for daily living rooted in regional communities, the explicit coverage of the disabled people by the social security system, the active use of UN guidelines in the establishment of laws for the disabled people, etc.

In 1993, Standard Rules on Equalization of Opportunities for Persons with Disabilities was adopted to guarantee the disabled people the exercise of their rights and fulfillment of their duties in the same way as other citizens. There is great importance in such Standard Rules. These are used for the precise delineation of the duties of governments in conventions on social rights. Further, acts violating basic principles such as equality or acts violating the UN standard provisions relating to equal opportunity for the disabled people are considered to constitute infringement of the human rights of the disabled people[10].

In this way, recent international human rights documents take up the issue of the disabled people. There is a growing recognition of the need to guarantee and promote the human rights of the disabled people through the establishment of general laws, policies, and plans and the establishment of special laws, policies, and plans covering them.

III. Asia and the Law on Disability

The growing international recognition of the issue of the disabled people has created great pressure in all countries for the legislation and amendment of disability laws. There have been particularly fast developments in the Asian region since 1990. A major reason behind this was probably the effort on the part of the countries in the region to produce results before the final year of the "International Decade of the Disabled" and need for the host countries to show off their progress in the yearly conferences in the "Asia-Pacific Decade of the Disabled". Of course, the stage of economic development or democratization and the cultural background of the countries concerned such as their indigenous religions and traditions also proved to be plus and minus factors.

Disability laws are being developed through the amendment of existing constitutions and laws and the legislation of new laws. Matters relating to the disabled

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[9] *Ibid.*, pp.15-16.

[10] *Final Report of the Special Rapporteur of the Commission for Social Development on Monitoring the Implementation of the Standard Rules on the Equalization of Opportunities for Persons with Disability* (Second

people are being incorporated into general laws, and independent laws are being established for individual fields, and also comprehensive laws for the disabled people are being established. This report will briefly introduce the situation in China, South Korea, Thailand, and the Philippines -- all of which have established a comprehensive disability laws.

1. China

China established the Law of the People's Republic of China on the Protection of Disabled Persons in December 1990. The law is comprised of nine chapters and 54 articles covering general provisions, rehabilitation, education, employment, culture life, welfare, environment, legal liability, and supplementary provisions. The law is designed to guarantee the legitimate rights and interests of the disabled people, develop programs for them, promote the full and equal participation of the disabled people in social activities, and guarantee a fair share of the benefits of the material culture of society.

The disabled people enjoy rights equal to those of other citizens in the fields of politics, the economy, culture, and society and home life. The civil rights of the disabled people and respect for them as persons are protected under law. The national and local governments are responsible for disability programs. The central organization behind them is the China Disabled Persons Federation. The government and society offer various rehabilitation services. Disabled children have the right to ordinary education or special education. Employment for the disabled people is arranged by centralized employment in welfare companies or through a quota system based on mandatory rates of employment of the disabled people. Further, the government and society are obligated to set design standards for roads and buildings to make them accessible to the disabled people and create a barrier free environment. The concerned departments under the State Council and the local governments are responsible to formulate relevant regulations and local statutes to implement the law. The State Council established the Regulations on the Education of Persons with Disabilities in 1994. The Regulations on the Labor and Employment of Persons with Disabilities and regulation relating to rehabilitation of the Persons with Disabilities are currently being drafted.

Phase 1997-2000).

2. South Korea

South Korea established the Law for the Welfare of the Physically and Mentally Disabled People in 1981, then completely revised it and changed its name as the Welfare Law for Persons with Disabilities in 1989. It again completely made a revision in 1999. The related laws were also revised according to its amendments. The 1977 Special Education Promotion Law was revised as the Special Education Law. Further, the 1990 Act Relating to Employment Promotion, etc., of the Handicapped was revised as the Law for the Promotion of Employment and Vocational Rehabilitation of the Disabled People. It is interesting to note that the hosting of the Seoul Olympics and the Paralympics in 1988 was the key factor to amending these laws, for example the Building Law was amended to require public facilities to be made barrier free.

The 1989 Welfare Law for Persons with Disabilities is comprised of eight chapters and 80 articles covering general provisions, research on basic measures, welfare measures, welfare institutions and organizations, rehabilitation assistant devices, manpower specialized in welfare for the disabled people, additional provisions, and penal provisions. The law is designed to guarantee a decent living and rights of the disabled people by clarifying the duties of the national and local governments, encouraging comprehensive measures for welfare for the disabled people by establishing programs for the prevention of disabilities, for medical treatment, education, vocational rehabilitation, improvement of the living environment etc. And for the disabled people, determining measures contributing to the independence, protection, assistance, and other facets for stabilization of their lives, and thereby to improve welfare and promote the participation of the disabled people in society. Further, it lays out the basic concept of welfare for the disabled people that is social integration through full participation and equality of the disabled people in society.

3. Thailand

Thailand established the Rehabilitation of Disabled Persons Act in 1991. The Act consists of 20 articles in all and calls for the provision of rehabilitation services such as medical treatment to the disabled people, the establishment of a fund for assisting the disabled people, improved access to buildings and transportation for the disabled people and other efforts to eliminate barriers, and employment of the disabled people in private companies. Ministers of Ministry of Interior, Education and Public Health are in charge of the enforcement of this Act. Various systems are being set up

under by Ministerial Regulations for implementing the Act. For example, Ministerial Regulation No.1 is on the Employment of Disabled Persons and the Contribution to the Fund for Rehabilitation of Disabled Person, which set out a quota system that requires the employers to hire 0.5% of the total workers. And the recent Ministerial Regulation No.4 identifies building, places, vehicles and public services that are required to have equipment to facilitate disabled persons access. Also, the regulation calls for a system requiring all disabled children to attend school, free rehabilitation, and free dispensing of artificial limbs etc.

4. The Philippines

The Philippines established the Act Providing for Rehabilitation, Self-Development and Self-Reliance of Disabled Persons and their Integration into the Mainstream of Society and for other Purposes, also known as the "Magna Carta for Disabled Person", in 1992. The law is comprised of 50 articles covering basic principles, social services such as employment, education, health, and assistance, telecommunications, accessibility, political and civil rights, discrimination on employment, on transportation, on the use of public accommodation and services, and final provisions. The Act is accompanied by a set of detailed Implementing Rules and Regulation of the Magna Carta for Disabled Persons.

It is said that the law is important in that it (1) clearly sets down the rights and privileges of the disabled people in various fields, (2) gives due recognition and support to the exercise of the political and civil rights including the right to organize and the right to demonstrate, and (3) clarifies situations where the disabled people are discriminated against in employment, transportation, and public facilities and prohibits such discrimination[11]. As seen from the name of the law, it aims at the independence and social integration of the disabled people. There is also the Accessibility Law, which enhance the mobility of disabled people by requiring certain buildings, institutions, establishments, and public utilities to install facilities and other devices.

Conclusion

International conventions or policies of the international community can sometimes have a huge impact on domestic policies, but in practice the most effective

[11] Adela A. Kawano, "Present Situation of Disabled People in the Philippines (outline)", *Fukushi Rodo*, No.60, 1993,

means for improving the position of the disabled people is to amend domestic law to incorporate the rights and interests of the disabled people[12]. In this sense, along with the development of the international community, some of the Asian Countries have established the first stage, that is, the establishment of the basic framework laws. Of course their implementation, and the participation of the disabled people in that process are required for guaranteeing the true rights of the disabled people in real life. But the establishment of laws, even the very abstract ones, in the first stage gives ground for the Disabled People to utilize the law and legal system for their empowerment.

Although the issue concerning the disabled people is an important field in social development not much research have been done. Especially, the laws relating to disability need more development and further study. In this sense, there have been hopeful developments in this direction. Such as the World Bank preparing for analysis of the relationship between disabilities and poverty in the developing countries and the Asian Development Bank beginning its study on the treatment of the issue concerning the disabled people.

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pp.43-44.

