## ６.２.１６　世界銀行会議（世界銀行・ロシア政府共催）記録

報告者：名古屋大学　松浦　好治

はじめに

１．以下は、２００１年７月８日（日）から１２日（木）までロシアのサンクト・ペテルスブルクで開催された会議の傍聴記録である。

２．会議は、英語、ロシア語、フランス語、中国語、スペイン語、クラアチア語の同時通訳が提供された。この記録の作成者(松浦好治)は、英語で傍聴し、英語以外の報告や発言が行われた場合には、英語の同時通訳で報告・発言内容を聞き取った。同時通訳は、通訳者の質にかなりの差があり、しばしば、込み入った内容の部分は、通訳されなかったり、通訳交代時の前後の通訳が欠けていた。したがって、ロシア語で報告・発言が行われた場合は、同じ会議に参加された名古屋大学の市橋克哉教授のロシア語からのメモで補足必要がある。この記録の作成にあたっては、原稿を市橋教授に送付し、必要な修正をしていただいた。また，７月１１日（水）の午後に開催された分科会 Legal and Judicial Reform: Europe and Central Asia Regional Forum の記録は、市橋教授の作成されたものである。

３．１２日（木）の会議は、名古屋大学側の帰国便の都合で出席できなかったので、傍聴記録はない。（１２日は、午前と午後に複数の分科会が平行して開催され、途中で全体会議が行われるという計画になっている。午前の平行会議のテーマは、Access to Justice（司法へのアクセス）、Judicial Independence and Accountability（司法の独立と責任）である。途中の全体会議のテーマは、European Standard（全体会議、ヨーロッパの標準）である。午後の分科会のテーマは、Legal Education（法学教育）、Public Awareness（人々の意識）である。

４．各会議では、複数の報告者が司会が用意した質問項目に簡単に回答し、司会がある程度の方向づけを行った上で、参加者との質疑応答を行うという形式が採用されていた。用意された質問（論点）が適切である場合もあったが、質問自体の適切性について疑問を感じる場合も少なくなかった。

もちろん、各会議についての背景的な資料は、分厚い印刷資料として配布されているので、これらの資料を参照しながら、報告を肉付けして理解する必要がある。また、学会とは異なり、世界銀行の会議の性質上、報告と討論だけで十分な検討にはならないことは、参加者の多くが認識していたことであろう。また、会議の前後に関係者の間で積極的な意見交換が行われていたことを考慮すれば、会議の不充分さは、ある程度我慢しなければならないのかもしれない。

2001/07/08 18:30-

世銀総裁 James Wolfensohn、サンクト・ペテルスブルク知事 Vladimir Yakovlev 氏の挨拶があった。プーチン大統領の出席が予定されていたが所要のため欠席となり、メッセージが代読された。

続いて、ロシア大統領府 Dmitri Kozak 氏による報告 Legal and Judicial Reforms in Russia（ロシアにおける法改革と司法改革の現状）が行われた。その内容は以下の通りである。

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Dmitri Kozak 氏の発言

現代は、グローバル化の時代である。そこには、多様性の中にも共通の要素が認められる。それは、司法府の存在であり、世界人権宣言、国際人権規約、ヨーロッパ人権条約その他の国際的文書あるいは地域的文書人権保障原則を盛り込んだロシア憲法等の国内法令の中にもその必要性ははっきりと認められている。

ロシアの現状と関連する重要な論点としては次の３つを指摘することができる。

第１は、司法の独立性と公正さの確保である。この分野における具体的な論点としては、任命等における外部の圧力からの独立、身分保障、（特別裁判所の危険、イデオロギー攻勢からの隔離）、裁判所の財源の確保、裁判官人事など法の運用（administration of justice）を裁判官団体が独占することの意義、裁判官の任免、裁判官の免責性（immunity）、定年制、裁判所の他の機関からの独立性（裁判官の家族の身の安全確保を含めて）、懲戒責任に関する裁判官弾劾手続の整備などがある。

第２は、司法へのアクセスの確保である。具体的な論点としては、裁判官の数の確保、訴訟遅延の防止、裁判所の適切な地域配置、裁判官の専門分化の推進、専門性をもった裁判所（憲法裁判所、仲裁裁判所、さらに、行政、労働、破産等の裁判所）の展開、ＡＤＲ、私的な商事裁判所の設置、犯罪の整理（非犯罪化と訴追費用の考慮）、裁判費用、訴訟扶助、情報化の促進などがある。

第３は、裁判所による人権保障の確保である。具体的には、犯罪捜査プロセスに対する裁判所の排他的監督権の確立、人身保護令状（habias corpus）の利用すなわち、検察官がすべてをきめる原則から、裁判官がすべてをきめる原則への転換などが論点となる。

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2001/07/09 9:00-

James Wolfensohn（世銀総裁）による基調講演

法の支配の背景となる状況

この会議は、過去の会議の延長上に位置するものである。世銀の関心は、開発問題への取り組みである。たとえば、世界人口の多くが１日１から２ドル程度の生活水準にあり、世界人口の３／４が開発を必要としている。開発の目標は、一応まともな(decent life)を人々が送ることができるようにすることである。

開発の前提条件となるのは、経済インフラ、政治、統治その他の確立である。統治、経済、法制度(legal and judicial system)は、適正な開発・発展に(equitable developments)に深く関わっているが、それらは相互に独立しているわけではなく、密接に相関している。われわれの活動は、これらの前提条件をどのような形で開発の中に整合的に組みこむことができるかを検討しつつ行う必要がある。

次に、現在起こっている変化を視野に収める必要がある。たとえば、新しい国家・地域の登場や政治形態の変化（アフリカの４８国中４４国で、軍政からの離脱が起こっている）。巨大な人口を擁するインドと中国の動向にも配慮する必要がある。開発・発展には、当然ながら時間が必要であり、我慢強い努力が要請される。さらに変化に伴なって地域の文化、制度その他に大きな影響が及ぶのは当然であり、それへの配慮も必要であろう。この分野での困難は、関係国が多いこと、関係者が多いこと、富の偏在があることなどの多様性から起因するものである。

民主主義への動きも大切な論点である。政治制度の整備を進めるプロセスにおいて、司法改革は中心的重要性をもつ。改革にあたっては、世界的、普遍的な原理との関連性（条約、宣言その他）を参照する必要があるが、これらの原理・価値は、開発のさまざまなレベルでかかわりをもってくる。

法の支配に関する論点

以上の背景の下、法の支配を考察しなければならない。法の支配に関わる論点には、政府の責任、法の前の平等、人権と財産権への配慮などがあるが、これらの論点は、貧困の問題とかかわらせて理解すべきである。

最近の研究成果を参照すると、貧困者は、まっさきに金銭を求めるわけではなく、まずアクセスの機会、節操、子どもの機会、暴力からの自由、身の安全などを語ることがわかる。自治体はどれほど頼りになるのか、警察は信用できるか、にわとりの産む卵はだれに帰属するのかという身近な問題とこれらの意識は結びついている。

これらの欲求・意識がどのような形で法の支配の問題に結びついてくるのかをわれわれは具体的に確定し、取り組まなければならない。したがって、今回の会議では、単なる法理論を議論すべきではなく、貧困とわれわれの未来、平和につながる問題としてすべての論点を位置づけるべきあろう。繰り返しになるが、われわれの努力の対象は、このような広い視野の中にあるべきであって、単なる法や施設設備の問題に限定すべきではない。

つぎに、われわれは法のおかれる社会的文脈を十分に視野に収めるべきである。法が社会の中でどの程度効果的に機能しているか（effective function of law)に着目した個別具体的な考慮が重要である。

われわれのプロジェクトに完成点はないことを認識すべきである。そうであれば、ターゲットとなるのは、問題が発生した場合に十分に対処できる能力(capacity)の育成である。その種の能力を育てながら、個別の改善計画を一般論としてではなく、個々に論じていくべきであおる。

法改革は、政治改革その他とパラレルに推進して初めて見るべき成果を挙げるものである。

世銀において、腐敗(corruption)の問題を論じることは、タブーあるいはためらわれた。その背後には、開発に腐敗はつき物だという意識があった。しかし、いまや腐敗問題にに取り組むことは避けられない。腐敗は、ただ、経済面に限定されるわけではない。民間においても政府においても腐敗は観察される。また、法制度にも腐敗は深く浸透している。われわれは、法の支配についても、法の不当な支配(mis-rule of law)についても正面から論じなければならない。

最近の研究によると、より質の高い法の支配は、より高い経済収入の地域に成立する（逆もまた成立する）。東欧諸国の困難は、法システムが経済力によって支配されていること、政治の法に対する介入などにみられる。法システムに関して、能力主義は、ほんの一部でしか採用されておらず、適切な研修訓練をうけているのは関係者の７％以下であり、雇用の安定も保障されていないという点は、すべて問題点ということができる。

今回の会議のテーマは、一応まともな生活(descent life)が保障される社会の基盤整備の一環として法システムを整備するにはどうすればよいのかを論じ、それには、貧困者に機会を活用する能力(capacity to use opportunity)を与えることが重要であるということを論じるところにある。

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2001/07/09 9:45-11:00

Legal and Judicial Development in Practice

Session 1 :Stakeholder Support: How can political will and constituencies be built for legal and judicial development? 9:45-11:00

司会者から提示された質問は、法システムと司法制度の構築発展に関連して、まず誰がどの問題に手をつけるべきか、誰が stakeholder（重大な利害関係を有する者）なのかであった。司会者は、発言者を随時指名したので、以下の記録は、必ずしも発言順ではなく、しかも、何回かの発言をまとめている場合もある。

報告開始前に参加者を対象とする世論調査が実施された。

Monique Ilboudo (Secetary of State for Human Rights, Burkina Faso)

女性による司法改革への関与である。改革の意識は高まったが、現在は、裁判所関係者の訓練に焦点が移りつつある。

司法に対するアクセスの拡大には障害があった。とくに、女性には、司法の敷居が高かった。その改善には、社会一般の声と普遍的価値（人権その他）に関する情報の流布がきわめて重要である。近時、各界代表５００人から成る団体が設立され、司法改革に貢献している。

法文は優れている（権利の特定、制度の設計）面が多いが、その実現(enforcement)については、問題が多い。そのため、関係者による会議が開催されている。

また、裁判システムの地方分権が必要に思われる。というのは、司法制度は、かならずしも広いアクセスを提供しているわけではないからである。そこで、一般市民を啓蒙して、政府の責任、裁判の公開、透明性の確保などへの理解を深めなければならない。

裁判官の訓練プログラムの中に、複数の紛争処理制度に対する裁判官の理解を高めるものを含めるべきである。

Vyacheslav Lebedev (Chief Justice, Supreme Court, Russian Federation)

司会者の問：まず、どのように改革を始めればよいか。

改革は、それ自体が目的ではない。改革が社会的必要だという意識がまず必要である。改革については、重要な役割を有する人々の関与が重要であり、決断がなさけければならない。ただし誰かは問題である。ロシアでは、政治家は、司法改革に関心をもたなかった。改革には、法律家集団がまず関与し、その後、他の国家機関が協力する形で始まった。

連邦レベルで、裁判所の役割論や法改革の義務は、最高裁にあるとされた。その時には、国際法の保護を市民に拡大するという視点が採用された。１９９０年、市民からの不法逮捕に関する抗告を裁判所は受け付ける義務があるとされた。この判決について、裁判所は、国際法規を根拠として援用・適用した。このロシア最高裁の判決をソビエト最高裁は覆した。ただし、ソ連崩壊後の現在では、８０％以上の人身保

護請求が認められている。

ロシアでは、多くの治安判事裁判所が設立され、司法へのアクセスの場となっている。　司法アカデミー(Academy of Justices)は、２年前に設立され、裁判官の新任研修・研修・研究などを担当している。

問題は、裁判所予算が削られた場合、裁判所は、憲法訴願しなければならないというところにある。

ともかくも、現在、司法は、短期間のうちに連邦においてその存在を確立したといえる。また、裁判の公開は、民主過程において不可欠であることも認識されるに至っている。

Lord Woolf (Chief Justice of England and Wales)

司会者の問いに対して、自分の経験に基づいて答えることにしたい。ロシアの裁判官の話の中で、イギリスの古い制度であるマグナ・カルタや人身保護令状が言及されていることは興味深い。過去が繰り返し言及されるのは、問題が解決されていないことを象徴するのであろう。

自分の経験したことは、民事訴訟の改善である。イギリスの司法は、一見したところは、優れているように見える。しかし、これまで人々に司法に対するアクセスを十分提供していないという強い批判があった。自分が担当した司法改革は、議会における優先順位としては第３位であった（社会保険その他の改革の方がより重視された）。

必要に応じて司法制度を改正することがもちろん重要である（それは、一律の改革というような広範囲な改善にはならないかもしれないが）。英国は、国際人権条約を支持したが国内法の一部にしていなかった。しかし、ついに、昨年、Human Rights Act として国内法が成立した。それにともない、司法の焦点が動いたことに注意すべきである。国内法の成立に伴ない、権利の実現(enforcement)は、国際法的な根拠ではなく、コモン・ローを媒介にしておこなわれるようになった。それは、権利の実現の焦点をより具体化したのである。

裁判所だけで、改革が実現するわけではない。イギリスの民事訴訟の改革は、議会の決断がなければ不可能であった。また、行政の協力がなければ、裁判所の活動は円滑に行かないであろう。メディアの支援もおそらく不可欠の要素であろう。基調講演で指摘されたように、改革は、継続活動であり、社会の公衆の支援なしには実行できるものではない。

Mona Zulficar (Senior Researcher, Institute of Constitutional and Administrative Law, Utrecht University, The Netherlands)

司会者の問：エジプトにおける弁護士として活動した経験から弁護士の役割について述べてほしい。

法改革は、手間暇のかかる仕事であり、文化の変革とつながっている。とくに、女性運動との関連でこの点を意識すべきである。法改正は、社会教育・啓蒙と結びついている。エジプトで１９３０年に導入された家族法手続を例として話をする。それまでの家族法は、シャリア裁判所があった時期に制定されたものである。しかし、シャリア裁判所廃止後、その旧態依然とした実体法は存続し３０年の家族法に受け継がれた。その正当化として、家族にかかわる裁判は、個別具体的で、かつ微妙な配慮が必要だという理由がつけられた。

１９９０年以後、その見直しが始まった。しかし、司法省や裁判所の中の人々の立場は、さまざまであり、だれを同盟者にするかが問題となった。

統計（判決に必要な時間、判決の実施状況など）その他の情報収集もなされた。２年ごとに開催される女性会議も法改革に大きな影響を与えた。メディアへの接触も強化された（メディアに対する法案の詳しい説明その他）。

法改正は、宗教を冒涜するという発想は頻繁に見られたので、家族法と宗教ルールとの混同をしてはならないという啓蒙活動を司法省と協力して行い、問題の混同が起こらないような努力もなされた。つまるところ、これは、法に限定されないすべてのレベルでの「戦争」であり、議会でも大きな争点となった。司法府の保守性も問題であった。

幸いなことに、新法は成立した（そして、通常の世俗の民事手続が家族法の領域にも導入された）。

質疑応答

次のような質問がなされた。回答の一部は、各報告者の発言部分に含めて記録した。

・この種の変革が起こる時、対立の妥協を実現する actor は誰か。？

・全会一致は困難だが、多数の同意と有力なリーダーたちの「了解」も必要であり、あわせてメディアの支援も重要である。これらが妥協への動きに貢献する。この局面で法律家の技能(lawyers as bridge-makers)が有用である。同時に、共有される観念や価値観(common denominators)の特定も重要である。（Zulficar）

・重要な改革の場合、さまざまなソースからの動き、communication が働く、そこでの無理強い・押しつけは成功しない。説得に耳を傾けることが有益である。法律家は、その種の特性をもっている。(Lord Woolf)

・立法府が容易に態度を変えないときが問題。裁判所は必ずしも助けにはならない。伝統は、しばしば法の不存在という文脈を生み出す。しかし、司法制度における倫理（適切な問題処理）の強調も必要性。すべては、立法にかかっている。(Lebedev)

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2001/07/09 11:30-12:45

Legal and Judicial Development in Practice

Session 2

Legal and Judicial Reform: How can regional efforts and cooperation be strengthened?

司会者が質問の中で強調したのは、法改革に関連して地域的な協力を可能にする最大の要因は何かという点であった。

Dennis Byron (Chief Justice, Eastern Caribbean Supreme Court, St.Lucia)

カリブ海地域の９つの異なる政府をカバーする連合体の体験に基づく報告である。政府レベルの統合組織はない、したがって共通法は存在しない。法の原案は、共同で起草されるが、採択するかどうかは、各政府の判断に依存する。協力の障害は、各政府の有する主権である。

Thea Herman (Head, International Cooperation Group, Department of Justice, Canada)

協力を可能にする要因は、協力の種類により異なる。立法関連では、取引に関連するファクターが協力を可能にすると思われるし、一方、いわゆるソフトな協力の面では、経験の交流などを中心にすれば、可能である。

Mikhail Krotov (General Secretary, Chief of Secretariat, Interparliamentary Assembly, Commonwealth of Independent States)

CIS 諸国の議会間では、議会制度を介した協力が可能である。また執行部を介した協力も可能である。両者は、相互に補完しあっているのであり、現に、すでに１５０を越えるモデル法律案がこの方法で立法された。現在、訴訟法のモデル法典案の作成を行っている。協力関係は、共同市場の存在によって推進されていると思われる。主要な困難は、生活水準が異なっていることに起因する。

Daniel Lipsic (General Secretary, Ministry of Justice, Slovakia)

地域協力については、どの領域を対象とするかをまず考えるべきであろう。協力は、共通の価値、文化などが契機となる。ＥＵ加盟も推進に働く。障害は、主権の制限を伴なうところから発する。共同立法については、共同立法の訓練段階ではとくに問題はない。しかし、現実の立法となると、主権問題など困難な要素がある。

Akio Morishima (Professor Emeritus, Nagoya Univ., Japan)

アジアでの協力は、各国の多様性のため容易ではない。経済ファクターは、協力を推進するように働くであろう。ASEAN, APEC は、その例である。しかし、法の領域における協力は、まだ萌芽的状況にある。植民地の経験のある国は、宗主国の法の影響を受けている。地域協力は、始まったばかりであるが、現地の事情に応じた協力関係を推進することは有益である。

質疑応答

・各国の司法府の独立性維持が困難になるのではないか。たとえば、手続は、コモン・ローと大陸法とで異なる。実体法での相違も注意すべきであろう。

・ CIS における協力。ビジネス関連の ADR などが動いている。犯罪捜査関連でも協力がなされている。

・情報交換の面での協力。アフリカでは、諸国を対象とする法案が検討され、その採択が各国に求められる。

・協力の方法論には、さまざまなものがある。Capacity building に関する作業を先行させ、くわえて複数の作業を行うというアプローチが有効であるように思う。

・多様性は、協力への障害になるよりは、協力につながるのではないか。アジア、南アフリカでは、多様性に応じた個別的な協力関係を樹立し、実施すれば、比較的安価に作業を行うことができる。

・法学教育：地域協力形態の法学教育には意味がある。カリブ領域では実際にそのような形式の教育が行われている。それは、国境を超えた人的つながりの形成にもつながる。学生だけでなく、法曹一般の育成

についてアジアの経験は、その意味で有益であろう。

・東欧では、刑事法を中心にして、共同立法の試みが続けられている。民事訴訟についても努力が始まっている（対審制度の導入は、扶助制度の整備も必要とする）。

・法の統合となると、法典編纂システムを初めとして（大陸法か、英米法かを初めとする）枠組み選択を行う一方、法概念その他について整備・洗練というような基礎的作業をしなければならない。そのような積み重ねをするだけの時間的余裕は、多くの発展途上国にはないであろう。したがって、法整備に対する支援国の間の緩やかな協力のほうが現実的であろう。

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2001/07/09 Luncheon Talk

Peter Eigen (Chairman, Transparency International, Germany)

内容については、記録をとらなかった。

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2001/07/09 14:15-15:30

Elements of An Effective Judiciary

Session 3: Organization and Financing of the Judiciary: How can adequate and accountable finacing be secured?

