

Chapter 1 The Legal System and the Economic, Political and Social Development in Japan

I Introduction

In this course we will follow briefly the history of legal development in Japan and ask how legal reforms have influenced, and have been influenced by, economic development, which has also influenced, and has been influenced by, political and social development in Japan. It is a part of the complexity of mutual relations between legal, economic, political, and social development in a society, from which we will clarify the roles of legal reform for the development of the country.

The way to development is not simple and single, but there are various routes to approach development. The well-known route which had occurred in the U.K. was that the Parliament finally succeeded in limiting the political power of the King by the Glorious Revolution in 1688, having the Bill of Rights to be guaranteed, and establishing the rule of law, which led to the industrial revolution since the 17th century. It was a typical pattern of mutual relation between political development (the popular revolution), legal development (the rule of law), and economic development (the industrial revolution). Then how was it in Japan? Acemoglu and Robinson analyzed the Japanese pattern as follows:

By 1890 Japan was the first Asian country to adopt a written constitution, and it created a constitutional monarchy with an elected parliament, the Diet, and an independent judiciary. These changes were decisive factors in enabling Japan to be the primary beneficiary from the Industrial Revolution in Asia.¹

According to Acemoglu and Robinson, the Japanese way seems to be similar to that of the U.K., for the political development (the Diet in constitutional monarchy), which was sustained by the legal development (the written constitution), led to the industrial revolution. Indeed, there were common elements between Japan and the U.K. However, characteristic features cannot be neglected in the Japanese pattern, in which the history of parliament was fairly short and the principle of the rule of law was a new

¹ Acemoglu and Robinson, 2013, p. 297.

concept, if they were compared with the British ones. Instead, the role of the government has been crucial, which led the country toward the economic development within a shorter period of time. It is a unique development story of one country from which we can draw some implications for both successes and failures in development.

II Features of Legal Development in Japan

The Japanese legal system has developed as a combination of Japanese customary rules, Chinese legal system, Western civil law and common law system, and some global standards. It is the result of historical development of the Japanese legal system, which can be divided into six stages as follow:

[Table 1] The Historical Development of the Japanese Legal System

1) Indigenous rules developed before 5 th century
2) Chinese legal concepts and legal rules such as ritsu (penal rules) and ryo (administrative rules) introduced from the T'ang dynasty in China since 7 th century
3) Japanese legal concepts and legal rules such as the giri (right reason) and the laws for the warrior (samurai)'s household developed in the feudal system since 9 th century
4) Western legal concepts and legal rules such as freedom and rights of individual introduced from England, France, Germany, etc. since the end of 19 th century
5) Western legal concepts and legal rules such as parliamentary system and judicial review introduced from England, U. S, etc. after the end of WW II
6) Globalized legal concepts and legal rules such as rights of children and women influenced by international society since the end of 20 th century

The unique structure of Japanese law has been formed through the reception of laws from foreign countries such as China, European countries, U.S. etc. However, those foreign rules were assimilated with existing rules so that they could be applied to the practices. As a result, it became a hybrid of traditional rules and received rules. It is characterized as “grey” legal culture (Katsuta 1996: p. 249) and it is as a type of legal

pluralism.

The Japanese legal system is now also changing in accordance with the policies of government, requests from international societies, and the needs of citizens and economic circles, etc. It is still on the way to development.

III Before Modernization

1. Introduction of the ritsu-ryo system

The Japan introduced ritsu-ryo codes from China since the 7th century. But it was available by the introduction of a writing system (Kanji) by way of the Korean peninsula. It also received Buddhism and political philosophy based on Confucianism and Absolute Legalist thought. Confucianism taught that rulers should instruct and lead the ignorant people with virtue and courtesy, and Absolute Legalism stressed that they should rule by a system of reward and punishment based on law². On the basis of these legal system and political philosophy, the Emperor and his/her officials established the nationwide-uniform system of rule. Law represented nothing than orders of ruling class and the codes were a catalogue of obligations on the part of subjects toward the society governed by rulers. This conception of law has lasted long, and the people's feeling of such conception of law seems to remain until now. Under the ritsu-ryo system all the land and people belonged to the Emperor.

Also the respect for conformity was developed influenced by the collective labor structure for rice production and the development and management of irrigation system.

Shinto is the indigenous religion developed gradually in Japan from the time unknown in detail. It is a kind of animism in which trees, rocks, and other natural objects are worshipped as gods reside within it. It has no fixed scripture or metaphysical doctrines. Shinto was also used to strengthen the Emperor's authority by explaining that the Emperor came from the heaven down to the earth as a god.

This became the very basis of the political structure of Japan as a kind of kingdom, the ultimate authority of which is drawn from the Emperor.

² Katsuta 1996: p. 250.

2. Development of the feudal system

However, since around the 11th century, the ritsu-ryo system was shaken by the rise of the bushi (warrior class, samurai) and a manor system began to evolve. On the basis of this rule over the privatized land, the real authority shifted into the hand of a shogunate (bakufu) government comprising bushi, especially in eastern part of Japan. It developed the bushi law, as represented by the Joei (Goseibai)-Shikimoku in 1232. It was enacted by the agreement between the shogun, the lord, and his main retainers who had benefices from the lord in reward for their military service. It was an important and unique law relating to the warrior class based on the bushi justice, which was the morality called “dori” (reason), or “giri” (right reason). This norm became the basic rule of various kind of the Japanese organizations such as family, school, company, bureaucracy, etc., which, allegedly, led to the company-cult.

The political power of shogunate (bakufu) government was gradually strengthened and the areas under its control were expanded to the whole country (however, firstly in eastern part) through the thirteenth to seventeenth century. However, this process was not promoted in a straight line. During the period of Kamakura-bakufu (1180-1338), there was once the restoration of the Emperor called “Kemmu-no-chuko” in 1334. Although the bakufu took back the political power, it weakened again around the end of Muromachi-bakufu (1338-1573) which had succeeded Kamakura-bakufu. Since the end of the fifteenth century, small independent states ruled by the regional bushi were emerging all around the country. The ruler of each state was called “sengoku-daimyo” (the lords in Civil War period), and this period was called “sengoku-jidai”(the Age of Civil Wars), which lasted until 1603 when Ieyasu Tokugawa established a unitary feudal regime of Tokugawa-bakufu government (1603-1868). Tokugawa-bakufu lasted until 1868 when the Restoration took place again.

After the establishment of the Tokugawa-bakufu, almost all areas of Japan were unified under the purely feudal regime, and the solid structure of the regime was devised keeping the authority of the Emperor remained as the symbol of the nation. Each “han” (territory) divided up among the “daimyo” into fiefs enjoyed political and

legal autonomy, but the control by the bakufu and its head “shogun” was strongest, and the bakufu (the central government) law presided over the han (the territory) law when there was an inconsistency. This system is called “baku-han-taisei”.

The bakufu government established strict hierarchical order that consisted of “kuge”, “buke”, the clergy, commoners and pariahs. The commoners were ranked below the warrior (“Shi”) in such an order as peasant (“No”), artisan (“Ko”) and merchant (“Sho”). Although the peasants were ranked at the highest status among the commoners, they were imposed very heavy burdens, obliged to live frugally, allowed to change neither the place of residence nor their occupation.

In order to maintain this rigid class distinctions, the bakufu government adopted Confucianism as its official ideology, and issued basic regulations (“hatto”), orders (“furegaki”) and circulars (“tasshi”) on the basis of Confucianism. Especially they emphasised that the people’s fate is determined by heaven from their birth. Among basic regulations, *Kinchu-narabini-kuge-sho-hatto* (the general status code of “kuge”) of 1615, *Buke-sho-hatto* (the general status code of “buke”) of 1615, and *Kujikata-osadame-gaki* (the Written Rules of Procedure) of 1742 were most famous.

IV Modernization

1. The Restoration and the establishment of the new government

But in the latter half of the nineteenth century, the bakufu government confronted the internal defiance which aimed to overthrow bakufu by means of the imperial authority. The Japanese imperial authority has been often utilised to overthrow the former government and to legitimize the coup d’etat by the new government.

In 1867 the fifteenth shogun Yoshinobu Tokugawa handed back the “taisei” (great political powers), including the domain and the people directly governed by shogunate government to the Emperor (“taisei-hokan”). And other “han” (territorial states) returned their land and people to the emperor in 1871 (“han-seki-houkan”). After that the newly built government, Meiji government, promoted a set of policies to centralise the political power into the hands of the emperor.

Some of the “han” resisted the new Meiji government, but were repressed by 1877

when the last civil war, “Seinan” War was suppressed. This process is called “Meiji-ishin” (“Meiji” Restoration). However, there are controversies about what the substance of “Meiji-ishin” was, and exactly when it began and came to an end.

Some think that it was a revolution, while others think that it was not a revolution because it was carried out by fairly limited groups made up mostly of the lower class bushi of some great han in the southwest of Japan such as “Satsuma”, “Choshu”, “Tosa” and “Hizen”. They indicate that it was lacking in “a popular movement element” of a “revolution” and thus only “a change of the subjects of political power only within the same privileged class³. If it is true, it might be a coup d’etat again rather than a revolution.

2. The State’s Policy of “Bunmei-kaika” (Enlightenment for Civilisation), “Fukoku-kyouhei” (Wealthy State and Strong Army) and “Shokusan-kougyo” (Investing and Promoting Industry) for “Modernization” of the State

(1) Fundamental Norms in the First Stage

The Meiji government began a set of campaigns to unite the people under the centralized authority and to keep independence of the state against foreign powers. This can be seen as a process of “modernization” initiated by the state following the model of “modernized” countries. And a series of reforms and new codifications of law can be realized in this “modernization” context. The Japanese style of “modernization” can be well characterized by some slogans at that time: (i) “bunmei-kaika”, (ii) “fukoku-kyouhei” and (iii) “shokusan-kougyo”. In the field of law, however, it resulted in (formal) discontinuity of the state law between the modern state law and the former Japanese law⁴. We can divide this modernization process in three stages.

In the first stage, that is, during the first four or five years of the Meiji period, the government proclaimed that it should keep “institutions of Tokugawa ancestors, beautiful or graceful customs and good laws”⁵. According to this principle, the Meiji government issued the fundamental norms such as *Imperial Covenant of Five Articles*

³ Noda, 1976, p. 42 and not 2.

⁴ Noda, 1976, p. 39.

⁵ The Great Command of the Restoration of Imperial Rule in 1867.

(the Charter Oath of the Emperor Meiji) (1868) and *Code of the Form of Government* (1868). However, since these norms were made by referring not only to (i) ritsu-ryo and other traditional rules and (b) Japanese and Chinese historical records, but also to (iii) introductory books into the European and the North American political institutions, etc., they were a not well organized mixture of Japanese, Chinese and Western elements. For example, the Code of the Form of Government included the rule of separation of powers into the legislative, executive and judiciary, but it was not for the balance of powers, but only the convenient allotment of the centralized governmental functions.

Among individual legislation at this stage were *Public Officials Orders* (1870, etc.), *Civil Registration Law* (1871), *Penal Codes* (1868, 1871, 1873), orders that permitted the farmers of free cultivation, removed the ban on the transaction of land, confirmed private ownership of land for every individual, provided for the issue of the title deed of the land, and imposed a tax according to the price of the land (1871-1873)⁶.

(2) A Set of Codification and Introduction of the Liberal Western Legal System in the Second Stage

In the first stage there remained the continuity between the legal system in Edo period and the newly made legislation. However, in the second stage, that is, from about 1873 to 1890, the more a series of legislation that following the Western model started, the more legal continuity was cut off, at least at the level of the state law. This led to a radical transformation of the Japanese legal system.

In 1870 Rinsho Mitsukuri, a member of the study group of the civil law in the Government, translated the French word “droit civil” as “min-ken”. “Min” means citizen or private person, and “ken” means right. Their combination indicated that the citizen can have rights. But the other members of the group raised strong objections against such a translation, for they could not believe that a right resided in the subject.

In this stage, fairly liberal legal systems were introduced into Japan, mainly

⁶ In this way the financial basis of the government transformed from “nengu” (rice paid as rent) to a land tax in money (3 % of the land value) which accounted for 75% of the total revenue of the Meiji government in average (the highest record reached 93%).

following the model of the U. K. and France. Among them, for example, *Order concerning Procedural Documents* (“soto-bunrei”, 1873) and *Regulation on the Limitation* (1873) were influenced by the English law.

The next and much more completed in the Western style codes were *the Penal Code* (1880) and *the Criminal Procedure Code* (1880). They were drafted by Gustave Boissonade, who was Professor at the Faculty of Law, the University of Paris and came over to Japan in 1873 in response to the invitation of the Meiji government. These codes were challenged by conservatives in “Genro-in” (the Senate) and officials who supported the former penal codes based to the large extent on the *ritsu-ryo*⁷ and the traditional customs. But they won the promulgation and were put into effect in 1882.

Further, the Minister of Justice Takato Ohki appointed Boissonade to draft the civil code in 1879 or 1880 except for the parts of family (relation) law and succession law that were reserved in the hands of Japanese drafters. After this project was once interrupted in the middle, the new Minister of Justice Akiyoshi Yamada appointed Boissonade as a drafter again in 1887. His draft was written in French and translated into Japanese as it was drawn up. The translated drafts were discussed and modified by the Committee for the Investigation of Law, and then by Genro-in (the Senate), and finally by “Sumitsu-in” (the Privy Council). After that the government (the Cabinet was established in 1885) modified partly the substance without having consent of the Senate and promulgated the law. In general, the government (the Cabinet) could promulgate law even without prior discussion in the Senate at this stage. This shows the independence of the Senate from the Cabinet was incomplete, and the separation of powers was not established.

In 1889 some parts of the bills of the civil code drafted by Boissonade were adopted by the Senate. They were (i) the Book on Property, (ii) the Book on the Methods of Acquiring Property (except for the chapters of succession, legacy and marriage contract), (iii) the Book on the Securities Guaranteeing Obligations, and (iv) the Book on the Methods of Proof. They were promulgated in 1890. The other parts drafted by the Japanese drafters were also adopted and promulgated in 1890. They were three

⁷ See III (1) above.

chapters in (b) the Book on the Method of Acquiring Property and the (v) the Book on the Persons. These five Books were combined into a single code as *Civil Code of the Empire of Japan* (1890)⁸. Thus it followed the French style of codification called “Institutiones” system, and to be put into effect on 1 January 1893.

Here, before entering into the description of the third stage, we should confirm another important codification in the second stage. They were (i) *Commercial Code* (1889), which followed the German style; (ii) *Court Organization Law* (1890), which was drafted by Otto Rudolf on the model of German Law of 1877⁹; (iii) *Code of Civil Procedure* (1890), which followed the German system almost exactly, and came into effect in 1891; etc. To note is that the procedural law was put into effect and applied earlier than substantive law¹⁰.

However, in 1892 the enforcement of the code was determined to be postponed until 31 December 1896 after the very hot disputes both inside and outside of the Senate and it was failed at last as the new legislation work set out. Several reasons are indicated for the failure of *Civil Code of 1890*. Among them particularly important seems to have been the political background of the debate. The government, who had been taking up a positive attitude toward the introduction of the liberal legal systems in the second stage, was confronted with the increasing political movement called “jiyu-minken-undo” (the liberal movement seeking for civil rights) since around 1880. This movement was supported largely by the discontented former bushi who had not got positions in the new government¹¹. In order to oppress the movement, the government was changing the policy of the introduction of liberal legal system, and shifting its attention to introduction of a legal system based on the absolutism like the Prussian Empire. Under those circumstances the government began to show the interest in German law instead of French law and English law. At about same time

⁸ It consisted of (i) the Book on Persons, (ii) the Book on Property, (iii) the Book on the Methods of Acquiring Property, (iv) the Book on the Securities Guaranteeing Obligations, and (v) the Book on the Methods of Proof.

⁹ Cf. An independent supreme court called “Daishin-in” was constituted in 1875.

¹⁰ Noda, 1976, p. 55.

¹¹ Noda, 1976, p. 48 ff.

translation works of the German law and its legal literature were set about¹².

In order to promote again the codification of the civil code, the commercial code whose enforcement was also postponed in the same way as the civil code and the other related codes, the Council for Codification Studies was set up in 1893, and some members were appointed to the drafters. As for the civil code, three members were appointed and their drafts were submitted to the Chief Investigation Committee and then to the Plenary Committee for discussions and modifications. Drafters were bound by the guidelines adopted by the Council. It included a basic policy concerning the structure of the civil code. The Council adopted what is called “Pandekten” system based on the German Civil Code, especially that of Sachsen instead of “Institutiones” system of *Civil Code of 1890*¹³.

One important thing that should be mentioned here is the policy of the government which has just embarked on the compilation project of national basic codes. The Minister of Justice, Takato Ohki, articulated the policy to compile civil code on the basis of “natural reason” in order to facilitate the communications among human beings. Then he emphasized the importance to provide rights and duties between the persons in comprehensive legal relations in civil code. For that purpose, he established the Bureau for the Investigation of Local Customary Rules in 1876 and published the Collection of Customary Rules in Civil Matters in 1878¹⁴. At the same time he appointed French Professor Gustave Boissonade as a drafter of civil code in 1879 (or in 1880)¹⁵. The purpose of the Minister of Justice was to increase the integrity of national legal order on the basis of traditional rules to be combined with the newly introduced rules¹⁶.

¹² For example, Pandekten textbooks written by Dernburg, Windscheid, etc. were translated into Japanese.

¹³ As a result the new civil code consisted of Books of (i) the General Provisions, (ii) Real Rights, (iii) Obligations, (iv) Family Relations and (v) Succession.

¹⁴ It was extended and revised in 1880.

¹⁵ Boissonade came to Japan in November 1873 and gave lectures on natural law and French law at the law school in the Ministry of Justice from April 1874 until August 1879.

¹⁶ The natural law influenced substantially not only the theories but also practices since the early stage of the reception of Western laws. It was recognized as a source of law when the judge could not find any provision of law and customary law in civil

Whereas the guideline also included the policy that the purpose of the Council should be the needed “modification and revision” of *Civil Code of 1890*. As a result, the newly drafted bills of the Japanese civil code remained to have many provisions that originated in French Code civil, but at the same time it adopted provisions of German law (the first and second drafts of the German Civil Code were known), and more than twenty civil codes, their drafts and related statutes were referred to arrange the new provisions, so that it was characterized as “a fruit of comparative jurisprudence”¹⁷.

The bills were adopted by the Imperial Diet in 1896 and 1898. As soon as the new Civil Code came into effect on 16 July 1898, the German legal science became popular among academic circles, judges and lawyers, and it strongly influenced the Japanese Civil Code through its interpretation.

