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JAPAN

PREFACE

The evolution of the market-oriented economy and the increase in cross-border transactions have brought an urgent need for research and comparisons of judicial systems and the role of law in the development of Asian countries. Last year, in FY 2000, the Institute of Developing Economies, Japan External Trade Organization (IDE-JETRO) conducted legal researches in Asian countries with two main themes. The first theme was to figure out the role of law in social and economic development and the second was to survey the judicial systems and the ongoing reform process thereof. We organized joint research projects with research institutions in Asia and had a roundtable meeting entitled “Law, Development and Socio-Economic Change in Asia” in Manila. The outcome of the joint researches and the meeting was published in March 2001 as *IDE Asian Law Series No. 1-10*.

This year, in FY 2001, based on the last year’s achievement, we established two research committees: the Committee on “Law and Political Development in Asia” and the Committee on “Dispute Resolution Process in Asia”. The former committee focused on legal and institutional reforms following democratic movements in several Asian countries. Since late 1980s many Asian countries have experienced drastic political changes by the democratic movements with mass action, which have resulted in the reforms of political and administrative system for ensuring the transparency and accountability of the political and administrative process, human rights protection, and the participation of the people to those process. Such reforms are essential to create the stability of the democratic polity while law and legal institutions need to function effectively as designed for democracy. The latter committee conducted a comparative study on availability of the court system and out-of-court systems (namely Alternative Dispute Resolutions), with the purpose of determining underlying problems in the courts. As social and economic conditions drastically change, Asian countries face challenges to establish systems for fairly and effectively resolving the variety of disputes that arise increasingly in our societies. For dispute resolution, litigation in the court is not the only option. Mediation and arbitration proceedings outside the courts are important facilities as well. In order to capture the entire picture of dispute resolution systems, a comprehensive analysis of both the in- and out-of-court dispute resolution processes is essential.

To facilitate the committees’ activities, IDE organized joint research projects with research institutions in seven Asian countries, namely, China, India, Indonesia, Malaysia,

the Philippines, Thailand and Vietnam following the last year's projects. This year IDE sponsored a roundtable meeting entitled "Law, Development and Socio-Economic Change in Asia II" in Bangkok on November 19-20, 2001 to encourage the sharing of respective research findings on legal and institutional reforms following democratization movements as well as those on the availability of court systems and ADRs in Asian countries, and to promote research cooperation and scholarly exchanges among research counterparts. We wish to express our sincere gratitude to the members of the Central Intellectual Property and International Trade Court, and the Faculty of Law, Thammasat University, Thailand for their cordial cooperation in arranging the meeting. Participants in the meeting were committee members from Japan and researchers from the seven Asian countries. Stimulating discussions followed presentations by the respective researchers.

At the first day's meeting, titled "Dispute Resolution Process in Asia: Theory and Reality", we discussed the issue of dispute resolution systems, with special emphasis on ADR. The presentations were devoted to the background, objective and philosophy of developing an alternative dispute resolution system as well as specific features of ADR in each country. The sharing of basic information, experiences and philosophy on dispute resolution in different countries contributed to a further deeper findings of our comparative study on judicial systems and dispute resolution processes in Asia.

The second day's meeting, titled "Law and Political Development in Asia" was divided into two parts: one session was on Political and Administrative Reform in Asia, and the second session was on Ensuring the Rule of Law in Asia. The first discussed issues of democracy, decentralization of power and constitutional reviews. The second discussed issues of enforcement and the meanings of "rule of law". Critical discussions on "Law and Development" in the dimension of political development inspire reanalyzing the concept of rule of law and factors pertinent thereto in Asia.

This publication is the result of that two-day roundtable meeting, and is based on the papers submitted for the meeting and the record of discussions. The outcome of research conducted by the respective counterparts will also be published as *IDE Asian Law Series*. We believe that this work is unprecedented in its scope, and we hope that this publication will make a contribution 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 SPEECH

by

Toshiaki Hayashi

Executive Vice President, IDE-JETRO

Distinguished guests and dear participants, on behalf of the IDE/JETRO, let me have the pleasure of declaring the opening of our Roundtable Meeting on “Law, Development and Socio-Economic Change in Asia II”. This Meeting follows the last year’s successful RTM in Manila, which we owed to the cordial assistance of the College of Law, The University of Philippines as well as the active cooperation of our joint research counterparts.

First of all, let me express my heartfelt thanks to the participants for joining in this RTM all the way from various Asian countries despite the present unstable international political climate. I must admit that we feel some fears when we take airplanes abroad. I also would like to express my sincere thanks to the Central Intellectual Property and International Trade Court, and, the Faculty of Law, the Thammasat University, Thailand for kind assistance in holding this RTM.

At this RTM we will concentrate on the study of Asian law through presentations and discussions. IDE researchers as well as our joint research counterparts from seven Asian countries will present papers about Asian laws. We will focus on the two subjects: one is “the Dispute Resolution Process” and the other is “Law and Political Development in Asia.”

The role of law in Asia is changing. According to the latest news, China is participating in WTO and the Climate Change Meeting on the Global Warming has just ended in Morocco. China’s Participation in the WTO regime represents the process that the Giant in Asia will step by step join in the world economic order. The Climate Change Meeting on the Global Warming symbolizes a trend that all the developed and developing countries are uniting together to reinforce environmental law regime through international agreements and treaties. These two phenomena are not necessarily exceptional cases for us. Rather, we can see essential changes or movements in these events. That is the change of the role of Asian countries in the international setting. As the Asian countries play more important roles in the world, laws will become an important tool to protect and consolidate their legal stances. Law is increasingly becoming an important tool for any Asian country in order to stay as a member of the international community.

We can witness similar radical changes in the recent economic and political development in Asian countries. In terms of economy, we observe the transition from the old socialist or communist regime to an open market system in China, Indochina and Central Asian countries. In order to accelerate or support their smooth transition to an open economy, international organizations and developed countries have been providing legal technical assistance to these countries. Introduction of new laws conducive to free marketing systems or revision of old laws into modernized legal

systems are primarily based on the principle of ownership. Such laws are indispensable to cope with radical changes that may take place under new socio-economic conditions. Japan is also amid the globalization process and we are in need of coping with such newly arising international requirements.

Further, in terms of the politics of the Asian region especially after the cold war, we witness a transition from the old dictatorial regime to a more democratized regime. Some Asian countries have successfully achieved their political democratization; however, the attainment of their democracy in terms of establishing legal systems still remains as nominal. Eradicating corruption and nepotism is a matter of general social concern. Transparency, accountability, decentralization and participation are becoming key issues in all Asian developing countries. There is much to be expected with the role of law in Asia. Laws can assist such democratization movements in firmly rooting in developing societies. Our discussion here will be hopefully led to explore the new role of laws which can assist and consolidate the way ahead to a more democratized governments and societies in Asia.

As the Asian society changes rapidly, the role of law will also have to change. In the process of modernization and globalization in Asia, the number of legal disputes will increase, which would invite unstable conditions in the societies. This is an unavoidable phenomenon; however, this is where the capacity of law in Asia is being challenged. At present, it becomes common issues to discuss the implementation and the enforcement of laws. It is one of the essential parts of the role of law, which relates to the functions of the judiciary as well as the mechanism of dispute resolution.

With the research background and conceptual framework, I have just mentioned, in mind, let us start our today's discussion on the dispute resolution process in Asian countries.

I sincerely hope that all the participants will find this RTM discussions very enjoyable and fruitful. I am sure that our academic ties among our institutions will be further developed and strengthened through this two-day RTM. Thank you very much.

OPENING SPEECH

by
Justice Prasobsook Boondech
Supreme Court

Mr. Chairman,
Distinguished Guests,
Ladies and Gentlemen,

During my tenure in office as the Chief Justice of the Central Intellectual Property and International Trade Court, My colleagues and I had the honour of conducting a joint research with the Institute of Developing Economies on the topic of “*The Thai Judicial System: An Outlook for a New Century*”. It is my pleasure and privilege to welcome you all to the city of Bangkok for the Second Round-Table Meeting on Law, Development and Socio-Economic Change in Asia.

Although I am now with the Supreme Court, I treasure most highly my association with this Round Table and I am most delighted personally to welcome you today.

The past few years have been interesting years for Asia. We Asian people have certainly lived through interesting times. To cite a celebrated Chinese saying, “*we are living in an interesting time*”, is perhaps appropriate. In 1997 Thailand and many countries in Asia witnessed the transition of their economy from phenomenal success and double-digit or near double-digit growth of the past few earlier years to near collapse verging on the state of bankruptcy in many important financial and business sectors. Lawyers, like any other profession, bear the burden of bringing Asia out of this predicament. This is a time for re-thinking, re-planning and re-structuring our legal as well as our social, economic and political infrastructure.

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

I had the privilege of leading and managing the Central Intellectual Property and International Trade Court for the last two years. I felt the burden of our legal system to

cope with the economic crisis is to create a legal environment friendly to international trade and investment. The legal environment whereby legal rights, local and foreign, shall be equally protected and enforced under our law and our judicial system. The legal environment of good faith and trust worthiness. The legal environment that will lead us to the glory of international trade and investment and the recovery of our economy as a whole.

Alternative Dispute Resolution is a new terminology of an old concept. Non- aggressive, non-confrontational approach to dispute settlement has been the teachings and practice of eastern philosophers since time immemorial. It is only recently that the method of ADR has been the subject of critical and scientific analysis. Ironically it is the academics in the West who bring ADR, with its famous '*win-win solution*' trademark to world attention. Society, commerce and trade all over the world are the beneficiaries of alternative dispute resolution. In Thailand as well as everywhere in the world, ADR represents a refreshing approach to litigation.

Even in the courts of justice, conciliation is now widely practised throughout the country with encouraging figures of success. Cases at the appellate level may also 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 and succession, in the labour courts for cases of labour disputes and in the Central Intellectual Property and International Trade Court for cases of intellectual property and international trade disputes.

We are living in a more harmonized society. We are resorting to the more basic and societal-based dispute resolution methods. We are living in a smaller and closer-connected Asia. Hopefully we are leading towards a more peaceful society. May I have the honour of welcoming each one of you to the Second Round-Table Meeting on Law, Development and Socio-Economic Change in Asia.

Ladies and Gentlemen: I can assure you that Bangkok has more to offer than the Regent Hotel. Please have a nice time here and bring back with you good memories of Thailand. If there is anything I or my colleagues can do to you your stay here a more memorable one, please let me know. May I wish this conference every success it deserves.

SESSION I

Dispute Resolution Process in Asia: Theory and Reality

GLOBALISM AND LOCALISM IN DISPUTE RESOLUTION

by

Yoshitaka Wada *

I. Introduction: Globalism in the Field of Dispute Resolution?

Under the flag of “globalization” almost all Asian countries are now trying to adapt to the Western model of financial and business transactions. Law and dispute resolution systems are expected to serve as a foundational framework in which each transnational business transaction takes place. Law as a standardized universal system of rules is considered to enhance transparency and assure the safety of business transactions. For this purpose, legal scholars have carefully studied the law systems of Western countries and made efforts to reform and modernize their own legal systems.

However, when examining this issue of globalization in the field of law and dispute resolution, we should take account of many other factors such as cultural diversity, specific social structure, people’s patterns of behavior and so on. Law and dispute resolution systems do not work in a vacuum; they operate within concrete cultural and social settings. Even if we transplant the same Western model, it can play quite different roles in each specific situation, influenced by local power structure, economic situation and cultural belief system. Transplanting a universal system does not mean simply the copying of a system from one society to another. It always requires subtle rearrangements and autonomous transformations, to be effective within each society where other modes of social ordering and dispute resolution are embedded. It means that even if we accept and transplant the common global law system, we inevitably face conflicts caused by cultural and social diversity.

* Professor, Graduate School of Law, Kyushu University, Japan.

To some Asian countries, the concept inherent in the Western universal rule of law is itself completely new, and the distribution of power between government and legal system is sometimes ambiguous. Moreover, the local dispute resolution mechanism embedded in the local social structure is still vigorously working. In this situation, introduction of the Western model of a universal law system tends to be limited to the superficial level only, and ad hoc negotiation among a multiple rule system would be required.

Even in some Asian countries that long ago transplanted the Western law system and which have rich experience with ordering society based on that system, its real function in the society is very different from that in Western countries. Japan, for example, has a long history of ordering society through a transplanted capitalistic law system. However, it is true that business practices and the behavior of Japanese companies in handling disputes have their own characteristics, which sometimes became a cause of conflict and have been criticized by Western countries. Despite this fact, the behavior of Japanese companies still maintains features that are deeply rooted in that country's culture.

In order, therefore, to understand the meaning of "globalization" in the field of law and dispute resolution in Asian countries, we must scrutinize the reality of these culturally based operations and the function of the legal system in specific social and economic settings. For example, we must examine how everyday social and business transactions take place under the shadow of the law and local rules, how conflicts are settled when a contract is breached, and under what circumstances local people and businesses use or avoid official litigation.

From this point of view it is essential to understand the complex relationships between the formal legal system and the informal local mode of dispute resolution. One simple way to understand this issue is to assume that development of formal litigation is directly proportional to the decline of informal alternative modes of dispute resolution. According to this hypothesis, as society becomes more complex and urbanized, people prefer formal court to local methods of dispute resolution when they become involved in disputes. In urban industrialized settings, relationships

among people tend to be impersonal, temporal and diffuse. As a result, local community and primary groups such as kinship lose its power to control people's behavior and to settle disputes within them. Instead, people turn to a more formal approach to dispute resolution to regulate their behavior. In short, industrialization and urbanization cause the decline of informal modes of dispute resolution and the concurrent development of a formal legal system.

Although this stereotyped view is correct in a broad sense, it is too simplistic and partial to be applied to the problem of globalization and localism in Asian countries. It is unrealistic to suppose that local modes of dispute resolution and social ordering will disappear completely as a result of introducing the Western legal system. There must be much more complex relationships between a formal legal system and informal local modes of dispute resolution and, accordingly, globalism and localism.

This paper examines this complex relationship between the formal legal system and informal modes of dispute resolution

II. Paradox of Western Model of Legal System

One common view regarding development of the modern Western legal system holds that it was brought about by commercial demand for transparent and stable written rules that could be universally and generally applied to business transactions beyond each local community. The Western modern legal system encouraged development of capitalistic economies by offering a unified framework that enhanced the predictability and safety of transactions. In this view it is logical that the modern Western legal system confronted, and tried to erode, ambiguous local ways of social ordering and customs. It freed people from communal convention and unreasonable tradition.

However, we should also carefully note another aspect of this phenomenon. Did the modern legal system always contradict local ways of social ordering? Were

the people at that time really satisfied with the legal mode of dispute resolution; did they dislike their local customs? In order to answer these questions we should consider some features and limits of a legal system as a dispute resolution device.

First of all, the legal approach to dispute resolution can treat only some specialized aspects of all social conflicts between parties. Before bringing the case to a court, the litigant has to translate his/her problems into legal language that is often inadequate and insufficient from his/her point of view. For example, in some tort cases, the plaintiff may want a sincere apology from the defendant or he/she may want future improvement of the defendant's behavior or its organizational reform to avoid further discord. However, such demands are usually beyond the scope of a legal system, and the litigants have to limit their claims to a legally articulated solution, namely, compensation. As the result, in many cases, a legal system as a dispute resolution mechanism cannot deliver a responsive and satisfying solution.

Secondly, in this process of translating social conflicts into legal language, the legal profession's assistance is indispensable. The language of law is too complex and jargon-filled, so people usually have to depend on the specialized knowledge of legal professionals. This means that the modern legal system is transparent and predictable only to legal professionals. It has kept people in a subordinate relationship to legal professionals. To lay people facing disputes with others, the local ways of ordering and communal customs may have been much more transparent and predictable.

Thirdly, this formal approach to a dispute resolution system is very costly compared to informal local methods. In order to maintain specialized dispute resolution institutions such as courts, it is not only the society, but also particular parties who have to share the burden. This naturally influences the accessibility of the formal court system.

Of course, these characteristics of a modern legal system are unavoidable limits in order to maintain its neutrality, objectivity, universality and fairness. Nevertheless, we should note that this modern legal system, as a very special and

partial mode of dispute resolution, has to contain a paradox within itself. That is to say, even though it confronted and tried to erode local ways of ordering, it also paradoxically required them as supportive devices in order to keep hidden its limits and disadvantages as a dispute resolution system. In situations where local ways of ordering are still vigorously working, the legal system can play its expected roles as a universal rule system by delegating disposition of extra-legal aspects of disputes and minor cases to the local mechanism. Here, the legal system and local ways of ordering and dispute resolution are working cooperatively, and they support each other.

The Western legal system in the modern era stands on this subtle balance of cooperation and, at the same time, it confronts the relationship with local ways of dispute resolution. What will happen, however, when such local ways of social ordering and dispute resolution gradually disappear as a society grows increasingly urbanized and industrialized? We can find the answer in the experience of the United States.

III. Causes of ADR Movement in the United States

In colonial America small religious communities, where churches and priests kept their authority and power of social ordering, it was considered immoral to mobilize a legal system from outside the community in disputes among its members. As industrialization and urbanization proceeded, these colonial religious communities were destroyed and local ways of social ordering grew increasingly weaker. Finally, following the Civil Rights movement and consumer rights movement, the United States had to face the litigation explosion and became the most litigious society, under such institutional incentives as punitive damages, contingency fees and the jury system.

What was the reaction of the US government and bar associations after this litigation explosion in the late 70's and 80's? The US, including the Ministry of Justice, bar associations and law schools, began eagerly to search for alternative

dispute resolution methods. Some law and social scholars began researching informal modes of dispute resolution in societies where social order is maintained without mobilizing a formal legal system. Others, drawing upon sociological data and organizational analysis, tried to design more efficient procedures to dispose of some types of grievances and disputes such as consumer complaints, automobile accidents, medical malpractice, environmental conflicts and so on. Stimulated by these studies, a variety of alternative dispute resolution (ADR) institutions were experimentally founded. Some of them were successful and others eventually failed.

Three different social requirements were operative in bringing about this ADR movement in the US and other advanced countries, each of which could be seen as means to compensate for the deficits of the formal legal system as a dispute resolution institution.

First of all, the court system, which is designed to dispose of any kind of legal dispute, is often inadequate and has no ability to deal with cases that include highly developed technological or specialized scientific issues. Here emerges the need to establish a specialized ADR capable of disposing of some particular types of disputes in which a specialist in the field, rather than a judge, examines the cases.

Secondly, people require much quicker, cheaper and easier methods of dispute resolution instead of the time consuming, costly and hard-to-handle procedures like formal litigation, especially in such areas of dispute as consumer claims or everyday neighborhood conflicts, in which only small amounts of money are at stake. It is natural for most disputants, from ordinary people to big business companies, to process their cases as efficiently as possible. The courts and the formal legal system are wholly incapable of meeting this demand.

Thirdly, because vital communal ties and informal ways of social ordering and dispute resolution embedded in community have been lost, social means to take care of emotional and relational aspects of conflicts have also disappeared. These relational and emotional aspects of conflicts, which were formerly taken care of by regional or kinship ties and local communal norms, require some treatment even in

highly industrialized and urbanized settings. Obviously courts and the formal legal system are not responsive to this need. Although people vigorously bring their cases to a court and obtain some legal decision or monetary compensation, even the winners are very often dissatisfied with the result, because such a decision can resolve only a limited part of their interests in the dispute. Even after the court decision has been obtained, conflict between the disputants can continue or sometimes escalate drastically. In this situation, it is natural that people want ADR that is responsive to their needs with respect to the relational and emotional aspects of their dispute. In other words, instead of the formal court system, whose scope is limited only to legal aspects, revitalization of ADR based on communal everyday norms and values is an indispensable need even in a highly industrialized and urbanized society like the United States.

To meet these social needs for ADR, numerous organizations have been institutionalized in a variety of areas of dispute, sometimes by the government and other times by the private sector. Clearly, the United States, known as the world's most litigious society, is, at the same time, where alternative dispute resolution has incomparably flourished. ADR is now playing an indispensable role in dispute resolution and social ordering in United States.

Thus, we can understand the ADR movement as the mixture of three social needs and requirements that the US and other highly developed countries inevitably must face. It is impossible for a globally unified legal system and formal courts to satisfy all social needs that were formerly dealt with by informal local ways of social ordering and dispute resolution.

IV. Different Perspectives and Arguments Regarding ADR

The progression of ADR worldwide is said to have been a reaction to the inability to cope effectively with small claims and relational disputes under a system where procedures have been rigidified as in normal litigation. There are now. However, various complications in levels of evaluation for situating ADR: positive versus

negative evaluations; emphasizing ADR's cooperative relationship with formal litigation processes versus its competitive relationship. This section of the paper will therefore briefly review both pro-ADR and anti-ADR positions, further dividing the perspectives into those which favor formal litigation processes and those which are critical of them.

(1) The Pro-ADR Pro-Litigation position

Probably the most common or typical appraisals of ADR belong in this category: the view that justice can be quantitatively improved by establishing the appropriate relationship between ADR and formal litigation. There are two major variants relating to the division of functions between ADR and litigation, stressing:

- (a) the efficiency and smooth functioning of litigation; and
- (b) the expansion of access to justice.

(a) Efficiency of formal court system

In this first variant, the most important objectives are improvement of performance and efficiency of the civil justice system centered on litigation, by expanding ADR. To prevent disfunctionalities in litigation, such as delays, cases are to be divided into those truly requiring resolution by formal processes and those which can be adequately dealt with more simply. Only the former would be dealt with by litigation. Thus, ADR is expected both to deal with appropriate cases under more simple processes such as mediation and arbitration, and to exercise a screening function transferring the more difficult cases to more formal processes. In this way, the formal judicial system can better fulfill the functions originally expected of it.

Numerous practical criticisms are raised against this variant. It is unclear to some whether establishing more ADR will in fact reduce the burden on the civil justice system or contribute to better achievement of its functions, or whether rational channeling is really possible. More important for the purposes of this paper is that the Western ideals of the formal litigation process are taken for granted and their better achievement becomes the objective.

Generally speaking, this variant is a narrower, more conservative reaction to the phenomenon of the ADR movement. A major, possibly primary focus is on reducing the burden on the formal judicial system. Typically, this sort of exercise is seen as "technical": improving productivity in processing cases through the system. Of course, a longer-term aim in so doing may be to increase overall access to the system - the "access to justice" variant discussed in paragraph (b) immediately below. Alternatively, however, the aim may simply be to cut costs to participants in the process - particularly to the state - without expecting or hoping for an expansion in accessibility of the system and a rise in the number of cases brought.

(b) Access to justice

Although sometimes linked to the first, the second variant in the Pro-ADR Pro-Litigation perspective focuses less on fulfilling formal litigation processes themselves. Rather, the aim is to guarantee access to justice for more classes of people who have not traditionally been able to access the civil justice system, and to improve the performance of the legal dispute resolution system as a whole for them. By replacing litigation, with its high attendant costs in terms of time and money, with cheap, fast informal systems, this variant specifically hopes to suck up more disputes into the expanded legal arena and thus help legal dispute resolution become more prevalent in society. Invariably, dispute resolution by ADR is compared with model dispute resolution by formal litigation processes, and often the latter is evaluated as superior. That is because the "resolution" presented by the most procedurally refined formal litigation process is taken as correct, and thus the presentation of a resolution basically similar to the latter is taken as the ideal. Of course, there are occasions when original and flexible resolution differing from that presented by the litigation process is stressed. This is not, however, a general criticism of resolution through litigation, but is rather seen as adjustment to particular circumstances.

An example of this attitude can be found in the recent establishment of a variety of Product Liability Dispute Resolution Centers in Japan, which are considered indispensable in Japan where the number of lawyers is kept very low, making litigation an expensive and unpopular option. This view is also in accord, for instance, with the actualities of dispute resolution in Traffic Accident Dispute

Resolution Centers, generally seen as the most successful example of ADR in Japan. However, we must note that this second variant also undoubtedly takes the formal processes of litigation as the "core" of the entire dispute resolution system. Furthermore, we can note that the notion of access to justice really amounts to the access of the legal system to the furthest reaches of social life - an aspect of "legalization" of social life, which opens itself in particular to direct criticism from the Anti-ADR Anti-Litigation view mentioned briefly later.

(2) The Pro-ADR Anti-Litigation position: Community mediation

Amidst the movement favoring ADR, there is a contrasting view that raises fundamental doubts about the existing formal processes in litigation. Beginning with the apprehension that those processes not only fail to resolve the problems rooted in social relationships between the disputing parties, but that they often even lead to further disintegration of those relationships, this view proposes original ADR quite independent of the legal system. As with the San Francisco Community Board, for instance, even procedural matters can be dealt with by trained but non-lawyer community members, following an ideal typified by community revival. Dispute resolution becomes focused on restoring cooperative human relations, rather than legal considerations.

In highly industrialized and urbanized settings, however, there are doubts as to the practicality of this approach, in fragmented contemporary urban communities, where rights consciousness has also increased. In fact, this type of ADR has suffered from a perennial shortage of cases and difficulties in attracting funds in the US. As it comes to rely on funding support and referral of cases from the courts and the police, it becomes more difficult to retain its original ideals, and there are fewer and fewer functional differences between it and the (1)-(b) type ADR. We can expect, however, that in Asian society this community based ADR can work positively and play an important role in social ordering and delivering justice into society.

(3) The Pro-litigation Anti-ADR position: Second class justice

Negative perceptions of ADR can similarly entail seeing the traditional litigation process in both a positive and a negative light. The former view argues that

the price ADR pays for quick and simplified resolution of disputes is a reducing in procedural fairness through due process, and the loss of the opportunity for substantive review by judges, and thus, that ultimately ADR merely offers cheap but second-class justice which will reflect power imbalances between the parties to the dispute. The negative perception of ADR is further developed by arguments that court-assisted settlements come at the expense of the important role of litigation in setting clear standards by means of publicized and objective judgments, and can permit excessive intervention by managerial judges. Clearly, however, this Pro-Litigation Anti-ADR position shows great faith in the functionality and legitimacy of the Western model of formal litigation process on which it is premised.

(4) The Anti-Litigation Anti-ADR position

By contrast, a negative perception of ADR can follow from a consistently skeptical view of the Western litigation model. This view argues that not only does the existing legal dispute resolution system not add to fairness in society; it even adds to and solidifies unfairness. Yet ADR is said to work to hide this defect in the judicial system from critical gaze, and ultimately to act as a means for the state to expand its control into all areas of society. In particular, this view criticizes the expansion of (1)-(b) type ADR linked to the formal judicial system, premised on the provision of court-like dispute resolution, on the basis that it encourages the intervention of simplified legal control by legal professionals.

* * *

This concludes a brief review of the various basic perceptions of ADR, according to whether they perceive litigation and ADR itself in a positive or a negative light. Due to limitations of space, this paper cannot fully explore the various positions, nor do I intend here to argue the merits of each.

The social conditions in each society dictate whether each of these articulations on relationships between formal litigation and ADR is appropriate or not. Accordingly, we should search for ideal balance and division of functioning between local dispute resolution and formal courts as a global legal system, examining each society's particular cultural, religious, economic and social structural settings. For this purpose, we must carry out empirical research to learn much more about the complex relationships between informal ways of social ordering and the function of a

formal legal system in concrete situations. Here, I will present examples from my own study of the behavior of Japanese-Thai companies during economic crisis.

V. Contract Law and Private Ordering of Japanese-Thai Companies

1. Japanese "Trust" and Thai-Chinese network--- Case of a small electric appliance producer

In the case of one Japanese-Thai joint company that produces and sells small electric appliances, the Thai partner is a famous Thai-Chinese family, and only one Japanese manager is sent from Japan. This company sells their products to comparatively small or medium-size wholesalers and retailers who are usually also members of Thai-Chinese family networks. Although their buyers may change their business partner at any time, if the price is cheaper, their relations tend to endure over time, and they never draw up any documents other than invoices. This one Japanese manager handles almost all aspects of the company's operation such as management of the company, sales negotiation and some dispute negotiation. However, if trouble arises, the Thai partner family usually appears on the stage and resolves matters effectively and informally. Neither the Japanese manager nor the Thai partner usually ever think of mobilizing formal legal rules and the court system.

We find two characteristics in this situation. One is the simple structure of decision making on both parts. Although it is a joint company, almost all power to make decisions is centralized in the Japanese manager, and the Thai partner takes a hand only in cases of difficult negotiations with Thai-Chinese buyers. On the other hand, Thai buyers are usually family companies, and their structure of decision-making is also simpler than that of a huge modern company. In this case, both parties have no need to consider complex organizational distribution of power and the writing of contracts for that purpose.

The other characteristic is informal social ordering through Thai-Chinese family networks and the Japanese way of building trust. There is no need to say that

the function of Thai-Chinese networks is based on a system of mutual support and trust. As for the Japanese manager's behavior, it is very impressive for its combination of reasonable and traditional aspects. He is in his late 40's and is critical of the traditional Japanese approach to business in which extra-business social intercourse such as eating, drinking, playing golf and going to Karaoke are indispensable. Although, to some extent, he has to participate in important events like funerals or parties held by the buyer's family, his efforts are mainly devoted to improving the quality of his company's products. He thinks the traditional Japanese ways of doing business do not work in Thailand, and trust can be gained through providing qualified products at good prices and establishing common bonds of friendship with buyers. Here, the quality of the products at good prices (economic dimension) and friendship (relational dimension) are considered to be the important factors for doing business in Thailand.

In this case, these two factors---the simple structure of decision-making in both parties and the relational (Thai and Japanese) and economic (Japanese) dimensions---allow them to do business without ever considering the legal aspect of contracts.

During the Economic Crisis, many of his buyers delayed paying their debts, or sometimes could not pay at all. Like other Japanese companies, his company renegotiated a plan of payment and almost all the buyers were sincere. At this point he never considered the possibility of bringing the case to a court. However, some of the buyers actually went bankrupt, and only in these cases did he take them to court. Here, we have to pay attention to the meaning of taking the case to court.

He had no expectation of resolving the problem or recovering the money, because the other party had no resources to make payment. Moreover, his company had to pay expensive lawyer's fees for just a nominal judgment. The reason he took the case to court was to persuade and satisfy the Japanese parent company that recovering the debt was really impossible by any means. It was indispensable to receive a court decision to get the parent company to acknowledge and dispose of the loss (150,000,000 Baht).

In my view, this is the most common and typical reason for Japanese companies to take a case to court. For them, courts are not a forum for resolving their trouble, but a kind of agency to get a document that is indispensable in persuading their parent company and the tax office.

2. Helping, fostering and constructing strong ties---Case of motor industry

The motor industry's reaction to parts suppliers during the Economic Crisis was an impressive example of Japanese attitude toward contract relations and the formal legal system. In the Economic Crisis, most suppliers suffered a hard time, and some of them faced bankruptcy. Toyota Motors and other Japanese motor companies got together and discussed what measures to take. Finally, they decided to buy parts at twice the ordinary price from all suppliers so that most of them could survive the Economic Crisis.

Is this behavior economically reasonable? If viewed from a short-term point of view, of course it is not. However, the motor industry cannot continue to grow without qualified parts suppliers. The Japanese motor industry in Thailand is now trying to shift from the production of motor vehicles exclusively for the Thailand market to production for export. Thus, they need suppliers that can meet international quality standards. Accordingly, it is advantageous, from a long-term point of view, for the motor industry to help and foster suppliers and establish strong family-like ties with them. In this respect, I should add that the majority of suppliers in Thailand are also Japanese-Thai joint companies.

Even if it is economically reasonable in the long run, the reaction of the motor industry during the Economic Crisis is still unusual from a non-Japanese point of view. This typical Japanese attitude of maintaining good relations and to secure profits together is deeply rooted in Japanese patterns of social organization. Their contract behavior is to be REASONABLE within this cultural framework.

In addition, written contracts are again unimportant for both parties. Even a

large company such as Toyota Motors does not care about written agreements in many cases, although they have written contracts, which are required by the legal or document departments. Maintaining relations is much more important than contract law, because a contract legal system can only protect a short-term profit while many times destroying good relations and, therefore, long-term profits. Here, we can find an answer to the previously raised question: why do Japanese companies put dispute resolution clauses in writing more often than Thai companies, in spite of their recognition that Japanese are more flexible and less legally oriented than Thai? Although their complex organizational background sometimes induces Japanese companies to write out detailed clauses, their contract practices are still more flexible and far from a legal system.

Avoiding contract law and courts is, therefore, reasonable for preserving good relationships and pursuing long-term profits from the Japanese point of view. The expectation that both parties will cooperate to maintain this trust is the most essential part of their contract relationship.

VI. Conclusion: Globalism and Localism Dispute Resolution in Asia

As these patterns of Japanese companies behavior and attitudes for courts and formal legal system suggest, in Asian countries, where social values and tradition differ completely from Western ones, and where there is a high possibility that local informal ways of social ordering are still vigorously functioning, relationships between formal courts and local informal dispute resolution are much more complex.

Of course, in the era of globalization, when advanced technology and complex business transactions are spreading rapidly around the world, the need for ADR that is specialized in some specific area can be found everywhere including Asian countries. Moreover, the expansion of access to Justice may be one of the significant issues in dispute resolution in Asia. Although a crucial problem in making formal courts a more accessible forum for dispute resolution, it is also true that there are limits to this option, because court systems strictly following formal procedures logically involves

high costs to both society and users. Establishing more efficient and accessible ADR would be indispensable, at least as a supplemental device for distributing justice broadly into society. In these points, the requirements for ADR in Asia are based on common reasons with Western countries, even though the extent and specific situation may differ.

Informal methods of dispute resolution based on cultural and social values, however, raises a difficult question: whether it should be expelled by formal legal system transplanted from the Western model or be preserved while respecting local values. Of course, this question is too simplistic. Nowadays, each local area's methods of social ordering or dispute resolution cannot escape the shadow of a legal system. For example, the behavior of Japanese companies in Thailand is on the one hand based on its cultural patterns, but on the other hand it always proceeds under the shadow of legal sanction as the ultimate device and tactics reflecting the situation of the world economy. In this sense, the global system can penetrate even into the very local methods of social ordering. It is also true, however, that a court decision can often be based on local values or be strongly influenced by local customs. If formal courts always reject local values or customs and instead insist on universal and globally standardized rules, the result is that local people will avoid using them. In this sense, globalism can be acceptable only when it respects local values and establishes appropriate relationships with them.

If this understanding of mutually sustaining and penetrating relationships between global and local systems is true, then we must examine them more closely and search for the ideal model for a dispute resolution system in society as a whole. Our research project on dispute resolution in Asia will deepen and advance the progress of our understanding in this area.

ALTERNATIVE DISPUTE RESOLUTION SYSTEM: PROBLEMS AND PROSPECTS

by

S. K. Verma *

Themes and Issues

The following are the themes and issues taken up in this presentation:

1. How has the present court system served the people? What are the problems involved therein?
2. How far the tribunals, commissions and special courts set-up by the Government fulfilled the need of common man for simple and quick justice?
3. Have the alternative dispute resolution fora available in India such as
 - (i) Arbitration
 - (ii) Conciliation & Mediation
 - (iii) *Lok Adalat* (People's Court)
 - (iv) *Gram Nyayalaya* (Village Court)
 - (v) Ombudsman and *Lok-Ayukta*

been able to fulfill the need and aspiration of common people? If not, what steps need be taken to make them effective?

4. What are the parties' viewpoint with regard to ADRs?
5. How the ADRs are different from court system and what are the preferences of the people and why?
6. What are the dispute resolution processes in consumer protection, labour and environmental matters?

* Director, Indian Law Institute, New Delhi.

I. Court System in India

1. Overview of the court system in India

The Indian Constitution though federal in character, provides for unitary judicial system. The Supreme Court and the high courts form one single integrated independent judiciary. Below the high courts in each state, there are subordinate courts. The subordinate courts represent the first tier of the entire judicial structure. As a general rule, civil cases are dealt by with one set of hierarchy of courts known as civil courts and criminal cases by another known as criminal courts. The organization and growth of the present hierarchy of courts of justice with the superior courts at the apex and inferior courts at the base owes its origin to the advent of the British rule in India. Every court in this chain, subject to the usual pecuniary and territorial jurisdiction, administers the whole law of the country whether made by Parliament or by the State Legislature. The general hierarchy of civil and criminal courts is given in Annexure I.

2. Problems of the court system

The court system in India, which is based on adversarial model of common law, is cumbersome, expensive and hopeless. Although as a result of the various initiatives taken by the Supreme Court of India, the pendency of cases in the Supreme Court, which was 1,04,936 on 1st January 1992, has come down to 21,936 as in February 2001, the situation in the high courts and lower courts is static and dismal. The high courts and lower courts are overburdened and have to tackle with voluminous pending and fresh litigation arising everyday. Indeed high courts and various state governments, who have the power to appoint judicial officers, are very slow in taking steps to fill the vacancies in trial courts on time. Out of a total of 647 sanctioned posts of judges in various high courts, 177 posts were vacant as on August 10, 2001. The hierarchy of courts, with the right to appeal at different stages, adds to the magnitude of the problem. As on 10 August, 2001 there were 3.47 million cases pending in the high courts. During 1998, the number of cases filed in high courts was about 1.5 million and the disposal was about 1.3 million cases. Besides, as on June 30, 2001 approximately 20.3 million cases were pending in the lower courts in the country.

These delays are perennial because of the loopholes in the procedural laws, viz., Code of Criminal Procedure, Code of Civil Procedure and the Indian Evidence Act. In criminal cases, conviction rate is also very dismal, which has shaken the faith of people in the judicial system. In spite of the constitutional guarantees, judicial decisions and the reports by various high-powered committees, the concept of speedy justice has remained an elusive goal. The backlog in the disposal of cases has always remained a big problem, which is not conducive to meet the challenges of globalisation, liberalisation of economy and achievement of welfare state ideals. With an aim to salvage the situation, the 11th Finance Commission has given direction to the government to take specific measures to address the issue. Accordingly, to tackle the pendency of cases at the sub-ordinate courts the government has envisaged setting up of 1734 Fast Track Courts at various places and permanent *Lok-Adalats* in all the districts. As of June 2001, the government has set-up 459 fast track courts all over the country. These courts will continue till March 2005 and are expected to dispose of about two million cases by the year 2005.

3. 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 a result of this, besides traditional judicial system, it became imperative to evolve other foras to address new problems as well as provide speedy disposal of cases. This led to the setting up of tribunal, commissions and, among others, district boards, by amending the Constitution. Part XIV A, consisting of Articles 323A and 323B, was inserted by the 42nd Amendment Act, 1976 in the Constitution. Article 323B, incorporated in the Constitution empowers the appropriate State Legislature to provide for the adjudication or trial by tribunals of any disputes, complaints or offences with respect to all or any of the matters, namely; (a) levy, assessment, collection and enforcement of any tax; (b) foreign exchange, import and export across customs frontiers; (c) industrial and labour disputes; (d) land reforms by way of acquisition by the State; (e) ceiling on urban property; (f) election to either house of Parliament; (g) production, procurement, supply and distribution of food stuffs and such other foods as the President by notification declares essential goods; (h) rent, its

regulation, control and tenancy issues including the right, title and interests of landlords and tenants.

The appropriate legislature is also empowered to establish a hierarchy of tribunals. In pursuant to the provisions of the Constitution, and also to make the justice delivery speedier and economic, several tribunals, commissions and special courts have been set up, as given in Annexure-II. Quite apart from the above, special Commissions have been set up to protect, among others, the human rights of various sections of population such as the National Human Rights Commission, the National Commission for Minorities, the National Commission for Women, the National Commission for SC/ST, the National Commission for Backward Classes etc., through enactment of specific legislations. These commissions are vested with the powers of civil court in dealing with complaints of violation of rights and investigation of cases. Further, there exist special Boards called Juvenile Justice Boards in every district to deal exclusively the cases of Juveniles under the Juvenile Justice (Care and Protection of Children) Act, 2000, and special courts such as Family Courts, Mahila Courts etc.

II. Alternative Dispute Resolution (ADR): How Out of Court Systems Are Used as Dispute Resolution Mechanism

In addition to tribunals, commissions and special courts, simultaneously the movement of Alternative Dispute Resolutions (ADRs) originated in India out of the pressure of litigation and accompanying expenses and delays. In India, the Village *Panchayats* have acted as one of the Dispute Resolution Mechanisms since time immemorial.. The disputants are given the choice to choose their own elders, either one or two or more depending on the agreement between the parties and each arbitrator chosen by the parties try to find amicable settlement without jeopardising the legitimate rights of the party on behalf of whom, he/she is acting as an Arbitrator. This traditional mechanism is still available in our villages throughout the country for the settlement of disputes. At present, this method has been further explored towards the reduction of judicial work and replacement of adversary process with informal, short and more satisfying mechanism. The most common forms of ADRs are arbitration, mediation, conciliation, *Lok Adalats*, *Nyay Panchayats*, and the new emerging ADR of Ombudsman.

a) Arbitration

Arbitration is a well-established form of ADR and the one that most closely mirrors court adjudication. Arbitration remains the preferable means of determining a wide range of disputes, involving technical and commercial issues. The major variables in arbitration are the degree of informality in the proceedings and the extent of appeal rights, compared to court adjudication. Prior to the enactment of the Arbitration & Conciliation Act, 1996, the law of arbitration was governed by the Arbitration Act of 1940, the Arbitration (Protocol and Convention) Act 1937 and the Foreign Awards (Recognition and Enforcement) Act 1961. The Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961 provided for the enforcement of foreign arbitral awards mainly in commercial disputes in India. The Arbitration Act, 1940 standardized the law relating to arbitration throughout the British India. The Act dealt with (i) arbitration without intervention of a court; (ii) arbitration with intervention of a court and (iii) arbitration in suits.

In 1985, the United Nations Commission on Trade Law (UNCITRAL) adopted the UNCITRAL Model Law on International Commercial Arbitration. Taking into account UNCITRAL Model Law and Rules, the Parliament enacted the Arbitration and Conciliation Act, 1996. The Act made a significant change in the law relating to domestic arbitration. By section 85 of the new Act, the aforesaid three Acts of 1937, 1940 and 1961 have been repealed. The Act, apart from updating the law of arbitration has provided statutory frame-work for conciliation. Arbitration and conciliation, under the new legislation are independent and autonomous procedures, which derive support from the courts, though they do not require constant supervision and control from courts.

The Act widens the powers of arbitral tribunal. Under the previous law, an arbitrator had no power to decide on his own jurisdiction, now the arbitral tribunal may rule on its own jurisdiction. Further, prior to 1996, the arbitrator had no power to give orders about interim measures, which he can do now. Under the present law, the arbitral tribunal may also require a party to provide appropriate security in connection with any measure ordered by it. Section 11 is innovative in the new Act. Sub-section 6 thereof enumerates circumstances under which the Chief Justice of a State or Chief

Justice of India may appoint an arbitrator. The Chief Justice or his nominee may appoint an arbitrator when the parties have not agreed on the arbitrators to be appointed. Previously a party could make an application for appointment of an arbitrator. Such application could be made under section 8 (2) or section 20 of the Arbitration Act 1940. Now under the present Act, a party will have to make a request to the Chief Justice or his designate for appointment of an arbitrator. Besides, in order to promote arbitration, the Code of Civil Procedure (Amendment) Act, 1999 contain elaborate provisions, which facilitate arbitration and conciliation.

Problems of the Arbitration

The arbitration, however, is not without problems in India. The law does not prescribe any specific time-frame or procedure to complete/conduct the arbitration. The long delays that take place in the completion of the arbitration proceedings, the number of adjournments sought either by consent of the parties or through the intervention of the court and the enormous expenses incurred by way of fees payable both to the arbitrators and the counsel are some of the problems that are faced by those who opt for arbitration. In certain cases, it has come to light that the arbitration proceedings have been pending for a number of years. The amount spent on the arbitrator and the counsel by way of fees exceeded the amount of claim that was ultimately awarded to the claimant. Even after the enactment of 1996 Act, demands have been voiced asking for making amendments in the 1996 Act. For example, the provision of appointment by the Chief Justice or his nominee an arbitrator when the parties have not agreed on the arbitrators to be appointed under section 11 has become a issue of debate in the recent times (*Konkan Railway case (2000) 7 SCC 201*).

b) Conciliation and mediation

Under the 1996 Act, conciliation can be used in all civil cases. Mediation, as a matter of fact, is being used quite widely. Unlike arbitration, a conciliator does not give a decision, but his main function is to induce the parties themselves to come to a settlement. An arbitrator is expected to give a hearing to the parties but a conciliator does not engage in any formal hearing though he may informally consult the parties separately or together. The arbitrator is vested with the power of final decision and, in that sense, the arbitral award is binding on the parties, whereas, it is not so in conciliation.

Conciliation and mediation are frequently used process for resolving labour and family disputes. Counseling plays a crucial role in settlement of a dispute. The Government, keeping in view the long pendency of cases and resultant inconvenience caused to the parties and also in pursuance of the 59th Report of the Law Commission of India, has enacted the Family Courts Act, 1984. This Act lays emphasis on conciliation and achieving socially desirable results and elimination of adherence of rigid rules of procedure and evidence. Besides, it also provides, among others, (i) for the establishment by the state governments family courts in every city or town with a population exceeding one million; (ii) dispensed with the appointment of law graduates as judges of these courts and makes social workers with relevant qualifications eligible to become judges; (iii) section 6 provides for appointment of counselors in each family court and section 9 mandates the family courts to endeavour to settle the cases through conciliation and persuasion; (iv) simplifies the rules of evidence and procedure so as to enable a family court to deal effectively with a dispute. As on August 2001 there are approximately 85 family courts set up throughout the country. The main reason for its slow development is the restriction on advocates practice unless courts grant permission.

It is also to be noted that in the majority of the commissions for protecting the rights of various sections constituted at national and state levels and also in all the districts, the legal services authorities are assisted by a team of counselors to deal with family disputes.

The Arbitration & Conciliation Act of 1996, in Part III under Section 61 to 81 specifically deal with the settlement of disputes through conciliation. Under the Act conciliation can be restored to in relation to disputes arising out of a legal relationship, whether contractual or not. But the courts have important role in arbitration and appeal may be made against the award in certain cases, it is not so in conciliation.

c) *Nyay Panchayats*

In order to reduce the mounting arrears of cases pending for years in the courts and to make the concept of door delivery of justice a reality, the Government set-up various committees to review the situation and provide alternate solution thereto. The 14th Report of the Law Commission of India recommended for adopting the *Nyaya*

Panchayats system. These *Nyaya Panchayats* received constitutional recognition with the enactment of the Constitution 73 and 74 (Amendment) Acts. The Acts provided for creation of village *Panchayats* and reservation of 33% of seats for women in the election for members and chairman of these *Panchayats*. This *fora* for resolution of disputes with people's participation in the administration of justice is very popular in India and is adopted by almost every state in the country by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen on the grounds of economic or other disabilities. In this respect, *Nyaya Panchayats* constitute an aspect of over-all development of legal system.

Experience has shown that these *Panchayats* have not succeeded in bringing the desired result. These *Panchayats* are empowered under specific legislations to deal mainly with civil cases (the pecuniary jurisdiction varies from state to state) and in few states they also deal with petty criminal cases and the serious crimes are not brought before these *Panchayats*. The major problem is that there is no mechanism to ensure compliance with the decisions of the *Panchayats*, though in reality they are invariably followed. This does not rule out access to courts, thereby increasing the long pendency of disputes.

d) *Lok Adalats*

In India, *Lok Adalat* (people's court) has been developed as an alternative to dispute resolution mechanism for providing quick disposal of disputes between the parties. This is in conformity with Article 39-A of the Constitution of India, which requires the state to take measures for speedy disposal of disputes and provide legal assistance to parties who are in need of it. The Legal Services Authorities Act, 1987 has institutionalised the concept of *Lok Adalats*. Prior to the enactment of the Legal Services Authorities Act, 1987, the Committee for Implementing Legal Aid Schemes (CILAS) used to organize *Lok Adalats*.

The Legal Services Authorities Act, 1987 provides for organizing *Lok Adalats* from the Revenue *Taluk* (village) level to the national level. The *Lok-Adalats* are being co-ordinated at the district, state and national levels by the District, State and National legal services authorities respectively. The law relating to organization of *Lok Adalats* is contained in sections 19, 20, 21 and 22 of the Legal Services

Authorities Act, 1987. In pursuance of the provisions of the Act, the Government has recently set up permanent Lok Adalats in every district throughout the country. Besides, in states like Delhi and Gujarat, *Lok Adalats* have been set up to dispose of different categories of cases such as electricity, housing allotment, tax, telephones, insurance etc. Further, the National Commission for Women also sponsors *Lok Adalats* throughout the country for redressal of disputes related to women and family.

A *Lok Adalat* has jurisdiction to determine and arrive at a compromise or settlement between the parties to a dispute in respect of not only disputes pending before a court but also in respect of any matter which is falling within the jurisdiction of and is not brought before any court for which the *Lok Adalat* is organized. The *Lok Adalat* has no jurisdiction in respect of any case or matter relating to an offence not compoundable under any law. The procedure as to how the disputes can go before *Lok Adalats* is specified in Section 20 of the Act. The *Lok Adalat* while facilitating a settlement between parties has to keep in mind the principles of justice, equity, fairness and other legal principles. The settlement facilitated in the *Lok Adalats* are called awards of the *Lok Adalat*. These awards are final and binding on all parties to the dispute and no appeal shall lie to any court against the award, obviously because of the reason that these awards are compromise settlements. Every award of the *Lok Adalat* shall be deemed to be a decree of a civil court.

The popularity of *Lok Adalats* can be measured from the fact that as on December 31, 1999 a total of 49,415 *Lok Adalats* were held, to settle 9,720,289 cases. This figure improved a year later when on June 30, 2001, total number of 108,026 *Lok Adalats* were held to settle 13,003,356 cases.

e) Ombudsman

The institution of Ombudsman is slowly gaining momentum in India. Keeping in view the time constraints, the economy and the resources involved in regular courts some of the institutions have preferred to have an ombudsman for settlement of disputes arising against their institution. In this process the State Bank of India, which is considered as one of the largest establishment in the banking sector, has appointed its own ombudsman for settlement of disputes. Quite apart from this,

some of the state governments such as Delhi, Andhra Pradesh have set up the offices of *Lok Ayukta* (the synonym Ombudsman) at the State level by enactment of legislations. The *Lok Ayuktas* are empowered to deal with complaints of maladministration involving government officials, which includes Ministers. The setting up of office of *Lokpal* at the Central level is under consideration of the Government of India.

f) Comparison of ADRs and traditional judicial systems

India is a common law country, which follows the adversarial system in court procedure. Broadly speaking, adjudication in the adversarial system of conducting proceedings refers to a system in which a judge or adjudicator determines a dispute on the basis of information presented by the parties, who have the primary responsibility for defining the issues in dispute and for carrying the dispute forward. The system is based not only on substantive and procedural law but also on an associated legal culture and ethical base. Fighting litigation to its bitter and final end apart from generating tension and leaving a trail of bitterness, burdens the parties with heavy financial expenditure. Besides, the successful party has to wait for years before enjoying the fruits of litigation.

The Alternative Dispute Resolution System, on the other hand, provides procedural flexibility, saves valuable time and money and avoids the stress of conventional trial. The use of ADR processes can promote a more cooperative litigation culture. The two principle reasons for incorporating ADR into the litigation system are: (i) to enhance access and participation of parties in appropriate dispute resolution services, and (ii) to reduce costs and delays in court and tribunal proceedings.

g) Parties viewpoints with regard to ADRs:

The ADRs system in India in the form of arbitration, conciliation and mediation, *Gram Nyayalaya*, is not new. It is quite popular at the grass-root level to solve disputes, though followed in a very informal manner. In the early 70's few new systems such as the *Lok Adalats* and Ombudsman etc., were added to this list of ADRs. They have been given more attention and attempts have been made to make them more effective in the changed scenario of increasing backlog of cases and to meet the new challenges of globalisation. This, however, has not made much dent on

the existing system of dispensation of justice. Despite long pendency of cases and undue delays in the court system, availability of alternative dispute resolution mechanisms and special tribunals, parties still flock to the courts. The ADR system, particularly arbitration and conciliation under the Act, desires much to make it effective. The power to challenge the award of a tribunal, or limited jurisdiction of special tribunals, commissions, to settle disputes do not make it a preferred mode of settlement of disputes. This is evident from the number of appeals that come before the high courts and the Supreme Court of India from awards of tribunals. Almost on every important issue, people look to apex court. Indeed even after setting up of special tribunals, dealing specifically with matters pertaining to service conditions, compensation claims, customs disputes, etc have come up, still cases are plenty, which are pending in appeal before the Supreme Court of India. One of the main reasons for this being the immense faith in higher judiciary. In the case of ADRs, either parties do not believe in their sanctity or otherwise in order to delay unfavourable outcome in its favour, they avoid resorting to ADR procedures or even if it proceeds with ADR, later on it tries to wriggle out. With the power to approach the court on specified conditions of violation of principles of natural justice etc., to avoid penalties and this, many a times, discourages parties and thereby defeating the very purpose of speedy justice. This entire vicious cycle delays justice. All this induces parties to shun ADR mechanisms and resort to normal courts.

III. Dispute Resolution Process in Consumer Protection

In India, the enactment of the Consumer Protection Act, 1986 is a historic milestone in the history of the consumer movement in the country. It is one of the benevolent pieces of legislation intended to protect a large body of consumers from exploitation. The Act provides an alternative system of consumer justice by summary trial. The Act applies to all goods and services. It provides a framework for speedy disposal of consumer disputes and seeks to remove the evils of the ordinary court system. The Act provides for a three-tier consumer disputes redressal machinery (consumer forums) at the national, state and district level, which provides inexpensive and speedy redress for consumer disputes/complaints against defective goods,

deficiency in services, unfair and restrictive trade practices, or a matter of charging excessive prices etc. The structure of the same is given in Annexure III.

In India, there exist 569 District Forums, 32 State Commissions and a National Commission at New Delhi, to redress consumer grievances. These agencies are in addition to the civil courts and other redressal agencies available under various other legislations. A consumer can simply file a complaint on plain paper requesting compensation. The Act mandates these bodies to dispose a complaint as far as possible within a period of three months from the date of receipt of notice by the opposite party, and within five months of it requires analysis or testing of the goods. But due to the popularity of these forums, which made them cramped with cases, and some inherent difficulties in the Act to frame the foras have been unable to observe the time frame strictly. To remove the procedural delays, other lacunae and to make the dispute redressal easier and speedier, the Government has proposed amendments to the Act and a Bill is pending before the Parliament for enactment.

Since their inception nearly 1,602, 706 cases under different heads have been filed in the consumer courts out of which about 79% cases have been disposed of. As of December 11, 2000, the National Commission has dealt with 20,622 complaints and disposed off 11, 185 and in all the states Commissions 197,870 filed and 115,553 disposed of and in district for a a total of 1,384,214 cases pending and 1,136,661 cases been disposed of. This shows a disposal rate of 54.2% in the National Commission, 58% in the State Commission and a whopping 82% by the District fora.

IV. Dispute Resolution Process in Labour Matters

In India the Industrial Disputes Act, 1947 provides for the constitution of various authorities for the resolution of industrial disputes. At the lowest level is the work committee. The various methods involved for settlement of industrial disputes under the Act are (i) conciliation; (ii) court of enquiry; (iii) adjudication; and (iv) voluntary arbitration.

Quite apart from the aforesaid statutory machineries, several non-statutory machineries such as Code of Discipline, Joint Management Council, Tripartite Machinery and Joint Consultative Machinery play an important role in the process of preventing and settling industrial disputes.

1. Conciliation- The Industrial Disputes Act, 1947, provides for the appointment of conciliation officers and constitution of Board of Conciliation by the appropriate Government for promoting settlement of industrial disputes. For the successful functioning of the conciliation machinery, the Act confers wide powers and imposes certain duties upon them.

During 1959-66 the percentage of disputes settled by conciliation machinery varied from 57 to 83 in the Central sphere. During 1988, 10,106 disputes were referred to conciliation out of which the number of failure report received was 3,183 in the Central sphere. From period 1990-2000, in 39,521 labour disputes conciliation proceedings were held out of which, 10,985 were successfully settled. The statistics of the working of the conciliation machinery, however, reveals that it has made no remarkable success in India. Several factors may be accounted for the same.

First, failure of conciliation proceeding may lead to the reference to adjudicating authorities under the Industrial Disputes Act, 1947; *second*, lack of proper personnel, inadequate training and low status enjoyed by conciliation officers and too frequent transfer; *third*, undue emphasis on legal and formal requirements; *fourth*, considerable delay in conclusion of conciliation proceedings; and *fifth*, lack of adequate powers of conciliation authorities.

2. Adjudication Machinery- The Industrial Disputes Act, 1947, as originally enacted, did not contain provisions regarding the creation of separate Labour Courts. The Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956 introduced a three tier system for industrial adjudication. The machinery provided under the Act consists of Labour Courts, Industrial Tribunal and National Industrial Tribunal. The Labour Courts, Industrial Tribunals and National Industrial Tribunals are *ad hoc* bodies and consist of single member, called presiding officer. The appointment of the tribunal may, however, be for a limited duration. There are 17

Central Government Industrial Tribunals -cum-Labour Courts constituted by the Labour Ministry dealing with industrial disputes. The number of Industrial Tribunals and Labour Courts set up by the state governments and the Administrations of the Union Territories as on October 31,1998 was 333. As on November 30, 2000 the CGIT-cum-Labour Courts have handled (since their inception) 10,433 industrial disputes (received during 2000 a total of 2,035 complaints) and disposed during the year 2000 a total of 722 disputes. Besides it has received a total of 4,638 applications and disposed 835 applications during the same period.

A survey of the time taken by Labour Court and Industrial Tribunal reveals that it is a time consuming. The following reasons may be attributed for delays in disposal of cases:

(a) Quality of Personnel: The practice of appointing retired personnel which are likely to be retired or who are uninterested in adjudication of labour disputes or who have no aptitude or background of labour legislation.

(b) Status of pay: Low status of the Industrial Tribunal may also be responsible for the delay.

(c) Procedural delay: The complicated procedure laid down under the Industrial Disputes Act may also be responsible for the delay.

(d) Interference by the High Courts and stay of Proceedings: A survey of reported cases reveals that generally delay exceeding more than one year (and particularly the delay exceeding three years) occurs due to stay order of the high court through its writ jurisdiction.

(e) Attitude of the Parties: The unhelpful attitude of the parties towards adjudication may also lead to delay particularly where the parties either do not appear or are represented through lawyers (wherever applicable) or trade union officials or other authorised representatives. Further the delay in producing witnesses and documents may also affect the speedy disposal of the case.

(f) Problem of adjournments: Indiscriminate adjournment granted by the Presiding Officer of Labour Court or Tribunal add to the problem. This is so because the Industrial Disputes Act does not prescribe the number of adjournments which may be granted.

3. Voluntary labour arbitration: Section 10-A(1) of the Industrial Disputes Act, 1947 authorizes the parties to make a reference to voluntary arbitration. But, before the reference may be made to arbitrator, four conditions must be satisfied:

1. the industrial dispute must exist or apprehended;
2. the agreement for reference must be in writing;
3. the reference must be made before a dispute has been referred under section 10 to a Labour Court, Tribunal or National Tribunal; and
4. the name of arbitrator/arbitrators must be specified.