司法の独立と予算との関係を検討しようとするのがこのセッションの目的である。

司会者の質問は、どのようにして予算が決まるのか、十分な予算とは何かという点に焦点を合わせていた。（記録者の印象としては、予算を論じるのであれば、予算項目をまず特定すべきではないかと感じた。また、議論は、予算の独立性の欠如が裁判の公平性の基盤を掘り崩すという前提に立っているが、本当にそう前提してよいのかと思われた。）

司会者は、とくに、訴訟費用(court fee)による収入確保、予算と裁判所の責任との関係、裁判所を支援する団体(constituency)を創り出すことは適切な対応であろうかというような質問を行った。

Cristina Akmentins (Administrative Director, Federal Judicial Council, Argentina)

司法予算（注：裁判所だけに関するものかどうかは不明）は、裁判官委員会による予算要求からはじまり、専門家による査定を経て予算要求案となる。予算要求案は、最高評議会(Magistrate Council)の長官に提出される。その後、長官から立法府に予算案が提出される（立法府は、予算の上限を設定する以外の措置をとらない）。予算案は、執行府にも回付される。執行府がイニシアティヴをとって最終的に「適正な」司法予算が確定する。

Li Guoguang (Vice President, Supreme People's Court, People's Republic of China)記録者注：このスピーチは、逐次通訳で行われたが、音声上の問題その他のため内容を十分把握することができなかった。

中央裁判所の予算は、国家レベルの財源から、地方の裁判所は、各地方の財源から支給される。予算は、中央裁判所については、議会に提出される。

Ellen Northfleet (Justice, Supreme Court, Brazil)

一般的にいえば、統治の３部門の予算については、上限を交渉・審議によって決定する。各上訴裁判所は、予算要求書を提出するが、行政府は裁判所の要求額を変更することができない。しかし、立法府は、要求額を操作できる。対立法府との関係で、司法関係者が予算獲得に関連して、行うことができるのは、議会で証言するなどの行動に限定される。そもそも司法府には、議会における lobby 活動をする経路が存在しない。

近年、裁判所の仕事の量は、３倍に増加したが、司法予算自体は減少している。３倍増した係属事件数に対して、裁判官の増員は若干なされた程度である。州の裁判所については、より適切な予算措置がなされている。

裁判官の責任(accountability)の問題については、研修などの方法で機会を提供すべきであると考える。

Borwornsak Uwanno (Secretary General, King Prajadhipok's Institute and Professor of Law, Chulalongkorn Univ., Thailand)

司法予算の作成自体について行政府は、関与できない。司法府の予算額は大きくない。事務執行部門は、それぞれの統治機関に所属している。司法予算については、適正な額を配分することを定める憲法の規定がある。しかし、「適正さ」は、政治的決定にゆだねられている。また、予算要求案は、行政府による査定をうける。査定にあたっては、透明性（事件処理の効率性など）などの基準を用いて評価がなされるべきである。

発言終了後、参加者の意識調査が行われた。対象は、以下の事柄である。

質問：

・司法予算の最終判断者は誰であるべきか

options:judiciary, legislature, executive, constitutional provision

・確定した司法予算の配分権は誰に与えるべきか

options: highest court, judges meeting, non-judges meeting, ministry of justice

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2001/07/09 15:45-17:00

Elements of An Effective Judiciary

Session 4: Quality of Judges: How can the recruitment, selection and performance of judges be improved?

司会者は、裁判官の供給源、選任、執務評価の３つのテーマについて、まず報告者の最初の２つについて論じることを求め、第３の執務評価については、後に論じることにしたいと要望した。

Roger Errera(Member of the Conseil d'Etat and of the Conseil Superieur de la Magistrature,

France)

裁判官の責任を論じる場合、５つの側面があることに注意すべきである。第１は、裁判官が罷免・懲罰に値するかどうかを検討する側面、第２は、裁判官が犯罪を犯した場合の責任を追及する側面、第３は、上級裁判官による下級裁判官の評価がおこわなわれる側面である。第４は、裁判官の行為について民事責任（不法行為責任）を認めるかどうかという側面（いわゆる immunity の問題）、最後に、司法の機能不全についての国家責任（gross fault caused by malfunction of the judiciary, e.g.裁判所による不十分な権利保護)を論じる側面である。これらを分けて、検討する必要がある。

Daniel Fung (Former Solicitor General, Hong Kong)

裁判官については、相互に衝突する二つの原理が関わっている。裁判官の独立を主張する原理と裁判官の責任を追及する原理である。周知のとおり、司法府は、選挙で選ばれない。そこから責任という議論が発生する。人材確保という面では、行政府の影響の大きさが問題となる（たとえば、裁判官の任命にからんで）。香港では、選挙でもなく、完全な任命でもない中間的形態の方式の確立に努力した。その特質は、非政治的な選考プロセスを採用したところにある。中国の主張する「一国二制度」の下、裁判官指名委員会という制度が設けられた。それは、９人で構成される委員会であり、委員会の決定（指名）は、裁判官の任命権者を拘束するというものである。（委員には、裁判官、行政官、バリスタ、ソリシタ、非法律家が任命され、９人のうち５人は、非政府関係者でなければならず、指名には、委員の７名以上が賛成する多数決が採用される。）

Nelly Koutzkova (Chief Judge, Sofia District Court, Bulgaria)

経済学的見地からは、裁判官不要論も聞かれる。しかし、裁判官は、必要であり、優秀な裁判官を調達する方策を真剣に考えるべきである。裁判の革新のため、裁判官を全面的取り替えるという方法（たとえば、東西ドイツ統合後、東ドイツの裁判官に代えて西ドイツ裁判官が任命された）もあるが、漸進的な質の向上を図るという方法もある。いずれにしても、魅力ある俸給の提供と競争原理の導入が必要である。

質疑応答

・優秀な裁判官の調達のためには、給与、名誉の両方が必要である。また、訴訟扶助など、裁判を起こしやすい環境を整えるための予算措置も重要である。

・英米法的な法曹一元か大陸法的なキャリアシステムかの検討も必要である。

・裁判官の不法行為責任を認める一方で、責任保険の導入を図るべきではないか。

・裁判官倫理基準の存否とその実施形態についても検討が必要である。

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2001/07/10

Empowerment: Justice at Work

第５セッション開始前に報告と特別講演とが行われた。

報告：プーチン大統領との会見について 9:00-9:15

前日の晩、モスクワで行われた世銀会議参加者との Putin 大統領との会見の模様が報告された。その席では、裁判官の給与、死刑制度、司法改革、その他幅広い話題が取り上げられたとのことであった。

特別講演　9:15-10:00

Hernando de Soto (President, Institute for Liberty and Democracy, Peru)

報告者は、 The Mystery of Capital: Why Captialism Triumphs in the West and Fails Everywhere Else 他の著作のある経済学者である。

自分は、経済学者ではあるが、法の重要性を確信する者である。多くの経済政策に加えて、法制度を考慮しなければ市場経済の分析は十分ではない。この種の発想が自分所属するシンクタンクを設立する原動力となった。

経済的な分析を行うには、歴史をみて、成功例を参照すべきであり、その分析を学問的に行うべきである。スミスやマルクスは、経済体制の移行の問題を論じたのである。産業革命は、人口移動と分業を生成したというのが、彼らの理解であった。マルクスは、分配や支配に関心を向けたが、移行プロセス自体の理解は、上のようであった。彼らは、資本がもっとも重要な要素であると考え、その蓄積と分配を分析した。問題なのは、資産それ自体が価値をもつというある種の形而上学を両者とも受け入れていたことであった。

南米では、スラム、法の支配の欠如、社会不安の克服のために最大の努力を行ってきたが、その克服にはいまだ成功していない。しかし、注意深く観察すると、資産自体は、南米にも存在している。しかし、北米の資産たとえば建物のほとんどが、賃貸その他(loan)の形で利用されているにもかかわらず、南米ではそれが行われていないのである。

資産の利用の成果は、水道その他さまざまな供給の形で北米に貢献している。その成功秘密は、法制度にある。つまり、法はさまざまな社会的効用を生み出す枠組みを提供しているのであり、それが南米と北米との差となっているだ。

たとえば、ペルーで国有電話会社を売却しようとしたところ、まったく売却できなかった。一定の形式を整えたの財産形態に会社を変換しなければ市場での売却はまったく不可能であった。つまり、電話会社の資産利用を可能にする法形式があって、資産は価値を有するに至るのである。とくに世界的な法形式に組み込まれる場合は、資産は、さまざまな価値を創造する可能性をもつ（クレジット・カード、「所有」制度はその好例である。）したがって、経済的「現実」とは、法形式を媒介にして初めて成立するものである。

このように考えると資本とは、このような法形式を媒介にして初めて理解可能となる。南米では、このような法形式が市場において広範な同意と支持を獲得していないというところにこそ、問題がある。したがって、南米における資産(assetts)は、dead capital つまり単なる物理的存在でしかなく、多くの価値を生み出さないのである。

エジプト：貧困層は、どの程度建物や資産を所有しているのかを調査した。すると、。過去２００年間のエジプトに対する対外投資の総額と同等の資産がエジプトに存在する。つまり、貧困は、資産の存否に

よるものではない。問題は、表の経済と闇の経済との関係にある。闇の経済(shadow economy)にある資産をどのような形で表の経済に引き戻すことができるか、それはまさに法の問題である。それは、二つの経済で用いられているルール同士の競争であるとも言える。この法は、かならずしも成文法であるとは限らない、人々が従っている法がこの種の形式性を提供していることもある（カリフォルニアの gold rush のときの、mining contracts はその例である）。

土地所有制度の確立もこの文脈の中で理解できる。たとえば、日本の地券制度（さらには、戦後の農地改革）、ハイチの土地権利書（これらは、全国的な権利ではなく、地方的な慣行に基礎を置く地方的な権利である）、フィリピンの土地所有権（地方の役所が個々に権利を設定した、たくさんのルールが存在する）などは、すべて、人々の慣行と結びつき、人々に支持されるルール・権利と結合している。

資本主義が存続した理由の一つは、さまざまな矛盾するプロセスをなんとか統合して価値を生み出すことができた点にあり、その核心は優れた法形式にあったのである。

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2001/07/10　10:15-

Empowerment: Justice at Work

Session 5: Law and the Poor: How can law be used to advance the interests of the poor?

記録者注：このセッションは、司会者のテーマ設定、議事運営が極めて恣意的であったため、まとまりのないものとなった。とくに問題であったのは、司会者の提示した質問の趣旨が明確でなかった点である。発言者の話に要領を得ない部分が少なくないのは、そのためであると思われる。

Philip Daltrop (Assistant General Counsel, Asian Development Bank)

司会者の問：社会権に対するアジア開発銀行の態度。

かならずしも量的側面だけに焦点をあわせることはなくなっている。権利の源としては、国内法（憲法上の権利）と国際条約を（一般条約だけでなく、個別の権利に関するものを含む）考えることができる。発展途上国の内情を見ると、必ずしも国際公法上の条約は参照されているわけではない。それは、各国の事情によって、国内戦略がきまるからである。

たとえば、フィリッピンでは、立法が行われるが、その実施にはきわめて多くの問題があり、立法の円滑な実施は容易ではない。ただし、会議の背景レポート（補足資料）では、農業用水問題について、どのような形で法が実施されているかに関する詳しい分析がある。

Maryam Elahi (Director, Human Rights Program, Trinity College, USA)

立法だけでは不十分である。たとえば、ガテマラでは、格調の高い憲法と最悪の人権侵害とが両立した。法の有効性は、政府の意向と密接に連動しているので、政府の決意が重要である。しかし、貧者に力(empowerment)を与えることは、すべての政府の利益になるとは限らないので、法を実施しようという政府の決断が必ずしもなされないのではないかと思われる。

NGO はこの問題にかかわりを持っているが、NGO にこの問題解決への関与を求めるにしても、その

守備範囲を確定するとき、しばしば、政府により NGO の活動が制約されていることを認識しておくべきである。

Guenther Hirsch (President, Supreme Court, Germany)

この問題を考える場合、立法と法域の実体とを区別しておくべきである。ドイツでは、立法は女性差別を禁じている。しかし、社会現実では、差別は継続している。たとえば、パートタイムで働く人は、フルタイムとはことなる扱いを受ける。法の外面をみれば、これは単なる就業形態の違いに起因する違いのように見えるかもしれないが、これは、実態では多くの女性が差別されていることを意味する。裁判官は、そのような実態に敏感であるべきである。（法の機能のさせ方への配慮が必要である。）

Albie Sachs (Justice, Constitutional Court, South Africa)

具体例で話のポイントを説明したい。ケープタウン付近には貧困地帯がある。そこに居住する一群の人々は、雨期になると居住不可能なほど環境が悪化する。あるとき、500 人ほどが雨季になって近くの乾いた地域に移動した。しかし、そこは、低所得者の住宅予定地であり、滞在は不許可とされた。彼らは、結局雨の降りしきるグランドに移動させられた。

問題は、憲法上の権利保障である。裁判所は、巧妙な解決を図った。判決では、基本権（適切な住居に住む権利）があることは認めたが、それは予算によって制限されるものであるとした。その一方で裁判所は、子どもには shelter に入る無制限の権利があり、子供の保護義務のある両親もまた shelter に入ることが認められるとしたのである。

これはたしかに巧妙な解決ではあるが、やはり、争点は、社会権を裁判所が強制的に実現できるかどうかである。裁判所は、特定の住居建設を命じることはできないが、政府が適切な住居に住むことができるようにする義務があることを明らかにしたということができる。

われわれは、住居と人権との親密な連関を意識すべきであろう。そこから考えると、二つのテーマ、つまり社会権を権利として認めること、および人間の尊厳を考察の中心に据えることをもっと意識する必要がある。

Hernando de Soto (President, Institute for Liberty and Democracy, Peru)

経済学的に「貧者とは何か」をまず特定すべきである。その場合、法制度の外にある資産をまず問題にすべきである。メキシコでは、その種の資産は、石油埋蔵量の何倍にものぼる。また、雇用の提供が法制度の外で行われる（ペルーでは、それは全雇用の 70%にも及ぶ）ことにも注意が必要である。高利で信用を調達することが起こるのは、法制度の問題でもある。そのような問題を発生させる重要な要因は、法制度がさまざまな形で作り出しているいわゆる red tapes であり、それらも併せて問題とされるべきである。

なぜよい法が実践されないのかを考察してみると、法の具体的な実施プロセスについて円滑な実施を妨げる事情があることがわかる。ペルーでは、法のほかに行政規制がなされ、行政規制が優れた内容の法の実施をゆがめている。

法を実施するためには、法を受け入れ支持する集団(constituencies)との間できちんとしたコミュニケーションを確立する必要がある。つまり、必要なことは、political system と implementation の過程をきちんとモニターすることである。

ただし権利・権限(title)の設定だけでは、何の意味もない。肝心なことは、立法を媒介にして設定される権利・権限を実現する機能・プロセスを支援し、補完することである。そのような手当てをしない世界銀行のプロジェクトはことごとく失敗している。また、問題は貧者自体にあるのではなく、彼らの所有する dead capital を活性化するところにある。資本の活性化のためには、社会の意志・意向を下から汲み上げるころのできる法を作ることができなければならない。腐敗(corruption)について一言付け加えれば、それは通常、社会の上層部に発生するのであり、きちんとしたコミュニケーションが成立している貧困層の中では稀にしか発生しない。

質疑応答

記録者注：質問は、de Soto 氏にほとんど集中した。

・人々が変革への力をつけること、いわゆる taking off の力はどのようにして入手できるのか。そもそも法形式の整備をするだけの余裕が途上国にあるのか。

・経済学者は、権利設定が経済学的に意味があるという。また gender equality にも意味があるという。しかし、法にだけ焦点を集めるのはやはり問題ではないか。

・資本主義だけが貧困から脱出する方法なのか。資本主義を実践していても問題がある国は少なくないではないか。

・権利については、all or nothing ではなく、proportionality の発想をも取り込むべきであろう。

・裁判所の中立性（政治プロセスからの）はときとして深刻な対立の処理を裁判所に任せることを可能にする。

・法システムは、かならずしも shadow economy を陽光の下にもってくるとは限らない。その点を考慮すべきである。

・権利という言語・語彙を活用することをもっと真剣に考えるべきである。なぜなら、単なる地域言語ではなく、一般性・普遍性をもつ法言語を導入することには意味があるからである。

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2001/07/10　14:15-15:30

Thickning the Web

Session 6: Post-conflict Countries: What are the challenges involved in rebuilding the legal framework and the judiciary?

司会者は、議論の焦点を「大量虐殺などの起こった社会における法システムの再建と社会の再建についての議論」に合わせた。とくに、紛争後の安定と平和の推進のために法システムはどのような貢献ができるかを、中東、アフリカ、バルカンその他の地域における経験を参照しながら、検討することにしたいと述べた（また、警察の役割にも注目する）。報告は、紛争後の国において司法改革をすすめるための条件は

何か。国際機関、bilateral agencies の役割は何か。といったところから始められた。

Chris Mburu (Former Human Rights Officer, UN Peace-Keeping Mission, Sierra Leone)

ルワンダその他例を報告する。紛争後には、適切なインフラが欠けている。たとえば、ルワンダでは、紛争前８００人いた治安判事が紛争後には、４０人に減少した。治安が回復しても、残った治安判事は、将来を考えて practice に消極的である。つまり、それは、改革の道具さえないということである。国際的な援助も再建への糸口さえつかむことができない。すべては一から作り直さなければならないのである。

大量虐殺の関係者は、事件後７年たっても大量に拘置所に収容されており、事件処理の遅延は、解消に何十年もかかる計算になる。また、政府はあっても、改革への政治的意志をもたないという点も大きな障害となっている。

Jamal Benomar(Senior Advisor on Governance and the Rule of Law in Conflict and Post-conflict Countries and Head of the Conflict Prevention and Peace-building Unit, UNDP/ERD)

law enforcement と security との関わりについて話をしたい。世銀の調査によれば、安全こそが人々のもっとも求めているものである。治安を確保する刑事司法がこの意味で重要であり、民主的統制に服する治安維持機構の整備が求められる。

６カ国を対象とする調査によれば、刑事司法は、全体的システムとしてとらえるべきであるとされる。そのような観点からさまざまな措置がとられているが、その多くに civil society の参加（文民統制、あるいは司法の監督）は行われていないという問題点がみられる。

政府に対してなされた各種の勧告を見ると、法に対するリップサービスはされているが、人権保障が実際に推進されている兆候はみられない。警察・治安部は、文民統制に服しつつあるが、これまでの問題性を依然としてひきずっている。

組織的な権力濫用は、影を潜めつつあるが、濫用自体は観察される。濫用を防止するための社会の関与(community participation)が提案されてはいるが、その実施自体はまだはっきりしない状態にある。

以上の指摘は、紛争後の国家に当てはまるが、それらの国家だけに限定されるわけではない。また、今後の対応の中では、あまりに法に偏した(legalistic approach)方法に対応を限定するのは賢明とはいえない。

Zoran Pajic (Associate Fellow, Centre for Defense Studies, King's College, Univ. of London, UK)

ユーゴを例にしてみると、再建の二つの方向があると言える。一つは、平和維持に重点をおきながら安定を図る方法である。もう一つは、体制自体を変更する方法である。

いずれにしても、紛争後の国家では、当事者が対立する紛争で、最終的な別れ際の時の言葉は、「裁判所で会おう」ではなく、「地方のボスのところで会おう」に変わりつつあるといわれる。これは法システムに対する信頼の喪失を意味している。たとえば、未決事件数の増大は、まさに法システムに対する信頼の喪失の一例である。

私の見るところでは、国際的な援助団体は、政治的解決を図るあまり法の支配その他の重要な価値を放棄してきたのではないかと思われる。たとえば、援助団体と全体主義的国家(totalitarian state)との協同

を考えてみればよい。その結果、司法は、不合理な昇進システムその他が原因となって「腐敗」しつつある。その局面では、司法の独立と不適任な裁判官の排除という矛盾する問題が現れてくる。バルカン半島における司法の再建に関する国際的努力は、腐敗と public administration への人々のアクセスに十分な配慮をしてこなかったという弱点を持っている。

もう一つの問題は、援助団体が common law 系の法的アプローチを本来大陸法系の領域に無理に持ち込もうとしたところにある。それは解決困難な軋轢と非効率を生み出したのではないか。結局のところ、問題は、これらの地域において民主主義をどのようにして実施させることができるかである。

Jokl Smart (Justice, Supreme Court, Sierra Leone)

戦争犯罪について。どのようなアプローチが望ましいかは、利用できる裁判制度の機能の仕方に依存する。ルワンダ（アミン政権）では、政権との間で平和条約の交渉が行われたが、成功しなかった。その結果は、一種の革命であった。このような状況においては、特別裁判所が有効であると考えられる。

一つのアプローチとしては、国際法(crime agaist humanity)を国内裁判所で適用すること、つまり裁判所が国際、国内法の裁判所で、国際的な基準を適用するという方向が考えられる。

質疑応答

・人権侵害の記録、公的場面での謝罪、恩赦の組み合わせも一つの試みである（南アフリカのアプローチを参照）。

・平和条約による問題処理では不充分ではないのか。

・伝統的な村落審判組織の再活用も視野に入ってくる。その問題点は、法曹の訓練を受けていない人間が重大犯罪の判断者となるところにある。（しかし、１３万人の被疑者の存在を考えると、何らかの対策を講じる緊急の必要は明らかである。）

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2001/07/10　15:45-17:00

Thickning the Web

Session 7: Specialized Courts: Are they a quick fix or a long-term improvement in the quality of Justice?