(3) An Inclination for the Legal System Based on the Absolutism in the Third Stage

The drafting of the constitution started provably in 1886 under the initiative taken by Hirobumi Ito. Kowashi Inoue was a central figure among the drafters. He consulted with German Jurist Herman Roesler and Albert Mosse who admired the Prussian Constitution of 1850. Inoue completed the draft by 1888 and it was discussed in the Privy Council, but it was not discussed in the assembly, that is, in the Senate. On 11 February 1889 *Constitution of the Empire of Japan* was “granted”, not promulgated, by the Emperor to his subjects. This Constitution is called *Meiji Constitution*.

The Meiji Constitution provided for the Imperial Diet, but it was only a collaboration organ with the emperor (Arts. 5, 37 *CE*) and the Imperial order was to be applied as law in the case of emergency and when the Diet is out of session (Arts. 8, 9 *CE*). The power of the Diet was considerably weakened also by the Government. For instance, if the Diet would not adopt the bill of the budget submitted by the Government, the budget of the previous year was to be enforced again (Art. 71 *CE*)¹⁸. Furthermore, the

matters (Article 3, Ordinance No. 103 in 1875).

¹⁷ Hozumi, 1912, p. 22.

¹⁸ See also Art. 54 and compare it with the parliamentary system under the present Constitution (especially Art. 68 I CJ).

military power was not prescribed and controlled by the Constitution. That meant the military despotism. Certainly, the Constitution brought about the rules of democratization to some extent. However, because of those immature independence of the Diet and incomplete control over the military force, it is characterized as “constitutionalism only in an appearance”.

As for the administrative organizations, they were principally influenced by German law. The Cabinet system (1885), *Communes Law* (1888), and *Departments Law* (1890) were particularly important, for through these institutions the central and local administration were perfected along the Prussian line about by 1890¹⁹.

*Establishment process of the judicial independence: “Otsu” Incident:

In 11 May 1891, when the Russian Prince, the future Czar Nicholas II, visited Japan, a policeman, named Sanzo Tsuda, thought that the Prince had come to spy, and he attacked and stabbed the Prince in a small-town Otsu. As the incident bothered the autocrats of the government for it would complicate the relation between Japan and Russia, the Prime Minister, Masayoshi Matsukata, pressured the Minister of Justice and required him that the death penalty should be given to Tsuda. The Meiji Emperor unconventionally called on the Prince in hospital and the Minister of Foreign Affairs Shuzo Aoki had given an assurance to the Russian Embassy that Tsuda must be sentenced to die.

However, the head of the Supreme Court Iken Kojima refused to yield to such political pressure with the support by the members of the bar and, on 27 May 1891, the court sentenced Tsuda to life imprisonment for the reason that although the crime was serious to be severely punished but the Criminal Code did not provide the death penalty for attempted murder (Art. 112, 116 the former Criminal Code) and the high treason (Art. 2 the former Crim. C) could not be applied to this case as alleged by the government leaders. This reasoning based on the rule of law could persuade the Russia and it is said that the Kojima installed the “principle of judicial independence” in

¹⁹ Cf. Noda, 1976, p. 57. He sees the completion of establishment of the administrative organization was “about 1885”.

Japan and he is honored as the “Guardian of Constitution.”

Behind the scene of the “Kojima Story” it is indicated that he was moved by his background as a minority which had been unfavored by the majority group in the Meiji government who came from the former big territorial states such as Satsuma and Choshu. Certainly, his rival Aritomo Yamagata who came from Choshu and was the former prime minister, tried to give sanctions to him for the reason of gambling in 1892 and told prosecutors to impeach him and his fellow judges. However, the law required the prosecutors to prove the facts with good evidence and the Supreme Court judges dismissed the charges against him for the lack of evidence²⁰.

This story seems to tell us that the political pressures and incentives for agents to follow their principal’s wishes can be actually restrained by the rule of law.

*Accumulation of human capital

The development of education has played a momentous part in Asian economic expansion. This is, of course, spectacularly so for Japan, where the educational priorities and the rights of citizens and residents against the local authorities to provide school education assumed a leading role in the initiation of rapid economic expansion. For example, between 1906 and 1911, education consumed as much as 43 per cent of the budgets of the towns and villages, for Japan as a whole. In this period in Japan, ... while in 1893 one third of the army recruits were illiterate, already by 1906 there was hardly anyone who was not literate.²¹

V Post War Reforms

1. Series of reform in the first stage (1945-1948)

On 10 August 1945 the government of Japan decided to accept *Potsdam Declaration* and proclaimed the unconditional surrender on 15 August 1945 (the instrument of surrender was signed on 2 September 1945). After that the Japanese government was placed under the control of Allied Forces. However, as it was not a direct rule, the

²⁰ Ramseyer and Rosenbluth, 1997, 142-143.

²¹ Sen, 2000 [2006], p. 18 [p. 43].

Japanese government was allowed to act under the supervision of “Rengokoku-saiko-shireikan” (the Supreme Commander of the Allied Powers: SCAP). In order to help the SCAP to control the Occupational Forces, the General Head Quarter (GHQ) was set up. Over the SCAP there was "Tainichi-rijikai" (the Allied Council for Japan: ACJ) to supervise the SCAP, and the ACJ was under the control of “Kyokuto-rijikai” (the Far Eastern Committee: FEC).

In the first stage of the occupation (from August 1945 to the summer 1948), reforms were suggested or required by the GHQ such as:

- (a) demilitarization of Japan²²;
- (b) fundamental reform of the Constitution; and
- (c) what is called “five major reforms”, which included (i) equalization of the sexes, (ii) encouragement of the labour union, (iii) democratization of the economy, (iv) abrogation of institutions related to the police state, and (v) establishment of the judicial system.

These reforms meant a radical change of the political, economic and legal system of the Meiji regime. Lots of measures for the reform was rapidly carried out under the strong influence of the GHQ. Especially, the role of civilian advisors from the U.S.A. was crucial.

As for (b) above (fundamental reform of the Constitution), *Constitution of the Empire of Japan* was totally “amended” as *Constitution of Japan* (promulgated on 3 November 1946 and put into effect on 3 May 1947). It brought about the radical change of the fundamental principles of the former legal system. It included the following points:

- (i) There was a transformation of sovereignty from the emperor to the people. The will of the people are to be represented by Parliament, the members of which are to be elected by the universal election. The universal election was for the first time held in 1946.

The new Constitution was enacted by way of an “amendment” of the former Constitution according to Art. 73. As a result, the validity of the new Constitution was

²² As for the demilitarization, see Oda, 1992, p. 32.

challenged, since it would be questioned whether the fundamental principles of the Constitution (including rules concerning the holder of sovereignty, balance of powers, and other constitutional system) could be changed by way of its “amendment.” In order to justify and explain theoretically the inconsistency of the formal continuity with the substantial discontinuity of the constitution, the “August Revolution” Thesis was propounded²³.

But this theory sounds like so explanatory that it lacks in the meaningful social reality corresponding to the “revolution.” In this sense, it would be improper as it concentrates the attention exclusively on the problem of the constitutional continuity. Rather we should much more consider the continuity of the legal system as a whole. From this viewpoint, as Raz indicates, the constitutional continuity between the old laws and the new laws are not necessary or sufficient conditions for the continuity of the legal system. The reason is that the legal system is only one of the defining features of the complex forms of social life that includes religions, states, regimes, tribes, etc.²⁴ In this context, there might be the possibility to affirm theoretically the continuity of the actual legal system between the Meiji regime and the present regime.

(ii) The guarantee of the fundamental human rights safeguarded by the introduction of judicial review needed the revision of the Code of Criminal Procedure.

(iii) The renunciation of war was provided for in the Constitution (Art. 9 *CJ*).

As far as (c) above (“five major reforms”) concerned, such reforms were implemented as follow:

(i) In order to realise the equality between men and women, all the provisions that were related to “ie” system were thought to be nullified. As a result, the parts of the family law and succession law in *Civil Code* was totally revised, and other provisions which were in contradiction with the equality of sexes were excluded from *Civil Code*²⁵. And the women were given the right to vote for the first time in the election of 1946.

²³ It was challenged by the “Nomos Sovereignty” Thesis. On this dispute, see Hasebe, 1997.

²⁴ Raz, 1980, p. 188.

²⁵ For example, Arts. 14-18 Civ. C. concerning the limited legal ability of women to conduct a transaction.

(ii) Three major labour laws were promulgated. They enhanced the right of workers to the labour union, to the minimum standards of the labour conditions, etc.

(iii) The agrarian reform was carried out in 1946. Absentee landlords were forced to sell the land to the state, and tenant farmers were given the opportunity to buy the land at a certain lower price. The maximum amount of land one person could own was limited to less than 1 ha. As a result of the Agrarian Reform, 2,500,000 households newly became the land owner²⁶.

“Zaibatsu” (the business conglomerates) and the (stock) holding companies were dissolved. Further, *Anti-Monopoly Law* and *Exclusion of Excessive Economic Concentration Law* was enacted in 1947.

In the process of legal reform, the American laws had strong influence especially on *Constitution*, *Code of Criminal Procedure*, the labour laws, *Anti-Monopoly Law*, etc.

2. A Change of the original occupation policy in the second stage (1948-1951) and its influence on the basic legal structure

In the second stage of the occupation (since around the summer in 1948 until the conclusion of the Peace Treaty in 1951), however, the early occupation policy was significantly altered influenced by the increasing tensions between the U. S. and the states of the Eastern Bloc. According to this shift in policy, such reforms as disarmament, encouragement of the labour union, and dissolution of the business conglomerates were looked over again. Consequently, some reactionary revisions were carried out. For instance, the labour standards of the public officials were considerably diminished by the order of 1948 (Order No. 201)., and the right of officials to union, which was guaranteed by *Labour Union Law* of 1945, was denied by its revision in June 1949.

Anti-Monopoly Law of 1947 was also amended in 1953 “in order to adapt it to the

²⁶ In the case of Tanashi City, before the Agrarian Reform about 50% of the agrarian land (361 ha in total) was owned by absentee landlords. The government bought the land and about 90% of it was transferred to the tenant farmers at the price of one-sixtieth of the market value (0.6 Yen per m² in 1946). However, the farmland (361 ha in 1946) have been decreasing to 30 ha in 1999) as the land price increased (510,000 Yen per m² in 1990).

situation in Japan”²⁷, which meant the relaxation of regulation.

The outbreak of the Korean War and growing worse of the Cold War promoted the shift of disarmament policy to rearmament, which led to the introduction of the Police Auxiliary Force. It grew up into the Self Defense Force, whose troops were noted above (Chap. 7). A series of this political movement brought about a serious contradiction of the actual existence of the Self Defense Force and the constitutional explicit clause of the renunciation of war (Art. 9 *CJ*). This political framework has been firmly fixed by the U. S. - Japan Security Treaty since 1951, when Japan signed the Peace Treaty with the Allied Nations that took effect in 1952.

The Supreme Court has avoided deciding on the constitutionality of the existence of the Self Defense Force, because its decision would affect the highly political decisions of the executive and legislative and it would break the separation and balance of powers. As far as this question is concerned, the Supreme Court is very cautious. We are confronted with the increasing “danger” that the prolonged state of contradiction would neglect the normative implication of Art. 9 *CJ*.

VI Conditions for Economic Development and Legal Reform

1. Initial conditions

Japan embarked on the reforms for modern economic growth around the middle of 1880s. In 1886, GNP per capita was only 136 USD as converted into USD in 1965. It was still 876 USD in 1965 (see [Table 2])²⁸.

However, the economic growth has been rapidly accelerated since the 1960s as a result of the government policies to promote economic activities (see [Table 3]). The government facilitated the private firms to introduce new technologies from developed countries by providing financial support. But those private activities could be promoted on the basis of institutional infrastructures which had developed before and after modernization.

²⁷ Oda, 1992, p. 34.

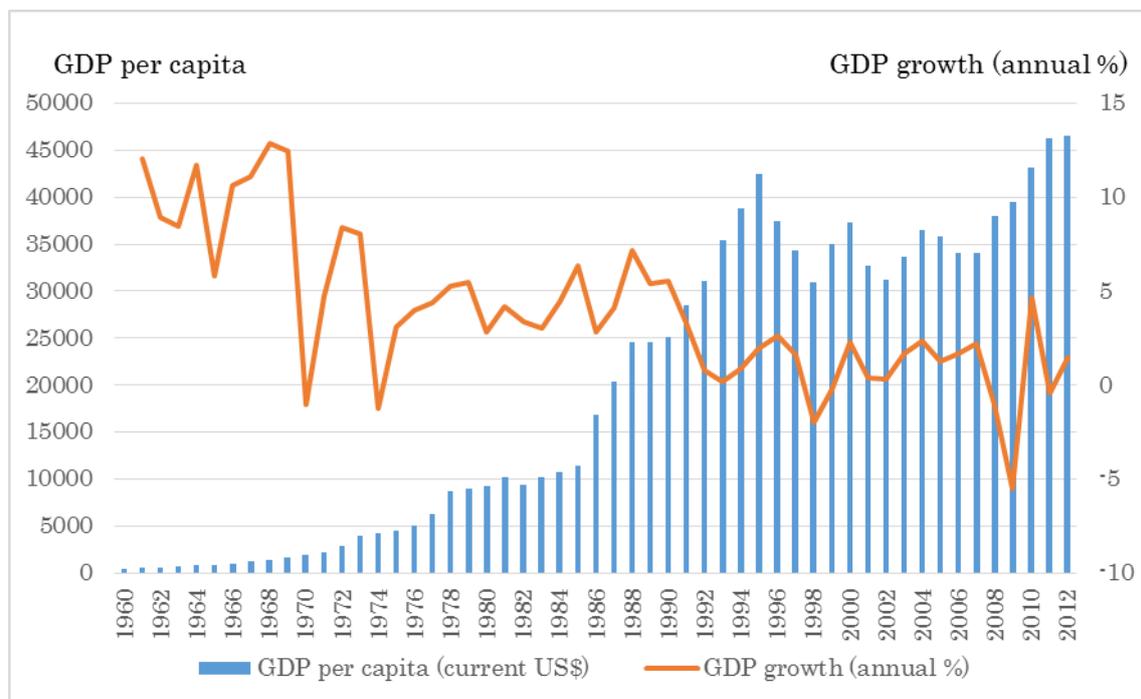
²⁸ The figure is the GNP for 1965 and is the GDP for 2012.

[Table 2] The Change of GNP (GDP) per capita

	Great Britain	France	Germany	U. S. A.	Japan
1965 (USD)	1,870	2,047	1,939	3,580	876
2012 (USD)	38,999	41,223	42,569	51,709	46,530

Source: Minami, Ryoshin, *Nihon no Keizaihaten [Economic Development in Japan]*, 3rd ed., Toyokeizai-shinposha, 2002, p. 4.

[Table 3] The GDP per capita and the GDP growth rate



Source: World Bank, *World Development Indicators*, 2014.

As for the initial conditions, several advantages are indicated. **The literacy rate** was fairly high. Although the available data are fragmented, around 1880s, it is estimated about 86% in Edo (now Tokyo), and more than 80% in rural areas, maybe due to the education system in the Buddhist temples.

The irrigation system had been developed by using not only ponds but also rivers

together with the establishment of association to manage the distribution of water.

The transportation system was developed by the hikyaku (express messenger) who delivered documents, money, promissory notes, luggage, silk, flowers, etc. about 4 days between Edo and Osaka. It had become the basis of the postal service system established in 1871, distribution of goods, and financial system.

The shipping system was developed around the coast, mainly between Edo and Osaka.

The market system was developed mainly for rice. The rice market opened around 1660 in Dojima, Osaka. It adopted the securitization system and treated the futures transactions, which was authorized in 1730 by the Bakufu government. The price information was delivered by the hikyaku as mentioned above.

2. Government policies and laws and regulations

(1) Encouraging new industries

The Meiji government took the policy of “encouraging new industries,” which needed to introduce new technologies and institutional innovation including the engineering education. It was implemented by a series of education laws promulgated in 1886 which covered primary, secondary and higher education²⁹. By the government’s initiative and support, the economic structure has been transformed from indigenous sectors such as agriculture, fishing, forestry, silk industry, textile manufacturing, brewing industry, paper manufacturing, oil manufacturing, etc. into modern sectors such as mining industry, railway business, shipping industry, machine industry, chemical industry, etc. by the cooperation between government and private firms. The salient feature of Japan’s economic policy was that the government considered the balance between the promotion of efficiency in industries and that of fairness between employers and employees, though it took time to implement it.

(2) Growth with equity

²⁹ Before that, the Institute of Technology was established in 1873 and the University was established in 1877. Those predecessors had already been established within ministries, and the predecessors of private universities had been opened since 1858.

After the WW II, the democratization was strongly promoted under the initiative of the Allied Forces. The democratization of political decision-making was implemented by the fundamental revision of the Constitution in 1946 and other related laws. The dissolution of zaibatsu and agrarian reform were significant measures to democratize the economy by reducing the income differences. The agrarian reform included the redistribution of the private land-holding, so it was implemented by making the Law on the Special Measures for the Establishment of Landed Farmers in 1946.

On the basis of this democratization policies, the government took the effort to manage the macro economy and to keep the stability of society on the one hand, and to integrate the Japanese economy into the international economy on the other.

In August 1954, the Ministry of Finance announced the Basic Ideas of the Future Economic Policy and required the private firms both to reduce the costs of production and to increase the employment by creating job opportunities. In January 1960, the government concluded the Japan-U.S. Security Treaty to secure the national defense, then in December 1960, the Cabinet headed by the Prime Minister Hayato Ikeda adopted the Income-Doubling Plan to be attained within ten years from 1961 to 1970. For that purpose, it was necessary to increase the productivity in private sector so that the government took the measures to introduce new technologies and innovations, and **the Law on the Promotion of the Modernization of Medium and Small-Sized Firms** was enacted in 1963³⁰. The gross GDP doubled in 1966 and the gross GDP per capita doubled in 1967 as that in 1961.

(3) Liberalization of trade and investment

Since the end of 1950s both the government and the private sectors understood that they could not avoid the liberalization of trade and investment in the near future. In June 1960, the government made a cabinet decision on the basic plan for the liberalization of trade and investment that included a detailed schedule for liberalization of markets starting from the raw materials, then the goods which had international competitiveness, and then the industries under rationalization and

³⁰ Also the Law on the Agency for the Promotion of Employment was enacted in 1961.

technology development. The leaders of business circles were quite positive for liberalization, because they thought it was a chance to increase the technology standards.