Unlike the early 60's the number of disputes referred to voluntary arbitrators is generally declining after 1990's with the evolution of new foras for redressal of labour disputes. From this it is evident that the response to arbitration machinery under section 10A is not encouraging. Some of the factors for this trend have already been referred to. Others which are responsible for this trend are: (i) the lack of proper atmosphere ; (ii) the reluctance of the parties to resort to arbitration machinery; (iii) lack of persons who enjoy the confidence of both the parties, and (v) the question of bearing the cost of arbitration.

V. Dispute Resolution Process in Environment Matters

Economic advancement through industrial development is also an imperative need of the day. The foremost duty is to harmonise the interest of economy with those of ecology. The fundamental question is about increasing economic growth and decreasing environmental pollution to save the future generation from disastrous consequences about its survival in times to come. This becomes more delicate for a developing nation like India. The welfare state in its nature is under an obligation to enact adequate laws to control the pollution and to maintain ecological balance.

In India at present 41 legislations have been enacted to regulate environmental pollution. Some of these being: the Water (Prevention and Control of Pollution) Act, 1974, the Water (Prevention and Control of Pollution) Rules, 1975, the Water (Prevention and Control of Pollution) (Procedure for Transaction of Business) Rules, 1975, the Water (Prevention and Control of Pollution) Cess Act, 1977, as amended by Amendment Act, 1991, the Water (Prevention and Control of Pollution) Cess Rules, 1978, the Air (Prevention and Control of Pollution) Act, 1981, as amended by Amendment Act, 1987, the Air (Prevention and Control of Pollution) Rules, 1982, the Air (Prevention and Control of Pollution) (Union Territories) Rules, 1983, the Environment (Protection) Act, 1986, the Environment (Protection) Rules, 1986, etc.

Prevention and Control of Pollution

As on December 31, 2000, out of 1,551 industries, 1,326 industries have provided the necessary pollution control facilities, 172 industries have been closed down and remaining 53 industries are defaulting in the 17 categories of identified highly polluting industries, legal actions under the Environment (Protection) Act, 1986 were taken for all the defaulting units. A survey of decided cases reveals that the prosecutions launched in ordinary criminal courts under the provisions of the Water Act, Air Act and Environment Act never reach their conclusion either because of the work-load in those Court or because there is no proper appreciation of the significance of the environment matters on the part of those in-charge of conducting those cases. Moreover, any orders passed by the authorities under Water and Air Acts and the Environment Act are immediately questioned by the industries in courts. These proceedings take years to reach conclusion. Very often, interim orders are granted, disabling thereby the authorities from ensuring the implementation of their orders.

To combat the above problems, the first step taken in this direction was the enactment of the NATIONAL ENVIRONMENT TRIBUNAL ACT, 1995. This Act has been enacted to provide for strict liability for damages arising out of any accident occurring while handling any hazardous substance and for the establishment of a National Environment Tribunal for effective and expeditious disposal of cases arising from such accident, with a view to giving relief and compensation for damages to persons, property and the environment and for matters connected therewith or

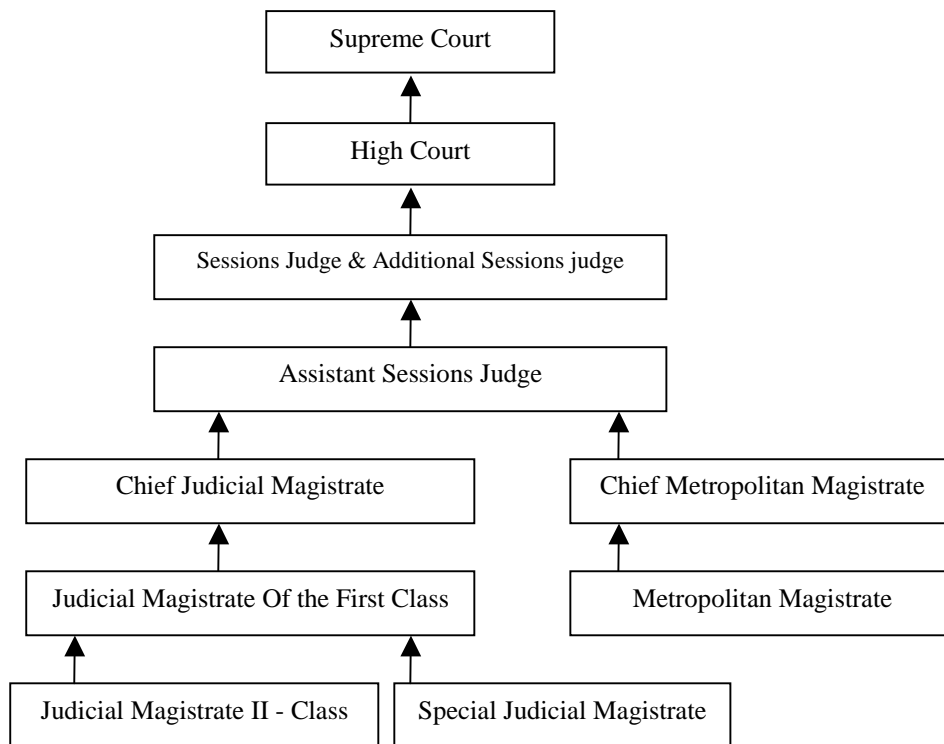
incidental thereto. This tribunal is to be set up by Central Government. Along with it, benches can be set up under the Act at different places at the discretion of the Central Government. They are yet to be established. But this Act is limited to cases related to hazardous substances and processes and does not deal with the whole spectrum of environmental cases arising otherwise.

Thus, at present there is no specific dispute resolution mechanism available under these Acts except setting up of boards at the Central and State levels with the powers to monitor the pollution and issuing notices to the violators.

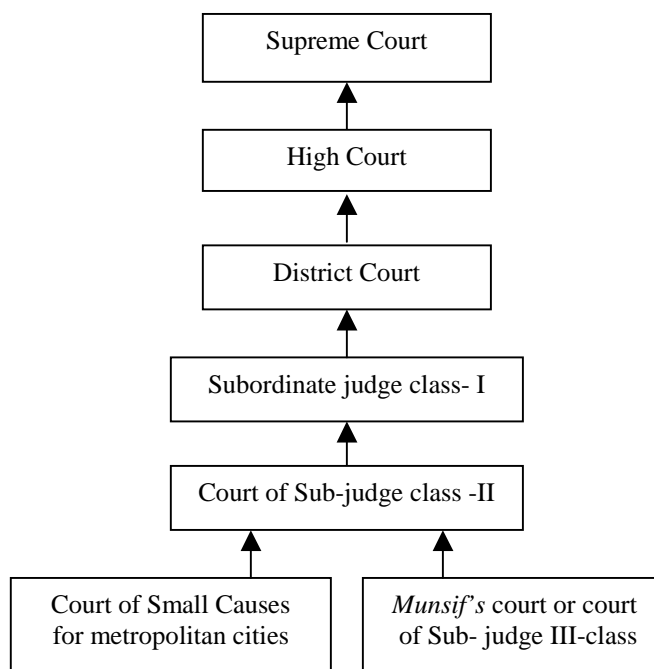
In this backdrop it is felt that, till these environment tribunals come to exist, mechanisms and procedures for the adjudication of environment disputes will remain unsatisfactory, due to inadequacy or insufficiency of the forums available for consideration of the matters.

Annexure I Hierarchy of Judicial set-up

Hierarchy of Criminal Judicial System

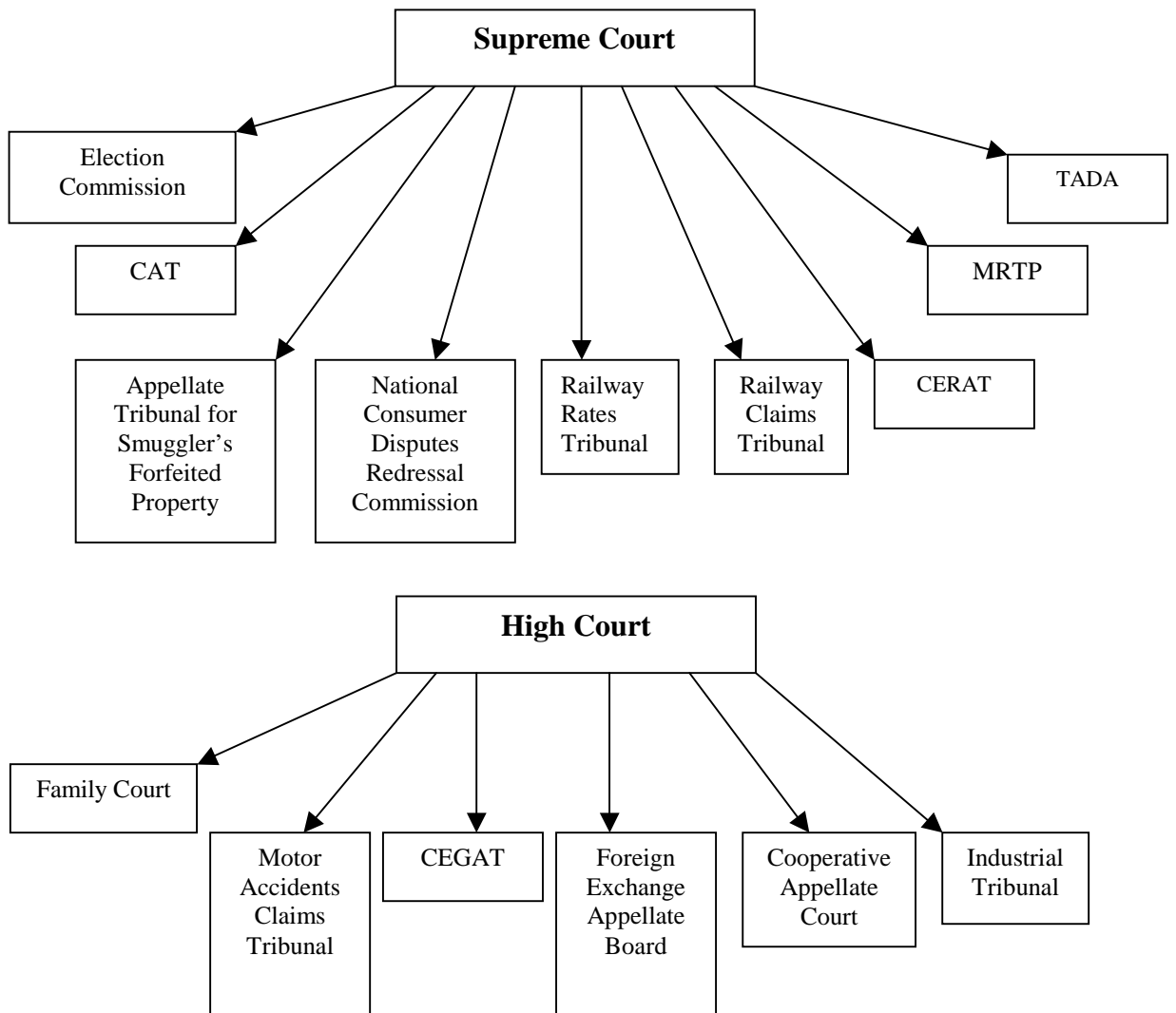


Hierarchy of Civil Judicial System

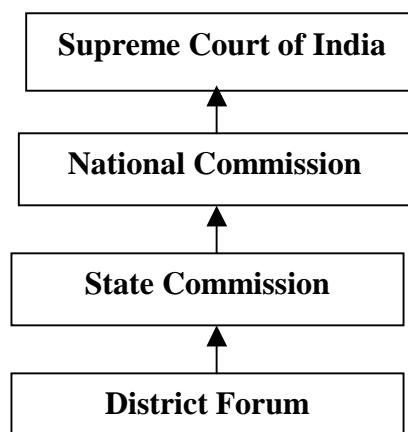


Annexure II

Tribunals and Commission in India



Annexure III



ALTERNATIVE DISPUTE RESOLUTION IN THAILAND *

by

Vichai Ariyanuntaka **

The past few years have been interesting years for Asia. We, Asian people have certainly lived through interesting times. To cite a celebrated Chinese saying, “*we are living in an interesting time*”, is perhaps appropriate. In 1997 Thailand and many countries in Asia witnessed the transition of their economy from phenomenal success and double-digit or near double-digit growth of the past few earlier years to near collapse verging on the state of bankruptcy in many important financial and business sectors. Lawyers, like any other profession, bear the burden of bringing Asia out of this predicament. This is a time for re-thinking, re-planning and re-structuring our legal as well as our social, economic and political infrastructure.

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

* This research is an undertaking by the Central Intellectual Property and International Trade Court in conjunction with the Institute of Developing Economies (JETRO-IDE) of Japan. Members of the working group for the research comprise of five judges from various courts of justice in Thailand, one Senior Public Prosecutor, six field researchers and two legal officers acting as secretariat and liaisons. Each member is assigned to write and lead a research on his/her expertise. A few meetings are conducted to interview players in each compartment of the legal profession. Field research in the form of questionnaires is conducted. All members are responsible for the final draft. *Justice Prasobsook Boondech*, Ex Chief Justice of the Central Intellectual Property and International Trade Court, now Senior Justice of the Supreme Court, has acted as the honorary advisor to the research programme.

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

ADR in its official form has been a recent development in Thailand. The longest and most successful arbitration center is the Arbitration Office, Ministry of Justice (Now called the Thai Arbitration Institute).¹ In the first year of its establishment in 1990, there was only one arbitration case concerning a construction dispute. In 1999, there were a hundred cases involving disputes over constructions and breach of contracts filed at the Arbitration Institute. At the outset of the establishment of the Arbitration Office, it was hoped that arbitration would reduce the workload of court in civil cases. After ten years in operation and the caseload of approximately a hundred per year, it is hardly likely that arbitration would reduce any substantial number of cases going to court.² Other arbitration institutes are simply in their embryonic stage. The existence of which are signs of development and for prestigious reason.

ADR is a new terminology of an old concept. Non aggressive, non-confrontational approach to dispute settlement has been the teachings and practice of eastern philosophers since time immemorial. It is only recently since the method of ADR has been the subject of critical and scientific analysis. Ironically it is the academics in the West who bring ADR, with its famous '*win-win solution*' trademark to world attention. Society, commerce and trade all over the world are the beneficiaries of alternative dispute resolution. In Thailand as well as everywhere in the world, ADR represents a refreshing approach to litigation. It represents a new challenge to the legal profession. This paper proposes to examine some of the lessons we have learned from introducing or perhaps more accurately, reintroducing court-annexed ADR into dispute resolution mechanism in Thailand.

¹ Since the new Constitution (1997) and the introduction of separation of the Judiciary from the Ministry of Justice in accordance with the Constitution, the Arbitration Office of the Ministry of Justice has become the Thai Arbitration Institute, Alternative Dispute Resolution Office, Office of the Judiciary.

² The present figure stands at approximately 850,000 cases per annum. In 2000 AD there were 840,939 cases filed in the courts of first instance throughout the Kingdom. See www.judiciary.go.th for more detail.

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 States³, in 1996, the President of the Supreme Court issued the Practice Guidance on court-annexed conciliation and arbitration.⁴ 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.

³ Chief Judge Clifford Wallace formerly of the US Court of Appeals for the Ninth Circuit was a major stimulant in Thailand for this influence.

⁴ *Practice Guidance Concerning Conciliation dated 7 March B.E.2539 (1996)*. The Practice Guidance was issued by virtue of s 1 of the Statute of the Court of Justice (then in force) whereby the President of the Supreme Court was empowered, in the capacity as head of the Judiciary to lay down 'directions' for judges. In practice these 'directions' are invariably termed 'Practice Guidance'.

(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. Role of the Judge: Inquisitorial V. Adversary

Although the Thai legal system may be classified as belonging to the civil law tradition whereby the German *Bürgerliches Gesetzbuch* (BGB), the French *Code Napoléon* and the Japanese Civil Code played a dominant part in the formation of its Civil and Commercial Code. The English common law had a significant influence on the Thai Commercial law in particular on Book III of the Civil and Commercial Code entitling Specific Contracts. On the procedural side, with the influence of the English Inns of court and legal educational institutions where Thai judges of earlier times were exposed to, Thai procedural law may be described as adversary. This predicament may raise some jurisprudential problem.

There are two conflicting views as to the role of a civil court. The traditional English view is that the court should play a passive role and leave the conduct of the case to the parties; the court should act as an umpire to see that the parties play the game of litigation according to its rules and to give an answer at the end to the question 'who's won?' The continental view is that once the parties have invoked the jurisdiction of the court it is its duty to investigate the fact and the law and give a

decision according to its view of the justice in the case with regard to any public interest that may involved.

The question to ask is if a judge on the bench attempt to lead a negotiation towards settlement of the dispute, would he in any way be compromising or be seen as compromising his role as a passive neutral?

The truth is judges in Thailand have little or no difficulties on the problem raised. The reason may be based on the fact that on the true analysis, the Thai legal system is a blend between the civil and common law family. Thai judges are familiar with conciliation. The Civil Procedure Code, since its promulgation in 1935, prescribes in section 20 that the Court shall have the power, at any stage of the proceedings, to attempt compromise or conciliation between the parties on the issue in dispute.

The Thai courts, when conducting a conciliation process, will depart from their traditional passive role of a judge in the adversary system, to the role of a more active judge in the inquisitorial system. However, when the judge feels uneasy or inappropriate for him or her to continue sitting in the case, he or she shall withdraw. Otherwise the judge may be challenged on the ground of bias. However, the instance is very rare. The status of a judge, being in a position of respect, may actually assist the process of conciliation. In a case in the remote part of Thailand, the plaintiffs and the defendants are brothers and sisters involving in a bitter dispute on the matter of an inheritance where the father died intestate. After some lengthy session of arguments and allegations, the presiding judge, who acted as the conciliator, asked the parties in earnest. “Do you folks still offer merits to your father?” Both parties answered in an empathic “Yes”. It is common indigenous belief that when one’s elder dies, the living relatives shall offer merits to the dead for him to get on to a better life after death. The judge said in a loud voice. “Then don’t bother to do any more merits. Your father cannot go anywhere. Actually, he is crying and suffering at the moment because you lot are fighting over his assets. He cannot rest in peace because of you.” The dosage of “shock therapy” did catch the attention of the parties and led to amicable settlement. This is hardly the role of a judge in an adversary system. But the important thing is that it works.

In the process of conciliation, it is always helpful for the conciliator to refrain from making a statement or opinion. It is always more prudent to form a question than to make a statement. For examples, You don't suppose to have any problems on the Statute of Limitation? I suppose you can justify on the amount of damages claimed? Where does the burden of proof lie? Etc.

III. Some Techniques Used in Court-Annexed Conciliation

Recently, section 20 of the Civil Procedure Code⁵ which initiated court-annexed conciliation since 1935, has been amended to incorporate further modern techniques in conciliation. Three more paragraphs are added as follows:

For the purpose of conciliation, where the court deems appropriate or where on request of a party, the court may order that the conciliation be conducted behind closed doors in the present of all or any of the party with or without attorney.

Where the court deems appropriate or where on request of a party, the court may appoint a sole conciliator or a panel of conciliators to assist the court with the conciliation.

Rules and means of court-annexed conciliation, the appointment, powers and responsibilities of conciliators shall be governed by Ministerial Regulations.⁶

Furthermore, section 19 of the Civil Procedure Code empowers the court, for the purpose of conciliation, to order litigants in the proceedings to be present in court, although legal representation is appointed. The sanction for disobeying the court order to make a personal appearance is contempt of court. (section 31(5))

There are some practical points used in court-annexed conciliation where the judge acts as conciliator in Thailand:

⁵ As amended by the Civil Procedure Amendment Act (No. 17) B.E. 2542 (1999).

⁶ No such regulations have yet been formulated.

- Conciliation is conducted in a conference room not in the court room. Formalities are dispensed with. Secrecy is enforced. Public and the press are barred from witnessing the conciliation proceedings.
- Non-disclosure agreement is made. Without prejudice condition is added to facilitate the invention of options for compromise.
- Although the law allows conciliation without attorney, in practice the conciliator never discourages the present of an attorney. Attempt to do so is likely to have an adverse effect on the trust of the parties in dispute towards the conciliator. The decision to exclude attorney should come from the party itself. It is the conciliator who should say, attorneys are welcome.
- Caucuses with each of the parties to the exclusion of the other are helpful; sometimes to dilute some of the less-than-reasonable claims or to increase some of the more-reasonable offers. Although the law allows the use of caucuses, it is best policy to obtain the consent of the parties first.
- An atmosphere of joint effort to solve the problem is perhaps the best environment to create in conciliation. Parties are invited to present options to settle the dispute. Each option caters for the mutual interests of the parties. Conciliator to be sensitive to the need and legitimate interest of each party.
- Conciliator to be careful about objectivity and neutrality. Instead of making a statement in the affirmative. Asking a question is more “politically correct” and may achieve the same result.
- Refreshments, coffee breaks, (good) working lunch or even a few jokes of the day do help the atmosphere in a negotiation. Miracles sometimes happen during these “time-out”.
- It is arguable the wisdom of forcing litigant to appear in conciliation with the threat of contempt of court. The device is sometimes used in consumer claims where the defendant is a corporation.

- Under a recent amendment to the Civil Procedure Code, conciliation is compulsory in small claims disputes⁷.

IV. Court-Annexed Arbitration

Court-annexed arbitration is a welcome development of 'case management'. It helps solve the problem of backlog of cases. It is particularly useful in construction cases where the services of an expert are of great importance. It can save days, weeks or even months of court time in the testimony of expert witnesses. Court-annexed arbitration often occurs at the pre-trial conference where a difficult question of fact is singled out for special consideration by a specialized arbitrator.

The advantages of arbitration compared to litigation are traditionally listed as follows:

- (a) Privacy.
- (b) Tribunal of the parties' choice.
- (c) Informality of proceedings.
- (d) Speed and efficiency.
- (e) Lower costs.⁸
- (f) finality of the award.

⁷ Section 193 paragraph two of the Civil Procedure Code as amended by the Civil Procedure Amendment Act (No. 17) B.E. 2542 (1999).

⁸ In many cases whether arbitration incurs lower costs than litigation is debatable. With respect to one of the direct costs - filing fees and other tribunal fees - arbitration can be more expensive than all other forms of dispute resolution including litigation. Since in most jurisdictions filing fees and court fees are nominal. In Thailand, court fee is calculated at 2.5% of the amount in dispute but not exceeding 200,000 baht (approx. US\$ 5,300). The International Chamber of Commerce (ICC) Court of Arbitration's filing of registration fee is US\$ 2,000 and an additional administrative charge, a percentage of the amount in dispute is added. In an apparent effort to counter its reputation for being too expensive, the ICC announced that the administrative charge is now capped at US\$ 50,500 regardless of the amount in contention. Attention must also be given to the fact that while judges work may be described as public service most arbitrators charge for fees. Two other factors must also be taken into consideration. First, attorney fees can be huge if the trial lasts a long time. Secondly, in comparing arbitration costs to litigation costs, one must remember that arbitral awards are not themselves enforceable and if the losing party does not voluntarily pay, additional costs for a judicial enforcement proceeding will be incurred.

The ultimate end of both litigation and arbitration from the plaintiff's or claimant's point of view is the effective enforcement of the judgment or award. The most certain method to ensure the enforceability of a judgment is to litigate in the national court of the defendant. But most international businessmen and their lawyers are reluctant to sue in the defendant's national court. The alternatives are arbitration or litigation in the national court of the plaintiff or, possibly, in a neutral country. Unless the defendant has sufficient assets in the place where the litigation takes place, the plaintiff will have to seek enforcement of the judgment in another country. In case of arbitration, if the respondent does not voluntarily pay, the claimant will have to seek judicial assistance in the enforcement of the award regardless of where the arbitration took place.

Court-annexed arbitration has been included in sections 210 - 222 of the Civil Procedure Code since its publication in 1935, but the provisions have never been used until very recently when ADR is seriously considered and practised. Court-annexed arbitration arises when the parties fail to put an arbitration clause in the contract and later bring a civil action in court. At the pre-trial conference when considering the issues in dispute, the judge may, in consultation with and by consent of the parties, refer complicated technical issues on question of fact to arbitration. This is seen as a means of involving a judge in case management. Most of the advantages of arbitration as a means of dispute resolution can be obtained by court-annexed arbitration. However since the award is incorporated into the final judgment of the court, it loses the enforceability of the award abroad under the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards 1958. Since the incorporation of arbitration clause in a contract is of recent phenomenon in Thailand, many commercial disputes that would have gone to arbitration were brought to courts of justice creating a great amount of backlog. Referring some of the issues to arbitration is a welcome option for judges at the pre-trial conference.

V. The Establishment of the Central Intellectual Property and International Trade Court

Although litigation is not considered as an ADR, modern techniques learned from ADR could be valuable for judicial reform of civil litigation. This is particularly true in Thailand with the recent establishment of the Central Intellectual Property and International Trade Court (IP&IT Court) whereby ADR methods are adopted to a large extent. ADR, originally conceived as means for alternative dispute resolution has now been accepted as method for litigation in court. The significance of ADR has turned a full circle. It is proposed now to examine some salient points of this 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. The 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 intellectual property and international trade should be grouped together for easy access and administration. This is also seen as an answer from Thailand to the problem of delay and lack of expertise in civil litigation.

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

- Liberal use of Rules of the Court to facilitate the efficiency of the forum.
- Exclusive jurisdiction in the enforcement of arbitral awards in intellectual property and international trade matters.
- Panel of three judges to constitute a quorum. Two of whom must be career judges with expertise in intellectual property or international trade 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.

- Availability, for the first time in Thai procedural law, of the ‘*Anton Piller* Order’ type of procedure.
- Possibility of the appointment of expert witness as *amicus curiae*.
- Leap-frog procedure where appeals lie directly to the Intellectual Property and International Trade Division of the Supreme Court.
- Use of pre-trial conference.
- Use of court-annexed conciliation.
- Use of court-annexed arbitration.
- Use of videoconference for witness abroad.
- Continuous trial.
- Subject to the consent of the parties, documents in English do not have to be translated into Thai.
- Use of written statement in conjunction with oral cross- examination and re-examination.

While establishing a new court is not an easy task, the promotion of it to international commerce and industry is most difficult. 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 some of the criteria one considers hard when choosing a forum to conduct international commercial litigation.

With the expansion of trade and investment in the Asia-Pacific region and the growing needs for effective mechanism and management for international commercial dispute resolution. Many arbitration centres have been established in the region in direct competition with the more established centres in Europe and America. One sees an increasing attempt to create and promote ADR. Prospective claimants will have more opportunity than in the past for forum shopping. A predictable phenomenon in the climate of free market economy. The more difficult question is ‘quality control’.

VI. Scope of the Present Research

The present research will focus on legal and empirical analysis of ADR in Thailand. Three major areas are focused: consumer protection, labour disputes and environmental disputes. Dispute resolution in these areas need delicate, good understanding and almost tailor-made procedure effectively to redress the problems arisen. Most consumer protection regimes in the world are in the form of small claim court or tribunal whereby participation of the consumers themselves is encouraged but legal representation discouraged. Conciliation is somewhat seen as having better rate of success in that mode. It is almost like a DIY (Do it Yourself) dispute resolution. Labour disputes in Thailand is resolved through a panel of tri-partie judges: a career judge, a judge from the employers' associations and a judge from the employee's associations. The rate of success in conciliation in the Labour Courts of Thailand is phenomenal and exceeds the success in other courts of justice. Environmental Disputes on the other hand are quite new here. Dispute Resolution in environmental matters is at present rested in the traditional court system and procedure. However, the brighter side is that, Thailand has now more and more legal scholars in the field of environmental law. We only need them to switch their emphasis more on dispute resolution matters. This is exactly what this research is trying to achieve.

We hope that this research, the contents and researchers of which are listed in the appendices, will be able to shed some light on and contribute to the growing phenomenon of alternative dispute resolution in Thailand. Three areas of concentration: consumer, environmental and labour protections are singled out for empirical treatment. We hope to finish the research by January 2002.

OVERVIEW OF THE DISPUTE RESOLUTION MECHANISM IN CHINA

by

Dr. Liu Junhai *

I. Court System and its Reforms in China

1. The current situation of judicial system

An independent and fair judicial power is crucial to the effectiveness of the market economy, the rule of law, and social justice. China's reforms are going through a period of structural adjustment, which must be backed up by an effective and fair judicial system. In China, the judicial authority over civil, administrative and criminal cases is exercised by the People's Court. In the judicial proceedings, the People's Court administers justice independently according to law, subject to no interference by administrative organs, organizations or individuals. Furthermore, the People's Court shall base itself on facts and take the law as the criterion.

Chinese courts hear 5.2 million criminal, civil, economic, and administrative cases annually. Chinese Courts are supposed to deal a harsh blow to serious crimes that threaten social stability, to readjust the relationship between civil and economic affairs and eliminate social contradictions, and to guarantee the smooth implementation of major reform measures.¹

As China is moving towards the "litigious society", the increasing litigation is classified into three categories, namely: civil and commercial cases, administrative

* Associate professor at the Institute of Law, Chinese Academy of Social Sciences. Email: liujunhai_2000@yahoo.com; junhai@public.east.net.cn

¹ Xinhua, "Courts ordered to help economy grow", China Daily, July 6, 1998.

cases and criminal case. The trial of civil and commercial cases is governed by the Civil Procedure Law of 1991 and relevant substantive private law, the trial of administrative cases is governed by the Administrative Procedure Law of 1989 and relevant substantive administrative law, and the trial of criminal cases is governed by the Criminal Procedure Law of 1996 and relevant substantive criminal law. Among other things, civil and commercial cases are the most predominant categories in terms of workload, including but not confined to contracts, torts, financial disputes, intellectual properties, State-owned enterprise reforms, farmland contracting, agricultural development, real estate, labour disputes, etc.

China began to pay more attention to judicial justice issues in the autumn of 1997. But the current judicial system is lagging behind in the implementation of these laws and regulations, and some malpractice still occurs in the courts. The judicial shortcomings include the judicial corruption, ineffectiveness of the judiciary, and lack of independence of the judiciary. Judges' expertise should be further improved. Some of the judges abuse their power, severely damaging justice of judicature, and tarnishing the reputation of the courts. It is necessary to improve the examination and qualification system for judges so as to raise their competence. Rampant regional protectionism is one of the judicial shortcomings. The fact that local courts do not operate on an independent basis is the major cause of this regional protectionism. In terms of personnel, funds and equipment, these courts are administrated by local governments. Under the current Organic Law of the People's Court, judges are selected by local People's Congresses. Some local governments, in an attempt to protect local interests, seek countermeasures against national law. This has resulted in unjust practices in some areas.² It threatens to tarnish the dignity of Chinese law and the image of courts. Worse, it may shake Chinese people's faith in the rule of law. This problem needs a timely reform to ensure independence of judicial activities, and promote market economy.

To safeguard the independence, effectiveness, accountability, honesty and cleanness of the judiciary, China has started reforming its judicial system. Judicial reforms are also an important part of the legal and political reforms in China.

² "Legal reform to keep pace with market", China Daily, February 20,1998.

Without such reforms, the market economy will be in danger of foundering. Of course, economic analysis can be used to help analyse judicial systems so as to advance the current judicial reform.

2. Strategies against judicial corruption

In recent years, some judicial officials abused their power for the sake of money or gave unfair judgment for personal revenge or interests, including taking bribes, corruption, embezzlement of public funds, and dealing with cases in a manner contrary to the law.³ In Heilongjiang Province, for instance, judges have been punished for such malpractice. Between 1993 and 1996, sentences given in 438 court cases were found to be erroneous and 460 judicial officials were penalised as a result.⁴ Their misdeeds have invited public complaints and tarnished the image of China's judiciary system. A strong public opinion is growing to fight against the abuse of power and corruption in the judicial sector, and develop a sounder system to weed out the roots of corruption in law enforcement departments.

To enforce internal supervisory mechanisms in courts and ensure justice, to give innocent people the power to redress injustice, and to discipline the judges, the Supreme People's Court issued in 1998 a new punishment regulation regarding malpractice in trial procedures to safeguard judiciary justice, according to which judges shall be put under investigation after they are found to have intentionally broken the law in court trials or carried out court verdicts and unintentional legal offences resulting in serious consequences. The new regulation is applicable in both substantial and procedural laws, intentional or unintentional violations of the law, and both ongoing and past illegal activities.

The Supreme People's Court of China set up a reporting centre in May 1998 to handle calls and mail regarding judges in the supreme court, provincial higher people's courts and intermediate people's courts. Major cases to be handled by the centre will include embezzlement, taking bribes, abusing power, concealing or forging

³ Xinhua, "Judicial officials", China Daily, July 30, 1998.

⁴ Dian Tai, "Wei calls for fight against corruption", China Daily, July 30, 1998.

evidence, leaking secrets, unlawful coercion, dereliction of duty and illegal collection of money.⁵

Recently, there also have been cases in which the court retirees immediately got themselves re-employed as counsels. They used relations forged during years of working in the field to influence the judicial procedure and outcome. The Supreme Court prohibits retired judges from acting as defence lawyers or legal representatives in the region of their former service within three years of their retirement. According to a rule issued by the Higher People's Court in Yunnan Province, the plaintiff and defendant are entitled to question the qualifications of legal representatives. Violation of the regulation will bring the case to a second trial.⁶

The top priority in the campaign against judicial corruption is to rectify the judicial discipline and working style, and re-select the leadership of the courts at different levels, in a bid to ensure a clean and disciplined court system. In 1998, Courts across China corrected 11,563 error-laden cases that were tried before 1998 and punished 2,512 judges. The Supreme People's Procuratorate punished 1,215 prosecutors, including the chief and a deputy chief of the Anti-Corruption Bureau under the Supreme People's Procuratorate. The chief, Luo Ji, was removed for depositing money confiscated in a case into a bureau account. The deputy chief, Huang Lizhi, was removed for accepting a dinner invitation from a suspect in a case.⁷ China appointed 594 new chiefs and deputy chiefs of anti-corruption bureaux at county and prefecture levels nation-wide in the second half of 1998 as part of its effort to curb judicial corruption. The appointments were made to replace former chiefs who had failed to pass a nation-wide examination and assessment survey, and to fill existing vacancies. As part of the campaign, 1,332 new presidents and vice-presidents of county and prefecture-level procuratorates were installed to fill vacancies left by those who had been demoted.⁸ To investigate cases of judicial corruption, the Supreme People's Court appointed ten prestigious judges as superintendents who will be responsible for offering advice in handling major,

⁵ Briefs, Reporting center, China Daily, May 12, 1998.

⁶ Wu Jiachun, "Call urges judicial fairness", China Daily, March 13, 1998.

⁷ Xu Yang, "NPC considers amendments", China Daily, January 30, 1999.

⁸ Xinhua, "Anti-corruption chiefs named", China Daily, January 16, 1999.

difficult or misjudged cases. They are also authorised to investigate major issues concerning judicial corruption in the courts, as well as cases involving parties from different jurisdictions. They are required to forward reports and suggestions based on their investigations to the Supreme People's Court.⁹

Another critical issue closely connected with judicial corruption is wrongly handled cases arising from authoritative judicial practice. During a revision of more than 4.41 million cases of various kinds in the first 10 months of 1998, 85,188 cases were deemed wrongly handled. Among them, 9,395 cases were corrected. The rest are being dealt with, according to the Supreme People's Court.¹⁰ It would produce stronger public criticisms if the occurrence of wrongly handled cases could not be prevented and substantially reduced. The goal may be achieved through legitimate procedures, accurate verification of facts, good evidence, clearly stated judicial documents, and accurate and convincing applications of the law. It is essential to establish a system for investigating and prosecuting anyone who is held responsible for unjust or misjudged cases.

According to a regulation promulgated by China's Supreme People's Court, judges misjudging cases or breaking the law in making their judgements have begun to be punished from September 1998. The ultimate aim of the regulation is to improve the supervision system within the people's courts and ensure that justice is safeguarded. The regulation applies to all judges, including presidents of the courts, presiding judges and adjudicative personnel. People's courts have the power to determine whether a case handled by its personnel is misjudged or not according to relevant regulations and laws. Judges held responsible for misjudging cases will receive a disciplinary punishment. Those who have committed a crime in the process will be dealt with accordingly by judicial departments. The investigation of violations of trial procedure laws cover past and present infringements. China's Supreme People's Procuratorate issued a similar regulation covering China's procuratorial organs in late July 1998. Both rules are significant in building up a

⁹ Shao Zongwei, "Reform brings new supervisory judges", China Daily, October 31, 1998.

¹⁰ Shao Zongwei, "Judicial Reforms Outlined", China Daily, December 3, 1998.

system for investigating misjudged cases.¹¹

3. The far-reaching impact of open trials and live court broadcasts on judicial reforms

According to the Chinese Constitution and laws, except for three kinds of cases -- those involving national secrets, privacy and minors -- all cases should be tried openly. The verdicts of the above-mentioned three kinds of cases must also be announced publicly. To conduct public trials means to allow ordinary people including media reporters to attend court trials. This practice has proven effective in many countries to prevent lopsided adjudication, lax enforcement of necessary judicial procedures, and prejudicial judgements against the accused. But in practice, it has not been fully followed by many local courts, and court proceedings were not publicised until a few years ago.

Of course, for many years, some courts have opened their trials to only a certain number of visitors who hold a special pass issued by the courts. At the same time, the formality required to apply for the pass is usually complicated, which keeps away a great number of visitors. In cases that require the court to open session more than once, many courts choose not to inform the public of the schedule. What is more, some local courts say they do not have courtrooms big enough to accommodate all visitors. As a result, ordinary trials are usually conducted in the presence of a very small number of visitors.

According to current Constitution and legislation, every Chinese citizen has the right to information, including the right to know the truth about any case. However, this right can only be realised if China's courts conduct trials openly before the watchful eye of ordinary citizens. If China is to establish a sound democratic and legal system, China's courts must conduct their proceedings openly, in accordance with the law.¹²

¹¹ Shao Zongwei, "New rules improve judicial safeguards", China Daily, September 4, 1998.

¹² "Trials should be conducted in public", China Daily, February 6, 1998.

1) **Opening court trials to the public**

China began to reform its judicial procedures in 1996. Conducting an open trial has been a major requirement of the reform. But no regulations have been stipulated to punish those who go against judicial principles. Perhaps this is the reason the principles are being overlooked. Some law enforcement officers and judges are not sure about their ability to make the right judgement in certain cases. Furthermore, many courts fear that the participation of ordinary visitors, especially media reporters, may make trials complicated. That is the main reason for the unpopularity of public trials.

Xiao Yang, president of the Supreme People's Court, has pointed out that courts must consciously put themselves under the scrutiny of the public eye and that the "public trials" stipulated in the Constitution must be carried out.¹³ Starting from June 10, 1998, Chinese citizens above the age of 18 have been able to audit any public trials held in the Beijing No 1 Intermediate People's Court. All that is required is to show an ID card. By doing that, the court has become the first intermediate court in China to allow its workings to be viewed. On the same occasion, journalists are allowed to report any cases tried publicly by the court, provided that their reports are accurate and responsible. For this purpose, an attention-grabbing screen of 200,000-yuan (US\$24,096) was set up at the gate of the Beijing No 1 Intermediate People's Court, listing the cases to be tried in court, in full view of an interested public. More and more local courts are beginning to permit citizens aged 18 or above to attend most court hearings.

Open trials have a far-reaching impact on propelling judicial reforms and ensuring the integrity and justice of the legal system. Open trial is the most direct, widespread and forceful kind of supervision. It can increase judicial openness and transparency, prevent darkroom operations, and ensure that justice is served. One of the major reasons for the public complaints about the courts is that the trials are secret and not transparent. The public have an opportunity to observe and supervise judicial activities. This can curb or eliminate interfering factors such as personal favours, power, and money. It is an effective way to protect judicial independence,

¹³ Shao Zongwei, "Court trials now open to public", China Daily, June 11,1998.

and to impose pressure on judges, urging them to improve their professional skills. It can also improve the legal awareness of the general public. Therefore, most legal and media specialists agreed that live broadcasts of courtroom hearings have a positive impact on China's legal reform, moving the system towards greater transparency.

2) Live court broadcasts

Xiao Yang, president of the Supreme People's Court expressly and repeatedly declared in 1998 that as long as the media respects the facts and takes an impartial stand, live coverage of trials is always welcome. More than 40 television stations across China have broadcast live court proceedings. The first was Nanjing City Television Station in Jiangsu Province. The station began broadcasting court live in April, 1994 with a weekly programme titled "Courtroom Fax". More than 200 trials have been aired on the programme. The first nation-wide live broadcast of a court hearing by China Central Television (CCTV) on July 11 enjoyed an audience rating of 4.5 percent, higher than that of CCTV's noon news programme. The copyright infringement case involved ten Chinese film studios and was heard in Beijing's No. 1 Intermediate People's Court. A survey conducted in Nanjing reveals that many local residents are interested in the programme and frequently ask their friends to record it when they are unable to watch proceedings.¹⁴ To date, at least eleven higher people's courts and 58 intermediate people's courts have begun live telecasts of trials to increase their openness and transparency.¹⁵ Experts and lawyers are often invited to comment on the trials, and telephones are in place to allow viewers a chance to air their opinions.

A newly released 500-sample survey conducted by Beijing No 1 Intermediate People's Court indicates that 90.7 percent of its respondents think the trials they have attended are "just and fair". Among the 172 respondents who have participated in courtroom actions, 92.5 percent said the judges listened attentively to the litigants. By the end of 1998, some 2,630 people had attended trials with valid identification cards. Since December 1998, all courts in Beijing have opened their courtrooms to

¹⁴ Xinhua, "Live trial coverage attracts viewers", China Daily, August 6, 1998.

¹⁵ Xiao Shao, "Hot line improves media access to courts", China Daily, February 11, 1999.

ordinary citizens. The survey also shows that 75 percent of respondents are satisfied with the performance of the judges. People were asked to evaluate the judges' manners, attitude towards litigants' ability to control the trial, and proper dressing.

Being exposed to the public's eyes, it is only natural for the judges to be cautious about every word they say. Since courtrooms have been opened to the public, the quality and efficiency of handling cases in court have improved. Judges usually pronounce verdicts at a later date instead of right at the end of the court session. Both the complexity of some cases and the large number of legal provisions have imposed difficulties on the timely pronouncement of verdicts. The quality of judges, which the court will routinely improve, is another reason for the late verdicts.¹⁶

To improve media access to courts, the Supreme People's Court (SPC) has opened a telephone hot line to be used by the news media this year. The hot line is managed by spokesmen for the court. It follows the opening of a hot line reporting on law enforcement advice and another one directed to spokesmen for the NPC. In addition to convening press conferences, the spokesmen will help reporters locate people they want to interview, clarify some facts and inform them of cases of public concern. At present, the SPC holds five to eight press conferences each year. Reporters may still cover court stories on their own. Chinese courts at all levels will gradually establish a spokesperson system.¹⁷

It should be noted that although most of the public have viewed the live broadcasts of court cases, some of them have not. A number of people are worried that this practice will disrupt the trial process and deter witnesses from speaking the truth, because the latter might be afraid of retaliation or exposure to the public. Some people believe cases shown to the public should be typical cases, and ought to be used to serve an instructive function. These cases should be tried by judges of high calibre. It is stipulated in China's law that any case may be open to the public, except when the cases involve national security or personal privacy. If witnesses do

¹⁶ Shao Zongwei, "Survey finds trials are 'just and fair'", China Daily, January 12, 1999.

¹⁷ Xiao Shao, "Hot line improves media access to courts", China Daily, February 11, 1999.

not want to be exposed to the public, blurring their pictures on TV can be an ideal substitute.¹⁸ All these concerns show that there is still a long way to go before this vivid and direct practice can be accepted by the public.

It is also an open question as to how to avoid any negative impact of broadcasting proceedings. Some people argue that cases involving violent crime or a large number of victims and witnesses should not be broadcast, while others argue that class-suit cases, such as consumers suing a company, would be suitable for a TV audience. Defendant and plaintiff should be informed of the live broadcast beforehand and should not be forced into the project. The media should remember they are only playing a minor role in these live broadcasts. Media coverage of the cases should not improperly influence the decision reached by the courts. Televised discussions by experts should be held after rather than during the court hearing.¹⁹

To fulfil the basic principle of the Chinese constitution of public trial, it is more crucial to improve people's legal awareness and judges' professional level rather than focusing on the limited space of the courtroom.

4. Reforms with the lay assessor system

The people's lay assessor system is an important part of the judicial system. The jury system was introduced to China at the beginning of this century, but ended with the fall of the Qing Dynasty (1644-1911).²⁰ China inherited the people's lay assessor system from the former Soviet Union. People's lay assessors had been instituted in regions controlled by the Communist Party of China before the founding of New China in 1949. China's first constitution in 1954 made a clear provision for such a practice in China's judicial system. However, the system was short-lived, falling victim to the "Cultural Revolution" (1966-1976). Although the status of the system was re-established in the 1978 constitution, it is only recently that it has again been given due attention.²¹ The Supreme People's Court has proposed to the Standing Committee of the NPC to draft laws to regulate the selection, rights and

¹⁸ "Live show of trials raises law awareness", China Daily, October 2, 1998.

¹⁹ Shao Zongwei, "Live court broadcasts benefiting legal reform", China Daily, October 21, 1998.

²⁰ It is also argued that China may experiment with juries in the reform of its trial system.

²¹ Shao Zongwei, "Foundation for reform of assessor function set", China Daily, December 4, 1998.

duties of lay assessors.

Unlike the jury system practised in Western countries, Chinese lay assessors share equal rights and duties with the judges in court. Forming a collegial bench with judges, they play a vital role in rendering trial judgements by a majority vote of lay assessors. They provide an effective channel for the people to participate directly in judicial activities and conduct supervision of the judicial activities.

Some courts in China have hired experts in special fields to function as lay assessors. The Beijing No 1 Intermediate People's Court started to hire IPR rights academics as lay assessors a year ago. The courts are currently paying more attention to lay assessors' proficiency in their individual fields than to their knowledge of law. This helps judges to determine the facts of a case.²²

The people's lay assessor system should be further improved. People's lay assessors must have a certain educational level and have acquired some legal knowledge. Some local regulations state that people's lay assessors should at least have graduated from high school. Many legal professionals maintain that in cities like Beijing and Shanghai, lay assessors should have a college education. Since most lay assessors have no systematic legal education, they feel intimidated in front of judges, especially if disagreements arise. This often results in assessors just listening to trials without making their own judgements. Lay assessors should be encouraged to make their independent judgement, and deliver their opinion in good faith.

It is necessary to improve legal education to ensure that judicial power is vested in the right hands. While lawyers must pass strict professional examinations, many judges and procurators do not have to. In this situation, judges could easily reach the wrong verdict, while paying little attention to lawyers.

As to other issues concerning the internal judicial structure, the powers of collegial benches (made up of three judges) and single judges are expected to expand, and the function of judicial committees will be limited to difficult major cases only.

²² Zong Wei, "Awareness of laws, legal education vital to system", China Daily, December 4, 1998.

The practice will transform the role of the chief judges and presidents of courts from ratifying court judgements to ensuring proper trial conduct by all parties to a case.²³

5. Reforms with the township courts

The implementing of the rule of law in the rural areas is an important part of the rule of law. There are 17,411 township courts in rural areas. Township courts are a branch of the county-level courts and are independent of township governments. The courts have a lot to do to help China's 900 million farmers solve problems arising from renewal of farmland contracts and the development of the rural economy. They handled 50.27 percent of all first instance cases in China's courts in the past five years from 1993 to 1998.

However, there are still problems at different governmental and judicial levels in building up township courts. Although they are not a part of the township Party committee of township governments, some township governments have used court staff as government employees. Some court arrangements could affect the outcome of trials.

China's Supreme People's Court has urged the courts to stamp out such malpractice, to stop getting involved in government affairs that are not part of their legal duties, and to conduct their activities in accordance with the law. It is necessary to formulate rules to rework China's to strengthen the judiciary's role, so as to help stop corruption in it and help further effect law and order in rural areas by standardising the operations of township courts, their governance, and their trial procedures.²⁴

6. Improving efficiency, especially speeding up litigation resolutions

Efficiency is critical to judicial justice. According to Article 135 of the Civil Procedure Law of 1991, the trial of first instance shall be concluded within six months dating from the acceptance of the plaintiff's suite. According to Article 146 of Civil Procedure Law of 1991, the trial of first instance using the simplified procedure shall

²³ Shao Zongwei, "Judicial Reforms Outlined", China Daily, December 3, 1998.

²⁴ Xinhua, "Legal reform touches on township courtrooms", China Daily, November 30, 1998.

be concluded within three months dating from the acceptance of the plaintiff's suite. According to Article 159 of the Civil Procedure Law of 1991, the trial of second instance shall be concluded within three months dating from the acceptance of the party's appeal. Thus, it takes the parties nine months to get the final court rulings. However, both courts of first instance and courts of second instance are entitled to prolong the trial for due cause. In practice, some corporations or individuals need two or three years to reach the final court rulings. It has been reported that courts of second instance have taken around two years to deliver the final court ruling, requiring the court of first instance to rehear the case. This means that the plaintiff and the defendant had to follow another circle of trial including first and second instances.²⁵ It is urgent to speed up trials, reduce the judicial cost and improve the judiciary effectiveness. The Supreme people's court has realised that exceeding the time limit for concluding trials is a violation of the procedural law, and should be given the same attention as the correction of wrong judgements. During the first ten months of 1998, courts in China handled more than 4.3 million new cases and concluded more than 3.82 million.²⁶

To improve judiciary effectiveness, it is necessary not only to create awareness among judges of modern, effective practices, but also to equip the office facilities with modern technologies. Some courts, including Beijing's Higher People's Court (BHPC), have launched the construction of the Court Computer Information Network. The project of BHPC will cost about 60 million yuan (US\$7.228 million). The network is going to include a supporting system especially for presidents' decision-making, a lawsuit information system, an office management system and a public information system. It will connect Beijing's more than 30 courts from municipal to county levels. Beijing sees an increase of 10,000 to 15,000 cases every year, and its courts have already run out of space for additional officials. The courts expect this network to greatly raise their efficiency by freeing them from a tremendous amount of manual operations presenting a looming threat to judicial efficiency. Beijing residents will expect to get quick judicial consultation through the network, which will also greatly improve judicial transparency by releasing

²⁵ Chijian, "A time-consuming suite", *Democracy and Law*, Vol.8, 1998.

²⁶ Shao Zongwei, "Judicial Reforms Outlined", *China Daily*, December 3, 1998.

typical cases and trial results, and receiving related inquiries.²⁷

To offer effective and timely judicial remedy to the consumers in vulnerable positions, it is feasible to establish consumer small claims courts or general small claims courts in China. Some local courts in Suihua region, Heilongjiang Province and Changde City, Hunan Province, have experimented with establishing special courts to handle the cases concerning consumer disputes. The author believes that it is more reasonable to establish the small claims courts in China, covering not only the consumers' small claims, but also other small debt claims based on either contract or tort.

7. Measures against unsatisfactory enforcement of judgements

In China, the biggest danger threatening the dignity of the rule of law is the fact that it has not been possible to enforce a considerable number of rulings in civil law and commercial law cases. According to the Supreme People's Court, nearly one million cases with a total value of 190 billion yuan (US\$22.9 billion) were pending throughout China by September 1998. According to high court statistics, the national incidence of unexecuted cases now stands at 30 percent per year. In some courts, the backlog of adjudicated but unresolved cases has risen to a stunning 60-70 percent of the annual caseload.²⁸ In July 1998, Beijing had 9,882 un-enforced court decisions. Fifty-seven percent were civil cases, while 32.6 percent were commercial ones. The cases involve judgements valued in tens of billions of yuan. Compared with district courts, the city's higher and medium people's courts have had far more un-enforced court decisions, because of more complicated procedures and larger amounts of money involved. For several years, un-enforced court decisions have continued to damage the prestige of the law and have caused widespread criticism.²⁹

The problem with the enforcement of court decisions did not appear until the late 1980s, when cases awaiting resolution peaked in many courts across China. The

²⁷ Tang Min, "Network to help courts in cases", China Daily, October 19, 1998.

²⁸ He Sheng, "Courts face hurdles in backlog", China Daily, November 30, 1998.

²⁹ Tang Min, "Beijing to speed up judgment enforcement", China Daily, September 10, 1998.

situation was so bad that specific enforcement divisions had to be established in courts at all levels to cope with the problem. The debtors often try every means to conceal their real financial situations and put off repayment as long as possible. Some scofflaws have even used violence against law enforcers. Since August 1998, more than 30 incidents have been reported in Fujian Province in which about 30 law enforcers were injured during their attempts to resolve cases. Violence against law enforcement officers has become an increasingly serious problem. Four court police officers have been killed during the process of execution in the past three years.³⁰

Local protectionism is an important factor in the context of the increasing number of un-enforced cases. It is not uncommon for local governments and local people's congresses to intervene in execution. They either exert their influence from behind the scenes or stand by the culpable litigants in public. Jilin provincial government has reportedly announced a list of 94 major enterprises in its province slated for "special protection", saying they are free from any liability in court-ordered debt collecting actions. There are probably more protected enterprises at the prefecture and county levels. What makes things even worse is that some local courts have even found themselves confronting local police and local procuratorates as they tried to carry out their duties. In extreme cases, local police have even clashed with judges or taken away the goods confiscated by the court. More than 50 such cases have been reported to the Supreme People's Court since 1992. The impetus behind these clashes usually comes from local establishment authorities.³¹

Meanwhile, the lack of a detailed, unified regulation over court enforcement also contributes to the current difficulties. For example, the provisions on the execution of verdicts in the civil procedure law seem a bit too simple to avoid a variety of interpretations. Many cases also result from a poor level of awareness of laws and a lack of a belief in the rule of law among both the litigants and those who could have a say in law enforcement.³²

³⁰ He Sheng, "Courts face hurdles in backlog", China Daily, November 30, 1998.

³¹ *Id.*

In December 1998, the Supreme People's Court issued a document concerning how to deal with resistance to execution of laws. It empowers the local courts with greater authority and provides practical measures to defend the law's honour. The Supreme Court is now launching a special training course for the senior judges responsible for the enforcement of judgements.

To enforce civil court orders, local courts have begun to take tough actions against debt repudiators who refuse to pay overdue court-ordered debts despite having the economic ability to do so. Initially, names of the repudiators are being published in the local press in an attempt to bring the problem to the public's attention. If the repudiators continue to ignore the court, executors from the courts may enforce compliance. Local media have given support to the campaign by publicising debtors' lists over the last two months. These tough actions have proven effective in South China's Guangdong Province, including Guangzhou, Zhan-jiang, Shenzhen, Dongguan and Foshan. For example, most of the 112 enterprises and 16 individuals whose names were publicised by Guangzhou Intermediate People's Court in the press have paid 520 million yuan (US\$62.65 million) in overdue debts, accounting for 92.8 percent of the total.³³

In early 1998, Beijing's courts launched a mass campaign to ensure that debtors cannot repudiate their obligations. 170,000 yuan (US\$20,482) in outstanding debts was repaid within one day in Fengtai District People's Court.³⁴ Haidian Court announced a second order on July 17 to detain those who refused to carry out the court's decisions. On May 22, Haidian Court publicised the names of 54 units or individuals refusing to carry out court decisions involving more than ten million yuan (US\$1.2 million).³⁵ In addition to making the name list of debt repudiators public and compulsory means of enforcement such as detention, some local courts are restricting the daily consumption level of debt repudiators. This has also proven effective.

³² *Id.*

³³ Wang Rong, "Campaign launched to protect creditor's rights", China Daily, September 11, 1998.

³⁴ CD News, "Courts pursuing Beijing debtors", China Daily, September 11, 1998.

³⁵ Xinhua, China Daily, July 28, 1998.

8. The authority of interpretation of legislation by judges

In China, judges are only authorised to apply the legislation in the individual cases. They are not qualified to make the law. However, since some legislation is very general or even silent on a number of detailed issues, the judges need to exercise the authority of interpretation of legislation in order to determine the legal foundations for the case they are dealing with. It is possible for the judges to abuse such authority for the sake of personal interest.

Hence, it is necessary to deprive such authority on interpretation for certain issues. For instance, considering the difficulty of distinguishing between the acts of God and normal commercial risks, the unified Contract Law has deprived the local court judges of the authority to make the interpretation as to whether certain circumstances amount to an act of God. Only the Supreme Court has the authority to make a competent interpretation with regard to this issue.

It is also necessary to require that court rulings describe the detailed logic and rationale for making the interpretation of legislation comprehensively, and to disclose the interpretation of legislation by judges to the public. In practice, many court rulings are very simple and general with their wording, while the explanations for the interpretation of the legislation are sometimes not provided. It would be beneficial to impose some rigid requirements on the drafting of the court rulings.

II. Alternative Dispute Resolution (ADR)

1. Overview of the ADR: Types and functions

According to Chinese law, in the event of civil law and commercial law disputes, the private parties may pursue the following avenues of alternative dispute resolution in settling their disputes: (i) negotiation; (ii) mediation; (iii) arbitration. Of course, in case the negotiation or mediation fails to settle the disputes, and an arbitration clause is not provided in the contract and a written arbitration agreement is not reached afterwards, the parties may bring suit in the People's Court. Therefore, the Civil and commercial dispute resolution channels in China forms a pyramid, in which the negotiation mechanism functions as the bottom tier, the mediation

mechanism functions as the second bottom tier, the arbitration mechanism functions as the second top tier, the litigation mechanism functions as the top tier.

1) Negotiation

In China, the civil and commercial parties tend to hold negotiation talks between them. The negotiation mechanism encourages the parties to reach agreements on settling their disputes without the intervention of third neutral parties. Thus, negotiation mechanism is an indispensable part of contractual freedom. Since the two parties are in the best position to know their own interest, the negotiation results could usually satisfy the maximum demands and interest of both parties. Since no third party appears in the negotiation process, the negotiation mechanism is the most confidential technique among all the ADR techniques. Of course, the two parties may focus too much on their own interest and supporting reasons to ignore their opponent's interest and supporting reasons. However, due to the advantages of confidentiality, efficiency and friendship maintaining, the negotiation mechanism is the most predominant channel in resolving the disputes in China. The disputes parties only try mediation, arbitration or litigation after they have not found success in negotiation process.

2) Mediation

In China, mediation is classified into administrative mediation and private mediation. In administrative mediation process, a government agency acts as the mediator; in private mediation process, a private party, either a natural person, or legal person, including non-governmental organisation, acts as the mediator. Although administrative mediation process exists for the purpose of resolving private disputes, it is less important than private mediation in terms of disputes resolved.

In mediation process, there is a neutral third party assist and facilitate the dispute parties to negotiate each other, and to reach a settlement agreement. In China, there are various categories of mediators, including but not confined to, people's mediators at grass-root level, consumer associations, government agencies, etc.

Like negotiation, mediation also permit maximum private autonomy enjoyed by the parties due to the following factors: First, the mediator is chosen by both parties. Second, both parties are actively involved in the dispute resolution process. Third, the disputes are settled by agreements reached by both parties, not imposed by third parties.