記録者注：内容的にはもっとも乏しいセッションである。何のために専門分化を論じる必要があるのかが明確にされていないし、とくに法支援との関係でどのような意味があるのかがはっきりしていないように思われる。

司会者は、司法改革の文脈で裁判所を専門分化させるべきかどうかの選択が問題となることを指摘し、その上で、裁判所の専門化をどのようにして進めるのがよいかを報告者に尋ねた。

Alexander Areefulin (Deputy Chairman, Supreme Arbitrage Court, Russian Federation)

ロシアの仲裁裁判所の活動を中心に報告する。ロシアの商事裁判所の歴史は、きわめて古い。その領域に、ソ連時代になって国家仲裁機関が関わってきた。1990 年代以降、仲裁裁判所の再生が顕著である。そこでは、迅速さと確実な執行が求められ、それに対して適切な対応が行われている。

世界的に見て裁判所の専門分化（たとえば、ドイツの裁判所）はひろく観察されるところである。ロシアでは、６０万件の事件が仲裁裁判所に申し立てられている。この組織には、三審制の裁判所があり、裁判官の供給も通常裁判所とは別個に行われる。共通の実務レベルの維持のため、最高裁判所と最高仲裁裁判所が合同で決定する方式による努力がなされている。

司法へのアクセスの確保のために新法が準備されている。とくにロシアの広大な領土は、適切な裁判サービスの提供を難しくしている。また、地方からの中央への上訴は、非常に数が多い。

Edward Cazalet (Retired High Court Justice and Chairman, Citizens Advice Bureau, Royal Courts of Justice, UK)

専門分化は、大きな流れとなっていくと思われる。知識、技術の専門分化に対応するためには、それは必要であろう。専門家の中でさらに専門分化が行われるのではないかと推測される。たとえば、税法、商法、人権その他の領域でその傾向が強まるであろう。イギリスでは、90 を越える行政審判所(administrative tribunals)があり、それは専門分化している。

専門裁判所は、より大きな組織の中の一部であることもあれば、独立した組織であることもある。イギリスでは裁判制度の連続性が前提となっており、その中で専門分化が進んできた。それは社会主義における急速な体制変革とは異なる。

たとえば、高等法院では、1875 年に家族・検認・海商部が成立した。その時点では、単なる組織の統合でしかなく、専門分化は無関係であった。ところがその後、家事事件で心理学その他の成果を導入したり、検認関係でも専門的な問題が増加していったために、専門分化が促進されていった。それは、現代的な代理母、精子銀行、その他の問題を考えれば、容易に理解できることであろう。

商事裁判所：Lord Mansfield は、19 世紀にロンドンの商人たちの慣行をベースとして成立した商法をコモン・ローに導入し、それによってコモン・ローを革新した。しかし、彼の引退後は、反対派の動きもあってそれが順調には発展しなかった。その結果、仲裁条項その他が問題処理にもちこまれ、専門性が高められて行った。

関係の法曹利用者が専門裁判所の実務が需要に応えているかどうかを定期的（たとえば、年に１回）に確認し、評価するという方式の導入などを検討すべきであろう。

Lucia de Tobon (Vice President, Judicial Council, Colombia)

専門分化の定義（機能の配分）について報告したい。専門分化の程度は、それぞれの社会の状況に依存する。したがって、ある特定の社会でどのようなタイプの専門分化を行うかが問題であろう。コロンビアでは、政府と武装組織との間の対立が問題である。そこでは、その種の問題を専門に扱う特別行政裁判所が有意味である。

憲法裁判所も 1990 年代に設立された。裁判官も憲法問題の専門家を集めている。その他に、麻薬問題を専門的に扱う裁判所も存在するのであり、自分の所属する Judicial Council は、それらの問題を検討している部門がある。

近年、司法予算の減少にともない、裁判所機能の再配分が行われつつあることも、裁判所の専門分化との関係で影響を及ぼして行くであろう。

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2001/07/11 9:00-10:30

How do we know when we have succeeded?

Session 8: Evaluating Legal and Judicial Reform: What mechanisms work?

記録者注：報告に先立って、評価制度の可能性について、出席者を対象とする opinion poll が行われた。しかし、質問項目の設定その他をみると、厳密な調査と言うよりは、統計遊びに近い。

司会者は、評価問題に関連して、評価の技術的詳細にわたる議論は、今回除外されると述べた。

David Bernstein (Chief Counsel, Legal Transition Team, European Bank for Reconstruction and Development EBRD)

自分の所属する機関の採用する評価方法について概要をお話する。EBRD は、1996 年以来評価アンケートによって、商事法について評価を行っている。それは、毎年、法律実務家にアンケートを送り、商事法の機能や有用性に関する彼らの印象調査を中心とするものである。調査対象は、商事法の法文だけでなく、現実の法の有効性についても行われる。

さらに、商事法の特定項目について、チェックリスト方式による調査をも導入した（対象領域としては、corporate governmance、破産などがある）。法文の調査と印象調査の双方を対照して検討･分析を行っている。

評価のやり方は、どの国が最も優れているかという国別順位によるのではなく、格段に優れたグループ、優れたグループというような評価区分を設けた評価になっている。

評価を意見調査で行うのは、利用者（法律家に限定）の印象が重要だからである。基準の設定については、関係者の参加がより基盤を確かにすると思われる。ただし、調査には費用が必要であり、評価のために使われる資源の大きさについても十分な配慮をする必要がある。

Lgia Bolivar (Director, Human Rights Center, Andres Bello Catholic Univ. Venequela)

警察について報告したい。被害者にとって、警察の活動は出発点として決定的な意味をもっている。したがって、警察の倫理は非常に重要である。イギリスでは、警察官の独立(constable independence)が伝統であったが、おそらく裁判所による警察の監督が望ましいであろう。このようにして警察への信頼を高めるとともに、制定法による一層の保障が必要である たとえば、１９８４年法(1984 Act)はその種の努力の成果である。

証拠収集が進んだ段階で、訴追機関が警察による証拠収集にチェックをかけなければならない。望ましいことではあるが、イギリスでは、それは必ずしも可能ではない。

では、警察官の職業倫理を高めるにはどうすればよいのか。警察官の職業倫理を高める訓練として、職業倫理に関する口頭試問があるが、それは場合によっては副作用を産むおそれがある。

汚職(corruption)は、しばしば警察について起こる。そこで、最近では、事件発生後早い時期に検察が警察に赴いて活動する方式が採用されつつある。ただし、それには、それを可能にする資源の配分が不可欠である。

イギリスは、1998 年にヨーロッパ人権条約を批准した。それは、警察に対する一つの脅威となった。警察は、批准された条約に対して必ずしも好意的ではないが、裁判所は、条約を強く支持している。これは、北アイルランド問題などに影響を与えるであろう。

評価は、対象活動に間違いなく影響を及ぼす。ただし、ターゲットの設定は、評価ターゲットにならない活動を歪曲するおそれがある。また、それは、外部、内部の双方にプレッシャーをかける結果となる。たとえば、Crown Prosecution Service が評価対象とされた目標を達成すればするほど、かえってこの機関に対する社会的評価が低下した事例は象徴的である。さらに、目標不達成に対するペナルティーは、かえって改善への動機づけをそぐ場合もある。

Barry Loveday (Reader in Criminal Justice, Institute of Criminal Justice Studies, Prtsmouth Univ., UK)

評価について誰の視点が重要かについて報告したい。一言で言えば、stakeholders の視点が重要である。当初の目標と結果の間に齟齬があれば、当然に検討が必要となる。それとともに、効率性の内容は stakeholder に通知されなければならない。評価の目的は、効率度の特定に他ならない。

評価に文化的要因を含める場合、とくに目的の達成を妨げる要因としてそれを用いる場合には、その中身を特定する必要がある。その場合、その種の考慮をすることの透明性を確保すべきである。

制度に対する信頼感の程度を測るメカニズムをどうするかは、今後の検討課題である。

Sandra Oxner(President, Commonwealth Judicial Education Institute, Dalhousie Unv., Canada)

チェックリストを用いた評価方法について報告したい。チェックリストには、間違いなく意味がある。ただし、それだけで利用するとゆがみが生じる。一つは、法域により需要が異なる（たとえば、裁判所予算の独立性を重視する法域もあれば、裁判所による予算管理権を重視する法域もある）ので、リストが間違って評価される恐れがある。

チェックリストは、支援事業の開始時期に用いることには、意味がある。ただし、評価は、対象社会に見られる行動パタンの変更を目指すものであるので、その点を考慮すべきである。つまりリストは、部分的な有用性をもつにとどまることを認識すべきである。

たとえば、汚職の程度を示す corruption index は明らかに政治的意味をもっている（まず、世界の注目を集めること）。index の作成は、既存の多くの統計情報を基礎にしている。そこで利用される情報源の数、偏りのもつ問題性を十分意識しておかないといけない。また、何のためにこのような評価を行うのかをはっきりと関係者に告知しておくべきであろう。

誰がリストを作成し、誰がフェアーに評価することができるのかという疑問は、当然生じる。そこで、支援 project を全体として評価するだけでなく、プロジェクトの構成部分についてもそれぞれ評価が必要である。また、数字化しやすいものにだけ注目すると核心的問題への取り組みが回避される恐れがある。

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2001/07/11 11:00-12:00

Special Roundtable

司会者は、裁判所予算の獲得の必要と司法の独立性をテーマとして指定し、透明性の確保のために、司法審査が果たすべき役割、裁判官のモニタリングと司法の独立とはどのように関連するかについて報告者の意見を求めた。

Gadzhiev (Justice, Constitutional Court, Russian Federation)

ロシアにおける最近の関心は、司法の独立にある。とくに司法のコントロールを排除しようとする立法の否定が重要である。裁判官の待遇改善のため、裁判官の給与と検察官を含む行政官の給与とを切り離す方向を検討している。裁判官の俸給は検察官のそれより多くなければならない。俸給の切り下げの禁止も検討されている。つまり、裁判所に対する「財源保障」は焦眉の課題である。

ソビエト後の国家には、共通した状況がある。privatization は、私有財産の配分を必要とさせた。所有権の移転に関連して、対処する新しい法制度が必要であり、さまざまな措置が講じられている。とくに行政裁判制度の確立が重要であり、独立した行政裁判所と行政訴訟法をつくらなければならない。

腐敗・汚職(corruption)との関連では、社会全体の努力に注目すべきである。法の誠実な執行が社会的な利益になることが社会的確信になれば、それは大きな影響を及ぼすであろう。

裁判官の責任は、倫理の側面を含む。そこには裁判官団体の問題点を指摘することも含まれる。administration of justice の面については、下級審の独立性を守ることにも配慮しなければならない。今必要なことは、裁判官の独立に対する憲法的確信の育成と司法制度の再統合である。

Anthony Kennedy (Associate Justice, Supreme Court, U.S.A.)

政治理論における checks & balance は三権の相互影響を予定しているのであり、それは、separation of powers の原理とは、異なるものである。合衆国において、司法府は、連邦議会に赴き予算を「要請する」。過去において、議会は司法府の要請にほぼ応えてきた。したがって、合衆国の連邦裁判所について、格別の問題は存在しない。

ただし、州レベルでは問題が生じたこともある。たとえば、州最高裁の判決に不満をもった議会が裁判所の予算を操作しようとしたことがあったが、最高裁判所の長官が州議会において checks & balance その他についての説得を行って、問題が決着したことがあった。

行政法という観念の登場は、1930 年代である。いわゆる Administrative Agency は法を作るのであり、合衆国では三権のどこに位置づけられるかという問題を含む。行政の末端にある行政官・警察官は、

法的に発想するよりも、結果あるいは目的を重視する。そのため必ずしも法的に適切な行動がなされるとは限らない。しかし、考慮すべきは、法文化の問題、つまり法を執行するときには、権利を尊重しなければならないという意識を法の執行者に文化的に植え付けることは重要であり、その教育は永続的なものである。

裁判官の責任追及については、さまざまな方法が用いられるべきである。corruption については、impeachiment や刑事訴追が、より軽い問題には、別のアプローチが可能である。

司法の責任が前提となって、司法の独立が成立する。ふつう人間は、事実を見て、その場で直観的な判断を下す。裁判官も変わるところはない。しかし、言語的原理に基づく法は、判断の理由の開示を含むさまざまなチェックを要求し、裁判官は、自分のしていることを一から再検討することを求められる。裁判官の責任倫理は、本当の理由を誠実に述べることを求め、つねに考え直すことを求める。

ところで、common law では、裁判所が法を作ってきた。それは判決の中に当事者を説得するためのレトリックが豊富に含まれることを意味する。かつて大陸法系の判決と英米法系の判決では、レトリックの量などが明らかに違ったが、最近では、ヨーロッパ全体を対象とする裁判所は、レトリックの量を増加させてきている。

現在、合衆国における大きな争点は、裁判官の選挙による選出方式を再検討するところにある。

Eduardo Rodriguez (Justice, Supreme Court, Bolivia)

司法予算と司法の独立性との関係は、微妙である。とくに、司法改革が進行中である場合には、いっそう問題性を孕む。そこでは、改革のための資源配分をどうするのが適切かという論点がはっきりと表面化する。一方、資源が配分されたときには、それに対する accuntability が当然問題になる。

行政法の登場は、1990 年代である。ボリビアにおける *privatization* の開始は、市民の異議申し立てメカニズムを必要とさせた。伝統的には、政府に対する異議申し立ては、最高裁に提出することになっていた。しかし、それでは十分に対処しきれないので、行政法の整備が求められたのである。

裁判官の責任について、きちんと区分けをして扱うことが corruption に対処する一つの方法である。たとえば、裁判官の刑事責任、民事責任、免職などがそれである。なによりも、すべての裁判官が懲戒の対象となりうるようにすることが重要である。

裁判官が法を作っていくという点については、Kennedy 裁判官に同意する。しかし、裁判官の任務は、本来個別事件の判断に集中するところにあり、単に法と貧困を直結させるような発想を中心とすべきではないであろう。

裁判官の責任を問題にする一方で、民主主義の深化（たとえば、行政の透明性の確保）もなされるべきである。

質疑応答

・行政裁量の司法審査の可能性

・シオラレオーネでは、憲法は裁判官の immunity を定め、制定法は腐敗について裁判官の責任を明記していた。憲法裁判所は、汚職した裁判官を訴追して、有罪判決をくだした。

・判決の公表の望ましさについて、それは基本的にぜひなされるべきではないか。

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2001/07/11 15:00-17:00

記録者注：15:00 以降は、4 つの分科会が平行して開催された。4 つの分科会とは

Legal and Judicial Reform: Europe and Central Asia Regional Forum

Donor Coordination Meeting

Legal Aid Workshop

Judges' Workshop である。

名古屋大学の関係者は、Donor Coordination Meeting と Legal Aid Workshop には参加していないので、記録はない。

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2001/07/11 15:00-17:45

Legal and Judicial Reform: Europe and Central Asia Regional Forum

Friedrich Peloschek (Legal Vice President, World Bank)

ここでは、世界銀行がこの間支援を行っている法改革・司法改革に関する四つの問題ににについて検討を行う。それは、1 行政裁判、2 国民の裁判への参加、3 法学教育、4 汚職との闘争についてである。すでに、ラテン・アメリカにおいてわれわれが行ってきたこの分野の支援の経験が、ここでも役に立つ。それは、経済の自由化を促進する立法の制定・整備、裁判判決を公表する仕組みをつくり普及させること、そして、訴訟手続を当事者主義にすることである。これらの改革に基づいて法改革は進めなければならない。

Mark Dietrich (Consultant and author of the "Voices" report)

グルジア、キルギス、ポーランド、ルーマニアおよびロシアの五カ国における法改革・司法改革で重要なことは、それぞれの国の経済改革の進ちょく状況に応じた妥協を行うことである。その上で、それぞれの国における法改革・司法改革は、どれだけ法律家の力を強くすることができるか、どれだけ市民社会の力を強くすることができるかにかかっている。その際、これらの方向を押し進めるためには、国家官僚を国民がコントロールする行政裁判制度を導入すること、国民の裁判への参加の道を広げること、国民に対する法学教育の普及が大切である。

Jan van Olden (Director, Center for International Legal Cooperation, Liden)

中央ヨーロッパおよび旧ソ連諸国に対して、わたしたちは、民法典の制定について支援活動を行ってきた。この分野で特徴的なことは、民法典の制定という改革に対して国民の理解や支持を得ることが困難であり、もっぱら当該国の政治指導部の理解、支持、支援に頼らざるを得ないことである。現在、刑法典、刑事訴訟法典等の制定の支援活動にあたっているが、状況は同様である。したがって、改革の進ちょくは、

どうしても政治指導部の政治的利益に結びついていて、改革に必要な財源確保の問題も、結局これに依存することになる。改革にとって、現地の政治指導部が採った過った政策は、決定的な損害となる。

Lado Chanturia (Chairman of the Supreme Court of Georgia)

グルジアでは、司法改革は司法改革綱領を策定して、それに基づいて行っている。大統領も立法府もこの綱領を支持しており、われわれは新しい法律を次々に制定し、新しい制度へと移行している。例えば、仲裁裁判所を廃止して、法人や個人営業者関係の経済事件を含めてすべての事件を通常裁判所が扱うようになったし、最高裁判所のなかに行政事件を扱う行政部も設置した。これから、司法改革は、その第二段階へと入る。そこでは、検察庁改革が最重要の課題となる。われわれの法システムは、大陸法システムに属している。そのため、この間、主にドイツの GTZ やヨーロッパ会議の支援を受けて司法改革に取り組んできた。また、USAID、ABA、ソロス財団からも支援を受けている。

Rolf Knieper (Professor of Law, University of Bremen)

われわれは、グルジアにおいて民法典の制定について支援活動を行ってきた。また、現在、民事訴訟法典の制定についても支援活動を行っている。この支援活動を通して、民法典制定等の民事法改革は、より深くて適切なものとなった。今後、行政法関連法律の改革に関する支援へと向かうことになっている。われわれとしては、この支援活動を通して、新しい法律や新しい制度を移行過程にある諸国においてどのようにつくっていくべきかに関する技術を習得してきた。

Session 。　Plenary - Administrative Justice

Michel Scheltema (Professor of Law, Chairman of the Scientific Council of Government Policy; former Commissioner for the new Dutch Administrative Code, The Netherland)

行政と市民との間の権利義務関係を規律するために、行政法は必要である。オランダにおいて統一行政法典を制定したのは次の理由による。行政法には多数の法令があって、その数は多すぎ、朝令暮改もしばしばみられ、これを体系化して行政にとっても法律家にとってもその予測可能性を高める必要があった。官僚ではなく市民の立場に立って法典化を行い、誰にとっても理解しやすいものとして、不服申立等の救済の便宜もはかる必要があった。この行政法典は、公正、平等、合理性、効率性等の行政の諸原則をうたう総則、聴聞の実施等行政行為を行う前の手続（東欧諸国にみられる行政処罰に関する手続も副次的なものであるが入っている）、不服申立手続、そして、行政裁判所への訴訟手続から構成されている。

この法典は、中央政府と地方政府の両方に適用され、また、行政立法、行政行為等広い範囲の行政活動に適用される。租税法関係を除いてすべての行政法関係に適用される。不服申立について、顕著な改善がみられ、全体の３０％が国民の申立を認容するものとなっている。これは、現在グルジアが参考にしようとしている。