The government, especially the Ministry of Trade and Industry (MITI), put emphasis on the private powers and initiatives and supported them to shift from light industries to heavy industries by making of **laws and regulations for subsidies**. It also facilitated the private firms to import the machines to manufacture those machines by shifting from the import subsidies to trial manufacturing subsidies.

It is well known that disputes occurred between the government and the private firms. Since 1961, the MITI prepared for **the Bill on Temporary Measures for the Promotion of Specific Industries**. In order to arrange the efficient investment and government support, it included a plan to divide the automobile companies into three groups such as those for production vehicle, special vehicle, and compact car. The MITI classified HONDA into the third group, because there were TOYOTA and NISSAN for the first group, and a new comer was thought to be unable to win GM and FORD in the U.S., so that its new entry would end in the waste of investment. But, Soichiro Honda, then the HONDA's president, strongly opposed the plan that the government could not say anything about what the private company should produce. In March 1963, the government submitted the Bill to the parliament, but it could not be broadly supported by various stakeholders and was abrogated as a result of the oppositions. This is one of the stories which showed the strong desire of private firms for free investments. However, the cooperation between the government and private sectors has been strengthened, which led to the mergers of big companies such as in heavy industries, paper industries, automobile industries, etc. These industry policies had also been adjusted to the competition policies administered by the Fair Trade Commission.

In the case of Japan's development process after the World War II, it is said that the simultaneous advancement of economic development, socio-economic equality, and democracy promotion in the sense of political participation has been sought by the government: (i) It was brought about by the government policy of increasing spending in certain fields of agriculture, light industries and then heavy industries, (ii) which

led the more socioeconomic development, (iii) that enabled the government to redistribute income from the more privileged to the less privileged groups, (iv) which facilitate the more socioeconomic equality, and (v) the more supportive participation to the government decision-making and the stability of government (Kabashima 1984: pp. 332-338)

The income difference between the rich and the poor in Japan has been reduced to around one tenth of that before the World War II.

(4) Anti-pollution measures

In the reverse side of the rapid economic growth, the pollution had been getting worse quite seriously. If I limit only the serious cases, the Itai-itai Disease (caused by cadmium) occurred around 1910 and lasted until 1970s in Toyama, and Minamata Disease (caused by organic mercury) occurred around 1956 in Kumamoto, the Yokkaichi Asthma (caused by sulfurous acid gas) around 1960 in Aichi, the Niigata Minamata Disease (caused by organic mercury) around 1964 in Niigata, etc.

The government was not so positive to look at this problem and very slow to react them. It enacted the Basic Law on the Prevention of Environmental Pollution in 1967 and the Law on the Special Measures for the Remedy for Pollution-related Health Damage in 1969³¹. However, it was too late to prevent the spread of damages. The government established the fund to provide compensation, but it could not cover all the victims because the requirements to be confirmed as affected by the disease are fairly strict.

VII The Role of Law for Economic Development in Japan

1. The Role of law in the process of economic development

We can summarize that the legal reform has contributed to economic development in various ways.

First, it consolidated the basis of the government including the tax system.

³¹ It was abrogated by the Law on the Compensation for the Pollution-related Health Damages enacted in 1973.

Second, it gave the foundations for the private transactions by establishing the cadastral, confirming the owner of the land, and providing the transaction system at a fairly low cost.

Third, it gave the stability to the economic policies once decided by the government and it avoided the political intervention. It can be characterized as an “anchor” which secures the government to implement its development policies by avoiding the waves of interventions from opposition parties and organizations and political instability.

Some special laws such as for the agrarian reform were the basis of strategic communications between the parliament, judiciary and administrative, and between the government and firms and civil societies.

2. The Particularity or uniqueness of the Japanese case?

There is a case that the conventional wisdom sees that “consulting Japan's legal experience would be worthless because Japanese life is hardly affected by law, that law is irrelevant to most Japanese and disfavored as a means of dispute resolution, that the Japanese economy is ruled by powerful bureaucrats unhindered by legal restrictions”³².

However, it seems a bit far from the reality of law in Japan. Even if law is not used in the litigation, the consciousness of abiding law is fairly strong in Japan. It may be due to the historical development of the Japanese legal system, in which law is composed of orders made by rulers high on the social scale to control the common people under their control, and the authority of law has been backed by the stability of centralized government in Japan.

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³² See Upham, 2006, p. 91.

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Chapter 2 The Legal System and the Economic, Political and Social Development in Northeast Asian Countries (1): the case of Korea: What are the roles of law and politics in economic development in Korea?

1. Economic and Legal Development in Korea

Korea achieved a rapid economic growth since 1970s, which was named as the “Miracle of the Han River”, and its GDP per capita has increased more than ten times in 2010 as that in 1980. It is still keeping the pace of growth even in time of the economic recession in neighboring countries (see [Figure 1]).

“It is generally agreed,” according to Chaihark, “that economic development in Korea came during oppressive military regimes that showed little respect for rule of law”³³ (see [Table 1]).

In Korea, influenced by the Confucian norms and ideas, there has been the characteristic concept of the rule of law, which can be understood as the regulation of government officials (bureaucracy) by the law codes (“regularized governance”), and which is far from arbitrary rule or lawlessness. It is also a mistake to recognize an “aversion to law and litigation” in Korea.³⁴

The Korean legal system is regarded as a system of civil law, which has been profoundly influenced by the German law and jurisprudence.³⁵

2. Reasons for the Rapid Growth

(1) The Influence of Confucian Norms and Ideas

³³ Chaihark, Hahm, 2004, “Rule of Law in South Korea: Rhetoric and implementation,” in: Peerenboom, Randall (ed.), *Asian Discourses of Rule of Law: Theories and implementation of the rule of law in twelve Asian countries, France and the U.S.*, Routledge Curzon, p. 387.

³⁴ Chaihark, in Peerenboom 2004: p. 385.

³⁵ Dam, Kenneth, 2006, *The Law-Growth Nexus: The Rule of Law and Economic Development*, p. 31.

Several reasons are indicated as the probable causes of economic growth in Korea.

First, the traditional Confucian ethics seems to have been influencing the industrious labors of the ordinary workers.

(2) The Dramatic Change of Civil Service

Second, the powerful bureaucracy has played a crucial role in Korea. As late as 1960, the Korean civil service was viewed as a corrupt and inept institution. However, by the late 1970s, the Korean bureaucracy had become one of the most reputable organization in the developing world.

General **Park Chung-hee** took over the government in 1961 and reorganized the civil service and replaced the “spoils system” with a merit-based system. He improved the monitoring system of civil servants’ activities, so that the recruitment and the promotion became more on capabilities and performance. He also introduced the retirement system patterned after Japanese one so as to encourage the bright individuals to remain in the bureaucracy. These reforms induced competition among bureaucrats and improved the work ethics.³⁶

(3) The government intervention into the markets

The government’s Economic Development Board played a key role to foster the big companies such as *Samsung* and *Hyundai* by constructing the industrial parks, subsidizing utilities, giving tax rebates for exports, making cheap loans for investment in new products. Government officials frequently consulted with private sectors and made incentives for the new knowledge-intensive and capital-intensive industries.³⁷ It is indicated that the policies taken by the Korean government were similar to those of Japan with respect to selected credit, protection, and limitation of entry into specific sectors.

But, the Korean government seems to have made more interventions such as promoting individual firms to rectify entrepreneurial and skill deficiencies, reflecting

³⁶ World Bank, *The East Asian Miracle: Economic Growth and Public Policy*, Oxford University Press, 1993 1993: p. 176.

³⁷ World Bank 1993: p. 130.

on the export performance of the firms to determine whether the firm deserved continued promotion. The selectively promoted sectors in Korea were the heavy and chemical industries including iron and steel, metal products, machinery, electronics, industrial chemicals, etc. They were the capital-intensive and technology-intensive sectors shifted from the labor-intensive sectors which had been anticipated to lose competitive advantage in the future.³⁸

It can not be overlooked that the favoured treatment of certain selected firms should have affected the equal provision of the chances to small and medium-sized firms and their employees.

3. The Relation between Law and Economic Development in Korea

The legislation of a series of laws on the promotion of particular industries such as “Machine Industry Promotion Law”, “Ship Building Industry Law”, “Electronics Industry Promotion Law”, “Petrochemical Industry Promotion Law”, etc. and government regulations for those laws seem to have facilitated the investments in selected sectors and economic activities. Those laws played a role of “anchor” for the government policies to be protected from the political intervention by opposition parties and movements.

Government also improved the civil service including access to justice so as to facilitate the commercial transactions.

The Korean type of development may also be characterized as a “government-led and private initiative” style, which can be shared with the case of Japan, Taiwan, Malaysia, Singapore, etc. Government seems to have taken the ultra-legal policies to promote the economic activities, export industries in particular. The law has been used as a tool to manage the government policies and maintain the stability of those policies.

However, the instrumental usage of law may be traded off by the restrictive function

³⁸ World Bank 1993: p. 308; Yoon Je Cho, “Government Intervention, Rent Distribution, and Economic Development in Korea,” in: Aoki, Masahiko, Hyung-Ki Kim and Masahiro Okuno-Fujiwara (eds.), *The Role of Government in East Asian Economic Development: Comparative Institutional Analysis*, Oxford University Press, 1996: pp. 209-232.

of law on the government power. The Constitutional Court was established in 1987 in Korea to answer the challenges on the constitutionality of certain government policies.

The law and development relation in Korea reveals the tense relation between the legitimacy of government actions on the one hand and its justness or rightness on the other, which actually led to the very rapid growth in a shorter period of time.

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Chapter 3 The Legal System and the Economic, Political and Social Development in Northeast Asian countries (2), the case of Taiwan: What are the features of the Taiwanese legal system and its relation with economic development?

1. The Political Change of Governance in Taiwan

During 1960 to 1985 Taiwan kept the GDP growth rate of around 4 % in average, which marked the second place of the world that was called the “Miracle Growth”. It was recognized as one of the Four Tigers in the High Performing East Asian Economies (HPEAs) that achieved the “East Asian Miracle.”³⁹ There seem to be some similarities and differences in the development pattern among Taiwan, Korea and Japan, all of which are classified into the Civil Law countries in East Asia.

Before the domination by the Netherland in 1642, there have been indigenous people and migrants from China resided in Taiwan, though they were not subordinated under the united regime. In 1662 the Dutch troops were defeated by the Kingdom Tungning, which surrendered to the Qing Dynasty in 1683. There after it dominated Taiwan for 212 years.

After the Sino-Japanese War in 1894, Taiwan was ceded to Japan as a result of the Shimonoseki Treaty in April 1895. Although the anti-Japanese movements announced the establishment of the Republic of Formosa on May 23 1895, the Imperial government of Japan entered into Taipei and established the Governor-General Taiwan in June 1895 and initiated the colonial administration.

As it was the first time for the Imperial Japan to manage the colonial administration, it took time to determine whether it should take the extension of the same institutions to be applied as of the mainland or the special institutions to be established for governing the Taiwan area. Under the Anti-Japanese movements in Taiwan and the disputes in Mainland, the Imperil Diet passed **the Law No. 63** in 1896 which recognized

³⁹ World Bank, 1993, pp. 2-3.

that the Governor of Taiwan could issue the order which had the same effect as that of legislation in accordance with the specific circumstances in Taiwan. This law was temporary and valid for 3 years, though it was extended three times. It was succeeded by **the Law No. 31** in 1906, which was also based on the policy that the special institutions were to be established and applied specifically to Taiwan area. It was also extended twice.

In January 1912 **the Republic of China** was founded, whose Provisional President was Sun Yat-sen, and the Qing Dynasty fell when the Last Emperor Pu Yi abdicated the throne in February 1912.

In 1921, the Imperial Japan shifted the colonization policy toward the extension of the same institutions as mainland to be applied in Taiwan. The Imperial Diet passed **the Law No. 3** which provided that the existing laws to be applied in Taiwan shall be listed by the Imperial Ordinance and that the Governor of Taiwan was able to issue orders when there were no corresponding and appropriate laws enacted in mainland, which must be recognized by the Emperor afterwards. However, the Imperial government found that they need various special laws to be applied in Taiwan in accordance with the customary rules and special circumstances developed in Taiwan. The Imperial Japan had conducted the survey of customary laws and conventions in Taiwan under the leadership Santaro Okamatsu, who was then a professor of Kyoto University. Professor Okamatsu was critical to the extension policy of the same institutions as for mainland to be applied in Taiwan, and planned to enact proper laws appropriate for Taiwan, which in turn to be the model for mainland of Japan. However, some disputes occur whether the same law and regulations as in mainland should be applied to Taiwan or not in the fields such as land law and land registration law, law of tenant and landlord, law of finance and securities, etc. Although the extension policy was implemented even in those fields, the *legitimacy* was problematic.

Whereas the government of the Republic of China enacted a series of major laws

including civil code, company law, law of bills of exchange, maritime law, insurance law, civil procedure code, criminal code, criminal procedure code, etc., from 1920s to 1930s, which were brought into Taiwan after the return of Taiwan to the Republic of China.

In September 1945, Taiwan returned to the Republic of China, the President of which was **Chiang Kai-shek**. The Constitution of the Republic of China was established in 1946 and came into effect in 1947. However, due to the outbreak of struggle between the Nationalist Party and the Communist Party, the government of the Nationalist Party issued the Temporary Ordinance for National Mobilization of the Republic of China in May 1948 in the mainland China.

In January 1949, as the Communist Party put Beijing under its control, the government of Nationalist Party went to Taiwan and invoked the martial law. Whereas the Communist Party announced the foundation of **the People's Republic of China** in October 1949, the Nationalist Party announced that it placed the temporary capital in Taipei.

2. Policies Implemented and Economic Growth

After the chaotic situation which lasted from the late 1940s to the beginning of 1950s was brought into control, the Nationalist government in Taiwan implemented the policy of *import-substitute industrialization* in 1950s.

However, due to the narrowness of the domestic market and the harmful effects of protectionism, the government changed the policy toward *the export-oriented industrialization* since 1960s. It included the labor intensive industries such as food processing, spinning, apparel, home electronics appliances, etc. It was so effective to stimulate the Taiwan economy that it entered into the virtuous cycle of growth orbit.

Since 1970s the government shifted its industry policy from the light industries toward *the heavy and chemical industries* by implementing the Ten Big Construction

Plans which were initiated in 1973, the Construction Plan of Twelve Items which commenced in 1978, the establishment of public-private joint corporations through 1970s, etc. in those fields such as railway, highway, airport, port, ship-building, iron manufacture, petrochemical complex, etc.

In 1987 the government repealed the martial law and challenged the further advancement of industrial structure by shifting the labor-intensive industries which moved in abroad and introducing *the high-tech and capital-intensive machine industries* such as the production of personal computer, semiconductor and other electronics parts, etc. For that purpose, the government enacted **special laws to liberalize the investments from foreign countries and improved the investment environment including the construction of special zones**. Thus it avoided the hollowing-out of the industrial structure and mitigated the harmful influences by the financial crises occurred in 1997 and 2006.

One of the characteristic features in Taiwan's industrial structure has been that the number of the small and medium-sized enterprises (SMEs) have exceeded 90 % of each sector and they have developed the network of division of labors⁴⁰. The advantage of this system has been that it could lowered the initial costs for starting up of new enterprises, facilitated the entry into new businesses and the creative destruction, and diversified the investment risks, which produced various success stories characterized as "Taiwan Dream."

3. Possible Institutional Factors for Economic Development

A series of Agrarian Land Reforms conducted by the government of Nationalist Party seem to have contributed to the redistribution of the assets which led to the social and political stability, increase the agricultural productions and acquisition of foreign currency, which then enabled to purchase materials necessary for the export goods. This policy was based on the **Sun Yat-sen's** idea of the equal land rights, which

⁴⁰ World Bank, 1993, pp. 161-162.

was, however, consciously distinct from the land policy implemented by the Communist Party in mainland China. A large number of landlords whose land was taken by the government became the owner of the small and medium-sized enterprises, which have been the driving force of the Taiwan's economic as indicated above.

As mentioned above, many laws and regulations have been brought into Taiwan by foreigners. However, the people in Taiwan revised them with their customary rules and put them into practice not only in the fields of private transactions but also in the public law in such a way as additions to the Constitution. Taiwan also introduced some Common Law rules such as the security transactions of movable property and securitization of credits.

4. Coordination of Economic Growth with Political Development

The management of balance between the continuous implementation of economic development policies and the control of political activities has been also problematic in Taiwan as well. The people's request for democratization was suppressed repeatedly.

However, the President **Chiang Ching-kuo** repealed the martial law in July 1987, which lasted for 38 years since 1949, and in the national election of the President held in 2000, Mr. **Chen Shui-bian** was elected for the first time from the Democratic Progress Party, who took over the administration of the former President **Lee Teng-hui**. The Nationalist Party took back the seat of President led by Mr. **Ma Ying-jeou**, who were facing again with the democratization movements which had been spread in rural areas. The first unified (nationwide) local election was held on 29 November 2014. In that election the Nationalist Party was defeated by the Democratic Progress Party.

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Chapter 4 The Legal System and the Economic, Political and Social Development in Northeast Asian countries (2), the case of Hong Kong: What are the features of legal system in Hong Kong and its relation with economic development?

1. Change of governance and law in Hong Kong

Hong Kong consists of more than two hundred islands and a part of Kowloon Peninsula, which has the area of around 1,100 km². The population is over seven million, more than 93% of which are Chinese.

This area was dominated by Qin Dynasty in 214 BC and its domination has been succeeded by the Chinese Dynasties. In 1368, Ming Dynasty founded the naval base in Hong Kong. Since the beginning of the 16th century, Europeans such as Portuguese arrived Hong Kong, and Ming Dynasty tried to displace them. However, **in 1711**, the Britain negotiated with Qin (Manchu) Dynasty, which had opened Guangzhou Bay, and constructed the mercantile houses there.

In 1839 the Opium War broke out, which was lobbied by Jardine Matheson Holdings, Ltd., and (1) Hong Kong Island was ceded eternally from China (Qin Dynasty) to Great Britain as a result of **the Treaty of Nanjing in 1842**. It was the first step toward the colonization of Hong Kong by Great Britain. Then, (2) a small portion of the Kowloon Peninsula and some outlying islands were ceded by **the Treaty of Peking in 1860**. Finally, (3) China leased the New Territories (an area including outlying islands and the remainder of the Kowloon Peninsula) to Britain for 99 years by **the Convention of Peking in 1898**.