12 Jeremy Cooper and Stuart Vernon, *Disability and the Law*, Jessica Kingsley Publishers, London, p. 57.

Law and Development: Environmental Law in Asia

Naoyuki Sakumoto[*]

Many Asian countries have achieved considerable success in the area of economic development up to now. At the same time, however, they have run up against numerous social problems as a result. These problems include environmental pollution, urbanization, disregard for human rights, labor disputes, disparities in income, and the need for consumer protection. These are all extremely modern problems for developing countries compared with the traditional collection of problems which used to typify them, that is, poverty, unbridled population growth, malnutrition, and lack of educational services. This new set of problems cannot be handled by the conventional approach of increasing the size of the economy. They are problems which arise in the process of rapid development or the process of modernization. In the past, in Japan and elsewhere, these were thought of as problems accompanying strains of development, contradictions accompanying the increasing sophistication of capitalism, and other results of excessive zeal in capitalist production systems. Solving these problems requires the formation of a modern social order or civil society or guarantee of legal stability.

The industrialized countries overcame these strains in development to a considerable extent in the process of economic growth. Such an approach to development, however, would not be appropriate for the Asian countries and other developing countries in the future. The October 20, 2000 issue of the Japanese Yomiuri newspaper reported, somewhat exaggeratedly, that in order for all of the people in the developing countries and rest of the world to enjoy a standard of living comparable to Japan or the West, another two worlds' worth of energy and other resources would be necessary. In this way, development is an issue which must be simultaneously argued from two apparently contradictory positions, that is, reflection on the previous approach to development of the industrialized nations and the future direction of development of

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the developing countries.

The rise of the issue of the global environment clarified the fact that development is limited by the finite nature of the global environment and resources. The previous one-sided stance in development toward economic growth gave rise to environmental problems causing considerable harm in the industrialized countries and many developing countries. As a result, the best approach to development is a subject of hot debate. One term now being bandied about internationally is "sustainable development". This derives from the position that unlimited development is not possible. The problem is that restrictions on development are being predicted or discussed before the majority of developing countries have reached a basic level of development.

This paper studies the role played or should be played by the law in the development of the Asian region through environmental law. Environmental problems are extremely modern problems, which are just as hard to solve by the Asian countries as the industrialized countries, and these must be solved by the law. It is important how the current environmental laws of the Asian countries deal with the problems institutionally or how effectively environmental laws are applied to solve the problems. In fact, as will be seen later, many Asian countries have built up a considerable body of environmental laws and have established administrative organizations for their implementation. Society is watching to see if environmental laws are being efficiently implemented and if they are helping to solve specific problems. That is, there is a question as to if environmental laws in Asia are being efficiently applied in all aspects of prevention of problems, implementation, and dispute resolution. It is believed that a comparison of the basic positions in the environmental laws of different Asian countries with those of other countries will throw light on the role played by environmental laws in development.

Next, this paper will study the changes in the concept of development, the experience of Japan in environmental law, the features and issues in the development of environmental law in Asia, and the role played by environmental law in development.

I. Changes in Concept of Development - From "Development vs. Environment" to "Sustainable Development"

The concept of "development" has changed dramatically this quarter century. That is, at the 1972 Stockholm UN Conference on the Human Environment, a

completely different situation ended up arising in the understanding of the "environment" from the then North-South issue. This was the "development vs environment" issue. The developing countries argued that pollution was a result of the excess consumption in the industrialized countries, that they actually wanted dirty smokestacks and polluting factories, and that imposing environmental restrictions would fetter the future development of the developing countries. On the other hand, the industrialized countries began arguing about the risk to the environment and environmental restrictions claiming that there are limits to the environmental capacity of the world and that international cooperation is necessary for protection of the environment. For example, the Club of Rome's "Limits to Growth" and the environmental report of the U.S. State Department reflect the stance of the industrialized countries at that time.

Seen from the current stage, however, this "development vs environment" issue can be said to be folding into the concept of "sustainable development". The concept of "sustainable development", formally adopted at the UN, focuses on the fair distribution of resources between the current generation and future generations. In fact, many industrialized countries and developing countries are searching for means for realizing this. This concept is being widely adopted in national policies or international environmental policies or in fields other than the environment and can be said to have become entrenched to a considerable extent as an idea for finding a balance between the environment and development.

Sustainable development was first propounded in the report of the Brundrant Commission, "Our Common Future" (1), in 1987. This was an extremely epoch-making meeting of minds when considering the fact that the industrialized countries and developing countries had previously adopted a confrontational stance over the environment. The basic issue of "development vs. environment" however has implications on the eradication of poverty in the developing countries and is important for the industrialized countries as well and therefore should not be considered to have disappeared from the debate. Rather, the concept of sustainable development can be said to have succeeded in the sense of preparing a common foundation for discussion of the environment and development out of the confrontation between the industrialized countries and developed countries over the North-South issue. It is however unclear how much of a direction has been given to the basic solution of the environmental problem. Rather, it can be said to be still an issue left for future "political will".

II. Experience of Japan in Environmental Law - In Relation to Development

1. History of Development of Environmental Law in Japan

Japan has undergone numerous trials in its environmental law in relation to development. At the present time, the 1993 Environmental Policy Basic Law forms the pinnacle of the body of Japanese environmental law. That law was not, however, enacted early on by any means compared with the other industrialized countries or Asian countries. The present law was arrived at after repeated Japanese style seesawing between development and the environment and after repeated trial and error.

The history of environmental law in Japan can be roughly divided into five periods. These are closely related to the occurrence of environmental problems. The first period was at the start of the 20th century when Japan pushed forward with rapid economic development in order to increase its national standing and militarize. New mines were rapidly opened up and problems arose with pollution like in the Ashio Copper Mine Incident. This inflicted great harm to numerous residents and farmers. The mining law at that time had provisions relating to the protection of mining rights and restriction of mining activities, but no provisions relating to the prevention of pollution. During this period, there were truly no laws relating to pollution at all. Water and air pollution became problems, but these were settled privately by payment of compensation and forced relocation, but never by law.

The second period was when Japan was rebuilding its economy after the Second World War. Tokyo, Osaka, and other large cities suffered from terrible air pollution, water pollution, and other environmental problems. Local government agencies enacted laws in advance of the national government to deal with the situation. These included 1949 provisions for preventing pollution in Tokyo, 1950 provisions for preventing pollution from business in Osaka, 1954 provisions on general noise levels from locations other than factories in Tokyo, 1954 amended provisions on prevention of pollution from business in Osaka, and 1955 provisions for preventing pollution in Fukuoka prefecture and provisions for preventing noise.

Much sacrifice and loss were entailed however before pollution was officially recognized as a problem and dealt with by laws on the national level. The Edogawa

River was heavily polluted by discharge from the Tokyo Factory of Honshu Paper, for example. Fishing associations staged protests in front of the Tokyo government offices and the factory leading to numerous injuries. This is now known as the Urayasu Fishermen's Riot. The issue however was then raised for discussion at the National Diet and resulted in the establishment of two laws relating to water quality: a law for the protection of water quality and a law restricting factory discharges. These were the first antipollution laws in Japan.

In the 1950s, Japan was already building up its petrochemical industry and heavy machinery and chemical industries. An increasing number of petrochemical complexes were established in Yokkaichi and other cities. "Yokkaichi asthma" became a social issue. As a result, a law was established restricting smokestack emissions in 1962. The law, however, called first of all for a balance with industrial development and adopted restrictions on concentration rather than restrictions on total emissions therefore enabled the emission standards to be bypassed by just diluting the emissions. The regulations were also limited to specific areas. In other words, the law was peppered with loopholes.

The third period began in the 1960s when pollution began to become a huge problem throughout the industrial regions of Japan. Pollution became a serious social issue and finally prompted the country as a whole to start dealing with the matter. The public particularly focused on four major incidents involving pollution: mercury poisoning in Minamata Bay of Kumamoto prefecture, mercury poisoning of the estuary of Aganogawa river in Niigata prefecture, cadmium poisoning of Jinzugawa river in Toyama prefecture, and the asthma in Yokkaiichi city of Mie prefecture. To deal with this, the Prime Minister's Office established a special liaison council to promote pollution countermeasures comprised of representatives from the different ministries. This was Japan's first environmentally related government organization. The council discussed the establishment of a basic law for the prevention of pollution. Local government agencies, the Japan Federation of Bar Associations, political parties, and various other organizations pressed strongly for its establishment, while Keidanren and the rest of industry opposed it as being premature. At the end of a heated debate, the basic law for preventing pollution was finally established in 1967. This was a comprehensive law and formed the first stage in Japan's efforts to curtail pollution.