この法典化には、行政府は抵抗したが、政治指導部の支持を得て、広く利害関係を有する市民や研究者が参加してつくっていった。ドイツ、アメリカ、オーストリア等の国の行政手続法を参考にして、重要な

章から順につくっていった。この法典に違反する法律以下の法令は、違法となる。この法律の施行によって、現在、裁判官、行政官等の研修が必要になっており、また、運用の実際について、三年後に点検・評価を行うことになっている。

Howard N Fenton 」 (Professor of Law, Ohio Northern University Pettit College of Law USA)

ウクライナ、アルメニアおよびグルジアにおいて行政法制の改革の支援にあたってきた。どこの国においても官僚の抵抗は大きい。そこで、官僚が怖がるマスコミを利用して改革の支援を行ってきた。これら諸国においては、アメリカ行政法のモデルはそのまま使えないが、行政手続を整備することは重要であり、この点で、オランダの経験は当該国の行政法制の改革にとって役に立つ。現在、ウクライナとアルメニアでは行政裁判所設置の計画がつくられたところで、これから関係部署の同意を取り付けて、具体的な法案化を行わなければならない。この二つの国では、行政裁判所法の作成へ向けたゆっくりとした歩みがある。将来、政治指導部の支持があれば、行政法典化も可能かもしれない。

一方、グルジアの改革は興味深いものがある。ここでは、すでに、行政手続法案は最終テキストが完成している。規則制定手続を含む行政手続法で、アメリカの専門家が支援に入っている。ただ、行政法の改革の場合、その国の政治や文化の影響は大きくて、ドナーは自国のモデルを改革へ向けた提案とすることはできない。この点で、アメリカの行政手続法は有益ではなく、むしろドイツやオランダのそれが有益であることを、われわれは認めなければならない。行政処罰法の問題についても同様である。

Jacek Chlebny (Judge, Naszelny Sad ASdministracyjny w Lodzi, Poland)

ポーランドでは、第一次世界大戦後行政裁判所が設立されたが、戦後は廃止されていた。しかし、1981 年に、再び最高行政裁判所が設置されて、行政決定を国民は裁判所に訴えることができるようになった。昨年の行政事件数は、６５，０００件に達していて、ここ２、３年で数は２倍に増えている。事件の半数は、税および関税の事件である。現在、最高行政裁判所とその１０の支部に２２４人の裁判官がおり、裁判は３人の合議で行われている。裁判官には、３５歳以上の法律家または行政官で、１０年以上の実務経験を持つものから選ばれている。 判決には拘束力があり、行政行為の法効果を取り消し、行政機関は、判決に従って執行しなければならず、執行しない場合は、執行罰または損害賠償命令が課せられる。問題点は以下の通りである。1 裁判は１審制であること、2 審理が２年以上におよぶこと、３行政行為を変更する権限を持たないこと、４判決を執行しない場合の救済が十分でないことなどである。

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2001/07/11 15:00-17:00

Judges Workshop

記録者注：主要なテーマは、裁判官の研修をどのように組織して、運営すべきであるかであった。実際には、いろいろな報告がなされたので、全体としては、まとまりがない。

Shlomo Levin (Deputy Chief Justice, Supreme Court, Israel)

裁判官研修のグローバリゼイションについて

golobalization という言葉は、現在のはやりである。就任に先立って訓練を受けるというメリットが大陸法にはある。英米法系では、実務の経験を積んでから裁判官に任命にされる。しかし、弁護士としての実務経験が裁判官として職務につねに有益であるとは必ずしもいえない。

裁判官同士の国境を越えた交流が進んでいるが、それは、一定レベルの研修の共通性を確保することにつながっている。来年イスラエルで開催されるイスラエル政府主催の裁判官研修プログラムにおいても研修の専門家が各国からまたさまざまな組織から招かれている。研修としては、インターネットを用いるものから、地域的な会合までさまざまな形態が可能である。

英米法系では、大陸法系のように事前の研修を要求することになるであろうし、大陸法系でも裁判官の実務研修が必要と思われるようになるであろう。

Sandra Oxner (President, Commonwealth Judicial Education Institute, Dalhousie Unv., Canada)

裁判官研修と司法改革に関連して報告する。

自分の所属する機関は、コモン・ロー系諸国(52)の裁判官研修プログラムを提供し、合衆国の federal judicial center と似た活動をしている。プログラムは、裁判官だけでなく、書記官についても訓練プログラムを提供している。この種のプログラムの導入を検討している国に対しても援助している。プログラムへの参加は任意である。開発しているのは、各種の教育プログラムである。中心となっているのは、3週間のプログラムであり、司法府の弱点を克服するような内容となっている。研修以外に周辺的なプログラムもまた提供している。

フロア-からの発言（フランスの裁判官）

あまり大陸法と英米法という二つの法系の違いを強調するべきではなく、裁判官は、よく似た機能を果たしていることに注目すべきである。裁判官の研修については、百科事典的な知識の習得への誘惑が働くが、裁判官としての専門的訓練との兼ね合いが問題となろう。さて、フランスでは研修には、新任研修と職務研修 in service training とがある。後者については、希望する科目、訓練その他を受けることができる（知識の更新、新しい紛争処理方法の習得その他）。

フロア-からの発言（ロシアの裁判官）

ロシアには Academy of Justices という組織がある。これは、裁判官に対する継続的教育の提供を目的とする組織である。裁判官の専門分化を推進することも機能に含まれる。裁判官研修所を修了後も手続その他について研修を行う。さらに、３年以内に半日の必須研修が求められる。研修所は、全国に１０存在する。裁判官は、職務を係属しながら、上級学位を取得することができる。これらの機会を通して、法の均質的適用が可能となっている。

フロアーからの発言（発言者不詳）

チェックリストを作成して、裁判官になすべきことを意識させることが必要ではないか。

Antonio Garcia (Supreme Tribunal, Venezuela)

ベネゼエラでは、最高裁長官会議で judege network IUDICS:harnessing knowledge というプログラムの開発をすることを合意して作業に着手した。その結果、緩やかなネットワークが形成された。人権問題、司法制度その他で協力が可能となった。これは一種の情報交換システムである。それは、computer network を媒介にして情報を一般に提供する一方、裁判所関係者に対するバーチャル学校を開くという機能ももっている。

Maria Poza Cisneros (Justice, General Council of the Judiciary, Spain)

Canari's declaration について報告する。ラテンアメリカの国際的な最高裁裁判官会議は、ラテン・アメリカンの裁判所を対象とする会議を組織した。インターネットなどを介して参加諸国の司法制度の向上の協力が試みられている。

Lucia de Tobon (Vice President, Judicial Council, Colombia)

記録者注：Mexico workshop という会議が開催されたこと、その報告書の一節が朗読されたが、ポイントはよくわからなかった。

Paul Cotter (President, Rule of Law Fundation, U.S.A.)

internet and knowledge について報告する。イスラエル、カナダ、オーストラリア、アメリカが協同して組織(Rule of Law Foundation)をつくり、可能な限りの法関連資料を集める計画である。裁判官用の図書館、倫理、書式などの整備を測ることが目的である。裁判官の間の連絡網を確立する。さらに裁判所の標準条件（俸給、設備、その他）についても検討を始めている。

Albie Sachs (Justice, Constitutional Court, South Africa)

Courts as a guardian of the consitution of human rights について報告する。

かつては、誰が裁判官であるかは容易に特定できた。しかし、現在では必ずしもそうではない。裁判官は、普通人になってきた。人権の保障について、われわれはどのようなアプローチができるのか。スカリア裁判官は、憲法の定める体制を守るべきだとすれば、裁判所は contorvertial な問題に裁判所は介入すべきでないという見解をとった。それは強力な議論だが自分は、納得しない。議会や行政は、必ずしも虐待されている人々、つまり政治ゲームの外にある人々を保護するとは限らない。しかし、社会が moral society でありつづけるべきであるとすれば、それらの人々の人権を保護しなければならない。その文脈では世界人権宣言その他は決定的に重要である。国際的なレベルで考えると、ある裁判所の判決は、国境を越えて他の裁判所の多数となる可能性をもっている。重要なことは、その力は、数ではなく思想であり、哲学である。裁判所の仕事は、自分の使命を意識しながら、行政や立法の行動を監視することであろう。

Paul Magnuson (Chief Judge, US District Court, Minnesota, U.S.A.)

Judicial ethics について報告。

裁判官倫理では、ある種の行動基準を意味している。世間は、ふつうより高い基準であることを期待するのである。（発言内容は別紙がある。）

以上

# 7．配　布　資　料

セッション２

パネリスト（森嶌先生）提出資料

# Japanese Cooperation in Legal and Judicial Reform of Economic Transition Countries in Asia

Professor Akio Morishima

A World Bank Conference

" Empowerment, Security and Opportunity Through Law and Justice "

July 8-12 2001

Tavrichesky Place

Saint Petersburg, Russia

## 1 Society and Law

Law is a system of social norms through which a state controls the activities of people under its jurisdiction. A legal system is accepted by society and functions well if it is founded on other norms such as morals and customs which have emerged and are inherent in the society. Throughout history, however, laws in one country were received by other countries when different cultures came into contact and one was affected or conquered by the other.

In the process of its unification in the 19th century, Germany received Roman law while Germanic customary laws prevailed there in the medieval era. Japan introduced European legal systems (French, German and English laws) in the last half of the 19th century in order to modernize the country. In both countries serious controversies broke out as to whether the reception of law would not destroy the normative order of their society. To make a compromise between Western legal rules and Japanese traditional norms, Japan retained somewhat feudal rules in family law and succession law. In addition, in order to avoid a direct application of Western rules to Japanese society, conciliation or mediation procedures were extensively utilized in and out of court reconciling Western rules with societal norms. Courts often interpreted provisions of law that had derived from Western rules in quite a different way from the original concept, in adjusting them to meet social needs.

While the Western Powers colonized Africa and Asia since the 19th century, suzerain states directly or indirectly introduced their own legal systems to their colonies. On the other hand, cultural anthropological studies were

developed to seek a better way to administer colonies with less conflict between society and the introduced law. In most colonies Western legal rules were applied to a very limited sector of society, leaving traditional customs intact. For example, the British colonial administration adopted a dual legal system in Nigeria to avoid conflicts between common law and indigenous society. In rural Moslem communities Islamic priests presided the court applying Islamic laws (sharia) while in urban areas where the British and non-Moslems lived the common law system was introduced. This dual system remains in Nigeria even after independence.

Unification of laws is not so easy even in the Western world. In the United States where the federal system is adopted each state has its own laws and courts beside the federal legal system. When interstate commerce developed it became inconvenient to have legal rules that differed from one state to another. The efforts to unify legal rules started in the form of the Restatements or uniform Codes. However, it has taken time to reach an agreement to unify legal rules in spite of the fact that, apart from historical and political backgrounds, there are few differences among states in terms of culture and society. In Europe efforts have been made to harmonize and unify European law by organizations such as UNIDROI. While scholars of comparative law have devoted themselves to explore a system of uniform legal rules that can be applicable universally, the discrepancy between the German legal system and French one, not mention the common law system, has not yet been bridged.

The above-mentioned examples show that a legal system in one society can hardly be transplanted to other societies with different cultures. A rule in one society may not be accepted by another society. The legal system is a historical and cultural product of the society. If one does not understand the relationship between the law and society, any experiment for a transplantation of law cannot be successful. This fact should not be ignored particularly when a donor organization carries out legal assistance projects in other countries with different political, social and cultural backgrounds.

## 2 Law and Development Movement

In the 1960s and 1970s the law and development movement (LDM) flourished in the leading law schools in the United States. The US donor agencies and foundations dispatched legal advisors from law schools to African and Latin American countries to bring a free market economy and liberal democratic government institutions into these countries. The believers of this movement presupposed the so-called modernization theory. According to this theory, development was an inevitable evolutionary process from the pre-modern state of society, with irregularity and localism, to the modern state of Western society, with uniformity and universality. Development would ultimately bring about economic, political, and social institutions similar to those in the West. In the development of a market economy and Western-style democratic institutions, the rule of law was considered to be as an indispensable element.

The scholars of law and development tried to transplant the American legal system to developing countries without paying serious attention to the rules and customs of traditional communities in those countries. The political implication was, however, to win those countries over to the side of the United States in confronting Soviet Russia. The LDM was in reality a part of the political strategy of the United States during the Cold War.

However, by the mid-1970s the LDM had been openly criticized by the scholars who were initially participants of the LDM as being ethnocentric and naïve. Critiques argued that the LDM had ignored the social stratification and class differentiation in developing countries and had failed to take into consideration the function of local communities in the society. As a result of such fundamental criticisms the LDM lost the momentum of the initial stage and faded away.

## 3 International Legal Assistance Projects for the Countries of Economic Transition

After the collapse of Berlin Wall and the Soviet Union, communist countries have made the transition from communist command economies to market-based economies. The social and political conditions of these countries of economic transition vary from one country to another. Russia, as the leader of the former Soviet Union, has the infrastructure of a socialist legal system, including human resources, although fundamental principles and concepts of socialist law are quite different from capitalist law. Some countries formerly under communist control, such as Poland and Hungary, could achieve legal reforms based on the previous experiences in the civil law system prior to the communist regime. On the other hand, some of the former members of the Soviet Union in Central Europe do not have sufficient knowledge and resources to cope with the new situation. They need legal assistance from outside.

In Asia, China started legal reforms as early as the beginning of the 1980s under the strong initiatives of the Communist Party. During the Cultural Revolution in the 1960s and 70s the law and lawyers were considered as counterrevolutionary and legal institutions were completely extinct in China. The legal reforms and the rebirth of the rule of law for shifting to the socialist-market economy, however, have been implemented by the Chinese Government in order to avoid interventions from capitalist countries. While many foreign lawyers from capitalist countries have been invited and provided technical information of the market law, they have never been directly involved in the legislative process. Countries such as Vietnam and Cambodia, having fought long wars almost incessantly since World War II, have neither the existing legal institutions nor the capacity to design the market legal system.

While social and economic conditions of countries of economic transition are vastly different, they all have adopted the idea of the rule of law in trying to establish the liberal market in their own country and participate in the world economy. In order to promote industry and the market they desperately need to attract investments from capitalist countries. They also wish to be involved in international transactions to earn foreign currencies. For all these reasons they have vigorously made efforts to introduce Western capitalist law into their society.

To assist the developing countries of economic transition, some Western governments, international donor organizations, and private organizations started legal assistance projects in the 1990s. A new LDM has been revived in the United States more than one decade after the decline of the early LDM. Legal scholars and practitioners from the United States have been actively involved in the legal assistance projects. Despite the failure of the early LDM in the seventies, the thrust of legal assistance policy today remains essentially the same as the early one, namely the transplantation of free markets, democracy, and the rule of law in the countries of economic transition regardless of their political and economic conditions.

Some international funding organizations have requested recipient countries, as conditionality for financing, to introduce laws such as land law, security law and bankruptcy law in order to secure loans. Western lawyers, in many cases American practicing lawyers, are sent to the recipient country by the lender as a consultant to draft requested laws. They often copy a law of their own country disregarding the actual conditions of the recipient country. As a result, in some cases, legal rules inherent in common law were brought into the country where the basic legal structure had been founded on Continental law. In an extreme case a law of security on immovables, which required registration at a governmental office in order to establish and transfer the security right, was drafted for the country where no land registration system existed.

## 4 Japanese Legal Assistance Project

The government of Japan officially launched a legal assistant project for Vietnam in 1996 after two years of negotiations, as a part of the technical assistance project scheme. Prior to this project, individual programs such as training courses in Japan and overseas workshops for lawyers of the countries of transition economies had been held by various organizations including the government. The Japan International Cooperation Agency (JICA, Japan's international aid agency) has carried out legal assistance projects with the cooperation of the Ministry of Justice, the Supreme Court, the Japan Federation of Bar Associations and some universities. The legal technical assistance project for Cambodia started in 1998 and the scheme will be expanded to Laos this year. The main components of these assistance projects consist of four elements: (1) assistance to legislation, (2) provision of legal information, (3) capacity building, (4) provision of equipments. Since their inauguration these projects have been growing in terms of the number of lawyers' organizations involved on both sides, the budget, and the contents of assistance.

As described in Chapter one, Japan started its modernization in the middle of the 19th century and adopted Western legal systems to fit its society with Asian cultural backgrounds. It took nearly a century for Japan to adjust Western legal rules to our society. However, in the swift process of globalization of economies in the 1990s, the developing countries of transition economies in Asia have not had enough time and resources to adapt their societies,

which have Asian cultural backgrounds and a tradition of command economies, to the Western legal rules. Legislators in Vietnam lack sufficient knowledge and information to build the system of Western-style market laws. Governmental officials and judges do not have the expertise to enforce laws. People in society are still foreign to the idea of free will. Practically all lawyers having been killed and legal institutions having been destroyed under the Khmer Rouge regime, Cambodia is not capable of reconstructing its legal system by itself.

Having long and rich experiences in receiving foreign laws in Japan and recognizing the difficulties of these countries in Asia in the process of economic globalization, the JICA's legal assistance project adopted the following policies in implementing the project.

First, Assistance to legislation of fundamental market laws: the JICA project regards it as important to provide assistance in the area of fundamental legal institutions, such as civil law, commercial law and civil procure law, which constitute the legal infrastructure of a market economy. In some countries of transition economies, legislation has been randomly made in accordance with urgent needs for marketization without discreet considerations of consistency and uniformity of their legal system. Vietnam enacted a foreign investment regulation in response to the needs for foreign investments before introducing laws for regulating business activities for which investments were to be made. A law of business contracts was made after foreign investment companies became involved in commercial transactions with domestic companies. As a matter of fact, a law for domestic companies did not exist when foreign investment entities were established. In the long run, the market requires to have a consistent system of laws founded on fundamental principles for the free market. General laws, such as civil law, are fundamental to the market. From a strategic point of view, it is vitally important to assist countries of transition economies in constructing legal infrastructure on which a consistent system of laws for the market is to be founded.

Second, Provision of information and legal skills to cope with urgent needs: the JICA project is making tremendous efforts to provide information on laws that are prerequisite for the country of economic transition to participate in international organizations such as WTO and ASEAN. The countries of economic transition are urgently required, whether they wish for it or not, to introduce a vast number of new legal institutions, such as intellectual property law, anti-trust law, and international arbitration law, in order to participate in international community in the process of economic globalization. It is critical that they make preparations for legislation in these areas. Since laws in these areas are highly technical, they desperately need detailed technical information.

Third, Participatory methods for transferring legal technology; Japanese legal experts make efforts as much as possible to provide technical information of legal rules and principles in the Western legal systems including the Japanese system, with their historical and social backgrounds. The discussions with lawyers of the recipient country are carried out interactively. The reasons for this participatory method are: (1) to improve the capability of lawyers of the recipient country, and (2) to avoid estrangement of proposed legislation from their own society. For example, in

Cambodia, Japanese teams of law professors and practitioners are working on drafting the Civil Code and the Civil Procedure Code. In order to make these Codes applicable to Cambodian society the draft provisions prepared in Khmer by Japanese teams are discussed with Cambodian group of judges and legal officials at the workshops. While Japanese legal experts lead discussions and give advice to Cambodian lawyers, it is up to Cambodian officials to decide which rules of different systems are ultimately to be chosen as the law of their country. In Cambodia Western consultants usually draft laws in the language of their country without prior consultation with Cambodian lawyers. However, our policy for legal assistance holds the ownership of the recipient country in high regard.

Fourth, Introduction of research methods of sociology of law: In order for a legal institution to have roots in society, it is necessary to understand the norms and customs of the society before it is introduced. It is true that conducting scientific studies of legal sociology to know social norms requires vast amounts of time and money. It is extremely important, however, for legislators to comprehend the relationship between law and society. In Vietnam, after the enforcement of the Civil Code of 1995, a small- scale field study concerning family ownership and land transaction was conducted by the Legal Research Institute of the Ministry of Justice as a part of the JICA legal assistance project. On the basis of this experience a new social research program under the JICA project is planned to prepare basic sociological data for the proposed amendments of the Civil Code. We hope that the sociological approach will enhance the legislative capacity of Vietnamese lawyers.