Compared to negotiation, mediation could be made much more organised and effective, as a third neutral party will assist the two parties to identify the best approach to satisfy the needs of both parties. As a Chinese old saying indicates, the parties in question are usually naive, and outsiders are usually informed. Of course, mediation does not work very well in every dispute, as the success of mediation depends upon the co-operation from both parties. If one party refuses or fails in working closely with his opponent and the mediator, mediation will be frustrated. In these circumstances, the parties might need to turn to arbitration or litigation. Among ADR techniques, the mediation mechanism is the second most popular channel in resolving the disputes in China.

3) Arbitration

In case the parties are unwilling to solve a dispute through consultation or mediation, or fail to do so, the dispute may, be submitted to a Chinese arbitration body or some other arbitration body. However, the precondition for applying for arbitration is that there is an arbitration clause provided in the contract, or the written arbitration agreement reached by the parties afterwards. The arbitration clause or agreement shall have the following contents: an expressed intent to request arbitration; items for arbitration; and the chosen arbitration commission.³⁶

According to the Arbitration Law of 1994, the arbitration award is finally binding on the parties, and the party that is not satisfied with the arbitration award may not bring the case to a people's court. But labour dispute arbitration is an exception. For if the workers involved are not satisfied with the adjudication of arbitration, they may bring the case to a people's court. If they are not satisfied with the judgement of the first instance, they may appeal to the court of second instance.

³⁶ Arbitration Law, Article 16 (1994).

Of course, it is quite burdensome for the workers to follow both arbitration and suite channels.

2. Current situation regarding the use of ADR

1) Use of negotiation

In China, most private parties tend to consider negotiation the top priority to pursue in resolving their disputes. The main reasons are that negotiation helps to save the time, financial and other resources for the parties, and to avoid destroying the long-term business or community solidarity built in the business history. For instance, many business corporations in China have established special departments inside the corporations, responsible for processing the consumer complaints.

2) Use of mediation

Chinese traditional no-litigation culture has promoted the healthy development and maturity of mediation mechanism as an alternative disputes resolution, which has been known as "East Experience" in the eye of westerners. Therefore, both traditional and contemporary societies give special attention to mediation mechanism. For instance, people's mediators at grass-root level, new version of Chinese traditional mediators, are still an indispensable part of China's dispute resolution system. As to May of 1999, according to the statistics of Chinese Ministry of Justice, there are nearly 10 million mediators in China. They handled nearly 87,000 civil disputes in 1998. Over the past two decades, they have mediated nearly 130 million civil cases, 5.3 times those handled by courts. Their efforts have also prevented 2.86 million civil disputes from becoming acute, stopped more than 1.5 million attempted suicides provoked by civil disputes and halted 1.3 million civil quarrels from flaring up into criminal cases.³⁷ Since mediation itself is a product of no-litigation culture, able to save the face for both dispute parties on one hand, and able to reduce the disputes resolution cost, it can be expected that these mediators will continue to play important roles in resolving the civil and commercial disputes. Of course, mediators need further build their intellectual expertise, and get more actively involved in newly

³⁷ Shao Zongwei, "Mediators face new challenge", China Daily, May 28, 1999.

emerged industries and social corners.

3) Use of arbitration

In the 1980s, foreign firms strongly objected to arbitration in China because they did not have confidence in the fairness of Chinese arbitration proceedings or the means of enforcing arbitration awards. By the 1990s, the China International Economic Trade and Arbitration Commission (CIETAC) has become one of the largest business arbitration centres in the world, and is considered to be a fair forum. Since the adoption of Arbitration Law in 1994, many major cities have established independent arbitration bodies. Beijing Arbitration Commission is one of the newly emerged arbitration bodies, and arbitrates around 500 commercial cases annually.

Generally speaking, the parties will voluntarily implement the arbitration award. If one of the parties fails to implement the award, the other party may apply to a people's court for enforcement. If the people's court that has been requested to enforce an arbitration award finds the award unlawful, it shall have the right to refuse the enforcement. If a people's court refuses to enforce an arbitration award, the parties may institute proceedings concerning the contractual dispute in a court.

As far as the speed of dispute resolutions is concerned, most arbitration bodies are able to conclude the resolution of the disputes within a fixed period. The Arbitration Law of 1994 is silent on the time limit requirements for delivering the arbitration award. This issue is always dealt with by the arbitration rules of arbitration bodies. For instance, under Article 48 of the Arbitration Rules of Beijing Arbitration Commission, the arbitration award shall be made within four months dating from the formation of the tribunal of arbitration. Such time limit requirements are often satisfied.

3. Parties' viewpoints with regard to ADR

In contrast with the characteristic of American society, Chinese traditional society has been reluctant to resolve the disputes through litigation. Although development of market economy has stimulated the rapid growth of litigation in China, most Chinese people prefer ADR to litigation. There are various reasons to explain such attitude. However, Confucian no-litigation culture has played a crucial

role in shaping parties' viewpoints with regard to ADR.

One of the fundamental characteristics of Confucian vision of law can be summarized as no-litigation preference. In other words, although litigation were heard by the government officials who had both administrative and judicial powers, they were perceived as something undesirable, disgraceful and abnormal, and needed to be eliminated in an ideal society. Confucius himself expressed this argument very clearly: "In hearing litigation, I am like any other body. What is necessary, however, is to cause the people to have no litigation."³⁸ The ironical thing was that, Confucius himself was once a judge. However, he did not encourage people to go to court for dispute resolution. In the same line, Fan, a learned subsequent commentator, interpreted no-litigation as the following, "The purpose of hearing a case is to resolve the dispute itself, and block the sources giving rise to disputes". Yang also noted that, "Confucius did not consider hearing cases as a difficult job, rather considered no-litigation among and between the people as the most fundamental issue"³⁹

Then, why Confucianism was so enthusiastically pursue a utopia without litigation? Theoretically speaking, such a litigation-disliking attitude could be traced back to the root of Confucianism vale system. In the relationship-oriented theoretical framework, Confucius paid special emphasis on the significance of "DE" (ethics, virtue and morality) building for a person who wants to become superior man (JUN ZI).⁴⁰ Since ethical requirements are broader, stricter and more comprehensive than legal requirements, no qualified superior man is satisfied with only complying with less rigor legal requirements. Such a characteristic thus remains the fundamental difference between superior man and mean man or small man (XIAO REN). Once people transform themselves into superior men, the whole society will be in harmony and peace, and disputes in society will become less and less. Therefore, less or even no litigation is a necessary condition for a society to become a harmonious and ideal society, so called "Common wealth World"(DATONG SHIJIE).

³⁸ Verse 13, Yanyuan 12, LUN YU.

³⁹ Zhu Xi, Adavance 11, Book 6, ZHUXI JIZHU.

See also: <http://read.cnread.net/cnread1/gdwx/z/zhuxi/lyjz/006.htm>.

⁴⁰ Chinese concept "JUNZI" could be translated into various counterparts, including but not confined to, "gentleman", "a man of complete virtues" or "superior man". Of course, it is difficult to choose a most appropriate word for the translation purpose.

No wonder why Confucius tried his best to persuade people to get rid of litigation as more as possible.

Confucius no-litigation attitude has greatly influenced Chinese mainstream legal philosophy at both official and grass-roots levels from Han Dynasty through late Qing Dynasty even contemporary China. In addition to the consideration of fame or face, a much more important concern is about the political stability possibly brought by litigation. At official level, most emperors and government officials consider diminishing litigation as one of their governing goals. Thus, the number of litigation served as an important yardstick to evaluate the political performance of the local officials. For example, Han Yanshou, a governor of Dongjun in Xi Han Dynasty, attributed the private litigation to his insufficient morality building. For this reason, he always closed himself inside home, re-examining his faults relevant for the private litigation. Consequently, the parties to the litigation also deeply blamed themselves, eventually, 24 counties within his jurisdiction witnessed no litigation for a period of time since then.⁴¹

Even the court of justice of Min Guo period in early twentieth century clearly endorsed the no-litigation preference. For instance, the Capital Higher Court of Justice in Nanjing had a horizontal hanging scroll, "Fairness and Justice"(MING JING GAO XUAN), its left couplet saying "the purpose of trial of litigation is to expect no litigation"(TING SONG QI WU SU), and its right couplet saying "the purpose of imposition of punishments is to reduce their imposition"(MING XING FU XU XING).⁴²

To guarantee the value of no-litigation preference, the governing class tended to obligate the dispute parties to first exhaust private mediations to settle the disputes. In Song Dynasty, the judges usually tried to mediate between the plaintiffs and the defendants, in order to diminish the litigation. In Yuan Dynasty, it was mandated that, "all the disputes regarding marriage, family property, land and house, debtor's default, unless gross breaches of law, shall be mediated by the local community leader

⁴¹ Zhang Jinfan, "Several Issues on the World Position of Chinese Legal Culture and its modernization". See, <http://www.cin.hebnet.gov.cn/Others/Rendafazhi/d6j2.html>.

⁴² Zhuming, "Minguo Shiqi De Shoudu Gaodeng Fayuan", Tuanjie Bao, November 27, 1999.

through convincing, in order to avoid the loss and waste in farming". In Ming Dynasty, most minor criminal cases and civil disputes were required to submit to mediation first by county sheriff, local official and clan seniors.⁴³

Apart from the resistance of litigation on the part of governing class, grass roots people were also reluctant to bring litigation to the court. There are several reasons to explain their attitude. The first factor is the great concern about the litigation cost arising from motivating a case to the court. Many people got afraid of endless involvement into the litigation process, and inevitable suffering of loss in terms of money and time that would be able to be shifted to farming. While the cost associated with private mediation is very moderate, the cost arising from litigation might be too high to under the parties' control. The second factor is judicial corruption. Judicial corruption had been a big social problem through most Chinese feudal history. There is old saying, "Although the gate of court is widely open, grass roots people should not go there if they only have good reasons, but don't have enough money to bribe the judges there" (GUANFU YAMEN BAZI KAI, YOU LI WUQIAN MO JINLAI). Although there were many sophisticated written codes, most of judges were also the administrative in certain regions; it was very normal for the judges to follow the administrative procedures to hear the case, which was more arbitrary and less open. Arbitrary and less open judicial procedure in return to breed judicial corruption. The third factor is relevant to the concern about potential loss of face or fame. Although litigation cost was not a big problem for the parties, they might be deeply concerned about their potential reputation loss arising from the litigation. Chinese feudal society was a typical agricultural society. The farmers had been living in certain area for succeeding generations and usually kept very close touch each other. They also had to care a lot about the evaluation from other members in terms of family and clan harmony and personal morality. Whatever roles they might play, either plaintiff or defendant, the mere fact of being alienated with the litigation would convey a shamed and disgraceful message to other members in the clan and local community. Although there were litigation in certain periods or regions all the time, it was true that grass roots people generally try to avoid litigation

⁴³ See also, Cheng Zongzhang, "Zhongguo Chuantong Shehui Wusong Guan Zairenshi", <http://www.enweiculture.com/Culture/whlt/t993/zgct.htm>.

as more as possible. Lack of sufficient litigation incentives also partly explains why attorneys had not created an independent legal profession in Chinese feudal society.

In English, ADR has various nicknames, such as “Adequate Dispute Resolution” or “Avoiding Disastrous Results.” These nicknames have strongly indicated the virtues and advantages of ADR. They are also the common attitude of private dispute parties in contemporary China.

4. Problems of the ADR

ADR is not perfect and is not workable in all the circumstances in China. Rather, all ADR techniques have their disadvantages. As far as negotiation is concerned, either of the two parties could block the negotiation process, and such blocking could happen very frequently especially when one party focuses too much on its own argument and ignores too much about the argument of its opponent. For instance, some business corporations ignoring social responsibility or business ethics, do not want to take into account the reasonable consumer complaint, and therefore force consumers turn to mediation, arbitration or litigation.

In contrast, mediator could make mediation process manageable by pointing out the problems frustrating the negotiation. However, the mediator is neither an arbitrator nor a judge. It means that the dispute parties have the final decision right as to whether to accept the mediator’s suggestion or not. Therefore, many private cases could not be properly settled by mediation in China. For instance, many consumer disputes of small claim are left unsettled due to the failure of cooperation on the part of business or consumers, lack of mediation staff and investigation means, lack of enforcement authority.

Arbitration also has its own disadvantages. First, it is possible that the two parties forget or fail in reaching an arbitration clause in advance, and that the two parties fail in reaching an arbitration agreement afterwards. Second, the arbitration bodies are not necessarily competent enough to hear hundreds of millions of private disputes. For instance, many arbitration bodies focus on hearing commercial disputes of large claim, but unwilling to hear hundreds of millions of consumer disputes of small claim. That is why many local consumer association have begun to

establish special arbitration bodies responsible for hearing consumer disputes of small claim.

5. Value in ADR

ADR functions as a very useful, effective and workable tool in resolving disputes. The values of ADR have already been demonstrated in the past Chinese history, not only by no-litigation culture, but also by the wide use of negotiation, mediation and arbitration in modern times.

The first value of ADR is efficiency and cost saving. General speaking, ADR requires much less resources to be devoted to settle private disputes than litigation. As mentioned above, based on current civil procedure legislation, it takes the parties nine months to get the final court rulings. However, both courts of first instance and courts of second instance are entitled to prolong the trial for due cause. In contrast, either negotiation, mediation or litigation could be concluded within shorter period. Shorter period of dispute resolution usually, if not always, means less cost, and less human resources spent on the dispute resolution process.

The second value of ADR is maximum confidentiality or privacy. When ADR techniques are used, the dispute resolution process is conducted in private, and not open to the public. Nobody except the parties, their attorneys, witnesses, is permitted to observe the dispute resolution process without the consent of both parties. The parties or mediators or arbitrators have no authority to disclose the final settlement results, unless both parties grant the permission. Contrarily, the litigation process must be open to the public, except for the cases involving national secrets, privacy and minors. Even the verdicts of these three kinds of cases must also be announced publicly.

The third value of ADR is maximum private autonomy or contractual freedom. In ADR process, the parties have the final and ultimate control over the procedural and substantive issues, including the selection of specified ADR technique, mediators or arbitrators, and low degree of formality than litigation. In contrast, the litigation parties have less control over the litigation process than ADR process. For instance, the judge is appointed by the court of justice, not by the parties. The litigation

process is much more formal than ADR process, and is usually highly structured by set legal rules.

Considering the value of ADR and possible negative effects of litigation, including costly and fame-destroyed consequences for the parties, Chinese traditional no-litigation culture is correct in arguing that litigation mechanism itself is not a value to pursue, even not the best tool to pursue the value of harmony. In recent past years, China adopted the policy of building rule of law. However, many people thought "rule of law" are closely connected with litigation, and consider active litigation as a yardstick to test the progress of rule of law. It is very easy for the people to forget the most fundamental value to pursue while they are busy in suing or being sued each other. Therefore, traditional no-litigation culture is positive in encouraging the private disputes to be resolved more effectively, gracefully and less costly than going to court of justice. Such channels might be negotiation, mediation or arbitration. However, traditional no-litigation culture could not be interpreted as to deny the justification of all litigation. Because in most cases, either plaintiffs or defendants are justified to protect their legitimate interests and rights through litigation, and the justice in individual cases would not be able to realize without litigation process. And Confucius himself did not said he refused to hear cases; what he said was to pursue an ideal society without litigation. Of course, when litigation become inevitable, Confucius would urge the court to hear the cases in efficient and economic way, and exhaust mediation procedure first, and enforce the fair and reasonable judgments as soon as possible. When modern China sets her first step in the track of moving to litigious society, there are always something positive could be learned from Confucius in promoting the growth of ADR mechanism in China.

A PERSPECTIVE ON COMPARATIVE STUDY OF DISPUTE SETTLEMENT INSTITUTIONS AND SOCIOECONOMIC DEVELOPMENT

*With reference to “The Role of Law and Legal Institutions in Asian Economic
Development 1960-1995”*

by

Miwa Yamada *

The purpose of this paper is to raise questions regarding the methods and findings of a study of dispute settlement institutions in Asia in the book titled “The Role of Law and Legal Institutions in Asian Economic Development 1965-1995.”¹ Initiated by and published for Asian Development Bank, the book examines the correlation between legal development and economic development during 1960-1995 in six Asian economies: China, India, Japan, Korea, Malaysia, and Taiwan. The research in the book consists of three studies: the relationship between corporate law and capital formation, the relationship between security interest law and lending, and the relationship between dispute settlement institutions and economic development. I will, inter alia, focus on the study of the relationship between dispute settlement institutions (DSIs) and economic development (hereinafter referred to as ‘the Study’), for the Study contains interesting implications for our joint research project.

First, I will overview the framework of the Study, introducing methods used and findings therein. Second, I will raise questions regarding findings of the Study about Japan, and third, discuss the method used in the Study to analyze the correlation between

* Researcher, Institute of Developing Economies (IDE), Japan.

¹ Katharina Pistor and Philip A. Wellons, *The Role of Law and Legal Institutions in Asian Economic Development 1965-1995*, Oxford University Press, 1999.

dispute settlement institutions and socioeconomic development. Finally, I will present remarks about our joint research project on dispute settlement institutions.

I. Overview of the Study

1. Purpose of the Study

Western historical experience suggests that the availability of effective and low-cost dispute settlement is an important condition for expanding markets, for meeting the increasing complexity of economic development, and thus ultimately for economic development itself. In order to prove that this experience also applies to Asia, the Study analyzes the role of legal institutions, in particular the role of courts in Asian economic development, focusing on the role of dispute settlement institutions in resolving commercial disputes between non-state parties.

2. Samples used in the Study

To analyze the importance of formal DSIs, the Study collected data on litigation, the total number of civil cases. [See Table 1 for Japan.] Litigation rates indicate the demand for DSIs. The demand for dispute settlements in the courts, however, may be determined not only by the willingness but also by the availability of DSIs. Therefore, the Study also presents data on the number of courts at different levels and the number of judges.

3. Methods used in the Study

The Study tests the proposition that formal dispute settlement will become more important with increasing division of labor. The Study ranks the six economies on a common scale. [See Table 2.] To measure the division of labor, the Study selected three indicators that are summarized in a cumulative index on a scale from zero to ten, called the Division of Labor Index. The three indicators are (i) the share of the population in urban areas; (ii) the share of the population engaged in agriculture (negative indicator); (iii) the share of the population above the age of 25 that has completed primary and secondary education. These indicators measure the diversification of economic activities, which is typically higher in urban than in rural areas as well as in sectors outside

agriculture. Education levels reflect the level of human capital available for more diverse economic activities. The Study seeks a correlation between the Division of Labor Index and the litigation rates in six economies.

4. Findings in comparison across economies

The Study's findings are summarized as follows: (1) Over the long term, rates for litigation concerning civil and commercial disputes increased in all economies. The Study found a positive and statistically significant correlation between per capita litigation rates and indicators for the division of labor. [See Table 3.] It suggests that with economic development, legal institutions will perform increasingly similar functions throughout the world. (2) Still, litigation rates vary considerable across economies. The variations cannot be explained by economic development, or the extent to which division of labor has been achieved in these economies. For example, litigation rates in Japan in particular have remained much lower than in the other high performing economies. (3) Nor do institutional constraints explain differences in litigation rates. Comparing litigation rates in Japan with those of the Republic of Korea and Taiwan, it is demonstrated that even when these countries share civil law tradition and a legacy of state imposed ceilings for the legal profession, litigation rates can vary considerably. This puzzle of persistent divergence is not solved.

II. Questions on Findings about Japan

1. Statistical question on Japan's low litigation rate

The data in the Study are limited to the number of civil litigations in first instance courts, and the Study explains that the reasons for the low number of civil litigations are culture and institutional barriers, including control mechanisms the state exercises over the judiciary. The Study did not refer to the court-connected mediation, which is significant in terms of the number of cases and the outcome available.

One distinctive feature of the Japanese court system is that it provides court-connected mediation.² According to the data in 1999, the number of civil litigation cases filed in courts (district courts and summary courts) was 523,000 in total, whereas 264,000 civil mediation cases³ were filed in courts (summary courts and district courts). The number of civil cases filed in court-connected mediation is equivalent to more than half of all civil cases.

An agreement between the parties in court-connected mediation has the same legal effect as settlement in litigation. When the parties do not reach an agreement, the court may render a decision if it is deemed necessary for resolving the dispute. If no party objects to the decision within 2 weeks from its notification, the decision will also have the same effect as settlement in litigation. In litigation, almost half of all litigation cases end in settlement without rulings.⁴ Though the litigation procedure differs from court-connected mediation procedure, in many cases both produce outcomes with the same legal effects, i.e. settlement in litigation, that is to be enforced as final judgment.

The number of court-connected mediation cases is significant and cannot be ignored in researching litigation in Japan. Limiting the statistics to the number of litigation cases filed does not necessarily reflect litigation propensity or institutional barriers of courts. People might bring a suit with the aim of settling in litigation, and also might use courts for mediation to obtain the same results that they would obtain by bringing a suit. Therefore, the figure in the Study may not necessarily reflect accurately the litigation preference of Japanese people. Looking at the similar outcomes resulting from litigation and court-connected mediation cases, suggests the need to adjust the number of litigation cases by taking court-connected mediation into consideration.

² In a court-connected mediation, a judge sits with two mediators appointed from among non-judges. The qualifications of mediators are (1) to be an attorney, (2) to be able to provide useful and well-versed knowledge and experience in resolving civil disputes, or (3) to possess valuable life experience, and be aged more than 40 and less than 70. *Minji Chotei Hou* (Code of Civil Mediation Law), *Minji-Chotei-Iin Kisoku* (Rules of Civil Mediation Members)

³ This number excludes family cases.

⁴ Naohisa Hirota, “ADR as Dispute Settlement Means in Comparison with Litigation” (in Japanese), No.1207 *Jurist*, 2001.

2. Questions on analysis of Japan's low litigation rate

The comparison of litigation rates in the Study is based on the premise that in the societies with similar social structures and in similar economic development stages, the number of disputes per unit of population would be approximately the same. On this premise the litigation rate is calculated by dividing the number of litigation cases by the population, and the rate is deemed to be litigation propensity in the society. The Study found that the record of civil, including commercial litigation, in Japan between 1960 and 1995 casts some doubt on theories suggesting that commercial litigation increases with the expansion and increase of complexity of economies. The fact remains that in comparison with other highly industrialized economies in the West, but also, in comparison with other Asian economies, the propensity to litigate in Japan has been low. The Study attributes the comparatively low litigation rate in Japan to its culture and institutional barriers.

It is said that in contrast to Western culture, Japanese culture, with its emphasis on harmony, influences the preference for mediation and conciliation rather than litigation, which is deemed to be hostile. However, examples proving the contrary are also found: e.g. Christian ethics to deter litigation and social conventions to avoid impetuous litigation in the US business community.⁵ Further, in the US, where the litigation rate is comparatively high, most of the litigation cases filed end up in settlement, with less than 10% proceeding to trial.⁶ Thus, it is not easy to make a sharp contrast between Japanese culture and Western culture, harmony on one hand and confrontation on the other hand.

The Study presented institutional barriers as another reason for the low litigation rate in Japan. Institutional barriers are often shaped by culture, but they may also reflect the political interests of the governing elite, as opposed to the economic or cultural preference of disputing non-state parties. The strong evidence for the existence of institutional barriers is the control over the size of the legal profession, including judges

⁵ Yasuo Watanabe et al., *Textbook Modern Judiciary* (in Japanese) Nihonhyoronsha, 2000.

⁶ Takeshi Kojima, *Out-of-court Dispute Settlement and the Rule of Law* (in Japanese) Yuhikaku, 2000.

and attorneys.⁷ However, as admitted by the Study itself, as similar constraints have not led to the same outcome in other economies (Korea, Taiwan), institutional barriers alone are not a sufficient explanation for the low litigation rate in Japan.

Predictability in dispute settlements would be another factor to cause the low litigation rate.⁸ Parties would settle their disputes by means that would rationally maximize their wealth. When both parties can foresee the outcome of litigation and the plaintiff can recover damages outside litigation, litigation would be avoided as the result of rational judgment made by the parties. Ramseyer proved this assumption in traffic accident cases in Japan, where a developed insurance system is available.⁹ It is concluded that a low litigation rate does not necessarily mean that people do not pursue their legal rights. If apart from litigation there are more effective and lower cost mechanisms that would enable the parties to fulfill their rights, culture and institutional barriers are insufficient to explain the low litigation rate in Japan.

III. Questions on Analysis Methods

1. Definition of dispute settlement institutions

The Study is based on the premise that the availability of effective and low-cost dispute settlement is an important condition for expanding markets with complex business transactions. In other words, as markets expand, formal institutions that have the power to enforce their rulings against parties unwilling to comply voluntarily become more important. In the West, that is the court system. Partly due to the lack of data, therefore, the Study dealt with only formal DSIs, i.e. litigation in court systems established by states. However, if the Study intends to examine the relationship between effective and low-cost dispute settlement and the expansion of markets, the Study does not necessarily have to limit its subject to the court system. There are DSIs other than

⁷ Frank K. Upham, *Law and Social Change in Postwar Japan*, Harvard University Press, 1987.

⁸ *Supra* note 5.

⁹ Mark Ramseyer, *Law and Economics* (in Japanese) Kobundo, 1990.

courts that could certainly serve as mechanisms to solve disputes effectively at low cost. In fact, the court system, which is believed to be effective and less costly, is often found not to be the case even in Western countries.

When we study a particular DSI, we need to define the institution as it is distinguished from other institutions. Otherwise, we will not be able to analyze the reasons why the particular institution is used or not used. The Study contrasted litigation as a Western system against conciliation/mediation as an Asian system. However, the dichotomy between litigation and other dispute settlement institutions is not easy to establish. We can find conciliation/mediation elements in the litigation process in the Western countries such as the US¹⁰ and England¹¹. In Japan, the court-connected mediation also provides the parties with a forum where, with professional advice on issues, they estimate the time and cost in case of litigation and foresee the outcome, considering several determining factors such as enforceability. Whereas the pretrial conference is a part of litigation, the court-connected mediation is not within litigation. As DSIs, however, they may share similar functions in seeking a possibility of settlement.¹² When a case is filed in a court and then referred to other dispute settlement means, whether inside or outside the court, we cannot conclude that the dispute in the case filed is resolved by the court. We cannot, therefore, draw the conclusion that the

¹⁰ Federal Civil Procedure Rules 16 (amended 1983, 1987, 1993) explicitly recognizes that it has become commonplace to discuss settlement at pretrial conferences. Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early stage of the litigation as possible. Although the Rule does not impose settlement negotiations on unwilling litigants, it is believed that providing a neutral forum for discussing the subject might foster it. For instance, a judge may arrange, on his own motion or at a party's request, to have settlement conferences handled by another member of the court or by a magistrate. In addition to settlement, the Rule refers to exploring the use of procedures other than litigation to resolve the disputes. Notes of Advisory Committee on 1983 amendments to Rules.

¹¹ The Civil procedure (Amendment) Rules 1999 provides that when appropriate, a judge may recommend that the parties use alternative means other than litigation. The purpose of the pretrial conference is by discovery at an earlier stage to enable the parties to foresee the outcome of the disputes so that they may be able to avoid litigation in cases where they might incur wasteful time and costs.

¹² The significance of the pretrial conference is facilitated by the discovery system, which Japanese court-connected mediation lacks. Settlement in pretrial conference is deemed a contract between the parties, unlike settlement in litigation in Japan, which is equivalent to final judgment. In terms of technical accuracy, comparison of the systems in this paper is insufficient and needs further study.

increasing number of cases filed reflects the increasing significance of the court's role in dispute settlement.

For a study of effective and low-cost institutions for settling disputes, both litigation and non-litigation institutions need to be covered. If we narrow our study to litigation only, it is necessary to define the significance of the court system, which other DSIs do not have. Is it the state's power to enforce the ruling against parties unwilling to comply voluntarily? Would social sanction serve as a third-party power to enforce in cases other than litigation? Defining the significance of each DSI, we will be able to articulate their relationships to socioeconomic development.

2. Function of DSI

When we look at the statistics of cases in DSIs, it is necessary to distinguish the functions of each institution, such as function to receive cases, function to settle cases, and function to enforce rulings. The statistics to be selected would differ depending on functions. In order to examine how DSIs function in settling disputes by statistics, it is suggested to classify the following: a) the number of cases filed, b) the number of cases settled by ruling, c) the number of cases transferred to other institutions, and d) the number of cases withdrawn.

When a plaintiff brings a suit and succeeds in collecting his claims by enforcement of judgment, we can conclude that the number of cases filed actually shows the number of cases where the court functions to settle disputes. This, however, is not always the case. When a case is filed but transferred to institutions outside the court and settled there, the number of cases filed does not reflect the court's function as dispute settlement institutions. Data on the number of cases filed is, therefore, not sufficient to prove that the court functions as a dispute settling institution. If the Study focuses on the court system because the court system entails the power to enforce rulings, the number of cases settled by ruling and the number of cases enforced should be surveyed, not just the number of cases filed.

3. Factors determining litigation rate

The Study is based on the premise that as markets expand and the complexity of impersonal transactions increase, disputes between parties who do not belong to the same ethnicity or trade will increase, and thus, the number of litigations will increase as well. This assumes that in the societies with similar social structures and in similar economic development stages, the number of disputes per unit of population would be approximately the same.

In reality, however, the number of disputes would be determined by numerous variables. For example, the rate of defective products would differ in different countries, and a lack of a particular system such as land registration would contribute to an increase in disputed cases. In order to calculate litigation rates precisely, we need to distinguish the factors determining the number of litigations from the factors causing disputes. In calculating the litigation rate, the denominator should be the total number of disputes occurring and the numerator should be the number of disputes that are brought before courts. Thus, in order to obtain an accurate litigation rate, not only dividing the number of litigations by population, but further, we need to consider various factors to adjust the statistics.

4. Division of labor index

In the Study, to test the proposition that formal dispute settlement will become more important with increasing division of labor, the six economies are ranked according to a cumulative index on a scale from zero to ten, consisting of three indicators: i) the share of the population in urban areas, ii) the share of the population engaged in agriculture (negative indicator), and iii) the share of the population above the age of 25 that has completed primary and secondary education. These three indicators are believed to represent the diversification of economic activities. The Study concluded that there existed a positive correlation that was statistically significant between litigation rates and the three measurements for the division of labor.

It should be noted that the finding does not provide a direct causal link between the litigation rate and the division of labor index. The division of labor index alone cannot explain the increase of litigation rate unless it also considers what factors contribute to choosing litigation other than non-litigation methods and what factors deter such choices as well. The Study itself, however, admits that civil and commercial litigation is a more complex matter than a simple function of labor in society and the supply of court institutions.

In order to find a correlation between market expansion and increase in litigation rates, I suggest a research with a limited scope targeting business entities and commercial disputes, instead of viewing the society as a whole. Samples of business entities can be classified by the number of their clients, the geographical expansion of their markets and the volume of trading. Then we would survey commercial disputes they are involved in and how they resolve them, whether by litigation or other means, and the reason for such means. The result would be more accurate and credible for proving the correlation between market expansion and increase in litigation rates in a particular context of commercial transactions.

A fundamental question about the Study is whether increasing division of labor equates with socio-economic development. The Division of Labor Index adopted in the Study is based on the premise that the increase of urban population, decrease of agricultural population, and increase of population with education represent the increase of markets and more complex economic transactions. Expanding markets and increasing complexity of economic transactions are only limited aspects of economic development. In order to measure socio-economic development, we need more indicators.

IV. For Further Research

The Study tested the proposition that a court system modeled after and transplanted from the West would play an important role in economic development as it did in the West. It assumed the same economic development path would be followed by Asian countries and overlooked their variety. In fact, Asian countries track different respective paths in their socio-economic development and possess a variety of DSIs.

For further research on how DSIs evolve in response to changes in the socioeconomic environment, it will be necessary to analyze the interaction between the propensity to litigate or to use other institutions within a specific environment of a given country and outcomes available in each institution. After the Asian economic crisis, many Asian countries have undergone judicial reforms, and a variety of dispute resolution systems are drawing attention. With the increasing complexity of economic development, dispute settlement institutions are needed to handle not only commercial transactions but also disputes arising from diversified interests in societies. Labor disputes, consumer protection disputes and environmental disputes reflect drastically changing modern societies. Our joint research on these cases will find how DSIs play important roles in present Asian societies.

Table 1 **Civil Litigation**

<i>Year</i>	<i>Cases filed</i>	
	<i>Number</i>	<i>PMP</i>
1962	132,191	14.0
1966	169,979	17.3
1970	175,164	17.0
1974	149,688	13.5
1978	156,505	13.6
1982	244,069	20.5
1986	335,679	27.6
1990	210,178	17.0

PMP = per million people

Source: Excerpt from Pistor and Wellons, p.230.

Table 2 **Division of Labor Index, 1960 and 1995**

<i>Economy</i>	<i>Indicators</i>							
	<i>Share of population in urban areas (percent)</i>		<i>Share of labor force in agricultural sectors (percent)</i>		<i>Mean years of secondary education</i>		<i>Cumulative index</i>	
	<i>1960</i>	<i>1995</i>	<i>1960</i>	<i>1995</i>	<i>1960</i>	<i>1995</i>	<i>1960</i>	<i>1995</i>
PRC	18.2	30.3	80.8	73.5	0.96 ^a	1.56		
Index	2	4	2	3	8	9	4.0	5.3
India	18.8	26.8	72.9	64.1	0.12	0.84		
Index	2	3	3	4	2	8	2.3	5.0
Japan	67.3	77.6	26.4	7.2	1.87	3.06		
Index	9	10	8	10	10	10	9.0	10.0
Korea, Republic of	32.4	81.3	55.1	18.1	0.97	3.47		
Index	4	10	5	9	8	10	5.7	9.7
Malaysia	29.9	53.7	58.6	64.0	0.49	1.63		
Index	4	8	4	8	6	9	4.7	8.3
Taiwan	51.0 ^b	63.0	46.5	12.8	0.92	2.49		
Index	8	9	6	9	8	10	7.3	9.3

a. Education estimate for PRC is based on 1975 data.

b. Population estimate for Taipei, China is based on 1974 data.

Source: Pistor and Wellons' calculations based on 'World Development Indicators' The World Bank (1997).

Table 3 Demand and Supply of DSIs in Lower and Intermediate Level Courts in Asia, 1960 and 1995

<i>Economy</i>	<i>Type of cases</i>	<i>Litigation rates (PMP)</i>		<i>Number of judges (PMP)</i>	
		<i>1960</i>	<i>1995</i>	<i>1960</i>	<i>1995</i>
PRC ^a	Commercial at lower and intermediate levels	461.8	1,124.0		137.5 ^a
India	Civil at lower levels	489.6	1,209.0	5.5	10.9
Japan	Civil at all levels	1,782.7	3,386.8	25.2	22.8
Korea, Republic of	All civil except family cases	1,194.0	14,713.0	11.6	27.0
Malaysia	Civil at lower and intermediate levels		17,850.0	7.1	15.3 ^b
Taipei, China	All civil including family	17,420.0	37,660.0	32.4	57.1
	Commercial only	694.4	865.5		

PMP= per million people

a. Numbers for PRC are based on estimates. Note that many who serve as judges do not have full legal training.

b. Data for Malaysia are for 1990.

Source: Pistor and Wellons, p.246.

Discussions in Session I

As social and economic conditions drastically change, Asian countries face challenges to establish systems for fairly and effectively resolving the variety of disputes that arise increasingly in our societies. For dispute resolution, litigation in the court is not the only option. Mediation and arbitration proceedings outside the courts are important facilities as well. In addition, administrative organs and private organizations such as bar associations function as resolution systems for dealing with the increasing number of disputes. While discussions on out-of-court dispute resolution systems are not conclusive, a wide range of ADR facilities have been established and used actively in practice. The purpose of some ADR is to mitigate the backlog in courts, while others are intended to bring about less costly and speedier resolutions than courts do. In addition, people may find in ADR the opportunities to resolve disputes that are technically difficult to bring to court.

In order to capture the entire picture of dispute resolution systems, a comprehensive analysis of both the in- and out-of-court dispute resolution processes is essential. Country presentations on the first day of the Meeting gave a comparative study of the current situation of dispute resolution processes in the courts as well as ADR in Asian countries.

The first issue discussed in the first session was whether Asian countries would be able to provide a forum that parties would turn to for dispute resolution. There is a Regional Arbitration Centre in Kuala Lumpur, which provides arbitration for disputes arising from cross-border transactions in Asia; however, the rate of access to the center by Asian parties is considerably low. It was pointed out that even in disputes between Asians, parties tended to choose arbitration in Western countries and by Western arbiters. This is because the Western system is believed to have more trustworthy and transparent procedures. In order to determine the reasons, the importance of a comparative study on arbitration in Asia was stressed. It would be helpful to discover the extent to which Asian people are using our own arbitration

centers in Asian countries versus their use of Western arbitration and arbiters instead. While Singapore International Arbitration Centre has been relatively successful, Japan Commercial Arbitration Association has dealt with very few cases. Although Asian countries imported or adopted the systems from the West, how the systems function depends upon how the systems have developed in the respective Asian countries. Through comparative study, we will be able to find how to promote Asia as arbitration centers.

The second issue is the role of the judiciary. In a comparison of judicial systems and alternative dispute resolution systems, how they are used depends upon whether the people trust judges in the respective countries. Further, the judges assume the role not only of adjudicator but also arbiter or mediator since there have been a variety of dispute resolution systems such as arbitration or mediation in courts. One speaker pointed out the problems in the fusion of roles between the formal adjudication and other dispute resolution systems. There is a danger that the roles of the judiciary and the executive will be confused. Another speaker argued that any person in Asian countries who holds power is respected and that this tends to give the starting point of corruption. She also stressed the need to change this cultural perception and habitat. This issue is relevant to the first question regarding why arbitration in Asia is not popular. A speaker explained that Japanese people's confidence in the courts was the reason for the low usage of arbitration. Another comment was that an alternative to the court system or administrative institutions could be community-based conciliation, rather than resorting to state-based or bureaucratic systems. Learning from Asian traditional methods of dispute resolution was suggested. The session was concluded with the remark that in order to have appropriate dispute resolution, it would be desirable for litigation, arbitration and other systems to compete for obtaining users in terms of cost and quality.

SESSION II

Dispute Resolution Process in Asia: Theory and Reality (2)

LABOR DISPUTE SETTLEMENT IN THE PHILIPPINES

by

Domingo P. Disini, Jr. *

Abstract

I. Policy Considerations – Method of Dispute Settlement

- A. The preferential use of voluntary means of dispute settlement is an avowed policy of the State. Every effort is exerted by the law to foster and implement the practice of voluntarism in the firm belief that real and lasting industrial peace cannot be achieved by legal compulsion but must essentially rest on a voluntary basis.
- B. Compulsory arbitration as a method of dispute settlement is very limited and used only in one instance – only “where there exists a labor dispute causing or likely to cause a strike or lockout in an industry indispensable to the national interest. Even so, “before or at any stage of the compulsory arbitration process, the parties may opt to submit their dispute to voluntary arbitration.

II. Machinery for Dispute Settlement

It is the policy of the state to provide both administrative and judicial mechanisms for the adequate resolution of labor disputes. These mechanisms consists of:

1. Appellate Courts of the Judicial System;
2. Government Agencies or Administrative Tribunals exercising quasi-judicial functions; and
3. The law encourages the parties, and fosters the use of voluntary arbitration as a preferred means or procedure of dispute settlement.

III. Speedy Justice – To Achieve the Policy of Speedy Settlement

1. Administrative Tribunals exercising quasi-judicial functions are enjoined to “use every and all available means to ascertain the facts in each case speedily and objectively, without regard to the technicalities of law or procedure”, and “the rules of evidence prevailing in courts of law and equity shall not be controlling”.

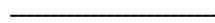
* Professor of Law, College of Law, University of the Philippines.

2. The period provided in the law within which labor disputes must be reserved are considered as mandatory.

IV. The System

A review of history shows that the country's policy has moved from active Government intervention to one of minimum intervention in the policy of method of dispute settlement.

By and large, the system has been accepted and works well considering the present state of the labor movement; worker awareness of rights, employer practices; and the trust and confidence of the private parties in government. There is, however, a noticeable delay in settlement of labor disputes due to the slow process in the workings of government agencies; of law, the system of voluntary arbitration has gained growing acceptance and may be the wave of the future.



I. Constitutional and Statutory Policy Statements on Methods of Dispute Settlement

A. Constitution of the Philippines

1. Voluntarism as preferred method

Article XIII, Social Justice and Human Rights.

Sec. 3. ...

The State shall promote the principle of shared responsibility between workers and employers and the preferential use of voluntary modes in settling, disputes, including conciliation, and shall enforce their mutual compliance therewith to foster industrial peace.

2. Due process requirements – Constitution – Article III – Bill of Rights

Section 1. No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.

B. Statutory – Labor Code of the Philippines

P.D. NO. 442, AS AMENDED. (Referred below as Labor Code)

1. Voluntarism and exception

1.1 Voluntarism

Art. 211. Declaration of Policy. - A. It is the policy of the State: ...

- (a) to promote and emphasize the primacy of free collective bargaining and negotiations, including voluntary arbitration, mediation and conciliation, as modes of settling labor or industrial disputes. ...
- (b) to encourage a truly democratic method of regulating the relations between the employers and employees by means of agreements freely entered into through collective bargaining, no court or administrative agency or official shall have the power to set or fix wages, rates of pay, hours of work or other terms and conditions of employment, except as otherwise provided under this Code.

1.2 Exception to General Rule - Compulsory Method - Compulsory Arbitration

Art. 263 (g), Strikes, Picketing and Lockout

...

(g) When, in his opinion, there exists a labor dispute causing or likely to cause a strike or lockout in an industry indispensable to the national interest, the Secretary of Labor and Employment may assume jurisdiction over the dispute and decide it or certify the same to the Commission for compulsory arbitration. Such assumption or certification shall have the effect of automatically enjoining the intended or impending strike or lockout as specified in the assumption or certification order. If one has already taken place at the time of assumption or certification, all striking or locked out employees shall immediately return to work and the employer shall immediately resume operations and readmit all workers under the same terms and conditions prevailing before the strike or lockout. The Secretary of Labor and Employment or the Commission may seek the assistance of law enforcement agencies to ensure the compliance with this provision as well as with such orders as he may issue to enforce the same.

In line, with the national concerns or and the highest respect accorded to the right of patients to life, strikes and lockouts in hospitals, clinics and similar medical institutions shall, to every extent possible, be avoided, and all serious efforts, not only by labor and management but government as well, be exhausted to substantially minimize, if not prevent, their adverse effects on such life and health, through the exercise, however legitimate, by labor of its right to strike, and by management to lockout. ... In such cases, therefore, the Secretary of Labor and Employment may immediately assume, within twenty four (24) hours from knowledge of the occurrence of such a strike or lockout, jurisdiction over the same or certify it to the Commission for compulsory arbitration. For this purpose, the contending parties are strictly enjoined to comply with such orders, prohibitions and/or injunctions as are issued by the Secretary of Labor and Employment or the Commission, under pain of

immediate disciplinary action, including dismissal or loss of employment status or payment by the locking-out employer of backwages, damages and other affirmative relief, even criminal prosecution against either or both of them.

The foregoing notwithstanding, the President of the Philippines shall not be precluded from determining the industries that, in his opinion, are indispensable to the national interest, and from intervening at any time and assuming jurisdiction over such labor dispute in order to settle or terminate the same.

Art. 263 (h), (Option)

(h) Before or at any state of the compulsory arbitration process, the parties may opt to submit their dispute to voluntary arbitration.

Art. 221, ... Prior Resort to Amicable Settlement

...

Any provision of law to the contrary notwithstanding, the Labor Arbiter shall exert all efforts towards the amicable settlement of a labor dispute within his jurisdiction on or before the first hearing. The same rule shall apply to the commission in the exercise of its original jurisdiction.

2. Speedy Labor Justice

2.1 Procedural Rules

Art. 221. Technical Rules not binding and prior resort to amicable settlement. -

In any proceeding before the Commission or any of the Labor Arbiters, the rules of evidence prevailing in courts of law or equity shall not be controlling and it is the spirit and intention of this Code that the Commission and its members and the Labor Arbiters shall use every and all reasonable means to ascertain the facts in each case speedily and objectively and without regard to technicalities of law or procedure, all in the interest of due process. In any proceeding before the Commission or any Labor Arbiter, the parties may be represented by legal counsel but it shall be the duty of the Chairman, any Presiding Commissioner or Commissioner or any Labor Arbiter to exercise complete control of the proceedings at all stages.

2.2 Time Periods

Art. 277 (I) Miscellaneous Provisions

(i) To ensure speedy labor justice, the periods provided in this Code - within which decisions or resolutions of labor relations cases or matters should be rendered shall be mandatory. For this purpose, a case or matter shall be deemed submitted for decision or resolution upon the filing of the pleading or memorandum required by the rules of the Commission or by Commission

itself, or the Labor Arbiter, or the Director of the Bureau of Labor Relations or Med-Arbiter, or the Regional Director.

Upon, expiration of the corresponding period, a certification at why a decision or resolution has not been rendered within the said period be issued forthwith by the Chairman of the Commission, the Executive Arbiter, or the Director of the Bureau of Labor Relations or Med-Arbiter,

2.3 Appearances Non-Lawyers

Art. 222. Appearance and Fees. – (a) Non lawyers may appear before the Commission or any labor arbiter only:

1. if they represent themselves; or
2. if they represent their organization or members thereof.

3. Machinery Dispute Settlement

Art. 211. Declaration of Policy. - A. It is the policy of the State: ...

(e) To provide an adequate administrative machinery for the expeditious settlement of labor or industrial disputes;

II. Dispute Settlement Agencies

I. Agencies of the Judicial Branch of Government – Judicial Review – Appellate

A. Supreme Court of the Philippines

1. Composition – Article VIII, Judicial Department - Section 4(1), Constitution of the Philippines

Sec. 4. (1) The Supreme Court shall be composed of a Chief Justice and Fourteen Associate Justices. It may sit *en banc* or in its discretion, in divisions of three, five, or seven Members. Any vacancy shall be filled within ninety days from the occurrence thereof.

2. Qualification – Article VIII, Judicial Department - Section 7 (1), Constitution of the Philippines

Sec. 7. (1) No person shall be appointed Member of the Supreme Court or any lower collegiate court unless he is a natural born citizen of the Philippines. A Member of the Supreme Court must be at least forty years of age, and must have been for fifteen years or more a judge of a lower court or engaged in the practice of law in the Philippines.

3. Appellate Function — Article VIII, Judicial Department - Section 5(1), Constitution of the Philippines

Sec. 5. The Supreme Court shall have the following powers:

(1) Exercise original jurisdiction over cases affecting ambassadors, other public ministers and consuls, and over petitions for certiorari, prohibition, mandamus, quo warranto, and habeas corpus.

B. Court of Appeals – Batas Pambansa Blg. 129

1. Composition

Sec. 1. Section 3, Chapter 1 of Batas Pambansa Blg. 129, as amended, is hereby further amended to read as follows:

Sec. 3. Organization. – There is hereby created a Court of Appeals which shall consist of a Presiding Justice and sixty-eight (68) Associate Justices who shall be appointed by the President of the Philippines.

2. Qualification

Section 7. Qualifications. – The Presiding Appellate Justice and the Associate Appellate Justices shall have the same qualifications as those provided in the Constitution for Justices of the Supreme Court.

3. Jurisdiction

Section 9. Jurisdiction. - The Intermediate Appellate court shall exercise:

... Exclusive appellate jurisdiction over all final judgments, decisions, resolutions, orders or awards of Regional Trial Courts and quasi-judicial agencies, instrumentalities, boards or commissions, except those falling within the appellate jurisdiction of the Supreme Court in accordance with the Constitution, the provisions of this Act, and of subparagraph (1) of the third paragraph and subparagraph (4) of the fourth paragraph of Section 17 of the Judiciary Act of 1998.

C. Agencies of the Executive Department Exercising Quasi-Judicial Functions

1. President of the Philippines

Determination of industries indispensable to the national interest and power of compulsory arbitration

Article 263 (g) – Labor Code

The foregoing notwithstanding, the President of the Philippines shall not be precluded from determining the industries that, in his opinion, are indispensable to the national interest, and from intervening at any time and assuming jurisdiction over any labor dispute in such industries in order to settle or terminate the same.

2. The Secretary of the Department of Labor and Employment

2.1 Certification for/or exercise of compulsory arbitration powers over labor disputes in industries indispensable to the national interest

Art. 263 (g), Labor Code

(g) When, in his opinion, there exists a labor dispute causing or likely to cause a strike or lockout in an industry indispensable to the national interest, the Secretary of Labor and Employment may assume jurisdiction over the dispute and decide it or certify the same to the Commission for compulsory arbitration.

In line with the national concern for and the highest respect accorded to the right of patients to life and health, strikes and lockouts in hospitals, clinics and similar medical institutions shall, to every extent possible, be avoided, and all serious efforts, not only by labor and management but government as well, be exhausted to substantially minimize, if not prevent their adverse effects on such life and health, through the exercise, however legitimate, by labor of its right to strike and by management to lockout. In such cases therefore, the Secretary of Labor and Employment may immediately assume, within twenty four (24) hours from knowledge of the occurrence of such a strike or lockout, jurisdiction over the same or certify it to the Commission for compulsory arbitration.

2.2 Appellate jurisdiction decisions of Med-Arbiters in certification election cases

Article 259. Appeal from Certification Election Orders. – Any party to an election may appeal the order or results of the election as determined by the Med-Arbiters directly to the Secretary of Labor and Employment on the ground that the rules and regulations or parts thereof established by the Secretary of Labor and Employment for the conduct of the election have been violated. Such appeal shall be decided within fifteen (15) calendar days .

D. Regional Bureaus and Offices in the Department of Labor and Employment

3.1 Regional Director – DOLE

Recovery of wages, simple money claims and other benefits

Article 129. Recovery of Wages, Simple Money Claims and Other Benefits.
- Upon complaint of any interested party, the Regional Director of the Department of Labor and Employment or any of the duly authorized hearing officers of the Department is empowered, through summary proceedings and after due notice, to hear and decide any matter involving the recovery of wages and other monetary claims and benefits, including legal interest, owing to an employee or person employed in domestic or household service or househelper under this Code, arising from employer- employee relations. Provided, That such complaint does not include a claim for reinstatement: Provided, further, That the aggregate money claims of each employee or househelper do not exceed Five thousand pesos (P5,000.00). The Regional Director or hearing officer shall decide or resolve the complaint within thirty (30) calendar days from the date of the filing of the same.

Any decision or resolution of the Regional Director or hearing officer pursuant to this provision may be appealed on the same grounds provided in Article 223 of this Code, within five (5) calendar days from receipt of a copy of said decision or resolution, to the National Labor Relations Commission which shall resolve the appeal within ten (10) calendar days from the submission of the last pleading required or allowed under its rules.

3.2 Bureau of Labor Relations

a) Inter-union and intra-union conflicts and disputes, grievances or problems affecting labor-management

Article 226. Bureau of Labor Relations. - The Bureau of Labor Relations and the Labor Relations Divisions in the regional offices of the Department of Labor and Employment shall have original and exclusive authority to act, at their own initiative or upon request of either or both parties, on all inter-union and intra-union conflicts, and all disputes, grievances or problems arising from or affecting labor- management relations in all workplaces whether agricultural or non-agricultural, except those arising from the implementation or interpretation of collective bargaining agreements which shall be the subject of grievance procedure and/ or voluntary arbitration.

b) Qualifications of Med-Arbiter

Education - Bachelor of Laws,

Experience - 4 years relevant experience, RA 1080

Training - 24 hours of relevant training

(Source: Bureau of Labor Relations. See also letter of Chairman, Civil Service Commission to Secretary, Department of Labor and Employment, November 25, 1994)

E. Offices-Agencies Attached to the Department of Labor and Employment

1. National Labor Relations Commission and Labor Arbiters

1.1 National Labor Relations Commission – attached to the Department of Labor and Employment

a. Composition

Article 213. National Labor Relations Commission. - There shall be a National Labor Relations Commission which shall be attached to the Department of Labor and Employment for program and policy coordination only, composed of a Chairman and fourteen (14) Members.

Five (5) members each shall be chosen from among the nominees of the workers and employers organizations, respectively. The Chairman and the four (4) remaining members shall come from the public sector, with the latter to be chosen from among the recommendees of the Secretary of Labor and Employment.

Upon assumption into office, the members nominated by the workers and employers organizations shall divest themselves of any affiliation with or interest in the federation or association to which they belong.

The Commission may sit *en banc* or in five (5) divisions, each composed of three (3) members. Subject to the penultimate sentence of this paragraph, the Commission shall sit *en banc* only for purposes of promulgating rules and regulations governing the hearing and disposition of cases before any of its divisions and regional branches and formulating policies affecting its administration and operations. The Commission shall exercise its adjudicatory and all other powers, functions and duties through its divisions. Of the five (5) divisions, the first, second and third divisions shall handle cases coming from the National Capital Region and other parts of Luzon; and the fourth and fifth divisions, cases from the Visayas and Mindanao, respectively: Provided, That the Commission sitting *en banc* may, on temporary or emergency basis, allow cases within the jurisdiction of any division to be heard and decided by any other division whose docket allows the additional workload and such transfer will not expose litigants to unnecessary additional expense. The divisions of the Commission shall have exclusive appellate jurisdiction over cases within their respective territorial jurisdiction.

The concurrence of two (2) Commissioners of a division shall be necessary for the pronouncement of judgment or resolution. Whenever the required membership in a division is not complete and the concurrence of two (2) Commissioners to arrive at a judgment or resolution cannot be obtained, the Chairman shall designate such number of additional Commissioners from the other divisions as may be necessary.

The conclusions of a division on any case submitted to it for decision shall be reached in consultation before the case is assigned to a member for the

writing of the opinion. It shall be mandatory for the division to meet for purposes of the consultation ordained herein. A certification to this effect signed by the Presiding Commissioner of the division shall be issued, and a copy thereof attached to the record of the case and served upon the parties.

The Chairman shall be the Presiding Commissioner of the first division, and the four (4) other members from the public sector shall be the Presiding Commissioners of the second, third, fourth and fifth divisions, respectively. In case of the effective absence or incapacity of the Chairman, the Presiding Commissioner of the second division shall be the Acting Chairman.

b. Qualification

Article 215. Appointment and Qualifications. - The Chairman and other Commissioners shall be members of the Philippine Bar and must have been engaged in the practice of law in the Philippines for at least fifteen (15) years, with at least five (5) years experience or exposure in the field of labor-management relations and shall preferably be residents of the region where they are to hold office. ...

The chairman and the other Commissioners, . . . shall hold office during good behavior until they reach the age of sixty-five (65) years, unless sooner removed for cause as provided by law or become incapacitated to discharge the duties of their office.

c. Jurisdiction

1) Appellate

Art. 217. Jurisdiction ... and the Commission. - ... (b) The Commission shall have exclusive appellate jurisdiction over all cases decided by Labor Arbiters.

2) Original Jurisdiction - Labor Injunction

Art. 218. Powers of the Commission. -

(e) To enjoin or restrain any actual or threatened commission of any prohibited or unlawful acts or to require the performance of a particular act in any labor dispute which, if not restrained or performed forthwith, may cause grave or irreparable damage to any party or render ineffectual any decision in favor of such party: Provided, That no temporary or permanent injunction in any case involving or growing out of a labor dispute as defined in this Code shall be issued except after hearing the testimony of witnesses with opportunity for cross-examination, in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and only after a finding of fact by the Commission, to the effect:

(1) That prohibited or unlawful acts have been threatened and will be committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat, prohibited or unlawful act, except against the person or persons, association or organization making the threat or committing the prohibited or unlawful act or actually authorizing or ratifying the same after actual knowledge thereof,

(2) That substantial and irreparable injury to complainant's property will follow;

(3) That as to each item of relief to be granted, greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief,

(4) That complainant has no adequate remedy at law; and

(5) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

2) Wage Distortion

Article 124. Standard Criteria for Minimum Wage Fixing. – xxx Where the application of any prescribed wage increase by virtue of a law or Wage Order issued by any Regional Board results in distortions of the wage structure within an establishment issue.

In cases where there are no collective agreements or recognized labor unions, the employers and workers shall endeavor to correct such distortions. Any dispute arising therefrom shall be settled through the National Conciliation and Mediation Board and, if it remains unresolved after ten (10) calendar days of conciliation, shall be referred to the appropriate branch of the National Labor Relations Commission (NLRC). It shall be mandatory for the NLRC to conduct continuous hearings and decide the dispute within twenty (20) calendar days from the time said dispute is submitted for compulsory arbitration.

1.2 Labor Arbiter

a. Qualifications

Art. 215. Appointment and Qualification. - ... The Executive Labor Arbiters and Labor Arbiters shall likewise be members of the Philippine Bar and must have been engaged in the practice of law in the Philippines for at least seven (7) years, with at least three (3) years experience or exposure in the field of labor management relations: Provided, however, that incumbent Executive Labor Arbiters and Labor Arbiters who have been engaged in the practice of law for at least five (5) years may be considered as already qualified for purposes of reappointment as such under this Act.

b. Jurisdiction

Art. 217. Jurisdiction of Labor Arbiters ... – (a) Except otherwise provided under this Code, the Labor Arbiters shall have original and exclusive jurisdiction to hear and decide, within thirty (30) days after the submission of the case by the parties for decision without extension, even in the absence of stenographic notes, the following cases involving all workers, whether agricultural or non-agricultural:

1. Unfair labor practice cases;
2. Termination disputes;
3. If accompanied with a claim for reinstatement, those cases that workers may file involving wages, rates of pay, hours of work and other terms and conditions of employment;

4. Claims for actual, moral, exemplary and other forms of damages arising from the employer-employee relations;
5. Cases arising from any violation of Article 264 of this Code, including questions involving the legality of strikes and lockouts; and
6. Except claims for Employees Compensation, Social Security, Medicare and maternity benefits, all other claims, arising from employer- employee relations, including those of persons in domestic or household service, involving an amount exceeding Five thousand pesos (P5,000.00), regardless of whether accompanied with a claim for reinstatement or not.

SECTION 10 of R.A. No. 8042. Money Claims. Notwithstanding any provision of law to the contrary, the Labor Arbiters of the National Labor Relations Commission (NLRC) shall have the original and exclusive jurisdiction to hear and decide, within ninety (90) calendar days after the filing of the complaint, the claims arising out of an employer- employee relationship or by virtue of any law or contract involving Filipino workers for overseas deployment including claims for actual, moral, exemplary and other forms of damages.

2. National Conciliation and Mediation Board

Executive Order No. 126. Reorganizing the Ministry of Labor and Employment – January 1987

2.1 Composition

Section 22. National Conciliation and Mediation Board. - A National Conciliation and Mediation Board, herein referred to as the “Board”, is hereby created and which shall absorb the conciliation, mediation and voluntary arbitration functions of the Bureau of Labor Relations in accordance with Section 29 (c) hereof. The Board shall be composed of an Administrator and two (2) Deputy Administrators. It shall be an attached agency under the administrative supervision of the Minister of Labor and Employment.

The Administrator and the Deputy Administrators shall be appointed by the President upon recommendation of the Minister of Labor and Employment. There shall be as many Conciliators-Mediators as the needs of the public service require, who shall have at least three (3) years of experience in handling labor relations and who shall be appointed by the President upon recommendation of the Minister.

