

BASIC POLICY FOR LEGAL ASSISTANCE\*  
OF JAPAN

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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 UNAPEI<sup>2</sup> (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 be 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<sup>3</sup> 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.

## 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<sup>4</sup> and developed countries<sup>5</sup> 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 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 practically 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.

g. 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.

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<sup>1</sup> UNAFEL was established according to an agreement between the Government of Japan and the United Nations.

<sup>2</sup> 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).

<sup>3</sup> E.g., the United Nations Development Program (UNDP), Asian Development Bank (ADB), European Bank of Recovery Development (EBRD), World Bank (WB), etc.

<sup>4</sup> E.g., Australia, Canada, Germany, France, Sweden, the UK, the USA, etc.