During the Pacific War, from 1941 to 1945, Hong Kong was occupied by the Japanese Army. The Japanese government established the Hong Kong Military Administration Office and it once tried to exclude the British legal system, but it failed. After the end of the World War II, it was returned to Britain as a British Colony in 1945, immigrants from Mainland China came to Hong Kong and investments have increased from foreign countries as well as China, especially from Shanghai.

In 1966, the Great (Proletarian) Cultural Revolution in China began in Mainland, and the Chinese Red Guard came to Hong Kong and fought with the British Army

around the border, the riot broke out in Hong Kong to protest against China. However, **Zhou Enlai' s announcement** that China won't take back Hong Kong and keep its freedom, and it made the Hong Kong Riot calm down.

Since 1970s, the British government negotiated with the Chinese government about the extension of the British domination. But it was not successful. **On December 19, 1984**, at the end of the long negotiation, Britain and China made **the Joint Statement** that Britain will return the sovereignty of Hong Kong to the PRC **on July 1, 1997**, and the PRC won't apply socialist state system including socialist laws **for 50 years (until 2047)** based on the Deng Xiaoping's policy of **"One Country, Two Systems"** . As a result of the Joint Statement, some people migrated from Hong Kong to Canada, Australia, and other Commonwealth countries. On the whole, however, investments have steadily increased from China into Hong Kong.

In 1986, when **the Tiananmen Squire Incident** occurred in Beijing, large-scale demonstrations were organized in Hong Kong. People had been familiar with the free trade and democracy under the British common law and sensitive to the government's restriction of the citizens' liberties.

In order to prepare for the return of Hong Kong to China, **the Hong Kong Basic Law** was enacted **on April 4, 1990**. Whereas, in 1992, Rt. Hon. Christopher Francis Patten, was appointed as the Governor of Hong Kong and he initiated some measures to accelerate democratization before Hong Kong was returned to the PRC, but it brought about the political tension with China.

In 1997, the sovereignty of Hong Kong was handed over to the PRC, and **Mr. Tung Chee Hwa** was appointed as the Chief Executive of Hong Kong, who was reelected in 2002. In 1998, the election of Legislative Council was held, though it was not a direct and general election. In 2005, the election for the second Chief Executive was held, and **Mr. Donald Tsang Yam-kuen** was elected. In 2012, the election of the Chief Executive held again and **Mr. Leung Chun-ying** was elected. These elections were not direct and general election, but candidates must be nominated by **the Election Committee**, which had 1200 members with more than 1 eighths approval. Then, the members of the Election Committee made a vote to determine the Chief Executive.

On August 31, 2014, the Standing Committee of the National People's Congress (NPC) decided that for the coming election to be held in 2017 for the Chief Executive of Hong Kong SAR the candidates must be nominated by **the Nomination Committee**, the member of which is to be 1200, and then every citizen over 18 years of age can directly make a vote. However, just after this decision, the anti-government demonstration called "the Umbrella Revolution" took place in Hong Kong against the Beijing government and the Chief Executive alleging that the Nomination Committee may be able to exclude the candidates who would be critical against the Beijing government.

In the background of this movements, not only the anxiety about the future of democratization in Hong Kong, but also the dissatisfaction among the citizens seem to lie on the increasing wealth gap, stagnated wages, increasing costs of housing and goods, etc. against the Hong Kong administration. The Umbrella Revolution movement has gradually declined and ceased around the beginning of December 2014.

2. Economic Development in Hong Kong

Hong Kong has developed through the intermediate trade between Mainland and foreign countries. After the World War II, it has become the hub of distribution among Southeast Asian countries. While the Hong Kong government, under the domination by the British Governor, promoted development projects such as provision of residence, etc., the government has kept loose regulations for keeping low rate taxation and for facilitating transactions. Together with the guarantee of liberties including freedom of expression and protection of private property by the Common Law rules brought into Hong Kong from Britain, the free transactions and communications have been maintained in Hong Kong, which led to the stable growth of economy.

Although light industries such as **textile industry** for export have developed in 1970s, since 1980s, **financial business, commerce, tourist industry** have been increasing in Hong Kong. In 2012, the tertiary industry accounts for 93.1% of GDP in Hong Kong, while the primary industry for 0.05% and the secondary industry for 6.9%, which is the very characteristics of Hong Kong economy. The maintenance of traditional Common Law rules have provide advantageous institutional environment

for the Hong Kong economy which has been mainly based on the commercial transactions.

3. Features of Legal System and Development in Hong Kong

As for the legal system, the British Common Law system has been adopted and took root in Hong Kong. The central organization of it has been the court system consisting of Court of Final Appeal, to High Court, District Court and Magistrates' Court as normal courts, together with the special court such as Juvenile Court and special tribunal, Land Tribunal, Labour Tribunal, Small Claim Tribunal, etc.

Although the link with the Judicial Committee of Privy Council in U.K. was abrogated after the handover of the sovereignty in 1997, the government invited U.K. advisors to reconstruct the judicial system in Hong Kong even after 1997. Hong Kong SAR seems to keep the very characteristics of Common Law system in East Asian Countries.

It would be worthwhile to compare the Common Law systems adopted by Singapore, Malaysia, India and Myanmar, where more regulated legal systems seem to have developed on the basis of Common Law institutions.

The Basic Law of the Hong Kong SAR of the PRC

(Underlines are added by Matsuo)

Art. 8

The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.

Article 73

The Legislative Council of the Hong Kong Special Administrative Region shall exercise the following powers and functions;

(1)	<u>To enact, amend or repeal laws</u> in accordance with the provisions of this Law and legal procedures;
(2)	To examine and approve <u>budgets</u> introduced by the government;
(3)	To approve <u>taxation</u> and <u>public expenditure</u> ;
(4)	To receive and debate the policy addresses of the Chief Executive;
(5)	To raise questions on the work of the government;
(6)	To debate any issue concerning public interests;
(7)	To endorse the appointment and removal of the judges of the Court of Final Appeal and the Chief Judge of the High Court;
(8)	To receive and handle complaints from Hong Kong residents;
(9)	If a motion initiated jointly by one-fourth of all the members of the Legislative Council charges the Chief Executive with serious breach of law or dereliction of duty and if he or she refuses to resign, the Council may, after passing a motion for investigation, give a mandate to the Chief Justice of the Court of Final Appeal to form and chair an independent investigation committee. The committee shall be responsible for carrying out the investigation and reporting its findings to the Council. If the committee considers the evidence sufficient to substantiate such charges, the Council may pass a motion of impeachment by a two-thirds majority of all its members and report it to the Central People's Government for decision; and
(10)	To summon, as required when exercising the above-mentioned powers and functions, persons concerned to testify or give evidence.

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Chapter 5 The Legal System and the Economic, Political and Social Development in Southeast Asian countries (1), the case of Singapore: What are the reasons for the rapid and stable economic growth and the role of law in implementing development policies?

1. The Political Change of Governance in Singapore

Although *Singapore* was once used to be characterized by a group of unemployed (dock) workers and ruined slums in 1950s, it achieved successful economic growth since 1960s. Its GDP per capita overtook that of Japan in 2007 and thereafter it has kept the position of the richest country in Asia. The GDP per capita in 2014 reached 56286.8 USD (as world's top 8. It was 36194.4 USD in Japan). It is also ranked as world's top 8 in terms of Human Development Index taken by the UNDP, which is followed by Hong Kong (15th) and Japan (16th). It should be worthwhile to enquire the reason(s) why Singapore has achieved the remarkable progress in around 50 years and what has been the role of law in its development process.

Singapore island and its surrounding small islands (around 716 km²) has been dominated by Malacca sultanate (1402), Portugal (1511), Johor sultanate (1528), and the Netherland (1641). In 1819 Thomas Stamford Raffles (British East India Company) traded with Johor sultanate and got permission of constructing mercantile houses and acquired the actual domination of the island and named it as "Singapore." In 1824 Johor sultanate officially ceded Singapore to Britain. In 1824 *Singapore* was united with *Penang* which had colonized in 1791 together with *Malacca* which was also acquired by the treaty between Britain and the Netherland in 1824 and they constituted Straits Settlement in 1826. Singapore became a capital of Straits Settlements in 1832.

After the colonization of Singapore, the British government extended the jurisdiction of the courts located in Penang to Singapore and Malacca by **the Judicial Charter** in 1826 and established the courts in Singapore as well. The jurisdiction of the courts in

Singapore was separated from those of Penang and extended to Malacca as well.

In 1866 **the Government of Straits Settlements Act** recognized Singapore as an independent colony and founded the Legislative Council (LC) which was conferred the legislative power. Since 1867 the LC legislated various laws named as “Ordinances” to be distinguished from “Act” legislated by the British Parliament. In 1867 the LC enacted **the Straits Settlement Ordinance** which rearranged the courts in Singapore as the supreme courts in Straits Settlement and the judges in Singapore courts as the supreme judges in Straits Settlement in 1868. In 1873 the LC established the Court of Appeal. However, the final instance was kept by Judicial Committee of Privy Council in Britain. In 1878 the LC enacted **the Civil Law Ordinance** which provided that current laws in Britain shall be applied to matters concerning *agency, company, partnership, banks, land and maritime transportation and other matters on maritime law* unless special ordinances provided otherwise.

After the occupation by the Japanese Army from 1942 to 1946, Singapore was left as an isolated colony, for Penang and Malacca participated in Malaya Union. The Social Democrats who established People’s Action Party (PAP), later became the government party of Singapore, had to fight with communists and negotiate with British government for its independence. In 1957 the British government recognized Singapore as a self-governed Dominion and in 1958 it passed **the Singapore State Act** which recognized the independence of Singapore. Singapore became independent sovereign state in 1959.

However, it was a challenge for a small country of Singapore to be independent economically and politically, the population of which was around two million at that time (now around 5.17 million) in small islands at the southern extremity of the Malay Peninsula. Mr. **Lee Kuan Yew**, who won the national election in 1959 just before the independence and became the first prime minister from 1959 to 1990, designed to manage the country by the unification with *the Federation of Malaya*, which has rich

resources and vast extent of land. Singapore and the Federation of Malaya negotiated time and again and they reached an agreement to unite as *the Federation of Malaysia* together with Sarawak and Sabah in the north Borneo. However, the Chinese citizen, who were more than 70% of the Singapore population, were very critical to the central government's policies of favored treatment of the Malays, who were barely the majority in Malaysia. In the campaigns for national election in 1963, the United Malaya Nationalist Organization (UMNO), the government party of Malaysia, and the PAP fought each constituencies. In 1964 the racial riot broke out in Singapore between the Chinese and the Malaya. On August 9, 1965, Singapore was separated from the Federation of Malaysia and became independent again on the basis of the agreement between the prime Minister **Tunku Abdul Rahman** who announced the separation and Lee Kuan Yew who cried after the separation.

The nation-building of Singapore restarted with the enactment of **the Republic of Singapore Independence Act** in 1965 (Law No. 9), which provided that certain provisions of the Malaysian Constitution shall continue to be applied to Singapore. **The Constitution of the Republic of Singapore** rearranged on the basis of the Constitution of the State of Singapore, the Malaysian Constitution and Amendments after the separation. It consists of 14 Parts and it was compiled and published in 1980.

The Constitution of Singapore adopted the republic, the head of which is the President. Although it has a ceremonial and symbolic authority, the powers of the President have been extended through the Amendments to Constitution with the advices of Council of Presidential Advisors which was established by the 1991 Amendment. The 1991 Amendment introduced the direct popular election for the President.

The political structure of Singapore is based on the Westminster-style parliamentary system of government, under which the cabinet is collectively responsible to the Parliament, which consists of the Prime Minister (PM) and other

ministers who exercise the executive powers. The PM is appointed by the President among parliamentarians and other ministers are to be appointed by the President with the advice of the PM.

The Parliament of Singapore is a single-chamber system, the number of seats of which is 87, that consist of 12 single-member constituencies and 15 plural-member constituencies. As a result of the 2011 election, the PAP occupies 81 seats and the Workers' Party (WP) has 6 seats.

2. Policies of Economic Development

The government of Singapore took *the leap frog strategy* under the leadership of the Economic Development Board. It provided the industrial estates for the promotion of the investments to be provided by multinational companies. It was successful and major multinational firms came to Singapore, such as Texas Instruments, Hewlett Packard, Philipps, etc.

The government created the bases for international banking by providing infrastructures for financial transactions and establishing the Singapore Development Bank.

3. The Role of Laws in Development in Singapore

The institutional basis of the Singapore's legal system has been founded and developed under the British colonization by introducing and establishing the common-law style legal system. However, the Singapore's legal system is not completely a copy of the British common law. For instance, **Constitution of the Republic of Singapore** includes the guarantee of human rights in Part IV on "Fundamental Liberties". However, Part IV does not provide the guarantee of private property, though Singapore has achieved the most successful economic growth so far.

In addition to establishing common law system, a series of laws which regulate the

employment environment including **the Employment Act** in 1968, **the Industrial Relations Act** in 1968 and the establishment of National Wage Council in 1972. They were the instruments of a kind of social contract with citizen so as to implement government policies for increasing the true interests and welfare of the nations.

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Chapter 6 The Legal Reform and the Economic, Political and Social development in Indochinese Countries: The Case of Vietnam, Laos and Cambodia

I The Case of Vietnam

1. Economic Development in Vietnam

Vietnam, Laos and Cambodia were all once the French colonies, and they experienced the government based on communism or socialism after independence. Among them Vietnam seems to have achieved the highest economic growth as a result of the government policy called Doi Moi (Renovation) which was adopted at the 6th National Congress of the Communist Party of Vietnam in December 1986. Its GDP per capita reached around 2052 USD in 2014 which increased from 1911 USD in 2013 (in the same years they were around 1760 USD from 1646 USD in Laos, and 1090 USD from 1008 in Cambodia)⁴¹.

2. Characteristics of the Concept of Law and the Structure of Legal System

(1) The Neo-Confucian Conception of Law

The neo-Confucian ideology introduced from China has influenced profoundly the Vietnamese perception of law, which stands for the Confucian morality and maintains social order and hierarchies and is severely sanctioned by penal rules. “For most Vietnamese, unwritten moral codes based on Confucian, Buddhist, Taoist, and animistic precepts governed village life.”⁴²

(2) The socialist and statist conception of rule of law

The law, on the one hand, is conceived as “a tool of proletarian dictatorship,” and conflated with the paramount party policy that includes moral edicts and has supremacy over law, which allows “the substitution of policy for law.” On the other hand, however, the law is regarded as a part of superstructure and reflects the will of the ruling class, which has coercive force and exhorts state officials and citizens to

⁴¹ See [Figure 1] .

⁴² Gillespie, in Peerenboom 2004: p. 149.

respect it and act within it.⁴³

(3) A Challenge to Create a Socialist Law-Based State

Even after the introduction of the constitutional doctrine of law-based state from the Soviet Union in the latter half of 1980s, Vietnamese legal theorists did not abandon the socialist legality and have tried to combine them so as to create a socialist and law-based state.

(4) Maintenance of the Unified and Centralized State Power in the National Assembly

Even after the Doi Moi introduced in 1986, the 1992 Constitution still maintains the unified and centralized state power in the National Assembly rejecting the separation of powers doctrine.

3. Legal Cooperation and Legal Development in Vietnam

The Vietnamese Government decided to introduce the market mechanism together with its institutional bases including the comprehensive reform of Civil Code. It has been accepting legal assistance from U.S., European countries, Australia, Korea, Japan, etc.

4. Access to Justice in Vietnam

Access to justice in Vietnam has been promoted by the governmental as well as non-governmental activities and legal cooperation by various countries. However, there are differences among societies in the recognition of justiciable problems, although the notion of “justiciability” may be gradually changed as a result of the mutual communications and social change. Also the citizen’s expectation on the judiciary and the consciousness of the judges and prosecutors about the role of state in dispute resolution may be different but changing. It will influence, for instance, the

⁴³ Gillespie, in Peerenboom 2004: pp. 150-151.

applicability of the adversarial principle in the civil procedure⁴⁴. From this point of view, the survey conducted by the UNDP Vietnam in 2003 and 2010 seems interesting. On the one hand, according to **the 2003 survey** based on the interviews to 1,000 people who lived in different regions and belonged to different classes of income, the awareness of legal institutions among the interviewed Vietnamese people was ranked as follows: 1) the People's Committee, 2) the police, 3) the grass-root mediation groups, 4) lawyers, 5) the courts, 6) the procuracy, 7) the Legal Aid Centers⁴⁵.

As for the accessibility to those institutions, the police and the People's Committee stood out again with ranks 1 and 2 respectively, each reaching around 40% of positive poll responses. Lawyers followed with around 10% in rank 3, and the head of hamlet, the grass-root mediation groups, the courts, the procuracy, the Legal Aid Centers came last with less than 10% in a collective rank 4⁴⁶.

Interviewees who actually accessed legal institutions were questioned about their confidence in these institutions. The responses revealed the following ranking: 1) the head of hamlet, 2) the grass-root mediation groups, 3) lawyers, 4) the procuracy, 5) the courts, 6) the People's Committee, 7) the Legal Aid Centers, and 8) the police⁴⁷. However, the confidence in the Legal Aid Center was higher within the interviewees who actually used it (40%) rather than that within those who had no experience to use it (10%). Anyway the result suggests the persistence of the dual justice system in Vietnam⁴⁸.

The survey shows that the awareness, accessibility and confidence of the people towards the legal institutions did not correlate and that the gap was serious especially between the awareness and accessibility indicators on the one hand, and the confidence indicator on the other. The gaps suggest four further conclusions as follow.

⁴⁴ Andrews in Zuckerman and Cranston 1995; Matsuo 2014.

⁴⁵ UNDP 2004: p. 8.

⁴⁶ UNDP 2004: p. 12.

⁴⁷ UNDP: 2004, p. 8.

⁴⁸ See **[Figure 3]** .

First, the people generally had a difficulty to access typical legal institutions such as the courts.

Second, the people might have had to use the legal institutions reluctantly even though they had no great confidence in them.

Third, there seems to be a tendency that administrative organizations such as the People's Committee and the police seem to be more familiar and accessible than the judicial system such as the courts. This tendency seems to exist in other Asian countries. This fact shows that access to justice will be largely influenced by the governance structure, which has long been established in the historical development of the society.

Forth, even the gap between the awareness and access indicators cannot be overlooked, especially in view of the results concerning the head of hamlet and the grass-root mediation groups. As a basic condition the people seem to have a feeling that they do not like to give conflicts a legal dimension. This reluctance may be changed by increased knowledge and understanding of ordinary people about their rights, the law and legal relief, by improved popularity of lawyers, and by an emerging custom of solving conflicts by way of the legal system. The consciousness of legal problems and strong feelings about them may be influenced by the government's policies toward the citizens and in turn influence those policies.