2.2 Qualifications of Conciliator-Mediator - (Source: National Conciliation and Mediation Board)

Essentially, Conciliators-Mediators must have the following qualifications:

- a) Bachelor’s Degree relevant to the job
- b) Four (4) years relevant experience
- c) Twenty four (24) hours relevant training

- d) Civil Service Eligible for Professionals or appropriate Eligibility for Second Legal Position

2.3 Function

The Board shall have the following functions:

- (a) Formulate policies, programs, standards, procedures, manuals of operation and guidelines pertaining to effective mediation and conciliation of labor disputes;
- (b) Perform preventive mediation and conciliation functions;

III. Non-Governmental or Private Agency Voluntarily Set-up by Labor and Management – Voluntary Arbitrator or Panel of Voluntary Arbitrators

1. Qualification

(Revised Guidelines in the Accreditation and De-listing of Voluntary Arbitrators, Department of Labor and Employment, November 15, 1999)

Accreditation of an individual as voluntary arbitrator shall be subject to the condition that he/she meets all the qualifications prescribed by the NCMB for accreditation. If found qualified, accreditation which is renewable every five (5) years, shall be granted.

Minimum Criteria

To qualify as an Accredited Voluntary Arbitrator, a person must possess the minimum criteria for accreditation, as follows:

- 1.1 He/she must be a Filipino citizen residing in the Philippines.
- 1.2 He/she must be a holder of at least a Bachelor's Degree preferably relevant to Labor and Social Relations, Economics and related fields of study.
- 1.3 He/she must have at least five (5) years experience in the field of Labor Management relations.
- 1.4 He/she has no pending criminal case involving moral turpitude.

2. Jurisdiction

2.1 Original and Exclusive

Article 261. Jurisdiction of Voluntary Arbitrator or Panel of Voluntary Arbitrators. - The Voluntary Arbitrator or panel of Voluntary Arbitrators shall have original and exclusive jurisdiction to hear and decide all unresolved grievances arising from the interpretation or implementation of the Collective Bargaining Agreement and those arising from the interpretation or enforcement of company personnel policies referred to in the immediately preceding article. Accordingly, violations of a Collective Bargaining Agreement, except those which are gross in character, shall no longer be

treated as unfair labor practice and shall be resolved as grievances under the Collective Bargaining Agreement. For purposes of this article, gross violations of Collective Bargaining Agreement shall mean flagrant and/or malicious refusal to comply with the economic provisions of such agreement.

The Commission, its Regional Offices and the Regional Directors of the Department of Labor and Employment shall not entertain disputes, grievances or matters under the exclusive and original jurisdiction of the Voluntary Arbitrator or panel of Voluntary Arbitrators and shall immediately dispose and refer the same to the Grievance Machinery or Voluntary Arbitration provided in the Collective Bargaining Agreement.

2.2 By Agreement of Labor and Management

Article 262. Jurisdiction over other Labor Disputes. - The Voluntary Arbitrator or panel of Voluntary Arbitrators, upon agreement of the parties, shall also hear and decide all other labor disputes including unfair labor practices and bargaining deadlocks.

Article 124. ... Minimum Wage Fixing.

...

Where the application of any prescribed wage increase by virtue of a law or wage order issued by any Regional Board results in distortions of the wage structure within an establishment, the employer and the union shall negotiate to correct the distortions any disputes arising from wage distortions shall be resolved through the grievance procedure under their collective bargaining agreement and, if it remains unresolved, through voluntary arbitration ...

IV. Dispute Settlement Agency: Public Sector or Government Sector – (Executive Order No. 180, 1987)

1. Composition

Section 15. A Public Sector Labor Management Council, hereinafter referred to as the Council, is hereby constituted to be composed of the following:

- 1) Chairman, Civil Service Commission - Chairman
- 2) Secretary, Department of Labor and Employment - Vice-Chairman
- 3) Secretary, Department of Finance - Member
- 4) Secretary, Department of Justice - Member
- 5) Secretary, Department of Budget and Management - Member

The Council shall implement and administer the provisions of this Executive Order. For this purpose, the Council shall promulgate the necessary rules and regulations to implement this Executive Order.

2. Jurisdiction

Section 16. The Civil Service and labor laws and procedures, whenever

applicable, shall be followed in the resolution of complaints, grievances and cases involving government employees. In case any dispute remains unresolved after exhausting all the available remedies under existing laws and procedures, the parties may jointly refer the dispute to the Council, for appropriate action.

V. Social Legislation Claims Settlement Procedure

A. Employees Compensation and State Insurance Fund

1. Composition

Article 176. Employees Compensation Commission. (a) To initiate, rationalize, and coordinate the policies of the employees' compensation program, the Employees' Compensation Commission is hereby created to be composed of five ex-officio members, namely: the Secretary of Labor and Employment as Chairman, the GSIS General Manager, the SSS Administrator, the Chairman of the Philippine Medical Care Commission, and the Executive Director of the ECC Secretariat, and two appointive Members, one of whom shall represent the employees and the other, the employers, to be appointed by the President of the Philippines for a term of six years. The appointive Member shall have at least five years experience in workmen's compensation or social security programs. All vacancies shall be filled for the unexpired term only.

(b) The Vice Chairman of the Commission shall be alternated each year between the GSIS General Manager and the SSS Administrator. The presence of four members shall constitute a quorum. Each member shall receive a per diem of two hundred pesos for every meeting that is actually attended by him, exclusive of actual, ordinary and necessary travel and representation expenses. In his absence, any member may designate all official of tile institution lie serves on full-time basis is his representative to act in his behalf.

(d) The Commission shall have the status and category of a government corporation, and it is hereby deemed attached to the Department of Labor and Employment for policy coordination and guidance.

2. Claims Procedure

Article 180. Settlement of Claims. - The System shall have original and exclusive jurisdiction to settle any dispute arising from this Title with respect to coverage, entitlement to benefits, collection and payment of contributions and penalties thereon, or any other matter related thereto, subject to appeal to the Commission, which shall decide appealed cases within twenty (20) working days from the submission of the evidence.

Article 181. Review. - Decisions, orders or resolutions of the Commission may be reviewed on certiorari by the Supreme Court on question of law upon petition of an aggrieved party within ten (10) days from notice thereof.

B. Social Security Act

1. Composition

Section 3. Social Security System.- (a) To carry out the purposes of this Act, the Social Security System, hereinafter referred to as 'SSS', a corporate body, with principal place of business in Metro Manila, Philippines, is hereby created. The SSS shall be directed and controlled by a Social Security Commission, hereinafter referred to as 'Commission', composed of the Secretary of Labor and Employment or his duly designated undersecretary, the SSS president and seven (7) appointive members, three (3) of whom shall represent the workers' group, at least one (1), of whom shall be a woman; three (3) the employers' group, at least one (1) of whom shall be a woman; and one (1), the general public whose representative shall have adequate knowledge and experience regarding social security, to be appointed by the President of the Philippines. The six (6) members representing workers and employers shall be chosen from among the nominees of workers' and employers' organizations, respectively. The Chairman of the Commission shall be designated by the

President of the Philippines from among its members. The term of the appointive members shall be three (3) years: Provided, That the terms of the first six (6) appointive members shall be one (1), two (2) and three (3) years for every two (2) members, respectively: Provided further, That they shall continue to hold office until their successors shall have been appointed and duly qualified. All vacancies, prior to the expiration of the term, shall be filled for the unexpired term only. The appointive members of the Commission shall receive at least two thousand five hundred representation allowances as may be fixed by the Commission, but not to exceed Ten thousand pesos (P10,000.00) a month.

2. Settlement of Claim

Section 5. Settlement of Disputes - a) Any dispute arising under this Act with respect to coverage, benefits contributions and penalties thereon or any other matter related thereto, shall be cognizable by the Commission, and any case filed with respect thereto shall be heard by the Commission, or any of its members, or by hearing officers duly authorized by the Commission and decided within the mandatory period of twenty (20) days after the submission of the evidence. The filing, determination and settlement of disputes shall be governed by the rules and regulations promulgated by the Commission.

b) Appeal to Courts. - Any decision of the Commission, in the absence of an appeal therefrom as herein provided, shall become final and executory fifteen (15) days after the date of notification, and judicial review thereof shall be permitted only after any party claiming to be aggrieved thereby has exhausted his remedies before tile Commission. The Commission shall be deemed to be a party to any judicial action involving any such decision, and may be represented by an attorney employed by the Commission, or when

requested by the Commission, by the Solicitor (General or any public prosecutor.

c) Court Review. - The decision of the Commission upon any disputed matter may be reviewed both upon the law and the facts by the Court of Appeals. For the purpose of such review the procedure concerning appeals from the Regional Trial Court shall be followed as far as practicable and consistent with the purposes of this Act. Appeal from a decision of the Commission must be taken within fifteen (15) days from notification of such decision. If the decision of the Commission involves only questions of law, the same shall be reviewed by the Supreme Court. No appeal bond shall be required. The case shall be heard in a summary manner, and shall take precedence over all cases, except that in the Supreme Court, criminal cases wherein life imprisonment or death has been imposed by the trial court shall take precedence. No appeal shall act as *supersedeas* or a stay of the order of the Commission unless the Commission itself, or the Court of Appeals or the Supreme Court, shall so order.

C. Government Service Insurance System (GSIS)

1. Composition

Section 42. The Board of Trustees; its Composition; Tenure and Compensation. - The corporate powers and functions of the GSIS shall be vested in and exercised by the Board Of Trustees composed of the President and General Manager of the GSIS and eight (8) other members to be appointed by the President of the Philippines, one (1) of whom shall be either the President of the Philippine Public School Teachers Association (PPSTA) or the President of the Philippine Association of School Superintendents (PASS), another two (2) shall represent the leading organizations or associations of government employees/retirees, another four (4) from the banking, finance, investment, and insurance sectors, and one (1) recognized member of the legal profession who at the time of appointment is also a member of the GSIS. The Trustees shall elect from among themselves a Chairman while the President and General Manager of the GSIS shall automatically be the vice-chairman.

2. Settlement of Claim

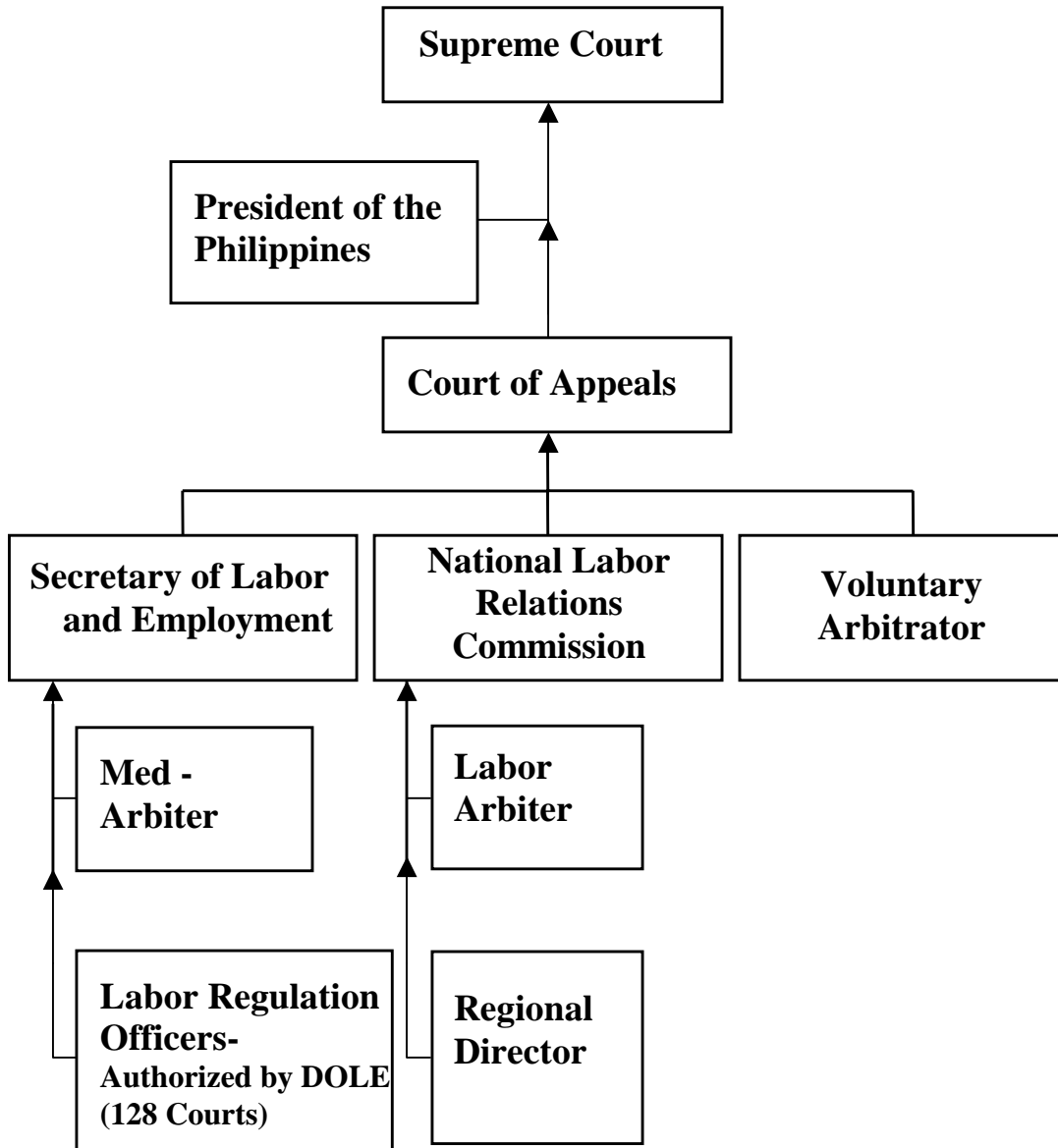
Section 30. Settlement of Disputes. - The GSIS shall have original and exclusive jurisdiction to settle any dispute arising under this Act, and any other laws administered by the GSIS.

The Board may designate any member of the Board, or official of the GSIS who is a lawyer, to act as a hearing officer to receive evidence, make findings of fact and submit recommendations together with all the documentary and testimonial evidence to the Board within thirty (30) working days from the time the parties have closed their respective evidence and file their last pleading. The board shall decide the case within thirty (30) days from the receipt of the hearing officer's findings and recommendations. The cases heard by the Board shall be decided within thirty (30) working days from the time they are submitted by the parties for decision.

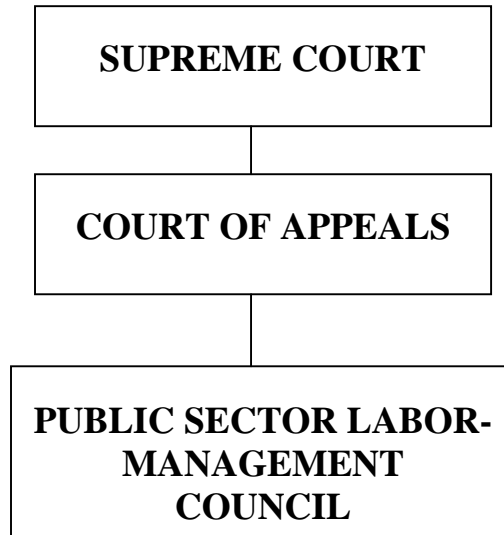
Section 31. Appeals. - Appeals from any decision or award of the Board shall be governed by Rules 43 and 45 of the 1997 Rules of Civil Procedure adopted by the Supreme Court on April 8, 1997 which will take effect on July 1, 1997: Frovided, That pending cases and those filed prior to July 1, 1997 shall be governed by the applicable rules of procedure: Provided, further, That the appeal shall take precedence over all other cases except criminal cases when the penalty of life imprisonment or death or reclusion perpetua is imposable.

The appeal shall not stay die execution of the order or award unless ordered by the Board, by the Court of Appeals or by the Supreme Court and the appeal shall be without prejudice to the special civil action of certiorari when proper.

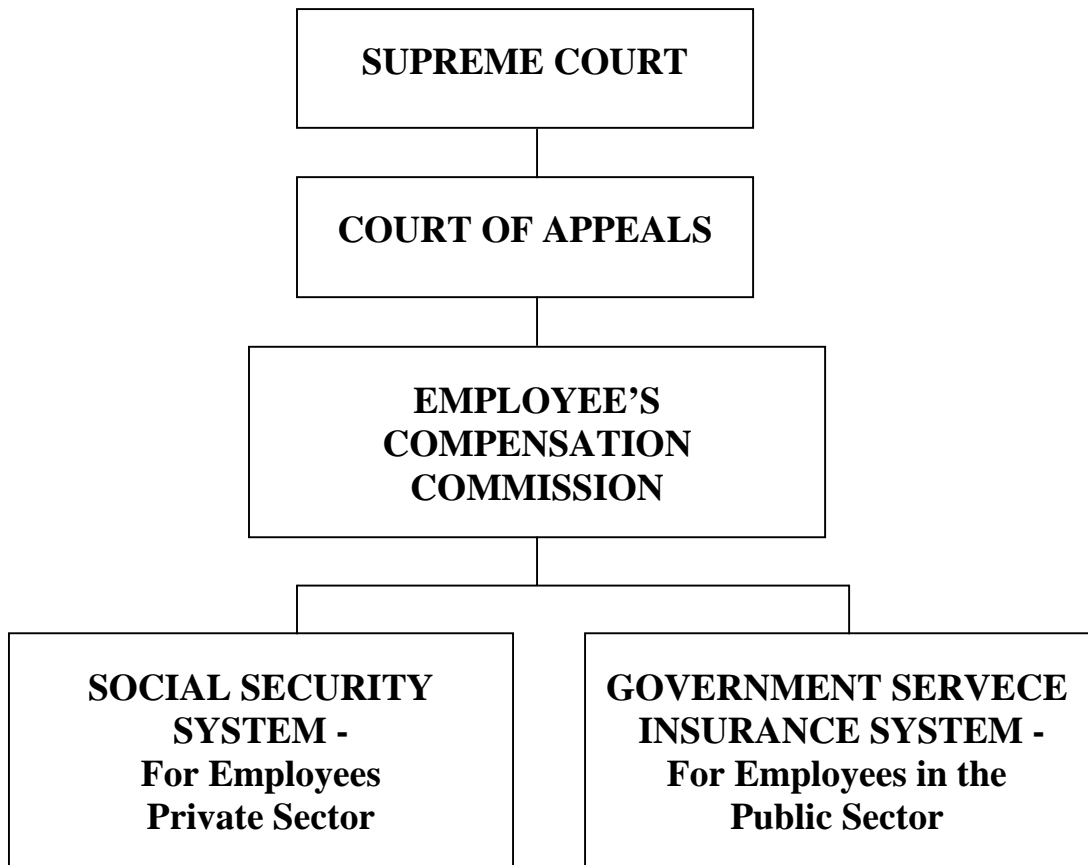
**LABOR DISPUTE SETTLEMENT
PROCESS FLOW CHART -
Labor Standards and Labor Relations Cases**



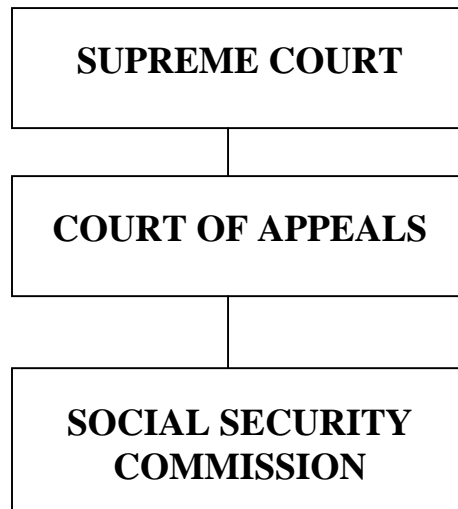
**LABOR DISPUTE SETTLEMENT IN THE
PUBLIC SECTOR OR GOVERNMENT SERVICE
(Executive Order No. 180, June 1, 1997)**



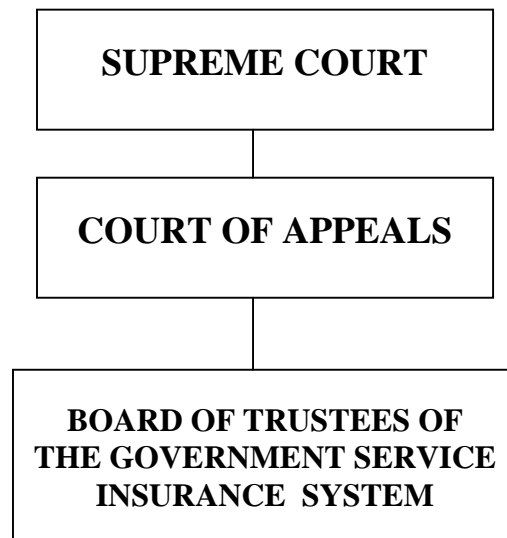
**DISPUTE SETTLEMENT OF WORKMEN'S COMPENSATION CLAIMS:
EMPLOYEES COMPENSATION AND STATE INSURANCE FUND
BOOK IV, LABOR CODE OF THE PHILIPPINES**



**SETTLEMENT OF CLAIMS UNDER
SOCIAL SECURITY LAW OF 1997
(R.A. NO. 1161, As Amended by R.A. No. 8282)**



**SETTLEMENT OF CLAIMS UNDER THE REVISED GOVERNMENT
SERVICE INSURANCE ACT OF 1997
(R.A. No. 8291)**



Notes:

A. Agencies

1. The Supreme Court and the Court of Appeals are integral parts of the Judicial Department of Government. Both courts perform judicial functions as appellate agencies in labor related and social legislation cases.
2. The Secretary of Labor and Employment and the National Labor Relations Commission, are agencies of the Executive Department of government performing quasi-judicial functions either in their original jurisdiction or as appellate agencies. The NLRC is attached to the DOLE for policy coordination purposes.
3. The Voluntary Arbitrator is a non-governmental private entity jointly established by labor and management.
4. National Conciliation and Mediation Board is a governmental agency attached to the DOLE for policy coordination. It is not an adjudicative agency but only assist the parties in dispute resolution.

B. APPEAL PROCEDURE - MODE

1. Appeal to the National Labor Relations Commission

Administrative Appeal under Article 217 (b), P.D. No. 442, as amended, Labor Code of the Philippines

2. Appeal from the Voluntary Arbitrator to the Court of Appeals - Rule 43, Rules of Court of the Philippines
3. Rule 43 - APPEALS FROM THE COURT OF TAX AND QUASI-JUDICIAL AGENCIES TO THE COURT OF APPEALS

Section 1. Scope. - This Rule shall apply to appeals from judgments or final orders of the Court of Tax Appeals and from awards, judgments, final orders or resolutions of or authorized by any quasi-judicial agency in the exercise of its quasi-judicial functions. Among these agencies are the Civil Service Commission, 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 under Republic Act No. 6657, Government Service Insurance System, Employees Compensation Commission, Agricultural Inventions Board, Insurance Commission, Philippine Atomic Energy Commission, Board of Investments, Construction industry Arbitration Commission, and voluntary arbitrators authorized by law. (n)

Sec. 2. Cases not covered. - This Rule shall not apply to judgments or final orders issued under the Labor Code of the Philippines. (n)

Sec. 3. Where to appeal. - An appeal under this Rule may be taken to the Court of Appeals within the period and in the manner herein provided, whether the appeal involves questions of fact, of law, or mixed questions of fact and law.

Sec. 4. Period of appeal. - The appeal shall be taken within fifteen (15) days from notice of the award, judgment.

4. From Court of Appeals to the Supreme Court – *Special civil action of certiorari*, under

Rule 65 of the Rules of Court of the Philippines

5. From the National Labor Relations Commission to the Court of Appeals. – Rule 65, Rules of Court.

See also: *St. Martin Funeral Home v. NLRC*, 295 SCRA 494 (1998)

6. Appeal from the Court of Appeals to the Supreme Court – Rule 65, Rules of Court, Petition for Certiorari.

Rule 65

CERTIORARI, PROHIBITION AND MANDAMUS

Section 1. *Petition for certiorari.* - When any tribunal, board or officer exercising judicial or quasi-judicial functions has acted without or in excess of its or his jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, and there is no appeal, nor any plain, speedy and adequate remedy in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered annulling or modifying the proceedings of such tribunal, board or officer, and granting such incidental reliefs as law and justice may require.

The petition shall be accompanied by a certified true copy of the judgment, order or resolution subject thereof, copies of all pleadings and documents relevant and pertinent thereto, and a sworn certification of non-forum shopping as provided in the third paragraph of Section 3, Rule 46. (1a)

**LABOR DISPUTE SETTLEMENT IN THE PHILIPPINES
NATURE OF DISPUTE AND ADJUDICATING AGENCIES**

**LABOR STANDARDS AND LABOR RELATIONS
ISSUES: PRIVATE SECTOR**

NATURE OF DISPUTE	WHERE COMPLAINT FILED - INITIAL ADJUDICATION	FLOW OF APPEALS
Violation of Apprentice Agreement (65)	Regional Director – DOLE	Secretary – DOLE ——— Court of Appeals ——— Supreme Court
Wage distortion resulting from promulgation of Wage Order by the Regional Tri-partite Wages and Productivity Boards. (123)		National Wages ——— National Labor ——— Court of Appeals ——— Supreme Court And Productivity Relations Commission Commission (123)
Violations which may aid in enforcement of the Labor Code, any Labor Law, Wage Order or Rules and Regulations issued by Agency (128)	No complaint. Violation discovered in course of Visitorial and Enforcement Power of Secretary DOLE or authorized representative	Secretary of Labor ——— Court of Appeals ——— Supreme Court And Employment
Recovery of Wages, Simple Money Claims and Other Benefits. Aggregate money claim of each complainant does not exceed P5,000.00. No claim for Reinstatement (129)	Regional Director – DOLE	National Labor ——— Court of Appeals ——— Supreme Court Relations Commission (129)
Disputes, governing matters arising from interpretation or implementation of the Productivity Incentives Act of 1990 (Sec. 9, R.A. No. 6971)	Labor Management Committee in the establishment with the assistance of the National Conciliation and Mediation Board (NCMB). Voluntary Arbitration (Sec. 9, R.A. No. 6971)	Court of Appeals ——— Supreme Court

NOTE: Numbers refer to Article Number of the Labor Code of the Philippines P.D. No. 447 as amended. Article or Section Numbers in other laws are specifically indicated. Labor dispute refer to controversies where there exist an employer-employee relationship between the parties.

NATURE OF DISPUTE	WHERE COMPLAINT FILED - INITIAL ADJUDICATION	FLOW OF APPEALS
Violation of the Sexual Harassment Law. (R.A. No. 7877)	<p>Employer created Committee on Decorum to investigate complaint. (Sec. 4, R.A. No. 7877)</p> <p>Victim or complainant may institute separate and independent action for Damages and other relief in Regional Trial Court (RTC) (Sec. 6, R.A. No. 7877)</p> <p>Criminal complaint in Regional Trial Court. (Sec. 7, R.A. No. 7877)</p>	<p style="text-align: center;">Court of Appeals ———— Supreme Court</p>
Unfair labor practices (217(a)(1))	Labor Arbiter (217(a)(1))	National Labor ———— Court of Appeals ———— Supreme Court Relations Commission (217(b))
Termination disputes (217(a)(2))	Labor Arbiter (217(a)(2))	National Labor ———— Court of Appeals ———— Supreme Court Relations Commission (217(b))
Wages, rates of pay, hours of work and other terms and conditions of employment. Complaint accompanied with claim of reinstatement (217(a)(3))	Labor Arbiter (217(a)(3))	National Labor ———— Court of Appeals ———— Supreme Court Relations Commission (217 (b))
Claims for actual, moral, exemplary and other forms of damages (217(a)(4))	Labor Arbiter (217(a)(4))	National Labor ———— Court of Appeals ———— Supreme Court Relations Commission (217(b))

NATURE OF DISPUTE	WHERE COMPLAINT FILED - INITIAL ADJUDICATION	FLOW OF APPEALS
Cases arising from violation of Prohibited Activities in connection with strike or lockout and legality of strike and lockout (217(a)(5) and 264)	Labor Arbiter (217(a)(5))	National Labor Relations Commission (217(b)) ——— Court of Appeals ——— Supreme Court
All other claims arising from employer-employee relations where amount of each claim exceed P5,000.00, whether accompanied or not with a claim for reinstatement (217(a)(6))	Labor Arbiter (217(a)(6))	National Labor Relations Commission (217(b)) ——— Court of Appeals ——— Supreme Court
Claims arising out of an employer-employee relationship or any law or contract involving Filipino Workers for Overseas Deployment including claims for actual, moral, or exemplary and other forms of damages. (Sec. 10, R.A. No. 8042, Migrant Workers and Overseas Filipinos Act of 1995)	Labor Arbiter (217(b))	National Labor Relations Commission (217(b)) ——— Court of Appeals ——— Supreme Court
Intra-union and inter-union conflicts, and all disputes, grievances or problems arising from or affecting labor-management relations except implementation or interpretation of collective bargaining agreements (226)	Med-Arbiter of Bureau of Labor Relations in Regional Offices of DOLE (226)	Secretary of Labor And Employment ——— Court of Appeals ——— Supreme Court

NATURE OF DISPUTE	WHERE COMPLAINT FILED - INITIAL ADJUDICATION	FLOW OF APPEALS
Petition for Certification Elections (232 and 259)	Med-Arbiter of Bureau of Labor Relations in Regional Offices of DOLE (232)	Secretary of Labor ——— Court of Appeals ——— Supreme Court And Employment (259)
Unresolved grievances arising from interpretation or implementation of collective bargaining agreement and those arising from the interpretation or enforcement of company personnel policies and violations of collective bargaining agreement which are not flagrant and/or malicious refusal to comply with the economic provisions of collective bargaining agreement. (261)	Original and Exclusive Jurisdiction of Voluntary Arbitrator or Panel of Voluntary Arbitrators (261)	Court of Appeals ——— Supreme Court
All other labor disputes including unfair labor practices and bargaining deadlocks.	Voluntary Arbitrator or Panel of Voluntary Arbitrators. By agreement of the parties (262)	Court of Appeals ——— Supreme Court
Disputes in industries indispensable to National interest. (263(g))	Compulsory Arbitration by: President of the Philippines <u>or</u> Secretary of Labor and Employment <u>or</u> National Relations Commission if certified by Secretary of Labor and Employment for Compulsory Arbitration (263(g))	Court of Appeals ——— Supreme Court
Disputes where notice of intent to declare strike or lockout is filed	No adjudicatory powers. National Conciliation and Mediation Board (NCMB) will conciliate or mediate the dispute or recommend voluntary arbitration. (Sec. 22, EO No. 251, July 25, 1987)	

**LABOR DISPUTE SETTLEMENT IN THE PUBLIC SECTOR –
TERMS AND CONDITIONS OF EMPLOYMENT IN THE GOVERNMENT SERVICE
(EXECUTIVE ORDER NO. 180, (June 1, 1997))**

NATURE OF DISPUTE	SETTLEMENT OF PROCEDURE	FLOW OF APPEALS
Disputes arising out of Executive Order No. 180, June 1, 1997, Providing Guidelines for the Exercise of the Right to Organize of Government Employees etc. (Sec. 16, E.O. No. 180))	Parties will settle in accordance with applicable Civil Service Law and procedure. Refer unresolved dispute to Public Sector Labor Management Council. (Sec. 15, E.O. No. 180)	Court of Appeals ———— Supreme Court

**SETTLEMENT OF WORKMEN’S COMPENSATION CLAIMS-
EMPLOYEES COMPENSATION AND STATE INSURANCE FUND
BOOK IV, P.D. NO. 442 AS AMENDED.
LABOR CODE OF THE PHILIPPINES**

NATURE OF DISPUTE	SETTLEMENT PROCEDURE	FLOW OF APPEALS
Coverage, entitlement of benefits, collection and payment of contributions. (180)	Original and exclusive jurisdiction Social Security System 180 (for employees-employers in the private sector) (180) Government Service Insurance System (for employees-employers in the Government or public sector (180)	Employees ———— Supreme Court Compensation Commission (180) Sec. 9, B.P. 129

**SETTLEMENT OF CLAIMS – SOCIAL SECURITY
LAW OF 1997, R.A. NO. 8282**

NATURE OF DISPUTE	COMPLAINT FILED WITH – AGENCY	FLOW OF APPEALS
Coverage, benefits, contributions, and penalties and other matter	Social Security Commission (Sec. 3 and 5(a))	Court of Appeals ————— Supreme Court on Law and Facts on Law only (Sec. 5Cc) (Sec. 5(c))

**SETTLEMENT OF CLAIMS-
REVISED GOVERNMENT SERVICE INSURANCE
ACT OF 1997, R.A. NO. 8291**

NATURE OF DISPUTE	COMPLAINT FILED WITH – AGENCY	FLOW OF APPEALS
Any dispute arising under the Government Service Insurance System Act of 1997 (Sec. 30, R.A. No. 8291)	Board of Trustees of the Government Service Insurance System (Secs. 3, and 30, R.A. No. 8291)	Court of Appeals ————— Supreme Court (Sec. 31, R.A. No. 8291, (Sec. 31, R.A. No. 829, Rules 43, Rules of Court) Rule 45, Rules of Court)

THE MALAYSIAN EXPERIENCE WITH ADR, WITH PARTICULAR REFERENCE TO THE RESOLUTION OF LABOUR DISPUTES

by

Sharifah Suhana Ahmad *

1. Introduction

The need for an effective and expedient method of settling labour disputes, particularly collective disputes involving employers and trade unions, preoccupied the British Colonial Administration in Malaya in the early 1940's. Strikes, frequent and involving large numbers of workers were hampering the economic development of the Colony and adversely affecting the economic interests of colonial entrepreneurs. Added to this was the threat posed to Britain's political hegemony as history has recorded that these early labour up-risings were fanned by Communist ideology.¹ The concept of voluntary arbitration was introduced in 1940 when an Industrial Court was established under the Industrial Court Enactment 1940 (Federated Malay States). However, due to the outbreak of war, the Enactment of 1940 was never implemented. Subsequently, this early piece of legislation was replaced by the Industrial Courts Ordinance 1948, and the Trade Disputes Ordinance 1949.

However, voluntary arbitration as a method of settling labour disputes did not work in Malaysia. From 1948 to about 1963, only six disputes were referred to the Industrial Court, and in its twenty-year span from 1948 to 1967, the Industrial Court only made 18 awards. Some reasons offered for this failure include the apathy on the

* Associate Professor, Faculty of Law, University of Malaya, Malaysia

¹ Gamba, C., *The Origins of Trade Unionism in Malaya*, (1962) Eastern Universities Press, Ltd., S'pore.

part of employers and the preference of parties to disputes for the direct action of strikes, which have been known to yield the desired results.²

As the newly-independent Malaysian state found itself beset by strikes in most of its essential services, the catalyst for change came in the form of a political crisis – Indonesia’s confrontation with Malaysia which resulted in the need to maintain uninterrupted essential services and general discipline in the labour force. The government declared an Emergency during which the Essential (Arbitration in the Essential Services) Regulations 1965 was passed which introduced the system of compulsory arbitration of trade disputes in Malaysia. This system remains in force until today.

2. The Statutory Scheme under the Industrial Relations Act 1967 for the Prevention and Settlement of Disputes

The Industrial Relations Act 1967³ [“IRA”] provides for three main methods of dealing with trade disputes - conciliation, fact-finding (inquiry) and finally arbitration.⁴ When a trade dispute⁵ exists or is apprehended, an employer or trade union of workmen who are parties to the dispute may report the same to the Director General of Industrial Relations (DGIR).⁶ However, the DGIR is empowered, whether or not a trade dispute has been reported to him, to take such steps as may be necessary or expedient for promoting a settlement of the trade dispute if he deems it necessary in the public interest to do so.⁷ Among the steps which the DGIR might take for the settlement of trade disputes is to have the dispute referred to any machinery which already exists by virtue of agreement between the parties.⁸ Only where the DGIR is

² M. Ali Raza, “Legislative and Public Policy Developments in Malaysia’s Industrial Relations”, The Journal of Developing Areas, Vol. 3 (April 1969), pp 355, 356.

³ Act 177.

⁴ Ayadurai, D., *Industrial Relations in Malaysia*, (1998) MLJ, p. 81.

⁵ “trade dispute” is defined as any dispute between an employer and his workmen which is connected with the employment or non-employment or the terms of employment or the conditions of work of any such workmen – IRA, s. 2.

⁶ Industrial Relations Act, 1967, s. 18(1).

⁷ *ibid*, s. 18(3).

⁸ *ibid*, s. 18(4).

satisfied that there is no likelihood of the trade dispute being settled that he must notify the Minister.⁹

Under “conciliation”, the disputed parties have to attend a conference to be presided over by the DGIR or such other person as he may appoint.¹⁰ The Minister is empowered to enter into conciliation proceedings “at any time, if he considers it necessary or expedient...”¹¹ Thus, the Minister is not dependant upon the DGIR’s reporting procedure.

The IRA also empowers the Minister to appoint a Committee of Investigation or a Board of Inquiry and may refer to the Committee or Board any matter connected with or relevant to the dispute.¹² The Committee is empowered to “investigate the causes and circumstances” of any trade dispute or matter referred to it.¹³ A Board on the other hand is empowered with the discretion to inquire into any matter referred to it either in public or in private, and report thereon to the Minister.¹⁴ Any report of the Board has to be laid as soon as may be before the *Dewan Rakyat*,¹⁵ (Lower House of Parliament) and the Minister may publish or cause to be published any information or conclusion arrived at by the Board as a result of or in the course of its inquiry.¹⁶

If a trade dispute is not otherwise resolved, the Minister is empowered to refer the dispute to the Industrial Court on the joint request in writing of a trade union of workmen and the employer who are parties to the dispute.¹⁷ However, the Minister “may of his own motion” refer any trade dispute to the court if he is satisfied that it is expedient to do so.¹⁸ Thus, the arbitration process may be initiated by the Minister without having to await notification from the DGIR that he has failed to cause the dispute to be settled, thus bringing the conciliation proceedings to a pre-mature end. Statute imposes no duty upon the disputing parties to enter into conciliation, and

⁹ *ibid*, 18(5).

¹⁰ *ibid*, S. 19(2).

¹¹ *ibid*, s. 19A.

¹² IRA, s. 34.

¹³ *ibid*, s. 35(1).

¹⁴ *ibid*, s. 37(1).

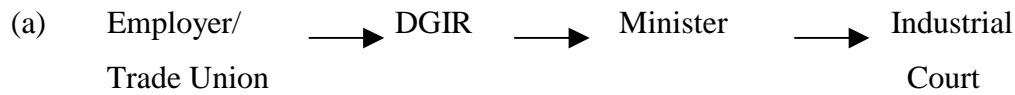
¹⁵ *ibid.*, s. 37(3).

¹⁶ *ibid.*, s. 37(4).

¹⁷ IRA, s. 26(1).

¹⁸ *ibid.*, s. 26(2).

indeed conciliation is not a necessary first step prior to arbitration. Although the Act recognises industry arrangements for the settlement of trade disputes, the Minister has the discretion to override those arrangements if in his opinion it is unlikely that the dispute would be expeditiously settled through those arrangements.¹⁹



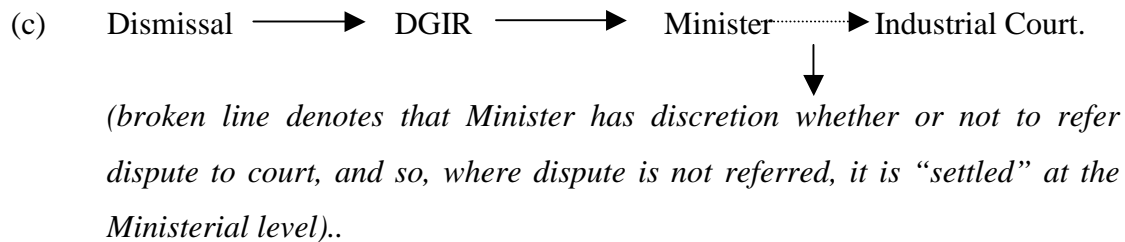
Ordinary flow of dispute-settlement process.



Where the Minister may intervene, either to bring conciliation to an end or to have the dispute referred straight to the Industrial Court, without undergoing the conciliation process.

Apart from the settlement of trade disputes, another important dispute covered by the IRA relates to unfair dismissals, which, in Malaysia is governed by the concept of dismissal without just cause or excuse under section 20(1) of the IRA. When an employee, irrespective of whether he is a member of a trade union or otherwise, considers that he has been dismissed without just cause or excuse, he is entitled to make a representation in writing to the DGIR. Upon receipt of the representation, the DGIR must “take such steps as he may consider necessary or expedient” in order to settle the dispute as expeditiously as possible. Where the DGIR is satisfied that there is no likelihood of the representation being settled, he must notify the Minister. The Minister is given the discretion whether or not to have the dispute referred to the Industrial Court:

¹⁹ *ibid*, s. 26(3).



In Malaysia, conciliation is undertaken principally by government servants, that is, officers of the Industrial Relations Department of the Ministry of Human Resource. There are no autonomous bodies authorised by law to undertake conciliation services. At the time the Industrial Relations laws were drafted, Malaysia was still very much a newly-emergent nation with industrialisation in its early stages. The task of conciliation was given to government servants as “in most newly emergent nations of Asia, government servants continue to enjoy the prestige accorded to them during the colonial era.”²⁰ Hence, it was felt that these persons were suitable as they could command the respect and confidence of the parties concerned.

Statistics from the Ministry of Human Resource seem to show that conciliation has been a success and a primary contributor to the settlement of labour disputes:

²⁰ Chelvasingam – MacIntyre, “Industrial Arbitration and Government’s role in the field of Industrial Relations” [1971] 2 MLJ xlv.

Table I
Settlement of industrial/trade disputes

	1998	1999
Disputes carried forward	268	329
Disputes reported	442	496
Total	710	825
Settled	381	374
Mode of Settlement		
Conciliation	277	352
Referred to Industrial Court	71	22
Not referred	33	0
Total	381	374

Source: Annual Report, Ministry of Human Resource

Table II
Settlement of Dismissal Cases

	1998	1999
Disputes carried forward	2,123	4,275
Disputes reported	8,819	5,639
Total	10,942	9,644
Settled	6,667	5,133
Mode of Settlement		
Conciliation	5,003	3,346
Referred to Industrial Court	886	1,419
Not referred	778	368
Total	6,667	5,133

Source: Annual Report, Ministry of Human Resource

The statistics show that conciliation has been a success where collective labour disputes are concerned (Table i), where settlement of disputes through conciliation is

at 73% in 1998 and 94% in 1999. However, conciliation has not been as successful in the settlement of disputes pertaining to dismissal (Table ii). The failure of conciliation as a method of settlement here places the burden of settlement upon the Industrial Court. As Table (iii) shows, of the total number of cases arbitrated by the Industrial Court in a year, a large percentage comprise cases pertaining to termination, ie, in 1994, 81%; in 1995, 80%; in 1996, 72.8%; in 1997, 74.5% and in 1998, 72%.

Table III

Malaysia: Type of Cases Arbitrated by the Industrial Court, 1994-1998

Type of Cases	1994	1995	1996	1997	1998
<i>Termination Cases</i>					
<i>Constructive</i>	15	26	19	34	58
<i>Misconduct</i>	439	410	366	407	403
<i>Retrenchment</i>	9	4	50	14	17
<i>Non-Termination Cases</i>					
<i>Non-Compliance of Award</i>	15	41	67	60	69
<i>Non-Compliance of Collective Agreement</i>	12	14	16	30	42
<i>Interpretation of Award/Collective Agreement</i>	10	12	10	5	28
<i>Variation of Award/Collective Agreement</i>	7	3	1	2	12
<i>Amendments to Collective Agreement (By Court Order)</i>	-	-	-	-	-
<i>Collective Agreement (Terms and Conditions)</i>	48	30	57	49	26
<i>Questions of Law</i>	14	9	10	9	5
<i>Victimisation</i>	-	-	1	1	4
Total	569	549	597	611	664

Source: Industrial Court, Ministry of Human Resources

The relative success of conciliation in cases of collective labour disputes as opposed to individual disputes can be explained from the perspective of the way in which industrial adjudication operates in Malaysia, in particular the exercise of judicial review by the civil courts over inferior courts or tribunals such as the Industrial Court.

3. Powers of the Industrial Court, and the Effect of Judicial Review

As in other specialist tribunals established by statute to resolve particular disputes, the Malaysian Industrial Court is imbued with broad powers and jurisdiction, not confined in its operation by technicalities or legal form. Among its more important provisions are the following:

(3) The court shall make its award without delay and where practicable within thirty days from the date of reference to it of the trade dispute or of a reference to it under section 20(3).

(4) In making its award in respect of a trade dispute, the court shall have regard to the public interest, the financial implications and the effect of the award on the economy of the country, and on the industry concerned, and also to the probable effect in related or similar industries.

(5) The court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

(6) In making its award, the court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of the trade dispute or in the matter of the reference to it under section 20(3) but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under section 20(3).

There is no right of appeal from the decision of the Industrial Court to a higher court, and there is no special appellate court created for the settlement of labour disputes. Instead, an award decision or order of the court shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court.

The Industrial Court is not the only decision-maker in cases of labour disputes, particularly collective disputes. Broad discretionary powers are also conferred upon members of the Executive, such as the Minister and the Director-General of Industrial Relations to make “final decisions”, for example in cases of trade union recognition disputes. Statutory conferment of wide discretionary powers coupled with the

presence of ouster or privative clauses has led to the healthy growth of administrative law in the field of Malaysian industrial relations. However, the application of principles of administrative law by the civil courts in their exercise of judicial review has not been consistent. In collective labour disputes, where decisions have been made by members of the executive, for example to award recognition to a particular trade union or to deny representation rights to a class of workers, the civil courts have been slow to interfere with the exercise of executive powers and adopts a broad almost expansive approach in order to give effect to the actions of the executive.²¹ In the case of dismissal without just cause or excuse, the civil courts appear to adopt the stance that such disputes, in order to be better adjudicated in the interest of justice to the affected party, ought to be referred to the Industrial court.²² If the Minister fails to refer such disputes to the Industrial Court, he must have good reasons for not doing so and must clearly explain those reasons, otherwise, it will be presumed that he had no good reasons for the failure to make the reference. Hence a good deal of disputes on dismissals end up at the Industrial Court while most collective disputes would be settled, either by the parties concerned or by executive decision.

4. The Future of ADR as a dispute-solving mechanism for labour disputes in Malaysia

Although official statistics look impressive, many labour lawyers in Malaysia are of the opinion that conciliation as a method of dispute-resolution for labour disputes does not work as well as it should. Conciliation is carried out by government servants with no formal training in ADR or even exposure to it, but who are expected to learn on the job. Secondly, while disputes continue to increase, there is a limitation on the number of officers available to undertake conciliation, as it is not easy to increase the number of officers due to government budgetary constraints. The above problems coupled with increasing legalism due to judicial review has prompted moves to alter the fundamental character of the Industrial Court. In a move to “streamline quasi-judicial and purely judicial issues”, future Industrial Court Chairmen will most

²¹ *Metal Industry Employees Union v Registrar of Trade Unions* [1976] 1 MLJ 220.

²² *Hong Leogn Equipment Sdn Bhd v Liew Fook Chuean* [1996] 1 MLJ 481; *R Rama Chandran v The Industrial Court* [1997] 1 MLJ 145.

likely consist of officers from the Attorney-General's Chambers. Currently, the Industrial Court is comprised of a panel of persons representing employers and a panel of persons representing workmen, all of whom are appointed by the Minister. Prior to such appointment, the Minister normally consults organisations representing employers and workmen.

It has been acknowledged that this will most likely "render future industrial disputes" more technical.²³ The Malaysian Trades Union Congress, in opposing the move, expressed its concern that this will drastically change the character of the Industrial Court: "The Industrial Court normally makes decisions by placing more importance on employers and employees' interest rather than on the technicalities of the law. Workers will lose out if the change is enforced-disputes can then only be settled by a protracted legal battle."²⁴

Thus, while ADR has been seen to be gaining momentum as an effective method of dispute settlement in other fields, such as consumer cases, it is greatly under threat in the field of labour disputes.

²³ Minister in the Prime Minister's Department responsible for law – quoted in "The Sun", 23 July 2001.

²⁴ MTUC Secretary General, quoted in "The Sun", 23 July 2001.

ENVIRONMENTAL DISPUTE SETTLEMENTS IN JAPAN

by

Izumi Chibana *

I. Historical Background of Environmental Dispute Settlements

Environmental pollution dispute settlements have been a large social concern in Japan especially since the latter of 1960's. As a result of the rapid development of the Japanese economy, the national income doubled and unprecedented material prosperity was brought about. The social change brought not only positive effects, but also negative impacts represented by several cases of damage to agricultural products by mining waste and other sporadic air pollution, such as the Minamata disease¹, Yokkaichi asthma², and Itai-itai (ouch-ouch) disease³. As they had extremely tragic consequences for human health and life, the importance and urgency of settling environmental pollution problems⁴ was widely recognised. To settle environmental pollution dispute, civil trials by the general judicial system were expected to play a significant role. However, the system was inadequate to provide relief for victims for the reasons below.

- (1) Victims must establish a cause-effect relationship based upon highly technical scientific knowledge, which was extremely difficult
- (2) Trial costs were prohibitively expensive

* Researcher, Institute of Developing Economies (IDE), Japan.

¹ A disease caused by organic mercury toxins in wastewater from factories in Minamata Bay in Kagoshima and Kumamoto Prefectures, and in the Basin of the Agano River in Niigata Prefecture.

² An asthmatic disease caused by smoke from factories in Yokkaichi City in Mie Prefecture.

³ A disease caused by cadmium toxins in wastewater from mining and industrial factories in the Basin of the Jintsu River in Toyama Prefecture.

⁴ Environmental pollution problems were considered to be extremely difficult with distinctive characteristics compared with ordinary civil cases such as (1) the number of victims was usually large, (2) the damage usually destroyed not only lives and health, but also the property and living environment of human beings, and (3) investigating a cause-effect relationship, confirming the exact amount of damage and appropriate compensation remained difficult.

- (3) Trial proceedings were rigid and it took a long time to final judgements

Under these circumstances, social-infrastructure improvements in the judicial system with regard to pollution dispute settlements were considered to be a prime task. Thus, there was a strong demand to establish a new and discrete system besides a civil trial by the general judicial system to obtain prompt and proper resolution by easing the conventional rigid procedures. The Basic Law for Environmental Pollution Control was enacted in 1967⁵, which requires that the government take appropriate measures to establish a proper system for environmental dispute settlements⁶. Later, after specific deliberation in the central antipollution measure committee, the Law concerning the Settlement of Environmental Pollution Disputes was also enacted in 1970 setting up administrative commissions at both central and local government levels. The reason why an administrative commission at local government level was established was that it had played an important role settling pollution dispute promptly and properly and was the most familiar organization offering consultation regarding daily pollution complaints to local citizens.

II. Overview of the System for Environmental Pollution Dispute Settlements

1. The Environmental Dispute Coordination Committee

The Environmental Dispute Coordination Committee was established on the 1st of July 1972, as an external agency⁷ of the Prime Minister's Office, by consolidating the Land Coordination Commission⁸ and the Central Pollution Examination Commission⁹. One of its main aims is to offer a prompt and proper resolution by means of mediation, conciliation, arbitration, and adjudication. The committee has quasi-judicial functions, and its neutrality and independence are presented by law. It consists of a chairperson and six commissioners who are nominated by the Prime Minister with the consent of the Diet for a five-year term and

⁵ One of aims of the Law is encouraging environmental awareness by the public.

⁶ Defined in Article 21 of the Basic Law for Environmental Pollution Control.

⁷ Defined in Article 3 of the National Government Organization Law.

⁸ Established on the 31st of January 1951.

⁹ Established on the 1st of November 1970.

are supposed to exercise their authority independently¹⁰. Three of them serve part-time. Three full-time commissioners' former avocations are bureaucrats in the Ministry of Land, Infrastructure, and Transport, the Office of the Prime Minister, and the Ministry of Health and Welfare. The remaining six include an academic whose specialty is Administrative Law, a lawyer, and a former director in the Industrial Technology Academy. In addition, three of them are qualified lawyers so their expert knowledge can be taken as an advantage in their assignment with regard to settling disputes on behalf of the public. Moreover, to ensure political independency, they are restricted from engaging in political activity. The committee can nominate up to 30 experts to investigate technical problems and also has an executive bureau with 40 staff to handle the business of the committee as necessary¹¹. Furthermore, the committee can request other administrative agencies relating to a case to submit documents, offer technological knowledge, and provide their views on the case. The committee can also request local government, academic institutions, public research institutes and so forth to do further investigation and research¹². A secretariat to deal with clerical work is also established. It is comprised of two divisions; one is a general affair division dealing with regular administrative affairs, and the other is an investigative division in charge of settling disputes according to each case's speciality with staff on loan from the Ministry of Health and Welfare, Economy, the Ministry of Trade and Industry, the Ministry of Agriculture, Forestry and Fisheries, the Ministry of Land, Infrastructure, and Transport, and the Environmental Agency. It is also required to have personnel qualified as lawyers¹³; three judges are now on loan to the secretariat from the judicial system.

2. Prefectural Environmental Dispute Councils

As provided by the Law concerning the Settlement of Environmental Pollution Disputes, each prefecture can establish an environmental dispute council by local government ordinance, and regulations regarding its administrative affairs, organizational structure, and so forth are specifically defined by the Law. In a prefecture that doesn't establish such a council, a prefectural governor is required to

¹⁰ Defined in Article 5 of the Law of establishment of the Environmental Dispute Coordination Committee.

¹¹ Defined in Article 6-9, and 18, *ibid*.

¹² Defined in Article 15 and 16, *ibid*.

nominate nine to fifteen coordinators in charge of examining pollution disputes¹⁴. In 2000, thirty-eight local governments established such councils and nine of them¹⁵ have nominated coordinators.

3. Prefecture Environmental Dispute Council Unions

When damages span several prefectures, the case concerned is called an inter-prefectural case and related local governments are required to cooperate with each other and can establish a council union to precede mediation and arbitration¹⁶. If the union could not be established, the Environmental Dispute Coordination Committee will have jurisdiction over the case.

4. The Relationship between the Environmental Pollution Coordination Committee and Prefectural Environmental Dispute Councils

Both the Environmental Pollution Coordination Committee and the Prefecture Environmental Dispute Council must act appropriately as independent organizations according to each authority. As the Environmental Dispute Coordination Committee has authority to oversee justice with regard to the Law concerning the Settlement of Environmental Pollution Disputes, it coordinates closely with each prefecture Pollution Dispute Settlement liaison meetings. The jurisdiction of the committee and councils regarding environmental pollution settlement is shown below.

According to Article 24 of the Law concerning the Settlement of Environmental Pollution Disputes, the Environmental Pollution Coordination Committee exercises authority over the cases below.

- (1) Grave Cases
 - Cases involving health impairments such as chronic bronchitis, bronchial asthma or Minamata disease caused by air or water pollution, where damages are usually widespread and serious

¹³ Defined in Article 19, *ibid*.

¹⁴ Defined in Article of 13-19 of the Law concerning the Settlement of Environmental Pollution Disputes.

¹⁵ Yamanashi, Nagano, Wakayama, Tottori, Shimane, Tokushima, Kagawa, Ehime and Nagasaki Prefectures.

- Cases in which more than 500 million yen in damages to animals, plants or their living conditions because of air or water pollution are claimed.
- (2) Cases with nation-wide implications
- Cases requiring widespread solution, such as damages affecting citizens in more than two prefectures
 - Cases involving noise from airplanes
 - Cases involving noise from Shinkansen trains (bullet trains)
- (3) Inter-Prefectural Cases
- Cases involving damage affecting more than two prefectures¹⁷

Prefectural Environmental Dispute Council exercise authority regarding mediation conciliation, and arbitration in cases except grave ones, cases with nation-wide implications, and inter-prefectural cases¹⁸. As for adjudication, only the Environmental Dispute Coordination Committee has authority. In the cases below, both the Committee and Councils can settle related disputes.

- (1) When significant effects on society can be foreseen such as a large number of victims suffering economic hardships if a case is left as is, either the Committee or a Council can work on mediation within the scope of their authority after an official deliberation to appoint an authority¹⁹
- (2) Settling a dispute through conciliation after failing to settle it through mediation, the mediation authority is decided by consultation between

¹⁶ Defined in Article of 20, 21, and 27, *ibid*.

¹⁷ In this case, an official application by parties has to be submitted to a prefectural governor of either prefecture. Moreover, the council has to give notice that the case is an inter-prefectural case. All prefecture governors concerned are required to discuss to establish the council union to settle the pollution dispute. When the council union is established after discussion, it has authority over the case. If prefecture governors do not reach final, the Environmental Pollution Coordination Committee will exercise authority so that all paper work will be done in the Committee (Defined in Article of 27, *ibid*).

¹⁸ Defined in Article 24-2, *ibid*.

¹⁹ Defined in Article 27-2, *ibid*.

the Committee and a Council²⁰

- (3) Taking over a case concerning conciliation for some appropriate reasons between the Committee and a Council²¹
- (4) When the adjudication committee settles the dispute by means of conciliation, even though the case had to be settled by adjudication
- (5) By agreement between the parties concerned, it was decided that authority would be exercised

5. Environmental pollution complaints

As pollution problem usually have a direct impact on local citizens and communities, local governments deal with environmental pollution complaints from local citizens. Their complaints are the preliminary step in environmental pollution disputes, therefore appropriate settlement of pollution complaints becomes the significant first step in solving pollution disputes overall. Consequently, the Law concerning the Settlement of Environmental Pollution Dispute positioned pollution complaint settlements as one factor of pollution dispute settlements, and requested local governments to endeavour to cooperate with related administrative agencies for appropriate administration on complaints regarding environmental pollution, and to provide for the placement of environment pollution complaint counsellors in local governments²². Their chief tasks are to hear complaints from local residents, to provide advice on resolving complaints, and to notify the concerned administrative agencies about such cases. From the 1st of April 1996 to the 31st of March 1997, about 62,315 complaints were received by local governments, and about 3,016 counsellors were posted nationwide by the end of year of 1999. As the Environmental Dispute Coordination Committee plays a role of public leadership and guidance with regard to dealing with complaints concerning pollution disputes received by local governments²³, the Committee is required to do the research necessary to comprehend complaints as well as provide information and documents to facilitate activities at local governments by holding workshops on pollution complaints and consultation related to pollution complaints.

²⁰ Defined in Article 27-3, *ibid.*

²¹ Defined in Article 38, *ibid.*

²² Defined in Article 49, *ibid.*

²³ Defined in Article 3, *ibid.*

III. Procedures for Environmental Dispute Settlements

To settle environmental pollution disputes, an official application by the parties concerned is required in principle. Unless the application is offered, no means of mediation, conciliation, arbitration or adjudication functions effectively. The first three means are based upon each party's mutual agreement. Each of the procedures is shown below:

1. Mediation

Mediation is provided by a mediation committee consisting of three Committee or Council members. The mediation committee does not have authority to render a legally binding decision, but helps the parties concerned to meet a feasible voluntary solution. The mediation committee may propose a solution based upon their judgements²⁴.