Fifth, Strengthening training for capacity building at all levels: To improve capacity of legal experts of the recipient countries, JICA provides one-month general training courses in Japan and three-to-five day technical workshops on specific topics in the recipient countries. Currently, approximately forty experts from Vietnam and twenty from Cambodia are invited annually to the training course in Japan. Similar courses are offered to other countries of economic transition. Long-term and short-term legal experts (in total over fifty annually) are dispatched to hold workshops. Since the legal assistance project cannot last for long, it is vital to enhance the capacity of the lawyers in the countries of economic transition to continue legal reforms by themselves. JICA sends a long-term expert to Vietnam to help establish a training system for judges. JICA also offers scholarships to law students from developing countries in Asia to study either at the graduate or undergraduate level at Japanese universities. The students would be trainers in law after they come back to their own countries.

The countries of economic transition have to cope with economic globalization in a short period, in spite of lack of human and financial resources and of experiences. They have to solve many difficult questions simultaneously. However, unless they have long-term perspectives and strategies for their own law and society in the future, short-sighted legal reforms will simply bring confusions in the society. We believe that Japanese experiences in importing the Western legal system to non-Western society may help Asian countries of economic transition make unique and wise balances between the Western legal principles and social norms of their own.

## 5 Regional Cooperation for Legal and Judicial Reforms

Asia is diverse in terms of geography, history, culture, political regime and society. Levels of economic development in Asian countries range from the category of the developed to the least among less developed. Because of this diversity and many other reasons, no forms of regional cooperation regime, except ASEAN, have been successful in Asia. Legal cooperation would be even more difficult because some countries in Asia have legal systems derived from Continental European law, and others from Anglo-American law. The idea of a regional law center for the Mekong Delta countries emerged among parties including the Asia Foundation in 1994, but the plan has not been implemented, probably because of lack of sufficient funds and conflicts among legal systems.

Region-wide cooperation for legal and judicial reforms seems currently infeasible in Asia. Bilateral cooperation between developed and developing countries would be practical. Legal assistance programs to Vietnam and Cambodia have been proposed increasingly by donor countries and international funding organizations since the late 1990s. Some programs from different donors are redundant and even conflicting, while some areas are not covered by any assistance program. It has been pointed out that cooperation and coordination among donors is necessary. The World Bank has become interested in the coordination among legal assistance programs.

We recognize that economic globalization is now inevitable for any country in the world. However, we are reluctant to accept the unilateral introduction of the free market, Western style democracy and rule of law to the counties of economic transition without regard actual conditions of these countries. The donors should be reminded that market economies may aggravate, not alleviate, poverty in developing countries. The market economy is not a goal but a mere measure to attain better quality of life of the common people. The goal of legal assistance should be to enhance the ability to build up good governance of society upon the ownership of the people of the developing countries. For this purpose donors should take a long-term view and assist them mainly in capacity building. It is essential for donors to respect the initiative of the recipient country before they start negotiations among themselves. So long as all participants of this conference can share the above-mentioned goal, we are willing to join the discussions for further cooperation among donors.

# ドナーコーディネーションミーティング
# 配布用資料

# BASIC POLICY FOR LEGAL ASSISTANCE*

# OF JAPAN

July 11, 2001

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* This paper was prepared by the Mission of ***Japan International Cooperation Agency (JICA)*** for the purpose of presenting the basic policy, including goals, definition, significance and necessity, concerning the Legal Technical Assistance of Japan on the occasion of ***A World Bank Conference Co-Hosted by the Government of Russia on the Legal and Justice Reform***. The views in this report are those of the members of the JICA Mission attending the Conference.

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## I. DEFINITION OF LEGAL ASSISTANCE

A. While international cooperation of Japan in the legal and judicial field dates back to 1962, when the Ministry of Justice invited UNAFEI[1] (United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders) to Japan, technical assistance focused on legislation and implementation of such laws as civil and commercial law commenced in 1993. We currently call this assistance *"Ho-seibi-shien"* in Japanese, which can be literally translated into "Legal Improvement Assistance." *"Ho-seibi-shien"* (hereinafter referred to as "Legal Assistance") has been financed and managed chiefly by the Japan International Cooperation Agency (JICA), an organization that handles Japanese official development assistance (ODA) since 1996. On the basis of past Japanese experience, Legal Assistance can be defined as:

> "extending support to developing countries in their efforts to develop their law, which encompasses support for drafting of specific bills, creation of various legal systems for the implementation of laws and the capacity building of legal experts and practitioners."

The reason this report begins with the definition of Legal Assistance is to emphasize that Legal Assistance should not confined to the mere drafting of specific bills and that importance should be placed on the implementation of law and capacity building of legal experts and practitioners. It seems that the assistance in the past tended to center on the drafting of specific bills, and in some cases it has involved nothing else. Thus, there may be doubt in these cases as to whether due consideration has been paid to ensuring that these bills actually function in recipient countries.

The above definition is intended not only to be used for the purpose of self-regulation by those engaged in Legal Assistance, but also to demonstrate our belief that law should be actually implemented and applied in order for it to be truly called "law."

B. Inasmuch as Legal Assistance is defined as above and its substance understood to be as above, it should be noted that various individuals and organizations[2] are engaged in these activities in one way or another and that their policies may vary. However, each of the Japanese members attending this conference has played a key role in Legal Assistance provided as the ODA. The views expressed in this report are the results of the discussion of the members, although they are not necessarily those of the organizations involved.

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[1] UNAFEI was established according to an agreement between the Government of Japan and the United Nations.

[2] E.g., JICA, the Ministry of Foreign Affairs, the Ministry of Justice, the Supreme Court, other government ministries and agencies, the Japan Federation of the Bar Associations, universities, non-governmental organizations (NGOs) and nonprofit organizations (NPOs).

## II. SIGNIFICANCE AND NECESSITY OF LEGAL ASSISTANCE

### A. Law and Society

Since law is a sort of a means of social control and the norms of the society, law is closely related to the direction the society wishes to take as well as to its various social norms. Law functions well as a means of controlling society if the law conforms with such social phenomena as morals and customs, which have been generated naturally within the society, and if it is supported by these phenomena. In this sense, law is closely related to such societal aspects as history, politics, and economic issues. Thus, law can be viewed as a feature of the culture of a country.

However, when societies with different cultures encounter each other, discord may arise between them. When the culture of one society undergoes transformation under the influence of another, changes in law take place. Serious controversies would surround the adoption of new laws that are grounded in a fear that the introduction of law not derived from the original society could destroy hitherto cultivated morals and customs. This was the case in the adoption of the Roman law in Germany. Japan encountered similar issues in the adoption of Western laws in the latter half of the 19th century.

This indicates a close interrelation between law and society, and means that introducing law that lacks due consideration for resolving any disparities between the law and social norms is bound to fail. In the 1960s, this appeared to be a reason for failed attempts to modernize the legal systems of a number of countries in Africa and South America.

### B. Current Social Conditions and the Significance and Necessity of Legal Assistance

If a country can prosper and attain security and happiness for its people without contact with another country of different culture, it needs only to follow its own legal norms. In such cases, Legal Assistance would not be an issue. However, while international economic activity has existed in varying degrees since ancient times, in the latter half of the 20th century, in particular, rapid progress in transportation and telecommunication coupled with post-Cold War moves of socialist countries toward a market economy has led to a sharp increase in global economic activity, both qualitatively and quantitatively, not only in terms of merchandise but also knowledge, information, technology, and services. Any country cannot maintain growth without engaging in such international economic activity.

Under these circumstances, developing countries, as members of the international community, need to develop their legal systems on a common basis with other countries. In this respect, they have little choice but to adopt the law of more developed nations. In particular, countries that had state-controlled economic systems for many years are adopting a market economy as well as open door policies, and they are promoting the introduction of foreign investment, technologies, and so on. This has made the development of legal systems indispensable to efforts to ensure that economic activities proceed smoothly and securely.

While some countries have moved into a market economy, others are trying to recover from the Asian financial (currency) crisis while striving to carry out reforms that will enable them to cope with economic liberalization and globalization. Legal Assistance is also essential for these countries.

## III. SIGNIFICANCE AND NECESSITY OF LEGAL ASSISTANCE OF JAPAN

### A. Current State and Issues of Legal Assistance

To date, international institutions[3] and developed countries[4] have been engaged in a variety of Legal Assistance activities focusing on countries that have moved toward a market economy.

Countries that have moved toward a market economy need both to realize well-functioning domestic markets and to introduce foreign investment. For this purpose, many have introduced Western law, regardless of the extent of the development of their domestic markets. In these countries, because the introduction of foreign investment requires laws such as land law, mortgage law, bankruptcy law and foreign investment law (which are all requisites for receiving loans), the legislation of these specific laws has been prioritized. This means that basic laws such as contract law and

[3] E.g., the United Nations Development Program (UNDP), Asian Development Bank (ADB), European Bank of Recovery Development (EBRD), World Bank (WB), etc.

[4] E.g., Australia, Canada, Germany, France, Sweden, the UK, the USA, etc.

commercial law are often introduced on a piecemeal basis. Because recipient countries are themselves limited in planning capability, they tend to rely largely on bills that have been drafted by foreign legal experts working as consultants. As a consequence, the following cases are found among recipient countries:

1. For a mortgage registration system to function, first an insurance system that ensures compensation of losses incurred in the course of transactions should have been developed. However, despite the absence of this kind of system, a country may pass a mortgage law that assumes ready access to such an insurance system.
2. In another scenario, despite the fact that in the absence of a developed registration system for real estate (or any plans to create one), it is practicably impossible to make registration the essential element in transfer of land ownership, a country brings into effect a land law that requires immediate registration without considering such alternative measures such as having certain interim provisions in place or making registration the essential element for verification of titles against third parties, not for transfer itself.

Institutions that provide Legal Assistance are in fact procuring funds and conducting activities in accordance with their own policy and mission. Their relationship with funds providers means that they cannot extend support in any way they see fit because of the need for accountability to the providers. Thus, it is not really surprising that they tend to direct their efforts toward the introduction of specific, individual laws for which they can predict results with relative ease.

However, since law exhibits its full functions only when it is brought into effect and applied, it is essential for support to be carried out in a truly effective way from an overall and realistic standpoint that also ensures the implementation and application of the said law.

**B. Significance of Legal Assistance of Japan**

In light of the issues discussed above, when providing Legal Assistance, it is essential to promptly meet the urgent economic needs of countries that have shifted to a market economy and to make law practicable for the societies of recipient countries. In addition, it has to be ensured that even if certain laws contain parts difficult to enforce at that particular point in time, the future should be looked into, that is, the future when the legal systems will be more advanced and the desirable consistency will be realized between these parts of the system and others.

Bearing this in mind, the reasons and advantages for Japan to provide Legal Assistance and its significance may be summarized as follows:

1. Japan has introduced civil law system from France and Germany over a period of around 130 years since the latter half of the 19th century, and common law system after World War II. Japan has

harmonized both systems of law with Japanese circumstances. This has been a valuable experience in the adoption of law from different societies, and it enables us to share a sense of the difficulty that recipient countries are experiencing at present.

2. Thanks to studies of each legal system in the course of introducing civil law and common law, Japan has accumulated an excellent store of knowledge through comparative analysis of the both. Thus, Japan is in a good position to point out how the introduction of certain systems influences the existing system. Having had experience in adopting laws from other countries, Japanese legal experts can relate to others their experience in terms of the effects of this process. Moreover, the experts can make a contribution by relating our experience in resolving conflicts between introduced law and existing social norms, finding out what is required for the actual implementation and application of such law, and ensuring that legal systems are consistent.

3. Importance should be placed on the establishment of a basic system of laws consisting of Civil and Commercial Law and the Civil Procedure Code, among others. These are key laws for a market economy. Also important for the same reason is establishment of legal systems that are instrumental to the fair and efficient solution of disputes. Civil and commercial law and a fair and efficient civil adjudication system are of prime importance in ensuring freedom of economic activities among independent and private economic participants. Assistance for drafting specific laws required in connection with foreign investment has been provided as well by other donors. Giving priority to the development of basic laws is therefore believed to be beneficial in terms of avoiding duplication with other donors as well as promoting cooperative liaisons among the donors. In addition, because of considerable differences in legal technicalities between common law and civil law, inconsistent introduction of both systems of law will only invite confusion. Thus, it will be greatly significant for Japan to make recommendations based on its own experience to other donors.

4. Of the members of the Group of 7, Japan is the only one located outside of Europe and North America. Many developing countries are also located outside the regions of Europe and North America. The legal system of Japan, having arisen from the aforementioned circumstances, may offer some significant alternatives for these developing countries. Japanese experience gained in the course of legal development through the adoption of common law will also offer significant guidance to these countries.

5. Japanese contribution to Legal Assistance in the intellectual arena will lead to the growth and security of the international community as a whole, including Japan. This is of great significance from the perspective of Japan's contribution to the world community.

## IV. BASIC POLICY FOR LEGAL ASSISTANCE OF JAPAN

### A. Basic Policy of Official Development Assistance (ODA)

Legal Assistance provided by Japan is being conducted mainly through elements of its ODA program that are administered by JICA. The ODA of Japan is implemented in accordance with its ODA Charter, which states "Japan attaches central importance to the support for the self-help efforts of developing countries towards economic take-off. It will therefore implement its ODA to help ensure the efficient and fair distribution of resources and "good governance" in developing countries through developing a wide range of human resources and socioeconomic infrastructure, including domestic systems, and through meeting the basic human needs (BHN), thereby promoting the sound economic development of the recipient countries." (Quoted from the Official Development Assistance Charter, dated June 30, 1992).

In particular, the charter states that "Historically, geographically, politically and economically, Asia is a region close to Japan," and "it is important for the world economy as a whole to sustain and promote the economic development of these countries. There are, however, some Asian countries where large segments of the population still suffer from poverty. Asia, therefore, will continue to be a priority region for Japan's ODA." (Quoted sections are from the Official Development Assistance Charter mentioned above.)

This policy is in accord with the experience of Japan, which has started to make an intellectual contribution via Legal Assistance. The policy explicitly mentions the importance of self-help, fostering of human resources, development of economic and social infrastructure, and good governance.

### B. Basic Policy Regarding Legal Assistance of Japan

Japan commenced Legal Assistance on a full-scale basis in 1996, and it has provided ongoing Legal Assistance to Vietnam as a pivotal means of assistance and part of JICA key policies. This year is the second year of the second phase and the fifth year from the beginning of this cooperation. Full-scale support has also been extended to Cambodia through a 3-year program that commenced in 1999. This program is providing assistance for the drafting of bills for a civil code and a civil procedure code. Legal Assistance to Laos will get underway in full using these experiences as a reference, and the number of countries receiving assistance from Japan will increase further in the future.

Legal Assistance of Japan to date starts with Japanese universities' acceptance of overseas students. It also includes other activities of an academic nature such as professors' offering of personal advice on the drafting of bills, and the Japan Federation of the Bar Associations sponsoring seminars mainly through its international exchange commission. The Ministry of Justice has also taken part by organizing courses in Japan and dispatching legal experts to seminars in recipient countries within a JICA framework for Legal Assistance. The Supreme Court is also involved in

dispatching legal experts.

Furthermore, International Cooperation Department was newly formed at the Research and Training Institute of the Ministry of Justice in April of this year. It specifically deals with Legal Assistance. In the future, the aim will be to step up Legal Assistance activities as a whole through further cooperation with other institutions in the legal domain .

To achieve the above-mentioned ODA policy, we follow, in the field of Legal Assistance, the policies below, based on our experience in developing Japanese law since the latter half of the 19th century:

**1. Respect for the Ownership of a Recipient Country**

When providing ODA the self-help efforts of recipient countries must be bolstered, and to ensure that this happens, sufficient care must be taken to engage in policy dialogue with the governments of these countries. In the field of Legal Assistance in particular, merely developing law and systems within papers will not achieve the desired objectives. These law and systems must take root in society. Thus, it is essential, as the first requisite for this type of assistance, that the government of a recipient country maintains its ownership.

There must therefore be adequate prior dialogue with recipient countries, and when providing advice and/or recommendations, it is required to:

a. give these countries alternatives

b. explain the advantage and disadvantage of these alternatives, and

c. call on these countries to make their own final decisions.

Only this approach can adequately foster human resources required to handle the operation of legal systems in these countries.

**2. Legal Assistance That Takes Root in a Recipient Country**

Legal Assistance cannot attain its goal by merely assisting the drafting of bills or enactment of laws. It only has significance when law is actually implemented and applied. Accordingly, the government of a recipient country has to have a true desire to carry out legal reforms, and it has to have the public support. However, from the standpoint of the assisting country, and in order to make the content of proposed cooperation satisfactory to the government and people of a recipient country, it must be always borne in mind how Legal Assistance will function amid the actual conditions of the recipient country.

In this respect, it is particularly important for us to ensure that legal technicalities and basic concepts that are common throughout the world are distinguished and handled accordingly. With regard to legal technicalities, there are numerous considerations, such as whether the legal system of a recipient country is under civil law or common law, and,

in the transfer of property rights, whether registration is an element that effectuates the transfer, or is an element for verification of titles against third parties. In this type of case, adopting the system most suited to the realities of the society is the best way to ensure that laws take root. However, in the case of basic principles, the dignity of individuals and their equality before the law, for example, should not be ignored just because of differences in the actual conditions and customs of the society. Social conditions in Japan immediately after World War II were not satisfactory in this respect. However, through adoption of the new constitution and other laws, Japanese saw an improvement in this situation, and can now say that current social conditions conform to what these laws originally intended to achieve. That is to say, we should not forget that law can be a driving force for shaping social consciousness in a desirable manner.

Similarly, regarding legal principles that are indispensable toward establishment of a market economy, even if certain aspects of a law appear to be far removed from the actual state of the society when the law is introduced, these should still be stipulated in the law, and given enough publicity in order to bring about the situation intended by the law.

Therefore, while laws should correspond to the actual circumstances of the society, we should also help lead the society toward the situation for which laws are intended. To achieve this, Japan has adopted the following measures:

a. Prioritizing the development of basic laws from a long-term perspective

Legal Assistance of Japan focuses on developing basic laws and systems fundamental to supporting a market economy. Such laws and systems include civil code, commercial code, civil procedure code and judicial systems. For this reason, areas of criminal law instrumental to maintaining the order of a market economy should also be covered.

As stated previously, civil and commercial law as well as fair and efficient civil procedure code are fundamental to ensuring freedom of economic activities among independent and private participants.

Also, prioritizing development of basic laws is believed, in the long run, to result in establishment of the rule of law in that it strengthens public awareness of rights and obligations, and facilitates their assertion of legal rights. In addition, in terms of the development of special laws, these laws can take practical effect only when a means of resolution through reliable judicial processes is established. Thus, a sound and efficient system of justice is the key to all legal systems.

b. Transfer of legislative technicalities and capacity building through participation

To assist in the drafting of civil code and civil procedure code in Cambodia, sub-committees have been organized that are comprised of Japanese scholars, judges and other legal experts. These sub-

committees, which comprise approximately ten members each, hold study meetings to draft provisions. They have adopted a method of operation by which committee members visit Cambodia five to ten times a year to make drafts of the laws and exchange opinions with parties such as judges and staff members of the Cambodian justice ministry.

For countries that are shifting to a market economy, joint studies with researchers of these countries are under way using methods grounded in the sociology of law. These studies involve issues such as what kind of norms actually exist in the society, how these norms will function when a market economy is introduced, and, if they will not function, what are the factors that will keep them from functioning.

In Vietnam, a joint study was conducted on the enactment of the 1996 civil code. This study will provide basic data for the work of revising its civil code. For this work, like the case of Cambodia described above, Japan and Vietnam joined forces to organize relevant sub-committees. The method adopted here involves joint discussions that take place in Vietnam to identify problems and points to be revised in the existing civil code based on issues studied by each party.

This way of work may be called the "joint research" method or "participatory" method. Through this method, Japanese experts can learn about people's awareness of law and the actual state of affairs in the countries receiving support. It also helps upgrade the capabilities of legal practitioners of these countries, which in turn develop law that actually take root in the society.

c. Providing information needed for urgent and specific legislation

Whether they like it or not, countries in transit toward a market economy join the international community as part of the general trend toward globalization. This is exemplified by membership in the WTO and ASEAN. Consequently, in order to join such organizations, these countries are required to introduce numerous new legal systems including intellectual property law and anti-trust law.