On the other hand, according to **the 2010 survey**, the following implications may be drawn⁴⁹.

First, average rate of respondents having knowledge about institutions in relation to protection of rights such as **court, procuracy, police, People's Committee, grass-root mediation groups, lawyers, legal aid centers**, etc. has increased from 62.3% in 2003 to 74.6% in 2010. However, it is analyzed that it was not because of actively conducted activities of propaganda but thanks to the development of mass media such as press and internet.

Second, the reasons for those who answered that they did not bring the case to **the court** were the lack of knowledge about courts and court proceedings (59.6%), a waste

⁴⁹ UNDP: 2011.

of time (33.7%), a waste of cost (21.9%), no confidence in a fair judgment (12.4%).

Third, respondents who did not know about lawyers' services were 39.3% in 2003, but they reduced to 24.7% in 2010. Those who recognize that **lawyers** played an important roles in dispute settlement were 44.2% in 2003, but they increased up to 75.8% in 2010. Fourth, although 50.6% of the respondents could not assess the usefulness of legal aid operation in 2010 survey, 73.2% of those who ever accessed **legal aid centers** positively assessed their role and confirmed as useful⁵⁰.

The continuation of monitoring would contribute to improve the measurement technique, to make a pressure on the government to open the information and to facilitate the promotion, and to know precisely about the needs of the citizens.

5. Implications from Vietnamese Way of Law and Development

In Vietnam there exist traditional institutions based on the Confucian morality widespread even in the countryside

The socialist and statist governance structure seems to have functioned similarly to the policy-making and its implementation by developmental state.

II The Case of Laos

1. Economic Development in Laos

Since the founding of the Lao People's Democratic Republic in 1975, the Lao People's Revolutionary Party, a socialist party and the only legitimate political party, has led the development of the country. It has transformed the economic policy in 1979 and since 1986 has continuously pursued gradual market opening with the idea of "*Labop My*," the new economic mechanism.

In 2011, the population is estimated around 6,560,000 in a land area of 236,800km².⁵¹ GDP per capita was USD 1,362 in 2011. The economic growth rate was

⁵⁰ See **[Figure 4]** .

⁵¹ Laos is a multiethnic country reported to have 49 ethnic groups.

7.59% in 2009 and is estimated to be 7.93% in 2010 and 8.26% in 2011, the highest among Indochinese countries.

Laos joined ASEAN in 1997 and became a member of WTO in October 2012.

2. Legal Reform

In 1990, the Lao government enacted a series of piecemeal statutes concerning economic transactions, such as Property Law, Contract Law, Law of Obligations other than Contracts⁵², Family Law, Succession Law⁵³, and the Civil Procedure Code⁵⁴. Of these, the first five have been amended since then. Recently an amendment of the Civil Procedure Code, the enactment of intellectual property laws and the implementation of the Business Enterprise Law of 1994 have been initiated. Furthermore, the government is planning to consolidate the above-mentioned piecemeal statutes in a comprehensive civil law codification.⁵⁵

The legal reform process in Laos is different from Vietnam and Cambodia in that it appears to be more incremental by starting from piecemeal legislation and continuing the necessary amendments in accordance with the gradual process of changes in the economy and society. Nonetheless, it seems to be marching in the same direction towards the civil law system as evidenced in the planning of a Civil Code.

3. Judicial Reform

(1) Judiciary

(i) The Court and Civil Procedure

There are 56 courts with competence for civil cases as the first instance⁵⁶, 3 Appellate Courts, and a Supreme Court.

The number of judges is reported to be 375 (plus 29 judges in the military court) as of

⁵² Contract Law 1990 and Law of Obligations Other Than the Contract 1990 were combined and became Law of Obligation from the Contract and Other Than the Contract in 2008.

⁵³ Family Law and Succession Law were amended in 2008 respectively.

⁵⁴ It was amended in 2004 and 2012.

⁵⁵ The drafting project of the Civil Code launched on 8 June 2012 in Vientiane.

⁵⁶ They include 17 Provincial Courts, 39 District Courts, 3 County Courts.

2011.⁵⁷

In 2010, the number of civil cases at first-instance courts was 2,526 including 1,555 civil cases in the narrow sense, 794 family cases and 177 commercial cases.⁵⁸

Out of the 1,555 civil cases in the narrow sense, around 500 concerned contracts (contract of sale, loan for consumption, service, construction, transportation, etc.), as were all the commercial cases (177 cases) including 144 cases concerning contracts of sale and loans for consumption.⁵⁹

In 2010, 621 civil cases were appealed to the appellate courts, 451 civil cases were appealed to the Supreme Court. Out of 574 judgments of appellate courts, 194 dismissed the rulings of the first-instance court, and out of 498 Supreme Court judgments, 97 dismissed the rulings of the appellate courts.⁶⁰

In 2011, the number of civil cases at first-instance courts was 3,129 including 1,888 in the narrow sense, 951 family cases and 290 commercial cases. The number of criminal cases at first-instance courts was 3,017.⁶¹

The civil procedure in Laos shares with Vietnam the feature of *ex officio* initiatives by the prosecutors and the courts, though it seems more moderate and, interestingly, the importance of *ex officio* initiatives is decreasing. Indeed, the court is expected to have the power and responsibility to find the truth and to give a correct judgment even in the civil procedure, rather than just to decide which claim is superior with the evidences provided by the parties. Thus, if the court finds that the evidences presented by the parties are not sufficient to make a decision, it is authorized to request the parties to provide additional evidences or collect further evidences on its own initiative.⁶²

Also the prosecutor has the power to participate in the civil procedure, to search the

⁵⁷ The number of the prosecutors was 348 as of 2011.

⁵⁸ The Survey Report arranged and conducted by the author in cooperation with Mr. Osamu Ishioka (lawyer, JICA expert in Vientiane) in December 2011.

⁵⁹ Ibid.

⁶⁰ Ibid. It is estimated that around 5 to 10% of the cases brought into the first-instance court will be solved within one year.

⁶¹ Information Sheet-Lao PDR, JFBA and JICA, 2011, p.1.

⁶² Art. 20, Para. 5 Civil Procedure Code.

evidence, to make a statement in the trial, etc.⁶³ Besides, if the civil case is expected to affect the public interest and no private party appears willing to file a lawsuit, the prosecutor (the People's Prosecutors Office) is authorized to bring the case to the court as a plaintiff.⁶⁴

If the defendant does not plead, the court summons the defendant. If the defendant has pleaded, but does not appear in the trial, the court passes judgment provided it has sufficient evidences, otherwise it summons the defendant to the trial.⁶⁵

However, as a result of the amendment to the Constitution in 2003, the power of judicial administration was transferred from the Ministry of Justice to the Supreme Court, which seems to have facilitated the independence of the judiciary. Noteworthy is the abrogation of the power to file for cassation against a legally valid decision.⁶⁶ Furthermore, in the recent discussions between the Supreme Court and the Prosecutors Office concerning a draft amendment of the Civil Procedure Code, the Supreme Court appears to be of the opinion that the power of the prosecutors to participate in the civil procedure should be much more limited. The Prosecutors Office is against such limitation arguing "Who else will guarantee the correctness of the judgment?".⁶⁷ This is a quite interesting discussion between the Supreme Court and the Prosecutors Office and it seems that the judiciary has just embarked on a long process step by step toward its independence. The Lao Bar Association, in turn, is drafting a statute on lawyers so as to consolidate the independent status of lawyers.

(ii) Judges

In order to become a judge, a candidate must make a career starting in the technical staff at the court, through service as an assistant judge, to appointment as a judge. As there is no unified examination, each court at first instance level recruits its own technical staff among graduates of the Faculty of Law at National University or from

⁶³ Art. 23, Art. 37, Art. 38, Art. 39, Para. 2 Civil Procedure Code.

⁶⁴ Art. 39, Para. 1 Civil Procedure Code.

⁶⁵ The Survey Report, op. cit. (n. 18).

⁶⁶ It is still maintained in Vietnam as stated above.

⁶⁷ The Survey Report, op. cit. (n. 18).

Law Schools administered by the Ministry of Justice.⁶⁸ If the head of the court thinks it appropriate, he/she recommends the technical staff to be a candidate for an assistant judge and, if it is accepted, applies for the unified training program administered by the Supreme Court. After the candidate completes that training course and passes the examination at its end, the Chief Justice of the Supreme Court appoints the candidate as an assistant judge. An assistant judge may be promoted to the function of judge, if the head of the court thinks it appropriate and applies for the candidate's participation in an examination by the provincial or county assembly. If the candidate passes the examination, the Supreme Court, in turn, examines the candidate and if he/she passes that test, the National Assembly appoints the candidate as a judge.⁶⁹

(2) ADR and Informal Justice

In Laos, the Village Conciliation Board is recognized as the body, which has the authority to resolve disputes among the members of the community. It is based on a traditional dispute resolution system. Since 1997, however, it was rearranged by circular of the Ministry of Justice and was established in every village in the whole country. Its jurisdiction covers civil cases such as debt, property, domestic troubles, land disputes, and minor criminal cases such as defamation, theft, and minor injury or trespass between relatives.⁷⁰

The dispute resolution through the Village Conciliation Board can save the cost of the formal justice, it is easy to access and psychologically more acceptable for the parties, and it can also help reducing the case -load of the court.

However, the typical member of a Conciliation Board is neither necessarily a lawyer nor a person with legal education, but has merely gone through a short training for one day or so. As a result, the Board sometimes accepted cases beyond its jurisdiction such

⁶⁸ There are three Law Schools administered by the Ministry of Justice in Laos.

⁶⁹ There is a room for the improvement of the qualification as a judge. A salary of a judge is estimated around from USD 80 to 100 per month, but increasing. In addition, there are some allowances including fees for gas, which are not easy to follow exactly. The Survey Report, op. cit. (n. 18).

⁷⁰ If the conciliation is not successful, the Village Conciliation Board shall advise the parties to bring the case to the court.

as granted claims of money lenders beyond the maximum limit of interest rate as provided by law.

The head of the Conciliation Board should be the most influential person within the community and should have a good understanding of the basic policies and laws of the nation⁷¹. The government expects the Village Conciliation Board to settle disputes out of court and has a policy of promoting conflict avoidance within villages by recognizing a conflict-free village as a "beautiful" village and granting a reward. This policy may influence the sense of the members of the village about which kind of conflict should be pursued as a legal matter, and which not. In this context, the problem of keeping a balance between the stability and peaceful order of the society on the one hand and the protection and implementation of the rights of individual on the other seems to be quite difficult to solve.

(3) Lawyers and Bar Association

(i) Lawyers

The number of lawyers was 144 as of 11 November 2011⁷², i.e. 2.3 lawyers per 100,000 inhabitants, a small number even if compared to other Indochinese countries (7.4 lawyers in Vietnam and 4.2 lawyers in Cambodia).⁷³

In order to become a lawyer, one must graduate from a law school (or equivalent) with a bachelor of law, take a 6 weeks' training course provided by the Lao Bar Association (LBA), and complete a one-year apprenticeship at the LBA. Thereupon the LBA will consider whether the candidate is qualified for law practice or not. If the candidate is thus qualified, the LBA shall send his/her name to the Minister of Justice and the Minister issues the lawyer's license. Once qualified, the candidate must register with the LBA in order to be able to practice as a lawyer.⁷⁴

The lawyer's fees are determined by negotiation with the client. There is no

⁷¹ In the background, it is said that there is the intention of the Communist Party to prevent the harmful effects to the nations from the rapid introduction of the market economy.

⁷² The number included 17 candidates who were taking the training course.

⁷³ See [Table 3].

⁷⁴ The registration fee amounts to around USD 125 per year (as of 2011).

regulation of lawyers' fees and contingent fees may be agreed.⁷⁵

However, the most people are not used to consulting with a lawyer when they are involved in a conflict. Not only ordinary citizens but also the government do not understand the role of lawyers adequately. As the representation in court is not limited to lawyers, a relatives or an organization of which the plaintiff is a member often become his/her representative.

(ii) Bar Association

The LBA was established by the Prime Minister's ordinance in accordance with the socio-economic development plan and it is placed under the supervision of the Minister of Justice. The LBA's activities include the training of candidates for law practice and paralegals, continuous education for lawyers, legal aid programs, the dissemination of laws, etc. The independent status of lawyers and the LBA will become a task in the future.

(4) Legal Aid

A legal aid program was launched in 2003 by the UNDP's project "Enhancing Access to Justice through the Lao Bar Association" and a Legal Aid Clinic was established in Vientiane in 2007. The project has been continued through the support of the Asia Foundation, and the LBA opened a Legal Aid Clinic in Pakse (Southern Laos) and Oudomxay (Northern Laos). The LBA is preparing for a mobile legal aid clinic with the support of the Asia Foundation.⁷⁶

The Legal Aid Clinic provides free legal consultation, free legal representation for those who need legal aid, and helps with the dissemination of laws. It has opened a legal aid hotline linked with the TV program. The activities of the Legal Clinics are supported by UNDP and the Asia Foundation.

⁷⁵ If the lawyer's fee is fixed by the amount of claim, it will be around from 2% to 10%. If it is a USD 1300 claim of repayment, and the plaintiff wins the case, the lawyer's fee will be around USD 120 to 240. The Survey Report, op. cit. (n. 18).

⁷⁶ See: <http://asiafoundation.org/country/overview/laos>.

4. Agenda for Future Development

(1) The comprehensive reform of the justice system to be continued

The Lao legal system has developed gradually in accordance with economic growth and social change and with the change of the governance system. It is necessary to continue this type of comprehensive and step-by-step law reform including the codification projects, the empowerment of legal professions by improving their qualifications, and the empowerment of ordinary citizens through the dissemination of laws and legal clinics. Laos seems to have proceeded incrementally in its own way of legal development.

(2) The gap between the formal justice and informal justice

As the problems of the Village Conciliation Board show, the gap between the informal justice and formal justice may be filled partly by spreading the substantive rules. In this context, legal information should be systematized, consistent, simple, and thus available to as many people as possible.

(3) Promotion of access to justice in rural and remote areas

There is also a big gap in legal services between the urban areas and rural and remote areas, where the common language may not be understood. In order to involve those areas into the national justice system, more frequent communication through the legal interface, which interprets the major content of formal rules, is required.

III The Case of Cambodia

1. Economic Development in Cambodia

After the defeat of Pol Pot regime, which was followed by the civil war, the reconstruction has been launched since the comprehensive peace settlement in 1991. Since then the Cambodian economy seems to have grown smoothly, though it was seriously affected by the subprime mortgage problem and economic downturn of Lehman shock in 2008. Its population was estimated to be around 15,100,000 million

people in a land area of 181,000km.

Cambodia has a history different from both Vietnam and Laos. The GDP per capita was around USD 900 for 2011. The growth rate was 6.7% in 2008, -2.0% in 2009, 5.96 % in 2010 and 6.09 in 2011%.

Cambodia joined ASEAN in 1999 and WTO in 2004. It has been pursuing a comprehensive legal and judicial reform with the strong support by international organizations, regional financial institutions, foreign governments, NGOs, etc.

2. Characteristics of the Concept of Law and the Structure of Legal System

Cambodia has received various types of legal assistance from international societies. As a result, it has achieved a significant progress in legal reform in terms of formal laws, although it is facing the difficulties in enforcement and administration of justice for the ordinary people.

About the laws and regulations in Cambodia, see the web page presented by Open Development Cambodia (<http://www.opendevdevelopmentcambodia.net/>).

3. Legal Cooperation and Legal Development in Cambodia

Under the regime led by Pol Pot, the legal profession had been totally purged, so that after the comprehensive peace settlement in 1991, when the United Nations Transitional Authority in Cambodia (UNTAC) began the legal reform, it was quite difficult for the Cambodian government to draft major laws. As a result, the government asked and accepted comprehensive legal assistance by many donors. This situation was different from that of Vietnam and Laos. The Asian Development Bank (ADB) and the World Bank (WB) supported the Land Law, the Japan International Cooperation Agency (JICA) supported the Civil Code, the Civil Procedure Law and its ancillary laws, the Canadian International Development Agency (CIDA) supported the Law on Commercial Tribunal, etc. The basic feature of the emerging Cambodian legal system can be characterized as the civil law system.

[Additional Agenda for Cambodia]

4. Access to Justice in Cambodia

5. Features and Problems in Cambodian Legal System and Legal Development

(1) Current Laws and Regulations

(2) Legal Professions and Management of Legal System

(3) Access to Justice in Cambodia

(4) Corruptions in the Government including Judiciary

(5) Problem of Land Grabbing

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Chapter 7 The Features of Legal System and the Economic, Political and Social Development in East Asian Countries

1. The Role of Law in Development Process

The law has been used as a tool of governance in East Asian countries. The governance by the legal authority should be recognized as only one type of legitimate governance. Max Weber identified three pure types of legitimate domination: the legitimacy based on “traditional grounds” resting on the established belief in the sanctity of immemorial traditions and the legitimacy of those exercising authority under them (traditional authority), “charismatic grounds” resting on devotion to the exceptional sanctity, heroism or exemplary character of an individual person and of the normative patterns or order revealed or ordained by him (charismatic authority), and “rational grounds” resting on a belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands (legal authority). The characteristic feature of legal authority is that the obedience is owed to the legally established impersonal order.⁷⁷

The role of law in the development process of those countries can be divided into three crucial phases of development: The first phase is the role of law for establishing the state or nation-building. The second phase is the role of law for the formation and implementation the strategies and policies of development. The third phase is the role of law (national law) for the mitigation of globalization impacts on the state which is on the way of development.

In all of those phases the governments in East Asian countries seem to have used the law, or more comprehensively the legal system, to promote development of their countries. In those phases, the political leaders and their technocrats have been playing an important role. Those countries have been characterized as a “developmental state.”

⁷⁷ Max Weber, *Economy and Society: An Outline of Interpretative Sociology*, edited by Guenther Roth and Claus Wittich, University of California Press, 1978, pp. 215-216.

2. The Role of Government and the “Asian Developmental State”

Is it possible for us to draw the “Asian Developmental State” model from the comparison of the East or Northeast Asian countries? ⁷⁸ Some features of governmental activities which are characteristic of (North) East Asian countries may be drawn.

(1) Attempts at corporatist development under the government’s strong guidance by arranging adequate strategies and policies and implementing them through legislation have been found as follow.

- (a) The government (especially legislature and administrative) enlisted a co-operative **workforce** through the arrangements of labor laws to regulate industrial (employer and employee) relations.

Also the role of land law, legislation for the provision of housing and social security has been important.