The basic law for the prevention of pollution, however, was restricted in how it protected the environment. First, there were only seven officially recognized types of

pollution, that is, air pollution, water pollution, soil contamination (added by an amendment in 1970), noise, vibration, land subsidence, and odors. Waste and other pollution problems were excluded from coverage. Further, while the law clarified the duties of the national government, local government agencies, business, and residents, it maintained a basic stance of stressing economic development over pollution. The law includes the phrase "to an extent not counter to balance with economic development", i.e., the "economic development balance clause". This meant the benefits of economic development had to be constantly weighed against the degree of tolerance of victims of pollution. Note that this law had provisions relating to the establishment of standards for discharge and environmental standards, plans for preventing pollution in specific areas, resolution of disputes regarding pollution, and relief to injured parties.

The fourth period began in 1970 with a string of legislation in the National Diet relating to pollution. The basic law for prevention of pollution was heavily amended and another 14 pollution related laws either established or amended. The National Diet came to be called the "Pollution Diet" due to the grand manner in which it took up the issue. The clause regarding a balance with economic development was deleted and the idea of giving priority to economic development over prevention of pollution disappeared from the law. The system of limiting regulation to only designated waters was abolished and regulations over water quality were expanded to cover the entire country. A law regarding waste disposal was established and penalties stipulated in another law concerning punishment of crimes of pollution relating to human health. The concept of "crimes of pollution" was established. In 1971, the Environmental Agency was established to coordinate government regulation of pollution - conducted piecemeal up until then. In 1972, a law was established for protection of the natural environment. This gave the Environmental Agency a mandate to plan, draft, and promote basic policies relating to the environment and to conduct a dual environmental policy of prevention of pollution and protection of nature. Considerable success was achieved by the application of this basic law.

At that time, in 1972, the UN Conference on the Human Environment was held in Stockholm. International interest in global-scale environmental problems soared. Further, as a result of the Conference, tremendous interest was generated in the international community over the severity of environmental problems in the developing countries. A great change occurred in awareness of the environment as a result of this Conference. The 1992 UN Conference on the Environment and Development had as its

main theme "development and the environment". The concept of "sustainable development" was adopted and a specific action plan for its realization, "Agenda 21", was adopted.

The fifth period was after 1993 and the establishment of a basic law for environmental measures. Influenced by the 1992 UN Conference on the Environment and Development, the new law incorporated the changing awareness of problems of the global environment, the concept of sustainable development, international cooperation in the environment, establishment of an environmental assessment law, the merging of the concepts of pollution and the natural environment, use of a basic plan for the environment, public participation, etc. This was in striking contrast to the former basic law on prevention of pollution. Since the establishment of the basic law, a series of laws have been established in Japan such as a recycling law, an environmental assessment law, PRTR law (related to environmental hormones), and a law relating to a recycling economy.

2. Features of Development of Environmental Law in Japan - From Perspective of Development and Environmental Law

First, there is the point that environmental policy has been of a delayed type dealing with problems after the fact. The slowness of the central government, which had been stressing economic development at that time, in tackling environmental measures only aggravated the social turmoil. Environmental problems first broke out in local areas and became social issues there. The local governments then dealt with them separately administratively or legally. This did not allow problems to be prevented or predicted in advance. At the initial stage, there were no laws applicable to prevention of pollution either at the national level or the local level. Not only this, there was insufficient scientific know-how. Further, there was sometimes a lack of awareness of environmental protection or awareness of the public will. At the local level, grounds for a national law could not be found, problems could only be dealt with piecemeal, and problems could not be sufficiently solved.

Therefore, discussions could not be raised to the level of the National Diet. The Japanese system might appear at first glance to have been formed by a bottom-up approach, but this does not necessarily mean it was democratic. Criticism was therefore raised calling into question official responsibility for the inaction.

For example, the incidence of Minamata disease in Kumamoto prefecture, which resulted in over 30 deaths, was being roundly discussed until the causal relation with organomercury compounds became suspected. Official inaction, however, meant that countermeasures were delayed. The same type of mercury poisoning occurred again in the Aganogawa river estuary in Toyama prefecture and produced fresh casualties.

Second, Japan has experienced this split desire over "development and the environment" several times before. Before this was overcome, sometimes a large number of casualties had to be produced. The same is true in many other Asian countries which have oriented themselves toward economic development. Close to 100 years ago when Japan was just starting to modernize, the country adopted a policy of rush industrialization to strength its military and economy. At the time, there was neither the idea of environment protection or related laws. Next came the period of high economic growth after World War II when pollution became an important social issue in Japan as a whole. Society at that time was also more strongly oriented toward economic development rather than the environment. This may be seen from the clause calling for a balance with economic development. This finally ended due to the effect on Japan of the changing awareness of the environment at national forums such as the Stockholm UN Conference on the Human Environment and the escalation of the debate of pollution in Japan to the National Diet level.

Third, however, it should be emphasized that the inherent issue of the "development vs environment" cannot be decided in Japan. While the term "sustainable development" has entered the popular lexicon, this concept is extremely weak in terms of solving actual problems. The tradeoff between development and the environment will always be an important issue as in the process of establishment of an environmental assessment law, in public works projects, including dam construction now underway in Japan, in the tradeoff between the construction of the Olympic facilities in Nagano and the environment, in the environment considerations when the Japanese government provides environmental aid, and in the approach to other individual projects.

III. Features and Issues in the Development of Environmental Law in Asia

There is no need to discuss the development of environmental laws in Asia here once again, but of course many Asian countries have achieved considerable progress. Here, the state of establishment of laws in each country can be viewed from a table prepared in advance (see Table 1) (2), so only the main features and issues will be pointed out (3).

The establishment of environmental law in the Asian countries can be said to have been prompted by the outbreak of problems in those countries, the levels of their economies and societies, the will and need for solving the problems, and international influence. In particular, many Asian countries began establishing laws after the 1972 Stockholm UN Conference on the Human Environment. At the same time, however, in the 1970s, many Asian countries adopted priority industrialization policies and went too far in development without giving due consideration to the environment. This brought pollution upon them and led to much destruction of the environment. The rising interest of society in environmental issues was another factor.

The first characteristic of the establishment of environmental law in the Asian countries is a tendency for an expansion of coverage from the initial focus on prevention of pollution to protection of the natural environment and protection of the larger global environment in turn. In the process of rapid economic development, industrial pollution first becomes serious, so laws begin being set up relating to the prevention of such pollution. Later, however, the scope of protection gradually expands. Further, along with the expanded coverage of protection, changes are seen in the techniques used for protecting the environment. That is, economic, educational, awareness-lifting, and participatory means are adopted instead of just the old means of planning and regulation.

Second, in the initial stage, in most countries, the national government begins establishing the laws for dealing with environmental issues. For example, in the Philippines, the Environment Policy Act and the Environmental Code were established in the mid-1970s. This was however under the Marcos regime, when government was at its peak of heavy handedness. The law was modeled on the American environmental law and was quickly put into force as a symbol of the level of development of that

country. A similar government led stance was also seen in Singapore. From this, the national governments at that time can be said to have been strongly aware of future needs or to have played a strong role overall. At the present time, however, environmental laws are conversely being reworked to meet with the actual conditions on those countries.

Third, the industrialized countries and the international community can be said to have had a strong influence on the establishment of environmental law in the Asian countries. For example, in addition to the international effort of the Stockholm UN Conference on the Human Environment, there were the programs of UNEP and ESCAP and other international organizations. At the present time, for example, developments are being seen such as the formulation of Agenda 21, the incorporation of the Bazelle Convention into domestic laws, etc. Further, the international private sector led environmental management techniques of ISO 14000 are being widely adopted.