From a long-term perspective, in addition to the development of basic laws, supply of information is important for ensuring swift responses to urgent demands. This is handled using information provided by legal experts stationed locally for long periods, and seminars conducted by experts dispatched to the target country for short periods.

d. Capacity building for legal experts and practitioners

No law or legal system will function without training for legal experts who apply it. This has been the experience of Japan itself. Development of law begins with their enactment, followed by the establishment of various systems surrounding court systems and law. These are issues of formal procedure

and thus not necessarily difficult issues. In contrast, however, fostering a pool of lawyers able to apply law is a matter of substance, and as such is not as simple as setting up the correct legal format. Fostering the right type of human resources in this case is a matter of great difficulty.

To solve this problem, Japan invites judges, prosecutors, staff members of justice ministries, etc., to Japan, and conducts training in such institutions as the International Cooperation Department of the Ministry of Justice. This training is not a short one-week course; instead it runs for around a month and allows those attending to experience the actual operation of the Japanese legal system. Each unit of training also has a specific theme and trainees engage in presentations and discussions to help them acquire basic knowledge and legal modes of thought.

The number of participants varies by country. However, in general, every year from between ten to forty participants are invited from each country. Another training program in progress involves invitation of two trainees each from six Asian countries, making a training unit of twelve persons in total. The training runs for around five weeks and centers on comparative studies undertaken by the trainees under the guidance of instructors. This enables participants to learn about not only their own systems and those of Japan, but also those of other Asian countries; it also gives them an opportunity to learn how to study these systems by comparing them.

In Vietnam, Japanese legal experts sent to the country for an extended period are conducting research to effectively promote the training of people who will work at the Vietnamese Ministry of Justice, courts, prosecutors offices, etc.

The fostering of human resources is a very difficult task. Thus, in addition to these visible means of assistance, Japan takes every opportunity to help the country in question foster human resources by adopting the participatory or joint research method, as described earlier, at seminars in these countries.

e. Scholarship for foreign students

Some universities in Japan accept students from abroad at their jurisprudence departments or graduate schools while paying their school expenses. From a long-term perspective, fostering the right kind of human resources requires training people that are capable of training others in their respective countries. From this viewpoint, some universities are training the leaders of the next generation by providing many foreign students with the opportunity to receive higher education.

Meanwhile, from the viewpoint of training practitioners, if these foreign students are to be practitioners, not only a scholastic education but also practical training and education should be provided.

For this reason, coordination among universities and other relevant organizations is necessary.

## V. GOALS OF LEGAL ASSISTANCE

In view of the fact that Legal Assistance requires more than mere assistance for the drafting of bills, the aspect of implementation and operation of the laws should be given due consideration. This gives rise to the issue of what our goals should be, and how their achievement can be measured.

In that law is closely interrelated with society, Legal Assistance is bound to continue until circumstances no longer require such support. As for the question of how it should be determined when this cooperation is no longer needed, the following observation based on Japan's own experience will have some relevance.

Looking back at the history of Japan, although the country did not ask for economic help, it began in the latter half of the 19th century to establish a constitutional state and system of law that did not yet exist in concept. Japan called for the advice of foreign legal experts. It also studied diverse legal systems in order to learn from them. In the beginning, those in Japan who were studying laws did so in the languages of their country of origin, as there were practically no books dealing with legal matters in the Japanese language. However, in order to disseminate law among the Japanese people, legal terminology in foreign languages had to be translated into Japanese. Having accomplished this, Japan began to conduct legal education in its own language. Now, although the population of its so-called "legal profession" is relatively small, Japan has many people that are engaged in jurisprudence and active in the study of foreign laws. Thus, both the quantity and quality of the study of jurisprudence in Japan are in no way behind those of other countries.

Moreover, major court decisions have been published and accumulated in easily accessible forms such as official court reports, reports by private companies, the internet home page of the Supreme Court, etc. There are abundantly published commentaries, treatises, articles and other legal materials that contain analyses and comments, and they are continuously updated. Media extensively report on important court cases. With access to such information, transparency of the application of law to the public is ensured. It took almost 100 years for Japanese to realize such current system of law.

As a conclusion, when a recipient country talks about law in its own language, conducts education in jurisprudence in its own language, and publishes legal reference books in its own language, the status of law as well as their implementation and application becomes visible to its public, and they gain public confidence. This is when Legal Assistance has fulfilled its mission, and this is why systematic and continuous assistance based on a long-range perspective is essential.

8　入手資料一覧

1.別途保管資料（ＪＩＣＡ図書館）

●Background Papers, Empowerment, Security and Opportunity through Law and Justice, July 8-12, 2001, Saint Petersburg, Russia (World Bank)

●Comprehensive Legal and Judicial Development Toward an Agenda for a Just and Equitable Society in the 21th Century, Edited by Rudolf V. Van Puymbroeck (World Bank)

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●2002 Program, Making a difference through law (International Development Law Institute, Sydney, Australia)

● Law in transition, Advancing legal reform (European Bank for Reconstruction and Development)

2.添付資料

●Bank Group Strategy Paper on Law for Development (African Development Bank)

●Asian Development Bank Statement to World Bank Conference on Law and Justice (Asian Development Bank)

●USAID and the Rule of Law (USAID)

●AusAID Statement to World Bank Conference on Law and Justice (AusAID)

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AFRICAN DEVELOPMENT BANK
BANQUE AFRICAINE DE DEVELOPPEMENT

AFRICAN DEVELOPMENT FUND
FOND AFRICAIN DE DEVELOPPEMENT

# BANK GROUP STRATEGY PAPER ON LAW FOR DEVELOPMENT

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OCTOBER 2000

## BANK GROUP STRATEGY PAPER ON LAW FOR DEVELOPMENT

### 1. INTRODUCTION

1.1 The Bank recognizes that at the base of good governance is an equitable, effective, and efficient legal and judicial system that caters to the needs of the people and to the needs of economic operators participating in, or desirous of participating in, its Regional Member Countries (RMCs). Accordingly, in adopting the Policy on Good Governance, which grew out of the Bank's new Vision for economic development in Africa, the Bank Group has highlighted legal and judicial reform as an indispensable component of the initiatives to reduce poverty and promote regional economic integration among the RMCs.

1.2 The Bank implements this aspect of its Good Governance Policy through its program named and styled 'Law for Development' ("the Program"). Under the Program, law is used as a tool to help foster economic development in Africa. The Bank recognizes that this is one of several cardinal tools that can be used in the effort to achieve its Vision. The Bank is also aware that other legal and judicial reform efforts have been undertaken before. Consequently, in formulating this Strategy, the Bank has reviewed work done by other multilateral institutions and development agencies in Africa and other parts of the world. Close attention has been given to experiences in earlier legal and judicial reform programs in Asia, Latin America, and in Africa. The Bank recognizes that work in this area cannot yield instantaneous results. Nevertheless, the Bank believes that efforts and the achievements in this respect must be measurable over time and, most importantly, must be sustainable.

1.3 Experience shows that legal and judicial reform is a gradual, long-term undertaking that requires patience, governmental commitment, and significant outlays of financial resources. Experience also shows that policy support, particularly, economic policy support by governmental authorities is key to any successful legal or judicial reform program. Empirical evidence supports the view that this Strategy works in environments where economic policies move in tandem with legal and judicial reform efforts and that the benefits to the population are heightened where direct state management of economic activities is minimized.

1.4 The Bank acknowledges the complex nature of good governance and of legal and judicial reform. The Bank also recognizes that there are competing needs for the limited resources available for economic development and that there are equally competing demands within the legal and judicial sectors of RMCs for the scarce resources being earmarked for the Program.

1.5 The Bank realizes that within the judiciaries of many RMCs the transaction costs for resolving disputes is high due to process delays, mounting caseloads, fees charged, and obsolete managerial techniques that impose high demands on the time judges must spend on administrative matters. It is also generally recognized that the level of funding for judicial and law related functions and services in most RMCs is inadequate and that mechanisms used to fund judiciaries have in many instances adversely affected the independence of judicial action. The Bank's objective would therefore be to facilitate greater responsiveness and effectiveness of the judiciary as an independent organ that addresses societal demands to resolve disputes and redress grievances.

1.6 The Bank therefore seeks, through a participatory approach with principal stakeholders within its RMCs, to develop a consensus that is tailored to addressing the peculiar challenges of each RMC. It has been demonstrated in projects elsewhere that attempts to conduct partial reforms which do not deal with real institutional or organizational constraints, or which fail to garner the support of the relevant actors, fail and thus frustrate expectations for fair and expedient judicial services. This approach, therefore, seeks to fashion a judicial system that is socially sensitive and equipped to efficiently and justly serve the local communities; an approach that engenders the confidence of businesses engaged in both domestic and global transactions that are desirous of doing business within the particular RMC. It requires the involvement of various groups within the society including the judiciary, the law societies, legal aid groups, academia and poverty reduction specialists.

1.7 The Bank's Vision is to help reduce poverty. Thus, the Law for Development Program takes a kaleidoscopic view that is not narrowed by a focus on market orientation, but includes ensuring access to justice for the poor as a means of redressing injustices, of ensuring stability, and of promoting informal transactions. The Bank realizes that in many of its RMCs literacy rates are low and as such certain aspects of judicial reform may be considered less relevant to those whose interaction with the law might be limited to low level bureaucrats and the police, and whose understanding of the legal system is poor. Accordingly, the Program for legal reform will be fashioned within the context of the prevalent legal regimes in the relevant RMCs, and will not be geared to a mere transplanting of foreign laws, legal concepts, and bureaucracies within a RMC.

1.8 The Bank's Vision also calls for greater economic integration in Africa. The Program will therefore place particular emphasis on regional harmonization and approaches to legal and judicial matters. In this regard, the Bank will cooperate with other international and bi-lateral institutions in promoting legal and judicial reform. Already, by virtue of a Partnership Agreement entered between the Bank and the World Bank, the two institutions work together on matters of Good Governance in Africa. The Bank is expected to lead in this

area and will strive to ensure efforts for legal and judicial reform in Africa are harmonized to obtain optimum results.

1.9 Financial Resources for the implementation of Law for Development will come primarily from the resources of the Bank and the Fund, and from contributions by bilateral donors, mobilized specifically for implementing the Bank Group's Good Governance Policy. Furthermore, the Bank Group will explore possible cooperation with large donor NGOs to mobilize additional donor resources for the implementation of program-related projects and activities.

## 2. Summary of The Bank Group Action Plan on Law for Development

2.1 Projects under Law for Development will not be exclusively stand alone projects. Aspects of the Program will be integrated into other Bank Group institutional support and capacity building projects. This will require close collaboration between the Legal Department and the Operations Complex of the Bank. This will also ensure a comprehensive approach to redressing the structural legal and judicial impediments that hamper economic development in its RMCs.

2.2 Legal Department: To cope with the expanded workload, the capacity of the Legal Services Department will be enhanced. Accordingly, a Unit on Good Governance, headed by a chief counsel, will be established in the Office of the General Counsel. The Unit will utilise the services of legal consultants, who are specialised in matters of legal and judicial reform. The establishment of this Unit will enable the Department to: (i) effectively participate in facilitative research on legal reform for economic development; and (ii) also manage related technical assistance projects. The Legal Services Department will undertake the tasks of building appropriate legal databases on African law and of handling various substantive development law issues of relevance to RMCs including, but not limited to, land reform issues; private sector development issues, such as legal issues relevant to the development of stock exchange and capital markets; statutory and judicial reforms, including issues of access to justice, deregulation, harmonization of laws, and infrastructure support; legal aspects of transparency issues, such as anti-corruption and public accountability; and co-ordination of these activities with the legal teams of other MDBs, international agencies, and other parties participating in legal and judicial reform.

2.3 Legal & Judicial Reform Conferences: The Bank will convene and co-sponsor two conferences next year in Africa on legal and judicial reform for Africa. These conferences will be convened in conjunction with the World Bank. The conferences will bring together, among others, the heads of the judiciaries in RMCs, ministers of justice and attorneys general of RMCs, the

heads of the law societies or bar associations in RMCs, legal aid societies, and academics. The Operations Complex and the Legal Department of the Bank Group will actively participate in the organization and programme of the conferences. The main purpose of the conferences is to discuss with and obtain from the participants pragmatic proposals to strengthen the legal and judicial environment in RMCs for African economic development. The conferences will also discuss a comprehensive joint strategy Paper to be developed with support from the Bank and the World Bank. This is consistent with the Bank's strategy to draw on the knowledge and experience of those on the front-line who would facilitate a buy-in by other knowledgeable stakeholders and help obtain the requisite governmental commitments.

2.4 Model Legislation: The Legal Department will prepare two key types of model legislation. First, in furtherance of the Bank Group's good governance Policy that recognizes the deleterious effects of corruption on economic development, the Bank will develop model Anti-corruption legislation that would be made available for adoption by RMCs. In support of the anti-corruption efforts, related legislation and rules in areas such as procurement and the conduct of public servants, will be proposed to plug the leakages that are draining most African economies. The Bank's strategy will be to emphasize both preventative and curative measures. Secondly, in furtherance of the Bank's policy on regional integration, a uniform Banking law will be drafted that could be used by regional organizations, such as ECOWAS, to bring greater harmony and facilitate cross-border banking transactions. The Bank will also prepare model codes of conduct that could be adopted by judicial officers and other public servants that would help address issues of corruption and ethics.

2.5 Registries: The Law for Development Program will further promote the Bank's policy of economic cooperation and regional integration by supporting the development of regional registries. A recognized constraint to good and effective governance in RMCs is the absence of efficient registries both for movable collateral used in secured transactions and for companies. The Bank's Good Governance Policy notes this deficiency and as part of the approach for Legal and Judicial Reform the Policy encourages Bank Group action in developing reliable, efficient registry systems. A dire need exists for registries at the national levels and at regional levels to facilitate financings and cross-border secured transactions. By way of illustration, the OHADA Treaty allows for the adoption of certain Uniform Acts. One of the first Acts adopted by the OHADA member states is the Uniform Act on General Commercial Law. The provisions of the General Commercial Law contemplate the setting-up of a Register of Commerce and Charges (Registre du Commerce et du Credit Mobilier) in each member state. It is intended that the details of all businesses and all charges over assets of such businesses must be filed in such registries. Currently, registries do not exist at equal levels of efficiency and comprehensiveness in RMCs, and even where they

do exist, they are not integrated. The Bank will assist in financing the establishment of registries, such as permitted under the OHADA laws, and will encourage the adoption elsewhere of similar systems.

2.6 African Legal Support Facility: The Bank Group has in the past supported the African Capacity Building Foundation, the African Project Development Facility, and other foundations and facilities for specific purposes other than those related to legal and judicial reform. To promote the twin purposes of legal and judicial reform, the Bank will spearhead the establishment of a facility exclusively for these purposes. The facility would provide or arrange technical assistance to RMCs to improve selected areas of legislation, enhance judicial capacity building, fund law-related studies, and furnish legal assistance for technical projects, where the internal capacity within the government of a RMC does not exist or is unavailable to provide the required legal services. This latter assistance could take the form of the Project Preparation Facility recently made available to RMCs by the Bank Group. The African Legal Support Facility would also assist in organizing systems for court reporting, publication of court reports and statutes, developing law libraries, legislative drafting services, support for regional arbitration centers, and other research databases and facilities.

2.7 Training: The Joint Africa Institute (JAI) as constituted concentrates on training in economic and financial matters. This could be expanded to include legal and judicial training. Alternative sources of such training include utilizing the capabilities, and where available, the facilities of established training expertise, or, if accepted, the African Legal Support Facility. The Bank will also seek to arrange in-country public awareness programs to further educate the mass of the populations in RMCs on their rights under their respective legal systems. The Legal Department would assist in formulating appropriate curriculum, based on the results of studies to be undertaken and of the conferences.

2.8 Corporate Governance: The internal mode of performance by corporations directly influences their efficiency and consequently macro-economic growth. With the increasing efforts to privatise and to use the private sector as a fulcrum for economic development, the need for greater transparency in the way corporations are governed becomes even more imperative. Corporate governance affects the stakeholders, the corporation's potential to access global capital markets, and its societal relationships. Proper corporate governance can have the effect of furthering Bank Group goals, such as expanded commercial activities on a regional level, curtailment of corruption, reduction of poverty, and environmental protection. The rules and the standards applied among shareholders, directors, and management determine the direction of the corporation and will be modernised to improve corporate contribution to economic development.

2.9 Commercial Law: Issues relating to the liberalising of economies for greater private sector participation, both domestically and internationally, affect economic growth and the ability of countries to attract investment. Internationally, the laws governing private sector activities are being revised and harmonised to facilitate cross border transactions. Even where these laws are not done by conventions or treaties, model laws are being introduced for these purposes. Issues pertaining to securitizations, insolvencies, security interests in movable properties, and other laws that affect the economic environment are critical to the development of RMCs. The Bank Group policy will promote the adoption of modernised laws and assist in building the requisite legal and judicial infrastructure for the implementation of these laws.

2.10 Regional Cooperation & Integration: As stated earlier, the Vision of the Bank calls for greater economic cooperation and regional integration. The ADF VIII's provisions for funding of multi-national projects support this aspect of the Vision.

2.11 Electronic & Other Information Databases: From the ADF VIII resources and from bi-lateral resources earmarked for good governance, funding will be obtained for the initiative to establish electronic databases and websites that will make available to RMCs and interested parties the selected laws of RMCs and other relevant information that would facilitate cross-border transactions. The Bank Group will also use these resources to become the premier source of electronic information such as bibliographies, articles and books on law development in Africa, particularly those works produced in Africa. With this the Bank will become a clearinghouse for African law development information and will be in a position to gather and distribute statistical and other information on legal institutions in Africa. In conjunction with the Bank's Communications office, the Legal Department will establish a *Law for Development Bulletin* with a concentration on issues pertinent to African economic development.

## 3. Priorities and Performance Indicators

3.1 Priorities and Performance Indicators: The Strategy calls for the attainment of certain goals within the short term (i.e. one year). These short-term goals are the springboard from which the Programme will be launched. In order of priority they are: (i) the strengthening of the Legal Department to execute work related to Good Governance; (ii) preparation of a Comprehensive Strategy Paper for legal and judicial reform in Africa jointly with the World Bank; and (iii) organizing and convening the conference(s) on legal and judicial reform in Africa.

3.2 In the medium term (i.e. 1-2 years) the Programme will (i) establish the electronic and other information databases; (ii) work with OHADA and other

regional organizations interested in establishing commercial and corporate registries; (iii) prepare and circulate draft model legislation and codes of conduct in selected areas; (iv) arrange a feasibility study for the establishment of the African Legal Support Facility; (v) commence law-related training programs within the framework of the Joint Africa Institute or other suitable institution(s); and publish the *Law for Development Bulletin*.

3.3 It is anticipated that in the long-run (i.e. 3-6 years) the Programme will ensure the adoption of legislation in the various RMCs to ease public access to and the understanding of the judiciary and other dispute resolution mechanisms, and equip the legal system with the tools and infrastructure needed for the delivery of legal and judicial services.

3.4 The nature of some of these activities and projects lend themselves to easy measurement because the results are tangible. The more difficult achievements to measure are the intangibles. Some of these intangibles would be assessed only over time based on the performance of the judiciaries and alternative dispute resolution mechanisms, the enactment and enforcement of new laws and codes of ethics or conduct, the increase in foreign capital in-flows, and the overall conduciveness of the environment for investment. The test of the success of the Programme would lie ultimately in its impact on the poor both in terms of their perception of the degree of equity attainable in the system, the added economic benefits the revised system offers which has an impact on their lives, and, most importantly, on the sustainability of the reforms.

## Conclusion

*The Bank Group is committed to an effective Strategy on Law for* Development that is based on poverty reduction and regional economic cooperation and integration. Particular emphasis in developing the Strategy depends on the active participation of various stakeholders in the member countries of the Bank Group. The Bank recognizes that the implementation of a Strategy that uses law as a tool to further African development can only be realized with the commitment of member countries of the Bank Group, especially those countries within which contemplated legal and judicial reforms will occur.

## Asian Development Bank Statement to World Bank Conference on Law and Justice

### Introduction

1. In light of the financial crisis of the late 1990's and the pace of economic change in the region, law and policy reform is of acute consequence in Asia. This has been recognized by the Asian Development Bank (ADB) in both its' "Long Term Planning Objectives," and the "Medium-Term Agenda and Action Plan." With this mandate, the role and impact of Law and Policy Reform (LPR) on ADB's developmental objectives has been substantial, in particular on: governance, sustainable economic development, private sector work, environment, and corruption.