Japan and Singapore have much relied on abundant cheap labor in their initial stage of development, who hardly had other resources. Labor legislation was used to mobilize and pacify the work force in the interest of industrial production. This applied also to Indonesia to a lesser degree, for it has been rich in natural resources.

- (b) It (especially legislature and administrative) mobilized **capital** through banking laws, financial market and foreign investment regulation.

However, differences which have become evident in the capital formation stage should not be overlooked. Japan remained hostile to foreign investment and relied on a substantial tax burden, peculiarities of banking system, a fairly closed securities market such as found in the case of Steel Partners vs Bulldog Sauce Company.⁷⁹

Singapore developed a peculiar mix of facilitation foreign investment and maintaining a state-controlled sector in strategic industries.

- (c) It (especially administrative) upgraded **technologies** by supporting and protecting through intellectual property laws.

- (d) It (especially legislature and administrative) nurtured **national enterprises**

⁷⁸ See Antons 2003, pp. 216-240.

⁷⁹ Decision of the Supreme Court, 7 Augst 2007, Minshu Vol. 61, No. 5.

through company laws and securities legislation and arranging ant-monopoly legislation.

- (e) It (especially legislature and administrative) gradually promoted **privatization** of successful state companies through the legislation of company laws and securities laws and those implementation.

(2) The court sometimes interpreted laws and regulations quite flexibly by taking into consideration of promoting the national economy and securing public interests.

(3) The administrative used administrative guidance to shift essential parts of the legislation to be regulated in a large number of administrative decrees.

(4) The government, especially the administrative and judiciary maintained the quality of administrators and judges by minimizing corruption and keeping the salaries standard as attractive as those in the private sectors.

(5) Informal and social norms which historically developed and contributed to improve efficiencies such as the “English public servant ethos” in Singapore, the “Samurai spirit” or the “Giri norm” in Japan, “a prior agreement on basic goals industrial policy” and strategies, the consensus formation facilitated by the fear to be imposed from foreign countries, etc.

(6) Other factors

Creation and protection of private property rights, effective enforcement of statutory regimes, limiting discretion of economic governance were also important factors which have contributed to the rapid growth.⁸⁰

3. The Critics of Developmental State and the Advocacy of New Developmental State

(1) The Critics of (Classical) Developmental State Model

David Trubek criticized the “Classic (Original, Orthodox) Developmental State” in 1960s and 1970s and presented an idea of the “New Developmental State” which emerged since 1990s influenced by the Neo-Liberal State in 1980s and 1990s.⁸¹

According to analyses by Trubek, characteristics of Classical Developmental State

⁸⁰ Ohnesorge 2003, pp. 94-107.

⁸¹ Trubek 2008; Trubek 2009.

were as follow:

- The knowledge necessary for effective investment ... planning ministries, five-year plans ... detailed centralized planning
- Import substitution industrialization and delinking from world markets
- Law as a tool to render state intervention more effective ... the important role of administrative guidance to stimulating and steering investment in what became globally competitive industries ... the role the legal system played was very little ... the subjugation of legal rights to the prerogatives of the state [?]
- High degree of legal informality ... the courts were weak enforcers of rights against the state [?]

Trubek applied the model of Classical Developmental State to Japan and concluded that “As Japan became a model of postwar industrial growth, formal legal institutions played at best a back-up role to informal mechanisms, ... consumer protection was minimal, ...”

(2) General Characteristics of New Developmental State

Trubek presented the typical model of New Developmental State (NDS) by using the case of Brazil, which emerged in 1990s, which can be generally characterized as follow:

- (i) It placed primary reliance on the market to allocate resources, that is, it privileged private investment and ownership as the engine for growth, focused on growth over distribution, and opened the country to international markets.
- (ii) State intervened to steer investment, to facilitate innovation, to subsidize promising products, markets and industries. They are novel types of intervention by an activist state.
- (iii) Attention was also paid to social equality and protection as well.
- (iv) Laws have been passed to encourage private investment in major industries for the creation of a national venture capital market, fostering innovation, making firms more internationally competitive.
- (v) Based on collaboration between the public and private sectors, NDS deviates from

the neo-liberal (market fundamentalism) approach⁸², because it recognizes that without various inputs and guidelines private actors may not make good investments.

- (vi) It rejected top-down and one-size-fits-all approach. Instead, it tailored policies to the needs and traditions.

-(vii) It merged in the context of globalization.

Trubek listed basic elements of the NDS recognizing that NDS was not available for every developing nations but most relevant for more advanced countries like Brazil, Russia, India and China (BRICs).

- Primary reliance on the private sector as investor rather than direct state ownership
- Acceptance of a major role for the state in steering investment, coordinating projects and providing information especially in projects with multiple inputs and long term payoff

- Extensive collaboration and communication between public and private sectors
- Strong interest in exports and relative openness to imports
- Direct attention to entrepreneurship, innovation, and new product development rather than reliance on imported technology and know-how

- Promotion of productive (rather than speculative) foreign direct investments (FDI)
- Emphasis on making private firms competitive rather than on shielding them from competition

- Privatization or public/private partnerships in provision of public services
- Promotion of domestic capital markets and the financial sector both to generate and to allocate resources

- Attention to social protection including efforts to reduce inequality, maintain solidarity and protect against some of the costs of restructuring

- Welfare programs conditioned to recipients' work or investment in their human

⁸² Trubek characterized Neo-liberalism that it regarded states would always get it wrong, market could find the right path, and it regarded law as basically a framework for the market and a shield against undesirable state intervention in market activities ... protecting investor expectations, facilitating private transactions ... limiting the role of the state.

capital

Trubek also required the appropriate legal and regulatory framework for the NDS as follow:

- Policy must be flexible enough to permit a variety of efforts ... regulatory frameworks sufficiently revisable ... incorporation of the fruits of learning
- Regulatory regimes that foster global competitiveness ... with subsidized systems searching for promising products and markets ... investment of public funds in promising companies (public venture capital)
- Highly selective use of tariffs, taxes and subsidies
- Open and transparent forms of governance
- Basic income grant to keep solidarity

(3) Evaluation of NDS

It seems that some difficult puzzles to be found in the NDS. They are:

- How to coordinate the policies of the NDS with the rule of law?
- “The proposal for continuous improvement and regular monitoring of public inputs may encounter problems if they are not consistent with the rules governing who has authority to modify regulations and/or if they clash with traditional forms of ensuring government accountability by use of constitutional or statutory audit units.”

The NDS seems to need the institutional control by *the (new) rule of law principle* which is to be made more flexible to grow in local circumstances.

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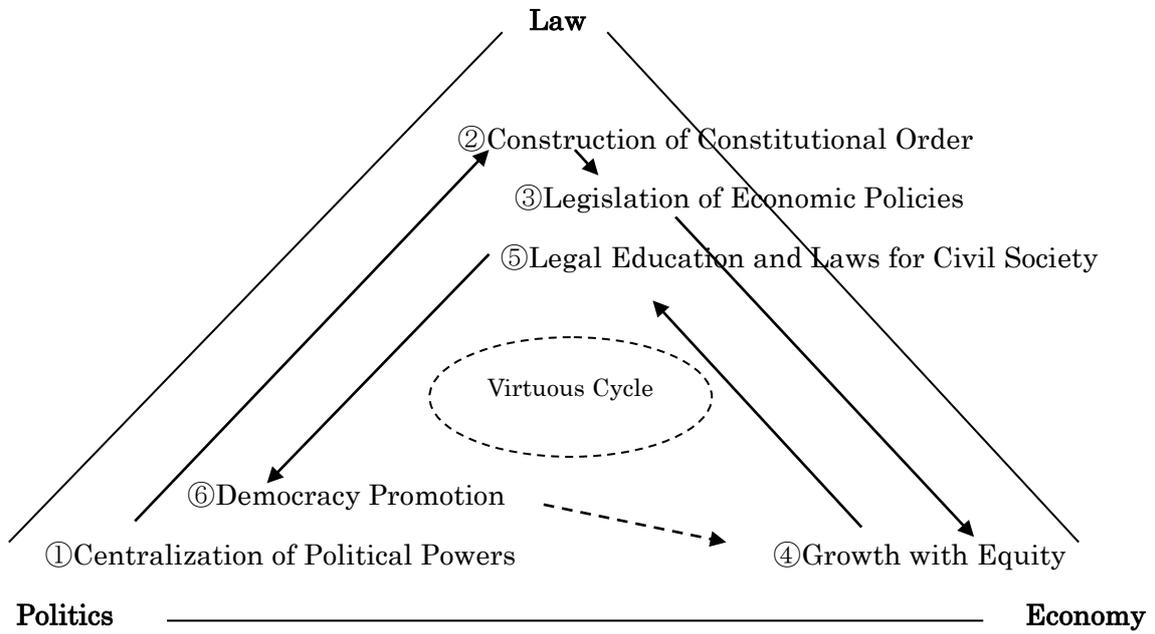
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【Figure 1】 Virtuous Cycle of Politics, Economy, and Law [Revised]

(to be found in East Asian Countries)



Chapter 8 The Promotion of the Rule of Law in East Asian Countries: the Role of Legal System in Economic and Political Development

1. The Relation between Legal Reform and Economic, Political and Social Development

(1) The Role of Law and the Rule of Law in Asian Countries

The role of law in the development process of (East) Asian countries has been recognized as 1) the construction of the firm base to establish the state (nation-building), 2) the formation and implementation of the strategies and policies of development, and 3) the mitigation of globalization impacts on the states which are on the way of development. However, those roles of law in Asian countries have been often problematic.

First, in some countries, such as in Thailand and Egypt, the constitution has been frequently challenged politically and abrogated by the coup d'état, then the draft constitution has been opened to be approved by the national referendum and promulgated again, but it has been abrogated again and again. The repeated political interventions into the constitution have affected the establishment of constitutionalism and the consciousness about the rule of law in those countries.

Second, the laws to implement the development policies have been used as anchor and often provided the “ratchet effect” in order to promote those policies. However, in some countries, they have affected fundamental rights of individual such as the right of private property, the freedom of expression, speech and association, etc.

Third, the laws to mitigate the globalization impact have sometimes been criticized as against the “universal” rules of globalized society.

In this context, *the role of law* needs to be examined from the viewpoint of *the rule of law*, which may judge the correctness of the role of law.

(2) Definitions of the Rule of Law

The rule of law is a still contested concept and there are various definitions such as formal and substantive definition, or thin and thick definition, or functional definition.

(a) Formal, Procedural or Thin Definition

It defines the rule of law as the state's conformity to objective indexes such as 1) existence of a formally independent and fair judiciary, 2) existence of a set of laws which are open to the public, 3) inexistence of laws which are applicable only to certain individuals or classes, 4) inexistence of law retrospectively applicable, 5) existence of provisions regarding judicial review of the government's action.

(b) Substantive, Expansive or Thick Definition

It defines the rule of law as not only the conformity to formal indexes, but also as the contribution to justice, fairness, freedom, equality, and to social good such as the realization of substantive equality through democratic decision-making: that is, as "the rule of good law."

(c) Functional Definition

The rule of law also conceived that the government's arbitrary exercise of discretionary power is appropriately controlled and its functions such as predictability of legal decisions, etc. are actually fulfilled.

The formal or thin definition is also called the "rule-book" conception and it requires the government as well as the ordinary citizens to act in accordance with the rules which have been explicitly set out in a public rule-book that is available to all. Those rules can be changed but only in accordance with the prescribed rules about how they are to be changed. A matter of substantive justice is regarded as an independent ideal and it is not a part of the rule of law ideal⁸³.

In contrast, the substantive or thick definition is also called the "rights" conception, and it does not distinguish between the rule of law and substantive justice and requires that the rules in the rule book capture the substantive rights.

The difference of views depends on the basic inquiry of the fields of legal science. For instance, in legal philosophy, the fundamental question would be *what* the rule of law is, whereas in law and development the inquiry cannot only ask what the rule of law is but it should go further to ask *why* it is significant for the goals of development and

⁸³ Dworkin 1985: pp. 11-14.

how it is to be established, because in the context of development process it is not enough to talk about the rule of law, but it is necessary to implement the rule of law in a particular circumstance of a particular country and to construct its legitimate governance based on the legality.

In this context, the question of the rule of law is placed in a more dynamic context of achieving good governance. But, it necessarily leads to the puzzle of ambivalence between the rule of law and the political power of government. The power of the emerging government must be strengthened in order to make laws, apply them to particular cases, and enforce them. At the same time, the government power must also be bound by laws so as to prevent abuse of or deviation from the political power on the part of government. However, the stronger governmental power becomes, the harder it becomes to control it through laws. As a result, “[i]f we cannot do without the state, we cannot do with it either?”⁸⁴ In the context of development, the fundamental dilemma of the tension between the rule of law and the power of government appears to be so serious that the question of how to solve it may be unavoidable.

(3) The Flexible Conception of the Rule of Law as Accumulated Layers of Rules

In order to coordinate the tensions between the *effectiveness* of the rule of law to be provided by the strong government and the *rightness* of the rule of law to be provided by the legitimate government, the rule of law needs to be conceived in more flexible way in the dynamic process of development.

(a) The Minimalist Approach

A clue to the flexibility of the rule of law concept may be found in the minimalist approach. It will only require that the government must abide by the rules promulgated by the political authority and treat its citizens with basic human dignity, and that there is access to a fair and neutral (to the extent achievable) decision maker or judiciary to hear claims or resolve disputes. These basic elements are compatible with many social-cultural arrangements and, notwithstanding the potential conflicts,

⁸⁴ North 1990: p. 58.

they have much to offer to developing countries.⁸⁵

Two elements are recognized as “the minimum content of the rule of law”. The first element is “that the government acts according to the rules produced in the political arena and respects the civil rights of its citizens”, and the second element is “that there is a judicial body to resort to that embodies the ethic of treating all cases before it neutrally and fairly.”

The minimum content is thought to be compatible with the individualist-oriented cultures as well as the communitarian-oriented cultures, and it may be adapted to fit local circumstances.⁸⁶ Tamanaha further develops this conception in his book *On the Rule of Law*, by understanding the rule of law as consisting of several clusters of meaning.⁸⁷

1) The first cluster of its meaning is that “the government is limited by the law.” This cluster first became firmly established in the Middle Ages in Europe, and thus preexists liberalism. As the government is not an extension of the community but is confronted with the communities within its country, legal limits on the government are necessary to ensure respect and support for their social and cultural views in a religion-steeped society or in a custom-dominant society. This understanding of the rule of law can be compatible with an individualist as well as a communitarian social conception, and can be available to a liberal as well as a non-liberal society.

2) The second cluster of the rule of law is “formal legality,” or “the rule by rules,” and it is regarded as “a supremely valuable good”, but it is not necessarily a “universal human good.” It is essential whenever government coercion against person or property is threatened, especially in the imposition of criminal sanctions, and is also valuable in providing security and predictability regarding transactions, commercial and otherwise. However, it should not dominate in all circumstances, even in market contexts, if other functionally equivalent social mechanisms are efficacious, such as social ties and shared understandings. It is even “counter-productive” in situations that require discretion, judgment, compromise or context-specific adjustments. It will

⁸⁵ Tamanaha 1995: p. 476.

⁸⁶ Tamanaha 1995: pp. 477, 484.

⁸⁷ Tamanaha 2004: pp. 137-141.

also face “particular difficulties” in situations where legal institutions are transplanted from outside, as is the case of post-colonial societies, where legal norms may clash with local norms.

3) The third cluster of meaning is “the rule of law, not man,” but it follows naturally whenever the first or second cluster is adopted. A society that adopts the view that the government is limited by law and that the law should satisfy the qualities of formal legality also necessarily embraces the concept of “the rule of law, not persons.”

Tamanaha emphasizes that all three clusters are open with respect to content. The requirements of formal legality specify only the form, not content of the laws. The “rule of law, not man” says that government officials must sublimate their views to the applicable laws but does not specify what those laws should be. Thus the rule of law, understood in terms of all three aspects, should always be subject to evaluation from the standpoint of justice and the good of the community.

I agree with Tamanaha’s conception of the rule of law in that it is not a hard substance whose contents are fixed but is a soft entity whose contents may be created around its core. However, if the first cluster starts from the limitation of the government which is confronted with communities within the state, it might be hard to talk about the rule of law in a state where the government is weak, fragile, or in the process of taking shape, so that it needs the centralization of political powers. In the context of development, before talking about the rule of law in the meaning of the limitation of the government, the government must become so stronger that it can authorize, enforce and amend the law, which is abide by the general public. The rule of law as the limitation of government power may be more significant in a fairly advanced stage. In contrast, the rule of law as the formal legality may be placed in a more basic stage, because it results from the very nature of law that is characterized as a union of the primary rules of obligation and secondary rules of formalization such as recognition, adjudication and change of the primary rules, as described by Hart.⁸⁸

(b) A Conception of the Rule of Law as Accumulated Layers of Rules

In the context of developing process of a country, the rule of law seems to be more

⁸⁸ Hart 1994: pp. 81, 94.

appropriately conceived as a stratified accumulation of rules within which at least four layers are contained.

1) The first layer of the rule of law stratum must be the existing rules and attitudes assumed by the citizens and government officials, even if they are informal. It should be noted that the rule of law cannot be transplanted in its true sense but it should be regarded as an *institutional change* which occurs regarding the existing rules, influenced by the new institution. Even in the failed state society is *not an institutional vacuum*, but there are institutions some of which are to be maintained and some to be changed by the new laws. In no sense can the process of legal reform be a fresh start from an institutional blank but is instead constructed on the scaffolding of the existing institutions. In this sense legal reform should be launched by confirming the existing rules even though they are informal, pre-modern, or obsolete. The foreign advisors should be careful to observe such existing rules and investigate them. If the existing institutions which are actually obeyed include the rule of change, the reformers should make all possible efforts to use them to change the existing rules to achieve reform from the viewpoint of development policy.

2) The second layer of the rule of law stratum is the formalization of the rules which may include a series of items of new legislation in accordance with the national legislation plan. In this process a point that is often neglected but which is quite significant from the rule of law principle, is *to make the detailed rules about making rules*. Those rules, which should be called *meta-rules*, include not only the rules for the formal legislation process in the Diet, but the rules about, for instance, who can make the drafts and discuss them, how many times they should do this basic work, how they can reach an agreement for the final draft, to whom it is presented, etc. The significance of the meta-rules relates to the very nature of law, which is described as the secondary rules which include the rule of recognition in Hart's sense.⁸⁹

Another point in the second layer is the problem of the content of rules to be formalized. Starting from a rigid concept of the rule of law, especially from the rights conception, a rule may be regarded as against the rule of law if it does not fully develop

⁸⁹ Hart 1994: pp. 79-99.

the rights of the individual or if it cannot effectively limit the government in exercising the power, even though the rule is formalized through the national legislation procedure prescribed by the constitution.