2. Conciliation

Conciliation based upon an official application by the parties concerned is provided by up to three conciliators who are appointed from Committee or Council members. Conciliators intermediate between the parties to help them reach a feasible settlement through mutual negotiations and discussions. Conciliators may collect oral from the parties and further specific information from technical experts. Although it totally depends on the parties to accept a proposal offered by conciliators, if they agree to accept it, the agreement becomes a legally binding contract²⁵. It is said that, compared with mediation, conciliation is effected by public authority.

3. Arbitration

In the process of arbitration, the parties abandon their rights to appeal to a judicial court and entrust an arbitration committee consisting of three Committee or Council members to pass judgement. Both of the parties promise to accept the proposal of the arbitration committee as a final judgement according to an arbitrating

²⁴ Defined in Article 27, *ibid*.

contract that they agreed upon at the beginning. The arbitration committee can officially initiate and proceed with a fact-finding process, and the arbitration award has a legal force identical to a judicial sentence²⁶.

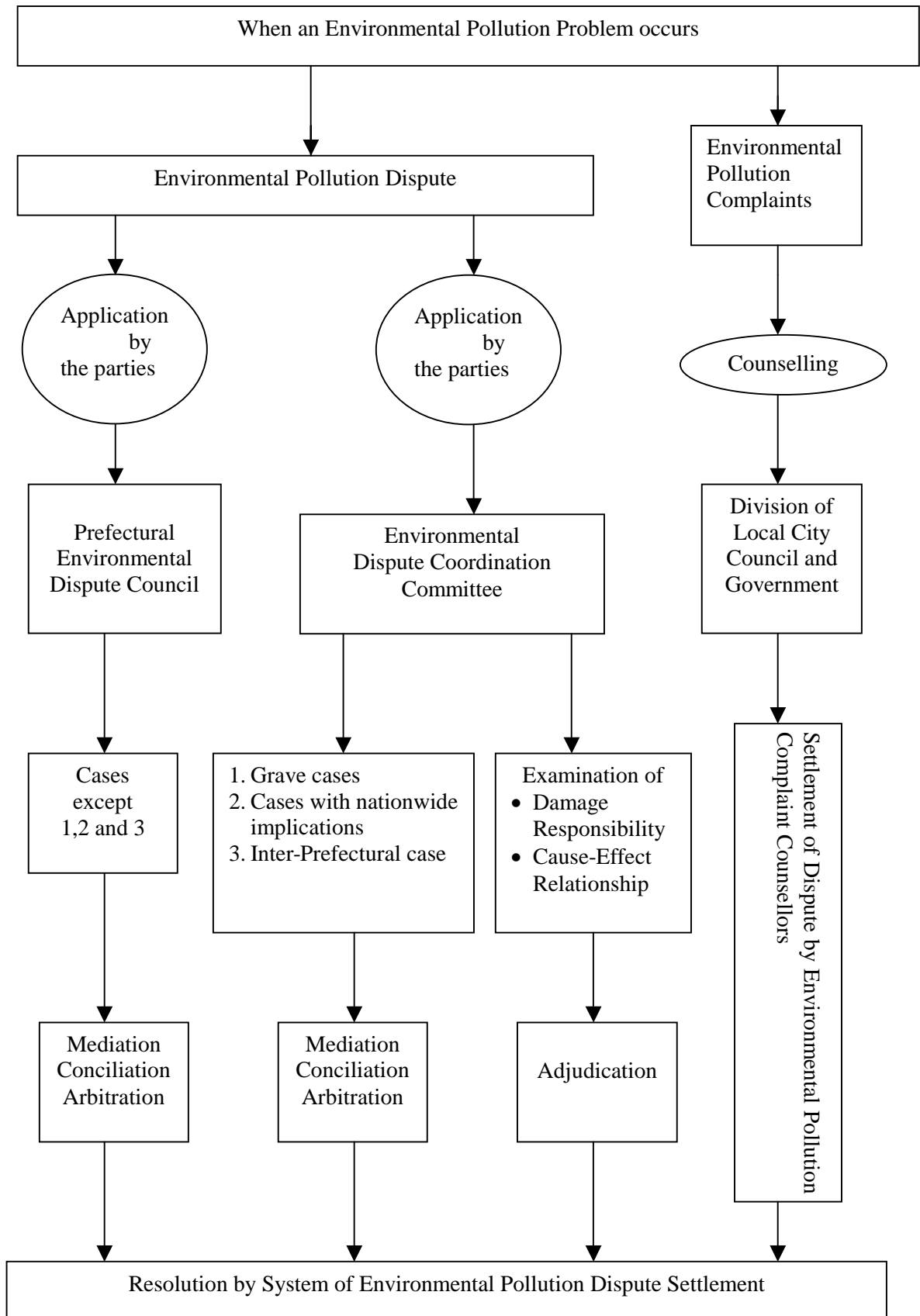
4. Adjudication

Unlike conciliation, mediation and arbitration processes based on agreement by the parties, the law gives certain legal effect to a judgement of an adjudication committee that is composed of three to five Committee members. An adjudication award is legally binding unless an appeal to a judicial court is made within 30 days, and adjudication is available only from the Environmental Dispute Coordination Committee. There are two types of adjudication, cause-effect and responsibility for damages. The cause-effect adjudication establishes whether or not a cause-effect relationship in legal terms exists between the alleged harmful act and the damage in the case concerned. The responsibility for damages adjudication establishes whether a party is responsible for the monetary compensation for the case concerned. Adjudication can be done by only the Environmental Dispute Coordination Committee.

²⁵ Defined in Article 31, 32, and 33, *ibid*.

²⁶ Defined in Article 42-20, *ibid*.

Table 1: Flowchart of System of Environmental Pollution Dispute Settlements
 (Source: By Author based upon information from White Paper of Pollution Dispute Settlement 2001)



5. Exhortation of Implementation of duty

To make the system for Environmental Pollution Disputes more effective, the Environmental Pollution Coordination Committee and Prefectural Environmental Dispute Councils can exhort an implementation of duty settled through Conciliation, Arbitration and the responsibility for damages adjudication to the party obligated when an appropriate reason is seen based upon an application by a concerned party²⁷.

6. Advantages of Using Administrative Commissions

Compared with civil trials by the general judicial system, environmental dispute settlements offered by these commissions have several advantages. Firstly, it helps to simplify procedures for a prompt settlement. To facilitate prompt dispute settlement, flexible proceedings with agreements by the parties and investigation and collection of case materials on official initiative are possible. Secondly, a lower-cost alternative is available. Resolving problems and settling disputes by taking advantage of the system helps to minimise the financial burden on the parties, as in this case the main part of the total cost of proceedings is borne by the government and prefectures. As a result, application fees are smaller than those for civil mediations by judicial courts²⁸. Thirdly, taking advantage of professional knowledge and expertise is possible. For a prompt and proper dispute settlement, the professional knowledge and expertise of Committee members with secretariat staff are quite essential. Appointing technical experts for further investigation is also helpful. Next, fact-finding through official initiative is possible. In this system, the Committee or the Councils can initiate a fact-finding process that helps alleviate the financial burdens on the parties and facilitates difficult fact-finding processes. Lastly, reflecting the Committee's experience on anti-pollution policies is possible. The Committee may present its own opinion to the Prime Minister concerning the improvement of environmental pollution control measures based on experiences gained while handling environmental pollution disputes.

²⁷ Defined in Article 43-2, *ibid*.

²⁸ Approximately 20 to 30 % of fees are decreased.

IV. System Operation of Environmental Pollution Dispute Settlements

1. System operation by the Environmental Dispute Coordination Committee

Since the enforcement of the Law concerning the settlement of Environmental Pollution Disputes on the 1st of November 1970, 739 cases have been accepted by the Committee, and 730 of them have been settled. Owing to the rapid social changes accompanying the growth of Japanese economy, the characteristics of environmental pollution dispute varied; especially pollution based upon urban orientated life styles has taken root instead of the conventional industrial pollution since the middle of 1980's. Here is an overview of system operation divided into two periods; one is from 1970 to the middle of the 1980s and the other is from the middle of the 1980s to the present.

1) The Period from 1970 to the middle of the 1980s

This is the period when the system was launched and Disputes in this period were mainly caused industrially on a large scale that was anticipated at the establishment of the system. The Minamata disease at the Shiranui River in Kumamoto Prefecture, mining pollution at the Watarase River in Gunma Prefecture, and noise pollution at Osaka International Airport, were typical cases.

Firstly, in the Minamata disease case, victims sought arbitration claiming a payment of compensation for damages against Chisso (Nitrogen) Co. Ltd. Since the first conciliation took effect in 1973, an application has been filed with the Committee every year for another arbitration to establish a rank of based upon a compensation agreement between victims and the company. The Committee also dealt with an application for changing the fees for consolation after setting up conciliation and this affair had been a large involvement for the Committee.

Secondly, in the case of mining pollution at the Watarase River, victims sought arbitration with regard to damages from mining pollution from the Ashio copper mine. Farmers in Ota city, Gunma prefecture, sought payment of

compensation and consolation regarding agricultural products damaged between 1952 and 1971, and arbitration was set up in 1974. This case is very significant in that it enabled a company to recognise its liability in resource-causing mining pollution as well as to pay appropriate compensation.

Lastly, in the case of noise pollution at Osaka International Airport, more than 20,000 local citizens living around the airport sought for payment of compensation from the State represented by the Minister of Transport, setting up measures to decrease noise, and prohibition of using the airport and so forth, claiming interference with their daily life causing psychological damage. This case generated 24 applications for arbitration between 1973 and 1981. In these arbitrations, prompt resolution regarding measures to decrease noise pollution was achieved and arbitration concerning prohibition of using the airport was agreed in a civil framework. Besides these cases, there were arbitration or adjudication cases related to air and noise pollution and fishery damages.

2) The Period from the middle of the 1980's to the present

After the middle of the 1980's, various incidents based upon an urban orientated life style such as roadway noise pollution, spiked tire dust pollution, damages from agricultural chemical used on golf courses, railway noise pollution and so forth increased rather than the large-scale industrial cases predicted at the system's establishment. The particular characteristic of incidents in this period was one of seeking to improve environmental conditions rather than remedy serious damages like those caused by conventional pollution incidents. Among others, prospective damages, the so-called "alarming pollution" became contained as a cause besides the incident that damage has generated actually. Moreover, when processing these incidents, an applicant is not required to have a civil right to claim, and it became more significant to settle arbitration through various means according to distinctive cases, taking various requests including administrative measure at a large scale into account. Consequently, various resolutions were based upon reality, making the most of the flexibility of the system for environmental pollution disputes. Additionally, it is notable that cases, which the Committee dealt with, increased, even though they were under the jurisdiction of prefectural environmental dispute councils. It is possible that

they were deemed to be inter-prefecture cases, making use of the adjudication or succession system.

Table 2: Number of incidents accepted by the Environmental Dispute Coordination Committee (Source: White Paper of Pollution Dispute Settlement 2001)

Year of	Total	Alarming Incidents	Incidents other than Alarming incidents	The Percentage of Alarming Incidents
1982	48		48	0.0
1983	42		42	0.0
1984	31		31	0.0
1985	31		31	0.0
1986	31		31	0.0
1987	25		25	0.0
1988	14		14	0.0
1989	11	4	7	36.4
1990	21	6	15	28.6
1991	5	3	2	60.0
1992	3	1	2	33.3
1993	10	4	6	40.0
1994	2	1	1	50.0
1995	2	2		100.0
1996	4	2	2	50.0
1997	1		1	0.0
1998	1	1		100.0
1999	1		1	0.0
2000	2		2	0.0
Total	285	24	261	

The trend is reflected in several cases such as noise pollution by automobile, dust pollution by spiked tires against a private company, and construction of a golf course where damage was caused by the agricultural chemicals used²⁹.

The current trend is represented by a case of noise pollution from the Odakyu Railway line settled through examination of the cause-effect relationship under public authority of the Committee. It was filed by local citizens in Setagaya Ward, Tokyo against Odakyu electric railway company for compensation of health damages caused by noise pollution, vibration, and iron dust. In 1988, the final arbitration including

²⁹ In this case, termination of the golf course construction was strongly requested, and it became the first such dispute accepted by the Environmental Dispute Coordination Committee in order to prevent pollution that could be caused in the future. The case was concluded with a permission to use agricultural chemicals as little as possible and a requirement that every possible effort be made to protect the environment by course developers.

setting up measures against recurrence was achieved. A case of damages from industrial waste and water pollution (an inter-prefecture case) is also a remarkable case in that local citizen sought removal of waste and payment of compensation. It was a large-scale industrial waste case and received great public attention. The final resolution including removal of the waste to Nao Island was achieved through arbitration in June 2000.

Additionally, after the middle of the 1980s, the various urban life style related incidents that involved the Environmental Disputes Coordination Committee occurred. This trend continues to the present, and is seen in incidents of waste-related, railroad noise, water pollution damage by liquid detergent, and blighted pine trees that called for an end to crop-dusting of agricultural chemicals. As a recent trend, quite a large number of similar incidents involving prefectural environmental dispute councils are being seen increasingly around the same time as a waste-related incidents or blighted pine tree cases.

Furthermore, diversification of the source of the outbreak has become a remarkable feature. Although pollution incidents caused by manufacturing and processing industries were historically the mainstream at the beginning of the system's establishment, in recent years, more incidents caused by waste and sewer processing, transportation, construction and civil engineering related matters are occurring in line with the changing society. Moreover, it is notable that cases seeking health and psychological or mental damages are increasing, rather than those involving property damages.

Another special characteristic of current cases is that the State, a municipal corporation, and public corporation have become parties in quite a number of cases. This is often seen in disputes concerning roads, garbage dumps, and so forth. When it comes to settling disputes, this characteristic becomes an advantage in that it promotes smooth proceedings, as the Prefectural Environmental Dispute Councils are one of the administrative agencies dealing with pollution dispute settlements, and it also promotes pollution prevention measures at the same time.

On the other hand, a number of incidents, which claims for factors that worsened living environments including for access to sunshine and ventilation, as well as traffic problems, have been increasing rather than the typical seven representative pollution cases. These days integrated dispute solutions are being sought. When dealing with such various disputes over pollution, it can be said that mediation by the Prefectural Environmental Dispute Councils Play a remarkable role in settling not only conventional industrial pollution dispute, but also various other pollution incidents caused these days, as it can offer a good opportunity for both the victims and responsible parties to negotiate on the basis of a neutral third-party organization in the spirit of concession.

Table 3: Number of incidents involving in the Environmental Dispute Coordination Committee Categorised by Outbreak Source

(Source: White Paper of Pollution Dispute Settlement 2001)

Year	Total	Business Institution	Construction	Road Way	Rail Way	Waste/ Sewage	Recreation/ Sports	Airport	Spiked Tire	Others
1982	49	48	1							
1983	42	42								
1984	31	31								
1985	31	31	1							
1986	33	31	1					1		
1987	28	21	1	2	1				3	
1988	15	15								
1989	11	5		1			3		2	
1990	23	13		1			3		2	4
1991	6	2	1	2	1					
1992	6	1			5					
1993	12	3			3					1
1994	5	1			3					1
1995	2									2
1996	10	2			4	2				2
1997	6	1			3	1				1
1998	2	1				1				
1999	4	1	2		1					
2000	4	2	2							
Total	320	251	9	6	21	4	6	1	7	11

V. Environmental Pollution Dispute Settlements in Practice

Since the Law concerning the Settlement of Environmental Pollution Disputes was enacted on the 1st of November 1970, 743 cases have been filed to the Environmental Dispute Coordination Committee as of the end of 2000. The total comprised 1 conciliation, 694 mediations, 1 arbitration, 45 adjudications including 36

examinations of responsibility for damages and 9 cause-effect relationships, and 2 exhortation or implementation of duty. Among them, 736 cases were concluded; they comprised of 1 conciliation, 691 mediations, 1 arbitration, and 41 adjudications including 33 examinations of responsibility for damages and 8 cause-effect relationships. In 2000, the Environmental Dispute Coordination Committee accepted 4 cases including 2 mediations and 2 adjudications regarding examination of responsibility for damages. The number of cases examined in the year was 13 and comprised 4 newly accepted cases and 9 cases such as 6 mediations, 3 adjudications, 2 examinations of responsibility for damages, and 1 cause-effect relationship case brought over from last year. The number of cases concluded within the year were 6 and the rest were carried over to next year.

Table 4: Number of Cases Filed/Concluded at Environmental Dispute Coordination Committee

(Source: White Paper of Pollution Dispute Settlement 2001)

*Not Concluded **Number in () is examination of cause-effect relationship

	Conciliation			Mediation			Arbitration			Adjudication		
	Filed	Concluded	Not Con.*	Filed	Concluded	Not Con.	Filed	Concluded	Not Con.	Filed	Concluded	Not Con.
1982	0	0	0	48	40	75	0	0	0	1(1)**	0	2 (1)
1983	0	0	0	42	46	71	0	0	0	0	1	1 (1)
1984	0	0	0	31	40	62	0	0	0	0	0	1 (1)
1985	0	0	0	31	38	55	0	0	0	1	1	1 (1)
1986	0	0	0	31	61	25	0	0	0	1	0	2 (1)
1987	0	0	0	25	29	21	0	0	0	3	0	5 (1)
1988	0	0	0	14	22	13	0	0	0	1 (1)	6 (2)	0
1989	0	0	0	11	18	6	0	0	0	0	0	0
1990	0	0	0	21	14	13	0	0	0	2 (1)	1 (1)	1
1991	0	0	0	5	16	2	0	0	0	1 (1)	2 (1)	0
1992	0	0	0	3	1	4	0	0	0	3	0	3
1993	0	0	0	10	5	9	0	0	0	2	0	5
1994	1	1	0	2	4	7	0	0	0	2	0	7
1995	0	0	0	2	2	7	0	0	0	0	0	7
1996	0	0	0	4	4	7	0	0	0	6 (1)	0	13 (1)
1997	0	0	0	1	2	6	0	0	0	4 (1)	0	17 (2)
1998	0	0	0	1	1	6	0	0	0	1 (1)	15 (1)	3 (2)
1999	0	0	0	1	1	6	0	0	0	3	3 (1)	3 (1)
2000	0	0	0	2	5	3	0	0	0	2	1	4 (1)
Total	1	1	-----	285	349	-----	0	0	-----	33 (7)	30 (6)	-----

VI. Summary

Environmental pollution dispute settlements have been a large social concern in Japan especially since the latter of 1960's. To settle them, civil trials by the general judicial system were expected to play a significant role, however, it was inadequate to provide proper relief for victims for reasons of efficiency time and cost. Under these circumstances, the Basic Law for Environmental Pollution Control and the Law concerning the Settlement of Environmental Pollution Disputes were enacted, and the Environmental Dispute Coordination Committee in Tokyo and Prefectural Environmental Dispute Councils in each prefecture were set up to prevent pollution as well as improve the living environment, making the most of their advantages such as simplified procedures, fact-finding through official initiatives, lower cost alternatives and so forth. The main purpose of that is to offer a prompt and proper dispute resolution by means of mediation, conciliation, arbitration, and adjudication, acting appropriately as independent organisations along the lines of each authority. In accordance with Article 24 of the Law concerning the Settlement of Environmental Pollution Disputes, the Environmental Pollution Coordination Committee is to exercise its authority over (1) Grave Cases that involves health impairments such as chronic bronchitis, bronchial asthma or Minamata disease caused by air or water pollution, where damages are usually widespread and serious; (2) Cases with Nation-Wide Implications that requires widespread solution including damages affecting citizens in more than two prefectures; and (3) Inter-Prefecture Cases that involves damage affecting more than two prefectures. Prefectural Environmental Dispute Council is to exercise its authority through processes of mediation, conciliation, and arbitration in cases except those three explained above. As for adjudication, only the environmental Dispute Coordination Committee can exercise the authority, as characteristics of cases concerned are so serious and complex.

Although the legal system was originally enacted to settle industrial pollution disputes chiefly occurred during the 1970's, it now has to deal with a new type of pollution dispute influenced by today's urban lifestyle such as noise pollution by automobile, dust pollution by spiked tires against a private company, and construction of a golf course where damage was caused by the agricultural chemical used. Based upon the tendency, these administrative organisations are expected to contribute to the

prevention of future pollution from occurring through establishing mutual agreements between parties concerned. Although compensation for damage from responsible companies was a main concern for the last decades, the Committee and Councils are now expected to concentrate on coordinating the merits for the parties.

One remained practical difficulty is that there has been no remarkable amendment of the Law since 1949, even though our society has been through various kinds of changes for past decades. The Committee has managed to deal with new type of pollution disputes with a flexible interpretation and application of the Law's Articles; however, limitations on flexibility of legal operation are still remained. Thus, it is necessary for the Committee to strengthen the system of dispute settlement dealing with environmental protection by enlarging its scope of targeted pollution, bringing an amendment of the Law into view.

THE JAPANESE MODEL OF DISPUTE PROCESSING

by

Yasunobu Sato *

I. Contemporary Issues in Japan's Commercial Dispute Processing

Japan is currently faced with a wave of 'globalization,' which should be seen as the third wave of massive law reforms following the Meiji modernization and the post-war democratization.¹ Globalization of the Japanese economy means that it has outgrown the traditional 'system'² and now requires a new system that reflects global standards. Japanese business and commercial activities, whether in or out of Japan, will inevitably include more cross-border commercial disputes. The current method of commercial dispute processing must be reviewed in the light of globalization. It was severely criticized as a barrier to trade and listed as one of the items to be discussed at the US-Japan Structural Impediment Initiatives in 1992.³ Transparent and accountable systems, including a dispute processing mechanism, have been demanded not only by foreign governments but also by the maturing Japanese economy itself. Japan has again justified its structural reform on the grounds of compliance with foreign pressure.

Contemporary issues regarding Japanese commercial dispute processing are analytically summarized below. In the light of global standards, access to justice both

* Professor, Graduate School of International Development, Nagoya University.

¹ The historical evaluation of Meiji modernization and post-war democratization is debatable. The author believes that these are both revolutionary events based on internal demands and catalysed by foreign pressure. The current campaign for massive reform is also as a result of pressure from foreign investors in the light of the recent Japanese financial crisis following the collapse of the 'bubble' economy and the subsequent Asian financial crisis due to a similar cause.

² K. van Wolferen (1989) p. 43.

³ Second annual report dated 30 July 1992.

in terms of quantity (availability of lawyers) and quality (natural justice) is substandard.

1. Availability of lawyers

Until recently the judiciary had been kept small as a tacit industrial policy. Commercial disputes have been controlled well by the bureaucracy through administrative guidance – wielding supervisory power through business associations and company groups. This tacit policy is reflected in a dearth of practising lawyers (*bengoshi*) and judges as well as the extremely small budget for legal aid. Inadequate access to *bengoshi* is aggravated by a *bengoshi* monopoly on legal practice, including civil and commercial dispute processing, under Article 72 of the Law on Bengoshi.

Furthermore, Article 30 of the Law on Bengoshi prohibits *bengoshi* from working for the business sector as in-house counsel and from holding any post in the bureaucracy. This segregation was intended to ensure the independence of *bengoshi* as legal professionals. However, it is obvious that this provision is now outdated and is a major obstacle to enhancing the transparency and accountability of business activities and public services under the rule of law. This provision has two negative implications: on the one hand, in a vicious circle, *bengoshi* have not realized that disputes relating to business or bureaucracy are their concern unless they are consulted for litigation in court; and on the other hand, neither large business corporations nor the bureaucracy has ever relied on *bengoshi*, who are mostly ignorant of business, until they believe litigation is inevitable even though it may involve sacrificing their reputation.

Consequently, people and companies have been dependent on the bureaucracy. Where administrative dispute processing is not available, they even resort to hiring racketeers to deal with civil and commercial disputes. Alternatively, they simply avoid disputes. Avoidance might have been the most reasonable solution for commercial disputes from an economic point of view during the period of high-speed economic growth. This phenomenon is shown by the sharp decline in the number of ordinary litigation cases received by the courts of first instance between 1985 and 1990 and the sharp increase from 1990 to 1995, a trend which coincides with the

growing ‘bubble’ economy from the mid 1980s until it ‘burst’ in the mid 1990s. Thus, the aversion to litigation was long ignored by the government until the adoption of the 1998 Civil Procedure Reform.⁴ The capacity of the judiciary, including the availability of lawyers and legal aid, was not addressed by the civil procedure reform. It was left for the ongoing judicial reform initiatives.

Along with the deregulation campaign under the recent administrative and judicial reforms and the Tokyo Big Bang initiatives, appropriate legal aid has recently been demanded and the Law on Legal Aid was finally enacted on 28 April 2000 and came into force on 1 October 2000. On 12 June 2001, the Justice System Reform Council attached to the Cabinet issued recommendations regarding the reform of the whole judicial system to increase its size and capacity as well as improve its quality, so that it could deal with an expected increase in the number and complexity of civil and commercial disputes. For this purpose, it recommended introduction of some features of the common-law style judicial system, such as a law school system emulating that in the US and the participation of citizens in jury trials, as well as the strengthening of legal aid. It proposed lifting the prohibition of *bengoshi* from working for the business sector as in-house counsel and from holding any post in the bureaucracy in Article 30 of the Law on Bengoshi. It also addressed reviewing the *bengoshi* monopoly of legal practice stipulated in Article 72.⁵ This issue relates to a more fundamental or philosophical issue on legal practice, that is, natural justice.

2. Natural justice

After the war, Japan partially adopted the adversary system: it introduced, for example, procedures based on the principle of party autonomy and procedures for the cross-examination of witnesses. However, as in the practice of settlement-in-litigation, the paternalistic practices of courts and judges still continue. In particular, as is seen in the practice of argument-and-settlement, the judge is assumed to be an inalienable professional who is a disinterested authority seeking truth and justice. As a wise man, the judge is also expected to persuade the parties to accept the most appropriate terms of settlement. The judge’s persuasive power is backed by his decision-making power

⁴ The new Code of Civil Procedure in 1996 came into force on 1 January 1998.

and state authority. Élitism, supported by the rank-conscious mentality of the people, underlies confidence in the judge and the court. This sentiment is shared by *bengoshi*, who also consist of a class of legal élite exclusively licensed by the state by means of Article 72 of the Law on Bengoshi. In this context, substantive justice has been sought by the court without due care for procedural justice. The fairness of the procedure has hardly ever been questioned since people's confidence in the fairness of state authority has generally convinced them that a court decision or proposal is fair and thus brings justice. Ideas of natural justice or due process have largely been alien ideas imported after the war. Thus, using Damaska's categorization of 'ideal types,' the Japanese civil practice would, in contrast to the English one, fall under 'inquisitorial' procedure by a 'hierarchical' authority in a 'managerial' state.

However, as discussed above, the mature economy has outgrown the government's control and regulation of economic activities. Foreign investors have demanded freer markets and more open competition in the context of globalization of free-market economies. Learning from the recent financial crisis following the bursting of the bubble economy in Japan, Japanese financial circles have also demanded deregulation of economic activities. Significant changes are under way. The model of a vertical society under a paternalistic state is gradually being transformed into a horizontal and flat society with a self-reliant, responsible private sector. Power is shifting from the state bodies to private entities. Closed communities are being restructured into open forums while the monoculture is now starting to accept cultural diversity. These social changes are also influencing civil justice and dispute processing. As the people's confidence starts to fade in the state authorities – in particular the courts – with regards to dispensing of substantive justice, procedural justice becomes appreciated as the only way to persuade people to reach fair solutions to disputes. The concept of fairness is increasingly being applied to procedural justice in the context of further globalization of commercial activities and dispute processing arising therefrom. What, then, is globalization?

⁵ See JSRC's recommendations issued on 12 June 2001.

II. Cultural conflicts in global commercial dispute processing

Not only in Japan, but in almost all other advanced countries as well, business and commerce are now conducted beyond national boundaries. Particularly after the collapse of the Berlin Wall in 1989, the capitalist economy entered a new era of free-market global economy. However, no global law or procedure has yet been realized. International commercial arbitration is developing as a viable way to process cross-border commercial disputes mainly because of its neutrality of jurisdiction and its enforceability through the New York Convention, as well as the efforts towards harmonizing domestic arbitration laws along the lines of the UNCITRAL Model Law on International Commercial Arbitration. Arbitration may provide the common framework for dispute processing. However, even the very concept of arbitration can be differently interpreted by each culture, and it cannot address the cultural conflicts behind the dispute.

Japan, together with China and other East Asian countries influenced by Confucian philosophy, has a conciliatory culture in which mediation or conciliation has long been a preferred mechanism for dispute processing. This culture is in sharp contrast to the Western adversarial culture based on individualism, which views conflict and dispute positively. Here, rules are devised for fair play in processing disputes, to actualize individual rights. In particular, under common law theory, the substantive law providing for rights is found by the courts and crystallized in adjective law. Thus, procedural justice, called either due process or natural justice, is considered to be of universal value.

Globalization of the free-market economy seems mostly to advance common-law driven Western dispute processing as the global standard, since the free-market system entails adversarial dispute processing. The recent Asian financial crisis has accelerated significant structural reforms, including law reform, in Asian countries such as Thailand, Malaysia, Indonesia and Vietnam. In particular, assisted by international organizations and bilateral cooperation agencies – mostly dominated by common law lawyers – massive laws consistent with free-market principles, such as transparency and accountability, have been introduced for the sound development of the economy. Commercial dispute processing, whether domestic or international, is

a prioritized area of such legal reform to enhance free-market systems based on arms-length human relationships. As Weber's rationality theory for capitalism suggests, dispute processing must here ultimately provide predictable binding decisions based on universal law applied to the facts found through due process. Thus, adversarial dispute processing underlying the rule of law is becoming the global standard.

However, the efficiency of adversarial dispute processing, such as arbitration, is now being questioned. In order to ensure procedural fairness and uniformity in the application of the substantive law chosen by the parties, arbitration has, ironically, become inflexible, costly and time-consuming, like litigation. This is a paradox of modern litigious dispute processing. Thus, the mediation or conciliation typically found in the East Asian tradition have recently been taken up as alternatives or complements to the arbitration process – a pattern of ADR. Med-Arb and similar hybrid methods of dispute processing are developing as innovative ways to solve the problem of international arbitration. China,⁶ Hong Kong,⁷ Korea⁸ and Singapore⁹ have formally adopted a system of conciliation within the framework of their arbitration. Not only these East Asian countries, but also dozens of other countries and jurisdictions, even including several common law jurisdictions¹⁰ have also incorporated settlement, mediation or conciliation, or a combination thereof, in the arbitration procedure. Common law jurisdictions' traditional hostile attitude to conciliatory efforts by judges and arbitrators is changing.¹¹ Accordingly, as can be seen in the contrast between the English and Japanese reforms in civil justice and arbitration, the adversarial and conciliatory cultures now seem to be converging on a possible global culture for better global dispute processing through comparative studies.

⁶ Article 41 of the Chinese Arbitration Law.

⁷ Section 2B (3) of the Hong Kong Arbitration Ordinance (Amendment No.2 – 1989).

⁸ The Korean Commercial Arbitration Board in Seoul endorses the combination of arbitration/conciliation (Tang H., 'Is There an Expanding Culture that Favours Combining Arbitration with Conciliation or Other ADR Procedures?' in Van Den Berg (1998), pp. 103–104).

⁹ Section 17 of the Singapore 1994 International Arbitration Act.

¹⁰ *Ibid.*, pp. 103–108. Several US states inserted a set of rules regulating conciliation in their arbitration laws. According to Tang, India, Germany, Slovenia, Hungary, Former CMEA countries, Croatia, Austria, Australia, Canada, The Netherlands, Switzerland, France, the US, Latin America and WIPO have such a combination.

¹¹ B.M. Cremades (1998), p. 164.

Such a global dispute culture cannot be developed without due care and respect for the local culture in each community. Each culture must learn from each other by means of such a cultural interface. It is clear from the Japanese experience that imported laws and systems need significant adaptation if they are to fit into indigenous institutions and local settings. The locality must be carefully examined and duly respected in order to *create*, not implant, appropriate laws and systems to best suit that locality.

III. A Model for Comprehensive Dispute Processing

What does the Japanese experience in dispute processing imply? The Japanese model of commercial dispute processing should be presented in order to bridge the cultural gaps between the conciliation culture represented by East Asia and the adversarial culture represented by Europe, England and the US.

1. Old model

The traditional Japanese model of civil and commercial dispute processing with third party involvement is a mixture of adjudication and conciliation in which the adjudicator also interchangeably played the role of conciliator. The decision maker usually attempted to seek some consensus from the parties. During the process of persuasion, however, he/she in fact often coerced them to accept the decision. The judge was expected to play the role of conciliator backed by his/her decision-making power in the civil procedure. Typically during rapid economic growth, economic bureaucrats who had the authority to supervise the disputing parties often controlled the dispute, mostly by means of non-binding administrative guidance.

This paternalistic dispute processing may be called a model for *mura* (village community, or metaphorically, a closed human group or relationships). *Mura* can be seen in every corner of Japanese society – closed business communities in the form of business associations, company groups and *keiretsu* (lineage of companies) as well as the closed legal community of a professional élite protected by a *bengoshi* monopoly

of legal practice. In this model, the third party involvement in dispute processing as mediator and umpire protects the community's common interests – harmony and peace of the *mura*. This old model is still largely valid in contemporary Japanese society, although Japan is currently seeking a new model, underlying the ongoing judicial reform.

2. New model

A new model of dispute processing must be compatible with global standards for a free-market economy. This may be defined as a party-controlled model. Although the third party's role is still important, the third party participates in dispute processing not as a superior but as an *equal partner* subject to the party's agreement. As masters of dispute processing, the parties control it with the assistance of lawyers, experts and the third party, who provide an opportunity for dialogue, expertise for the solution and safeguards for natural justice. Even in the case of litigation, the judge's role as mediator should be clearly defined by the parties. The role of the third party must, however, also reflect the public interests, the interests of an open community or society. Any dispute concerns some community or society. Even cross-border commercial disputes concern the global community or society. The participation of this neutral representative of an open community is beneficial not only for guiding the parties to an equitable solution, but also for the voluntary execution of the settlement terms or its decision.

In this sense, the idea of a 'triangle' consensus emerges where the neutral party has the support and confidence of the disputing parties. However, how can the old paternalistic processing be avoided in order to ensure the parties' control over their own disputes? First, it is advisable to separate mediation/ conciliation procedures, in which a third party plays the role of a mediator/ conciliator for settlement, from those procedures for a binding decision. This clear separation also avoids the dilemma of choosing between the effectiveness of mediation/conciliation attempts and the integrity of arbitration and litigation.

Nevertheless, the parties might prefer some hybrid processing for efficiency and credibility. Secondly, therefore, it is up to the parties to define the role of the neutral party and the appropriate procedures. Based on the agreement of the parties,

the third party could play multiple roles interchangeably – as mediator,¹² conciliator, adjudicator,¹³ arbitrator or even judge. The role and overall procedures could be variously designed and tailor-made by the parties. Various combinations of techniques for mediation/conciliation and umpiring can be devised as in the conciliation-in-court procedures. However, there is the dilemma of hybrid procedures’ concerns about natural justice, and this dilemma must be carefully addressed by defining the neutral party’s role and the hybrid procedures. In the event that the arbitrator or the judge has played the role of mediator/conciliator, the right to rebut should not be sacrificed before resuming arbitration or litigation without the parties’ informed consent to this risk. The settlement should not be coerced in the name of persuasion.

What is the difference between persuasion and coercion? It depends on who controls the dispute processing. Full disclosure of material information to the parties is essential to process a dispute under the control of the parties. The parties must be able to evaluate the settlement terms proposed by a conciliator, as it is crucial for their satisfaction that they can predict the result of rejecting or accepting the terms. No decision can be made without constraints, such as laws, customs, ethics, or even reputations, which define several choices. The point is whether the constraint is justifiable or not and who decides whether it is justifiable or not.

Thus, thirdly, lawyers are still important actors as advisors. Their participation is necessary to set the parameters of what are justifiable choices and to address natural justice concerns to the parties. On the other hand, non-legal experts should also be encouraged to participate in the process since specific expertise is useful or crucial for processing certain types of disputes, for instance, over highly technical financial derivative products.

¹² Here ‘mediator’ is defined as the informal facilitator of party negotiation while a ‘conciliator’ may be more actively involved by presenting a settlement proposal to the parties.

¹³ Here ‘adjudicator’ is defined as the person who can render a certain decision, which is not final – an unbinding opinion or binding on an interim basis subject to the parties’ objection, such as adjudication in lieu of conciliation by the judge in the procedure of conciliation-in-court. In England, The Housing Grants, Construction and Regeneration Act 1996 (which came into force on 1 May 1999) introduced mandatory adjudication, which is binding upon the parties on an interim basis.

IV. New Paradigm: Comprehensive Dispute Processing

Based on the new Japanese model, the concept of Comprehensive Dispute Processing ('CDP') may be proposed as a new paradigm for commercial dispute processing. The widely used concept of Alternative Dispute Resolution (ADR) seems to have recently become inappropriate since in this paradigm mediation/ conciliation is defined as complementary to litigation. As argued by some contemporary commentators, this concept is too narrow to express the whole system of appropriate dispute processing for commercial disputes. For commercial dispute processing, non-confrontational dispute processing has recently become increasingly widely accepted as the principal method for processing a dispute while maintaining the business relationship.

CDP seeks to create a consensus-centred dispute-processing network, linking and co-ordinating independent dispute processing procedures in various institutions as chosen by the parties. The procedures include mediation, conciliation, arbitration and hybrid procedures, such as Med-Arb. For instance, by using the networks for dispute processing prior to the emergence of a dispute, the parties may design their own tailor-made dispute processing as a preventive measure.

Takeshi Kojima advocates a 'total justice system'¹⁴ under which litigation is illustrated by the centre circle of a set of concentric circles, surrounded by the circle of arbitration and mediation/conciliation, which is, in turn, surrounded by the circle of administrative consultation, which is itself surrounded by the outer circle of negotiation for settlement. Within this system, he argues, there is interaction between these concentric circles; on the one hand, by the 'ripple effect' of formal judgments in the centre circle towards the outside circles of voluntary processing (the circle of administrative consultation and in turn the outermost circle of negotiation of settlement) and, on the other hand, by the 'osmosis effect' which in turn lets criteria used for the circles of voluntary processing become reflected in the standards for

¹⁴ T. Kojima, 'Funsōshori Seido no Zentai Kōzō (The Whole Structure of the Dispute Processing System)' in K. Shindō *et al.* (eds) (1984), p. 360.

judgments in the centre.¹⁵ Kojima argues that litigation is the centre of this system since it reflects justice.

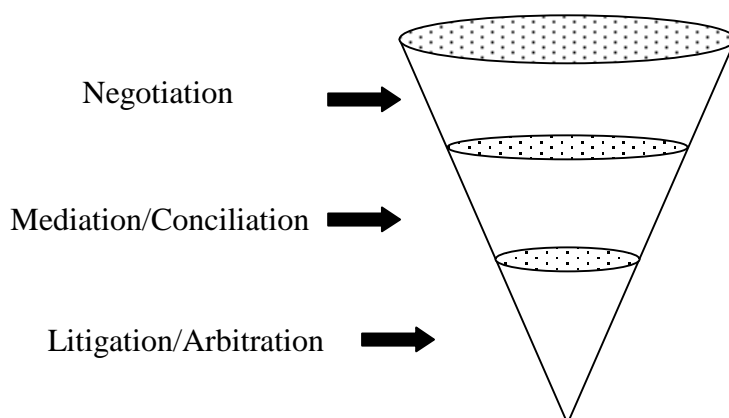
For lawyers, this model is easily understandable. Litigation should be of central importance to the total legal dispute processing system since it is the final resort (*ultima ratio*) and the ultimate coercive legal solution to disputes. Negotiation, mediation, conciliation and even arbitration cannot escape from the shadow of the law or the court's decision, whether lawyers are involved or not. Thus, it is essential to improve access to civil justice in order to enhance CDP. However, particularly regarding transnational commercial disputes, arbitration is another essential mechanism because it excludes the jurisdiction of a court in principle. International arbitration centres are becoming global courts beyond the limit of state courts and arbitration awards rendered therein are becoming more and more influential in practice. Furthermore, consensus-oriented dispute processing is of central importance in the designing of CDP in contracts for individual business transactions. During the 21st century, international investors and traders will further develop such contract-based dispute processing. From the disputing parties' point of view, as Bühring-Uhle rightly concludes,¹⁶ arbitration and even litigation can be re-defined as a complementary back-up procedure for a future-oriented polycentric voluntary solution for business.

CDP is a single total open system consisting of continuous layers of processing. In this sense, CDP can be illustrated by an image of an inverted cone (see Figure 1 below). The top level (broad part of the cone) is the wide entrance of CDP occupied by the most non-confrontational process, such as negotiation. The middle layer (narrowing towards the apex) is occupied by mediation/ conciliation and a hybrid with confrontational processing, and finally the bottom (the apex of the inverted cone) is occupied by the most confrontational system of litigation and arbitration.

¹⁵ T. Kojima (1992), pp. 513–514.

¹⁶ Bühring-Uhle (1996), pp. 393–394.

Figure 1. Image of CDP



From the point of view of disputing parties, this is a new paradigm for commercial dispute processing. For parties in commercial disputes, disputes normally come about during the course of their business, and in most cases, they will be solved in the course of business negotiation. If the dispute is more complicated, the parties will seek some help from a neutral third party to mediate or conciliate. Most commercial disputes will be processed and settled informally without referring to lawyers. Thus, commercial dispute processing should reflect the normal course of business practice and not be focused on the practice of lawyers.

V. The Bar Associations' Push for CDP

1. Creation of a one-stop shop for dispute processing

The idea of CDP should be articulated by bar associations in Japan as an appropriate means of dispute processing. A new model for CDP can be developed from the practice followed by the arbitration centres of the Japanese bar associations whereby the conciliator is appointed as arbitrator to decide unsettled issues within the specific scope entrusted to him/her by the parties, based on the confidence in the conciliator which has grown during the conciliation process. By clear specification of the entrusted scope by the parties, party autonomy and natural justice will be ensured since the result of arbitration within the scope is predictable.

A network should be developed between the judiciary and independent ADR institutions. The initiatives of bar associations may bring about such a network. The

bar associations can be co-ordinators of CDP or serve as one-stop shops for dispute processing, providing various means of processing, and information about them. The one-stop shop may provide the link between the parties and their choices and the various procedures in different institutions, such as arbitration and conciliation services in the JCAA and the JSE and procedures in specialized institutions for disputes involving construction, intellectual property and financial products, i.e., securities and banking. The shop should also be linked with judicial processing. Without an arbitration agreement, mediation/ conciliation could be wasted since there is no power to impose any binding decision. Thus, litigation should be employed as a back-up for mediation/ conciliation. On the other hand, the court will also benefit from the linkage between the judiciary and independent ADR institutions, such as bar associations' arbitration centres, because it will be able to refer the case to the institutions for mediation or conciliation before or during litigation proceedings without worrying about natural justice issues.

2. Sound competition

On the other hand, sound competition should be encouraged between the various types of processing in various institutions. Each system should be co-ordinated but not unified in order to allow for sound competition, which will improve the quality of the options available to the disputing parties as consumers. Bar associations' arbitration centres will thus have to compete with innovative judicial procedures, such as the development of a specialized court and procedures for conciliation-in-court and the small claims.

Again, for the promotion of such competition, the role of the bar associations is crucial as the professional bodies of *bengoshi*, who are the professionals of dispute processing. Articles 72 and 30 of the Law on Bengoshi should be reviewed with a view to liberalization through granting private business the right to perform dispute processing services and through granting *bengoshi* the right to work in the business and administration sectors to boost dispute processing capacity through self-regulatory business associations and administrative dispute processing. CDP covers not only civil justice, but also a wide range of dispute processing by business communities and administrative authorities.

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THE ALTERNATIVE DISPUTE RESOLUTION (ADR) IN VIETNAM

by

Dao Tri Uc*

I. Current situation of arbitral settlement of business disputes in Vietnam

Broadly speaking, in comparison with the court (*i.e.* juridical) settlement of business disputes, dispute settlement through arbitration have certain advantages and strong points such as the right to self-determination of the parties concerned is most secured as seen from various aspects (including initiation of a lawsuit, selection of arbitration body and individual arbitrators, submission of claims, choice of procedures and methods of dispute settlement etc.), single and private handling of the dispute through simplified, flexible and prompt procedures. As a result, commercial confidentiality may be ensured, time consumption is reduced, litigation costs are affordable to the businesspersons. Furthermore, arbitral awards, if respected, will much likely be honoured by the disputing parties. It helps to bring about a high level of practicality and enforceability of the awards. In international trade, the geographical distance and difference in the political regimes, legal systems and customs and so on become a serious obstacle to foreign businessmen. In case where a dispute arises over interests, the parties concerned tend to rely on those modes of dispute settlement that are considered fairer and closer to international standards or capable of offering a better chance of self-determination for the parties. Arbitral procedures can, by themselves, meet these expectations and since arbitral procedural rules in a large majority of countries were developed based on the model arbitral rules of UNCITRAL 1985, arbitral procedures are fundamentally uniform. Thank to these

* Director of the Institute of State and Law, National Centre for Social Sciences and Humanities, Vietnam

overwhelming advantages, arbitration emerged as a popular, internationally recognised and most-sought mode of business dispute settlement.

In sharp contrast to such a trendy preference for arbitration, the aforesaid advantages of arbitration seem to be under-explored in Vietnam. This judgement is given in consideration of the ill convincing creation and operation of the existing arbitration centres in the country. Quantitatively, apart from the Vietnam International Arbitration Centre, only 5 economic arbitration centres have been established in localities so far employing 94 arbitrators¹. Such a modest presence of arbitration centres fails to blow fresh air into the arbitral settlement of disputes in comparison with other forms of dispute settlement. In line with the economic transition and the pursue of an open-door policy, commercial transactions with foreign elements accompanied by disputes between Vietnamese business entities and foreign organisations and individuals also grew in number and complexity. Although there has been a surge in the number of disputes filed with, referred to and handled by the Vietnam International Arbitration Centre given those recorded under the centrally planned mechanism, it is still far below the level reached by its counterparts in regional countries². In comparison with the Vietnam International Arbitration Centre, locally-based economic arbitration centres were much less active. In this context, in addition to their handling of economic disputes, some centres have to engage in other

¹ These 5 economic arbitration centres were set up in Hanoi (2 including Hanoi Economic Arbitration Centre and Thang Long Economic Arbitration Centre), Bac Giang province (1), Ho Chi Minh City (1) and Can Tho province (1). Up to now, the Ministry of Justice has issued arbitrator certificates to 94 individuals from 12 provinces. Over the past 2 years, this number remained unchanged as no locality is reported to apply for arbitrator certificates. *Source*: Department of Civil and Economic Laws, Ministry of Justice.

² During 1963-1987, the Foreign Trade Arbitration Council and Maritime Arbitration Council handled only 3 cases while in 1988-1992, these two arbitration councils handled 91 cases. Since its establishment (at the end of 1995), the Vietnam International Arbitration Centre received approximately 20 cases/year on the average, a half of which was ended in hearings. In 2000 alone, the Vietnam International Arbitration Centre handled 21 cases (i.e. increased by only one case compared with that in 1999) with disputed values totalling USD 2,639,327. Parties concerned to disputes with foreign element (19 cases) include nationals from South Korea (4 cases), UK (3 cases), Singapore (2 cases), China (2 cases), Panama (1 case), Ucrain (1 case), Thailan (1 case), USA (1 case), Lichtenstein (1 case) and Taiwan (1 case). Vietnamese party was plaitiff in 52% of these cases (10/19 cases). Of the 21 cases mentioned above, the Centre brought into hearing of 9 cases and succesfully conciliated in 2 cases. By 15 October 2001, the Vietnam International Arbitration Centre received 5 claims relating to product quality and payment with a total disputed value of USD 427,769. In all these 5 cases, the plaintiffs were Vietnamese nationals or entities while defendants include Singaporeans (3 cases), Germany (1 case) and Poland (1 case). The Centre has held hearings of 2 cases and brought 2 other cases inton successful conciliation. *Source*: Vietnam International Arbitration Centre.

businesses such as organising seminars or training courses on business laws for enterprises. Many qualified and capable arbitrators found no opportunity to practice after their issuance of arbitrator certificates. Such a worrying situation resulted from the following reasons:

First, Perception and business culture

Despite its 30 years in existence and continuous strengthening and broadening since the start of the country's transition to a market economy, commercial arbitration and its advantages were not widely known among the business community. Some businessperson even misunderstood that commercial arbitration was merely a modified version and was insignificantly different from the previous State Economic Arbitration.

In the daily business practices in Vietnam, when a dispute arises, parties concerned often opt to resolve it through negotiation, conciliation or even suffer losses to keep their commercial confidentiality and reputation. In certain serious cases, the disputing parties may seek intervention from the economic police forces, procuracy offices and State Inspectorate. Only when these solutions become fruitless, other modes of dispute settlement such as courts and arbitration could be referred to.

Second, Lack of confidence among the business circle in the effective settlement of enforcement of arbitral awards.

Because of their limited presence and ineffective performance, the existing economic arbitration centres failed to establish reputation and draw proper interests from businesspersons. On the other hand, the reputation and attractiveness of arbitration institutions are also formed by their representing individuals arbitrators. In achieving this objective, individual arbitrators are required to be outstanding specialists with a high level of ethics and professional qualifications in their own areas of expertise, as well as good knowledge of the laws and hearing experience. Nevertheless, due to strict and limping provisions of Decree No. 116/CP of the Government on criteria of arbitrators which overemphasise legal knowledge while underestimate technical expertise, it is hard if not impossible for arbitration centres to

build up a large number of qualified and experienced arbitrators. Apart from the above-mentioned reasons, one of the other key factor that reduces the attractiveness of arbitral settlement of disputes in Vietnam is said to be a lack of efficient mechanism that secures a strict enforcement of arbitral awards or decisions. Though both Decree No. 116/CP and Arbitral Rules of the Vietnam International Arbitration Centre prescribe that the arbitral awards, once rendered by the Centre will be of full force and effect and will not be challenged or appealed before any court of justice or any institution, so far the relevant laws of Vietnam are still silent on a mechanism that ensure the compliance with awards made by domestic arbitration organisations, should such awards are to be enforced in Vietnam³. In accordance with Article 31 of Decree No.116/CP, in respect of arbitral awards rendered by economic arbitration centres that are not respected by a disputing party, the other party may be entitled to request a competent people's court to handle subject to procedures for resolution of economic proceedings. By its nature, this step should not be considered as a court support for the enforcement of arbitral awards but otherwise, it provides a legal foundation for the court to dismiss arbitral awards. Pursuant to this provision, the court may receive and hold hearings of first trial to handle the request without the need to verify the properness and validity of the arbitral awards. In reality, many businesses have first referred their disputes to arbitration but has later voluntarily withdrawn their claim once they are aware of such a fundamental limitation.

Third, arbitration organisations are not vested with adequate powers and are in short of support from judiciary bodies in resolving economic disputes.

Under the existing regulations, commercial arbitration in Vietnam may have jurisdiction over a certain number of disputes only: including,

- Disputes over economic contracts;

³ Meanwhile, under Decision No. 453/QD-CTN dated 28 July 1995 of the President concerning Vietnam's accession to the 1995 New York Convention on recognition and enforcement of foreign arbitral awards, the arbitral awards rendered by Vietnamese arbitration centres in respect of disputes involving foreign elements may be recognised and secured for overseas enforcement. Similarly, foreign arbitral awards or decisions may also be reviewed, recognised and enforced in Vietnam.

- Internal disputes in company and between members of the company during the establishment, operation and dissolution;
- Disputes over acquisition and sales of shares and bonds.

Under Circular No. 02/PLDSKT of the Ministry of Justice dated 3 January 1995 providing guidance on the implementation of Decree No. 116/CP, disputes over economic contracts are defined as those arising between (i) juridical persons, (ii) juridical persons and private enterprises; (iii) juridical persons and individuals having business registration certificates and (iv) private enterprises and individuals having business registration certificates. Such a definition may broadly cover a wide variety of business disputes arising from the conclusion and performance of contracts. However, this provision is not consistent with the Ordinance on Economic Contracts dated 25 September 1989 since, an economically contractual relation requires a participation of at least one juridical person. Furthermore, Circular No. 02 has not yet determined arbitral jurisdiction over contract disputes between juridical persons and scientists, artisans, family-based economic units, individual farming and fishing households as well as disputes between juridical persons and foreign organisations and individuals in Vietnam (Articles 42 and 43 of the Ordinance on Economic Contracts). There is a wide recognition that the effectiveness and scope of activity of arbitration organisations are not only dependent on their jurisdiction over disputes but are also under a strong impacts of the co-operation, support and assistance of the courts. Individual arbitrators handle disputes based on the power delegated by the disputing parties although, arbitrators do not always exercise their vested powers properly. Therefore, disputing parties must be equipped and well prepared to prevent possible abuse of power or breach of procedural rules, unfairness or bias of arbitrators. To this end, the parties concerned must be permitted to request the court to review, cancel, disapprove or have arbitral awards declared unenforceable. On their part, arbitrators also, under various circumstances need the court assistance in ensuring a fair and just settlement of the disputes. For instance, such a judiciary facilitation is indispensable in taking necessary measures at the request of the disputing parties to safeguard evidence or secure the enforceability of the awards after hearings, or in calling for independent examination, or summoning witnesses, since under the existing regulations, arbitrators have no competence to carry out these activities by

their own. Regrettably, a required degree of assistance and intervention by the public authorities in the arbitral dispute settlement is still absent in the laws.

Fourth, though widely seen as a crucial mode of dispute settlement, under the current circumstances of Vietnam, arbitral procedures are exposed to many limitations given the State-run judiciary procedures.

Notably, like in other countries, advantages of arbitral procedures are also disadvantages of judiciary procedures. Despite the complexity of court settlement of disputes or even corruption in the judiciary system, the court performance creates a confidence of the disputing parties that justice is exercised on behalf of the public powers and hence court judgements are much likely enforceable. This is a well established truth for the judiciary system is currently organised nationwide from central government to local authorities in all 61 provinces and hundred districts with powerful human resources consisting of thousands judges, jurymen and supporting staff. Apart from the assistance extended by other State agencies such as judgement enforcement body in securing the enforceability of court judgements, the court strength is also multiplied by internally co-ordinated efforts of the court components. For example, investigation and hearings may be delegated to agencies at various levels.

Another aspect that is often taken into consideration by the disputing parties when referring their dispute to the court is the ability to benefit from the court assistance in case of necessity. In handling of economic disputes before the courts or arbitration, burden of proof is always born by the parties concerned. However, if the gathering and preserving of proofs are carried out through judiciary examiners, the disputing parties may find it difficult to fulfil this obligation since in Vietnam only the law enforcement bodies such as police, procuracy offices and courts have the right to make a direct request for independent examination. It implies that in obtaining an examination report, an individual has no ways other than bringing an action and petitioning the court to request for examination as there is no legal requirement that oblige the courts to consider a disputant's request for examination before the initiation of a lawsuit. Additionally, due to underdevelopment of public service providers, weaknesses of the archives, and especially lack of willingness and "bureaucracy" of

part of the public servants, individual disputants are faced with mounting difficulties in proposing the competent agencies and persons to verify and authenticate the legitimacy of the proofs whose origin were dated back long ago.

Another obvious advantage of the court which can not be found in arbitration is the ability of the local courts to request the Supreme Court for further guidance and instruction on how to handle the case, where there is inadequate legal grounds to resolve the dispute due to the absence, vagueness, insufficiency or inconsistency of relevant provisions. In the context of incompleteness or even inconsistency of the legal system, this brings about a multiplied advantage for the courts.

Finally, court settlement of economic disputes also has an advantage in cost effectiveness. Normally, arbitral settlement of disputes in most countries costs the disputing parties less money than that in judiciary procedures. By the contrary, in Vietnam the arbitration costs are fairly high due firstly to the fact that arbitration fees are statutorily fixed at high rates compared with that of the court fees (for more detail, please refer to the table comparing arbitration fees applicable to domestic disputes by the Vietnam International Arbitration Centre and court fees applicable to economic proceedings under Decree No. 70/CP of the Government dated 12 June 1997). In certain cases, where the disputed values exceed USD 55,000, the arbitration fees of the Vietnam International Arbitration Centre are even much higher than those applied by the Association of American Arbitration⁴. High costs of arbitration in Vietnam is also due to the fact that arbitral award may be appealed by the disputing parties for a court review or cancellation.

⁴ For example, in accordance with the arbitration tariffs of the the Vietnam International Arbitration Centre, if a disputed value is USD 55,000 (or USD 100,000), the arbitration fees will be USD 1,625 and USD 2,750 respectively that are determined using the following formula: (USD 500 + 2.5% of the amount in excess of USD 10,000). However, pursuant to the international arbitration rules of the Association of American Arbitration (AAA) with effect from 1 March 1991, the arbitration fees under the same circumstances are only USD 1,600 and USD 2,050 respectively. Such a difference lies in the fact that AAA arbitration fees are computed to include: (i) USD 300 applicable to all claims upon their submission and other related costs that are equal to USD 1,250 + 1% of the amount in excess of USD 50,000 in case where the disputed values range between USD 55,000 and USD 100,000.

II. Improving laws governing procedures for arbitral settlement of economic disputes

Reconciliation of differences or conflicts of interests in business transactions is considered an important factor in enhancing the stability, linkage, solidity, and attractiveness of an economy. In promoting a market-driven economy and accelerating economic integration process, arbitral settlement of disputes is undeniable for this mode of dispute resolution is initiated by the disputing parties and aimed at heightening their right to self-determination. It does not however, mean that arbitration settlement of disputes may be independent from or free of State supervision and competes with public jurisdiction. On the contrary, arbitral jurisdiction serves as a supplementary form of the public jurisdiction. Its presence demonstrates democracy in economic activities and goes in line with a trendy socialisation of economic dispute settlement. An enhanced role of commercial arbitration will help to ease the trying burden of the court system. Thus ensuring a balance between arbitral jurisdiction and court jurisdiction, international arbitration procedures and domestic arbitration procedures emerges as an internal task of improving arbitration laws. From an external point of view, any effort to improve arbitration law must be aimed at making the arbitral rules in Vietnam closer and more consistent with international standards. On the one hand, it should represent characteristics of the socialist orientation but on the other hand, it should also respect cultural identity of the parties concerned, the independence, honesty, impartiality and non-discrimination between different legal cultures during the dispute settlement.

In the latest draft of the Ordinance on Arbitration, many of the shortcomings and limitations of the arbitration laws as mentioned above have been step-by-step removed. However, there also remain different views on a number of sections of the draft that may be of interest and relevance to our discussions:

1 Scope of disputes subject to arbitral jurisdiction

As mentioned above, provisions relating to jurisdiction over economic contract disputes seem to be contrary to and inconsistent with substantive laws. Although it is necessary to broaden the arbitral jurisdiction over dispute settlement, it

should be carried out in line with efforts to review and amend relevant regulations on economic contracts and commercial disputes. However, a thorough study is required as regard a possible expansion of arbitral jurisdiction not only to business disputes (business is defined in the 1999 Enterprises Law) but also to disputes arising from civil transactions based on principles of equality and self-determination. This is related to the identification of areas that may be or may not be subject to arbitral jurisdiction. Arbitration is usually referred to in resolving trade and investment disputes as a matter of international practice since the definition of “*business*” under Vietnam’s Enterprises Law is basically similar to that of “commerce” as stipulated in the UNCITRAL Model Law on Trade Arbitration dated 21 June 1985 (clause 1 of Article 1).