Fourth, a common problem in many Asian countries, large problems remain at the stage of enforcement of the laws. That is, the laws cannot be enforced or applied efficiently due not to the fact that insufficient environmental laws have been established, but rather despite considerable environmental laws being established. Pointed to as behind this are the weakness of the legal infrastructure as a whole, the lack of experience and human resources, the weakness of organizations for administering the environment, the lack of lower level regulations to complement higher level regulations, orders, and laws, and the lack of scientific and technical know-how. Further, corruption and other problems currently in the spotlight are other reasons behind the inefficiency of administration of the environment.

When comparing the development of environmental law in Asia as whole against that of Japan specifically, it is possible to take note of the difference in the time of outbreak of the environmental problems and the nature of the same, the international background at the time and the consequent effects, the knowledge or lack of the same regarding precedents or methods of dealing with environmental issues, and the extremely short time frame, a compressed time frame, in which economic development was achieved by the NIEs etc. Environmental laws continue to be based on the traditional legal systems, but are technical by nature themselves, so many countries exhibit a positive stance to the establishment of laws while incorporating new fields such as labeling, ISO14000, recycling, etc.

IV. Role Played by Environmental Law in Development

The environmental problems surrounding the industrialized countries or the developing countries are important, urgent issues for the present. In particular, many countries in the Asian region have embarked on fast track industrialization programs in recent years. Population pressures and the load on resources are mounting and many countries are experiencing the effects of pollution and destruction of the natural environment. An environmental crisis triggered by Asia and possibly affecting the world as a whole is feared. The modern environmental issues include not only traditional pollution limited to specific areas as in the past, but also harm to large numbers of people in widespread areas and the natural biosystem. For example, they are understood as including global environmental issues where the environmental impact affects the world at large, natural disasters, and the issue of the serious effect which the small amounts of hormone destabilizing chemical substances known as "environmental hormones" such as dioxins and PCBs have on the survival of humanity and other creatures or the biosystem.

Seen in this way, environmental issues are not limited to specific areas of the industrialized countries or the developing countries. To solve the problems, it is necessary for the national governments, local governments, business, NGOs, individuals, etc. to find means for solving them together in accordance with each of their roles in the overall framework of effort by the international community. If not, then an overall solution will be difficult. That is, even if one country were to take a stand for the protection of the environment, if a “free rider” country ignored environmental protection, the road toward solving global environmental problems would become longer. In this sense, there is a need to restudy environmental governance at the domestic level along with environmental governance at the global level.

Many suggestions can be gleaned when viewing development and the environment in the Asian region from the standpoint of environmental law.

First, the concept of development itself is changing. The general thinking regarding development has been changing in a major way as a result of environmental issues. The old one-sided emphasis on development stressing economic effect has come under fire and is no longer being accepted either at the industrialized countries or soon even at the developing countries. Rather, a balance between development and the environment is being called for and participatory development is taking its place.

Behind this has been the excessive destruction of the environment caused by the unsystematic, reckless development in the previous half-century and conversely the spread of environmental awareness and its victory over one-sided developmentalism.

Second, view historically, the relatively new field of environmental law has developed rapidly before other fields of law in the Asian countries. This is believed because of the practical need for solving pressing environmental problems through environmental law in many Asian countries - where the rule of man is usually dominant over the rule of law and politics usually takes precedence over law. In particular, in the fight between development and the environment, the position of protection of the environment often clashes with the position of priority to development and resolution by law is considered essential.

Third, while the environmental law of the Asian countries has developed so rapidly, new issues are rising. As already seen, there is the problem of the enforcement of environmental law. This is now a common theme in many countries. Various environmental problems or environmental disputes are raising their heads in the process of development. Environmental problems are matters for social concern. As expectations rise in society for solving these problems, enforcement of environmental law will be debated further.

Fourth, there is the internationalization of environmental law. The international community or neighboring countries are having a strong effect on the Asian countries. Not only the recent remarkable development of international environmental law, but also the progress made in environmental law in Japan, the West, and other industrialized areas and the establishment of laws among Asian countries is all having an effect on each other. This may be considered a new mode of development or propagation of law different from the traditional hand-me-down method of Asia in the past.

At the present time, sharp criticism is being leveled against the conventional type of development targeting solely economic growth. There is talk of such development forcing western European culture on the developing countries, anti-development sentiments, concerns beyond development, post-development anxieties, the feeling that dream of development is over, etc. These are all criticisms of the past stance of "development" which adopted a one-sided stance of economic growth. That is, they are criticisms of the stance taken toward development up until now of proceeding with development without paying much attention to political development and the quality of social development such as democratization, development of human

resources, creation of a participatory society, protection of human rights, and protection of the environment. On the other hand, a loud warning bell has been sounded about the current and future approaches to development. That is, even if the developing countries try out methods of development the same as those of the industrialized countries, they may not find they fit them. Further, there is the fact that there are limited available resources in the global environment. In this sense, it is necessary to reexamine the inherent meaning of development from the standpoint of global governance.

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Law and Social Justice: From a Gender Perspective

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Introduction

Social justice is not a mere aphorism to express concern for the plight of the poor and downtrodden. As a mandate imposed by the Constitution, it requires the adoption by the State of measures that guarantee the right of all the people to equality of opportunity for advancement in all fields of human endeavor and to equitable sharing of social and economic benefits with special emphasis to such measures that ameliorate the standard of living of the underprivileged groups (CONST., art. XIII, sec. 1). The aim is to assure that "those who have less in life should have more in law."

While the end of social justice is to ensure the dignity, welfare and security of all people, it is a well-recognized fact that women is a disadvantageous lot.

It is a truism that the Constitution is the fundamental law of the land and all legislative acts must conform to it. But inevitably, laws reflect the interests, conduct and norms that are founded on socially-shaped assumptions about women and men – their roles, capacities, needs and vulnerabilities. For the most part, they can bestow upon women and men, rights, privileges, and obligations indicative of those socially constructed stereotyped roles. In this way, laws can legitimize and strengthen gender biases and subordination in society.

Before the law, men and women are equal (CONST., art. II, sec. 14). Fairness and equity require that both have the same opportunities to achieve a better life, given their endowments and preferences. This sense of fair play and fairness is one of the cornerstones of any democracy. Although the Philippines has made impressive gains in providing women's socio-economic status as compared to many Asian countries, the position of Filipino women masks a number of gender issues related to human resources development, human rights, labor market participation, participation in politics, and decision-making (J.F.I. ILLO, WOMEN IN THE PHILIPPINES, xi (Asian Development Bank Country Briefing Paper, Dec. 1997)).

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I. Situation

Take, for example, the Filipina's situation today. In economic activities, men still dominate the labor force, but the labor participation rate and employment to population ratio of women are growing faster than men's. In 1999, only 49.9% of women were employed compared to 76% of the men. Men dominate all industries except the wholesale and retail trade, and community, social and personal services sectors (P.L. Adversario, "Gender Statistics As A Tool for Women Empowerment," This Week, October 9-12, 2000 http://bworld.com.ph/This_Week/Cover/coverstory.html. [1-7]). The government still needs to devise a system for measuring women's work. A 1990 study on the average number of hours rural women and men in Bicol spent on economic and domestic activities shows that women worked longer hours than men – 78 hours per week against the men's 59 hours (*Ibid*., p. 2). This does not factor in the 44.6 hours of domestic work per week spent by women as compared to men's 10.5 hours per week.

In April 1999, unemployment was pegged at 11.8%, at 11.2% for men and 12.8% women. The gender gap in terms of unemployment is narrowing due to women's greater readiness to enter vulnerable, low quality jobs and to employers' tendency to replace more expensive male workers with cheaper female workers. But with the decreasing gap in unemployment, there was also a rise in informal activities from July 1997-98, with the self-employed increasing by 430,000 and unpaid family workers by 127,000 ("Beijing Platform for Action Strategies: How Far Realized By Now?," Philippine NGO Beijing Scoreboard Bulletin 12 (August 1999) citing Illo, 1998).