For example, in the process of drafting the Vietnamese Code of Civil Procedure supported by foreign donors including the Japan International Cooperation Agency (JICA), there were heated debates between the Vietnamese government and the foreign advisors on the *special (supervisory) instance* which the Vietnamese government was eager to keep in the Civil Procedure Code. This is a process by which the final decision made by the Supreme Court may be reversed after an examination demanded by the head of the Attorney General or the Supreme Court, not by the parties at all. The purpose of the supervisory instance was alleged to ensure the appropriate and unitary application of law through which process the government can educate the people to comply with the law so that it leads to the realization of the ideal of a socialist state. It also aims to supervise the judges and to ensure that they do not abuse or deviate from their power. One of the problems is that it may affect the right to self-determination of the parties in the case before the court. These parties are not vested with the right to apply the special procedure as well as plead in it. This affects the stability of the legal status of the parties. The neighboring countries, such as the Lao PDR, had abrogated similar institutions and the new Cambodian Code of Civil Procedure had not introduced it. Nevertheless, the special rules were kept and inserted in the Art. 282 ff. in the Code of Civil Procedure.⁹⁰

Should this rule be regarded as contradicting the rule of law conception? From the viewpoint of the rights conception and the significance of the rule of law for the limitation of the government power, it will be judged negatively as being against the rule of law. However, in the circumstances where the capacity and the number of qualified judges and lawyers who represent the parties are limited, the government intervention may not be avoided to control the correctness of judgement. If, in the course of time, the number and the capacity of trained judges and lawyers together with the prosecutors gradually improved, on the one hand, and the notion of

⁹⁰ It was promulgated in 2004 and came into effect in 2005.

substantive rights will permeate the life of the citizens and raise their consciousness of the rights of the individual, a movement may occur to change that rule for themselves. A rigid conception of the rule of law might affect this spontaneous and dynamic process of the rule of law promotion.

A more crucial topic in the second layer is the *sequencing* of the formalization of law. Which field of law should be given priority over other fields? There seems to be a wide choice among various fields, such as civil law, commercial law, company law, intellectual property law, consumer protection law, economic law, competition law, foreign investment law, administrative law, criminal law, law of procedure, insolvency law, judicial law, election law, parliament law, tax law, etc. As Rose-Ackerman puts this problem:

“Where should reform begin? This is a difficult question to answer in the abstract, but a few observations are possible. A state needs clear and transparent rules defining criminal and civil offences and establishing rights to personhood and property. It needs simple and effective methods for bringing complaints against state officials. The state needs credible institutions to enforce the rules. Once these building blocks are in place, it can establish more sophisticated laws governing private economic activity and regulating society in the public interest, and it can consider how to deal with offences committed during the period of civil war or disorganization that preceded the creation of the new state.”⁹¹

First come the basic rules specifying the rights people have and how property ownership is to be determined. This includes laws that define crimes against people and property, on the one hand, and civil offences, on the other. My experiences from working on legal cooperation projects with Lao PDR, Nepal, Myanmar, Uzbekistan, etc. have led me to share Rose-Ackerman’s views. Formalization of the rules governing the most basic and primitive private rights, such as the right of property and personality (personhood), should be given top priority, as they are much more influential than any other rules. However, these rights are not always recognized and prescribed in the basic codes at a time. In that case, and it often is the case, the efforts to introduce and

⁹¹ Rose-Ackerman 2004: p. 209.

embody such primary rights may be continued with the aid of normative theory which will come in the fourth layer of the rule of law as will be mentioned below.

3) The third layer within the rule of law stratum is the establishment of the adjudication and enforcement system of the law. Rules which are formalized must be precisely construed and applied to each particular case, and actually and impartially enforced, otherwise the lack of an adjudication and enforcement mechanism will seriously affect the attitude to abiding by the law among the people. This process could be promoted by preparing for procedural rules, restructuring the existing government organizations, and training public officials.

4) Finally, the fourth layer within the rule of law strata is the merit of the contents of rules which can be valued as “good law.” However, the “good law” cannot be achieved at once and must be constantly reviewed in accordance with the normative theory developed within the country and influenced by the globalizing international society.

Thus the rule of law strata could not be established all at once but it can be gradually constructed by accumulating each layer of rules on step-by-step basis. In this process there seems to be an ideal sequence to the extent that the upper layers must be fragile without the foundation of the lower layers. However, it should not be regarded as a rigid and linear sequence. There may be a wide range of room regarding how to fulfill the contents of each layer, how to revise them, how to arrange the sequencing within each layer, how to coordinate the pacing, etc. In this sense the strata conception can make the rule of law more flexible so that it is easier for the government to establish it in each particular situation.

The formal, thin, or “rule-book” conception seems to correspond to the second layer within the rule of law strata, as a formalization process. The substantive, thick or “rights” conception may correspond to the fourth layer as a constant review of the goodness of content of law. Thus both conceptions capture one particular aspect of the rule of law respectively.

[Table1] Conception of the Rule of Law as A Layer

Layer IV	Goodness of substance of legal rules		Substantive, Thick or Rights Conception of the Rule of Law
Layer III	Structuring enforcement mechanism	Formal, Thin or Rule-book	
Layer II	Formalization of legal rules	Conception of the Rule of Law	
Layer I	Informal institutions		

Source: Author.

3. The Rule of Law as an Instrument for Attaining Good Governance

The rule of law, however, is not an independent goal of development but it is an instrument for achieving a more comprehensive goal, which is often referred to as “good governance” of the state. It is not by chance that most aid agencies, such as international organizations, national governments and NGOs which are engaged in legal assistance activities, state explicitly that their goal is to attain good governance, though some agencies, enumerate good governance together with other political ideals such as human rights, democracy, and the rule of law⁹². It is necessary to clarify the relation between good governance and the rule of law together with other political ideals.

The concept of good governance seems to be the most comprehensive political ideal concerning the state, because it includes not only the governance of the public sector⁹³

⁹² For example, see Art. 9 of the Cotonou Agreement concluded between the EU and the African, Caribbean and Pacific (ACP) States. It provides that the respect for human rights, democratic principles and the rule of law are “the essential elements” and that good governance is “a fundamental element” of the Agreement.

⁹³ UNDP, OECD, WB, IMF, IDB, AfDB, EBRD, EU and USAID seem to narrowly understand that good governance is concerned with the function of government or the public sector, so that it is a synonym for the good government. See UNDP, Democratic Governance Group, (2004) *Governance Indicators: A User’s Guide*, UNDP; OECD, (2006) *Annual Report 2006*, OECD, pp. 62-80; World Bank, (1992) *Governance and Development*, World Bank ; id., (1994) *Governance: The World Bank’s Experience*, World Bank; IMF, (1997) *Good Governance: The IMF’s Role*, IMF, Publication Service;

but also the promotion of the governance of private sector and civil society organizations (CSOs),⁹⁴ because the state, in a broad sense, consists of the private sector, government (public) sector and the CSOs. The private sector comprises economic organizations, such as markets and firms, which are necessary for the procuring goods and services of better quality, at a lower price, and as quickly as possible. But these economic organizations need the support of strong government to make uniform rules of exchange, to adjudicate impartially, and to enforce their decisions without exception. However, in order to control the strong power of the government as well as that of economic organizations, the third sector, civil society, is needed as a counter-balance. In this context, *good governance* can be defined as a state of balance among the economic organization (markets and firms), government, and CSOs within each country.

Good governance of the state matters in a globalizing world, because the coexistence of as many as possible of the states of good governance, i. e. good states, would lead to *global governance*, which may be the only possible peaceful order that can be contemplated given current international relations.

The next question would be how and by whom good governance can be established within each country. Although there is no single answer to this question, the role of the government (with the support of aid agencies) must be considered indispensable in the process of development. In this context, the government must be *strong and efficient* enough to make rules, adjudicate, and enforce judgments. However, for that very reason, the government must be *legitimate* i. e. equipped with the internal mechanism

IDB, (2006) *Annual Report 2005*, IDB; AfDB and AfDF, (1999) *Bank Group Policy on Good Governance*, AfDB and AfDF; EBRD, (1997) *Transition report 1997: Enterprise performance and growth*, EBRD; European Parliament, Council, Commission, (2006) *The European Consensus on Development*, Official Journal of the European Union, C 46/1-19; USAID, Center for Democracy and Governance, (1998) *Democracy and Governance: A Conceptual Framework*, USAID. Financial institutions, particularly such as WB and IMF, prefer to use the concept of good governance rather than that of good government which may be associated with political matters.

⁹⁴ ADB includes the private sector and CIDA includes the CSOs in the concept of (good) governance of the state. See ADB, (1999) *Governance: Sound Development Management*, ADB; CIDA, (2005) *Guide to key concepts in governance and development*, CIDA, pp. 1-5.

to ensure that their agencies mutually limit their power in accordance with the laws on the one hand, and on the other hand it must be *benevolent* toward the CSOs and help them to establish and monitor government activities in the light of the laws. In this process of establishing *good government*, i. e. *strong and efficient, legitimate and benevolent government*, the rule of law principle required by the legitimate and benevolent aspect of government may sometimes restrict the efficient exercise of power by the strong government. Thus discrepancies may arise among the different aspects of good government, especially between the rule of law and the strong and efficient government. Such discrepancies, however, may be resolved by arranging policy priorities from the perspective of attaining good governance. In Rose-Ackerman's words:

“States need to balance the protection of investors against their own need for policy-making flexibility ... [and] ... governments discretion to carry out taxation and regulatory activities that affect the returns to private investment. ... [T]he rule of law does not imply a rigid and unchanging set of rules.”⁹⁵

In this context the flexible conception of the rule of law, that it does not need to be established all at once, would allow the government to coordinate priority among competing policies.

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Chapter 9 The Civil Law - Common Law Divide and the Performance of Legal Reform in East Asian Countries

1. The Reception of the Major Western Legal Systems of Civil Law and Common Law into Asian countries

(1) Common Law and Civil Law in (East) Asian Countries

Different patterns may be found in the relations between legal reform and economic and political development among the comparatively successful East Asian countries. One of the frequently asked questions has been whether legal origins such as Common Law and Civil Law have influenced economic and political development in those countries.

On the one hand, Singapore, Malaysia, Hong Kong, India, Sri Lanka, Myanmar, etc. belong to the Common Law jurisdiction due to the British colonization of those countries.

On the other hand, Japan, Thailand, China, Korea, Taiwan, Vietnam, Laos, Cambodia, Indonesia, etc. adopted the Civil Law system through the reception of law or due to the French colonization of Indochinese countries.

... [F]ew developing countries are influenced by German law, and those few -- such as South Korea and Taiwan -- are already high-income countries. (Of course, South Korea and Taiwan had much lower incomes just a few decades ago and thus their legal development would merit investigation.) ...⁹⁶

These two major legal systems originated in Europe vied in East Asian countries just as in East Europe, where Americans and Germans have tried to mold their own laws. For instance, in drafting of Georgian commercial legislation, “[t]he contest pits continental Europe’s Napoleonic civil-code traditions against the common law of the Anglo-Saxons,” and “Germany’s conservative boardroom culture against America’s rough-and-tumble capitalism of proxy fights, hostile takeovers and junk bonds

⁹⁶ Dam 2006: p. 31.

...institutional competition concerned with corporate finance and corporate governance.”⁹⁷

Before we come to the conclusion on the superiority of Common Law or Civil Law for developing countries, it is necessary to identify the salient features of and differences between these two major legal systems.

(2) Features of Common Law and Civil Law

(a) Common Law System

On the one hand, in Common Law System, it is said that the primary source of law is the case law, and the statute is only the complementary source of law. Thus, judiciary matters in Common Law.⁹⁸

(b) Civil Law System

On the other hand, in Civil Law System, the primary source of law has been the legislation such as basic Codes and other legislated law by the congress, and the case law has been the complementary source of law. In Civil Law, legislation matters, the typical form of which has been the codification of major Codes.

(3) Conceptual Differences between Common Law and Civil Law

There are conceptual differences between Common Law and Civil Law. In Common Law System, it is indicated that the authority of the court and the stability of the precedents recognized as “Common Law” gave birth to the original concept of the rule of law. According to this conception of law, the law is not the will or decision of any individual or group but is what has been protected by the courts. As a result, the Common Law as the accumulated case law is endowed with *stability* as well as *flexibility*. But, it is inevitably wanting in transparency which could be achieved by the systematic and thorough description of law like in Civil Law System. However, the

⁹⁷ *Wall Street Journal*, 3 April 1995.

⁹⁸ As for the general description about the difference between the Common Law and Civil Law, see Matsuo 2004: pp. 82-83.

conception of law in Common Law tradition may be the modest way of treating the law, because it must be almost impossible project to list all the necessary legal rules to be applied in a society and to classify them completely into a system without any contradictions. Although the piecemeal legislation has been increasing in Common Law System, Common Law principle is relevant in interpreting them and common law technique will continue to build up a body of case law. Thus the Common Law conception is still alive with its original virtues. It led to the *adversarial system* of litigation procedure *led by the parties*, in which the truth of facts and the correct decision can only be found.

On the other hand, Civil Law System can be characterized as a system of substantive rights which is conceptually separated from and presupposed before the procedural rules, classified into personal rights and real rights, at the core of which lies the right of property (ownership), and it is expressed in the form of basic Codes such as Civil Code. This characteristic conception of law is thought to be traced back to the legal science since the Greek and Roman period, which was handed down through the Middle Ages to the modern times. In this process the expression of law (*ius*, *droit*, *diritto*, *Recht*, etc.) came to have the meaning of rights as well, and it was believed that the law as a system of rights can be fully described in the written form of Code. This conception of law led to the codification movements in the continental Europe since the end of the eighteenth century. These characteristics of the Civil Law System have the advantage of *systematic description* and *transparency* of legal rules, but it lacks in the flexibility to cope with the economic and social change, and consequently it always needs to be interpreted and supplemented by the court decision and legal theory. According to this conception of law, the truce of facts and the right answer must be found by the judges *ex officio* in the *inquisitorial system* of litigation procedure.

[Table 1] Characteristics of Common Law and Civil Law

	Common Law	Civil Law
Main source of law	Case law (stare decisis)	Legislation (codification)
Complementary sources	Statutes	Case law, customary law
Concept of law	What protected by courts, evolving, the rule of law	Roman legal science, natural law theory, codification, created, system of rights
Legal education	Inns of court, law school	University (law faculty)
Substantive law	Unfinished transition from causes of actions	Separated from procedural law
Procedural law	Wide range of Rule-making power of the courts	Regulated by the procedure codes
Concept of litigation	Dispute resolution Adversary system	Finding the true facts Inquisitorial system

Source: Matsuo 2004: pp. 53-54.

[Table 2] Virtues of Law

	Common law system	Civil law system
Stability	⊙ The rule of law	○
Flexibility	⊙	○
Consistency	○	⊙ System of rights
Transparency (browsability)	○	⊙

Source: Author.

(4) Is the Legal Assistance Competition Due to the Differences between Common Law and Civil Law?

(a) LLSV, “The Quality of Government”

Common law ... “developed ... as a mechanism for protecting the subjects from crown ...”

Scandinavian law

Civil law ... “an instrument of the State in expanding its power...” German civil law countries ... “despite the interventionist stance of the law ...” French civil law countries to be intermediate in government efficiency...”

Socialist law ... “a clear manifestation of the State’s intent to create institutions to maintain its power and extract resources ...”

Conclusion: “... countries that are poor, close to the equator, ethnolinguistically heterogeneous, use French or socialist laws, or have high proportions of Catholics or Muslims exhibit inferior government performance”⁹⁹

(b) Counterarguments against LLSV

(i) Focusing on the transplanting effect due to the differences in the domestic and situation of recipient countries

Adaptation of transplanted law with indigenous law; familiarity of transplanted law in the society.¹⁰⁰

(ii) Focusing on the transplanting process

Efforts have been made by the donors and stance of the recipients to transplant the law.¹⁰¹

(c) The difference between common law and civil law is not the true reason for the legal assistance competition

(i) A chance to create the new model of legal reform (global model?) by harmonizing the advantages of common law and civil law?

Legal assistance can be regarded as its forefront.

(ii) Legal assistance is not a zero-sum game to fight for transplanting the donor’s law

⁹⁹ La Porta et al. 1999: p. 222.

¹⁰⁰ Berkowitz et al. 2003: pp. 165-195.

¹⁰¹ Acemoglu et al. 2001: pp. 1369-1401.

It can turned out to be a plus-sum game by seeking for the common interests among recipient and donors.

(5) Possible Convergence of Common Law and Civil Law?

(i) The Introduction of Roman law to the Anglo-American jurisdictions

(ii) Increasing statutes in common law jurisdiction, increasing case law (annotated by legal doctrine)

“... I advocate a system based on persuasive authority of cases as contextualised by legal doctrine.”¹⁰²

(iii) Contents of property, contracts, torts, restitution, other rules of obligation, etc. have become common due to the growing tendency of mutual reception between common law and civil law.¹⁰³

(iv) Possible formation of hybrid model of common law and civil law and combination of virtues of law?

In Common Law System, stability is guaranteed by the rule of law.

In Civil Law System, consistency is provided by the system of rights.

(6) Is Convergence Found in (East) Asian Countries?

The case of Japan

A combination of the English, French, German, American and Japanese elements?

The case of other East Asian countries

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Acemoglu, Daron, Simon Johnson and James A. Robinson, “The Colonial Origins of Comparative Development: An Empirical Investigation,” *American Economic*

¹⁰² Hondius 2007: p. 24

¹⁰³ Matsuo 2004: pp. 54-55.

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Chapter 10 The Possibility of Legal Development through Legal Assistance and the Future of Law and Development

1. The Critical Conception of Law and Development

In the history of Law and Development, some skeptics have time and again challenged the basic assumption that the law plays a positive and causal role in development. Since this fundamental question on the relation between law and social change still remains unanswered, one might well wonder whether it makes sense to devote a substantial amount of money and human resources to legal reform in developing countries.¹⁰⁴

In an article published in 2011, Professor Tamanaha regards the “law and development” movement of the past five decades as “failures”. This critical appraisal is based on the idea that what he labels as “law and development” is modernization projects generated and funded by advanced capitalist countries and carried out by development organizations which aim to transplant Western laws to developing countries in order to establish capitalist, democratic, and liberal legal institutions, and therefore, that it is an intervention in a legal system from outside.¹⁰⁵ Such projects have not achieved much success despite the lengthy and costly efforts, as shown by judicial reform projects in Latin America, economic law reform projects in East Europe, etc. Tamanaha concludes that this concept of “law and development” is misleading, because the very label suggests that law has a special ability to achieve desired development goals.¹⁰⁶ But, this conception of “law and development” seems to correspond to the old-style legal assistance projects characterized as the simple transplantation of Western laws to developing countries. That conception is too narrow to understand the reality of recent development of legal assistance projects and law and development, which regard the relation between law and development in the more

¹⁰⁴ Kevin E. Davis and Michael J. Trebilcock, *The Relationship between Law and Development: Optimist versus Skeptics*, *AJCL* 56 (2008), 915-938, 942-945.