Areas where arbitration is not referable to as a mode of dispute settlement may include disputes over State or public interests, disputes between subjects of State management, disputes arising from personal relations, divorces or adoption etc.

2. Organisational form of arbitration

There is still a hot debate in Vietnam about a possible formation of ad-hoc arbitration to handle business disputes. Though Vietnam has insufficient number of qualified and experienced arbitrators, the law should not prevent the parties if they could find reliable arbitrators and succeeded in establishing an arbitration committee to resolve their disputes. This shows that due to its limited performance in comparison with statutory arbitration, ad-hoc arbitration is not as popular as statutory arbitration. Nevertheless, a public recognition of ad-hoc arbitration also enables the parties concerned to have a wider option of modes of dispute settlement, especially in case of minor or uncomplicated disputes.

3. Recognition and enforcement of arbitral award by the courts

In respect of the enforcement of arbitral award, some argue that if one disputing party refuses to honour the arbitral award but does not request for court intervention to annul the award, the other party may approach the judgement execution body for enforcement of the award but is not necessarily required to file

petition to the court for recognition and enforcement of the arbitral award⁵. Such a possibility, if realised, will speed up the enforcement of arbitral awards but it fails to ensure that the awards are valid and are in compliance with arbitration procedural requirements. The court examination and supervision of arbitration performance are crucial and help to reaffirm the court role as a judiciary body which is entirely different from the role of the judgement execution body (that serves as a component of the executive body).

4. Criteria of arbitrators

Unlike the laws of many other countries, the laws of Vietnam require individual arbitrators to meet certain specific criteria and conditions. Such a requirement is indispensable to secure arbitration efficiency and is therefore beneficial to the disputing parties. On the other hand, through its issuance of arbitrator certificates, the State may better supervise the arbitration practitioners. Similarly, the laws also regulate criteria of judges, prosecutors, lawyers and legal advisors etc. However, such criteria as “good ethics, honesty, objectivity and impartiality”, “having economic and legal knowledge and experience” were proven vague conceptions which may be differently understood and interpreted by each person. Truly speaking, there must be a distinction in determining arbitrator criteria between those applicable to arbitration practices and those applicable to individual arbitrators in handling specific disputes. The law may set forth provisions on criteria and conditions to be satisfied for the issuance of arbitrator certificates whereby certain categories of persons will not be eligible to act as arbitrators including individuals with insufficient civil behavioural capacity, serving prisoners whole sentence have not yet been erased from the court’ books, persons who are subject to criminal prosecution, judges, prosecutors, owners or managers of businesses which are declared bankrupt not due to objective reasons etc. All persons who do not fall under one of these categories may be eligible to apply for arbitrator certificates. Such a provision may help to prevent the “request-and-give” mechanism in licensing arbitrators. In the meantime, ill defined criteria such as “*good ethics, honesty, objectivity and impartiality*”, “*having*

⁵ Vietnam-French House of Law, Seminar on the Draft Arbitration Ordinance, Hanoi, May 2001, p 58.

economic and legal knowledge and experience” will no longer be taken into account in granting arbitrator certificates. Obviously, in establishing their own reputation and attracting clients, arbitration centres must build up a network of respected and qualified arbitrators as well as require their arbitrators to strictly observe the code of conducts. Thus although not prescribed by the laws, any arbitration organisation which is prepared to create its image in the market as a prestigious and leading institution must set its own criteria and conditions for the individual arbitrators. Furthermore, in practice, disputing parties always try their best to select appropriate individual arbitrators who are capable of protecting their interests. Therefore, the law should not require individual arbitrators to be “honest, impartial and objective”, but authorises the disputing parties to monitor the behaviour of arbitrators by exercising their right to declining or requesting to replace certain arbitrators once it is well established that these arbitrators are dependent or biased in dealing with the case. In addition, the law may require an impartiality or objectivity of individual arbitrators by obliging the arbitrators not to be closely related to one of the disputing parties based on bloodline, nurturing, marriage, or other ties. For example, an arbitrator will not be able to handle a dispute if one of the disputing parties is a business where his wife is working or the owner of a disputing business has business and property relationship with the arbitrator.

Discussion in Session II

Two main topics were discussed in session II: one was “Comprehensive Dispute Processing” and the other was “reform of the judicial system”.

Professor Sato’s presentation on the topic of comprehensive dispute processing elicited comments relating to questions about the meaning of comprehensive dispute processing and why legal practices tend to be monopolized by licensed lawyers. In Japan, access to lawyers is poor, as their numbers remain very low, and costs are very high. This situation has resulted from institutional barriers and limits on the number of lawyers and judges under governmental policy. Thus, abolishing the monopoly of the lawyers has now become a crucial issue, and introducing professional training of arbitrators and mediators based upon real skills is now very significant.

Other interesting comments were made regarding Dr. Ahmad’s presentation; in particular that arbitration is increasingly becoming a part of litigation, especially among business people who are apt to place more emphasis on mediation or conciliation when settling commercial disputes. In this discussion, differences between the legal cultures of each country were cited, and an instance was mentioned in which victims do not always want only money and compensation. In some cases, they strongly desire a sincere apology. The judicial system, however, cannot always offer such remedies through the general legal dispute settlement system. Mental and psychological compensation are also an important factor in some countries. It was strongly stressed that the lawyer’s role is not only one-way; it is important to re-conceptualize the lawyer’s role in the modern society.

The other subject concerned reform of the judicial system. It was mentioned that a recent very crucial issue is to increase the number of lawyers in Japan to maximize access to justice. The American type law-school system is now being introduced, with the aim of producing 3,000 lawyers every year, which is triple the current number of new lawyers. This will be a dramatic change, because just a couple of years ago, only 500 new lawyers were licensed each year. In comparison, the judicial system in the Philippines introduced a license system with an annual examination given by the Supreme Court. Reform of the Indian judicial system was also explained with specific details about the transplanting of other countries’ legal education and training systems such as those of the United States of America and Europe.

The discussion ended as specific dates were provided for consumer protection and labor disputes in Malaysia, the Philippines, and Japan.

SESSION III

The Political and Administrative Reform in Asia

LEGAL AND INSTITUTIONAL REFORM IN EAST ASIA: CASE STUDY OF THAILAND

by
Shinya Imaizumi *

I. Introduction

This paper examines the development of constitutional law under the political reform in Thailand in the 1990s, as a case study on legal and institutional reform following pro-democratic movements in East Asia.

Since the late 1980s, we have seen many pro-democratic movements in East Asian countries such as the Philippines (1986), Thailand (1992) and Indonesia (1998). The successful pro-democratic movements usually led to constitutional law reform directed toward eliminating negative legacies from the era of authoritarian or dictatorial government, and establishing a new framework for democratic governance. For example, the present 1987 Philippines Constitution was enacted following the People's Power Revolution that defeated the Marcos government. The 1987 Constitution not only returns to the model of the U.S. Constitution, but also adopts some new provisions and mechanisms for democratization. The Constitution established some constitutional organs to monitor the government, such as the Human Rights Commission. In Indonesia, the 35-year Suharto government fell in 1998, and it was followed by constitutional amendments and the enactment of laws for democratization. However, Indonesia still seems to be seeking a new framework for stability of its parliamentary system.

Thailand experienced the so-called "Bloody May" incident in 1992, in which

* Researcher, Institute of Developing Economies (IDE), Japan.

many people were killed and wounded when the Military fired into mass demonstration. The people were protesting the Army Commander, one of the Coup leaders of 1991, taking the position of Prime Minister. After this incident, “the development of democracy” or “political reform” was strongly propounded for advancing democratization, and it resulted in a series of amendments to the 1991 Constitution (in 1992, 1995 and 1996). Although the amendments of 1995 introduced many reforms, a more comprehensive revision of the constitution was proposed. Hence, under the 1996 Amendment, the Constitutional Drafting Assembly, separate from the Parliament, was established to draft the new Constitution. After eight months of debate and public hearings nationwide, the CDC adopted a draft in August 1997, and then the draft was sent to the Parliament and approved in September. After approval by the King, the Constitution of the Kingdom of Thailand 1997 went into force on 11 October 1997.

As seen later, the content of the 1997 Constitution, which is the direct result of political reforms in the 1990s, differs from the former Constitutions of Thailand, and is progressive in many respects. Political reform or democratization in Thailand in the 1990s started from the movement to protest military rule, so one of the tasks of constitutional reform is to eliminate or exclude the mechanisms built into the former constitutions to legitimize the rule of the military groups. However, the scope of the 1997 Constitution is not limited to this aspect. Rather, most reforms introduced by the 1997 Constitution are intended to build a framework for enhancing democratic governance.

In this regard, it should be recalled that historically parliamentary politics in Thailand not only were unable to prevent a resurgence of the Coup, but also provided an excuse for the Military to return to power. Since 1989, there has been a resurgence of civilian rule as a Prime Minister took office through general election. However, the government was not free from allegations of corruption as well as political maneuvering among political parties, including heavy use of non-confidence motions against the government. The decomposition of the government was the main excuse for the 1991 Coup. Such political maneuvering was seen even in the constitutional reform after 1992. In other words, the political reform was motivated by the unsatisfactory situation of the Thai parliamentary democracy.

The following sections examine “traditional” constitutional issues before 1992, and then consider some important components of reforms under the 1997 Constitution.

II. “Traditional” Issues in Constitutional Law in Thailand

The most eminent feature of constitutionalism in Thailand is the number of Constitutions it encompasses. From the first Constitution of 1932 to the present 1997 Constitution, Thailand has had a total of 15 such documents. The reason that Thailand has had so many Constitutions is that there were the frequent changing of political power through military coup. When a coup succeeded, the new group brought down the Parliament and repealed the existing Constitution. It was perceived as inevitable that each new coup group would enact its own new Constitution legitimizing their governance in place of the Constitution they repealed. Many of the coups resulted from power games among the ruling military groups, so there were few differences between the Constitutions. However, each new group tried to plant provisions or mechanisms within the Constitution that would help them in the continuation and facilitation of their own rule after parliamentary politics were restarted. As pointed out below, the demands of the people seeking democracy have primarily concentrated upon the elimination of such undemocratic aspects of the Constitution.

The most outright approach used by military groups was the enactment of “interim constitutions”. The Constitutions of Thailand can be classified into two categories: “interim constitutions” and “permanent constitutions”. An interim constitution is one that is enacted shortly after a coup for setting up a tentative framework of governance, and replaces the repealed Constitution. Usually, there are only a few provisions contained in an interim constitution, and significant provisions such as those concerning rights and freedom of the people are lacking. As for the Parliament, the interim constitution provides for the setting up of a one-house parliament comprising members nominated by the Prime Minister (rather than by election). Furthermore, some interim constitutions have contained provisions giving the Prime Minister strong authority.

The interim constitution is usually followed by enactment of a permanent constitution and general elections. Permanent constitutions usually contain more provisions than the interim constitutions, including clauses regarding human rights and freedom of the people. Permanent constitutions set up a bicameral parliament comprising the Senate and the House of Representatives. Since ruling groups are usually reluctant to enact a permanent constitution, enactment of a permanent constitution is the first and principal demand raised by the democratic groups.

Even if a permanent constitution was enacted, it usually contained some clauses or mechanisms considered useful for legitimizing and extending the military's rule. Until the first direct election of Senators in Thailand in 2001, Senators had been nominated by the Prime Minister or the ruling group. In the past, some constitutions had contained provisions enabling government officials to take the office of Prime Minister, minister or member of parliament without resigning their current positions. Thus, senators at that time included retired and incumbent government officials, including Military and Police. Other than this, the Prime Minister was not required to be a member of the Parliament, and it enabled the leader of the ruling group to be Prime Minister without being elected. In addition, the post of President of the Parliament was considered important for managing or controlling parliamentary procedures. Therefore, the President of the Parliament was assigned to be President of the Senate, while the position of Vice President of the Parliament became President of the House of Representatives. This type of arrangement was considered to favor the ruling group, since the Senate was usually under the control of the ruling group.

The democratic movement had demanded the elimination or exclusion of these undemocratic aspects of the Constitution. Indeed, the 1992 Amendments of the 1991 Constitution are largely devoted to these issues. Under these amendments, the post of President of Parliament was changed to President of the House of Representatives. Some provisions prohibit taking the position of minister or member of Parliament or other permanent governmental official at the same time. In addition, the Prime Minister must be elected from among the members of the House of Representatives.

Examples of “Traditional” Constitutional Issues (Before 1992)

	Undemocratic	Democratic
No	PM must be chosen from among the members of the House of Representatives	Yes
No	PM/Minister may not simultaneously be a permanent government official	Yes
No	President of the Parliament = President of the House of Representatives (In the past, Senators were nominated by Prime Minister, not by election)	Yes
	Interim Constitution	Permanent Constitution

III. Reforms under the 1997 Constitution

Reforms concerning traditional constitutional issues began shortly after the Bloody May event, and dealt with a series of constitutional amendments. Many important issues, however, such as the matter of the Senate were dealt with thoroughly in the 1997 Constitution.

There are more provisions in the 1997 Constitution than are contained in the former Constitutions. (336 Articles, including transitional provisions). One reason for the increase in the number of provisions is that many independent organs were established, and the Constitution contains many provisions concerning the organization of such organs and procedures for nomination or appointment to positions provided by the Constitution.

As shown in the number of provisions, reforms under the Constitution are rather comprehensive, but for an overview of the reforms under the Constitution, it may be useful to classify such reforms into 3 categories: (1) Reform for increasing political participation by the people, (2) Reforms for promoting and enhancing human rights protections and (3) Reforms for ensuring and promoting the transparency, fairness and effectiveness of the government. The principal reforms of each category are as follows (not exclusive):

1) Participation by the people

Reform of the Senate (Election)

Reform of the system for electing members of the House of Representatives

(small constituency system and party list system)

Decentralization

Initiatives and Referendum

2) Human rights protection

Increase of the provisions regarding the rights and freedoms of the people.

Establishment of the National Human Rights Commission

Establishment of the Constitutional Court and the Administrative Courts

Judicial Reform (especially criminal justice)

3) Transparency, fairness and effectiveness of the government

Establishment of the Constitutional Court and the Administrative Court

Establishment of the Parliamentary Ombudsman

Introduction of the system for “Examination of the Exercise of State Power”

(Chapter 10)

Disclosure of the assets of PM, ministers, MPs and other public officials

Establishment of the National Counter Corruption Commission

Impeachment (by resolution of the Senate)

Special Criminal Procedures relating to certain public offices (Supreme Court)

Establishment of the Auditing Commission and the Election Commission

As this list shows, reforms under the 1997 Constitution are rather comprehensive, but the following reforms are important to consider here. First of all, the most significant reform of the parliamentary system was the introduction of the system for election to the Senate. There were concerns that this reform would bring to the Senate the same political maneuvering seen among political parties in the House of Representatives. So the Constitution excludes partisanship from the Senate by requiring that candidates for Senator not be a member of any political party, nor to have certain relationships with any political party as prescribed in the Constitution. Therefore, theoretically, Senators are expected to be free from inter-party political maneuvering under this Article. The term of office of a Senator is 6 years, and any person who a Senator is restricted to one term only. This provision is intended to prevent a Senator from seeking special interests for his/her constituency, and instead,

to concentrate on the more general interests of the Kingdom. Based on the “neutrality” or theoretical non-partisan character of the Senate, the Senate is given a significant role in the constitutional system, especially in the nomination or appointment of public positions under the Constitution. However, it is another matter whether the Senators actually do act as the Constitution specifies. As results from the first Senatorial election in 2000 demonstrate, some Senators have a variety of relationships with the political parties.

Secondly, it should be pointed out that the 1997 Constitution has established a kind of plurality system for monitoring the Government, which will function supplementary to the traditional separation of powers. Several constitutional organs have been newly established by the Constitution such as the National Human Rights Commission, Parliamentary Ombudsman, the National Counter Corruption Commission, Election Commission, and the Auditing Commission. Other than these organs, the Constitutional Court and the Administrative Court have established ways for strengthening judicial review.

An interesting inventory scheme established by the Constitution is the series of measures provided in Chapter 10: “Examination of the Exercise of State Authority”, such as disclosure of the assets of certain public officials, and impeachment procedures. Under the impeachment procedures, any person in a public office provided by the Constitution or other laws, may be removed from that office by resolution of the Senate on the grounds that the person conducted certain crimes or malpractice as specified by the Constitution or other laws. (The resolution requires a vote of three-fourths of the total number of Senators.) The National Counter Corruption Commission is responsible for the investigation and examination of evidence and facts.

Furthermore, the Parliamentary Ombudsman and Human Rights Commission have been set up to receive complaints from people who have suffered damages from the actions of administrative organizations or governmental officials, or from human rights infringements. These organizations’ authority is primarily limited to investigation and recommendations, but the actual impact is expected to be substantial. These schemes give the people channels to participate in or to have their opinions

incorporated into governance.

They see that the classical framework based on the concept of separation of powers does not necessarily guarantee the proper functioning of democratic governance, and thus, they consider it necessary to put in place additional mechanisms for monitoring or improving that governance. On the other hand, it is true that the Constitution has many rather innovative aspects, and much preparation is needed for implementation. Implementation of the newly introduced institutions and procedures is raising other problems. It is certain that much time will be required before such a sophisticated system begins to work as designed. The increasing costs of these organizations is another factor obstructing implementation. However, it appears that the confidence of the Thai people is deepening with respect to parliamentary democracy (or, at least in the sense that we do not yet have any better system than the parliamentary system), and that they support the new framework under the Constitution.

IV. The Necessity of the Study on Reforms after Democratization

It is not unusual for Constitutions of countries with authoritarian political systems to contain some kind of mechanism to legitimize or cover up more or less undemocratic rule. Further, it is not surprising that a study of constitutional law in Asian countries has focused on the undemocratic aspects of their Constitutions. After we have seen the many democratic movements in this region, there is no reason not to extend our study to the changing constitutional law of those countries seeking a new framework for democratic governance. Legal and institutional reform in East Asian countries is neither perfect, nor working as well as it was designed to do. Such institutions themselves are but one product of the political process, and they also have to work under changing political situations. Thus, it is necessary to examine not only the legal framework, but also the actual situation of its implementation or functioning. Corruption would be the important factor in analyzing legal and institutional reforms after democratization, since corruption stimulates the feeling of inequality among the people, and it brings the people to an awareness of the problem of authoritarian polity, as well as of malfunctioning parliamentary polity.

**Comparison of the principal Constitutional Organizations:
1991 Constitution and 1997 Constitution**

1991 Constitution	1997 Constitution
Constitutional Monarchy	Constitutional Monarchy
Parliament Senate (no election; nominated by PM) House of Representatives (election)	Parliament Senate (election) House of Representatives (election/party list) <u>Parliamentary Ombudsman</u> <u>National Human Rights Commission</u>
Cabinet (Prime Minister and ministers)	Cabinet (Prime Minister and ministers) MP has to resign when appointed as PM/ Minister
Constitutional Judge Commission (<i>ad hoc</i>) Court of Justice	Constitutional Court Court of Justice <u>Division of Criminal Cases for the</u> <u>Person in a Political Position</u> Administrative Court
	<u>Counter Corruption Commission</u> <u>Election Commission</u> <u>Auditing Commission</u>

“ANOINTING POWER WITH PIETY”¹: PEOPLE POWER, DEMOCRACY AND THE RULE OF LAW

by

Raul C. Pangalangan *

The ouster of Philippine President Estrada was peaceful though barely constitutional, but for a patchwork of strained legal arguments. Is the “People Power” overthrow of unwanted leaders a step forward in “democratic experimentalism”, or a step backward for the rule of law so instrumental in constraining business and feudal elites?

The classic tension between constitutionalism and the raw power of mass struggles finds a fresh setting in the downfall of President Joseph Estrada (hereinafter, “Erap”), following civilian protests coupled with passive military support and induced economic paralysis. What is the place of law in democratic governance, in a newly restored democracy where political institutions are weak, business elites strong, and the Church even stronger? What is the role of constitutions in political transitions?

I. Organization

The current Philippine Constitution was the fruit of the first “People Power” revolution led by Cory Aquino which ousted the Marcos regime in February 1986 (hereinafter, EDSA 1, named after the major road in Metromanila where the protests converged) through a peaceful uprising which relied upon the moral indignation of a concerned citizenry. After EDSA 1, the Philippines constitutionalized “people power”, the direct but peaceful exercise of the will of the sovereign people. The second “People Power” (hereinafter, EDSA 2) led to the ouster of President Erap by

¹ ROBERTO UNGER, POLITICS (1990).

* Dean and Professor of Law, University of the Philippines.

Gloria Macapagal-Arroyo in January 2001. In May 2001, Erap’s supporters, typically poor and uneducated, converged on EDSA once more and marched to the presidential palace, asking for their heroes’ return (hereinafter, EDSA 3), committing acts of violence which compelled Arroyo to declare a “state of rebellion”.

In this paper, I examine *first*, the constitutional and factual framework for EDSA 2; *second*, I will situate EDSA 2 within the constitutional history of the Philippines, more specifically, vis-à-vis the virtually bloodless transition from the Marcos regime to Cory Aquino’s democracy; and *third*, I will look at the implications of EDSA 2 for the future of democratic and rule-based governance in the Philippines.

II. Institutionalization of “Direct Democracy” after EDSA 1

The Philippines’ post-Marcos Constitution (hereinafter, the 1987 Constitution) “institutionalized people power”² and the Supreme Court has since “rhapsodized people people”³ in several cases where the “direct initiative” clauses of the Constitution had been invoked. These clauses allow direct initiative for the following:

- (a) To propose or repeal national and local laws;⁴
- (b) To recall local government officials, and propose or repeal local laws;⁵
and
- (c) To propose amendments to the Constitution.⁶

The Congress has passed implementing laws, which have been applied, tested and affirmed before the Supreme Court. The Local Government Code⁷ provided for the recall of local officials by either the direct call of the voters, or through “preparatory recall assembly” consisting of local government officials, which was

² Subic Bay Metropolitan Authority v. Commission on Elections, 26 September 1996.

³ Defensor-Santiago v. Commission on Elections, 19 March 1997 (hereinafter, PIRMA I).

⁴ Const., art. VI, sec. 32. (“a system of initiative and referendum ... whereby the people can directly propose or enact laws or approve or reject any act or law or part thereof [upon] a petition therefor signed by at least ten *per centum* of the total number of registered voters, of which every legislative district must be represented by at least three *per centum* of the registered voters thereof”).

⁵ Const., art. X, sec. 3 (“a local government code ... with effective mechanisms of recall, initiative, and referendum”).

⁶ Const., art. XVII, sec. 2 (“directly proposed by the people through initiative upon a petition of at least twelve *per centum* of the total number of registered voters, of which every legislative district must be represented by at least three *per centum* of the registered votes therein ...”).

⁷ Republic Act No. 7160.

hailed by the Supreme Court as an “innovative attempt ... to remove impediments to the effective exercise by the people of their sovereign power.”⁸

The Congress has also enacted the Initiative and Referendum Act (hereinafter, the Initiative Law)⁹, which provided for three systems of initiative, namely, to amend the Constitution; to propose, revise or reject statutes; and to propose, revise or reject local legislation. In a case involving the creation and scope of a special economic zone created out of Subic Bay, a former U.S. military base¹⁰, the Supreme Court hailed the Initiative Law as “actualizing [] direct sovereignty” and “expressly recogniz[ed the people’s] residual and sovereign authority to ordain legislation directly through the concepts and processes of initiative and of referendum.”

The first wrinkle on this neat constitutional framework appeared in 1997, when then President Fidel Ramos (Cory Aquino’s successor), through willing cohorts, tried to amend the Constitution to lift term limits which banned him from remaining in office after his term ended in 1998. He was rebuffed by the Supreme Court, following protests by people who saw a dark reminder of a similar maneuver by Marcos which led to the death of Philippine democracy in 1972. Since the proposal was politically unpopular, a shadowy private group called the People’s Initiative for Reforms, Modernization and Action (PIRMA or, literally translated to Filipino, “signature”) instead launched a signature campaign asking for that constitutional amendment, invoking the direct initiative law. That attempt was rejected twice by the Supreme Court¹¹, which went to great lengths to say that the direct initiative clauses of the Constitution were not self-executory; that they thus required congressional implementation; and that Congress’s response, i.e., the Initiative Law, was “inadequate” – notwithstanding that it expressly referred to constitutional amendments – and thus cannot be relied upon by PIRMA.

A dissenting opinion found this “a strained interpretation ... to defeat the intent” of the law. Another dissent stated: “It took only one million people to stage a

⁸ Garcia v. Commission on Elections, 5 October 1993.

⁹ Republic Act No. 6753.

¹⁰ Subic Bay Metropolitan Authority v. Commission on Elections, 26 September 1996.

peaceful revolution at [EDSA 1 but] PIRMA ...claim[s] that they have gathered six million signatures.” The majority, however, pierced through the legalistic arguments and saw the sinister politics lurking behind. Then Justice Davide (now Chief Justice) said that the Court must not “allow itself to be the unwitting villain in the farce surrounding a demand disguised as that of the people [and] to be used as a legitimizing tool for those who wish to perpetuate themselves in power.” Another justice said that PIRMA had “cloak[ed] its adherents in sanctimonious populist garb.”

But if the PIRMA cases showed the limits of direct democracy, EDSA 2 re-affirmed its power.

III. Factual Framework of EDSA 2

We must not make a scarecrow of the law,
Setting it up to fear the birds of prey,
And let it keep one shape, till custom make it
Their perch and not their terror.
-- Shakespeare, *Measure for Measure*

Established interpretations of EDSA 2 portray it as the affirmation of the principle that no man is above the law, not even a President. Yet that was accomplished only by taking constitutional short-cuts, and later asking the Supreme Court to go out on a limb to provide the *post hoc* justifications.

1. *Erap was unbeatable politically (i.e., through elections) and could only be unseated legally (i.e., by conviction for impeachable offenses).*

In May 1998, Erap, a movie actor, was elected President by direct vote of the people, winning by the largest margin in Philippine history. The poor dearly loved the man for his movies, where he often played the underdog, fighting with his fists to save the downtrodden, hence his campaign mantra “Erap for the Poor.” His vices were openly known: several mistresses and families, gambling and drinking, often way into the morning with buddies with shady reputations. He won despite the understandable revulsion of the Catholic clergy. The business elite, aghast at Erap’s

¹¹ Defensor-Santiago v. Commission on Elections, 19 March 1997; People’s Initiative for Reform, Modernization and Action v. Commission on Elections, 23 September 1997 (both cases hereinafter

unprofessional working style (e.g., policy reversals during midnight drinking sprees) and favoritism for cronies, couldn't wait for the next presidential polls in 2004 when Erap, limited to a single six-year term, would step down.

Then in August 2000, a gambling buddy, now fallen from grace, linked Erap to a nationwide network of gambling lords who gave him illegal payoffs laundered through the banking system. How else, it was asked, could he have paid for his mistresses' lavish lifestyles? However, under the Philippine Constitution, Erap could be replaced only by impeachment, or resignation. It was thought that Erap could not be impeached, because he held the numbers among the congressmen (around 250, one-third of whom had to vote for impeachment) and the senators (24, two-thirds of whom had to vote for removal).

2. *Despite his enduring popularity with the masses, Erap was unseated by a loose coalition of business, Church, student and "civil society" groups, including Cory Aquino's "pro-democracy" legions. The voice of the people, uttered through elections, was overwhelmed by the voice of the people, spoken through mass protests.*

By mid-November 2000, enough congressmen had deserted Erap due to public protests, and the Congress hastily approved the articles of impeachment. A high profile trial ensued before the Senate, characterized by long technical debates on whether documents or testimony were inadmissible as evidence, often because the articles of impeachment had been clumsily drafted.

The groundswell of public indignation was triggered by the suppression of evidence during the trial (i.e., the sealed envelope of banking records alleged to be Erap's). That same evening, mass protests erupted in Manila, and the next day, the impeachment trial was aborted. The day after, the military chiefs would "withdraw their support" from the President. On the fifth day of protests, a Saturday, the Supreme Court Chief Justice, who had earned public respect when he chaired the impeachment trial, swore in Vice-President Gloria Arroyo as the new President. Locally, it was hailed as the triumph of democracy. Internationally, it was derided as "Rich People's Power", referring to the elite and middle-class composition of the

cited as the PIRMA cases).

protesting groups, a reminder of a venerable statesman’s warning about the perils of “political ventriloquism.”

3. *The constitutionality of Arroyo’s presidency was challenged before the Supreme Court. Yet the desperate measure, i.e., her oath-taking, was explained by the failure of legal and institutional processes.*

The hasty oath-taking of Arroyo was challenged before the Supreme Court. She, as vice-president, could have assumed the Presidency only in case of the Erap’s death, disability, resignation, or impeachment. None of these conditions had arisen. Erap was still alive and able to perform his functions. He had not been impeached, because precisely his impeachment trial had been aborted. And he had not resigned. Indeed there was no resignation letter, and contemporaneous televised statements by both the Chief Justice and President Arroyo indicated their own misgivings. In that context, the military’s “withdrawal of support” from Erap was in effect a mutiny against the President and Commander-in-Chief, violating the fundamental precepts of “civilian supremacy” and military non-intervention in politics. Finally, the Supreme Court had lent its legitimizing power to Arroyo’s presidency when the Chief Justice administered her oath, attended by several Justices, purporting merely to perform an administrative act (as indeed technically it was) and while so properly (and expressly) reserving the option to rule on any subsequent judicial challenge.

IV. Reconciling EDSA 2 with the Philippine Constitution

In *Joseph Estrada v. Gloria Macapagal-Arroyo*, the Supreme Court declared Arroyo as the legitimate President, taking the path of strict doctrinal interpretation of the text of the Constitution.

Faced with the Arroyo oath-taking, the Court could have taken one of several legal paths. *One*, it could take the path of least resistance and declare the matter a political question and outside the scope of judicial review, exactly the way the Court disposed of judicial challenges to the legitimacy of Cory Aquino’s government and, before that, to Marcos’s martial law government. *Two*, the Court could have also institutionalized People Power unabashedly as a mode of changing Presidents, and rather elastically interpreted the Constitution to mean that Erap was “incapacited”, not

by sickness but by induced political paralysis through “withdrawal of support” by various centers of power in government, including the military, and by civil society. And three, the Court could have done what eventually it did – find that Arroyo’s oath-taking was squarely covered by the Constitution.

The Court rejected the first path, i.e., the political question doctrine, arguing that Arroyo assumed office under the present Constitution – under which she alone, and none of the other contenders, had the right of presidential succession – in contrast to Cory Aquino who candidly declared the revolutionary and extra-constitutional character of her assumption into power. The legitimacy of Arroyo’s government thus required the resignation of Erap. Neither did the Court take on the second path, which would have thrown the gates wide open to extra-constitutional transitions. Instead, the Court insisted on the disciplined analysis of hard doctrine, as if EDSA 2 was not unusual at all and fit so snugly into the existing constitutional framework, and found that the “totality of prior, contemporaneous and posterior facts and ... evidence” show an intent to resign coupled with actual acts of relinquishing the office.

What is significant is that while all the participating justices upheld the validity of the Arroyo government, almost all of them spoke persistently about the possible excesses flowing from People Power – about opening the “floodgates” of the raw power of the people – while acutely aware of the imperatives of democratic governance. A justice asked: “Where does one draw the line between the rule of law and the rule of the mob, or between People Power and Anarchy?”, calling for “great sobriety and extreme circumspection.” Each Supreme Court justice, in his turn, echoed this concern. One justice cautioned the “hooting throng” that “rights in a democracy” should not be hostage to the “impatient vehemence of the majority.” Another spoke of the “innate perils of people power.” Another asked how many “irate citizens” it takes to constitute People Power, and whether such direct action by the people can oust elected officials in violation of the Constitution. Finally, another justice expressed “disquietude [that] the use of ‘people power’ [“an amorphous ... concept”] to create a vacancy in the presidency” can very well “encourag[e] People Power Three, People Power Four, and People Power *ad infinitum*.” In that light, the Supreme Court was unanimous only “in the result”, i.e., in the conclusion that

Arroyo's oath-taking was valid, but not in the reasoning, which for the majority resembled that of the political question doctrine.

V. Reconciling EDSA 2 with Constitutional Traditions

Should [the Supreme Court] choose a literal and narrow view of the constitution, invoke the rule of strict law, and exercise its characteristic reticence? Or was it propitious for it to itself take a hand? *Paradoxically, the first option would almost certainly imperil the Constitution, the second could save it.* (Vitug, J., separate opinion, *Estrada v. Arroyo*) (emphases supplied)

Thus the Court resolved the dilemma, first confronted by the hero Apolinario Mabini, legal architect of the first Revolutionary Government which followed our independence from Spain, who, having seen forebodings of the Philippine-American War, said, "Drown the Constitution but save the principles." This was not the first time that the Court confronted the persistent dilemma between popular democracy and the rule of law.

The *first* time was when the Court validated the Marcos constitution in *Javellana v. Executive Secretary*. The Court recognized that it had not been ratified according to the rules. What the rules required was the approval by the people in a plebiscite wherein voters cast their ballots. What Marcos arranged was for a mere show of hands in so-called "peoples' assemblies", where people were supposedly asked: "Do you approve of the new Constitution? Do you still want a plebiscite to be called to ratify the new Constitution?". The people allegedly having acquiesced to the new government, the Supreme Court declared it a political question and stated: "There is no further judicial obstacle to the new Constitution being considered in full force and effect." The sovereign people is the fount of all authority, and if the people had already spoken, the Courts are not in a position to second-guess that judgment.

Regardless of the modality of [ratification] – even if it deviates from ... the old Constitution, once the new Constitution is ratified ... by the people, the Court is precluded from inquiring into the validity of those acts. (Makasiar, separate opinion)

If they had risen up in arms and by force deposed the then existing government ... there could not be the least doubt that their act would be

political and not subject to judicial review. We do not see any difference if no force had been resorted to and the people, in defiance of the existing Constitution but peacefully... ordained a new Constitution. (Makalintal and Castro, separate opinion)

The *second* time, ironically, was when the post-Marcos Supreme Court validated Cory Aquino's government in the *Freedom Constitution* cases, using that same logic. Soon after EDSA 1, Cory Aquino promulgated her Freedom Constitution, the interim charter by which the Philippines was governed between February 1986 (EDSA 1) and January 1987 (when the present Constitution was adopted). The Court recognized however that Cory Aquino became President "in violation of [the] Constitution" as expressly declared by the Marcos-dominated parliament of that time (i.e., the Batasang Pambansa) and was "revolutionary in the sense that it came into existence in defiance of existing legal processes." Thus the Court stated that the people having accepted the Cory Government, and Cory being in effective control of the entire country, its legitimacy was "not a justiceable matter [but] belongs to the realm of politics where only the people ... are the judge."

The *third* time was with the PIRMA cases, where the Court abandoned what Justice Vitug would later call its "characteristic reticence" and openly recognized what *viscerally* we knew to be one man's ambition cloaked in "sanctimonious populist garb", but were *intellectually* constrained to call a "peoples' initiative."

The fourth time was with the EDSA 2 case, where the Court truly cast off its "reticence" about what the sociologist Randolph David refers to as "the dark side of people power", while intellectually maintaining the test of strict legality (in the main opinion) and a virtual "political question" (in many of the concurring opinions).

VI. The State of Philippine Constitutional Discourse

1. There is an emerging disillusion with the ideal of constitutionalism itself. Our original constitution was a virtual copy of the U.S. constitution, which has been described as "*A Machine That Would Go of Itself*"¹², a self-contained system of

¹² Michael Kammen, *A Machine That Would Go of Itself* (1993).

checks and balances that would enable government, first, to control the governed, and next, to control itself. That ideal is imperiled in the Philippines.

Erap's impeachment trial was to be the showcase for the rule of law: the high and mighty brought to heel before the majesty of law, the "soft state" finally overpowered. "He who the sword of heaven will bear, Should be as holy as severe." Yet in the end Erap was removed only by cutting constitutional corners, ratifying in the courts the triumph won in the streets, "anointing power with piety." All over the country, the rule of law ideal was caricatured as "legal gobbledygook" (a term used by an anti-Erap senator during the Impeachment trial, and which was readily embraced by a cheering Filipino public), the constitution, as a passing inconvenience.

What is so sacred about the Constitution anyway, people seemed to ask, why don't we just hound him out of the Presidential Palace? But constitutionalism says that we must insulate certain claims, certain values, from political bargaining, from the passions of the moment, from the hegemony of popular biases. It places certain things above "ordinary" politics, that is to say, the day-to-day parliamentary give-and-take among elected representatives, deputies we can vote out in three-year cycles. But, in doing so, critics say, constitutionalism takes politics away from the people, it distrusts the raw power of the masses, and would rather channel this energy toward government offices – directly elected representatives and appointed judges – farther and farther away from the people. As Harvard Law Professor Richard Parker says, yes, we have a Constitution but there is no constitutionalism. And he concludes: "Here, the people rule."

2. "People power" is constitutionally awkward precisely because it is peaceful and relies upon the moral power of an indignant citizenry. As recognized by the *Javellana* court, the political question doctrine may have been more easily applied had the change of constitutions been done by force of arms. "Treason doth never prosper, for if it prosper, none dare call it treason." Why make it any less acceptable that it was done by a mere show of hands? The People Power cases before the Supreme Court demonstrate amply the full range of constitutional principles to foster non-recourse to violence, without rewarding extra-constitutional temptations.

The favored explanation for EDSA 2 is that institutions and constitutional processes had failed, and extraordinary measures were called for to fill the vacuum. Hence the unusual conduct by two ideally non-political institutions, the courts and the military, each led – as if by fate – by persons recognized as true to their chosen calling, and who could not be accused of being power-hungry or opportunistic.¹³

3. This research, in particular, looks at the tension between rule-based governance through periodic elections and representative institutions (“the rule of law”) and mass-based politics which by-passes formal processes. I contrast democracy’s rituals with its substance. In the Philippines, the debate between democracy and the rule of law must go beyond *formal* institutions, and inquire into our *attitudes* toward rules and institutions. What we *formally* debate (about laws, morals and principles) is rarely the *real* point of dispute (about interests and appetites). We feel no duty to believe our formal arguments, and we lack the institutions and traditions that foster such belief. We are liberals in law, tribal in life. In our grand declarations we are free citizens in a republic but, in day-to-day life, a network of fiefdoms, bound by kinship and a kin-like web of obligations. On paper, elections are a sacred rite of democracy, but in our hearts we listen elsewhere for the people’s voice. We have debased democracy into ritual, and we are perplexed, now that we have tried it in practice, that it actually works, while our legal rhetoric lags behind.

¹³ In addition, unique in Philippine history where foreign players are often thought to manipulate events, the fall of Erap provides a rare glimpse of how a domestic crisis was resolved truly domestically. Perhaps by historical fluke, the United States – the typical interloper in Philippine politics – was at the time preoccupied with its own presidential electoral crisis.

LOCAL GOVERNMENT REFORM IN THAILAND UNDER THE NEW CONSTITUTION

by

Somtob La-Ongskul *
Sura Pattanapratchaya **

I. Background and Introduction

Before the emergence of the new constitution in 1997, Thailand had a weak local government. Its weakness was principally reflected in local government's few responsibilities and obligations, low revenues, state-dominated internal structure and insufficient staff. Local government in every form – Provincial Administrative Organisation (hereinafter “PAO”), Municipality, Sanitary District, *Tambon* Administrative Organisation (“TAO), City of Pattaya or even Bangkok Metropolitan Administration (“BMA”)¹ – was given few responsibilities, by the central government, for providing some simple public services such as garbage collection, waste disposal, road and waterway maintenance and market management. Most of important public services in localities such as those related to universities, hospitals, high ways and airports were provided by central government agencies, either ministries, departments or state enterprises.

Financially, local government was granted by central government the authority to levy limited categories of taxes and duties, most of which are the property tax, local maintenance tax, commercial plate tax and livestock slaughter duty. Furthermore, before the fiscal year of 2001, all local government units in the country were annually allocated by central government only 10 percent of total state revenues. Most of the budget received was expended on staff salaries and office equipment.

* Member of the Sub-committee on Supervision of Government Policy Implementation, Region 12, Thailand

** Researcher of the Thailand Environment Institute.

¹ BMA still had limited responsibility even though it had additional responsibilities including city planning, structure construction and building control and transportation.

As for the permanent staff, all local government bodies had totally the workforce of 57,115 persons in 1995, compared to 947,536 officials and employees of the central government (Anek 2000 : 8). Amongst staff of local governments, BMA, municipalities and City of Pattaya have had the largest staff, whilst most of TAOs have had only 3 officials; the TAO administrative officer, civil work officer and treasury. Moreover, the recruitment, promotion and punishment of the local government staff, with the exception of that of BMA², is determined by the personnel administration commission of central government. In the case of municipalities, City of Pattaya and TAO, their personnel administration system has been under the same central body – the commission on officials of municipalities, composed of only high-ranking central government officers especially officers from the Ministry of Interior.³ Sanitary District's personnel administration was directed by the central commission on officials of Sanitary Districts, nearly all members of which were central government officials.⁴

As far as internal structure is concerned (except that of BMA and a municipality),⁵ some delegates of central government, especially officers of the Ministry of Interior, performed their assigned tasks, at both executive and legislative levels, in all local government bodies - provincial governors as the *ex officio* President in the case of PAOs; subdistrict headman, village headman and subdistrict medical officer as *ex officio* members in the case of TAOs; chief district officer, assistant chief district officer and subdistrict headman as *ex officio* members of a Sanitary District Committee. The Interior Minister also appointed eight persons as members of City of

² BMA has had its separate personnel administration.

³ The members of the commission included Interior Minister, Permanent Secretary of the Ministry of Interior, Director-General of the Local Administration Department, Deputy Director-General of the Local Administration Department in charge of local government affairs, Director-General of the Public Works Department, Director-General of the Central Account Department, Secretary-General of the Teachers' Council, Secretary-General of the Civil Service Commission and representatives from the Ministry of Public Health.

⁴ The 10-member Commission included Permanent Secretary of the Ministry of Interior, Director-General of the Local Administration Department, Deputy Director-General of the Local Administration Department in charge of local government affairs, Director-General of the Police Department, Director-General of the Public Works Department, Director-General of the Central Account Department, representatives from the Ministry of Public Health, Secretary-General of the Civil Service Commission and two qualified representatives from Sanitary District.

⁵ Since its establishment, a municipality has had elected Mayor and council whilst, for BMA, election of governor was first introduced in 1985.

Pattaya Council. In the Thai context, the existence of the central government delegates in the internal structure of local government was, in effect, greatly responsible for low development of local government.

Granted few unimportant responsibilities, depending on state subsidies, with insufficient permanent staff and state-dominated internal structure, local government had a very low degree of autonomy and capacity in dealing with its local affairs. It is accepted in Thai academic circle that Thai local government is not “local self-government” but “local state government”, signifying territorial expansion of central government agencies.

As a result, providing public services determined by central state agencies is not responsive to the needs of the people of different localities. Moreover, given its limited authority, local government has largely constituted discouragement of public participation. The lowly-developed local government, as argued by Anek⁶, is a fundamental cause of national political problems, namely, money politics and corruption.

This situation has prolonged nearly 100 years since the establishment of the first local government body (Bangkok Sanitary District) in 1897, until the promulgation of the new constitution in 1997. ‘The new constitution brings about such unprecedented extensive and comprehensive local government reform.’⁷ In this article, we will take a panoramic view towards this reform.

II. Local Government in Thailand’s New Constitution

Prior to the new constitution, the movement of decentralisation was first launched by political parties, during the election campaign in 1992⁸. As a result, Thailand has the *Tambon* Administrative Organisation Act, B.E. 2537 (1994) which has eventually led to establishing nearly 7,000 TAO units nationwide. However, the

⁶ Anek Laothammatas, *Local Cause of Problems of National Politics and Government Resulting from Insufficient Local Government*, Bangkok: Bopit Press, 2000

⁷ Somkid, 1998 p. 362

decentralisation program did not have a secure place until its affirmation as “a state policy” in the new constitution.

In this connection, 10 sections of the new constitution are devoted to local government; section 78 of Chapter V (Directive Principles of Fundamental State Policies) and sections 282-290 of Chapter IX (Local Government). Amongst these ten provisions, sections 78, 282, 283 and 284 are particularly concerned with local government autonomy. Section 285 mandates the application of the elected council-mayor structure of a local government organisation. Section 286 lays down a mechanism for recalling members of a local assembly and local administrators whilst section 287 sows the seeds of the right of local residents to initiate local ordinance. These two last mentioned provisions are, indeed, based upon the principle of direct democracy. Section 288 is directed at local personnel administration and the last two sections, viz, sections 289 and 290, are concerned with two major duties of local government: the provision of education and the handling with natural resources and environmental matters.

All these provisions of the constitution result in many changes to the local government, be its internal structure, responsibility, finance, personnel administration or popular participation. It may be said that the constitution intends to institutionalise the local government.⁹

The new constitution mandates the state to give autonomy to localities, as encapsulated in sections 78, 282, 283 and 284. For the purposes of analysis, the wording of these provisions is herebelow quoted.

Section 78 “The State shall decentralise powers to localities for the purpose of independence and self-determination of local affairs, develop local economics, public utilities and facilities systems and information infrastructure in the locality thoroughly and equally throughout the country as well as develop into a large-

⁸ Four political parties shared the same proposal – the elected governorship as campaign policy.

⁹ Supasawat Chatchawal, Proper Structure for Local Government in Thailand (unpublished paper) Thammasat University 2001.

sized local government organisation a province ready for such purpose, having regard to the will of the people in that province.”¹⁰

Section 282 “Subject to section 1, the State shall give autonomy to the locality in accordance with the principle of self-government according to the will of the people in the locality.”¹¹

Section 283 “Any locality which meets the conditions of self-government shall have the right to be formed as a local government organisation as provided by law....”¹²

Section 284 “All local government organisations shall enjoy autonomy in laying down policies for their governance, administration, personnel administration, finance and shall have powers and duties particularly on their own part. ...”¹³

For the realisation of local autonomy, the constitution, as embodied in section 284, makes it compulsory for the state to enact a law setting out details as to the process of the decentralisation and body in charge of it.¹⁴ To this end, the Act Determining Plans and Process of Decentralisation was promulgated in 1999 under which a tripartite commission on decentralisation to local government organizations is erected, namely, the “Commission on Decentralisation to Local Government Organisation”, which is responsible for manipulating the process.

The Act requires a transfer by the State of its responsibilities and obligations with regard to managing public services and financing, personnel, and allocation of

¹⁰ The Constitution of the Kingdom of Thailand, Official translation by the Council of State, in Administrative Law Journal Vol. 16, 1997 p. 118

¹¹ Administrative Law Journal, *ibid.*, p. 182.

¹² Administrative Law Journal, *ibid.*, p. 182.

¹³ Administrative Law Journal, *ibid.*, p. 182.

¹⁴ **Section 284** “.... For the purpose of the continual development of decentralisation to a higher level, there shall be the law determining plans and process of decentralisation, the substance of which shall at least provide for the following matters.

.....

(3) the setting up of a committee to perform the duties in (1) and (2) consisting, in an equal number, of representatives of relevant Government agencies, representatives of local government

not less than 35 percent of national budgets, to local government organisations. Indeed, these statutory requirements will have to be completed within 10 years.

Apart from mandating the state to decentralise powers to localities, the constitution, in its section 285, requires the localities to apply the single form of organisation, that is, the “elected Council-Mayor” form, which is, in effect, a replication of the national parliamentary democracy model.¹⁵

Section 285 “A local government organisation shall have a local assembly and local administrative committee or local administrators.

Members of a local assembly shall be elected.

A local administrative committee or local administrators shall be directly elected by the people or shall be from the approval of a local assembly...”¹⁶

The spirits of this section have been carried into real effect through the imposition of five laws which change the localities’ internal structures accordingly.¹⁷ The first law, known as the Act Elevating Status of Sanitary District to Municipality, B.E. 2542 (1999), changes the Sanitary District, based upon the committee form of organisation, into Municipality adapting the elected council-mayor form. Next, under the Provincial Administrative Organisation Act (No.2), B.E. 2542 (1999), President of the POA must be from elected members of that PAO, thereby replacing the previous system under which this post was assumed by Provincial Governor *ex officio*. The third legislation, the Municipality Act (No.10), B.E. 2542 (1999), changes the indirect election of Mayor into the direct election system.¹⁸ Further, under the recent Administration of Pattaya City Act, B.E. 2542 (1999), all councillors, some of which formerly appointed, will now be elected and the city manager system was replaced by a new one - a directly elected mayor. Finally, the *Tambon* Council and *Tambon*

organisation and qualified persons possessing the qualifications as provided by law...”: Administrative Law Journal, *ibid.*, p. 183.

¹⁵ Certain academics have advanced an argument that the locality should have autonomy in choosing its internal structure form.

¹⁶ Administrative Law Journal, *ibid.*, p. 183.

¹⁷ Formerly, there existed 3 forms of internal structure of a local government in Thailand: 1) Council-Mayor form applied in BMA, PAO, Municipality and TAO, 2) Committee form applied in Sanitary District and 3) Council-Manager System applied in City of Pattaya.

¹⁸ Town Municipalities and City Municipalities, except *Tambon* municipality, have directly elected mayors.

Administrative Organisation Act (No.3), B.E. 2542 (1999) similarly requires that both *Tambon* councillors and *Tambon* administrators, some of which formerly appointed, be from election.

The new constitution (sections 286¹⁹ and 287²⁰) also introduces the direct democracy in the form of the “Recall and Local Ordinance Initiation by People” at a local government level. This philosophy is subsequently put in a place in the Act on Voting for the Removal from Office of Members of Local Assemblies and Local Administrators B.E. 2542 (1999) and the Act on the Local Ordinance Initiation, B.E. 2542 (1999).

Under the Act on Voting for the Removal from Office of Members of Local Assemblies and Local Administrators, the people, one third of the eligible voters in each locality, can request a recall of a member of their local government organisation. In the Act on the Local Ordinance Initiation, the people, at least half of eligible voters in each locality, can lodge a petition initiating a local ordinance. However, a criticism has been advanced that there is too little, if not at all, possibility for the people to exercise their right to initiate local ordinances as long as the number of residents required is too much.²¹

Moreover, the constitution (sections 289²² and 290²³) mandates the state to delegate to localities major functions in connection with, for instance, education,

¹⁹ **Section 286** “If persons, having the right to vote in an election in any local government organisation, of not less than three quarters of the number of the voters who are present to cast ballot consider that any member of the local assembly or any administrator of that local government organisation is not suitable to remain in office, such member or administrator shall vacate the office, as provided by law...”: see *Administrative Law Journal*, *op. cit.*, p. 184

²⁰ **Section 287** “Persons, having the right to vote in any local government organisation, of not less than one-half of the total number of the persons having the right to vote in that local government organisation shall have the right to lodge with the President of the local assembly a request for the issuance by the local assembly of local ordinances...”: see *Administrative Law Journal*, *op. cit.*, p. 184

²¹ Parinya Dhevanarumitkul, “Popular Political Participation in the New Constitution and the Direct Democracy”, *Administrative Law Journal*, Vol. 17, August 1998, p. 79.

²² **Section 289** “.... A local government organisation has the right to provide education and professional training in accordance with the suitability to and the need of that locality and participate in the provision of education and training by the State;...” *Administrative Law Journal*, *op. cit.*, p. 185.

²³ **Section 290** “For the purpose of promoting and maintaining the quality of the environment, a local government organisation has powers and duties as provided by law.
The law under paragraph one shall at least contain the following matters as its substance:

public health and environmental and natural resource. In the sphere of environmental and natural resources management, the constitution aims for enactment of particular legislation. There is, however, no initiation of any law concerning this matter.

As for local personnel administration, the constitution (section 288²⁴) requires that a local government organisation have its own committee with tripartite composition, being made up of representatives of central government, local government and qualified persons. The Committee's principal function is to set forth conditions and standards of the personnel recruitment, transfer, promotion, for all localities of the same kind.

Along the line of the constitutional provision, there has been enacted the Act on Local Personnel Administration, B.E. 2542 (1999) according to which PAOs have the PAO Officials Committee, provincially and nationally; Municipalities have provincial and central (national) Committee on Municipality Officials; and TAOs have local and central TAO Officials Committee. With regard to the City of Pattaya, it has its own committee as well – Pattaya City Officials Committee – but at national level its personnel administration is still under the Committee on Municipality Officials. In the case of BMA, the same concept is found in the “BMA Administrative Organisation Act (No.2), B.E. 2542 (1999).” It can thus be seen that local personnel administration is no longer in the hands of central government; rather, tripartite committees look after it by prescribing common standard of personnel recruitment,

(1) the management, preservation and exploitation of the natural resources and environment in the area of the locality;

(2) the participation in the preservation and exploitation of natural resources and environment outside the area of the locality only in the case where the living of the inhabitants in the area may be affected;

(3) the participation in considering the initiation of any project or activity outside the area of the locality which may affect the quality of the environment, health or sanitary conditions of the inhabitant in the area.”: Administrative Law Journal, *op. cit.*, p. 185.

²⁴ **Section 288** “The appointment and removal of officials and employees of a local government organisation shall be in accordance with the need of and suitability to each locality and shall obtain prior approval from the Local Officials Committee, as provided by laws.

The Local Officials Committee under paragraph one shall consist, in an equal number, of representatives of relevant Government agencies, representatives of local government organisation and qualified persons possessing the qualifications as provided by law.

The transfer, promotion, increase of salaries and the punishment of the officials and employees of a local government organisation shall be in accordance with the provisions of the law.”: Administrative Law Journal, *op. cit.*, p. 184

punishment and salary scales for localities. In fact, new local personnel administration committees under all these laws have already been established.

A mention must also be made of another significant development in local government. There will be, for the first time, a separate election law, indeed constitutionally originated, for application to local elections. This is now contained in the Bill on Election of Members of Local Councils and Local Administrators B.E.” At present, this draft law is still in its legislative progress.

III. Decentralisation in Practice: Decentralisation to Local Government Organisations Commission and Its Plan

Actually, the current decentralisation process in Thailand is dependent on the Act Determining Plans and Process of Decentralisation, B.E. 2541 (1998) and vital apparatuses thereunder, namely, the Decentralisation to Local Government Organisations Commission; the Decentralisation to Local Government Organisations Plan and the (forthcoming) Action Plan.

The Act sets up the Decentralisation to Local Government Organisations Commission. (At present, its secretariat – Office of the Centralisation to Local Government Organisations Commission – is attached to the Office of the Permanent Secretary of the Prime Minister’s Office.) Also, the Act determines the scope of powers and duties of local government bodies in providing public services. Under the Act, the Municipality, City of Pattaya and TAO have powers and duties, for example, in connection with formulating local development plans, providing and maintaining streets, waterways and sewerage, providing and keeping under control markets, piers and parking lots, promoting tourism activities, promoting commercial activities and investments.²⁵

As for local revenues, the Act determines the allocation of tax revenue for the local government bodies. In this instance, the Municipality, City of Pattaya and TAO, may have revenues from collecting approximately 20 categories of taxes, duties and

fees as well as from other gains. They may, for example, levy the property tax, local maintenance tax, commercial plate tax, value added tax, excise tax, automobile tax and gamble tax.

The Decentralisation to Local Government Organisations Commission draws up the Decentralisation to Local Government Organisations Plan. The current Plan takes effect from 17th November 1999. The Commission has powers and duties in accordance with section 12 of the 1998 Act establishing it as well as section 284 of the Constitution. Aside from designing the above-mentioned Plan, the Commission also formulates the action plan.

1. Structure of the Commission

According to the New Constitution, the Commission must be composed of three kinds of representatives at the same proportion: from government agencies concerned, local government organisations and the qualified persons. In this instance, the exact number of members of the Commission is set out by the Act Determining Plans and Process of Decentralisation, B.E. 2541 (1998), as to which the Commission is made up of 36 persons, of which 12 (as *ex officio* members) from representatives of the government agencies concerned, 12 from representatives of local government organisations, and 12 from the qualified persons.²⁶

Twelve representatives from the government agencies concerned as *ex officio* members include (a) 3 politicians in the Executive (Prime Minister or Deputy Prime Minister as entrusted by the Prime Minister, Minister of Interior and Minister of Finance) and (b) 9 government officials in the government agencies concerned (2 from the Ministry of Interior (Permanent Secretary and Director-General of the Local Administration Department), 1 from the Ministry of Finance (Permanent Secretary) 1 from the Ministry of Education (Permanent Secretary) 1 from the Ministry of Public Health (Permanent Secretary) and another 4 from the Secretary-General of the Council of State, Secretary-General of the Civil Service Commission, Secretary-General of the National Economic and Social Development Board and Director of the Bureau of the Budget.

²⁵ Section 16.

Twelve representatives from the administrators of the local government organisations include (a) 5 administrators representing 6,747 TAOs nationwide, (b) 3 administrators representing 1,129 Municipalities nationwide, (c) 2 administrators representing 75 PAOs nationwide and, finally, (d) Governor of Bangkok (representing BMA) and Mayor of the City of Pattaya.²⁷ With regard to 12 qualified persons, it is required that they possess knowledge and expertise in government administration, local development, economics, local government and law.²⁸

2. Implication of the Decentralisation to Local Government Organisations Plan (2000)

The Decentralisation to Local Government Organisations Plan is a master plan establishing conceptual framework, goal and guidelines of decentralisation; the action plan must also be set up in line with the master plan.²⁹ In this connection, the Decentralisation to Local Government Organisations Plan has recently received cabinet approval. Notwithstanding, there is, in practice, no guarantee that real decentralisation and real local self-government will come into existence.

Why is real local self-government needed to be promoted? The correct answer to this question lies in that decentralisation to local government organisations is a basic state policy as proclaimed in the new constitution. Members of the Constitution Drafting Assembly (CDA) paid so much attention to this matter that they gave it top priority.

²⁶ Section 6.

²⁷ At the time of this article, representatives from local government organisations are as follows: (1) Chanchai Silpaouychai, President of Prae PAO; (2) Pinyo Tanwiset, President of Chonburi PAO; (3) Surapong Poothanapiboon, Mayor of Rayong City Municipality, Rayong Province, (4) Weenrawat Paktaranikorn, Mayor of Yasodhorn Municipality, Yasodhorn Province; (5) Somchai Kunpleum, Mayor of Sansuk Tambon Municipality, Chonburi Province; (6) Noppadol Kaewsapat, Chairman of Omkred TAO, Nontaburi Province; (7) Niyom Klongdee, Chairman of Mukdaharn TAO, Mukdaharn Province; (8) Sorasak Jiradhampradab, Chairman of Chumpol TAO, Nakornnayok Province; (9) Apichart Sangkhachart, Chairman of Klonghae TAO, Songkhla Province; (10) Kittisak Mekkhajorn, Chairman of Kheelek TAO, Chiangmai Province; (11) Samak Sundaharavej, BMA Governor; and (12) Sundhorn Prasertdee, Mayor of Pattaya City.