To respond to unemployment, more and more Filipinos are working abroad mainly in vulnerable, unprotected and unregulated occupations as domestics, care givers, entertainers, and other service workers. In 1998, women comprised 61% of deployed new hires (Asis, 1999), the highest percentage since 1992. In 1997, deaths were recorded at 451, 148 of whom were women; 251 came home physically ill (124 of whom were women) and 22 returned mentally ill (84 were females) (*Id*., citing Asis, 1999 and Alcid, 1999).

In migration, the continued commodification of women and children has been facilitated by legal frameworks that condone prostitution where force is not ostensibly utilized to coerce women into prostitution. Worldwide, the problem of trafficking of women and children for prostitution, pornography, marriage-matching arrangements, military prostitution and other practices of sexual exploitation have been perpetuated by

organized criminal syndicates ("Charting Progress Five Years After Beijing," 5 COALITION ASIA-PACIFIC REPORT 1 (Jan.-March 2000)). Since 1997, some 143,611 Filipinas went abroad ostensibly to join their fiances but ended up in prostitution houses controlled by these syndicates (Beijing Platform for Action Strategies, *op. cit.*, p. 13 citing Yamsuan, 1999). This is precisely why a bill entitled The Anti-Trafficking in Women and Minors Bill have been passed the House of Representatives and presently being discussed in the Senate of the Congress of the Philippines.

The share of women in the Philippine power structure is still very low. Women have low participation in decision-making processes at all levels. According to the Commission on Elections, women, last year, held 27 seats or 12.4% of the total 217 seats in the House of Representatives. In 1998, women occupied 15.4% of the executive and legislative levels in contrast with the 84.6% of men. At the local government level, only one woman was elected for every six men in 1998. At the national level, only one woman was elected for every nine men.

Women in poverty do not enjoy social security. Those in the informal sector, which include home-based workers, domestics, micro-entrepreneurs, vendors, unpaid family works and whose work is invisible, unrecognized, unregulated, unprotected, low-skilled and low-paid find it hard to apply for membership because of the required documents like income tax returns. Either employers do not comply for lack of sanctions and in the case of subcontractors, they cannot identify their principal employers.

As for the rural women, who are in subsistence farming and who have a stake in food security as the family food provider they suffer from lack of government support and competition from cheap foreign imports. Their poverty have worsened due to the impact of globalization and economic crisis. The liberalization of agriculture and mining, the introduction of monoculture and more special economic zones have resulted in the destruction of the environment and sustainable livelihood, the conversion of land to high-value crop at the expense of staple crops, the ruin of local business and the displacement of indigenous communities from their ancestral lands (*Ibid.*, p. 12).

Very few women have benefited from land distribution. The latest data reveals that only 5,145 women versus 23,310 men received Certificates of Land Ownership Agreement (National Statistics Coordinating Board, 1999).

A current concern about women's health resolves around the right of women to have their health needs addressed as women and not merely for their roles as mothers.

This has forced the expansion of reproductive health concerns beyond maternal and child health to include fertility regulation, sexual health, infertility safe motherhood and child survival (PLAN FRAMEWORK OF THE PHILIPPINE PLAN FOR GENDER-RESPONSIVE DEVELOPMENT, 1995-2025, 11 (1996)). However, factors such as the government's efficiency and effectiveness in making available to all, married or not, protection against unwanted pregnancies and ensuring services for women's health, as well as necessary information to be given about sexual health, fertility regulation depend on the meager government's budget, the lack of qualified personnel, and the politics of a nation entrenched in the religious dictum and by the circular consequences of poverty and ill-health (*Id.*, at 10. Abortion is illegal and unconstitutional in the Philippines).

From 1991 to 1997, the Department of Social Work and Development has reported a total of 41,667 cases of women especially in difficult circumstances. Incidence of women battery constituted the biggest member at 59.8%. On the other hand, the Philippine National Police (PNP) reported that in 1998, there were 2,633 cases of physical injuries followed by 1,054 cases of rape and 426 cases of acts of lasciviousness (Philippine National Police, 1998 Report). For 1999, reported cases of physical injuries increased 14% while reported cases of rape and lascivious acts rose 11.5% and 37.6%, respectively (Reported by Deputy Director Rodolfo N. Caisip, Police Community Relations of the PNP).

However, these statistics are not entirely accurate considering that violence against women and children is usually shrouded with a culture of silence. Revelations of violence within the family bring shame and tremendous pressure on the victims to bear their pain, fear and rape in silence.

II. Constitutional Standards and Implementing Policies

As earlier stated, Section 14, Article II of the Constitution provides that "the State recognizes the role of women in nation-building and shall ensure the fundamental equality before the law of women and men." Likewise, "the State shall protect working women by providing safe and healthful working conditions, taking into account their material functions, and such facilities and opportunities that will enhance their welfare and enable them to realize their full potential in the service of the nation" (CONST., art. XIII, sec. 14).

The Philippines is a signatory of the U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1249 U.N.T. 13. It entered into force on

3 September 1981) which it ratified on 5 August 1981. This Convention sets forth internationally accepted standards and principles of achieving equality for women. It addresses a wide order of women's concerns in the private and public spheres and provides a mechanism for assessing the status of women in the enjoyment and exercise of their fundamental rights.

On its part, the Supreme Court, through Justice Florenz Regalado in the case of *Philippine Telegraph and Telephone Co. v. NLRC (*G.R. No. 118978, May 23, 1997, 272 SCRA 596 (1997)*)*, has cited CEDAW as the basis of corrective labor and social laws which prohibits discrimination against women with respect to terms and conditions of employment as when the services of a female employee was terminated because she contracted marriage during employment.

1. National Action Plans

A blueprint for integrating women in development was adopted and referred to as the Philippine Development Plan for Women (PDPW), 1989-1992. This was followed by the Philippine Plan for Gender-Responsive Development (PPGD), 1995-2005 which is a perspective plan giving strategies for development that will guide investment and expenditures of efforts and resources.

Pursuant to these constitutional mandates, Republic Act No. 7192 (1992) was enacted. Otherwise known as the Women in Development and Nation-Building Act, it enjoins government agencies to set aside for the benefit of women a substantial portion of development assistance funds obtained from foreign governments and multilateral organizations (Sec. 2). It installed a compliance requirement by which government agencies shall review and revise their regulations to remove gender bias therein (*Id*., sec. 10). It also mandates the National Economic and Development Authority (NEDA) with the assistance of the National Commission on the Role of Filipino Women (NCRFW) to ensure that the different departments, including its agencies and instrumentalities, which, directly or indirectly, affect the participation of women in national development and their integration therein to:

- formulate projects and provide income and employment for rural women;
- assess its programs;
- ensure active participation of women and women's organizations;
- collect sex-disaggregated data and include such in their project proposal/strategy;

- ensure that programs are designed so that the percentage of women who receive assistance is approximately proportionate to their traditional participation in the targeted activities or their proportion to the population; and
- assist women in activities that are of critical significance to their self-reliance and development.

2. Family Law

Perhaps, the aspects of life most highly influenced by culture and tradition are family and marriage. In the Philippines, marriage and motherhood are seen as the destiny of women. Their roles are further strengthened by other institutions such as media and religion.

The Family Code which was signed into law in 1987 answered the clamor of women to remove the discriminatory provisions of the Civil Code. Executive Order No. 209 provides more rights to women by equalizing the marriage age requirement at 18 years old, giving joint authority to the husband and wife to choose the family residence, manage the conjugal property and have custody of the children; the wife's right to exercise her profession or career and the right to accept gifts without the need of her husband's consent; wife's right to remarry even before the expiration of 300 days after her husband's death and the right to retain parental authority over her children after remarriage.

The Family Code did not provide for absolute divorce but aligned the marriage termination mechanism with Canon Law by providing for a "declaration of nullity of marriage" on the ground of psychological incapacity to comply with essential marital obligations" (Art. 36).

The Code has further broadened the grounds for legal separation:

- repeated violence or grossly abusive conduct directed against the petitioner, a common child or a child of the petitioner;
- physical violence or moral pressure to compel the petitioner to change religion or political affiliation;
- attempt of respondent to corrupt or induce the petitioner, a common child or a child of the petitioner, to engage in prostitution or connivance in such

corruption or inducement;

- drug addiction or habitual alcoholism of the respondent;
- final judgment sentencing the respondent to imprisonment of more than six years, even if pardoned;
- lesbianism or homosexuality of the respondent; and
- abandonment of petitioner by respondent without justifiable cause for ore than one year (Art. 55).