¹⁰⁵ Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development*, *Cornell International Law Journal* 44 (2011), 216, 235, 241-243.

¹⁰⁶ Tamanaha (note 2), 247.

complicated structure of each society influenced by the political, economic and cultural features that have uniquely developed in that society.

I agree with Professor Tamanaha's basic analysis that a good law in one location may be a bad one elsewhere. It is due to the "connectedness of law" principle, which means that the law is interconnected to every aspect of society such as the tradition, culture, political and economic system, distribution of wealth and power, ethnic, language and religious make-up of the society, the level of education of the populace, the extent of urbanization, geo-political surroundings, etc.¹⁰⁷ However, it is difficult for me to agree with the proposition that the "connectedness of law" principle stymies law and development¹⁰⁸, because it is possible, in my view, to design law and development that recognize the "connectedness of law" as the methodological foundation, and there exist law and development projects which are based on the recognition of the "connectedness of law" principle.¹⁰⁹ We cannot overlook the gradual movement of law and development that has been integrating the basic recognition of interrelatedness of law and other elements of society into its theoretical framework. It will provide us a thicker conception of law and development, in which law may be designed to influence economic growth or democratization not directly and one-sidedly but indirectly and in the complicated interrelation among different factors of each society. And also legal assistance projects are not necessarily mere transplantations of Western liberal legal systems into countries of insufficiently capitalist economies or lacking democracies. They may include international cooperation to exchange of ideas about how to weave a unique textile of legal system which may fit for each society between different societies including between developed countries. "Law and Development" should be reconsidered in this thicker and broader context of the function and formation of law.

¹⁰⁷ Tamanaha (note 2), 214. See also *Section 4* below.

¹⁰⁸ Tamanaha (note 2), 219.

¹⁰⁹ At least, there are certain law and development projects which regard the legal assistance as far from transplantation of law from one country to another but based on the joint study of law. See, for instance, Japan International Cooperation Agency (JICA), *JICA's Experience in Support for Legal and Judicial Reform in Developing Countries*, 2009.

2. The Possibility of Legal Development through Legal Assistance

Professor Tamanaha distinguishes between “law and development” and “legal development”. The latter would be designed, organized and implemented without pressures from outside by people who understand their local situation. He mentions China, where substantial legal development can be found, for instance, in the increased number of new laws enacted, of court cases (including administrative cases), and of licensed lawyers, “none of which can be directly attributed to law and development projects.”¹¹⁰

In fact, China has long been in contact with foreign countries such as Germany and Japan in order to reform judicial systems and to enact new laws, including not only private laws but also industrial, environmental, administrative, and other public laws.¹¹¹ The enactment of the tort law in 2009 is one of several legal cooperation projects with China I have participated in. We made comments and proposals about each and every clause of the first, second and third draft and held close discussions with Chinese drafters for more than a year. We also made special reports from the viewpoint of comparative laws in response to the queries from the Chinese counterpart on subjects such as product liability, strict liability, joint liability, etc. on crucial occasions in drafting process. Some comments were adopted, some were not, and some were adopted in newly arranged draft provisions. This was only one part of our activities. The important point is that this cooperation between China and Japan did not end with the promulgation of laws but still continues today despite political turmoils through the intermediation of resident specialists (lawyers, judges, public prosecutors dispatched from Japan) for further improvements of both legal systems.

This leads me to think that legal development in one country could be facilitated in a positive manner by legal assistance from other countries. Let us take a look at Japan. The law on the transaction of immovable property, for example, was first introduced in 1871 starting from Tokyo area and extended to other areas since 1872 by combining the traditional system with the new deed system known as the Torrens

¹¹⁰ Tamanaha (note 2), 242-243.

¹¹¹ As for the information as at April 1, 2009, see JICA (note 6), 75-76.

system, as practiced in British colonies such as Australia. It contributed to the transformation of the tax system from annual rice tax to land tax, which was the major financial basis of the newly established Meiji government. Moreover, the registration system also introduced was modeled on the Prussian system and set up with the help of German advisors. This system was combined with the law on the notary and substantive law provided by the Old Civil Code¹¹² as modeled on the French system but adjusted to local needs by French advisors. It was further revised by the New Civil Code¹¹³, which was drafted by Japanese scholars who had studied law in England, France and Germany.¹¹⁴ It has since been improved to save the costs of immovable property transactions just as it has more recently facilitated financial transactions which have become the basis of corporate finance, especially since the price of land has steadily increased until the burst of the bubble economy in the 1990s. This shows that the law has truly taken root in the country as a hybrid of Japanese, English, French, and German ideas.

In Japan, foreign legal systems have been introduced from China (in the 7th and 8th centuries), European Countries (in the 19th and 20th century), and the U.S. (from the 20th century), and, in combination with the existing system, have helped improve the stability of the government, to facilitate private activities, and to conform to international standards.

One important thing to mention here is how the Meiji government embarked on the compilation of national basic codes. The Minister of Justice, Takato Oki, who attempted a comprehensive legal reform, articulated the basic policy to compile the civil code on the basis of “natural reason” in order to facilitate the communications between human beings. As the implementation of such “natural reason” he emphasized the importance to clarify the rights and duties between the persons in the in civil code.

¹¹² It passed the Imperial Diet in 1890, but it did not come into effect as a result of the Disputes over the Implementation of Civil and Commercial Code.

¹¹³ It was modeled on the German system, but it was also based on the content of Old Civil Code. It was promulgated in 1896 (the former 3 Parts) and in 1898 (the latter 2 Parts) and came into effect in 1898.

¹¹⁴ Hiroshi Matsuo, Reception of law and civil law tradition, in: *Law, Legal Culture and Politics in the Twenty First Century*, eds. Guenther Doeker-Mach and Klaus A. Ziegert, 2004, 79-82.

For that purpose, he established the Bureau for the Investigation of Local Customary Rules in 1876 and published the Collection of Customary Rules in Civil Matters in 1878.¹¹⁵ At the same time he appointed the French Professor Gustave Boissonade to draft a civil code in 1879 (or in 1880).¹¹⁶ Oki's aim was to enhance the integrity of the national legal order on the combined basis of traditional rules and newly introduced rules.¹¹⁷

Similar situations occur in various legal assistance projects. For instance, in order to support the government of Nepal to draft the Civil Code, the Nepali Taskforce prepared the Preliminary Draft (673 Sections in 7 Parts: PD hereafter) with the support of the UNDP. After the legal scholars of the Japanese Advisory Group (AG hereafter) closely examined it and made comments and questions on an article-by-article basis, the Taskforce discussed with the AG on the basis of those comments and questions and reviewed the PD and made the First Draft. The AG then examined newly added and revised provisions and made further comments on an article-by-article basis again. A substantial part of the discussions between the Taskforce and the AG was concentrated on how to revise the existing laws¹¹⁸ in conjunction with new rules, taking into consideration practical needs, comparisons with other laws, and international standards. Careful attention was paid to customary rules, especially in family law and succession law, most of which were maintained, though some were amended or abrogated in accordance with "natural reason". The topics included the requirements for marriage, the legal protection of the disabled and the control of powers of the guardians, equal division of family property among family members, protection of a bona fide third party to facilitate the transactions, etc. After that the Taskforce revised some provisions of the First Draft and completed the Second

¹¹⁵ It was extended and revised in 1880.

¹¹⁶ Boissonade came to Japan in November 1873 and gave lectures on natural law and French law at the law school in the Ministry of Justice from April 1874 until August 1879.

¹¹⁷ The natural law substantially influenced not only the theories but also practices since the early stage of the reception of Western laws. It was recognized as a source of law when the judge could not find any provision of law and customary law in civil matters (Article 3, Ordinance No. 103 in 1875).

¹¹⁸ They consist of the concerned provisions in Muluki Ain (the National Code) and separate laws, regulations and local practices.

Draft (751 Sections in 6 Parts). It was provided under the Regional Consultations and the National Consultations, which were held from December 2009 to March 2010. It was revised and submitted to the Cabinet in April 2010 and was examined. The Third Draft was recognized by the Cabinet in January 2011, and the Bill was submitted to the Constitutional Assembly in February 2011.¹¹⁹ Although the Constitutional Assembly was dissolved in May 2012, legal assistance continues to constitute the Explanatory Note of each Section of the Third Draft, which was completed in June 2013. There were meetings between the Nepali counterpart and the Japanese AG to discuss the further amendments to the Third Draft until March 2014, and the latest version (743 Sections in 6 Parts)¹²⁰ was submitted to the newly established Constitutional Assembly, whose members were elected in November 2013.

I fully agree with Professor Tamanaha on the importance of local context in legal development. Wholesale legal transplantation is bound to fail, for it is not adapted to prevailing circumstances and cultures, while lacking sufficient resources and local stakeholders committed to the law. However, law may be developed under the influence of foreign countries, and this may not be appropriately called “legal transplants”. The term “legal transplant”¹²¹ seems to me to be more a metaphor for the various influences exerted by foreign laws which have occurred repeatedly in many parts of the world at various stages of history. It would be hard to find a country where the legal system has actually grown spontaneously and purely within that country. Certainly, it is worthwhile asking whether and why legal development may be promoted through foreign influences.

Legal development is, as Professor Tamanaha puts it, the “ongoing construction of legal institutions.”¹²² That means the process of increasing integrity of law, which is a

¹¹⁹ Government of Nepal, Ministry of Law and Justice, *The Bill of Civil Code, Civil Procedure Code and Report*, 2010.

¹²⁰ Ministry of Law, Justice, Constituent Assembly and Parliamentarian Affairs, *Civil Code (Proposed Bill)*, Singhadarbar, Kathmandu, 2014.

¹²¹ As for the analyses of the legal transplant, see Brian Z. Tamanaha, *A General Jurisprudence of Law and Society*, 2001, 107-132.

¹²² Tamanaha (note 2), 216.

constitutive part of development itself.¹²³ This integrity requires law to be structured on coherent principles such as justice, fairness and due process, from which legal rights and duties can be drawn and identified consistently.¹²⁴ The new possibilities provided from outside stimulate the reason of those concerned to consider the principles, to compare them with existing rules, and to select or arrange them so as to improve the integrity of their law. I have often encountered situations where people showed a deep interest in comparable information from outside as a means of improving their own national legal system.

However, legal reform has to be done step by step, even with assistance from abroad. A typical example may be found in the gradual change of the ex officio initiatives by the prosecutor and the court in civil procedure in Vietnam, Laos and Cambodia. The Civil Procedure Code in Laos, for instance, was amended in 2004 to abrogate the ex officio power to file cassation against a final decision without any request by the parties so as to conform to the amendment to the Constitution in 2003, which transferred the power of judicial administration from the Ministry of Justice to the Supreme Court and promoted the independence of the judiciary.¹²⁵ Thus in those legal assistance projects, we see that law is regarded as a means of promoting legal development step by step, not as having the special ability to achieve the desired goals in one fell swoop.

3. Hybridization of Law and Legal Pluralism

Legal assistance may be regarded as only one phase in the long history of reception of law, ever since ancient Roman law spread throughout the empire. Various types of legal systems were produced by mixing existing laws and laws received from outside. In our globalized world, sophisticated law of scientific value naturally spread from one

¹²³ Amartya Sen, What is the Role of Legal and Judicial Reform in the Development Process?, *The World Bank Legal Review: Law, Equity, and Development* 2 (2006), 38-39.

¹²⁴ Ronald Dworkin, *Law's Empire*, 1986, Chapter 7.

¹²⁵ Hiroshi Matsuo, Access to Justice in Indochinese Countries, in: *Institutional Competition between Common Law and Civil Law*, eds. Michèle and Henrik Schmiegelow, 2014, 9.3.1.3, 9.3.2.3, 9.3.3.3.

country to another.¹²⁶

Professor Tamanaha indicates that law is imbricated within a thick complex of internally evolved normative orderings, power bases and incentives that may seem imperceptible from outside, so that external intervention into any society faces additional barriers, which internally produced initiatives do not.¹²⁷

However, as I have mentioned above, existing laws are often crossed and hybridized with received laws during assisted legal reform. Of course, it is sometimes a lengthy process, especially if the political power of the government is not sufficiently centralized and does not reach all local areas. In such cases informal institutions such as local systems of dispute resolution continue to exist, even while the government tries to incorporate those local systems into the state legal system, as has been observed in Vietnam, Laos and Cambodia, where informal justice provided by the village community has been integrated into national legal system through the special law and order.¹²⁸

Whereas this version of legal pluralism may be characterized as the first and older one, the second and newer version recognizes the coexistence of different legal orders operative in society, “of which state law is just one, and often not the most powerful one.”¹²⁹ Professor Tamanaha claims that the tribunals which are accessible to the people and can provide forums in which to resolve dispute can be said to comport with rule of law functions, even if they do not meet what the West considers to be standard legal functions. Certainly, it is an alternative constellation of law which meets the needs of the community.¹³⁰

I agree that a flexible and realistic conception of (the rule of) law can be applied to various types of societies.¹³¹ However, I am not sure whether we can always advocate

¹²⁶ Matsuo (note 11), 85-86.

¹²⁷ Tamanaha (note 2), 243.

¹²⁸ Matsuo (note 22), 9.3.1.3, 9.3.2.3, 9.3.3.3.

¹²⁹ Tamanaha (note 18), 115-116.

¹³⁰ Brian Z. Tamanaha, *The Rule of Law and Legal Pluralism in Development*, *Hague Journal on the Rule of Law* 3 (2011), 15.

¹³¹ Professor Tamanaha, pursuant to the non-essentialist approach, conceives law as whatever people identify, recognize and treat as law through their social practices, and “what law is, is determined by the people in the social arena through their own usages,

legal pluralism if we remember the situation, for example, in Nepal, where different political groups have clashed for a long time without solving the serious problem of impunity, let alone improving the economic and social conditions of ordinary citizens. In this situation, the centralization of political power, combined with open, comprehensive and paramount rules, seems to be of utmost importance.¹³²

From the viewpoint of law and development activities, the second and newer version of legal pluralism in particular seems to be a temporary situation rather than a stable and standard one. In legal development, the rule of law should also be conceived as something to be established in the dynamic process, in stages from (i) a shared willingness among people to comply with existing institutions; (ii) the formalization of legal rules; (iii) the enforcement mechanism by a centralized authority; and (iv) the examination system of the substantial content of legal rules which should conform to the basic values of that legal system.¹³³

4. Connectedness of Law and Society and the Future of Law and Development

Professor Tamanaha points out that, while law and development projects are uniformly presented as being *for* the benefit of recipient countries and their people, they are often not *by* or *of* them.¹³⁴ However, recent legal assistance projects have tended to put emphasis on ownership by the recipient countries. There actually exist law and development projects in which the domestic and foreign participants carefully discuss each and every clause of draft provisions of law by taking into consideration the existing laws, customary rules and comparative study of foreign laws and they respect the initiative of the domestic members in the process.¹³⁵ There should be law

not in advance by the social scientist or theorist.” See Tamanaha (note 18), 166-167.

¹³² Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of a Legal System*, 2nd ed., 1980, 212 and note 9.

¹³³ Hiroshi Matsuo, Let the Rule of Law Be Flexible to Attain Good Governance, in: *Rule of Law Promotion: Global Perspectives, Local Applications*, eds. Per Bergling, Jenny Ederlöf and Veronica L. Taylor, 2009, 49-53.

¹³⁴ Tamanaha (note 2), 243.

¹³⁵ It is recognized as characteristics of the Japanese legal assistance. See Pip Nicholson and Sally Low, Local Accounts of Rule of Law Aid: Implications for Donors, *Hague Journal on the Rule of Law* 5 (2013), 1-43 and Pip Nicholson and Samantha Hinderling, Japanese Aid in Comparative Perspective, *Hague Journal on the Rule of*

and development projects which will promote effective reform for legal development by facilitating hybridization of existing rules and those introduced from outside.

Legal development would both influence, and be influenced by, the economic, political and social development in a society. The interrelations between them would vary in accordance with the conditions of each society, and their causal relationships would, therefore, be hard to identify. It would be due to the connectedness of law and various elements of society, which includes the relation between law and political structure, economic system, religious beliefs, cultural attitudes, geographical features and other social conditions.¹³⁶ In Professor Tamanaha's legal theory, there seems to be room for analyzing how the "connectedness of law" principle works in relation to the critics of the "mirror thesis"¹³⁷ and that of the conception of "law as a means to an end"¹³⁸. Is the concept of law in the "connectedness of law" the same as used in the critics of "mirror thesis" and that of the "law as a means to an end"? But, it seems to me that the concept of law in the critics of "mirror thesis" is presupposed for the conception of "law as a means to an end" and used in certain limited circumstances¹³⁹, while the concept of law in connectedness with society may be extended to cover various types of law embedded in the comprehensive structure of each society.

It seems necessary to examine possible relationships between legal development and political, economic and social development by entering into the inside of the connectedness of law and society. This seems to me to be a most important topic for achieving the thicker theory of law and development.¹⁴⁰ If we could construct some models of the relationship between legal development and political, economic and social development, they would be eminently useful basis on which to create an

Law 5 (2013), 274-309.

¹³⁶ Tamanaha (note 2), 214, 228-229, 245.

¹³⁷ It is described as the idea "law is a reflection – a 'mirror' – of society", and "the 'mirror' thesis: positive law reflects – is a mirror of – the customary practices and moral norms of the society to which it is attached." Tamanaha (note 18), 1, 9-10.

¹³⁸ Brian Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law*, 2006.

¹³⁹ "Law (of every kind) should be demystified and understood as a tool or instrument, a resource of power and way of doing things that draws upon symbolic connotations of rights and good, but with no necessary connection to custom, consent, morality, reason, or functionality in a social arena." Tamanaha (note 18) 240.

¹⁴⁰ See *Section 1* above corresponding with note 6.

academic field of law and development as distinct in social sciences in general and from the studies of law and society in particular.

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