2. The ADB has taken and will continue to take a systemic approach to law and justice reforms, which involves a broadening of the focus beyond the "black letter law" of legal rules. Since the inception of the LPR program at ADB, it has been observed that the legal system cannot operate without institutions that make these rules come to life through their dynamic interpretation and enforcement. Accordingly, ADB technical assistance for law and justice reforms have not been confined to the drafting and enactment of legislation. Rather, both country-oriented and regional technical assistance comprise administrative and judicial reforms which ensure that the legislative changes which ADB developing member countries (DMCs) introduce are implemented and enforced to serve their purposes.

3. The systemic approach taken by ADB to LPR, has as its focus the institutional capabilities of the legal system, including the judiciary as well as government administrative and regulatory agencies. It calls for a greater attention to the education and training of the judiciary and government officials staffing legal and regulatory institutions and the incentive systems in which they function. This approach implies focusing on the resources made available to the courts and regulatory agencies; the efficiency with which these resources are utilized; and the accountability of these agencies to the public. ADB, as discussed below, has worked on this premise and it serves as an integral part of both the Medium-Term and Long-Term strategic framework.

### Discussion of ADB Law and Justice Activities

4. The key point in judicial sector reforms involves the actual structure of legal institutions and the rules that govern the exercise of the different branches of government. Consequently, the cornerstone of successful reform is the effective independence of the judiciary. That is a prerequisite for an impartial, efficient, and reliable judicial system. Without judicial independence, there can be no rule of law, and without rule of law the conditions are not in place for the efficient operation of an open economy, so as to ensure conditions of legal security and foreseeability. This often presupposes working in the broad institutional context, and the Bank has conceived of it in these terms in a number of its most recent projects.

**Box 1: Institutional Strengthening for Judicial Independence In the Philippines**

In 2000, ADB began work on a TA to strengthen the independence of the Philippine judiciary. The Philippine Supreme Court, led by Chief Justice Hilario Davide, requested this TA and the executive branch of Government, led by the Department of Finance and the National Economic and Development Authority, strongly supports and has endorsed it.

The TA focuses on a number of reforms identified by the Supreme Court in its comprehensive Action Plan for Judicial Reform. It will (a) design and set up financial, budgetary, and administrative frameworks that will allow the judiciary to act autonomously in relation to its fiscal and administrative matters, (b) improve the appointment and nomination process of the judiciary to make it more transparent and performance-based, and formulate performance-based incentives to improve the competence and impartiality of the judiciary, and (c) improve the delivery of sustained, focused, and responsive training to the members of the bench.

This grant is the largest provided by ADB to the Government of the Republic of the Philippines for legal or judicial reform. It lays the basis for long-term efforts that will help achieve the judiciary's goal of being able to dispense impartial and independent justice, efficiently and effectively, thus obtaining civil society's trust and confidence. The TA will begin implementation later this year.

## Systemic Issues in Legal and Judicial Reform

5. The systemic approach discussed in the introduction implies focusing on the resources made available to the courts and regulatory agencies; the efficiency and transparency with which these resources are utilized; and the accountability of these agencies to the public. These were the conclusions reached as a part of a 1999 study conducted under the auspices of technical assistance to the Government of Pakistan for legal and judicial reform; and presently serve as the keystones for a series of TA's to the Government of Pakistan for legal and judicial reform.

**Box 2: Legal and Judicial Reform in Pakistan**

Building on two previous TA's in the country, ADB approved a $2.7 million grant to develop the capacity of the judiciary to institute substantive long-term reforms. As Pakistan moves towards a market economy, the legal system must be able to respond to the needs of people for justice including administrative justice to ensure citizens benefit from legal entitlements. Transaction costs are reduced such that the private sector can power Pakistan's macroeconomic growth. The development of a judiciary that is aware of its larger role in development, technically competent, well-resourced and accountable will provide the predictable justice that an economy such as Pakistan's requires.

Concomitantly, the creation of new methods of alternative dispute resolution, improved legal information, strengthening systems of administrative justice, and the use of local language will allow the poor to open the door to legal remedies, which has long been closed to them. Through work with various stakeholders: the federal and provincial bench, civil society groups, and various government agencies, ADB has set the groundwork for a comprehensive reform program which in addition to the above will deal with issues as diverse as: legal education, judicial training, case management, and long-term financial sustainability of key institutions in the sector.

## Legal Information

6. One of the overriding objectives of ADB's strategy for DMCs, is to facilitate the transition to a market economy. For such transitions to be successful, it is essential to increase the transparency and knowledge of the legal and regulatory framework. Legal information is vital to the success of market-based reforms – in particularly, the promulgation of new legislation. In 2000, ADB implemented TA to Tajikistan building on the experience and knowledge of the area gained during the implementation of previous legal information work in the People's Republic of China. Since the introduction of economic reforms in both countries, a large number of laws and regulations have been passed. The pace of adopting new legislation continues to intensify with the enactment of many new laws and regulations covering areas such as foreign trade, customs duties, taxation, foreign exchange controls, banking, capital market, and foreign direct investment in infrastructure sectors.

7. In Tajikistan, the result of scanty information on new laws has been twofold: corruption and the absence of foreign direct investment. ADB worked with the Law Reform Commission, which had been previously established by the Bank, to establish a database of laws and legal acts and to publish a collection of laws in both the Tajik and Russian languages thereby improving the state of legal predictability and transparency.

## Combating Money Laundering

8. The private sector and markets play a central role in the development process by responding to the challenges of mobilizing resources to address Asia's increasingly complex development agenda. One of the largest threats to the operation and the stability of a nation's financial system as well as the ability of the private sector to act purposefully in the development process is money laundering. In addition to the effects on the financial sector, it increases the vulnerability of countries to other types of crime such as drug trafficking, fraud, and corruption. This vulnerability leads to poor governance and undermines state institutions and their legitimacy.

9. In order to combat this serious threat to economic development, ADB recently implemented regional technical assistance to assist the Financial Action Task Force and the Asia Pacific Group (APG) in combating money laundering, and will focus on DMCs which have not yet met international standards. The RETA has an expansive purview, working with governments in the South Pacific as well as those in Southeast Asia.

10. It will help to improve transparency within regional financial institutions and establish strong accountability mechanisms. Among the anticipated outputs are: the identification of the necessary institutional and regulatory reforms; the publication of a comprehensive manual on combating money laundering; and the development of a regional action plan to promote regional cooperation to counter money laundering.

## Insolvency and Secured Transactions

11. In the wake of the financial crisis, ADB lead regional initiatives in insolvency and secured transactions law reform. Following on from its initiative in carrying out a comprehensive analysis of insolvency laws in the region in 2000, ADB has implemented technical assistance to Thailand to train members of the bar and the judiciary in business reorganization and insolvency law. Effective national insolvency regimes contribute strongly to crisis prevention by providing the predictable legal framework needed to address the financial difficulties of troubled firms before

the accumulated financial difficulties of the corporate sector spill over into an economy-wide crisis. Similar training was provided to the Judiciary in the Philippines following the transfer of jurisdiction over insolvency cases from the Securities and Exchange Commission to he courts. To support regional cooperation in cross-border insolvency issues and to enhance capacity to deal with insolvency generally, ADB approved a TA for "Insolvency Training and Capacity Building."

12. Regional work on secured transactions culminated this year with the publication of two substantial texts on the matter: "The Need for an Integrated Approach to Secured Transactions and Insolvency Law Reforms" as well as "Secured Transactions Law Reform in Asia: Unleashing the Potential of Collateral."[1] These works go a long way in providing a deliberative and thorough analysis of the elements that will form the foundation of a secured transactions regime that can effectively promote the economic benefits of secured transactions law reform.

13. In 2000, ADB initiated dialogue with several DMCs to the reform of their respective secured transactions laws. In Nepal, ADB is supporting an integrated approach to reform of insolvency and secured transactions laws in the context of a larger initiative for improving governance corporate and financial governance (CFG). Under ADB's support for CFG, a secured transaction registry will also be established.

**Land Law**

14. Specific governance issues have also been addressed through a series of smaller TA's to ADB DMCs. In Cambodia, the LPR program began implementation of land legislation, one of the first significant steps that country has taken in the development of market-oriented rule of law. The benefits of which range from a more secure environment for foreign direct investment to an end to the legal vulnerability of subsistence farmers who make up a large portion of the Cambodian population.

**Box 3: Implementation of the Land Law in Cambodia**

In 2000, the ADB approved technical assistance to the government of Cambodia to assist in the implementation of the country's newly drafted land law; the first piece of legislation covering such a purview since the 1975. In Cambodia, as elsewhere, land ownership is identified with poverty alleviation. Thus, enactment and implementation of a land law that enables the poor to secure good title is an issue of the first magnitude. This is particularly important for the poor who have occupied plots of land for many years. In a recent survey, provincial governors confirmed the importance of the new legislation; rating the usefulness of it in resolving land disputes in their respective provinces on a scale of 1 (not helpful) to 10 (most helpful), the average response was 9.3. Nationwide implementation of this law will do a great deal to reduce the vulnerability of the rural poor; and facilitate their access to justice either through the courts or a system of alternative dispute resolution. ADB TA includes a component to assist the poor to assert their rights under the new law through non-governmental organizations specializing in advocacy of the rights of the poor.

[1] See Volumes 1 and 2 of LPR at ADB 2000.

## Pro-Poor Judicial Reform

15. As referenced in last year's annual report, during 2000 the LPR program began work on regional technical assistance to strengthen pro-poor judicial reform efforts across Asia. Though, the term "pro-poor" is often utilized; however, a concrete definition of pro-poor law and development work, particularly in the context of Asia is not readily available. A number of components of pro-poor work: legal aid, alternative dispute resolution, decentralization, and legal information have already been incorporated into existing LPR work. However, there is a need to go farther in developing a pro-poor approach which is sufficiently broad.

16. This study, to be implemented in 2001, will look at questions of judicial access across Asia and identify existing impediments and solutions to the provision of justice to the region's most vulnerable individuals. The results of this RETA, along with similar work in the implementation of TA to Pakistan, will provide the theoretical and practical base of knowledge to mainstream pro-poor legal and institutional frameworks in development projects.

## Inter-Agency Coordination

17. The LPR program of ADB has actively coordinated its activities in developing countries across Asia. Over the past three years and as recently as last week, while working Pakistan, ADB has held meetings with UNDP, JICA, CIDA, and DFID to ensure that the legal and judicial reforms of the donor community are complementary. In the case of the Philippines, technical assistance for institutional strengthening and capacity building was based upon a report of reform recommendations issued by the UNDP and the World Bank. Institutionally, the establishment of a Legal Reform Unit within the Ministry of Law of Tajikistan, has taken the step of ensuring that all donor activities in the country are coordinated. During recent fact-finding in Dushanbe, ADB counsel met with representatives of USAID, SDC, and UNDP. ADB is optimistic that all agencies will make attempts to meet the representatives of development counterparts when on mission travel.

## Coordination and Harmonization in Reality

18. ADB publishes an annual "Law and Development Bulletin" which delineates law and policy reform projects underway in all of the Bank's developing member countries. This comprehensive document provides a mechanism for country counsels within the ADB, as well as LPR staff in other multilaterals and bilaterals to be aware of projects that are similar in nature and to avoid duplication in the provision of technical assistance. The "Law-Dev Bulletin" has been of great assistance to the Bank during the planning of country specific and regional technical assistance and we hope that ADB will continue to receive contributions and updates from counterpart agencies. In addition, ADB also has a list service called LAW-DEV. LAW-DEV was established by the Office of the General Counsel of the Asian Development Bank to provide an open, international forum for discussion and the exchange of information on issues relating to the creation and sustaining of legal frameworks conducive to economic growth and equitable social development in the developing member countries (DMCs) of ADB as well as in the emerging markets of Africa, Latin America, and Eastern Europe. To subscribe (which is free), send an email to **majordomo@intraweb.adb.org** with the message body reading "subscribe LAW-DEV" (no quotation marks and don't enter anything for "subject" in the email message). The majordomo software will automatically add your name to the list and will send you important introductory information about the purpose of this list service, including basic command features for using list-generated information.

# USAID AND THE RULE OF LAW

Since the mid-1980s, USAID has undertaken an active role in promoting rule-of-law through its programs. There has now emerged a global consensus, recognized among bilateral and multilateral donors and political analysts, on the centrality of rule of law to both democracy and economic development. International norms regarding the need to account for torture, genocide, and gross violations of human rights, as well as the importance of an independent judiciary and civilian police force, appear to be taking hold. USAID continues to promote these norms (as well as the importance of transparent and reliable legal systems to market economies) in its global rule-of-law programs.

The earliest programs began in **Latin America and the Caribbean.** The most comprehensive rule-of-law programs continue to be in the LAC region and **Europe and Eurasia.** In the LAC region, the original rationales for the programs were to reduce human rights abuses and to improve countries' abilities to combat major crimes and impunity from prosecution. Emphasis was, therefore, (and continues to be) on the criminal justice systems. Foundations were in place in most of the region. But these systems often had a long history of development in a non-democratic context. USAID activities therefore emphasized a variety of difficult, and often long-term, systemic reforms.

In **Europe and Eurasia, USAID** rule-of-law assistance has emphasized the development of legal systems that support democratic and market reforms. USAID has emphasized development of the legal and regulatory frameworks as well as creation and refashioning of basic legal institutions and processes. These include law schools, lawyers' associations, judicial training, and court administration. Often the approach is to cultivate support for judicial reform within these professional associations of lawyers and judges.

Rule-of-law programs in **Africa** vary widely, owing to the singularities of the countries themselves. Experiences range from efforts to rebuild **Rwanda**'s devastated justice system to a substantial program to help the **Republic of South Africa** reengineer its otherwise well-developed justice apparatus so that it serves the entire population. The overarching trend, which is expected to continue over the next year, is toward highly inclusive participatory programs involving civil society as well as the formal justice sector.

Programs in **Asia and the Near East** are, in general, at a more experimental stage. In **Mongolia** USAID has played a central role in helping Mongolian officials develop a national strategic planning framework for justice sector development. This framework is now in the process of implementation with other donors making important contributions. In **East Timor** USAID assistance is focussed on building the human capacity to manage the justice sector in a future independent state. USAID has sponsored a court management program in **Egypt** which has resulted in significant gains in judicial efficiency in two major Egyptian courts, with jurisdiction over as many as 12 million Egyptians.

USAID has adopted four basic approaches in its rule-of-law programs:

- *Establishing democratic legal frameworks* sets the terms of reference for democratic governance;

- *Building strong and transparent justice sector institutions* ensures that the mechanisms are in place to implement those frameworks;
- *Increasing access to justice* guarantees that justice systems serve all citizens;
- *Building constituencies for reform* increases pressure on governments to commit to reform efforts.

Each of these may be appropriate at specific times and in specific places. The relative importance of these factors in a given country depends upon the country's cultural and historical legacy and other contextually defined conditions. These approaches may be developed individually or jointly, depending on local conditions.

### The Legal Framework

When a nation's constitution, its organizational, procedural, and substantive laws, and its regulations are inadequate to its needs, promoting the rule of law often requires major reform of the country's legal and regulatory framework. Many developing countries inherited antiquated legal structures from colonial powers. Often, these structures are inconsistent with contemporary social and economic realities. In many cases, constitutionally recognized human rights guarantees are not duplicated in the secondary laws which effectively govern justice sector operations. Sectoral operations are also impeded by laws defining basic organization in ways which entrench inefficiencies, facilitate or encourage corruption, and undermine institutional mandates. Outdated laws often inhibit commercial transactions and prohibit the adoption of modern technologies and practices. Countries with non-Western or plural legal traditions face the additional challenge of accommodating indigenous values in a national legal framework which is adequate to the demands of a globalizing society and economy.

Improving legal frameworks commonly involves three areas of concern. First among these is the framework itself, which is the basis of the social contract between the governors and the governed. It provides a blueprint for the institutions, processes, and rules by which the government functions; it defines citizens' rights and responsibilities; and it establishes the relations among the branches of government. Whatever the quality and adequacy of the initial blueprint, over time some aspects may require alteration because society or its needs and values have themselves changed. A second concern is with legislation that often establishes the detailed organization and procedures of courts and other justice sector institutions in patterns that conflict with changing standards of efficacy and efficiency. A final concern is with substantive laws that often conflict with basic human rights principles, societal preferences, or the efficient conduct of valued activities. In short, while legal change is not the only element of reform, it is sometimes essential if legal and justice systems are to contribute to broader political and economic development.

### Justice Sector Institutions

Effective, equitable, and transparent administration of justice requires efficient and effective institutions. In most countries, the justice sector comprises several interdependent institutions—the judiciary, the prosecutors, the investigators and police, public defenders, and the private bar, to name a few. To function fairly and effectively, all actors must be knowledgeable of and operate under the same interpretation of laws

and practices. However, in most countries transitioning to democracy, the system is out of kilter. It suffers from a lack of integration, uneven development, and often incompatible institutional mandates and traditions. In addition, informal practices may further distort performance, for example, undermining even those human rights principles and guarantees officially recognized in the legal framework.

Ironically, in many countries, justice officials may be among the most common abusers of citizens' rights. Public sector professionals including judges, prosecutors, public defenders, and police suffer from inadequate training, low salaries and insufficient resources, inadequate organizational structures, and varying, but rarely sufficient, degrees of independence from other branches of government. The resulting inefficiency in the courtroom; lack of adequate capacity for prompt, fair, impartial, and competent investigation, prosecution, and handling of civil and criminal cases; and inadequate availability of counsel in indigent criminal cases undermine citizen confidence. In some circumstances, solutions to these problems require the introduction of new institutions—human rights ombudsmen or complaints offices for dealing with judicial and administrative abuses. In other instances USAID programming is designed to ensure that judicial actors gain the necessary skills and resources to fulfill their mandate successfully in a reformed legal system.

**Access to Justice**

Equal access to justice—which ensures that all individuals are able to seek and receive redress for their grievances with other private parties and with state officials or organizations— continues to elude most developing societies. In many countries, years of colonialism and dictatorship have robbed individuals of any expectation of fair treatment by governmental institutions. Often there is little understanding or information about rights and how to use the justice system to defend them. Inadequate capacity of the courts and resulting case backlogs frequently mean that justice delayed is justice denied. In addition, judicial ineptitude, neglect, and corruption fuel a pervasive lack of confidence and discourage reliance on the formal justice sector. In most cases, the problem of access is further complicated by changes in the quantity and quality of demand for services.

Social change produces both a greater number and a greater variety of conflicts among diverse groups of citizens with varying needs and resources. Responding to them adequately requires more and differently organized services. Discriminatory provisions, often well-hidden in the legal framework, sometimes provide different grounds for using a court or mediation program based upon whether the applicant is a man or woman or is from a different religious, ethnic, or linguistic group. The uniform and often "legal" denial of access to the justice system for women is a constant challenge. In addition to women's inferior standing in most of the developing world—particularly institutionalized in many traditional societies—women's lack of access to capital and denial of the right to own property deny them legal standing. Access is also often denied to religious, linguistic, and ethnic minorities as well as to poor and disadvantaged populations that lack information about their legal rights and the financial means to cover court and other legal fees.

USAID works with host country actors to develop mechanisms to promote equal access to formal and informal systems of justice, as well as to develop legislative regulations and budgetary provisions for legal defense and dispute resolution.

### Creating Local Demand/Constituencies for Reform

In USAID's experience it is often the case that state officials, both within and outside of the judicial branch of government, are resistant to justice sector reform. Vested interests and inertia can subvert any reform. In such cases USAID supports local civil society organizations in their efforts to articulate citizen demand for justice sector reform. USAID often provides support to bar associations, human rights advocacy organizations and the media to facilitate popular involvement.

When there are potential change agents operating within an otherwise change-adverse system, USAID seeks to support their efforts to build reform constituencies within their organizations. Technical assistance and training to such potential change agents can give them the leadership edge necessary to catalyze reform.