Instead of adultery on the part of the wife and concubinage on the part of the husband, which is hard to prove, the Family Code provides for sexual infidelity as a ground for legal separation (Art. 55(8).). However, it does not require a stretch of one's logic to realize that there are social realities about the double standards in the law. There are certain behavior and practices where men can indulge in and in which women are socio-culturally restrained from doing. A common example of this would be men having extramarital affairs or engaging in multiple relationships. For women, the sanctions are primarily in the context of social ostracism even in cases of women in serial monogamous relationships.

The State's premium on marriage is seen most obviously in cases of conflict between husbands and wives where the law consistently leans heavily toward spousal reconciliation. In an action for legal separation, a "cooling off" period from the time of the filing of the petition (FAMILY CODE, art. 58) is required even in cases of domestic violence which may need immediate action or redress. Moreover, there is general resistance in the recognition of marital rape although this is not precluded by the current rape law (Rep. Act No. 8353 (1997)).

There has yet to be a law on domestic violence because the existing laws on physical injuries and other pertinent offenses are not real alternatives. Prevalent among law enforcers, prosecutors, and the courts is the view that domestic violence is a private matter to be settled between the spouses.

3. Labor and Social Legislation

The Labor Code acknowledges biological and social consideration when it deals with the situation of working women. It requires the employer to provide a nursery in the workplace for the benefit of women employees, maternity leave benefits, family planning services, separate toilet rooms and lavatories for men and women and

at least a dressing room for women (Pres. Decree No. 442 (1974), arts. 132, 133 & 134 Pres. Decree No. 442 (1974), arts. 132, 133 & 134).

Article 135 of the Labor Code, as amended by Republic Act No. 6725 (1989), spells out what constitutes discrimination against employees: "*It shall be unlawful for any employer to discriminate against any woman employee with respect to terms and conditions of employment solely on account of her sex.*"

The following are acts of discrimination:

Payment of a lesser compensation, including wage, salary or other form of remuneration and fringe benefits, to a female employee as against a male employee, for work of equal value.

Favoring a male employee over a female employee with respect to promotion, training opportunities, study and scholarship grants solely on account of their sexes.

Under the Implementing Rules dated January 16, 1990, work of equal value refers to "activities, jobs, tasks, duties or services, workers or employees are required or called upon to perform and which are identical or substantially identical. Payment of a lower compensation or lower benefits to a female employee does not constitute a failure to comply with this section, if the difference between the rates of pay is based on length of service or seniority, on location or geographical area of employment, or any factor other than sex and the factors on which the difference is based would normally justify such difference in rates of pay.

Despite these statutory provisions, discrimination in opportunity and treatment remains a reality for women workers. This unequal access to jobs, better remuneration, and wider occupation choice can be attributed to several factors, such as a lower level of literacy; unequal access to education and training; limited educational choices of women due to the influence of family, teachers, and employers; inadequate educational and training schemes to meet the special needs of women; and the stereotyped roles that women play in society, particularly as wife and mother.

4. Health

Health is a basic human right. The Constitution specifically refer to it under Section 15 of Article II which provides that "*the State shall promote the right to health of the people and instill health consciousness among them*" and Section 11, Article XIII states that "*the State shall adopt an integrated and comprehensive approach to health*

developments. There shall be priority for the needs of the underprivileged sick, elderly, disabled, women and children."

Complementary legislation were passed, namely: (a) Executive Order No. 51 (1986) known as the National Code of Marketing of Breastmilk Substitutes, Breastmilk Supplements and Other Related Products; (b) Republic Act No. 6972 (1990) which establishes a day-care center in every barangay; (c) Republic Act No. 7600 (1992) providing incentives to all government and private health institutions with rooming-in and breastfeeding practices; and (d) Republic Act No. 7883 or the Barangay Health Workers' Benefits and Incentives Act of 1995.

5. Economic Rights

The Philippine Constitution subscribes to the same developmental framework in advocating as state policies the promotion of a just and dynamic social order (CONST. art. I I, sec. 9), and the promotion of social justice in all phases of national development (*Id*., sec. 10). It aspires to free the people from poverty by providing adequate social services, and promoting full employment, a rising standard of living, and an improved quality of life for all (*Id*., sec. 9), affirms labor as a primary social economic force (*Id*., sec. 18); and promotes comprehensive rural development and agrarian reform (*Id*., sec. 21).

Several laws were passed pursuant to these articles. Republic Act No. 6657 (1988) or the Comprehensive Agrarian Reform Law carries a provision that "all qualified women members of the agricultural labor force must be guaranteed and assured equal rights to ownership of land, equal share of the farm's produce and representation in advisory or appropriate decision-making bodies." The Department of Agrarian Reform continues to amend its administrative policies and guidelines accordingly by issuing Memorandum Circular No. 1993, series of 1993. It also ensures that women benefit equally and participate fully in the development projects of the Comprehensive Agrarian Reform Program. Likewise, Memorandum Circular No. 18, series of 1996, provides clarificatory guidelines in the manner of generating and issuing emancipatory patents (EPs) and certificates of land ownership agreements (CLOAs) to qualified agrarian reform beneficiaries and ensures gender equality between spouses who are beneficiaries of CARP, particularly in the generation and issuance of EPs and CLOAs.

On the other hand, the Department of Environment and Natural Resources has issued certificates of stewardship contracts that granted land tenure of twenty-five years

and access to training programs to both spouse beneficiaries.

To increase participation of women in business, Republic Act No. 7882 (1995) provides assistance to women engaging in micro and cottage business enterprises.

6. Criminal Law and Violence Against Women

Philippine laws pertaining to gender violence are inadequate. This necessitates the passage of major legislation to address domestic violence and the illegal trafficking of women. Although repeated physical violence and sexual infidelity are grounds for legal separation under the Family Code (Art. 55), the corresponding provisions have not been amended in the Revised Penal Code (Act No. 3815 (1932), arts. 333 & 334). For example, Article 333 on adultery states that to be guilty of adultery, a wife only needs to engage in a single act of sexual intercourse with another man. However, in Article 334, the married man commits concubinage only if he keeps a mistress, has sexual intercourse under scandalous circumstances or cohabits with her which certainly is discriminatory.

Republic Act No. 8353 or the Anti-Rape Law was passed last September 30, 1997. Rape as defined in the Revised Penal Code was expanded and the present law now provides that rape is committed:

> "1.By a man who shall have carnal knowledge of a woman under any of the following circumstances:
> - through force, threat, or intimidation;
> - when the offended party is deprived of reason or otherwise unconscious;
> - by means of fraudulent machination or grave abuse of authority; and
> - when the offended party is under 12 years of age or is demented, even though none of the circumstances mentioned above be present.
>
> 2. By any person who, under any of the circumstances mentioned in paragraph 1 shall commit an act of sexual assault by inserting his penis into another person's mouth or anal orifice, or any instrument or object, into the genital or anal orifice of another person."

The new law now classifies rape as a crime against persons and can now be prosecuted by the State. Note that the second paragraph of the law is gender-neutral. It also provides that any physical overt act manifesting resistance against the act of rape in any degree from the offended party, or where the offended party is so situated as to render her/him incapable of giving valid consent, may be accepted as evidence.

Recent laws passed include: (a) Republic Act No. 7877 (1995) which makes sexual harassment unlawful in the employment, education and training environment; (b) Republic Act No. 7659 (1993) which imposes the death penalty on certain heinous crimes such as rape when committed with certain attendant circumstances; (c) Republic Act No. 7610 (1992) which punishes child abuse, pornography and pedophilia; (d) Republic Act No. 8505 (1998) which provides rape victims assistance and protection and contains for a rape shield provision; and (e) Republic Act No. 7309 (1992) which awards compensation not exceeding PhP10,000.00 to victims of unjust imprisonment or detention and victims of violent crimes including rape.