²⁸ At the time of this paper, a List of qualified persons is as follows: (1) Kowit Posayanont; (2) Charas Suwanmala; (3) Chan Karnjanakpan; (4) Thongthong Chantarangsu; (5) Naris Chaiyasutra; (6) Pairot Suchinda; (7) Wuttillert Dhewakul; (8) Somkid Lertpaitoon; (9) Somchai Ruchupan; (10) Somchai Grusunsombat; (11) Anek Sittiprasart; (12) Wuttisarn Tanchai (replacing Anek Laothammatas who has become a Party List MP of the Democrat Party).

The fact that the local government has many problems appears to be the common knowledge. Indeed, most of local government organisations have had common problems, namely, no (or too little) autonomy in policy-making and management, inefficient management and budget and fiscal problems. In this regard, a view has vibrantly been expressed by Somkid Lertpaitoon (a former CDA member, who now sits as a qualified member in the Decentralisation to Local Government Organisations Commission), in 1998 (two years prior to the introduction of the Decentralisation to Local Government Organisations Plan):

“In fact, local government organisations in Thailand have limited powers and duties and little public service delivery. This situation should be explained by the fact that the provisions of laws empowering local government organisations have been ‘subject to other laws’” (Somkid, 1998 : 364)

About the fiscal problem, many Thai scholars including Dhanes Charoenmuang³⁰ advocate that local government organisations have limited revenue simply because they have little fiscal powers. This situation leads to local government organisations relying on subsidies from the central government.

The conceptual framework for the decentralisation to local government organisations designed by the Commission is thus based upon the following principles of significant importance, viz, first, autonomy in policy-making and management, secondly, definite division between national administration and local administration, and, finally, enhanced efficiency in management of local government organisations.

With regard to autonomy in policy-making and management, it is felt by the Commission that a local government organisation shall enjoy autonomy in making policies relating to the government, management, personnel management and finance and budget. As for the sharp division between national administration and local administration, the Commission believes that the state has to decentralise the power to local government organisations by changing roles and responsibilities which are under

²⁹ According to the Act Determining Plans and Process of Decentralisation, B.E. 2542 (1999), the action plan is required to be reported to Parliament after its approval by the Council of Ministers.

³⁰ Dhanes Charoenmuang, 1997 pp. 236-238.

the control of central government agencies and regional government agencies, and by putting local government organisations into such roles and responsibilities. Central and regional government agencies' responsibilities should simply be limited to macro-level ones and some kinds of responsibilities that local government organisations can not handle, supervising policy-making and legal capacity of local government organisations, giving them technical support and assessing their performance.

Now, as far as the last principle – enhanced efficiency in management – is concerned, the Commission is of the opinion that the state has to decentralise the power to the local government organisations in order that people will get better-quality public services and management, with a greater degree of transparency, efficiency and responsiveness to the people, and, as a result, the people, civil society and community will be promoted to participate in decision-making, co-operation and monitoring.

To materialise decentralisation, the Commission sets five goals of the Plan. First, responsibilities in the public service delivery must be transferred from the state to local government organisations within 4 years (in the first phase) or within 10 years and, also, there must be determined the definite scope of responsibility between the state and local government organisations and amongst local government organisations.

Secondly, the Commission must work out the proper amount of tax revenue, subsidies and other incomes to be allocated to local government organisations for financing their responsibilities. Out of the total national revenue, the proportion to be allocated to local government organisations should increase by not less than 20% within 2001 and not less than 35% within 2006. Next, the central government has to provide local government organisations with subsidies for public service delivery, as stated in annual appropriations, in accordance with the necessity and the need of local government organisations. Further, there will be a transfer of personnel and staff of central government agencies to local government organisations to serve the responsibilities transferred. Finally, laws and regulations concerned must be amended to accommodate the shift of responsibilities.

In concrete, the Plan will be in the form of transferring responsibilities, personnel, budget and assets. As planned, the Commission determines the first four years (2001-2004) as the period for strategy development and readiness preparation for transferring, for amendment of legislation concerned, and for improving internal management of local government organisations as well as of central and regional government administration. The next six years (2005-2010) will be the important transition period. During the period, the roles of central government agencies, regional government agencies and local government organisations will be changed. The relationship between local government organisations and regional administration will also be adapted. Amendment of relevant laws will also be carried out.

According to the Commission, the transfer will be founded upon several general principles including the following. In the first place, the transfer of responsibility as planned will not embrace the responsibilities or activities concerning national security, court trial and judgment, foreign affairs and national monetary and fiscal affairs. Secondly, responsibilities due to be transferred are mainly those belonging to government agencies while a transfer of responsibilities of state enterprises and public corporate can only be done when warranted by properness and as a matter of government policy. In addition, the transfer will depend on the considerations of potential consequences and impacts on the people residing in the territory of respective local government organisations. In effect, apart from its emphasis on these principles, the Commission also states that the action plan covers at least 6 aspects: (1) infrastructure, (2) life quality promotion, (3) community/society order and public order maintenance, (4) planning and promoting investment, commerce and tourism, (5) environmental and natural resources management and conservation and (6) art, culture, custom and local wisdom.

According to the action plan, more than 200 major responsibilities assumed by 50 agencies (except those of agencies within the Sub-ministry of University Affairs) will certainly be shifted to the hands of local government bodies. The process

concerning the transfer alluded to requires about 40 laws, ministerial regulations and rules to be amended.³¹

The Commission has, however, expressed their optimistic view that, during the transitional period, public services to be provided by the local government organisations will be more responsive to local people, that local people will be encouraged to participate in local management and that local government organisations will build and improve their capacity in carrying out activities with efficiency and transparency. In this regard, it is expected by the Commission that the daily life of local people after 2011 will be better and that local residents will have fair and equitable access to all public services and will, as well, have major roles in decision-making, supervising, monitoring and giving full support to activities launched by local government organisations.

One of purposes in mind of the Commission is that regional administration agencies will change their active role as “public services providers” into a new role as the “technical supporter and supervisor”.

A latest situation of the decentralisation reform driven by the Thaksin government is that the reform is not an easy process. This is, indeed, reflected in the comments made in Bangkok Post³² by PM’s Office Minister Chaturon Chaisaeng, Chairman of a sub-committee on preparation for decentralisation to localities. Chaturon states: “all education and public health services need not be transferred to local administrations by 2004 as required by the law on decentralisation..... There were problems with the transfers of education and public health services since ministries were not sure if local administration could handle them.” The action plan has received the cabinet approval but the plan does not include the transfer of responsibilities in connection with education and public health services.

According to Chaturon, a conclusion is reached as regards what to do with education and public health services. For education, local committees will be set up to

³¹ There was also a seemingly radical view that the completion of the decentralisation process would need the amendment of about 200 laws: *see* Anek Laothammatas, *Vision of Local Government and Decentralisation Plan*, Bangkok: Mitimai Press, 2000, p. 23 .

work together with agencies to develop potential and readiness for local bodies. Education services would be transferred to them once they are ready. Importance will be attached to standards and quality. Another problem obstructing the decentralisation of education management has been the unwillingness of existing personnel to be transferred to local government organisations. Much work has yet to be done to ensure financial security, welfare and promotional opportunities. A plan is afoot for local government organisations to recruit their own personnel in the future. For public health services, the Ministry of Public Health has agreed to set up local public health committees to prepare for the transfer of work to local government organisations.

3. The action plan and TAOs in the future

TAO which is a juristic person is the smallest unit of local government organisation. So far, nearly 6,747 TAOs have been officially announced and established by the Ministry of Interior. TAOs vary in many aspects in terms of demography, geography and revenue. In the demographical aspect, Bangpleeyai TAO in Amphur Bangplee, Samut Prakarn, is the most populated, with 47,133 inhabitants while Yangchumnoi TAO in Amphur Yangchumnoi, Srisaket, is the least, with only 21 inhabitants. Bangboathong TAO in Amphur Bangboathong, Nonthaburi, is No. 1 in generating revenue (75,563,537.02 Baht in 1999 compared to 1,222,134.95 Baht collected by Banghak TAO in Amphur Panthong, Chonburi). Three TAOs which can generate revenue for more than 50 million Bath a year are Bangboathong TAO in Bangboathong, Nonthaburi, Bangpleeyai TAO and Bangsaothong TAO in Samut Prakan.

As a result of the action plan, TAOs nationwide will receive many heavy-duty responsibilities which used to belong to government agencies within various Ministries.

So far, much doubt has been cast about relying on a local government organisation's personnel force and capacity to meet its emerging heavy-duty responsibilities. Under the Act on *Tambon* Councils and TAOs, B.E. 2537 (1994), as

³² *Bangkok Post*, October 22, 2001 Issue, p.3

amended by the Act (No. 2), B.E. 2540 (1997) and (No. 3), B.E. 2542 (1999), the structure of a TAO has 3 parts as follows:³³

- 1) TAO Council: consisting of members elected by local residents in each village, two members from each village.
- 2) Executive Board: comprising 3 members, Chairman and two executive members, elected by a resolution of the TAO Council. The TAO administrative head officer is a secretary to the Executive Board.
- 3) TAO routine staff: being made up of four parts, namely, TAO Office Administrative Head Officer, Treasury, Public Works Officer and Public Health Officer. The number of staff depends on the grade of the TAO.

TAO – Grade 1 (74 TAOs) has staff of 21 persons;

TAO – Grade 2 (78 TAOs) has staff of 12 persons;

TAO – Grade 3 (205 TAOs) has staff of 6 persons;

TAO – Grade 4 (843 TAOs) has staff of 4 persons; and

TAO – Grade 5 (5,546 TAOs) has staff of 3 persons.

The Number of Staff in TAOs Nationwide³⁴

	Male	Female	Total
TAO routine staff	11,786	9,087	20,873
Permanent Employees	485	2,132	2,617
Temporary Employees	5,380	6,313	11,693
Total	17,651	17,532	35,183

As a matter of fact, the routine staff force, rather than members of the TAO Council or of the Executive Board, are the key factor in fulfilling activities and responsibilities. At present, each TAO has at most 21 routine staff members (excluding permanent and temporary employees). From now on, TAOs nationwide will certainly need more routine staff force (or even permanent and temporary

³³ Tesapiban 96th Year, Feb. 2001, p. 36.

³⁴ Adaptation from Tesapiban 96th Year, Feb. 2001, p. 40.

employees), money supply and greater skill and expertise to meet the new needs resulting from the heavy-duty burden after the transfer of responsibilities.

Pursuant to the Act, each TAO has powers and duties with regard to the development in the economic, social and cultural aspects. Many duties that TAOs have to perform are, for example, providing and maintaining waterways and roads; cleaning roads, waterways, pathways and public places, garbage disposal, preventing communicable diseases, preventing public danger and providing relief, promoting educational, religious and cultural activities, promoting development programmes for women, children, the youth, elderly and disabled, protecting environment and natural resources, conserving art, tradition, local wisdom and local culture and carrying out assignments requested by central government agencies.

Many duties TAOs are allowed by law to do are, for example, providing water for consumption and agriculture, providing street lights, building and maintaining sewerage, providing and maintaining meeting halls, stadiums, recreational places and parks, promoting farmers' groups and co-operatives, promoting household industries, promoting vocations, protecting and maintaining public assets and property, making benefits from assets belonging to TAOs, providing markets and piers, managing city planning, running tourism activities and undertaking commercial activities.

Financially, TAOs are allowed to collect some categories of taxes and fees: local maintenance tax, property tax, commercial plate tax, livestock slaughter duty, etc. TAOs are allowed to gain revenue from making benefits from their assets, public facility bills, commercial activities, licence fees and fine, cash or assets from donors, fund allocated by government agencies or central government and subsidies from central government. However, there is no guarantee that TAOs can enforce its power to collect taxes and, if so, there is still no guarantee that the amount of tax revenue can meet their expenditure because most TAOs are in needy rural areas, with no expertise like central government agencies and with insufficient money.

According to the (unpublished) draft action plan for the transfer of responsibilities to local government organisations, TAO will have to deal with many

mega-level responsibilities which need expertise, consume a large amount of money and used to be under the control of ministries. The responsibilities surely need capable routine staff, financial resource and technical skill and expertise. Some examples of ministries' responsibilities are as follows.

1) Ministry of Interior will have to transfer the power to issue licences for the hotel construction to TAOs in 2003.

2) Ministry of Agriculture and Co-operatives will have to transfer its Center of Community Agricultural Technology Transfer and Services to TAOs in 2003-2004.

3) Ministry of Science, Technology and Environment will have to transfer its powers in connection with monitoring environmental quality concerning water, air and sound to TAOs in 2003.

4) Ministry of Education will have to transfer the power and duty to provide the maintenance of ancient places to TAO in 2002.

Responsibilities due to be transferred to TAOs are highly valuable (in case of five-star hotel construction) and need advanced expertise (in case of agricultural technology like GMOs). TAOs from now on will play new and important roles. Personnel staff have to be highly capable, with new and update skill and technological expertise. Proper training and development needed for the routine staff will be costly. As mentioned above, TAOs need capable routine staff, financial resource and technical skill and expertise. Unlike other local government bodies, TAOs may face a problem in generating revenue. In fact, there was, in the past, much trepidation that a local government body like a TAO would fail because of its inability of generate adequate revenue for its responsibilities. Despite such fear, TAOs have survived amid their heavy-duty burdens. That having been said, doubts remain as to TAOs efficiency in management.

IV. Concluding Remarks

Despite the well-established legal framework on decentralisation, the achievement in the real local government reform in Thailand is in question. Lack of willingness of the state officials and state agencies is mainly responsible for the failure in transferring the responsibilities and tasks to the local government organisations. The claim usually used by the central government is that the populace in the locality has never been ready for self-government due to paucity of skill, corruption and disqualified leaders. Phenomenal violence and widespread corruption in the local government bodies seemingly affirmed that never-ending claim. Also, the insufficient political support from the government is another obstacle. The policy on local government reform is not put on top priority.

It is expected that there will be no effective co-operation from the state agencies and officials for the process of the local government reform driven by the decentralisation to the Local Government Organisation Commission. The process of the local government reform is, therefore, the thorny path.

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CONSTITUTIONAL REVIEW OF THE PROTECTION AND REGULATION OF BUSINESS FREEDOM IN JAPAN

by

Noriko Ofuji *

I. Introduction

Cases concerning freedom of business are difficult to deal with from a judicial point of view, as they are often outside the framework of the judiciary. At least, that has been the view of the Japanese Supreme Court.

The Japanese Supreme Court, in its constitutional review based on Article 81 of the Constitution¹, has held to a “self-restrained position” in dealing with such cases, and has respected the policies of the National Diet and the Cabinet. It has often deemed constitutional the measures taken by the legislators and the administration that restricted this freedom.

Chapter 3 of the Constitution, entitled “Rights and Duties of the People”, in Article 22, Clause 1, affirms the freedom to choose one’s occupation. This is interpreted as also protecting the freedom of business. According to the text,

* Associate Professor, Faculty of Economics and Political Science, Seigakuin University

¹ The Japanese Constitution enacted in 1946 laid down for the first time in Japan the Democracy, the Sovereignty and the Fundamental Rights of the People. The Constitution has literally remained unchanged since then, a fact that makes revision of the Constitution a politically sensitive matter. The Japanese system of constitutional review is considered to be the same as that in the United States. However, the Japanese system is based on an article within the Constitution, whereas the United States system was created by a famous Federal Supreme Court case: *Marbury v. Madison* (5 U. S. [1 Cranch] 137, 2 L. Ed. 60 [1803]). A doctrine stressing this difference maintains that adoption of another system is possible in Japan, without necessarily changing the Constitution. That system would be the creation of a special Court for constitutional review such as the one in Germany. In fact, a case that the Japanese Supreme Court rendered on October 8th 1952 (Civil Case Book, No. 6-9, p. 782), can be read as opening this possibility. Article 81 of the Japanese Constitution states as follows: The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.

however, this freedom is assured only “to the extent that it does not interfere with the public welfare”, and the notion of “public welfare” hereby permits certain regulations.

II. Social Policy Regulation (Positive Regulation) and Police Safety Regulation (Negative Regulation)

In the early days following enactment of the Constitution in 1946, the notion of “public welfare” was interpreted by the Japanese Supreme Court as a notion admitting broad and inclusive regulation of the freedom of business². For example, in a judgment rendered on June 21, 1950, the public employment law was considered constitutional. This prohibited private employment agencies, on the grounds that such an enterprise was against the “public welfare”³. The notion of “public welfare” was frequently employed even to justify legislative or administrative restrictions on the freedom of expression, yet the Court had never defined the term. The use of this notion, in fact, helped the “self-restrained position” of the Supreme Court in judging as constitutional the measures taken by legislators and the administration⁴.

It was on April 30, 1975 that the Supreme Court ruled for the first time that a pharmaceutical law regulating the freedom of business was against the Constitution. According to the law, establishing a pharmacy was subject to a restriction requiring it

² The term “public welfare” appears in four articles of the Constitution: Articles 12 and 13, Paragraph 1 of Article 22 and Paragraph 2 of Article 29. The last two are the only articles concerning economic freedom.

Article 12: The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of rights and shall always refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare.

Article 13: All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.

Article 22: Every person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare.

2) Freedom of all persons to move to a foreign country and to divest themselves of their nationality shall be inviolate.

Article 29: The right to own or to hold property is inviolable.

2) Property rights shall be defined by law, in conformity with the public welfare.

3) Private property may be taken for public use upon just compensation therefor.

In fact, the term had been abused by the government and even by the legislators, before and during the war, under the precedent Constitution enacted in 1889, to justify broad and inclusive regulations of rights.

³ Criminal Case Book, No. 4-6, p. 1049.

⁴ The Japanese Supreme Court is often evaluated as taking a “self-restrained position” in its judgments, leaving a rather broad range of discretion to the legislators and to the administration.

to be located a certain minimum distance from other existing pharmacies⁵. This judgment is one of the five rare cases in which the Supreme Court judged certain provisions of laws to be unconstitutional in themselves⁶.

1. Criteria based on objectives of the regulations — Positive and negative regulations —

In the above judgment, the Supreme Court adopted two standards for judging the constitutionality of the pharmaceutical law. The first is the “double standard”, which originated in the United States Supreme Court⁷, which distinguishes mental freedom from economic freedom, according predominance to the former, and therefore applying relatively narrow criteria in judging the constitutionality and the rationality of its restriction, while the constitutionality and rationality of the restriction on economic freedom is judged under less restrictive criteria.

The second standard adopted by the judgment classifies restrictions on economic freedom according to their objectives. A restriction imposed to achieve a certain social policy is called a “positive regulation” whereas a restriction imposed on economic freedom for the purpose of safeguarding the public safety and health is called a “negative regulation”. To judge the constitutionality of a positive regulation, the Court applies the “standard of rationality”, known as a relatively lenient principle, where the Court judges that the law violates the Constitution only when the unlawfulness is clear. In contrast, a negative regulation requires a relatively narrow standard, and the Court utilizes the “standard of restrictive rationality”.

⁵ Civil Case Book, No. 29-4, p. 572.

⁶ The following are the four other cases.

- 1) The case rendered on April 4th 1973 (Criminal Case Book, No. 27-3, p. 265.), concerning the ex Article 200 of the criminal code stipulating the most serious crime for a homicide of ascendants. It was considered to violate the principle of equality under the law (Article 14 of the Constitution), in that it discriminated from the crime of ordinary homicide;
- 2) Two cases rendered on April 22nd 1976 (Civil Case Book, No. 30-3, p. 223.) and July 17th 1985 (Civil Case Book, No. 39-5, p. 1100.) concerning the inequality of distribution of seats in the House of Representatives;
- 3) The case rendered on April 22nd 1987 (Civil Case Book, No. 41-3, p. 408.) concerning the forest law which restricted the property rights of the co-owners.

⁷ The Japanese courts have taken various criteria and standards from the judgments of the United States Supreme Court. The “double standard” is an example.

The restriction imposed by the pharmaceutical law has been classified as a negative regulation, because the purpose of the legislation is to prevent danger to public life and health. The Law was enacted to prevent over-establishment and over-competition among pharmacies because it might lead to degradation of the quality of medicine, and the Court held that the objective of the Law can well be realized by a less restrictive measure and that it therefore restricts the Constitution⁸.

Meanwhile, the Supreme Court rendered a judgment on November 22, 1972, in a case regarding the retail market. The Supreme Court held that the license system for establishing a retail market is not unconstitutional because it is based on the objective of protecting small and medium sized enterprises and therefore can be classified as a positive restriction⁹.

2. Ambiguity of the criteria

One of the biggest problems in classifying restrictions on economic freedom according to their objectives is that, as the government's policy became more complex, it has grown increasingly difficult to distinguish whether a certain regulation should be classified as a positive regulation or a negative one. As the Supreme Court itself points out, the objectives of a certain regulation are "various" and "of many kinds", so it is hard to discriminate one from another. For example, among cases regarding the regulation of locations where public baths may be established, the judgment rendered on January 26, 1955, emphasizing its objective for the public health, held that over-competition can be injurious in terms of sanitation¹⁰. Unlike the situation in 1955, the majority of Japanese people had their own baths at home in 1989, so they no longer needed to go to a public bath. In 1989, the Supreme Court emphasized the positive aspect of public baths, and deemed it more important to stabilize the management of existing public baths, in order to provide them to the minority of

⁸ The purpose of the regulation, which is the prevention of degradation of the quality of medicine, is considered as negative. The court therefore rules here on the basis of the "standard of restrictive rationality".

⁹ Criminal Case Book, No. 26-9, p. 586.

¹⁰ Criminal Case Book, No. 9-1, p. 89.

people that cannot afford a bath at home (judgment on January 20, 1989¹¹, and on March 7, 1989¹²).

In the case of public baths, the emphasis of the objective has shifted from the negative to the positive, but, in fact, most of the policies have both aspects simultaneously. Even in the 1975 pharmaceutical law judgment mentioned above, the Supreme Court pointed out that the regulation on location can indirectly promote the establishment of pharmacies in areas where there are few or no pharmacies.

By using a lenient standard in examining the constitutionality of the positive regulations, the Supreme Court leaves the decision to the discretion of the legislative and administrative organs. The Supreme Court asserts that situations requiring positive regulations are too complex and that they are a highly specialized matter, so it is difficult for the Court to demonstrate that it is not needed. Therefore, the Court can judge that the law is unconstitutional only when the unlawfulness and the deviation of discretion by the legislature are clear. That, in fact, rarely occurs, and in most cases the discretion of the legislators is respected.

On the other hand, in cases involving negative regulations, the Supreme Court affirms that the necessity of the regulation and its rationality can be judged by “sound common sense”. Here, the regulation can be considered constitutional only when the legislature can demonstrate its necessity and its rationality.

III. The Effect of Globalization on the Protection and Regulation of Business Freedom

1. The decision of the Constitutional Court of the Federal Republic of Germany concerning pharmaceutical law

A decision in Germany rendered on July 11, 1958¹³ is a good example for comparison. In this case, the Federal Constitutional Court held that the pharmaceutical law of the state of Bayern was unconstitutional. The law restricted

¹¹ Criminal Case Book, No. 43-1, p. 1.

¹² Hanrei-Jiho (Jurisprudence Review), No. 1308, p. 111.

¹³ BverfGE 7, 377, Urteil v. 11.7.1958.

the locations where pharmacies could be established. The Court did not characterize the regulations as positive or negative, but it held that “subjective conditions” and “objective conditions” should be met in judging the constitutionality of a license system that restricts the freedom to choose one’s occupation (including the freedom of business). A subjective condition calls upon the people wishing to assume a certain office or to conduct a certain business to judge for themselves whether or not they fulfill the conditions required. The fulfillment of these subjective conditions is examined in the principle of proportionality.

Objective conditions meanwhile must be fulfilled when restrictions are based on “objective necessity”. The confirmation of this necessity is examined with narrow criteria, and the Court holds it to be constitutional only when the regulation is necessary to prevent imminent danger to especially important interests of the community.

In this case, the Court has fully verified the necessity of the regulation, and held that there is no danger to the health of the residents if the number of pharmacies increases, and therefore the regulation is unconstitutional.

2. The judgment of the European Court of Justice and discretionary power of the European Commission — Case C-180/96 concerning the validity of the emergency regulatory measures against BSE —

In 1996, the European Court rendered a judgment concerning bovine spongiform encephalopathy (BSE), or ‘mad cow disease’¹⁴. It declared that the emergency measures taken by the European Commission¹⁵ banning exports from the United Kingdom to other Member States and to third countries of bovine animals and bovine meat or products obtained from it, was not a misuse of its powers. The Court observed that the purpose of the directives¹⁶ from which those powers are derived is to enable the Commission to intervene rapidly in order to prevent the spread of a disease affecting animals or a threat to human health.

¹⁴ Case C-180/96 UK v. Commission [1998] ECR I-2265; Case C-157/96 R v. MAFF, ex p. National Farmer’s Union [1998] ECR I-2211.

¹⁵ Decision 96/239.

¹⁶ Council Directives 89/662 & 90/425.

As regards a possible breach of the principle of proportionality, the Court noted that when the contested decision was adopted there was great uncertainty regarding the risks posed by live animals, bovine meat and derived products. Where there is uncertainty regarding the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent. Consequently, in view of the seriousness of the risk and the urgency of the situation, a temporary export ban cannot be regarded as a manifestly inappropriate measure, and the Commission displayed due caution by imposing a general ban on exports of bovine animals, bovine meat and derived products pending more detailed scientific information.

3. Necessity of applying international norms assuring business freedom

On February 6, 1990, the Japanese Supreme Court held as constitutional modification of the Law Concerning the Market Price Stabilization of Raw Silk, and it imposed regulations on the import of raw silk¹⁷. The applicants in this case were the manufacturers of neckties made of Nishijin textiles, and they asked for compensation from the State, saying that the protective measures obliged them to buy domestic raw silk, which was twice the price of foreign products, and that the measures were counter to the General Agreement on Tariffs and Trade (GATT) as well as against Article 22 of the Constitution assuring the freedom of business. The Kyoto district court in this case, denied the self-executing character of the Agreement, saying that infringement on the Agreement may bring certain disadvantages based on the Agreement itself, but that it has no other legal force¹⁸. The Supreme Court held that the regulation is “positive” and that its purpose is to “protect the silkworm raising industry”. Adopting the “standard of rationality”, it concluded that the unlawfulness of the measure concerned is unclear in this case. The Supreme Court did not decide whether the measure was against the Agreement.

The Uruguay Round held under the GATT led to the creation of the World Trade Organization (WTO) in 1994. After this change, application of the International Agreement gained even greater importance, as it is no longer based on a

¹⁷ Shomu-Geppo (Justice Monthly Review), No. 36-12, p. 2242.

¹⁸ The judgment on June 29th 1984, Shomu-Geppo, No. 31-2, p. 207.

“provisionary” protocol, but on the agreement itself, and it could deprive the legislative or executive organs of the contracting parties from entering into negotiated arrangements, even on a temporary basis.

About this same time, in 1994, the United States enacted the Uruguay Round Agreements Act providing that U. S. federal law prevails over the Uruguay Round Agreement in the event of a conflict (Section 102 (a)), and that the Uruguay Round Agreements prevail over state law, but only in actions brought by the U. S. government (Section 102 (b) (2)). In addition, under the Act, no person (except the United States) has a cause of action or defense under any Uruguay Round Agreement by virtue of congressional approval thereof, nor may any person challenge a federal, state or local law or action or inaction on the grounds that it is inconsistent with the Uruguay Round Agreement, nor may a private party rely on the results of an action brought by the federal government (Section 102 (c))¹⁹.

Also in Europe, Decision 94/800 declares that “by its nature, the Agreement establishing the World Trade Organisation, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts”²⁰. This position was confirmed by the recent Case C-149/96 in the European Court²¹, in which it was held that “having regard to their nature and structure, the WTO agreements are not in principle among the rules, in the light of which the Court is to review the legality of measures adopted by Community institutions”.

In Japan, the National Diet made no such statement of reservation at the moment of ratification. Therefore, the role of the Supreme Court has become even more important in judging the cases individually in order to safeguard social values based on the Constitution.

¹⁹ See Jackson, J. J., “Status of Treaties in Domestic Legal Systems: A Policy Analysis”, 86 AJIL 310, 1992; Hill, M., “The Role of National Courts in International Trade Relations”, 18 Michigan Journal of International Law 321, 1997.

²⁰ Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

²¹ Case C-149/96, Portuguese Republic v. Council of the European Union.

IV. Conclusion

As the economic system becomes increasingly complex, the demand for a liberal economy and free trade on one side and the demand for a more substantial policy for social welfare on the other grow more intertwined.

The Japanese Supreme Court, in exercising its role of constitutional review, has so far given a broad range of discretion to other organs, under the pretext that the Court lacks the ability to rule on highly technical and specialized economic matters.

Yet, as the economic system becomes more complex, and as international norms directly affect national law, values written in the Constitution, such as that of social welfare, can only be safeguarded by constitutional review. It is high time, therefore, that the Supreme Court abandon its criteria of positive and negative distinctions in regulations, engage the world of economic norms and fulfill its role as guardian of the rule of law.

Discussion of Session III

The discussion in Session III focused primarily on the matter of corruption. With most Asian countries, as one participant called it, “sitting in the same boat”, they have long struggled with corruption that is deeply rooted in each society. The corruption shakes the confidence of the people in a democracy and, at the same time, affects development. Many participants share the view that the problem is the weakness of institutions, as Prof. Pangalangan suggested. Asian countries have already established good systems making laws, and they have many legal tools to halt the corruption, but implementing the enforcement of such laws still lacks effectiveness.

One participant argued that we should not place excessively high expectations on the existence of opposition parties or on decentralization. The opposition parties may also become corrupt after they come to power. And decentralization just shifts the level of problems. Meanwhile, other participants emphasized the role of lawyers and the people in watching and monitoring those in power.

In addition, it was pointed out that developed countries like the U.S. are also not free from corruption, although we sometimes say that corruption is a cultural aspect of Asia. It was suggested to study the countries that are successful in managing corruption problems. Singapore was mentioned as one of the countries that are always at the bottom of the list of corrupt countries.

Another subject discussed in Session III was administrative reform, particularly the establishment of Independent Administrative Institutes (IAIs) in Japan, which Prof. Ofuji mentioned. As the participants from Japan explained, governmental organizations have been criticized for their inefficiency or for providing poor accountability or transparency. Under the government’s reform policy, such governmental organizations will be privatized or reorganized as IAIs. Such reform is expected to increase the efficiency of the economy as a whole, to enhance structural reform, and to create new jobs in the private sector. The national universities will also be converted to IAIs. The universities will have much autonomy, and their management is expected to improve.

SESSION IV

Ensuring the Rule of Law in Asia

THE RULE OF LAW IN INDONESIA

by

Naoyuki Sakumoto *

I. The Rule of Law in Indonesia

1. Rule of Law vs. Legalism in General

“Rule of law”, in plain words, means that government and political power should be limited by rules published and known in advance and applied equally impartially to all and, secondly, that the law once made should be obeyed even by those who disagree with it on moral grounds¹. In its historical context, as originated in feudalistic England in the Middle Ages, the rule of law is understood as depriving tyrannical political powers and controlling the abuse of powers by means of law in order to protect people’s rights and freedom. This notion even in its historical sense forms a contrast to the contrary notion of “rule by law”. However, in the United States, it showed a further development and changed its meaning to a new dimension, coupled with the development of democratic ideas, to include people’s participation in the law making process to decide their own rights and duties through law. Rule of law, a principle that originated in England, developed and spread through many common law countries. Supremacy of constitution, inviolable individual human rights, due process of law, and the role of courts to control powers are some of the major principles included in the rule of law. This American type went so far as to include judicial review in its most developed notion of the rule of law.²

* Senior Research Fellow, Institute of Developing Economies (IDE), Japan.

¹ John Alder. *Constitutional & Administrative Law*, Macmillan, 1989, p. 42. According to the classic doctrines on the rule of law by Dicey, who published the *Law of the Constitution* (first published in 1885), the absolute supremacy or predominance of ‘regular law’, equality before the law, and the constitution as the means of the ordinary law of the land (*ibid.* p. 43).

² Nobuyoshi Ashibe. *Constitution (Kenpo, new edition)*, Iwanami-shoten, 1997, pp. 13-15.; Nagao Kazuhiro. *Constitutional law of Japan (Nihonkoku-kenpou)*, Sekai-shisousha, 1997, pp. 22-27.

In Germany, however, which affected Meiji period Japan in its establishment of constitutional principles, a completely different conceptual theory has developed to control political powers. The "Rechtsstaat" theory or the law state theory, if translated literally, was born in Germany before WW II in order to constitutionalize political powers. As it did not encounter the development of democracy during this period, the rechtsstaat theory required only formal rationalism, and such conditions as the substantive fairness and justice of law were not considered. Of course, the concept of rechtsstaat gradually changed and expanded in scope after WW II to include major principles already developed in the notion of rule of law. In the present German theory of "rechtsstaat", such general principles as separation of powers, supremacy of constitution, guarantee of fundamental rights, constitutionality, protection of rights at court and so on are included. Both rule of law and rechtsstaat are aimed at controlling the abuse of political powers; however, the concept of rule of law that emerged in England affected the US and other common law countries, while on the other hand, the rechtsstaat theory that was born in Germany exerted an influence that reached past Japan and other civil law countries in a modified manner as these are a historical product.

2. Integralism vs. Decentralism

Such principles as "negara hukum" (law state), "supremasi hukum" (supremacy of law), or "penegakan hukum"(enforcement of law) are popularly accepted as the guiding principles in Indonesia. Mulya Lubis³ explains that the past history of Indonesia was ruled by law and not by the rule of law, while Lindsay Timothy explains⁴ in his article that the rule of law has repeatedly lost (in) the battle against integralism in Indonesia. Negara hukum, which literally means "law state", is an Indonesian translation of the Dutch rechtsstaat. The expression of rule of law is used in its General Elucidation to the 1945 Constitution of Indonesia (5.I); however, no apparent definition is provided.⁵ The founding fathers of the Constitution of Indonesia, who introduced the idea of negara hukum as its state principle, were

³ T. Mulya Lubis and Mas Achmad Santosa. *Economic Regulation, Good Governance and the Environment: An Agenda for Law Reform in Indonesia, Reformasi: Crisis and Change in Indonesia*, Monash Asia Institute, 1999, p. 344.

⁴ Timothy Lindsey, *Indonesia's Negara hukum: walking the tightrope to the rule of law*, Monash Asia Institute, 1999, p. 369.

⁵ *Ibid.* p. 363.

influenced by the Dutch legal philosophies before WW II. So, it could be concluded that the Indonesian concept of rule of law in that nation's Constitution was based primarily on the *rechtsstaat* concept before WW II swept through the Netherlands and Germany.

Looking at the present democratization process in Indonesia and the law reform process, Indonesia has long been challenged by the debates on which type of government it should adopt, that is, the integrated unitary style government or the decentralized style government. There is a question whose type of government is most suitable to the Indonesian political climate. The current 1945 Indonesian Constitution clearly declares in its Article 1(1) that it has adopted a centralized unitary state as the state principle. It is generally understood that an Indonesian integralistic notion was influenced by the totalitarianism that flourished in Europe during the WW II period. The well-known communal value of Indonesia called "Gotong Royong" (mutual help) merged with totalitarianism. Dr. Supomo, one of the most influential Constitutional drafters, upheld adoption of the unitary state principle as integralism was most adaptable to the Indonesian cultural climate. He also emphasized that European democracy based on individualism and liberalism was not in harmony with traditional Indonesian values.

II. Past Challenges in Unifying Laws in Indonesia

1. Unity in Diversity

Such terms as "hukum nasional" (national law) or "hukum formal" (formal law) or "integrasi hukum" (integration of law) are frequently used to indicate that unification of laws throughout Indonesia is an imminent national task for the Indonesian people. However, this task has not yet been achieved since its independence. Discussions related to these terms include the fact that the Indonesian legal system has long been diversified and is not yet fully integrated at a national level, and that informal laws still exist in parallel with the national law throughout Indonesia. However, the recent situation during the past few years in Indonesia is quite different.

Another phrase called “Bhinneka Tunggal Ika“ (Unity in Diversity) symbolizes the most commonly accepted philosophy in Indonesia to take a harmonized direction in order to unify its diversified cultural values and different racial groups. If its geographical conditions are examined, Indonesia is an archipelagic country composed of more than 16,000 islands, with more than half of them uninhabited. There still exist more than 200 different customary laws called “adat laws” at local levels throughout Indonesia. Different laws have been applied to different racial groups in each region. Such diversified conditions as multi-racial, multi-lingual and multi diversified values provide the cultural basis for such an un-unified legal climate in Indonesia. What should be questioned is the way to harmonize the different values and interests of the different groups in the process of law reforms and its unifying process of laws in Indonesia.

2. Un-unified Colonial Rule by the Netherlands

The first challenge Indonesia had to face during its colonial period was the ruling method of the then Netherlands. The Netherlands intended to impose western colonial laws impartially all over Indonesia. The famous Professor Van Vollenhoven and his followers from Leiden University stood against the Netherlands’ colonial policy imposed by the then Governor-General’s Office. Van Vollenhoven and his school insisted that the Indonesian legal culture was quite different from that of European countries and that the exact situation of adat laws in Indonesia was not at all surveyed by them⁶. Eventually, Indonesia had to introduce western laws partially and discriminately, depending on certain conditions.

It is not an exaggeration to say that adat laws successfully protected the Indonesian legal culture. It suspended the intrusion of imperialistic colonial rule into Indonesia by means of law. But, at the same time, it could be said that integration of laws throughout Indonesia was not achieved, and various adat laws have survived as their living laws up to the present. This situation means that the national task of integration of laws throughout Indonesia has been handed down to the present

⁶ Terr Har. *Adat law in Indonesia*, ed. by Adamson Hoebel and A. Arthur Schiller, Bharatara, 1962, Jakarta. For details, see Naoyuki Sakumoto “Modernization of Indonesian law and its pluralistic structure,” in *Ajia Shakai no Kanshu to Kindaika*, Keibundo, 1992, pp. 285-286.

generation.

3. Federalism imposed by the Netherlands

The next challenge to the governmental structure of Indonesia was the revisit of the Netherlands in 1949 after the retreat of Japanese occupation in 1945. The Netherlands plotted to re-colonize Indonesia and did not approve the Indonesian proposal to become independent. Eventually, at the Hague Roundtable Conference on August 12, 1949, an agreement to end the war was signed between the Netherlands and Indonesia, and, the Netherlands agreed to transfer its sovereignty to Indonesia by December 30, 1949; however, the Netherlands requested the application of a federal system to Indonesia against Sukarno's integralistic ideas.

On December 14, 1949, Indonesia was forced to accept the Provisional Federal Constitution of the United States of Indonesia. This Constitution went into force on the 27th of that December. This lengthy Constitution included about 200 articles. Not only the adoption of federalism as the governmental style but also 35 articles related to human rights were included in Part 5 of Chapter 1. Fully 93 articles related to the governmental structure were also provided in Chapter 3 and Chapter 4. On August 15, 1950, this federal-type Constitution was suspended when Indonesia plunged into economic and political turmoil. This federal Constitution was replaced by another, provisional, Constitution, and, finally, with President Sukarno's strong leadership and his advocacy, Indonesia returned again to the integralistic 1945 Constitution on July 5, 1959.

What was advocated by then President Sukarno was the need to "Return to the 1945 Constitution" as expressed in his frequent political speeches to the public. He emphasized to "correct all kinds of errors, wrong policies and derailments since 1950 in order to realize guided democracy in Indonesia", as found in his speech entitled "Rediscovery of My Revolution" on August 17, 1959⁷. He also stressed in his speech entitled "The Year of Decision" on August 17, 1957, that "we need to correct our political system, which we imitated from abroad, and to realize our disciplined

⁷ Nihon-Indonesia Kyokai, *Compilation of President Sukarno's Speeches; Development of Indonesian Revolution*, 1965, p. 315.

guided democracy for the construction of a fair and socialistic society based on a disciplined democracy that is in harmony with the Indonesian manner of living, that is, a type of democracy in harmony with the Gotong Royong communal values”⁸. Here, we can see again both the traditional communal values in Indonesia and the integralistic political stance were matched to their own interests.

III. Law Reform

1. No Active Law Reform after Independence

During the period spanning the governments of former Presidents Sukarno and Suharto, they concentrated their political powers into their own hands under the protection of the 1945 Constitution⁹ and politicized the legal system under “Pancasila” ideologies (five founding principles for nation-building). It is not an exaggeration to say that no active law reform except a few cases was conducted by these two Presidents. The initial impact on law reform was given by the speech made by Dr. Supomo in 1947 who emphasized the need of arrangement of economic laws in the process of law reform. He also discussed that the integration of family laws would need more time for Indonesia.

In the 1960s there came out some new laws such as the Basic Agrarian Act of 1960 and investment related laws. In 1961, with the advice of the Indonesian Law Experts Association (Perhimpunan Ahli Hukum Indonesia) and the Association of Indonesian Lawyers (Ikatan Sardjana Hukum Indonesia), the Indonesian Law Development Institute (Lembaga Pembinaan Hukum Indonesia) was established in 1961 to support legal development in Indonesia. Later, the name was changed to the present National Law Development Center (Badan Pembinaan Hukum Nasional, BPHN). BPHN started its national law program, however, without much success despite their efforts. The second REPELITA (National Five-year Development Plan), which started in the 1970s, emphasized the need to start law reform in Indonesia in its

⁸ *Ibid.* p. 237.

⁹ For the concentration of powers under the present Constitution, *see* Naoyuki Sakumoto, “Constitutional Structure in Indonesia,” in *Ajia-shokokuno Kenpo-seido*, 1997 (Institute of Developing Economies).

Chapter 27, and stressed the need to codify and unify certain areas of laws along with the development of legal awareness in the society. But, politicization of laws covered major areas of law under such Pancasila ideologies. As a result, no enthusiastic law reform was conducted even though both the 1980s and the 1990s were designated as take-off periods in the above-mentioned REPELITA II. Nothing active related to law reform in Indonesia can be seen during the period of these two Presidents for 53 years.

2. Present Law Reform

Various law reforms have been undertaken, especially after former President Habibie. President Habibie took over from President Suharto in 1998. As can be seen in Table I as attached, a number of laws and regulations including two Governmental Regulations in lieu of Act were made and provided for in Indonesia in a very short period. More than 300 new laws were passed almost every year; however, many of them were passed at the initiative of “Secretariat Negara” (National Secretariat). This means that these laws were not prepared by the parliament but by the leadership of the National Secretariat. Constitutional amendments to the 1945 Constitution were made by MPR on October 19, 1999 and on August 18, 2000. The first constitutional amendment included the curtailment and decentralization of the excessively concentrated presidential powers, the empowerment of DPR functions as well as DPR members in order to process legislations. The second constitutional amendment focused on human rights protection, the decentralization of central government powers to local governments, the empowerment of making law functions of DPR, and defense and security. Among human rights provisions, such a new right to the environment was also included.

3. Unchanged MPR Superior Basic Structure

Here, let me compare two Decisions of MPR regarding the Indonesian legal system and the sources; Provisional Decision of MPR No.20 of 1966 and Decision of MPR No.3 of 2000. MPR is regarded as the most superior state organ in its powers and positions in relation to other constitutional bodies. MPR Decisions are to be provided for at MPR in order to realize the sovereignty of the people (Art. 3(2), MPR Decision of 2000). There are explicit provisions such as Article 2 and Article 3 in

this MPR Decision of 2000 stating that the Constitution ranks first. Contradictorily, however, hierarchal position of the MPR's decisions are always regarded as equal with the Constitution or above. In practice, the present Constitution has been amended by MPR Decisions. Actually in the other Article of this Decision of 2000, the MPR is provided with the powers to examine the 1945 Constitution and the MPR Decisions (Art. 5(1), MPR Decision of 2000). The Supreme Court of Indonesia is given the supreme power to review the constitutionality of Acts (Art. 5(2), MPR Decision of 2000).

During the period of former Presidents Sukarno and Suharto, political powers were concentrated in the hands of the Presidents under the protection of the 1945 Constitution. It can be said that no radical structural change of the government has been made even after the "Reformasi" period. State organs such as Supreme Court, Auditor's Office, DPR, President, and the Supreme Advisory Committee are under the same supreme national organ of MPR. MPR is the source of political powers even if they are technically divided to different state organs. Even after the downfall of former President Suharto who had been in office for 32 years, its basic constitutional structure has not been changed much, and the source of powers still resides with MPR. This is because MPR is regarded as a supreme state organ entrusted by the Indonesian people under the principle of sovereignty of the people. Those powers to appoint and impeach the President derive from MPR and not directly from the Constitution.

This all-powerful MPR governmental structure gives us an ambiguous image about the function of checks and balances among the governmental bodies. Indonesia is a constitutional state and the political powers are being decentralized, but the problem is that this process is not based on the separation of powers principle.

4. All-powerful MPR vs. Independence of Judiciary

Under such a constitutional structure, what will happen with the independence of the judiciary in Indonesia? The Supreme Court as well as the subsidiary courts in Indonesia are all positioned as part of the executive branch and could be controlled by the Ministry of Justice even if there were some delegation of powers to the Supreme

Court. Diagnosis study¹⁰ on Indonesia was conducted by BAPPENAS and the World Bank in 1997, where legal experts all over Indonesia cooperated and recommended a new action plan in a prioritized manner. However, the goodwill of BAPPENAS is said to have evaporated because then President Suharto gave no signs of support¹¹. Funding by USAID also failed in February 1998, and US experts concluded that “there was insufficient political will to implement the action plan”¹². This diagnosis study also pointed out that the amendment of Act No. 14 of 1970 on the Supreme Court, Act No. 5 of 1986 on Administrative Courts and Act No. 2 of 1986 on the General Courts should be called into question. Article 11(2)1 of Act No. 14 of 1970 provided that the powers related to the organizational framework, administration and finance of such courts as General Courts, Administrative Courts, Religious Courts, and Military Courts belong to the ministries of executive power. The Supreme Court, as an exception, could have its own organization, administration and powers. Article 11 of the newly amended Act No. 35 of 1999 on the Supreme Court provides that all the courts are subject to the Supreme Court, and the organization, administration and finance of each court shall be stipulated by respective specific Acts. The official General Elucidation of this Act explains that there arose a need to separate judicial powers from administrative powers, and, for this purpose, such amendments were made to transfer powers to the Supreme Court. The Elucidation states that the executive branch interfered with court practices. This new amendment is scheduled to go into force by 2004 at the latest.

A similar type of governmental structure as that in Indonesia can be found in other socialist or semi-socialist countries such as China, Vietnam and so on. Of course, we must admit that there are diversities in the constitutions of the different countries that are based on their own cultural and socio-political conditions¹³. The problem, however, is that such diversities can create conflicts with the universally accepted

¹⁰ Studi Diagnostik Pembangunan Hukum di Indonesia, BAPPENAS, 1997.

¹¹ *Ibid.* 4, p. 344.

¹² *Ibid.* 4, p. 344 and p. 347. This article explains four minimum principles that are widely accepted criteria for judicial independence based on the Code of Minimum Standards of Judicial Independence of the International Bar Association, *i.e.*, personal judicial independence, internal judicial justice, collective judicial independence, and substantive judicial independence.

¹³ Professor Yasuo Hasebe poses a question to readers regarding the extent to which cultural diversity can be admitted and accepted in terms of different types of contemporary constitutionalism. He quotes from J. Tully’s book entitled *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge University Pr., 1995. (*The Maze in Incomparable Values*, Todai shuppan, 2001, p. 51.)

legal principles of the developed countries. Is it safe to say that MPR Indonesia is a type of constitutional diversity or a polity with peculiarities in a rapid transitional process?

How could the independence of judiciary be secured under such a power concentrated system where all the state powers derive from MPR? Under such a judiciary system, how can human rights be protected? In its entire legal framework, MPR can source all the powers because it is regarded as the supreme organ representing the sovereignty of the people. There are no constraints upon its legislative power as the MPR's legislative power ranks equal with the Constitution and it can also amend the Constitution. As for the executive power, MPR can ask the most powerful President to resign, or impeachment him under certain conditions. As for the Supreme Court, it is still subject to the Ministry of Justice and MPR. It can hardly be said that the powers of the Supreme Court are fully assured and that the independence of the Judiciary is fully guaranteed. From the western way of thinking, unless the entire state's organizational framework including MPR were changed or unless MPR were abolished, it would not be possible to coexist together with such a principle as the separation of powers or the independence of judiciary.

5. Decentralization

Further, the decentralization process is under way along with the democratization process. There is heated discussion about the direction of the governmental structure of Indonesia, whether they should take a federal style or not. There are independence movements in Ache and West Papua (Irian Jaya) regions. Act No. 14 of 1999 regarding the Structure of MPR, DPR, and Local Governments, provides that parliaments at local levels are the apparatus for realizing democratization (Art. 34(1)). As a result, powers that were concentrated in the central state organ are now being delegated to local governments. Local people can elect their own mayors and can propose his resignation directly to the President of the land. Some of the powers permitted to the local governments by Article 34(2) of this Act are; filing their budget, stipulating local ordinances, formulating local government policy on regional development in line with national development policy, implementing international cooperation at local levels, and proposing their own opinions and judgments to the

central government regarding international treaties if they find some interests in the treaties. Law Act No.25 of 1999 provides for the balancing of budget between the central government and the local governments.

Generally speaking, it is understandable that the decentralization process can assist in accelerating the democratization process throughout Indonesia. However, there have arisen some vacuum-like phenomena at local levels as the local governments cannot cope fully with such a rapid decentralization process. Some problems included at local levels are insufficient organizational framework, lack of experience in managing projects by themselves, untrained human resources, and lack of financial sources. The extension of support from the central government, international organizations or NGOs to the local governments is urgently needed to escape from such a vacuum-like situation.

IV. Conclusion

Law reform in Indonesia is under way, but this has been pushed by international organizations such as the IMF and World Bank. Major areas of law reform targeted in the beginning stage are economy-related laws, as insufficiencies in these areas are regarded as obstructing their immediate economic recovery. Included areas for example are insolvency, antimonopoly, intellectual property and consumer protection. Now it is expanding to other areas such as political reform, administrative reform, and judicial reform. As for political law reform, human rights, ombudsman, governance, parliamentary system, empowerment of legislature, curtailment of presidential powers, political party, general election, and local autonomy are targeted. As for administrative law reform, capacity-building of public officials, corruption prevention, and taxation are being taken up. In addition, judicial reform, due process, independence of judiciary, judicial review, special court, and legal education are also being discussed.¹⁴

¹⁴ Recommended prioritized areas for law reform by the diagnosis study are reform of the judiciary system and the development of legal education in Indonesia. On the other hand, Mulya Lubis suggests 5 areas of law reform in order to implement good governance; good representative system, independence of Judiciary; strong, professional bureaucracy; strong and participatory civil society; democratic decentralization; and redefinition of the social function of the Indonesian military.

The roles of law presently most anticipated in Indonesia are: (1) to establish a unified system of national law to integrate the country through law, but in harmony with local adat laws; (2) to build a good governance system through participatory systems; (3) to support human capacity building; (4) to secure the independence of the Judiciary from any governmental organ; (5) to introduce the separation of powers principle in its organizational structure; and (6) to restore people's confidence in the Government.

Table I: Total number of laws and regulations during the Indonesian law reform period

	Act(UU)	Governmental Regulation(PP)	Presidential Decision(KPS) etc	Presidential Instruction(IP)	Total
1996 Jan-Jun	5	43	50	5	103
1996 Jul-Dec	4	31	49	-	84
1997 Jan-Jun	21	18	26	4	69
1997 Jul-Dec	12	30	27	1	70
1998 Jan-Jun	4	57	90	16	167
1998 Jul-Dec	10+2 (Perpul)*	21	112	14	159
1999 Jan-Jun	29	62	64	6	161
1999 Jul-Dec	28	37	113	9	187
2000 Jan-Jun	15	47	88	4	154
2000 Jul-Dec	23	108	93	5	229
2001 Jan-Jun	13	54	83	6	156

Source: Compiled by the author from the annual compilation of Indonesian laws and regulations "Himpunan Praturan Perundang-undangan Republik Indonesia", CV Eko Jaya, Jakarta.

* Governmental Regulations in lieu of Acts (Peraturan Pemerintah Pengganti Undang-Undang)

NATIONAL OMBUDSMAN COMMISSION OF INDONESIA: COMPARATIVE ASPECTS

by

RM Surachman *

In the history of control and supervision in Indonesia, 20 March 2000 is one more important date. That day many printing as well as electronic media in Jakarta reported and broadcasted the inauguration of the eight Ombudsmen of Indonesia in the Palace of the President of the Republic. Undoubtedly, for most Indonesian people's ears until then, even up to now, the word "ombudsman" is still undecipherable word. Whereas it is certain, the ombudsman system is one of the symbols of democracy respecting and promoting the rule of law. As a result, one cannot find any precedent in the history of modern democracy about the abolishing of an Ombudsman Institution.¹ On the contrary, some national states—neglecting the rule of law and governed by authoritarian and undemocratic rulers—established the Ombudsman Institutions to pursue international sympathies for having false image as democratic governments respecting the rule of law and human rights. Also it is recorded, that once the Parliament of Malawi rejected the Bill of the National

* Research Professor eqv (World Jurist Association), Washington DC; Commissioner, National Ombudsman Commission of Indonesia, (2000-...); *Pembina Utama*, or Principal Executive (IV/e); National President for Indonesia, World Jurist Association, USA (1999-...); Member, World Association of Law Professors, Washington DC; Penalist, L' Association Internationale de Droit Pénal, Paris; Individual Expert, 10th UN Congress on the Prevention of Crime, Vienna, April 2000; Research Fellow (1985-86), ISEAS (Institute of South East Asian Studies), Singapore; *Legum Baccalaureus*, University of Indonesia School of Law; *Legum Magister*, Pajajaran University School of Law; Alumni of PAGO (Program for Attorney General of Indonesia), University of Pittsburgh, Pittsburgh, Pennsylvania, USA; Alumni of UNAFEI (UN Asia and Far East Institute), Tokyo, Japan; Alumni of the Program on the Institution and Role of the Ombudsman, University of Reading/PAI (Public Administration International), London, UK.

¹ Cf. Emile Francis Short, "The Development and Future of the Ombudsman Concept in Africa," paper submitted to the 7th International Ombudsman Institute Conference, Durban, South Africa: 30 October-2 November 2000.

Ombudsman. Sometime later, however, the Ombudsman Office was established after the enacting of the Ombudsman Act.²

Two years after getting its independence from Kingdom of Sweden, in the end of 1919, Finland established Ombudsman Office. It is the second Ombudsman Institution in the world. Nonetheless, not until 7 February of the following year, the first letter of grievance came in to the new Office. Hence, the date became the birthdate of the Finish National Ombudsman.³ On the contrary, in the case of Indonesia, many people phoned the Chief Ombudsman candidate asking when the Office would be established. The first grievance to the *Komisi Ombudsman Nasional*, or the National Ombudsman Commission on the first day of its operation was lodged by the Colonel (Ret.) dr. Rudy Hendrawijaya, MPH. It was about the case involving the judiciary. He reported that there were two judgements of the Supreme Court of Indonesia for his case. In the first one, the Court rejected the *cassation* appeal lodged by the opponent party. This meant, the complainant won the case. In the second one, however, the Court agreed to review the case and gave its own judgement by which the complainant becomes the loser of the case. The complainant is of the opinion that the second judgement (No.1082 K/Pid/1988 of 16 November 1999) is none other than a forgery.⁴

I. The Spreading of Ombudsmanship

Sweden is the homeland of the modern ombudsman. Exactly it was established in 1809. Before the establishment of the Finish Ombudsman, for more than 100 years the ombudsman institution had been known only in Sweden. Then, in the second half of the last century, it spread all over the world with the Ombudsman Office of New Zealand as the first in the English speaking countries and outside Europe. Seven years earlier, in 1955, Denmark established the *Folketingets Ombudsmand*, or Parliamentary Ombudsman.⁵ This is the third Ombudsman in the Scandinavian

² See Lauri Lehtimaja, "Welcoming Address," in Ilkka Rautio, ed., *Parliamentary Ombudsman of Finland, 80 Years* (N.p.: Helsinki, 2000), p. 9.

³ Cf. Short, "The Development and".

⁴ Komisi Ombudsman Nasional, *Laporan Tahunan 2000/2000 Annual Report*, p. 10 and p.11.

⁵ See Sir John Robertson, "The Danish Ombudsman: New Zealand Precedent" in Hans Gammeltoft-Hansen and Flemming Axmark, eds., *The Danish Ombudsman* (Copenhagen: Department of

countries with emphasized on the maladministration and the oversight of the public service, excluding the oversight of the judiciary. Sometime later it was followed by Norway and Iceland.

In West and South Europe, the Ombudsman Offices were established in the Republic of Ireland, Italy, Switzerland, Austria, the Netherlands, Belgium, Greek, Malta, Portugal, and Spain. In East and Central Europe, the Offices were established in Slovenia, Lithuania, Hungary, Poland, Russia, Ukraine, Albany and Rumania. It will be soon established in Bosnia-Herzegovina and Bulgaria.⁶

In the beginning the United Kingdom was skeptical about the Nordic institution. However, an Ombudsman Office called *the Parliamentary Commissioner for Administration* was established later in London (1967) followed by other similar ombudsmen of particular public sector such as the Independent Housing Ombudsman, the Police Complaints Authority, the Prison Ombudsman, and the Data Protection Registrar.⁷ In France, knowing that its administrative court system was the most effective in Europe, many people opposed to the Ombudsman concept.⁸ At last, a variant of parliamentary ombudsman was established in Paris by the name of *Médiateur de la République*,⁹ by emphasizing mediation as its method of work. The francophone countries then followed this model.¹⁰ Meanwhile, the Ombudsman Office of New Zealand has become the model of the commonwealth countries.¹¹

In North America, Ombudsman Offices were established in some Provinces of Canada. The Ombudsman Office of Hawaii is the first State Ombudsman in the

Information, Ministry of Foreign Affairs, 1955), pp. 33-38; also it is referred in Bryan Gilling, *The Ombudsman in New Zealand* (Palmerstone North: Dunmore Press Limited, 1998), pp. 16-17.

⁶ See Le Médiateur de la République, *1998 Report to the President of the French Republic and Parliament*, Abridge Version, pp. 116-117.

⁷ Bryan Gilling, *The Ombudsman in New Zealand* (Palmerstone North: Dunmore Press Limited, 1998), pp.17-19 and Philip Collcutt and Mary Hourihan, "Review of the Public Sector Ombudsman in England", A Report by the Cabinet Office, April 2000. See also Cabinet Office, "Review of the Public Sector Ombudsmen in England", A Consultation Paper, June 2000.

⁸ See Mme Nicole Questiaux, "Countries With A System of Administrative Courts, How Administrative Courts Meet Their Need," in Donald C. Rowat, ed., *The Ombudsman, Citizen's Defender*, 2nd ed. (London: George Allen & Unwin Ltd., 1968), pp. 217-225.

⁹ See Le Médiateur de la République, *1998 Report to*, p. 9 and Le Médiateur de la République, *2000 Report to the President of the French Republic and Parliament*, on the backside of the cover.