## USAID JUSTICE SECTOR ASSISTANCE PROGRAMS

USAID is currently implementing justice sector assistance programs in the following countries:

| Asia/Near East | Africa | Europe/Eurasia | LAC |
|---|---|---|---|
| | | | |
| Bangladesh | Angola | Albania | Bolivia |
| Cambodia | Burundi | Armenia | Colombia |
| East Timor | Congo | Azerbaijan | Dom. Rep. |
| Egypt | Ethiopia | Belarus | Ecuador |
| Indonesia | Madagascar | Bosnia | El Salvador |
| Mongolia | Malawi | Bulgaria | Guatemala |
| Morocco | Mozambique | Croatia | Haiti |
| Nepal | Nigeria | Georgia | Honduras |
| Oman | Rwanda | Kazakhstan | Mexico |
| West Bank | Sierra Leone | Kyrgyzstan | Nicaragua |
| | Somalia | Kosovo | Panama |
| | South Africa | Macedonia | Paraguay |
| | Tanzania | Moldova | Peru |
| | Uganda | Montenegro | Venezuela |
| | | Romania | |
| | | Russia | |
| | | Serbia | |
| | | Slovakia | |
| | | Ukraine<br>Uzbekistan | |

# AUSAID STATEMENT TO WORLD BANK CONFERENCE ON LAW AND JUSTICE

AusAID is the Australian government's agency for international development. As such, AusAID manages Australia's official aid program, with a total estimated budget for 2001-2002 of approximately A$1.7m. The primary mandate of Australia's official aid program is to assist developing countries to reduce poverty and achieve sustainable development.

Good governance is increasingly seen as an essential ingredient in achieving these goals, and in recent years this has been reflected in increased number of governance activities, and an increased expenditure on governance activities.

In 2001-2002, such expenditure is estimated to reach A$295 million, representing about 17% of overall official aid expenditure. Of that A$295m, approximately A$35.4m will go to legal and judicial development activities, A$100m to civil society and human rights activities, another$100m to public sector reform activities, and A$59m to economic management activities.

In reality, these four elements of governance are interdependent and mutually reinforcing, and so law and justice activities writ large are very much part of, for example, work in civil society and human rights.

In the law and justice area, AusAID works almost exclusively in the Pacific and Asia regions (about one third and two thirds of expenditure respectively), though there is an AusAID funded Rule of Law project in Palestine, and some occasional work in Africa.

Assistance in law and justice is delivered largely on a bilateral basis, though there are some regional projects (eg the Pacific Judicial Education Program), some of which involve a number of partners (eg the PJEP also involves UNDP, UNOPS, ADB, DFID, and NZODA). On policy development, AusAID is currently working with ADB on a proposed TA for Strengthening Pro-poor Legal and Regulatory Frameworks.

The increased expenditure in the last 3 years or so reflects an increase in partner government requests for assistance as well as increasing donor recognition that an effective law and justice system is critical for poverty alleviation and sustainable development.

That requires consideration of appropriate policies in a number of legal areas, including assistance for economic development, assistance for institutional strengthening of the state legal apparatus, and assistance for poverty alleviation strategies such as access issues.

This last policy issue tends to raise concerns such as crime prevention and community policing, access to justice, improving informal and traditional justice systems, and penal reform, from a "pro-poor" perspective.

Current activities reflect the following, among other things:

- Almost all AusAID bilateral assistance to the legal sector is currently delivered through an Australian managing contractor, often from the private sector.
- Much of the assistance has been focussed on top-down institutional strengthening delivered (eg) through a central Law/Justice Ministry.
- Most of the large bilateral projects are at relatively early stages and any measure of the effect on the core mandate of reducing poverty at this early stage is minimal at best. Indeed limited explicit links between the activity and poverty outcomes have been evident in some early program designs, and only very recently has it become recognised as being necessary in designs and monitoring.
- Ad hoc technical assistance through (eg) the Pacific Technical Assistance Facility (PFTAF) and Youth Ambassadors (YA) also exists, though such assistance may be a less effective instrument of capacity building.
- A move to more flexible contracting has been evident, and considered effective, in designs.

AusAID is currently looking at becoming a more strategic aid agency, through positioning itself for greater effectiveness in an evolving operating environment.

In the law and justice sector, this might involve, among other things:

- Improved quality and relevance of AusAID's interventions, through (eg) improved analytical capacity.
- Improved whole-of-government engagement through working closer with (eg) other Australian government departments.
- A better understanding of the particular law and justice system, the links between institutions in the sector, and the opportunities to promote better partner government ownership.
- A better understanding as to how assistance can achieve improved poverty outcomes, including (eg) through a better understanding of the links between the "formal" and "informal" legal systems.
- Greater strategic alliances with other partners to achieve effective policy outcomes, both in the Pacific Region, where Australia is increasingly the major donor, and in the Asia Region where Australia, though not the major donor, has strong regional ties.

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# An Independent Judicial System

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## Empowerment, Security and Opportunity through Law and Justice

Conference in Saint Petersburg, Russia, July 8-12, 2001

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## I. Transparency International Focus on Independent Judicial Systems

We are delighted to have an opportunity to speak to this important conference about the judicial system. At TI we believe that the Rule of Law is a corner stone for building a transparent and accountable society. We believe that an effective Judiciary is a key element for establishing and protecting the Rule of Law. Our fight against corruption relates to the Judiciary closely, in two ways: It is an essential element of any integrity system to protect society against corruption; but the Judiciary is vulnerable, and it has to be protected against corruption itself. I will try to deal with both aspects in this talk.

**First, why is the Judiciary of paramount importance?**

We can answer that an independent, impartial and informed Judiciary holds a central place in the realization of just, honest, open and accountable government.

We can say that it must be independent of the Executive, if it is to perform its constitutional role of reviewing actions taken by the government and public officials to determine whether or not they comply with the standards laid down in the Constitution and with the laws enacted by the Legislature. In emerging democracies they have an additional task of guaranteeing that new laws passed by inexperienced Executive or Legislative branches do not violate the constitution or other legal requirements.

**But I will also point out that the Judiciary is vulnerable – both from without and from within.**

The Judiciary is almost by definition the weakest of the three "arms" of government – the others being the Executive and the Legislature. If these do not respect the independence of the Judiciary, then the Judiciary can be fatally undermined. The Judiciary is also not immune from corruption and internal decay.

I will therefore voice a word of warning: The capacity of the Judiciary should not be overtaxed. By itself it is not able to carry the whole burden of securing the Rule of Law. History has shown how easily the judicial system can be made subservient to dictatorship and abuse. Blatant examples can be found in many parts of the world.

In my own country, Germany, we have seen this in recent history under two oppressive systems. In fact, a close relative of my wife, a brilliant young judge, who dared in the early 40s to resist Freisler's policy of instrumentalising the courts for Hitler's policies, was conscripted to fight here in Russia, and was dead within weeks. This kind of pressure quickly undermined the independence of a Judiciary that was based on a proud professional tradition.

TI paid special attention to strengthening the Judiciary and has participated in various efforts to address these vulnerabilities, at the local and international levels. I will briefly introduce one of these, the drafting of a code of judicial conduct prepared by a judicial group last February in Bangalore (the Bangalore Draft).

## II. Independence and Accountability of the Judiciary

Independence protects the judicial institutions from the Executive and from the Legislature. As such, it lies at the very heart of the separation of powers. Other arms of governance are accountable to the people, but the Judiciary – and the Judiciary alone — is accountable to a higher value, and to standards of judicial rectitude.

The concepts of independence and accountability of a Judiciary, within a democracy, actually reinforce each other. Judicial independence relates to the institution – independence is not designed to benefit an individual judge, or even the Judiciary as a body. It is designed to protect the people.

### Appointment and Promotion of Judges

While a judge must be independent in this sense, he or she is not entitled
to act in an arbitrary manner. The right to a fair trial before an impartial court is universally recognized as a fundamental human right.

Individuals selected for judicial office must have integrity, ability, and appropriate training and qualifications in the field of law. The selection process should not discriminate against a person on the grounds of race, ethnic origin, sex, religion, political or other opinion, national or social origin, property, birth or status.

The ways in which judges are appointed and subsequently promoted are crucial to their independence. Thus, they must not be seen as political appointees, but rather for their competence and political neutrality. The public must be confident that judges are chosen on merit and for their individual integrity and ability, and not for partisanship.

The **election of judges** poses a special risk. While it has the attraction of being democratic, it may favor populism over professionalism. This risk can be reduced if the list of candidates is vetted for professionalism and non-partisanship. Still, the prospect of having judges campaign for re-election is particularly unattractive. An individual in court is entitled to a fair trial, and this is hardly assured if the judge has to court popular opinion through the way in which he or she conducts the hearing in order to win re-election.

There are also potential dangers in appointing the Judiciary exclusively by the Legislature, Executive or Judiciary itself. As a general rule, in countries where either of the first two bodies is the formal appointing mechanism, and there is general satisfaction with the caliber and independence of judges, appointments do, in fact, involve some degree of cooperation and consultation between the Judiciary and the authority actually making the appointment.

The **promotion of judges** should be based on objective factors – particularly ability, integrity and experience. Promotion should be openly seen as a reward for outstanding professional competence, and never as a kickback for dubious decisions favoring the Executive. The selection of judges for promotion should involve the judges themselves and any role that the Executive might have, should be minimal.

**Secure Tenure and Immunity of Judges**

It is axiomatic that a judge must enjoy personal immunity from civil damages claims for improper acts or omissions in the exercise of judicial functions. This is not to say that the aggrieved person should have no remedy; rather, the remedy is against the state, not the judge.

If judges are not confident that their tenure of office, or their remuneration, is secure, clearly their independence is threatened. The principle of the "permanency" of the Judiciary, with no removal from office other than for just cause and by due process, and their security of tenure at the age of retirement, is an important safeguard of the Rule of Law. It is generally desirable that judges must retire when they reach the stipulated retiring age. This reduces the scope for the Executive to prolong the tenure of hand-picked judges whom they find sympathetic

while reducing the temptation, on the part of the judge, to court the Executive, or other appointing authority, "approval" for re-appointment as the date of retirement nears.

Given that – at least up to the point where impeachment by the Legislature comes into play – judicial independence is best served by individual account-ability being handled by the judges, how can impartiality and integrity be maintained?

**Accountability of the Judiciary**

Judicial accountability is not exercised in a vacuum. Judges must operate within rules and in accordance with their oath of office, which reigns them back from thinking that they can do anything they like. But, how can individual judges be held accountable without undermining the essential and central concept of judicial independence?

Individual judges are held accountable through the particular manner in which they exercise judicial power and the environment in which they operate.

- Judges sit in courts open to public
- they are subject to appeal;
- they are subject to judicial review;
- they are obliged by the law to give reasons for decisions and publish them;
- they are subject to law of bias and perceived bias;
- they are subject to questions in the Legislature;
- they are subject to media criticism;
- they are subject to removal by the Legislature (or by a supreme judicial council); and
- they are accountable to their peers.

Until very recently it was near heresy to raise the question of the accountability of the Judiciary. Now, however, the realization is growing that accountability, far from eroding independence, actually strengthens it. The fact that individual judges can be held to account increases the integrity of the judicial process and helps to protect the judicial power from those who would encroach on it.

The most potent tool would seem to be an appropriate code of conduct. This should be developed by the judges themselves, and provide both for its enforcement and for advice to be given to individual judges when they are in doubt as to whether a particular provision in the code applies to a particular situation.

**But if rules of judicial conduct are articulated and accepted, are they enforced?**

One would not want to give more power to the Executive – whose decisions the courts review. Nor to the Legislature, as that would be to draw judges into the game of politics.

Likewise there is a need to be cautious about individual judges being accountable to a Chief Justice – a judge in Hong Kong was once removed by a Chief Justice only to have his decision reversed by Hong Kong's highest court, which pointed out that even a Chief Justice has to comply with the law.

Peer pressure is important, but independence from colleagues in a collegiate court can also be very important. In an appellate court each judge has to be able to keep his or her mind truly independent of colleagues.

Fair procedures and due process are needed for judges who are accused of impropriety. There is a need for some system for dividing serious misconduct (which may call for removal) from the minor matters (for example, lack of taste, a need for counseling, a lack of understanding and needing a quiet word rather than an open reprimand).

**The Removal of Judges**

Judges should be subject to removal or suspension only for reasons of incapacity, or behavior, which renders them, unfit to discharge their duties.

It is customary to make a clear distinction between the arrangements for the lower courts where run-of-the-mill cases are heard, and the superior courts, where the judges are much fewer in number, have been more carefully selected and who discharge the most important of the judicial functions under the constitution. Lower-court judges are customarily appointed in a much less formal fashion and are more easily removed for just cause. However, neither higher nor lower-court judges are "above the law". There must be sanctions for those who may be tempted to abuse their positions or display gross professional incompetence.

The removal of a judge is a serious matter. It cannot be permitted to occur simply at the whim of the government of the day, but rather it

should be in accordance with clearly defined and appropriate procedures in which the remaining Judiciary plays a part. The involvement of the senior Judiciary itself in policing its own members in a public fashion is generally regarded as the best guarantee of independence.

## III. The Vulnerabilities of the Judiciary

These concepts and tools are widely accepted and promoted to protect the independence and accountability of the Judiciary. However, the reality is different.

In many countries, surveys suggest that the public regard their Judiciaries as hopelessly corrupt. Few people are willing to pin their hopes for reform to institutions that are deeply sullied themselves. Often the primary indicator that corruption is spiraling out of control is a dysfunctional judicial system.

Contributing to this parlous state of affairs are lawyers – whom demand bribes for the judge, but may well keep them for themselves – and court clerks – who lose files and require money to find them or who withhold bail bonds until bribes have been paid? The Judiciary is therefore vulnerable because those around them are failing in their duties.

But most frequently it is the Executive that will try to unduly influence the Judiciary. Therefore, I will list some typical machinations used to undermine the independence and integrity of the Judiciary -- and these are many and varied. Some are subtle, such as awarding honors or ranking judges in the hierarchy at state occasions. Some may be impossible to guard against, while others are simply blatant – such as providing houses, cars, and privileges to the children of judges.

Perhaps the most blatant abuse by the Executive is the practice of appointing as many of its supporters or sympathizers as possible to the court. The appointment process is therefore a critical one, even though some governments have found that their own supporters develop a remarkable independence of mind once appointed to high office.

To combat this independence, the Executive can manipulate the assignment of cases, perhaps through a compliant Chief Justice, to determine which judge hears a case of importance to the government. It is therefore essential that the task of assigning cases be given not to government servants but to the judges themselves, and that the Chief Justice enjoys the full confidence of his or her peers.

When a particular judge falls from Executive favor, a variety of ploys

may be used to try to bring the judge to heel. Such a campaign may be aimed at criticizing certain judges or claiming that a mistake was made when they were selected for appointment. In such instances, judges are not in a position to fight back without hopelessly compromising themselves and their judicial office. To minimize the scope for this, responsibility for court administration matters, including budget and postings, should be in the hands of the judges themselves and not left to the Executive or its civil servants.

When it comes to public attacks, judges must not be, nor consider themselves to be, above public criticism. They cannot claim, at one and the same time, to be guarantors of rights to freedom of speech and yet turn on their critics. Nor should they attempt to muzzle public debate about problems within the Judiciary itself, as has been the case in some countries when the issue of corruption in the judicial process has arisen.

Much criticism can hurt, especially those judges who do their very best in difficult, and at times, hazardous situations. Criticism should be restrained, fair and temperate. In particular, politicians should avoid making statements on cases, which are before the courts and should not take advantage of their immunity as legislators to attack individual judges or comment on their handling of individual cases.

The government's Chief Law Officer should consider it his or her solemn duty to defend members of the Judiciary against intemperate and destructive criticism by fellow members or by the government. The head of the Judiciary also has an important role to play in speaking on behalf of all of the judges in those rare cases where a collective stand must be taken.

At the lower level of the court structure, a variety of corrupt means may be used to pervert the justice system. These include influencing the investigation and the decision to prosecute before the case even reaches the court; inducing court officials to lose files, delaying cases or assigning them to corrupt junior judges; corrupting judges themselves (who are often badly paid or who may be susceptible to promises of likely promotion); and bribing opposing lawyers to act against the interests of their clients.

The vulnerability of the Judiciary is aggravated, if those responsible for the investigation and prosecution of corruption cases do not impose high standards on their subordinates; court officials should be accountable to the judges for their conduct and subject to sanction by the judges where, for example, files are lost; and, the Judiciary itself must insist on high ethical standards within its own ranks, with

complaints being carefully dealt with and, where necessary, inspection teams visiting the lower courts to ensure that they are functioning properly.

The law societies and bar associations also do not take sufficiently stern action against members who behave corruptly. The fact that a system may itself be corrupt does not mean that the lawyers themselves have to become part of such a system. Although it may, in some situations, be an unavoidable necessity for a client to pay a backhander to the gate-keeper, one questions whether the lawyer need ever professionally be in such a position.

A final point of vulnerability for the judge is after his or her retirement. Judicial pensions tend to be less than generous, and the practice in some countries of "rewarding" selected judges with diplomatic posts on their retiring from office, is clearly one which is open to abuse if not handled in a very transparent fashion.

## IV. Building and Protecting an Effective Judiciary

It is clear that Transparency International has given great importance to helping build and protect effective judicial systems -- mainly by supporting its more than 80 National Chapters in their quest to pursue this route. It is the people in each society, in each country, who have to diagnose the weakness of their own Judiciary, and who have to develop strategies and tools to strengthen the Judiciary. To empower civil society to play this role, we help develop specific instruments, based on experiences in other countries, that can be considered and adapted for a particular situation, if found useful.

### Work of Judicial Group on Strengthening Judicial Integrity

One concrete example is the work of Transparency International with the Judicial Group, that met last in February of this year in Bangalore. With eight Chief Justices from a variety of countries, a Draft Code of Conduct for the Judiciary is being developed. The values which this Code upholds are:

- Propriety
- Independence
- Integrity
- Impartiality
- Equality
- Competence and diligence
- Accountability

Rules are provided under each heading to provide guidance. Through a process of consultation, and with the personal support of Mary Robinson at the UN Human Rights Commissioner, we hope this will develop into a global code and be adopted and adapted in countries around the world. The text of the draft is attached to the written version of this statement (Annexure A).

But codes alone will not suffice. We need to know precisely what is going wrong and identify ways and means for shutting off the loopholes in the judicial system which the corrupt are exploiting – be they court staff, lawyers, or the judges themselves.

(As an example.. In one country it was found that court clerks were refusing litigants access to their files unless they were paid a small bribe. The Chief justice, on discovering this, ordered that the court list be posted on the Internet. Not all have access to the Internet, of course, but this action stripped the court clerks of their monopoly and the practice of demanding bribes vanished abruptly.)

## V. The Way Forward:

Most likely it will be in little and incremental ways that we are to build independent and honest Judiciaries. Simply providing judges with travel scholarships (often paid through government ministries, who then use them to reward" the judges whose decisions the government likes), or simply depositing loads of books and cartons of computers is unlikely to change the way people are behaving. Much of the effort made to date by the international community has looked good on paper and been of little practical impact.

### Judiciary is Part of a Comprehensive Integrity System

An independent and accountable Judiciary committed to the Rule of Law cannot, alone and unaided, ensure that the Rule of Law is upheld, or that just and honest government takes place.

In this larger role it is one of a number of the institutions, which we at *Transparency International call the "National Integrity System".* Comprising a number of institutions – the executive, the legislature, the watchdog agencies, a free press, an active civil society, and the private sector as well as the judiciary – collectively they provide the assurances to the citizen that government will take place under the law.

These institutions, too, must be mutually reinforced by a variety of practices – independence, transparency, accountability, sound conflict of interest rules, guarantees of access to information, of a free press

and of free speech, are likewise essential attributes of the National Integrity System. If any elements of the Integrity System are not in place, society is at risk.

But however able and independent the judiciary, it must still be supported by a populace willing to complain, by independent and able investigators, by independent lawyers of integrity and by honest court clerks. Otherwise one can picture a judiciary, as honest as the day is long, sitting in isolated splendor and with not a case being brought before it that is of any significance whatsoever.

**Support of an Empowered Civil Society**

As the eminent jurist, Felix Frankfurter, once remarked, *"The Court's authority – possessed of neither the purse nor the sword – ultimately rests on substantial public confidence in its moral sanctions."* In other words, it rests on the confidence that civil society has in the way in which it discharges its essential functions. It is in this area that Transparency International is working.

It will be by uniting all the stakeholders in the judicial process in the vanguard of reform – and most importantly civil society as its principal victim – that we believe the most effective reform programs will be developed and implemented. And that is how a better future will be built on the basis of a truly independent and accountable Judiciary.

Peter Eigen
7.7.2001