Conclusion

Despite all these government initiatives, immediate attention should be given to the real causes of women's difficulties and the *de facto* practices that give rise to these hardships. A thorough examination of the inadequacy of some legislation as well as the impact of the laws on gender relations is in order. There is also a need to put monitoring mechanisms and indicators in place in order to measure the effects of government policies and programs.

There has been a growing consensus that sustainable development requires an understanding of the roles of women and men, within the community and in their relations to each other. With the gender and development approach, improving the status of women is no longer considered solely an issue for women, but instead is a goal whose attainment requires active participation of both women and men.

Discussion in Session V

One of the main discussions in this session involved child labor and social clauses.

A question was raised as to whether the prohibition of child labor has become a peremptory norm which binds all countries. Some participants expressed skepticism about outlawing child labor. The reasons given were that different countries are at different levels of development, with their own parameters, and hence no one can be sure whether or not banning child labor is right. In addition, the prohibition of child labor cannot be a peremptory norm unless sufficient conditions are created at the ground to ensure that children can enjoy all human rights. Also, a suggestion was given that other international instruments and institutions such as the UN Convention on the Rights of the Child and UNICEF be considered.

Dr. Ago agreed that the prohibition of child labor has not entered the sphere of a peremptory norm. Rather he stated quite categorically that he was against the idea of including child labor into the group of fundamental human rights norms upon which the ILO bases its activities. The reason for this is that the ILO can be expected to take severe sanctions against countries allow child labor to occur. But in fact the question of child labor is a delicate one. It is easy to ban products produced by children, because consumers in the West do not suffer. But what happens to the poor families and the children themselves? Would they not be forced into more unscrupulous underground activities? So Dr. Ago stressed that child labor should not be tackled by economic sanctions or bans, but rather by providing assistance for education and other means of living.

Dr. Ago also stated that he was categorically against giving importance to social clauses in trade agreements. But at the same time, he stressed the importance of incorporating social aspects into their activities. He said that the ILO has committed a grave error by linking two different kinds of things together, i.e. economic factors and social purposes. The two should be distinguished and should not be automatically incorporated in one rule by, for example, the insertion of social clauses into trade agreements. On the other hand, the international financial institutions and private enterprises cause many problems, so there is a need for the incorporation of social aspects with regard to their conduct.

Another question was raised on whether or not national governments should consider both social development and economic development when asking for assistance from international financial institutions. Dr. Ago responded that the goals of economic and social development should be met and harmonized at the final stage, especially at the national level. This failed to happen, however, in the so-called “development dictatorships,” where the economy was given priority over social development. He stated, though, that with the improvement of government structure, this problem will hopefully be solved.

The speakers and participants gave additional information on laws regarding disabled persons, environmental protection and Shariah Courts. A proposal was made regarding the need to create a mechanism to share legal knowledge and legal documents among Asian Countries.

Mr. Sakumoto supplemented this report giving a picture of environmental laws and regulations in Asia. He explained that most Asian countries have created so-called “Framework Acts” which provide guiding principles. They also have specific acts for water pollution, air pollution, etc., as well as regulations, orders, and local ordinances. Environmental law in Asian countries can be divided into two types. One is the pollution prevention approach and the other the environmental management approach. Malaysia, Singapore and Thailand take the former approach, whereas Indonesia and the Philippines take the latter. Under the former approach, certain regulations or sanctions are applied, whereas the latter is a kind of a mixed approach, which includes policies and economic means.

A question on Shariah Courts was raised, namely whether or not Shariah courts cover areas other than family law. And what happens when a non-Muslim wants to marry a Muslim. This question was brought up because in Indonesia, Muslims and non-Muslims were able to marry only up until the Marriage Law of 1974. But now, Islamic Law is becoming stronger and stronger in spite of the existence of mixed couples, and problems have arisen concerning their marriages and children. In the Philippines, the jurisdiction of Shariah Courts only covers the Muslim Code of Personal laws, which includes issues of family, succession and property. When a Muslim marries a Non-Muslim, the marriage is governed by the law under which they were married. In India, because there are many different communities, there is a special marriage act, which assures family members with different religions of the same legal rights.

Closing Remarks

Raul C. Pangalangan
Dean, College of Law
University of the Philippines

1. When I look back to our discussions over the past two days I draw lessons for future Law and Development activities of national foreign aid groups and international financial institutions (IFIs), and more particularly, for activities in law and judicial reform.
2. The Old Law and Development emerged in the 1960s and 1970s (see Trubek and Galanter; Tamanaha). Its goal was to transplant foreign laws to Asian countries. It was not culture-specific, historically rooted nor sociologically sensitive. It had a linear view of modernization, and exalted the "nation" as the highest form of community, deriding the village, tribe and family as "backward" levels of communal life. It saw the state as completely distinct from society, and adopted law as the chief instrument by which the former would shape the latter.
3. The New Law and Development ("New L&D") emerged in the 1990s in the aftermath of law reform activities by IFIs, and saw law not as an innate "technology" of development but as having a life of its own and animated by values and norms held dear by people and not just by their governments (*Yamada*). The new scholarship typically situated law in its proper milieu: the sociology of the profession (*Rokusha*); paradigms of public interest litigation (*Sato* and *Verma*); colonization and the internalization of, for instance, contract law (*Hartono*); the centralization of prosecution, for instance, in transition economies (*Dao Tri Uc*) and socialist states (*Zheng*). Studies on alternative dispute resolution today discuss both the emerging mechanisms (*Ahmad/Paul*) and the hesitations and fears about these mechanisms (*Imaizumi*).

   The new scholarship poses challenges also at the level of paradigms, the clash between competing models of capitalism (*Yasuda*), or the incorporation into aid programs – but not into international law – of the social aspects of economic relations (*Ago*).
4. More specifically as regards law reform, the papers also show the dynamic between institutions and markets, and between two modes of securing rights, i.e., through the

welfare state or through civil society.

The Asian Development Bank's pro-poor strategy, for instance, relies on legal literacy, access and empowerment, an approach that enhances civil society rather than government institutions (*Tiwana*). Market- and civil society-based initiatives have also worked in the field of environmental protection (which also shows the dynamic between curative and preventive approaches) (*Sakumoto*). On the other hand, the power of rights-based approaches is best demonstrated by the rights of the disabled (*Kobayashi*), whose needs – but for the compelling claims of law and justice – the market is prone to ignore. Finally, women's rights show the power of both approaches where, for instance, women are empowered with both the formal right to contract on her own and her access to credit through, for instance, micro-lending (*Feliciano*).

5. How will these affect law and judicial reform programs? Writing and re-writing laws will remain one, but simply one of their many goals, among them, empowering the stakeholders, educating the judges and lawyers, and forming newer and overlapping constituencies and giving them voice. *Empowering* will mean less about taking to the streets (though that should remain in the picture) but more about literacy and communication; conversely, *oppression* not only means when police hit demonstrators with truncheons, but likewise when telephone monopolies deny phones to hospitals, homes, police stations and businesses. *Educating* will mean not just classroom lectures (though that should remain in the picture) but forming a sense of community among judges, for instance, a collective sense of responsibility and, of course, a sense that theirs is a career, a part of a tradition, and not a transient job. *Forming constituencies* will mean not just political bailiwicks but identifying the invisible but shared needs and identities, getting strangers to realize that they are kindred souls, and getting them to talk to one another and give of themselves to the world.
6. With the New L&D, we have turned our backs on the facile acceptance of "modernization" and the naïve belief in laws' transferability. While foreign models will remain the starting point, these models will be drastically remolded at the national level, domesticized and localized, as they should be.
7. The challenges no sooner emerge.

(a) The professionalization of judges and lawyers, the emergence of the Weberian ideal of the professional, detached from bias and coolly scientific, no sooner gives rise to

the dangers of cartelization and professional arrogance against the layman. "Every profession is a conspiracy against the public." Professor Roberto Unger laments that today's hottest social issues are debated within the confines of the professions and their arcane jargon, and asks that these issues be brought back to the public as a first step toward reinventing democracy.