¹⁰ Marten Oosting, "Keynote Speech: The Ombudsman—A Profession," speech delivered in African Regional Workshop, Pretoria, South Africa, 26 to 29 August 1996.

¹¹ *Ibid.* See also Robertson, *The Danish Ombudsman*.

United States.¹² Whereas in Latin America, the first Ombudsman Office is established in Guatemala.¹³

In Asia, the modern Ombudsman was first introduced in India, and there are eleven local ombudsmen, or *Lok Ayukta*.¹⁴ In Pakistan the modern National Ombudsman, the *Wafaqi Mohtasib*, has been in existence since 1986. Whereas in Africa, the first Ombudsman Office established is the one in Tanzania.¹⁵

Nowadays there are already 107 National Ombudsmen in the world with the National Ombudsman of Thailand is the last. It was established on 1 April 2000 or eleven days after the Indonesian Ombudsman Commission was born.

It is worth of notice, that the word of “Ombudsman” has been protected by International Ombudsman Institute (IOI). The protection is intended to give criteria for the membership of that International Organization due to the growth use of the word “Ombudsman” by similar institutions, which are *not really* independent. Other criteria are whether or not the institutions screened having: impartiality, immunity, powers of investigation and authorities to make recommendation.¹⁶

II. Parliamentary Ombudsman vs. Executive Ombudsman

The Swedish word of *ombud* means “legal representative”. The word and function of “ombudsman” has been very popular there. Hence, the trade unions, political parties, public as well as private corporations have their own ombudsman. However, the most independent ombudsman in Sweden is the parliamentary ombudsman called *justitieombudsman*, or “JO”.¹⁷

¹² Donald C. Rowat, “Preface To Second Edition” in Rowat, ed., p. xiii.

¹³ Marten Oosting, *Contribution On Ombudsmanship* (The Hague: De Nationale Ombudsman, 1998), p. 5.

¹⁴ See Directory 2000 of International Ombudsman Institute; cf. Rowat, “Preface”, p.xxii.

¹⁵ See Directory 2000 of International Ombudsman Institute.

¹⁶ Cf. Kevin Murphy (Irish Ombudsman) in *Annual Report of the Ombudsman 1999* (Dublin: Office of the Ombudsman, n.d.), p.7.

¹⁷ Cf. Torsten Erikson, “The Ombudsman” in UNAFEI Resource Material Series No. 8, 1974, p. 63.

The authority of the *justitieombudsman* (the ombudsman of justice) is to oversee the application of law by the public service, military, and judiciary. Whenever there is diversion of law or apparently there is abuse of power, the JO will investigate it and give the recommendation and even it may prosecute the particular bureaucrat, military officer and judge who has allegedly violated the law or abused of authority. At the same time, those who think they have been the victims of malfeasance may lodge complain to the JO.¹⁸

The JO is a parliamentary ombudsman since he sends special as well as annual report to the Swedish Parliament (*Riksdag*) that elected him. Most ombudsmen in the world are parliamentary ombudsmen. The variants of it are found in some countries, where the ombudsmen are appointed by the Head of State (the King, the Queen or the President). Still, they are responsible to and send the report to the Parliament. For example, the Queen appoints the Parliamentary Commissioner, or the English Ombudsman, on the advice of the Prime Minister after consulting the leaders of the opposition parties.¹⁹

There are, however, ombudsmen elected by the Head of State and they send the report to the Head of State, not to the Parliament. Hence, they are executive ombudsmen. Ombudsmen of the Republic of Korea, Pakistan, Indonesia and Tunisia belong to this group. The variant of it is the French Ombudsman, or *le médiateur de la République* that is appointed by the Cabinet. Also he sends report to the Head of state. Without having full independence, still the executive ombudsmen play significant role in protecting rights of the public and to improve the rigid application of regulation and practices.²⁰

¹⁸ *Ibid.*

¹⁹ The credit should be given to Professor Roy Gregory, Reading University, England, UK, who corrected that particular paragraph in our paper dealing with comparative study on the Ombudsman System in Africa and Europe (written with Chief Ombudsman of Indonesia, Mr. Antonius Sujata in winter 2000) during my training in Public Administration International in London, UK in May 2001 on “The Institution and Role of Ombudsman.” See also RM Surachman, “Institusi Ombudsman: Perkembangannya”, paper submitted to Interactive discussion with the topic: The prospect of establishing Local Ombudsman in West Borneo, 22 September 2001.

²⁰ Daniel Jacoby, “The Future Of The Ombudsman,” paper submitted to International Ombudsman Conference, Taipei, Taiwan (19-24 September 1994), p.6.

One should notice, it is one of the universal principles of ombudsmanship that no one or no other institution—not even the Parliament (in case of a parliamentary ombudsman) or the President (in case of an executive ombudsman)—may intervene, instruct, and dictate ombudsman. Thus “responsible” in the context of ombudsmanship means that he has to send the special as well as annual report.²¹

As previously mentioned, the other Scandinavian countries later adopted the Swedish Classic Ombudsman. As a matter of fact, the West and South European countries did not adopt the Swedish model genuinely. They adopted the parliamentary ombudsman of Denmark instead. Without having the power of prosecution and without having the authority of scrutinizing the judiciary, the Danish Ombudsman oversees the bureaucracy and public administration.²²

In later development, some Ombudsman Offices extended their jurisdiction encompassing the power to investigate and prosecute corruption practices. This extension of power may be seen in the Philippines, Vanuatu, Ghana, Namibia, Sudan, Uganda, and Zambia. In other words, these offices have shifted from the position of the “Magistrature of Influence” into the “Magistrature of Sanctions”.²³

Other variant, the extension of jurisdiction may be seen in Latin America *inter alia* in Mexico, Guatemala, Honduras, El Salvador, Costa Rica, Panama, Colombia, Argentina, Peru and Bolivia. They established the so-called “Human Rights Ombudsman”, since the Offices have jurisdiction to investigate the human rights as well as maladministration violations.²⁴

The Ombudsman Offices in the East and Central European countries took the similar path. Meanwhile, unlike many Ombudsman Offices in some African countries, the Ombudsman Offices in Latin America and in East and Central Europe are not vested with the power to investigate corruption practices. However, all those

²¹ Surachman, “Institusi Ombudsman”, pp.8-9.

²² *Supra* n. 5.

²³ The term of “Magistrature of Influence” and “Magistrature of Sanctions” see the Office of Federal Ombudsman, Kingdom of Belgium, *Annual Report 1988*, p.18.

²⁴ See “The Ombudsman and its Relation to the Inter-American Commission of Human Rights”, p. 1, material for discussion (*handouts*) in the Program on the Institution and Role of the Ombudsman, University of Reading/PAI (Public Administration International), London, UK., p. 1.

ombudsmen are categorized as the second generation. Many of them called themselves as the “Human Rights Commission” or any other titles among other things are: Commissioner for Human Rights and Administrative Justice, Civil Rights Protector, Public Protector, Le Protecteur du Citoyen, Commission Nationale de Droit de l’Homme, Comision Nacional de Derechos Humanos, Procurador para la Defensa de los Derechos Humanos, Defensor del Pueblo, Defensor de los Habitantes, Difensore Civico, and Provedor de Justiça.²⁵ Whereas the first generation of ombudsmen are those classical ombudsmen that are responsible to scrutinize the public administration.²⁶

III. The National Ombudsman Commission of Indonesia²⁷

Most National Ombudsmen in the world were established by an Act. On the other hand, the National Ombudsman Commission of Indonesia was established based on the Presidential Decree Number 44 of the Year 2000. As previously mentioned, on 20 March 2000, the eight *Anggota* (Member), or Commissioners (Ombudsmen), were inaugurated by President Abdurrahman Wahid in the Palace in Jakarta. The position of the ninth Commissioner is still vacant. Few months later three Commissioners resigned and one of them became the Chief Justice of Indonesia. Now therefore there are four vacancies for the position of Commissioner.

It is worth of notice, that similar to the Ombudsman Commission of Indonesia, the National Ombudsman Office of Pakistan too was created by a Presidential Decree (President’s Order Number 1) in 1983.²⁸ Both Ombudsmen are appointed and responsible to the President of the Republic. Hence, both of them are not Parliamentary Ombudsmen.

²⁵ See Directory 2000 of International Ombudsman Institute; cf. Daniel Jacoby, “[Report of the] International Ombudsman Institution Board of Directors’ Meeting”, in the 7th International Ombudsman Institute, Durban, South Africa, 30 October to 2 November 2000.

²⁶ Cf. Jacoby “[Report of the]”.

²⁷ Cf. Surachman, “Institusi Ombudsman”.

²⁸ See *Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order, 1983*; also *Annual Report 1999* (Islamabad: Wafaqi Mohtasib (Ombudsman)’s Secretariat, 1999), p.4 and pp.138-149.

As have been seen, some parliamentary ombudsmen are appointed by the Head of State (the King, the Queen or the President). They are responsible to and send the report to the Parliament and yet they are autonomous and independent.²⁹

Accordingly, either the Ombudsman of Pakistan or the Ombudsman of Indonesia will become a Parliamentary Ombudsman, if each of the Presidential Decree mandates each of the Ombudsman to send the report to the Parliament.

Indonesia, however, will not amend the Presidential Decree for two reasons. Firstly, the Ombudsman Commission has composed the Draft of the Bill on the National Ombudsman. The preparing of the Draft is one of the mandates provisioned in the Presidential Decree. Secondly, the Ombudsman Commission has decided that it is the Indonesian Parliament, not the Head of State that will elect the future National Ombudsman.

It does not mean that the Indonesian Ombudsman Commission will become political partisan. The choice is motivated solely for gaining political support from the Parliament. In that condition, the National Ombudsman of Indonesia will hold a stronger position and will be more independent and impartial. What is more, being an outsider of the Executive, it will become an autonomous supervision institution. Needless to say, the Act of Indonesian Ombudsman as legal basis will be stronger than the present Presidential Decree.

IV. The Objective and the Mandates

As a matter of fact, the establishment of Ombudsman Commission was one of the commitments of the President Abdurrahman Wahid Administration (and continued by the present Administration under the leadership of President Megawati Soekarnoputri) to reform the laws and institutions in pursuing a better and clean administration and to enhance the realization of good governance. In other words, the establishment of the Commission is to prevent those authorities in public sector from

²⁹ *Supra* n. 18.

abusing of authority and discretion; to assist them in performing their jobs effectively and efficiently; and to compel them for maintaining the accountability and fairness.

For those purposes the Ombudsman Commission was given the following mandates described under the Presidential Decree Number 44/2000:³⁰

- (1) To accommodate the social participation in conditioning the realization of clean and simple bureaucracies, good public service, professional and efficient justice administration as well as impartial and fair trial by independent judiciary.
- (2) To promote the protection of individuals in getting public service, justice and welfare and in defending their rights against illegal actions and irregular practices resulting from abuse of power, corruption, collusion, discrimination, undue delay, deviation and improper discretion.
- (3) To enhance the supervision of the government institutions and agencies including the judiciary by sending clarifications, queries, and recommendations to those reported institutions and agencies (target groups), followed by uninterrupted monitoring of their compliance with the recommendations.
- (4) To prepare the transforming of the Ombudsman Commission into a more effective, autonomous, and completely independent Parliamentary Ombudsman of Indonesia by drafting the Bill on the National Ombudsman to be submitted to the Legislature within six (6) months.

In this context, the Ombudsman Commission practises these procedural activities: if it is discovered that there is a kind of maladministration committed by any government institution or agency in the form of undue delayed, inappropriate and arbitrary decision, actions, omissions, or deviation or apparently it is a result of abuse of discretion, and abuse of power, or it is in contradiction with law and regulations, the Ombudsman Commission will give recommendation to the target groups (the

³⁰ See *Laporan Tahunan 2000/2000 Annual Report* (N.p.: Komisi Ombudsman Nasional, 2001), p.6 and p.7. See also Arts 3-4 of Presidential Decree Number 44 of the Year 2000.

reported institution or agency) that the case is under the monitoring. Even if on the surface it is legal or not in contradiction with law and regulations, the Ombudsman Commission will do the same. Accordingly, it is possible for the Ombudsman Commission to dispose the case based on equity.³¹

In short, the immediate objective of Ombudsman Commission is *inter alia* to pursue the realization of the clean and effective bureaucracies in providing good services to the public based on the supremacy of law as well as the realization of the professional and credible law enforcement agencies including the accountable and independent judiciary that respect human rights and fundamental freedoms and maintain equal opportunity and justice for all.³²

In other words, the public institutions and agencies concerned are at least willing to accept and recognize the existence of the Ombudsman Commission. Further, those institutions and agencies will soon realize that a new institution of accountability and integrity i.e. the Ombudsman Commission now controls their works.

The long range objective of the Ombudsman Commission is *inter alia* to pursue the realization of good governance in the context of civil democracy based on the rule of law and supported by a strong judiciary that respect the principle of equality before the law, the presumption of innocence, and the right to a fair public hearing by an independent and impartial tribunal.³³

The influx of complainants to see the Chief Ombudsman for reporting their grievances reflect the wishful expectations of the people, that the Ombudsman Commission is completely independent and vested with broad authorities. They believe they have found the real protector for their rights and interest. They believe the Ombudsman Commission may provide the last opportunity to get redress and

³¹ RM Surachman, Commissioner (Ombudsman) of the National Ombudsman Commission, Address to Workshop on Administrative Law, Surabaya, October, p.2.

³² *Laporan Tahunan 2000/2000 Annual Report*, p.6 and p.7.

³³ *Ibid.*, p.8 and p.9.

remedies for their rights which have been damaged, dishonored, abrogated, or even abolished by the unfair authorities and impartial judges.³⁴

V. The Principle of Independence

Pursuant to article 17 of the Presidential Decree all expenditures for executing the duties and functions of the Ombudsman Commission will be born by the State Secretariat. In other words, the budget of the Ombudsman Commission is part of that of the State Secretariat.

Many of the opinion, that the article may distort the independent status of the Ombudsman Commission. However, the Ombudsman Commission has so far been successful in maintaining its independence from the Executive. It is recorded that the Commission send occasionally a critical recommendation to the President. For example, President Abdurrahman Wahid apparently did not want to appoint one of the two Chief Justice candidates nominated by the Parliament. The Ombudsman Commission sent the recommendation reminding that according to the law the President had to appoint one of them. Eventually, the President appointed Professor Bagir Manan, one of the candidates, as the Chief Justice.

As noted earlier, it is one of the universal principles of ombudsmanship that no one or no other institution may intervene, instruct, and dictate Ombudsman.³⁵ Dean M Gottehrer points out that the Ombudsman Office is established as independent and impartial institution. Even in many Constitutions the principle of independence for the Ombudsman is guaranteed. This means that “[t]he Ombudsman in the exercise of the office’s functions, duties and responsibilities under this Constitution shall not be subject to the direction or control of any other person or authority.”³⁶ Any individual thus must have easy access to the office. There is even no charge for any grievance lodged to the Ombudsman. In addition, Gottehrer comments that “[i]ndependence and

³⁴ *Ibid.*

³⁵ *Supra* n. 19a.

³⁶ Dean M. Gottehrer, “Ombudsman Legislative Resource Document”, Occasional Paper #65, (Edmonton, Alberta: International Ombudsman Institute, 1998)

impartiality of the Ombudsman are critical to the office's success because otherwise people will tend not to use it if it appears to be another bureaucratic government office."³⁷

Gottehrer is an American expert on ombudsmanship and one of the Indonesian Ombudsman Commission's consultants. In his research report he concludes that Constitutions of 54 countries accommodate the basic provisions on the Ombudsman. Moreover, he has read not less than 100 Ombudsman Acts of many countries. His discoveries show everyone that there are 59 universal principles of ombudsmanship. Practically, the Commission has dubbed them "Gottehrer principles", or "G-principles".³⁸

Truly, G-principle 1 (G-1), or the principal of independence is the most essential. This principle links with the purpose of its establishment, its sustainability, the appointment of Ombudsman, the tenure of office, functions, and procedure of removal.³⁹

The purpose of the establishment of Ombudsman Office is to oversee the public administration; to promote the standard of competence and efficiencies, to protect the individual from being the victim of injustice, maladministration, and abuse of discretion committed by any public authority; to promote and protect human rights as well. Moreover, the establishment of Ombudsman Office should be based on an Act. To repeal and to amend an Act needs a larger majority vote in Parliament. Hence, the Act is not easily changed. Further, the Ombudsman must have high qualification of personal and moral integrity; and must be capable to analyze problems of law, administration, public policy, and human rights (G-2 to G-6). Furthermore, the normal term of office may be between four and six years with or without the possibility of reappointment for the second term (G-8). In addition, the Ombudsman must be vested with the power to investigate (G-20) and to give recommendation (G-44). Then the causes for the removal of the Ombudsman must be specified in the Act *inter alia*

³⁷ *Ibid.*

³⁸ Surachman, "Address to".

³⁹ Gottehrer, "Ombudsman Legislative".

because of permanent mental or physical inability to execute his functions or because of misbehave actions and omissions (G-12).

As Marten Oosting, the past President of International Ombudsman Institute (IOI) and former Dutch Ombudsman points out, the independence of ombudsman encompasses three elements, namely institutional, functional, and personal independence.⁴⁰

Firstly, *institutional independence* means the Ombudsman is not part of any public agency. Moreover, he holds a high level position in the government system. He may not therefore be controlled by any power of authority (G-1). Secondly, *functional independence* means the Ombudsman may not be dictated or pressured by any authority or influence. To prevent any intimidation or instruction restricting his performance, he must be empowered with wide jurisdiction and flexible procedure by an Act (G-20 and G-26). Besides, he must be sustained by sufficient budget to promote his professionalism and quality standard in executing his duties and functions (G-59). Thirdly, *personal independence* means he must be a person of high integrity. The selection for his position in the office must be based on best qualifications. His term of office must be explicitly described in the Act (G-2 to G-6). Likewise, his remuneration and facilities must be guaranteed and equal with those of government officials of very high echelon (G-9 and G-10).

VI. The Principles of Impartiality and Immunity⁴¹

Other pillars of ombudsmanship are the principles of impartiality and immunity. In conducting the investigations and in giving the recommendations, the Ombudsman must be impartial. Therefore, there are some positions that are incompatible for him. For example, he is not eligible to be a member of political party, a Member of Parliament, and a judge (G-7). Whenever there is the possibility of

⁴⁰ Marten Oosting, "Protecting The Integrity And Independence of The Ombudsman Institution: The Global Perspective," in *Conference Papers, VIIth International Ombudsman Institute Conference*, Durban, South Africa, 30 October 2000-2 November 2000, pp.21-22.

⁴¹ Gottehrer, "Ombudsman Legislative".

conflict of interest, he must refrain from any case if he has any interest on it (G-14). Therefore the Ombudsman may appoint one or two Deputy Ombudsmen who will handle such matters.⁴²

Equally important, G-48 states, “The Ombudsman and persons acting under the Ombudsman’s direction or authority are immune from civil and criminal proceedings for any act performed in good faith under this Act. Ombudsman reports and proceedings are privileged.” To this Gottehrer gives his comment: “These immunities protect the Ombudsman, staff and anyone else acting under the Ombudsman’s direction or authority from harassment when dealing with controversial issues or making a finding seen as favorable to an unpopular position and from any consequences in a libel or slander suit.”⁴³

Not less important as one of the shields for an Ombudsman, his deputy and staff is G-47 stating that the conclusions, findings, recommendations and reports of the Ombudsman, his deputy and staff may be reviewed by any court except whether the Ombudsman has jurisdiction over the target groups or over grievances lodged to him.⁴⁴

VII. The Future of the National Ombudsman of Indonesia⁴⁵

Measured by those international standards, or universal principles of ombudsmanship, the present Indonesian Ombudsman Commission is still embryonic or prototypic in nature. Even though the Commission has proved to be an independent and impartial institution so far, it lacks of essential power for exercising full investigation, such as power of subpoena, power of ingress, and other protections or shields for his actions. This weakness was surely seen and felt by the Drafter Team.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ Cf. Antonius Sujata and RM Surachman, “Preparing the Establishment of A Parliamentary Ombudsman: The Indonesian Experience”, paper submitted to the 6th Asian Ombudsman Association Conference, Tokyo, Japan 18-21 June 2001.

As a result, most of the Gottehrer-principles or International standards and practices of ombudsmanship were incorporated into the Draft of the Bill, namely:

The reasons of the establishment and the purpose of the National Ombudsman of Indonesia. This is *G-principle 1*. (See Chapter Two of the Draft of the Bill, Art. 2.)

- The qualifications to be Ombudsman, or *G-principle 6*. (See Chapter Seven, Arts. 31 and 34.)
- To be independent and impartial, the Ombudsman may not hold any incompatible positions, such as a member of political party, a Member of Parliament, a judicial officer or a particular public official. This is *G-principle 7*. (See Chapters Five, Seven and Eight, Art. 35 jo. Art 1 point 1; Art. 37 jo. Art. 3 and Art. 13 section (4); and Art 38. jo. Art. 2.)
- Term of office and the eligibility to be re-elected as seen under *G-principle 8*. (See Chapters Seven, Art. 31.)
- The removal of the Ombudsman based on the incapability, such as permanent physic as well as permanent mental illness and misconduct, or *G-principle 12*. (See Chapter Seven, Art. 36 jo. Art. 45.)
- The Ombudsman shall refrain from investigation or examination of cases in which he has an interest in it. The purpose of this *G-principle 14* is to avoid the conflict of interest. (See Chapter Eight, Art. 38.)
- The authorities of the Ombudsman, or *G-principle 20* must be detailed in the Acts. (See Chapter Three, Arts 5 to 8.)
- *Ex-officio*, or *sua sponte* investigation, or the authority to initiate the investigation without complaints. This is *G-principle 20*. (See Chapters Three and Five, Arts. 6f, 6b, 6g, 8 and 13 section (2).)
- Who may lodge grievances or reports is *G-principle 22*. (See Chapter Four, Art. 4.)
- The jurisdictions of the Ombudsman and the categories of public agencies and institutions should be described, or *G-principle 23*. (See Chapter Three, Art. 8.)

- The categories of grievance and reports. This is *G-principle 24*. (See Chapter Three, Arts. 6 point a, 7 point a, and 11.) Note also the statute of limitation, or *kadaluwarsa* in Indonesian legal term. (See Chapter Four, Art. 39 section (3) point e.)
- *The G-principle 25* dealing with the obligation of the Ombudsman to keep the grievance and report confidential. (See Chapter Five, Art. 14 section (3).)
- The procedure rules starting from the grievances or reports received through the investigation processed up to the cases disposed in the form of discoveries, conclusions, and recommendations. This is *G-principle 26*. (See Chapter Five, Art. 13 to Art. 26.)
- The access to any public or confidential records is *G-principle 34*. (See Chapters Five, Art. 19 (1).)
- The power to enter the public premises, or *G-principle 37*. (See Chapter Five, Art. 24.)
- The power “to summon, to subpoena, to compel production of any records and the presence of any person to give testimony under oath” in the process of investigation. This is *G-principle 38*. (See Chapter Five, Art. 20.)
- The authority to give recommendation on the amendment of law to any government institutions or legislature, described under *G-principle 45*. (See Chapter Three, Arts. 9 and 10.)
- *The G-principle 48* dealing with the immunity. Since the Commission currently won the case when it was sued in the District Court of South Jakarta, it is worth being quoted completely here: “The Ombudsman and persons acting under the Ombudsman’s direction or authority are immune from civil and criminal proceedings for any act performed in good faith under this act. Ombudsman reports and proceeding are privileged.” (See Chapter Eight, Art. 38 section (3).)

Unfortunately, there are some more Gottehrer-principles should be applied into the Draft of the Bill. For example, it does not accommodate the following principles:

- The numeration or salary received by the Ombudsman may not be diminished and it should be equal to that received by the highest government officials such as justices and cabinet ministers. This is *G-principle 10*.
- It is mandatory for the Ombudsman and the staff to take an oath or pledge before he assumes his office or they assume their positions. These principles are respectively *G-principle 11* and *G-principle 15*.
- The authority to delegate the power and responsibility of the Ombudsman to a staff, or *G-principle 16*.
- There will be no cost or charge for anyone who lodges the grievance or report. This is *G-principle 27*.
- It is an offence to interfere with works of the Ombudsman, or *G-principle 50*.
- Anyone who complaints or reports should be protected from retaliation, or *G-principle 53*.
- *The G-principle 59*, or the last principle, dealing with the guarantee that the Office of Ombudsman shall have sufficient budget and funds.

The Commission will in due time try to insert those provisions into the final Draft of the Bill that is now being prepared by the Parliamentary Commission on Legislation (hereinafter referred to as “the Parliamentary Commission”).

Closing Remarks⁴⁶

Meanwhile, the Draft of the Bill on the National Ombudsman of Indonesia has been prepared by a small Team consisting of *Professor Sunaryati Hartono* (Deputy Chief Ombudsman), Mr. RM Surachman, *APU Research Professor eqv* (Ombudsman), Mr. Bennemay (Assistant Ombudsman), and Mr. Winarso (Assistant Ombudsman). After being socialized through some seminars in Jakarta and several provinces, the Draft was submitted to the Department of Justice and Human Rights on 8 May 2001 with some copies submitted to the Indonesian *DPR* (Parliament) and to the President of the Republic.

As previously pointed out, the drafting of the Bill is one of the mandates of the Presidential Decree on the Commission. The accomplishment has been possible by the sponsorship of the Asia Foundation in Jakarta, which allocated some funds as part of the second year budget granted to the Commission. After the Draft is reviewed by the Department of Justice and Human Rights, it will be submitted to the Parliament as a Bill.

The Parliamentary Commission, however, invited the Ombudsman Commission for the hearing about the Draft on 13 July 2001. On that day the Ombudsman Commission gave the clarifications on the background, general principles, objective, structure, functions and jurisdictions of the future National Ombudsman based on the Draft. In that hearing the Chairman of the Parliamentary Commission informed the Ombudsman Commission that the Parliamentary Commission is considering to transform the Draft into a Bill and then to submit it to the Plenary Meeting of the Parliament as the Bill proposed by its own motion, not proposed by the Government (Department of Justice). However, before reaching that stage, the Draft will be reviewed for some amendments based on the new inputs submitted by the public and by the Ombudsman Commission as well.

One should notice, that the existence of the Ombudsman Commission is to create an independent institution, to which nobody may intervene or influence.

⁴⁶ Quoted almost verbatim from “The 2001 Interim Report of the National Ombudsman Commission”.

Nevertheless, the Ombudsman Commission must submit its incidental reports as well as annual reports to the President of the Republic, since it was established by a Presidential Decree and its Ombudsmen (Commissioners) were appointed and inaugurated by the President too. It does not mean, the Ombudsman Commission may be intervened or instructed by the Executive, since its main function is just to oversee the Government Bureaucracies, Public Institutions, and Public Administration.

As soon as the Bill is enacted, the National Ombudsman will not be a Commission anymore. Moreover, the Chief Ombudsman will be elected by the Parliament and inaugurated by the Head of State. From that time, Annual Reports will be submitted to the Parliament, not to the President. Hence, the Ombudsman Commission will become a Parliamentary Ombudsman. Still, it will hold an independent and impartial status, with nobody (not even the Parliament) may intervene or influence it. In addition, the National Ombudsman will have wider jurisdictions and authorities.

Realizing the significant meaning of the Role of the Ombudsman Commission in the present situations of Indonesia, all Commissioners (Ombudsmen) will continue to execute their mandates with sincere and to the best of their efforts. They are even ready to work *pro bono publico* for the interest of those who feel that they have been the victims of *maladministration* and the victims of injustice as well.

In the meantime, several names will be submitted soon to the President of the Republic, Ms. Megawati Soekarnoputri, to be appointed Commissioners (Ombudsmen). Pursuant to the Presidential Decree Number 44 Year 2000 the Ombudsman Commission should consist of nine persons. To date, there are only five Commissioners after the resignation of three Commissioners as mentioned earlier.

With its limited authorities and jurisdiction, the Ombudsman Commission continues to execute its functions by preserving its independence and impartiality in motivating the target groups to comply with the recommendations for the interest of pursuing good governance and fair judiciary in Indonesia.

JUDICIAL SUPERVISION IN CHINA

by

Masayuki Kobayashi*

Introduction

In China the number of litigations has been increasing constantly since the “Reform and Opening” policies in 1978 (Table 1). Some of the factors for this rapid increase are: (1) reform towards a market economy, (2) reform of the state and administrative structures, (3) rapid growth of private enterprises, (4) rural reform and shift of the population to the cities¹. The types of litigation have also changed with the increase. The rate of criminal cases has decreased while civil and economic cases rose, and the content of civil cases also changed from marital and family issues to other types of economic disputes. Although there are questions concerning court practices, the social status of China’s courts has improved in these 20 years since the “Reform and Opening” policies².

Although the second instance is final in the Chinese court system, there exists a practice different from the West. That is, after the first and the second instance, there still remain a large number of “retrial” cases as if there were a third instances³ (Table 2). Nearly more than 20 percent of second instance cases are brought to retrial. It can be said in China, the “retrial” or review system is not an exceptional remedy measure, but only one of the typical steps in civil litigation procedures.

I. Judicial Supervision Procedure

Judicial supervision procedure is provided in Chapter 16 of the Civil Procedure

* Researcher, Institute of Developing Economies (IDE), Japan

¹ Institute of Law - CASS (2001), p.2.

² Wang (2000), pp.31-32.

³ Suzuki (1998), p.373.

Law. There are three routes for retrial. That is, (1) retrial by the court itself under the judicial supervision procedure, (2) retrial upon the application of the party concerned, and (3) retrial initiated by protest of the prosecutors' office under the judicial supervision procedure.

1 Retrial by the court

1) Proposal of retrial

The court has the authority to initiate a retrial under the judicial supervision procedure against any legally effective judgments. No complaint from the party concerned is needed. If the president of a court at any level finds a definite error in a legally effective judgment or written order of his court and deems it is necessary to have a case retried, he shall refer to the judicial committee which is the supreme decision-making body of the court for decisions (Art.177). The higher-level court also has the authority to propose a retrial. The Supreme Court and higher-level courts have the authority to bring the case up for retrial by themselves or direct a court at a lower level to conduct a retrial.

2) Conditions for retrial

The Civil Procedure Law only rules that a court shall bring the case up for retrial if the court "finds a definite error" in a legally effective judgment. Also, the standard for determining whether the higher court itself or the lower level court should conduct the retrial is not clear, but it is said that in the next few cases the higher court itself should conduct the retrial⁴. That is, (1) when the recognition of the fact of the original judgment is correct but the application of the law is wrong, (2) when there is an opposing opinion on the judgment in the lower court, (3) when there is strong interference from outside, and (4) when there are other special reasons that make it difficult for lower courts to conduct a retrial. If there is an error in the recognition of the fact, the retrial should be conducted at the lower courts.

It should be noted that in most cases, retrials proposed by the court itself typically originate in the complaints made by the party concerned. But still, there are

⁴ *Ibid.*, pp.375-376.

cases in which retrials originate from other sources, such as from the Prosecutors' Office, People's Congress and the Communist Party.

3) Limitations

There is no time limitation for the proposal of a retrial by the Court itself. If the court finds any errors in a judgment it can initiate a retrial at any time.

2. Retrial by the party concerned

1) Proposal of retrial

The parties concerned can apply for retrial to the court of original judgment or to a court at the next higher level if they consider that there is an error in the legally effective judgment (Art.178). The court must examine the application and notify the results to the applicant, and if the application meets the requirement, the court must decide to open a retrial (Art.179).

2) Conditions for retrial

The Court must begin a retrial if the application meets any of the following conditions (Art.179). That is, (1) there is sufficient new evidence to overturn the original judgment, (2) the main evidence on which the facts were ascertained in the original judgment was insufficient, (3) there was a definite error in the application of the law in the original judgment, (4) there was a violation by the court in the legal procedure which may have affected the appropriateness of the judgment in the case, and (5) the judicial officers have been found to have committed embezzlement, accepted bribes, committed malpractices for personal benefits and perverted the law in the adjudication of the case. In (5), there is no need for the conclusion of the judgment to be affected, only the mere fact is needed.

3) Scope of retrial

The scope of a retrial includes not only the legally effective judgments and written orders, but also legally effective conciliation statements. The parties concerned can apply for a retrial if there is evidence that the conciliation violates the principle of voluntary action or that the content of the conciliation agreement violates

the law (Art.180). In China more than half of all civil litigations are settled by conciliation, however many conciliation take place against the parties' will. One exception to the scope of a retrial is a judgment on the dissolution of a marriage, for which neither of the two parties can apply (Art.181).

4) Limitations

Application for a retrial must be submitted within two years after the judgment (Art.182). But since a retrial by the Courts or the Prosecutors' Office does not have any time limitations, the parties still have ways to make their claims through ordinary appeal procedures, even after two years.

3. Retrial by the Prosecutors' Office

1) Proposal of retrial

The Prosecutors' Office in China is not only an organization that prosecutes criminal cases, but it is also the organization responsible for legal supervision to maintain the unification of socialist legality⁵. The scope of its activities includes civil litigations in the court system, as provided in the Civil Procedure Law.

If the Supreme Prosecutors' Office or other higher level Prosecutor's Office finds any reason to protest a legally effective judgment made by a lower court, they can lodge a protest against the judgment under the judicial supervision procedure (Art.185). Local level Prosecutors' Offices can also request a higher-level Prosecutors' Office to protest a judgment made by the corresponding local level court. In the case of a protest by the Prosecutors' Office, the court must open a retrial (Art.186)

2) Conditions for protest

If the Prosecutors' Office finds any of the following circumstances it shall lodge a protest in accordance with the procedure for judicial supervision (Art.185). That is, (1) the main evidence on which the facts were ascertained in the original

⁵ *Ibid.*, p.381.

judgment was insufficient, (2) there was a definite error in the application of the law in the original judgment, (3) there was a violation by the court in the legal procedure which may have affected the appropriateness of the judgment in the case, and (4) the judicial officers have been found to have committed embezzlement, accepted bribes, committed malpractices for personal benefits and perverted the law in the adjudication of the case. Of these circumstances, it is said that the emphasis is on number (4), because the increasing number of prosecutions of corrupted judges is so serious that it might endanger the legitimacy of the court system⁶ (Table 3).

The sources of protested cases are, (1) claims from the parties concerned, (2) prosecution or claims from citizens, enterprises and other organizations, (3) direction by the Peoples' Congress or higher level Prosecutors' Office and cases transferred from other government organizations, and (4) cases discovered by the Prosecutors' Office itself⁷. Of these sources the majority of cases come from claims brought by the concerned party itself⁸. Regarding a protest against a civil litigation, it is said that the Prosecutors' Office will not initiate a protest unless there is a claim from the parties concerned⁹.

3) Procedure for protest

When examining whether or not it should protest according to the judicial supervision procedure, a Prosecutors' Office can obtain materials from the court, seek and collect evidence, and interview both parties concerned. The Prosecutors' Office has enacted a regulation especially for claims from the parties concerned, and this is quite similar to a court procedure.

II. Significance of Judicial Supervision System

While it is true that the number of retrial cases is so huge that it is difficult to

⁶ *Ibid.*, p.389.

⁷ Supreme Peoples' Prosecutors' Office "Provisional Regulation on Civil Judicial Supervision Procedure Protest Activities", 1992, Article 2.

⁸ Fu (2001), p.182.

⁹ Suzuki (1998), p.385.

just recognize a retrial as an exceptional remedy measure, taking the actual situation in China into account, the significance of this system cannot be denied. Especially in cases of wrongful application of the law or intentional misinterpretations, overturned misjudgments will serve to maintain the dignity and stability of the law, protect and relieve the legal rights and interests of the parties concerned.

Some of the reasons why misjudgments occur are, (1) corruption of judicial officers, (2) neglect of the law and procedure, (3) pressure from local leaders which is rooted in local protectionism¹⁰, and (4) lack of legal knowledge by the judges. It should be noted that most misjudgments are not due to negligence, but are intentional. Thus, if a court rejected a retrial just for the reason of following required procedures, it is obvious that the trust in the court system would collapse.¹¹

III. Problems of Judicial Supervision System

1. Conclusive judgment

In China, there is no notion of *res judicata*. A judgment only becomes legally effective. A legally effective judgment is enforceable, but since it is not conclusive the judgment always has the possibility of being changed. The judicial supervision system is designed to change a judgment at anytime. In fact, more than 20 percent of all retrial judgments overturn the original judgment, so it can be said that the validity of any judgment is unstable¹² (Table 4). Original judgments that have been already enforced could be retried and overturned. Even after a retrial, there is still the possibility of another retrial.

2. Disposition of rights

Both in the event of a retrial initiated by the court itself and a retrial initiated by the protest of a Prosecutors' Office, the retrial could be initiated even when the

¹⁰ Local protectionism occurs because the personnel and budget of the court is totally under the control of local government.

¹¹ *Ibid.*, p.398.

¹² "Revised" means overturning the original judgment and "conciliation" means making a new conciliation agreement that replaces the original judgment, so the total of these two are the cases in which the original judgment has been overturned.

concerned parties do not have any intention to argue against the original judgment. The parties concerned must participate in the retrial and are also responsible for the result of the retrial.

IV. Concluding Remarks

In Western countries the legitimacy of civil litigation is generally founded in the concept of “due process”, but in China it is founded in finding the truth and convincing both parties¹³. It is even thought inappropriate just to conclude a case by finishing all the procedures and leaving the judgment substantially wrong. In this sense civil procedure law is seen as normal only if it provides measures to ensure substantial justice to be served, rather than maintaining the stability of the law.

As China is moving toward establishing a socialist market economy and becoming more engaged in the global economy, there are more opinions that emphasize a “due process” approach. Although there is almost nothing relevant in the Judicial Reform taking place now in China, it is obvious judicial supervision will be a major issue in the near future.

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¹³ *Ibid.*, pp.398-400.

Table 1 Figure of Accepted First Instance Cases

	Total	Criminal	Civil	Economic Dispute	Administrative
1980	767,410	197,856 (25.8%)	565,679 (73.7%)	3,875 (0.5%)	---
1988	2,290,624	313,306 (13.7%)	1,455,130 (63.5%)	508,965 (22.2%)	8,573 (0.4%)
1989	2,913,515	392,564 (13.5%)	1,815,385 (62.3%)	690,765 (23.7%)	9,934 (0.4%)
1990	2,916,774	459,656 (15.8%)	1,851,897 (63.5%)	588,143 (20.2%)	13,006 (0.5%)
1991	2,901,685	427,840 (14.7%)	1,880,635 (64.8%)	563,260 (19.4%)	25,667 (0.9%)
1992	3,051,157	422,991 (13.9%)	1,948,786 (63.9%)	650,601 (21.3%)	27,125 (0.9%)
1993	3,414,845	403,267 (11.8%)	2,089,257 (61.2%)	894,410 (26.2%)	27,911 (0.8%)
1994	3,955,475	482,927 (12.2%)	2,383,764 (60.3%)	1,053,701 (26.6%)	35,083 (0.9%)
1995	4,545,676	495,741 (10.9%)	2,718,533 (59.8%)	1,278,806 (28.1%)	52,596 (1.2%)
1996	5,312,580	618,826 (11.7%)	3,093,995 (58.2%)	1,519,793 (28.6%)	79,966 (1.5%)
1997	5,288,379	436,894 (8.3%)	3,277,572 (62.0%)	1,483,356 (28.1%)	90,557 (1.7%)
1998	5,410,798	482,164 (8.9%)	3,375,069 (62.4%)	1,455,215 (26.9%)	98,350 (1.8%)
1999	5,692,434	540,008 (9.5%)	3,519,244 (61.8%)	1,535,613 (27.0%)	97,569 (1.7%)

Source: *Law Yearbook of China*.

Note: The total of 1988 - 1992 includes traffic cases.

Table 2 Figure of Accepted Cases by Instance

	Type	First Instance	Second Instance	Retrial	2nd / 1st	Retrial / 2nd
1989	Civil	1,818,385	112,500	22,282	6.2%	19.6%
	Economic	690,765	28,959	3,431	4.2%	11.8%
1990	Civil	1,851,897	116,362	24,694	6.3%	21.2%
	Economic	588,143	35,103	5,475	6.0%	15.6%
1991	Civil	1,880,635	127,113	29,919	6.8%	23.5%
	Economic	563,260	39,336	7,584	7.0%	19.2%
1992	Civil	1,948,786	125,096	32,288	6.4%	25.8%
	Economic	650,601	42,931	10,144	6.6%	23.6%
1993	Civil	2,089,257	114,997	29,417	5.5%	25.6%
	Economic	894,410	46,038	9,345	5.2%	20.3%
1994	Civil	2,383,764	122,099	30,050	5.1%	24.6%
	Economic	1,053,701	58,170	9,786	5.5%	16.8%
1995	Civil	2,718,533	139,298	34,683	5.1%	24.9%
	Economic	1,278,806	70,224	13,701	5.5%	19.5%
1996	Civil	3,093,995	159,846	37,604	5.2%	23.5%
	Economic	1,519,793	84,657	17,336	5.6%	20.5%
1997	Civil	3,277,572	182,766	44,745	5.6%	24.5%
	Economic	1,483,356	87,376	20,697	5.9%	23.7%
1998	Civil	3,375,069	207,186	48,694	6.1%	23.5%
	Economic	1,455,215	88,495	25,047	6.1%	28.3%
1999	Civil	3,519,244	246,241	57,430	7.0%	23.3%
	Economic	1,535,613	95,165	26,485	6.2%	27.8%

Source: *Law Yearbook of China*.

Note: Although retrial cases are mostly raised against second instance judgments, it includes both.

Table 3 Protested Cases and Penalized Judicial Personnel

	Protested Cases	Penalized Judicial Personnel
1998	11,652	2,512
1999	14,069	1,450
2000	15,770	1,338

Source: *Law Yearbook of China*.

Table 4 Figure of Decisions in Retrial Cases

	Type	Retrial Cases	Maintained (%)	Revised (%)	Withdraw (%)	Rejected (%)	Conciliation (%)
1989	Civil	20,658	12,362 (59.8)	3,321 (16.1)	1,452 (7.0)	--	--
	Economic	3,066	1,673 (54.6)	523 (17.1)	201 (6.6)	--	--
1990	Civil	23,582	14,689 (62.3)	3,626 (15.4)	1,740 (7.4)	--	--
	Economic	4,838	2,728 (56.3)	851 (17.6)	323 (6.7)	--	--
1991	Civil	29,286	18,330 (62.6)	4,331 (14.8)	2,473 (8.4)	--	--
	Economic	6,728	3,963 (58.5)	1,161 (17.3)	508 (7.5)	--	--
1992	Civil	31,980	14,529 (45.4)	4,451 (13.9)	2,617 (8.2)	3,912 (12.2)	1,528 (4.8)
	Economic	9,286	3,805 (58.5)	1,505 (16.2)	561 (6.0)	1,327 (14.3)	445 (4.8)
1993	Civil	30,639	11,340 (37.0)	4,415 (14.4)	2,745 (9.0)	4,727 (15.4)	1,887 (6.2)
	Economic	9,848	3,155 (32.0)	1,555 (15.8)	837 (8.5)	1,928 (19.6)	502 (5.1)
1994	Civil	30,783	11,639 (37.8)	4,646 (15.1)	2,275 (7.4)	5,206 (16.9)	1,613 (5.2)
	Economic	9,893	3,197 (32.3)	1,755 (17.7)	798 (8.1)	1,705 (17.2)	520 (5.3)
1995	Civil	34,475	11,733 (33.6)	5,074 (14.5)	2,712 (7.8)	5,528 (15.8)	2,853 (8.2)
	Economic	12,815	3,836 (29.9)	2,344 (18.3)	907 (7.1)	2,189 (17.1)	663 (5.2)
1996	Civil	37,274	12,491 (33.5)	6,105 (16.4)	2,700 (7.2)	6,834 (18.3)	2,087 (5.6)
	Economic	16,609	4,526 (27.3)	3,102 (18.7)	1,248 (7.5)	3,029 (18.2)	755 (4.5)
1997	Civil	43,347	13,072 (30.2)	7,579 (17.5)	2,762 (6.4)	8,361 (19.3)	2,244 (5.2)
	Economic	19,368	4,866 (25.1)	3,835 (19.8)	1,218 (6.3)	3,408 (17.6)	822 (4.2)
1998	Civil	48,152	10,984 (22.8)	10,343 (21.5)	2,544 (5.3)	10,087 (20.9)	--
	Economic	25,342	5,508 (21.7)	5,989 (23.6)	1,294 (5.1)	4,102 (16.2)	--
1999	Civil	56,103	12,200 (21.7)	12,450 (22.2)	2,957 (5.3)	11,386 (20.3)	--
	Economic	25,846	5,391 (20.9)	6,448 (24.9)	1,290 (5.0)	4,388 (17.0)	--

Source: *Law Yearbook of China*.

Discussion in Session IV

There were two main subjects in the discussion of session IV, one was the discussion on “rule of law” and the other was on “*res judicata*”.

Various comments were made to Mr. Sakumotos’ presentation, which lead to the discussion of “rule of law” vs. “rule by law”. One of the participants stated that the meanings of these terms are changing. Historically there were several stages of development of the term “rule of law”, which in the begging meant taking the political power from the king, which now has the connotation of citizen participation in law making process.

The other subject was about the notion of “*res judicata*”, particularly in China. In China although they have a hierarchy of court, which the Supreme Court stands on the highest level, the judgment of the Supreme Court can still be challenged for retrial. In Western notion the Supreme Court judgment should be final, but in China the Supreme Prosecutor’s Office can claim a protest against their judgments, which means a compulsory retrial. This is not a mere theory, but occurs in real life. Dr. Liu Junhai gave an example of a Hong Kong party who urged a representative from Hong Kong to the National People’s Congress to persuade the Supreme Prosecutor’s Office to protest against the Supreme Court judgment.

Although other counties shared the problem of endlessness of litigation, several participants expressed negative opinions against the judicial system in China. One argument was that the retrial system would be totally unacceptable for foreign parties, especially for business entities, because the transaction will never be stable. Another argument was that parties who go to Court often want resolution with finality of judgment and there must be an end to all litigation, and so the mere possibility for retrial without any time limitation is contradictory to legal stability.

Dr. Liu responded and claimed that the philosophy of retrial system is rather contrary. Its’ philosophy is to make the rule of law more predictable and stable, and wants to make people trust the rule of law. If there is any problems found concerning the application of law it must be corrected. It is not only an issue of procedure, but also an issue of substantial law. If the Court made a misjudgment, there should be a way for remedy, and the retrial system is one of the mechanisms to do so. Since it is not so rare for Courts in China to make misjudgment, this system for retrial is needed to insure the legality of the judicial system.

CLOSING REMARKS

by

Prof. Dr. Surapon Nitikraipot
Dean of the Faculty of Law, Thammasat University

Distinguished Scholars, Ladies and Gentlemen,

It is my great pleasure to attend the final session of the Round-Table Meeting on Law Development and Socio-Economic Change in Asia (II) and also to give closing remarks for this meaningful Meeting.

I am very delighted that IDE-JETRO has co-operated with the Faculty of Law, Thammasat University and the Central Intellectual Property and International Trade Court in organising the Round-table Meeting on this occasion. Indeed, the topics of discussion selected for all the 4 sessions are of great interest and gaining momentum in Asian countries during the present decade.

With regard to the topic “*Dispute Resolution in Asia: Theory and Reality*”, all countries including Asian nations have had profound concerns for Alternative Dispute Resolution (or known as “ADR”). In effect, we have witnessed much enactment of special legislation in this sphere. This Round-Table Meeting has proved to be a very intriguing forum for exploring the effectiveness of ADR mechanisms in place in Thailand as well as in other Asian corners. It is very fortunate that this year we had distinguished speakers from extensive jurisdictions, namely, from the Philippines, Japan, India, China and Malaysia, whose views and ideas on ADR in their countries threw much light on the meaningful ways in which ADR can be developed and ameliorated. I am very pleased that discussions on dispute resolution yesterday were actually extended to ADR in such particular areas as labour and environment as well. In fact, dispute settlement with regard to environmental issues seems to be rather new for some Asian jurisdictions. I, therefore, trust that rich experience vividly brought out yesterday would be of significant value to all participants.

Now, with respect to the session involving “*Political and Administrative Reform in Asia*” and the session surrounding the “*Rule of Law in Asia*”, I believe that every participant finds them very much intriguing, too. Speaking of political and administrative reform, it has, in the Thai context, received tremendous attention following the New Constitution. Indeed, this morning, our speaker from Thailand has rightfully reflected some thoughts and remarks about local government reform under the present Constitution. However, it must be realised that political and administrative reform in Thailand is enshrined in many parts of the new Constitution of Thailand, including, of course, the establishment of Administrative Courts. From other speakers, we have learned a great deal about “people power” and transparency. I am confident that all this will be a very worthwhile contribution to Asian development.

Now, some remarks on “*The Rule of Law*”. I am sure that this concept has been very familiar to lawyers everywhere and, at all times, constitutes a benchmark of governance. We are today very much benefited by very valuable remarks as reflected from the experience of Indonesia and China.

The discussions of all the selected topics have now come to an end. I hope that the experience and ideas we have shared and learned together from this Round-Table Meeting will not just be short-lived but will last long and be put into practical use for the benefit of our Asian countries.

Finally, I am very pleased that this forum has brought together many distinguished speakers from several Asian jurisdictions. I hope that the friendship we have created will be very long-lasting and that we will in the future enter into other meaningful forms of co-operation. I should also take this opportunity to extend my most sincere thanks to IDE-JETRO for making this form possible and I trust that we will receive this type of kindness again on next occasions.

Thank you.

CLOSING REMARKS

by

Naoyuki Sakumoto
Senior Research Fellow
Institute of Developing Economies

Distinguished guests, ladies and gentleman.

Thank you very much indeed all the participants for presenting elaborate papers while exchanging interesting opinions and comments. I also would like to express my sincere thanks to the Central Intellectual Property and International Trade Court in Thailand as well as to the Faculty of Law, Thammasat University, who have kindly supported this meeting. During this two-day Round Table Meeting in Bangkok followed by the last year's Round Table Meeting in Manila, we have had a very extensive discussion meeting full of two days focusing on two subjects; Dispute Resolution Process in Asia and the Development of Political Law, respectively, on Asia.

In this meeting, we could see that the number of disputes is increasing in such areas as commercial, environmental, labor, consumer related areas, and the need to resolve disputes is a matter of grave importance. ADR is increasing its role and widely used in Asia as a means to complement the at-court-resolution system. However, the types of ADR are varied as the disputes are closely related with the rapidly changing socio-economic conditions of each country. Further, we have tried to look into concrete dispute cases and have studied how ADR works.

As for the second subject on the development of political law in Asia, a new role of law was witnessed that are quite different from the one under dictatorial political order period. Among some Asian countries where democratization movements are apparent, not only judicial reforms but also political reforms are pushed forward in order to realize a democratic and accountable government.

Anyway, we are very much satisfied with our two days extensive meeting full of

presentations and active exchange of opinions. We came across in this Meeting here many fact-findings and discoveries. Even though this kind of lawyers' meeting among Asian countries is not common as Professor Pangalangan from the University of the Philippines mentioned in his speech, we have found out that we need to learn more to each other from neighbors in this Asian region.

I would like to extend my heartfelt thanks to each participant for joining in this RTM all the way from your country and those who have kindly supported this meeting from behind. With your kind participation and support, we can happily and successfully close this meeting. Professor Uck from Vietnamese Law and State Institute had to cancel his trip because of his sudden business related to constitutional amendment in Vietnam. I also would like to thank him for presenting his paper.

Finally, we would like to promise our future contact and academic cooperation. I hope for your good health and a safe and sound journey on your return trip. Thank you very much again and we very much look forward to seeing you again in the near future.

**Roundtable Meeting on
Law, Development and Socio-Economic Change in Asia (II)
19-20 November 2001
Bangkok, Thailand**

**Organized by
Institute of Developing Economies (IDE-JETRO), Japan
Central Intellectual Property and International Trade Court, Thailand
Faculty of Law, Thammasat University, Thailand**

PROGRAM

8:30-9:00 **Registration**
9:00-9:20 **OPENING SPPECHES**
 Mr. Toshiaki Hayashi
 (Executive Vice President, IDE-JETRO)
 Justice Prasobsook Boondech
 (Supreme Court, Thailand)

Day 1: Dispute Resolution Process in Asia

9:20-12:00 **SESSION 1: Dispute Resolution Process in Asia: Theory and Reality**
Moderator: Dr. Raul C. Pangalangan
 (Dean, College of Law, University of the Philippines)

9:20-9:40 *“Globalism and Localism in Dispute Resolution”*
 Dr. Yoshitaka Wada
 (Professor, Graduate School of Law, Kyushu University, Japan)

9:40-10:00 *“Alternative Dispute Resolution System in India : Problems and Prospects”*
 Prof. Surinder Kaur Verma
 (Director, Indian Law Institute, India)

10:00-10:20 *“Alternative Dispute Resolution in Thailand”*
 Judge Vichai Ariyanuntaka
 (Central Intellectual Property and International Trade Court, Thailand)

10:20-10:35 **Coffee Break**

10:35-10:55 *“Overview of the Dispute Resolution Mechanism in China”*
 Dr. Liu Junhai
 (Deputy Director, Department of Business & Economic Law, Institute of
 Law, Chinese Academy of Social Science, China)

10:55-11:15 *“A Perspective on Comparative Study of Dispute Settlement Institutions and
Socioeconomic Development”*
 Ms. Miwa Yamada
 (IDE-JETRO)

11:15-12:00 **Discussions**

12:00-13:30 **Lunch**

13:30- 16:10 **SESSION 2: Dispute Resolution Process in Asia: Theory and Reality (II)**
Moderator: Judge Vichai Ariyanuntaka
 (Central Intellectual Property and International Trade Court, Thailand)

13:30-13:50 *“Labor Dispute Settlement in the Philippines”*
 Prof. Domingo P. Disini
 (Professor, College of Law, University of the Philippines)

13:50-14:10 *“The Malaysian Experience with ADR, with particular reference to the resolution
of Labour Disputes”*
 Dr. Sharifah Suhana Ahmad
 (Associate Professor, Faculty of Law, University of Malaya, Malaysia)

14:10-14:30 *“Environmental Dispute Settlement in Japan”*
 Ms. Izumi Chibana
 (IDE-JETRO)

14:30-14:50	<i>“The Japanese Model of Dispute Processing”</i> Dr. Yasunobu Sato (Professor, Graduate School of International Development, Nagoya University, Japan)
14:50-15:05	Coffee Break
15:05-16:10	Discussions
17:00-18:30	Reception

Day 2: Law and Political Development in Asia

9:30-12:00	SESSION 3: The Political and Administrative Reform in Asia Moderator: Mr. Naoyuki Sakumoto (Senior Research Fellow, IDE-JETRO)
9:30-9:50	<i>“Law and Political Reform in East Asia”</i> Mr. Shinya Imaizumi (IDE-JETRO)
9:50-10:10	<i>“Anointing Power with Piety: ‘People Power’, Democracy and the Rule of Law”</i> Dr. Raul C. Pangalangan (Dean, College of Law, University of the Philippines)
10:10-10:25	Coffee Break
10:25-10:45	<i>“Local Government Reform in Thailand under the New Constitution”</i> Mr. Somtob La-ongsakul (Member of the Sub-committee on Supervision of Government Policy Implementation, Region 12, Thailand)
10:45-11:05	<i>“The Constitutional Review Concerning the Protection and the Regulation of Freedom of Business in Japan”</i> Ms. Noriko Ofuji (Associate Professor, Faculty of Economics and Political Science, Seigakuin University, Japan)
11:05-12:00	Discussions
12:00-13:30	Lunch
13:30-16:00	SESSION 4: Ensuring the Rule of Law in Asia Moderator: Dr. Pinai Na Nakorn (Faculty of Law, Thammasat University, Thailand)
13:30-13:50	<i>“The Rule of Law in Indonesia”</i> Mr. Naoyuki Sakumoto (Senior Research Fellow, IDE-JETRO)
13:50-14:10	<i>“National Ombudsman Commission of Indonesia: Comparative Aspects”</i> Prof. RM Surachman (APU Research Professor, eqv., Deputy Ombudsman, National Ombudsman Commission, Indonesia)
14:10-14:30	<i>“Judicial Supervision in China”</i> Mr. Masayuki Kobayashi (IDE-JETRO)
14:30-14:45	Coffee Break
14:45-16:00	Discussion
16:00-16:20	CLOSING REMARKS Prof. Dr. Surapon Nitikraipot (Dean, Faculty of Law, Thammasat University) Mr. Naoyuki Sakumoto (IDE-JETRO)

LIST OF CONTRIBUTORS

- Mr. Toshiaki Hayashi**
(Executive Vice President, IDE-JETRO)
- Justice Prasobsook Boondech**
(Supreme Court, Thailand)
- Prof. Dr. Surapon Nitikraipot**
(Dean, Faculty of Law, Thammasat University)
- Dr. Yoshitaka Wada**
(Professor, Graduate School of Law, Kyushu University, Japan)
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(Director, Indian Law Institute, India)
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(Central Intellectual Property and International Trade Court, Thailand)
- Dr. Liu Junhai**
(Deputy Director, Department of Business & Economic Law,
Institute of Law, Chinese Academy of Social Science, China)
- Ms. Miwa Yamada**
(IDE-JETRO)
- Prof. Domingo P. Disini**
(Professor, College of Law, University of the Philippines)
- Dr. Sharifah Suhana Ahmad**
(Associate Professor, Faculty of Law, University of Malaya, Malaysia)
- Ms. Izumi Chibana**
(IDE-JETRO)
- Dr. Yasunobu Sato**
(Professor, Graduate School of International Development,
Nagoya University, Japan)
- Dr. Dao Tri Uc**
(Director of the Institute of State and Law,
National Centre for Social Sciences and Humanities, Vietnam)
- Mr. Shinya Imaizumi**
(IDE-JETRO)
- Dr. Raul C. Pangalangan**
(Dean, College of Law, University of the Philippines)
- Mr. Somtob La-ongsakul**
(Member of the Sub-committee on Supervision of Government Policy
Implementation, Region 12, Thailand)

Mr. Sura Pattanapratchaya
(Researcher of the Thailand Environment Institute)

Ms. Noriko Ofuji
(Associate Professor, Faculty of Economics and Political Science,
Seigakuin University, Japan)

Dr. Pinai Na Nakorn
(Faculty of Law, Thammasat University, Thailand)

Mr. Naoyuki Sakumoto
(Senior Research Fellow, IDE-JETRO)

Prof. RM Surachman
(APU Research Professor, eqv., Deputy Ombudsman,
National Ombudsman Commission, Indonesia)

Mr. Masayuki Kobayashi
(IDE-JETRO)

Ms. Tomoko Mimura
(IDE-JETRO)

Judge Jagkrit Jenjesda
(Central Intellectual Property and International Trade Court, Thailand)

Ms. Sujin Janepanitpong
(Central Intellectual Property and International Trade Court, Thailand)

Mr. Damrongrit Pankaew
(Central Intellectual Property and International Trade Court, Thailand)

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3-2-2 Wakaba, Mihama-ku, Chiba-shi
Chiba 261-8545, JAPAN
FAX +81-(0)43-2999731
Web Site: <http://www.ide.go.jp>
e-mail: laws@ide.go.jp