(b) The favored concepts of the New L&D bear unique perils in Asia. The New L&D glorifies civil society, as if we were speaking of de-centralized and pluralistic communities of educated citizens. But Asian societies are typically feudal, ruled by local aristocracies or village elites. For them, civil society is feudal society! And so we then romanticize institutions as a way of escaping feudal and personalistic loyalties. But institutions themselves calcify into bureaucracies; they can begin as peoples' organizations but can end up alienated from their original constituencies. They merely replicate feudal patterns of power in a new setting, and the old aristocrats merely transform themselves into the new bureaucratic elite. And finally, the market, which has proved most reliable in breaking down feudal institutions. And indeed it shows much promise. Because while production is controlled by the same elite, consumption is necessarily public. Indeed. But marketing networks tend to be elite controlled as well, and can generate needs and re-shape demand at will.

(c) This should demonstrate the need to maintain international oversight over law and judicial reform programs. The New L&D calls for the localization of imported laws and programs. Again, typical though not unique of Asia is the peril that to localize a law is to subject it to elite manipulation, which brings back to where we started: an international forum on the erstwhile sovereign question of governance and law reform. The New L&D is mercifully safe from capture by local elites, and must remain so, but that is not just a question of political will but also a matter of knowing the power – and the weaknesses – of the weapons in one's intellectual arsenal.

APPENDIX

Closing Speech

Masayuki Kobayashi
Institute of Developing Economies (IDE)

First of all, I would like to thank you all for attending the two-day Roundtable Meeting. Your participation in the presentations and discussions made this two-day meeting very fruitful.

As Dr. Pangalangan just mentioned in his closing remarks, we had many findings concerning Law and Development and the Judicial System and its Reform. The presentations from different Asian countries and discussions from different points of view made a common ground for mutual understanding, and I am sure we were all able to get new ideas for our future studies and practices.

As Mr. Sakumoto explained in his opening speech, this Roundtable Meeting was planned as a part of the tow Research Committees held in Japan, that is “the Research Committee on Law and Development in Economic and Social Development” and “the Research Committee on Judicial Systems in Asia”, and the 9 Joint Research Projects held with 7 countries, for mutual understanding of legal systems and their reforming process in Asian Countries, and for promoting research cooperation among research counterparts. The final reports of the Joint Research Projects will be distributed to all the counter-parts who participated this meeting, and I am sure this will be our common asset and a big contribution to the academic circle.

This is only possible because of your kind and devoted participation in the Joint Studies.

Thus, on behalf of the Institute of Developing Economies, I would like to express our gratitude toward the distinguished speakers, moderators, and other participants who took part in this meeting, and especially to Dean Pangalangan and his colleagues from the University of the Philippines who have supported the Roundtable Meeting to be fruitful and made our stay enjoyable in Manila.

I would like to announce the closing of the Roundtable Meeting now, but I am sure that we will be keeping in close contact for future cooperation and friendship.

Thank you.

Roundtable Meeting on

Law, Development and Socio-Economic Change in Asia

20-21 November 2000
Edsa Shangri-la Hotel, Santana Room
Manila, the Philippines

Organized by
Institute of Developing Economies (IDE-JETRO), Japan
and
College of Law, University of the Philippines

PROGRAM

DAY 1) Judicial Reform in Asia: Current Issues and Challenges

8:30-9:00 **Registration**

9:00-9:20 **Opening Speech**
Dean Raul C. Pangalangan (College of Law, University of the Philippines)
Mr. Naoyuki Sakumoto (Senior Research Fellow, IDE-JETRO)

9:20-12:00 **SESSION 1: Country Reports on Judicial Reform (1)**
Moderator: Atty. Jessie John P. Gimenez (Attorney-at-law, the Philippines)

9:20 **Speakers:** *"The Judicial System in Thailand: An Outlook for a New Century"*
Judge Vichai Ariyanuntaka
(Central Intellectual Property and International Trade Court, Thailand)

9:40 *"Chinese Judicial System and its Reform"*
Dr. Zheng Qiang
(Secretary-General of the Public Law Center, Institute of Law, Chinese Academy of Social Science, China)

10:00-10:15 **Coffee Break**

10:15 *"The Legal and Judicial Reform during the Renovation Period in Vietnam"*
Prof. Dr. Dao Tri Uc (Director, Institute of State and Law, Vietnam)

10:35 *"Reform of the Judicial system in Japan –Current State and Theory–Training of Legal Practitioners"*
Mr. Akira Rokusha
(Associate Professor, Faculty of Law, Keio University, Japan)

10:55-12:00 **Discussion**

12:00-13:30 **Lunch (Sampaguita Room)**

13:30- 15:10 **SESSION 2: Country Reports on Judicial Reform (2)**
Moderator: Dr. Sunaryati Hartono SH
(Professor, Vice Chairperson, National Ombudsman Commission, Indonesia)

13:30 **Speakers:** *"Research Study on the Philippine Judicial System"*
Dean Raul C. Pangalangan (College of Law, University of the Philippines)

13:50 *"Alternative Dispute Resolution as an alternative means of accessing Justice in Malaysia"*
Dr. Sharifah Suhana Ahmad
(Associate Professor, Faculty of Law, University of Malaya, Malaysia)
presented by **Ms. Christina Paul**
(Attorney-at-Law, Legal Executive of Olympia Industries, Malaysia)

14:10 *"Indian Judicial System"*
Prof. Surinder Kaur Verma (Director, Indian Law Institute, India)

14:30-15:10 **Discussion**

15:10-15:25 **Coffee Break**

15:25-16:35 **SESSION 3: Perspective for Judicial Reform in Asia**

Moderator: Atty. Riza B. Vera (International Development Law Institute)

15:25 **Speakers:** *"Dispute Resolution for Consumer Protection"*
Mr. Shinya Imaizumi (IDE-JETRO)

15:45 *"The Role of the Judiciary in Administrative Litigation –A comparative study of the judicial behaviour in Japan and India-"*
Mr. Hajime Sato (IDE-JETRO)

16:05-16:35 **Discussion**

Day 2) Rethinking of "Law and Development": An Asian Perspective

9:30-12:00 **SESSION 4: Law and Marketization**

Moderator: Judge Vichai Ariyanuntaka
(Central Intellectual Property and International Trade Court, Thailand)

9:30 **Speakers:** *"Southeast Asian Law in Transition: The Law versus Politics, Economics, and Society during the Crisis"*
Dr. Nobuyuki Yasuda (Professor, Graduate School of International Development, Nagoya University, Japan)

9:50 *"Indonesian Contract Law"*
Dr. Sunaryati Hartono SH
(Professor, Vice Chairperson, National Ombudsman Commission, Indonesia)

10:10 *"Legal Technical Assistance in Japan's ODA: An Implication for Law and Development"*
Ms. Miwa Yamada (IDE-JETRO)

10:30 *"Law and Poverty Roundtable Conference"*
Mr. Omar Tiwana (Counsel, Asian Development Bank)

10:50-11:05 **Coffee Break**

11:05-12:00 **Discussion**

12:00-13:30 **Lunch (Room Rosal)**

13:30-15:00 **SESSION 5: Law and Social Justice**

Moderator: Atty. Concepcion L. Jardeleza
(Institute of Judicial Administration, University of the Philippines)

13:30 **Speakers:** *"Economic Development and Social Development –Do the Two Goals Meet?"*
Dr. Shin'ichi Ago (Professor, Graduate School of Law, Kyushu University, Japan)

13:50 *"Development, Disability and Law"*
Mr. Masayuki Kobayashi (IDE-JETRO)

14:10 *"Law and Development: Environmental Law in Asia"*
Mr. Naoyuki Sakumoto (Senior Research Fellow, IDE-JETRO)

14:30 *"Law and Social Justice From a Gender Perspective"*
Prof. Myrna S. Feliciano (Director, Institute of Judicial Administration, University of the Philippines Law Center)

14:50-15:05 **Coffee Break**

15:05-16:30 **Discussion**

16:30-16:45 **Closing Remarks**
Dean Raul C. Pangalangan (College of Law, University of the Philippines)

16:45-16:50 **Closing Speech**
Mr. Masayuki Kobayashi (IDE-JETRO)

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